

THE ENDANGERED CITIZEN SERVANT:
GARCETTI VERSUS THE PUBLIC INTEREST AND
ACADEMIC FREEDOM

LARRY D. SPURGEON*

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* Senior Lecturer and Larry Jones Faculty Fellow in Business Ethics, W. Frank Barton School of Business, Wichita State University, B.B.A., Washburn University; J.D., University of Idaho.

I. INTRODUCTION

The image of the “citizen servant,” sacrificing self-interest for the public good, has endured since the dawn of the nation, inspired by George Washington himself. Yet for much of our history, government employees surrendered their constitutional rights at the front door. This policy was best explained by Oliver Wendell Holmes, Jr. when he was a member of the Massachusetts Supreme Judicial Court:

The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him.

For many years the “Holmes’ Epigram” expressed the law of the U.S. Supreme Court.¹

In the 1950s, the Court began to recognize some constitutional protection for public employees when the government attempted to suppress their rights to participate in public affairs.² The reason for First Amendment protection is “to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”³ Speech on matters of public concern occupies the “highest rung of the hierarchy of First Amendment values.”⁴

The Court’s efforts to strike a balance between an employee’s right to speak as a citizen and the government employer’s need to protect its interests culminated in the *Pickering/Connick*⁵ two-prong test. The first prong asked “whether the employee spoke as a citizen on a matter of public concern.”⁶ Relevance to the public interest was the touchstone of constitutional protection. If the speech satisfied the first prong, the reviewing court balanced the “employee’s interest in expressing herself” against the employer’s interest in “promoting the efficiency of public services it performs through its employees.”⁷

1. See *Connick v. Myers*, 461 U.S. 138, 143–44 (1983) (“The unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights.”). The epigram appeared in *McAuliffe v. City of New Bedford*, 29 N.E. 517 (Mass 1892) (Holmes, J., dissenting).

2. *Id.* at 144–45.

3. *Id.* at 145 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

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

5. *Connick*, 461 U.S. 138 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

6. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

7. *Waters v. Churchill*, 511 U.S. 661, 668 (1994) (quoting *Connick*, 461 U.S. at 142).

For twenty years, the *Pickering/Connick* test was used by courts to determine if public employee speech was worthy of protection. Then, seven years ago, in *Garcetti v. Ceballos*,⁸ the Court divided the first prong into two parts, establishing a new threshold inquiry, a per se rule, which asks if the speech was made by the employee “as a citizen.”⁹ If so, the court asks whether the speech relates to a matter of public concern. Little harm would be done if the Court stopped there, since it simply split the two elements of the first prong into separate steps.

The Court did not stop there. It further held that speech made by a public employee “pursuant to official duties” is not made “as a citizen.”¹⁰ The role of the speaker is now the crucible. Public interest is relegated to second class status. The decision has no shortage of critics.¹¹ And for good reason: it directly clashes with two constitutional principles.

The first, a foundational pillar of First Amendment protection for public employee speech, is “the importance of promoting the public’s interest in receiving the well-informed views of government employees engaging in civic discussion.”¹² Without First Amendment protection the “community would be deprived of informed opinions on important public issues.”¹³ A modern version of the ancient battlefield custom of granting sanctuary to the bearer of a white flag, it is a recognition that to receive the message it is necessary to protect the messenger. Though *Garcetti*’s majority conceded that “[t]he interest at stake is as much the public’s interest in receiving informed opinion as it is the employee’s own right to disseminate it,”¹⁴ the

8. 547 U.S. 410 (2006).

9. *Id.* at 421.

10. *Id.*

11. See Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 946 (2009) (“[T]he Court has not developed a coherent theory to guide constitutional protection of academic freedom, and recently, in *Garcetti v. Ceballos*, it placed the protection, itself, in doubt.”). See also Cynthia Estlund, *Free Speech Rights That Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463, 1464 (2007) (“In eviscerating the free speech rights of public employees when they speak in the course of doing their jobs, *Garcetti* gets it wrong.”). But see Kraig P. Grahmann, *Respect for Authority: Translating Enduring Principles into Modern Law*, 36 OHIO N.U. L. REV. 523 (2010). Grahmann argues “that critics’ fears that *Garcetti* would significantly strip away First Amendment rights of government employees did not come true and that lower courts in all eleven United States judicial circuits have exercised considerable restraint when applying the case, generally interpreting it very narrowly.” *Id.* at 524. He also argues that “[w]hether a government employee is complaining to a supervisor, acting on a general job duty, speaking to the media, or even suing his own employer, he still has significant First Amendment protection.” *Id.* at 551. See *infra* Part III. C. for a discussion of lower court cases applying *Garcetti* to faculty speech with little concern about the impact on academic freedom or the public interest.

12. *Garcetti*, 547 U.S. at 419.

13. *Id.* at 420.

14. *Id.*

per se rule established a new categorical exclusion for speech, leaving unprotected even the most important speech if the speaker happened to be speaking pursuant to “official” job duties.

The second constitutional principle is the Court’s recognition of academic freedom as a “special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”¹⁵ Justice Souter observed in his *Garcetti* dissent that the majority’s ruling was “spacious enough to include even the teaching of a public university professor.”¹⁶ He expressed hope that the 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.’”¹⁷

Justice Kennedy, in his majority opinion, acknowledged the Court’s ruling “may have important ramifications for academic freedom, at least as a constitutional value.”¹⁸ His next two sentences (referred to hereafter as the “Caveat”)¹⁹ 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.²⁰

What is the legal effect of the Caveat? Was it intended to explain that the new per se rule applies to all public employee speech, noting in dicta that someday the Court might carve out an exception for academic speech? Or did the Court hold as a matter of law that academic speech is exempt from the per se rule?

Lower courts have struggled to decipher the Caveat with predictably uneven results, some applying the per se rule to academic speech with little or no analysis. Justice Kennedy’s comments in *Garcetti* indicate that the Court may well search for ways to honor its commitment to academic freedom. Thus far it has not done so, but it has not been for a lack of opportunity.²¹

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

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

17. *Id.*

18. *Id.* at 425.

19. *See Adams v. Univ. of N.C. Wilmington*, 640 F.3d 550, 563 (4th Cir. 2011) (describing Justice Kennedy’s statement as a “caveat”).

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

21. *See Lee v. York Cnty. Sch. Div.*, 484 F.3d 687 (4th Cir. 2007), *cert. denied*, 552 U.S. 950 (2007), *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007), *cert. denied*, 552 U.S. 823 (2007), and *Abcarian v. McDonald*, 617 F.3d 931

The thesis of this article is that the *Garcetti* per se rule damages the public interest in several respects. First, it leaves unprotected the “citizen servant . . . whose civic interest rises highest when they speak pursuant to their duties, and these are exactly the ones government employers most want to attract.”²² Second, it imposes a categorical exclusion for speech, precluding any evaluation of the value of the speech to the public if made pursuant to official duties. Finally, it threatens academic speech in colleges and universities.

Optimally, the Court should overturn *Garcetti*, throw out the per se rule, and return to the *Pickering/Connick* test. Recognizing that such a result is unlikely, this article proposes a modified approach for public employee speech, one which eliminates the per se rule and accounts for the Court’s legitimate concerns, yet permits courts to consider the relative value of the speech to the public interest.

The article then takes up the impact of *Garcetti* on academic speech. The vital role of colleges and universities in the democracy compels a different analysis for speech relating to teaching and scholarship, as well as shared governance activities. This article argues that fixing the *Garcetti* problem for public employees generally is critical and important for faculty speech as well, but does not resolve the ongoing problem that the public employee speech doctrine analysis simply does not fit academic speech.

The Court should answer the question posed by the Caveat and exempt academic speech from the public employee speech analysis. In its place, the Court should rely upon its existing policy of deference to both the institution and the community of scholars. Finally, the Court should include speech relating to faculty governance activities to provide a counterweight to the autonomy given to the institution.

Part II explores the inherent contradiction in *Garcetti* that one of the most important constitutional principles underlying the recognition of protection for public employee speech—the public interest—is undermined by the per se rule. Section A traces the evolution of the *Pickering/Connick* test. Section B examines the Court’s purported rationales for the *Garcetti* holding, explaining that each rationale was fully accounted for by the *Pickering/Connick* test. The per se rule was unnecessary. Section C shows that the per se rule harms the public interest by censoring the informed opinions of public employees on a technicality.

Part III explores *Garcetti*’s impact on academic freedom. Section A provides an overview of the Court’s tradition of treating academic freedom as a special concern of the First Amendment. Section B summarizes the scholarly debate about the constitutional contours of academic freedom. Section C presents representative cases decided after *Garcetti* to show the contradictory readings of the Caveat and to demonstrate the harm to

(7th Cir. 2010), *cert. denied*, 131 S. Ct. 1685 (2011).

22. *Garcetti*, 547 U.S. at 432 (Souter, J., dissenting).

academic freedom.

Part IV urges the Court to overturn *Garcetti* and return to the *Pickering/Connick* test for public employee speech. Section A discusses post-*Garcetti* cases which send mixed signals about the likelihood of such a result. Section B sets out my proposal for a modified approach to *Garcetti* in the event the Court is not willing to go that far.

Part V addresses the separate problem of academic speech. Returning to *Pickering/Connick* would mitigate the harm to academic freedom caused by *Garcetti*, but not completely. Speech by faculty members within their academic disciplines is made in their professional roles as experts, not as citizens. A different approach is needed. The Court should at a minimum exempt academic speech from the public employee speech analysis, and in its place reinforce its tradition of judicial deference to the community of scholars for academic decisions.

II. *GARCETTI* VERSUS THE PUBLIC INTEREST

A. Evolution of the *Pickering/Connick* Test

As the majority acknowledged in *Garcetti*, “for many years ‘the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights.’”²³ Yet long ago the Court “made clear that public employees do not surrender all their First Amendment rights by reason of their employment.”²⁴ In some circumstances, a public employee has First Amendment protection “to speak as a citizen addressing matters of public concern.”²⁵ The purpose of this protection is to promote more than the rights of the individual:²⁶ “[T]he First Amendment interests at stake extend beyond the individual speaker. The Court has acknowledged the importance of promoting the public’s interest in receiving the well-informed views of government employees engaging in civic discussion.”²⁷ The Court added that its ruling in *Garcetti* was “consistent with our precedents’ attention to the potential societal value of employee speech.”²⁸ To explain why this is so the court cited *Pickering v. Board of Education*.²⁹

Marvin Pickering, a high school teacher, was dismissed after sending a letter to a newspaper criticizing the school board’s handling of bond proposals and allocation of resources between sports and educational

23. *Id.* at 417.

24. *Id.*

25. *Id.*

26. *Id.* at 420.

27. *Id.* at 419.

28. *Id.* at 422.

29. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

programs.³⁰ The board alleged some of his statements were false and constituted an unjust attack on its integrity.³¹ The Supreme Court held that Pickering's letter was protected by the First Amendment.³² The idea that "teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest" had been rejected in prior decisions.³³ Yet a government employer has interests in regulating employee speech different from what it may do to regulate speech by non-employee citizens.³⁴ The balancing test adopted in *Pickering* compelled a reviewing court to weigh the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.³⁵ The Court declined to impose a general standard "against which all such statements may be judged,"³⁶ choosing instead to provide general guidance.³⁷

Pickering spoke on matters of public record, something any citizen could do.³⁸ His erroneous statements did not impact his daily duties in the classroom nor interfere with regular operations of the school.³⁹ The letter addressed issues of public concern. A core value of the First Amendment is in "having free and unhindered debate on matters of public importance."⁴⁰ As a high school teacher he was more familiar with the effects of the school board's funding decisions than an ordinary citizen because "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent."⁴¹ Consequently, "it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal."⁴²

Fifteen years later, in *Connick v. Myers*,⁴³ the Court added a threshold requirement to the *Pickering* balancing test. Sheila Myers was an Assistant District Attorney in New Orleans.⁴⁴ After learning she would be

30. *Id.* at 566–67.

31. *Id.*

32. *Id.* at 574.

33. *Id.* at 568.

34. *Id.*

35. *Id.*

36. *Id.* at 569.

37. *Id.*

38. *Id.* at 572.

39. *Id.* at 572–73.

40. *Id.* at 573.

41. *Id.* at 572.

42. *Id.*

43. 461 U.S. 138 (1983).

44. *Id.* at 140.

transferred within the department, Myers objected to her supervisors, expressing several concerns about office matters.⁴⁵ She also circulated a questionnaire to co-workers which her superiors believed to be a “mini-insurrection,” was terminated, and filed suit, alleging her speech was protected by the First Amendment.⁴⁶

The district court agreed and the Fifth Circuit affirmed.⁴⁷ The Supreme Court reversed,⁴⁸ adopting a new threshold inquiry that requires the lower court to first ascertain whether the employee spoke as a citizen on a matter of public concern.⁴⁹ Content, form, and context of the speech are to be considered.⁵⁰ The “manner, time, and place” of the speech is also relevant.⁵¹ The *Pickering/Connick* test was in force for more than twenty years. Then came *Garcetti*. Content has taken a back seat to context. The role of the speaker is now the litmus test.

B. The *Garcetti* Rationales

Four distinct rationales were given by the *Garcetti* majority to justify its ruling. Each will be analyzed in the subsections below. The concerns expressed by the Court, though legitimate, are fully accounted for by the *Pickering/Connick* two-prong test. The *Garcetti* per se rule is unnecessary, but far worse, jeopardizes the public interest.

1. A Relevant Analogue

In *Garcetti*, the Court held that government “employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government.”⁵² Stated another way, when a government employee speaks pursuant to job duties there is no relevant analogue to speech by non-government employees.⁵³ The examples provided by the Court for a “relevant analogue” were Pickering’s letter and Ardith McPherson’s statement to a co-worker,⁵⁴ at work, after learning that President Reagan had been shot, that “if they go for him again, I hope they get him.”⁵⁵

How does one distinguish a relevant analogue from an irrelevant

45. *Id.* at 140–41.

46. *Id.* at 141.

47. *Id.* at 141–42.

48. *Id.* at 154.

49. *Id.* at 147.

50. *Id.* at 147–48.

51. *Id.* at 152.

52. *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006).

53. *Id.* at 424.

54. *Id.*

55. *Rankin v. McPherson*, 483 U.S. 378, 381 (1987).

analogue? That Ceballos expressed his views within the office “is not dispositive,” the Court stated.⁵⁶ Expressions made at work may receive First Amendment protection because “[m]any citizens do much of their talking inside” the workplace, and “it would not serve the goal of treating public employees like ‘any member of the general public’” to hold that all speech is excluded from protection.⁵⁷

*Garcetti*⁵⁸ cited as support *Givhan v. Western Line Consolidated School District*.⁵⁹ In *Givhan*, District Superintendent Morris dismissed Bessie Givhan, a junior high school teacher.⁶⁰ Givhan alleged retaliation due to her criticism of school district policies with respect to racial practices.⁶¹ She did not go to the media. Her “requests” were made in writing to her principal:⁶²

She “requested,” among other things: (1) that black people be placed in the cafeteria to take up tickets, jobs Givhan considered “choice”; (2) that the administrative staff be better integrated; and (3) that black Neighborhood Youth Corps (“NYC”) workers be assigned semi-clerical office tasks instead of only janitorial-type work.⁶³

In *Connick*, the Court noted that Givhan’s “right to protest racial discrimination—a matter inherently of public concern—is not forfeited by her choice of a private forum.”⁶⁴

Justice Souter pointed out in his *Garcetti* dissent that Givhan’s complaints were not part of her official duties, yet a “school personnel officer” would not be protected for the same statements because hiring is part of his duties.⁶⁵ He added there is no “adequate justification” for drawing such a line, arguing the *Pickering/Connick* test was still viable.⁶⁶

That Ceballos’s memo concerned the “subject matter” of his employment “is nondispositive” because the “First Amendment protects some expressions related to the speaker’s job.”⁶⁷ *Pickering* was cited for the proposition that teachers are the most informed about school funding, and it is essential that they can speak out without fear of retaliatory

56. *Garcetti*, 547 U.S. at 420.

57. *Id.* at 420–21 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573 (1968)).

58. *Id.* at 421.

59. *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979).

60. *Id.* at 411.

61. *Id.* at 413.

62. *Ayers v. W. Line Consol. Sch. Dist.*, 555 F.2d 1309, 1313 (5th Cir. 1977), *rev’d sub nom. Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 413 (1979).

63. *Ayers*, 555 F.2d at 1313 (footnote omitted).

64. *Connick v. Myers*, 461 U.S. 138, 148 n.8 (1983) (citing *Givhan*, 439 U.S. at 415–16).

65. *Garcetti v. Ceballos*, 547 U.S. 410, 430 (2006) (Souter, J., dissenting).

66. *See id.*

67. *Id.* at 421.

dismissal.⁶⁸

The mandate to lower courts is to determine if the speech could have been made by a citizen outside of public employment. The logical fallacy of this rationale can be seen in *Morris v. Philadelphia Housing Authority*.⁶⁹ An assistant to the executive director of the Philadelphia Housing Authority (“PHA”) alleged retaliation due to his complaints about being forced to lobby for PHA, objecting to a lawsuit by PHA against the United States Department of Housing and Urban Development, and reporting co-worker embezzlement.⁷⁰ Dutifully applying the *Garcetti* test, the Third Circuit noted that it had “consistently held that complaints up the chain of command” about work duties, even “possible safety issues or misconduct by other employees,” are within the scope of official duties and not protected.⁷¹

The court contrasted its earlier decision in *Reilly v. City of Atlantic City*,⁷² which had extended protection to “truthful in-court testimony arising out of an employee’s official job responsibilities,”⁷³ reasoning that, “[t]estimony in court is distinguishable from internal reporting because it is part of the official adjudication process. Thus, there is a ‘relevant analogue to speech by citizens who are not government employees.’”⁷⁴

The logic goes something like this: if a public employee expresses legitimate concerns about government improprieties to superiors there is no relevant analogue because an ordinary citizen could not know about, much less report, improprieties inside the agency. Yet if that same employee expresses the same concerns in court testimony, the speech is protected because an ordinary citizen could testify in court. Hence, there is a relevant analogue.

Justice Kennedy made a similar point in *Garcetti*, observing that the ruling would not prevent employees from “participating in public debate.”⁷⁵ Presumably he meant employees, shielded by the Constitution, could go directly to the media. Helen Norton responds to this curious bit of reasoning by pointing out that a “rule that requires employees to raise their concerns to an entity other than their employer is both unrealistic and perverse.”⁷⁶

68. *Id.* (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968)).

69. *Morris v. Phila. Hous. Auth.*, No. 11-3334, 2012 WL 2626991 (3d Cir. July 6, 2012).

70. *Id.* at *1.

71. *Id.* at *2.

72. *Reilly v. City of Atl. City*, 532 F.3d 216 (3d Cir. 2008).

73. *Morris*, 2012 WL 2626991, at *3 (citing *Reilly*, 532 F.3d at 231).

74. *Id.* (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006)).

75. *Garcetti*, 547 U.S. at 422.

76. Helen Norton, *Constraining Public Employee Speech: Government’s Control of Its Workers’ Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 40 (2009) (citation omitted).

The relevant analogue rationale is particularly troublesome for academic speech. In *Gadling-Cole v. West Chester University*,⁷⁷ a visiting adjunct professor alleged retaliation due to internal complaints about religious and racial discrimination.⁷⁸ Her complaints were made to the department chair and the university's social equity department, and the court held they were "in essence employment grievances," reasoning that "they were not made outside the course of the Plaintiff's employment and instead related only to her own workplace interests."⁷⁹ The court buttressed this conclusion by noting that the plaintiff had "followed the internal employee grievance procedure to address her concerns and did not assert her statements in a public forum."⁸⁰

Whether the substance of a faculty grievance involves purely personnel matters or rises to the level of substantial interest to the public can only be determined by individualized fact finding. The *Pickering/Connick* test allowed for that. The *Garcetti* test does not.

2. Government as Employer

Justice White pointed out in *Connick*⁸¹ that one hundred years before, in *Ex parte Curtis*, the "Court noted the government's legitimate purpose in 'promot[ing] efficiency and integrity in the discharge of official duties, and [in] maintain[ing] proper discipline in the public service.'"⁸² The government "as an employer, must have wide discretion and control over the management of its personnel and internal affairs,"⁸³ and this "includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch."⁸⁴

In *Waters v. Churchill*,⁸⁵ the plurality opinion asked rhetorically: "What is it about the government's role as employer that gives it a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large?"⁸⁶ Noting that it had never "explicitly answered" that question, the Court observed that it had nevertheless "always assumed that its premise is correct—that the government as employer indeed has far broader powers than does the government as sovereign."⁸⁷ The Court

77. *Gadling-Cole v. W. Chester Univ.*, Civil No. 11-0796 (JBS), 2012 WL 1075809 (E.D. Pa. Mar. 30, 2012).

78. *See id.* at *1–*3.

79. *Id.* at *9.

80. *Id.*

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

82. *Id.* at 150–51 (citing *Ex parte Curtis*, 106 U.S. 371, 373 (1882)).

83. *Id.* at 151 (quoting Justice Powell's separate opinion in *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974)).

84. *Id.*

85. *Waters v. Churchill*, 511 U.S. 661 (1994).

86. *Id.* at 671.

87. *Id.* (citations omitted).

added that this assumption was “amply borne out by considering the practical realities of government employment,”⁸⁸ identifying two bases for granting more authority to the government as employer: (a) the importance of efficiency in operations; and (b) the nature of the government’s mission as employer.⁸⁹

(a) *Efficiency of Operations*

In *Pickering*, the Court held that the teacher’s letter did not jeopardize efficiency of employer operations.⁹⁰ The letter was not directed at anyone in the school district with whom Pickering had daily contact.⁹¹ No discipline by supervisors was involved nor any issue of co-worker harmony.⁹² Evidence was lacking to show or even presume that the letter “impeded the teacher’s proper performance of his daily duties in the classroom or to have interfered with the regular operations of the schools generally.”⁹³

The Court explained the *Pickering* balancing test in *Connick* by observing that it “reflects both the historical evolvment of the rights of public employees, and the common sense realization that government offices could not function if every employment decision became a constitutional matter.”⁹⁴ Though the Court reiterated the importance of not depriving a citizen of constitutional protection simply by virtue of taking on government employment, “this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state.”⁹⁵

Lawrence Rosenthal defends *Garcetti* on the grounds that it promotes managerial “prerogative of public employers to regulate duty-related speech of public employees in order to ensure that these officials are accountable. . . .”⁹⁶ Helen Norton makes precisely the opposite point—that *Garcetti* undermines accountability by allowing government employers to “punish, and thus deter, whistleblowing and other valuable on-the-job speech that would otherwise facilitate the public’s ability to hold the government politically accountable for its choices.”⁹⁷

The second prong of the *Pickering/Connick* test compelled a reviewing court to balance the employee’s right to speak as a citizen on a matter of public concern with the employer’s interests in maintaining efficiency of

88. *Id.* at 672.

89. *See id.* at 674.

90. *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 565 (1968).

91. *Id.* at 569–70.

92. *Id.* at 570.

93. *Id.* at 572–73 (footnote omitted).

94. *Connick v. Myers*, 461 U.S. 138, 143 (1983).

95. *Id.* at 147.

96. Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 *FORDHAM L. REV.* 33, 38 (2008).

97. Norton, *supra* note 76, at 2.

operations.⁹⁸ To invoke efficiency of operations to justify a categorical exclusion of speech when a balancing test already existed that accounted for the employer's efficiency of operations is simply baffling.

(b) *Mission of the Government*

Waters also made clear that restrictions on public employee speech are permitted “not just because the speech interferes with the government's operation,” since “[s]peech by private people can do the same. . . .”⁹⁹ Instead, the “extra power the government has in this area comes from the nature of the government's mission as employer.”¹⁰⁰ Government agencies are required by law to do particular tasks and hire people to carry out these tasks efficiently and effectively.¹⁰¹ When the government employee veers from the task the agency must have “some power to restrain her.”¹⁰²

The problem with a one-size-fits-all rule is that government entities have very different missions. Ceballos worked as an attorney in a county prosecutor's office,¹⁰³ as did Sheila Myers in *Connick*.¹⁰⁴ The aggrieved employee in *Waters* was a nurse.¹⁰⁵

Contrast the mission of colleges and universities. They issue no regulations for the general citizenry. Students compete for admission and pay substantial tuitions. Many are private institutions and state funding for public institutions is shrinking. A university's mission is to educate but not pursuant to a narrowly prescribed message.

Historian Henry Steele Commager traced the “four major functions” of a university over the centuries, concluding that the first three had developed in Europe.¹⁰⁶ These first three functions were to prepare young people for their professions: to train them in intellectual discipline and character; to communicate the heritage of the past; and to “carry on research [sic] to expand the boundaries of knowledge.”¹⁰⁷ The fourth function is the American experience, “to do all of the things that other universities have done and all the other things anyone can possibly think of; that is, to combine teaching, character development, professional training, and service to the community.”¹⁰⁸

This aspiration was best explained by the “most influential expression of

98. See *Pickering*, 391 U.S. at 565; *Connick*, 461 U.S. at 143–51.

99. *Waters v. Churchill*, 511 U.S. 661, 674 (1994).

100. *Id.*

101. *Id.* at 674–75.

102. *Id.* at 675.

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

104. *Connick v. Myers*, 461 U.S. 138, 140 (1983).

105. *Waters*, 511 U.S. at 664.

106. Henry Steele Commager, *The University and Freedom*, 34 J. HIGHER EDUCATION, 361, 361 (1963).

107. *Id.*

108. *Id.*

academic freedom principles found anywhere in the extensive literature on American higher education,”¹⁰⁹ the American Association of University Professors’ (AAUP) 1940 Statement of Principles on Academic Freedom and Tenure:

Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition. Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.¹¹⁰

The Court’s academic freedom decisions are replete with noble statements about the critical role of colleges and universities. Chief Justice Earl Warren wrote in one of the leading U.S. Supreme Court cases on academic freedom that¹¹¹ “[N]o one should underestimate the vital role in a democracy that is played by those who guide and train our youth.”¹¹² To impede this contribution to society because of a mechanical test based on internal administrative factors contradicts the public policy behind academic freedom.

The *Pickering/Connick* test allowed for the employer’s mission to be taken into account when balancing the employer’s interests with the employee’s rights. *Garcetti*’s per se rule was not necessary, and effectively prevents a court from taking into account the specific mission of the government employer.

3. Government Commissioned Speech

Government employees “often occupy trusted positions in society,”¹¹³ and as a result, they can “express views that contravene governmental policies or impair the proper performance of governmental functions.”¹¹⁴ Therefore, reasoned the Court, no liberties are infringed from restricting speech “that owes its existence to a public employee’s professional responsibilities,” because that “simply reflects the exercise of employer

109. Lawrence White, *Fifty Years of Academic Freedom Jurisprudence*, 36 J.C. & U.L. 791, 802 (2010).

110. *Id.* (quoting AM. ASS’N OF UNIV. PROFESSORS, *1940 Statement of Principles on Academic Freedom and Tenure with Interpretative Comments*, in AAUP POLICY DOCUMENTS & REPORTS 3–11, n. 6 (10th ed. 2006)).

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

112. *Id.* at 250.

113. *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

114. *Id.*

control over what the employer itself has commissioned or created.”¹¹⁵

For support, the Court cited¹¹⁶ *Rosenberger v. Rector & Visitors of University of Virginia*,¹¹⁷ which held that, “when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.”¹¹⁸ *Rosenberger* involved the denial of a student organization fee request because the university deemed it to be a religious activity.¹¹⁹ In ruling the university had improperly engaged in viewpoint discrimination, the Court reiterated its precedents that a university has the right, in making academic judgments, to decide how to allocate resources.¹²⁰ The Court reasoned that this:

[W]as but a proper recognition of the principle that when the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.¹²¹

This ruling was in line with *Rust v. Sullivan*,¹²² holding that the government’s prohibition on abortion-related advice was not unconstitutional because “when the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.”¹²³

Five years after *Rosenberger* the Court decided *Board of Regents of the University of Wisconsin System v. Southworth*,¹²⁴ another student speech case, emphasizing that its decision:

[O]ught not to be taken to imply that in other instances the University, its agents or employees, or—of particular importance—its faculty, are subject to the First Amendment analysis which controls in this case. Where the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different.¹²⁵

115. *Id.* at 421–22.

116. *Id.* at 422.

117. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

118. *Garcetti*, 547 U.S. at 422 (quoting *Rosenberger*, 515 U.S. at 833).

119. *Rosenberger*, 515 U.S. at 827.

120. *Id.* at 833 (citing *Widmar v. Vincent*, 454 U.S. 263, 276 (1981)).

121. *Id.*

122. *Rust v. Sullivan*, 500 U.S. 173 (1991).

123. *Rosenberger*, 515 U.S. at 833.

124. *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000).

125. *Id.* at 234–35.

The Court added that when the government speaks to promote its own policies it is accountable to the electorate,¹²⁶ contrasting student speech from “speech by an instructor or a professor in the academic context, where principles applicable to government speech would have to be considered.”¹²⁷

The Court seems to be saying that faculty speech is government commissioned speech, precisely the type of speech the *Garcetti* majority believed to be unworthy of protection. Why should that be a problem? Once again, Justice Souter provided an eloquent explanation in his *Garcetti* dissent:

The key to understanding the difference between this case and *Rust* lies in the terms of the respective employees’ jobs and, in particular, the extent to which those terms require espousal of a substantive position prescribed by the government in advance. Some public employees are hired to “promote a particular policy” by broadcasting a particular message set by the government, but not everyone working for the government, after all, is hired to speak from a government manifesto. See *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001). There is no claim or indication that Ceballos was hired to perform such a speaking assignment. He was paid to enforce the law by constitutional action: to exercise the county government’s prosecutorial power by acting honestly, competently, and constitutionally. The only sense in which his position apparently required him to hew a substantive message was at the relatively abstract point of favoring respect for law and its evenhanded enforcement, subjects that are not at the level of controversy in this case and were not in *Rust*.¹²⁸

Justice Souter’s reference to *Legal Services Corporation v. Velazquez*¹²⁹ is apt.

Velazquez held that a statutory condition imposed by Congress in a funding scheme under the Legal Services Corporation Act¹³⁰ violated the First Amendment rights of those who receive funds.¹³¹ The restriction prohibited lawyers working for fund recipients from providing legal representation to clients who endeavored to amend or challenge welfare law.¹³² The majority decision, written by Justice Kennedy, pointed out that

126. *Id.* at 235.

127. *Id.*

128. *Garcetti v. Ceballos*, 547 U.S. 410, 437 (2006) (Souter, J., dissenting) (citation omitted).

129. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

130. 42 U.S.C. § 2996 (2006).

131. *Velazquez*, 531 U.S. at 537.

132. *Id.* at 537–38.

the Court had previously said that viewpoint-based funding decisions are constitutional when the government is the speaker.¹³³

*Rosenberger*¹³⁴ was cited for its holding that when the government funds private entities “to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.”¹³⁵ The Court contrasted a situation where the government “does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.”¹³⁶ Agreeing the program in *Velazquez* differed from the student activity program in *Rosenberger*, the Court reasoned that because the legal services program was “designed to facilitate private speech, not to promote a governmental message, it is intended to provide representation to indigent clients, and the lawyers are speaking on behalf of the clients, not the government.”¹³⁷

An important factor noted in *Velazquez* was that the lawyers were not acting “under color of state law” when representing indigent clients, in part because they are working under professional canons for the legal profession, which require them to exercise independent judgment.¹³⁸

Like lawyers, professors are not hired to act under color of state law and speak a prescribed message. A university is a “marketplace of ideas,”¹³⁹ but as will be explained in Part V, the ideas expressed by faculty must be competent. The professor’s “message” is not dictated by administrators. It is vetted by academic peers, both within the university and in the academic discipline.

4. Federalism and Separation of Powers

The majority in *Garcetti* was concerned that if no per se rule were adopted state and federal courts would be thrust into a “new, permanent, and intrusive role”¹⁴⁰ of judicial oversight of government employee communications. More than a matter of resources, this approach would “demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.”¹⁴¹

This brief statement, without elaboration, has been largely overlooked. It raises two separate issues—federalism, which evokes the constitutional

133. *Id.* at 541.

134. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

135. *Velazquez*, 531 U.S. at 541 (citing *Rosenberger*, 515 U.S. at 833).

136. *Id.* at 542 (citing *Rosenberger*, 515 U.S. at 834).

137. *Id.*

138. *Id.* See discussion *infra* in Part V.B.

139. *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957).

140. *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006).

141. *Id.*

doctrines of reserved and enumerated powers—and separation of powers, which refers to the Court’s reluctance to intrude into executive branch agencies. The Court’s reluctance to tread lightly in the management of executive agencies is curious. Most public employee speech cases are brought under Section 1983,¹⁴² the 1871 statute which provides a civil cause of action to vindicate constitutional rights. There is nothing novel about a public employee utilizing Section 1983. Why the sudden pangs of conscience about separation of powers? The Court did not elaborate.

The second concern—federalism—is equally puzzling. The federal courts were created to enforce federal law and no federal law is more essential to the public than the First Amendment. A cryptic comment about federalism seems an odd way to justify a new categorical exclusion for speech.

Something else must be lurking. A telling comment can be found in the procedural history of the majority opinion. The Court seemed to be concerned that too many personnel matters were being litigated because lower courts were not applying the first prong of the *Pickering/Connick* correctly.¹⁴³ If the Court’s real reason for adopting the per se rule was to reduce the number of federal lawsuits its chosen remedy is futile—as even a quick search of post-*Garcetti* cases reveals. More to the point, the Court could simply admonish lower courts to do their jobs; that is, to consider both elements of the first prong of *Pickering/Connick* test. The harm to the public interest is disproportionate to the modest, and speculative, benefits of court administration.

C. The Per Se Rule Harms the Public Interest

Why has the Court tipped the scales so heavily in favor of the government employer? Why does it put such emphasis on the role of the speaker? Justice Souter wondered the same thing, pointing out that:

[T]he very idea of categorically separating the citizen’s interest from the employee’s interest ignores the fact that the ranks of public service include those who share the poet’s “object . . . to

142. 42 U.S.C. § 1983 (2006) (providing in relevant part: “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . .”).

143. See Areen, *supra* note 11, at 976 (“The Court in *Garcetti* explained that it wanted to avoid having too many disputes about the work of public employees litigated in federal court as First Amendment cases.”); see also Elizabeth M. Ellis, Note, *Garcetti v. Ceballos: Public Employees Left to Decide “Your Conscience or Your Job”*, 41 IND. L. REV. 187, 208 (2008) (pointing out that the *Garcetti* majority “sought to avoid continued judicial involvement in a vast majority of the constitutional claims brought by public employees”).

unite [m]y avocation and my vocation,” these *citizen servants* are the ones whose civic interest rises highest when they speak pursuant to their duties, and these are exactly the ones government employers most want to attract.¹⁴⁴

The public interest does not evaporate because the speakers are acting according to core job duties.¹⁴⁵ Observing that the Court had reiterated the public nature of Pickering’s speech only two years before in *San Diego v. Roe*,¹⁴⁶ Justice Souter wrote that the policy recognizing that the public interest is just as important as the citizen’s right:

[I]s not a whit less true when an employee’s job duties require him to speak about such things: when, for example, a public auditor speaks on his discovery of embezzlement of public funds, when a building inspector makes an obligatory report of an attempt to bribe him, or when a law enforcement officer expressly balks at a superior’s order to violate constitutional rights he is sworn to protect. (The majority, however, places all these speakers beyond the reach of First Amendment protection against retaliation.)¹⁴⁷

Recently the Court again stressed the importance of the informed views of government employees. In *Borough of Duryea v. Guarnieri*,¹⁴⁸ the issue was whether the *Garcetti* analysis should apply to cases arising under the First Amendment petition clause.¹⁴⁹ The Court quoted *Pickering* in stressing that public employees are the community citizens “most likely to have informed and definite opinions’ about a wide range of matters related, directly or indirectly, to their employment.”¹⁵⁰ The Court added that “[j]ust as the public has a right to hear the views of public employees, the public has a right to the benefit of those employees’ participation in petitioning activity.”¹⁵¹ Yet while the Court pays lip service to the ideal of the citizen servant, and the need to protect the messenger for the public good, the per se rule endangers the citizen servant and thwarts the public interest.

This contradiction is best illustrated by the threat to whistleblowers. The Ninth Circuit, in *Ceballos v. Garcetti*,¹⁵² noted that the defendants had

144. *Garcetti*, 547 U.S. at 432 (quoting Robert Frost, “*Two Tramps in Mud Time*,” in COLLECTED POEMS, PROSE, & PLAYS 251, 252 (R. Poirier & M. Richardson eds. 1995)) (emphasis added).

145. *Id.* at 433.

146. *San Diego v. Roe*, 543 U.S. 77 (2004).

147. *Garcetti*, 547 U.S. at 433.

148. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011).

149. *Id.* at 2492 (holding that petition cases should be analyzed the same as cases arising under the speech clause.)

150. *Id.* at 2500 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968)).

151. *Id.*

152. 361 F.3d 1168 (9th Cir. 2004).

conceded that Ceballos' allegations constituted whistleblowing.¹⁵³ They simply argued his statements lacked protection solely because "he included them in a memorandum to his supervisors that he prepared in fulfillment of an employment responsibility."¹⁵⁴ The court found this argument unavailing because:

The proposed per se rule would be particularly detrimental to whistle-blowers, such as Ceballos, who report official misconduct up the chain of command, because all public employees have a duty to notify their supervisors about any wrongful conduct of which they become aware. To deprive public employees of constitutional protection when they fulfill this employment obligation, while affording them protection if they bypass their supervisors and take their tales, for profit or otherwise, directly to a scandal sheet or to an internet political smut purveyor defies sound reason.¹⁵⁵

The Ninth Circuit reasoned that "[w]hether a job duty is routine or non-routine is a far less important factor for purposes of First Amendment analysis than the content of the public employee's speech."¹⁵⁶

Justice Kennedy did acknowledge in *Garcetti* that exposing inefficiency and misconduct in the government is a "matter of considerable significance," but he tossed that concern aside.¹⁵⁷ He reasoned that whistleblowers are already protected by "the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing."¹⁵⁸ As support, he cited a federal statute,¹⁵⁹ California law,¹⁶⁰ and professional rules of conduct for attorneys:¹⁶¹

These imperatives, as well as obligations arising from any other applicable constitutional provisions and mandates of the criminal and civil laws, protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions. We reject, however, the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties. Our precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing

153. *Id.* at 1174.

154. *Id.*

155. *Id.* at 1176.

156. *Id.* at 1177.

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

158. *Id.*

159. 5 U.S.C. § 2302(b)(8)(2005).

160. CAL. Gov't. CODE § 8547.8 (West 2005).

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

his or her job.¹⁶²

No one has argued that a “constitutional cause of action” is behind *every* statement made by a public employee. The issue is whether there should be constitutional protection for *some* statements made pursuant to job duties in *some* cases because they further the public interest.

Justice Souter pointed out that “statutory whistle-blower definitions and protections add up to a patchwork, not a showing that worries may be remitted to legislatures for relief.”¹⁶³ The disparate nature of state statutes are hardly adequate to fill the gap, with some covering all government workers, including municipal employees, while others cover only state workers.¹⁶⁴ As one commentator put it, the “scope of the First Amendment should not be limited merely because some state and federal statutes—subject to repeal or amendment—may afford similar protection.”¹⁶⁵ Most bizarrely, Justice Souter noted, is that the federal whistleblower statutes have left federal employees “unprotected for statements made in connection with normal employment duties,” which the majority deemed to be protected by the “the powerful network of legislative enactments . . . available to those who seek to expose wrongdoing.”¹⁶⁶

Nothing illustrates the power of Justice Souter’s argument better than *Matthews v. Lynch*.¹⁶⁷ Matthews was employed as an internal affairs officer for the Connecticut State Police (“CSP”), investigating alleged misconduct by CSP officers.¹⁶⁸ He discovered a “pattern and practice of covering up misconduct” by police officers, including the misuse of state funds.¹⁶⁹ Matthews went outside the chain of command to report this information because of a history of favoritism within the CSP, disclosing it to both the Connecticut Attorney General’s Office and the New York State Police (“NYSP”), which had been asked to investigate.¹⁷⁰ He also sought the protection of the Attorney General’s office as a whistleblower under Connecticut’s whistleblower statute.¹⁷¹

Matthews informed the Attorney General’s Office that he had been moved to CSP headquarters in retaliation for providing information, because some of the officers who were targets of his investigation wanted

162. *Id.* at 425–26.

163. *Id.* at 440.

164. *Id.*

165. Charles W. “Rocky” Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173, 1190 (April 2007).

166. *Garcetti*, 547 U.S. at 441.

167. No. 3:07-cv-739 (WWE), 2011 WL 1363783 (D. Conn. Apr. 11, 2011), *aff’d*, No. 11-1734-cv, 2012 WL 1873657 (2d Cir. May 24, 2012).

168. *Id.* at *1.

169. *Id.*

170. *Id.*

171. *Id.*

to monitor his activities.¹⁷² He filed a complaint with the State's Commission on Human Rights and Opportunities, alleging retaliation, and his union complained to CSP officials that it feared for Matthews' physical safety.¹⁷³ In response, those officials initiated an investigation of Matthews.

Matthews filed suit alleging a violation of his First Amendment rights.¹⁷⁴ The district court granted summary judgment to the defendants on the grounds that Matthews' disclosures of CSP misconduct were made "pursuant to his professional duties, and, therefore, his speech was not protected by the First Amendment under *Garcetti*."¹⁷⁵ The district court was unmoved by Matthews' argument that his speech was not made pursuant to his official duties because he was granted whistleblower status under Connecticut law, reasoning that investigating and reporting crime was part of his job.¹⁷⁶ The court rejected the notion that all citizens have a duty to report misconduct, an allusion to the "relevant analogue" statement in *Garcetti*, stating that this path to speaking as a citizen only applies if the reporting is outside of one's job responsibilities.¹⁷⁷

Adding insult to injury, the court accused Matthews of raising "form over substance," because the:

[C]ase law under *Garcetti* suggests that an employee's professional duties and responsibilities are to be interpreted broadly. It is therefore not appropriate to look only to the form of plaintiff's actions. His actions in informing authorities about misconduct within the CSP, however laudatory, was done in accordance with his professional duties and responsibilities as a state trooper. As such, they are not protected by the First Amendment.¹⁷⁸

Despite his good faith in reporting misconduct by the state police and his vindication by the NYSP report,¹⁷⁹ *Garcetti's* per se rule left Matthews unprotected.

In *Vila v. Padrón*¹⁸⁰ the plaintiff was the Vice President of External Affairs for Miami-Dade Community College.¹⁸¹ An attorney, Vila's duties included supervising grants, governmental affairs, legal affairs, and "high-

172. *Id.*

173. *Id.* at *2.

174. *Id.* at *1.

175. *Id.* at *4.

176. *Id.*

177. *Id.*

178. *Id.* at *5.

179. *See id.* at *2 (explaining that the NYSP issued a report that the CSP "had a pattern and practice of tolerating unethical and unlawful acts of its troopers").

180. 484 F.3d 1334 (11th Cir. 2007).

181. *Id.* at 1335.

level strategic planning.”¹⁸² She alleged that her contract was not renewed in retaliation for complaints she made about university actions which she deemed to be illegal or unethical.¹⁸³ She informed the provost an advertising contract violated Florida law because it was not let out for bid.¹⁸⁴ She informed college officials that the purchase of a building amounted to a kick-back arrangement, and the hiring of a consultant was a conflict of interest.¹⁸⁵ Finally, she objected to using college funds to pay for the illustration of a book by the daughter of a college trustee.¹⁸⁶ All but one of her complaints was made to university officials, and the Eleventh Circuit had little trouble holding that they were made pursuant to her official duties and unprotected under *Garcetti*.¹⁸⁷ The one statement made outside of the university was to a former trustee, in private, for guidance, in part because he was also a lawyer, and the court concluded that it too was made pursuant to official duties and unprotected.¹⁸⁸

Not all scholars worry about *Garcetti*'s impact on whistleblowers. Kermit Roosevelt III enthusiastically defends *Garcetti*.¹⁸⁹ Agreeing that retaliation against public employees for “inconvenient truths” is a bad thing, he argues the solution is not to require judges to decide which employees deserve protection.¹⁹⁰ He prefers to leave that to the government employer itself (the same employer allegedly committing improprieties), because it is after all “interested in improving the operations of their agency and will do a good job of deciding which complaints are worth acting on [and] which should be ignored.”¹⁹¹ He reasons that for every “good employee reporting real problems” there is a “flaky or disgruntled employee who presents baseless or trumped-up complaints.”¹⁹² A model of consequentialist reasoning, Roosevelt's argument is intriguing, but seems to miss the essential point. The public interest is paramount. It is not about keeping score. Tolerating five “flaky” employees for every “good” employee who reports actual corruption by a government agency is well worth the cost.

Garcetti took away all discretion, categorically excluding all speech made pursuant to official duties. The value of the speech to the public is

182. *Id.* at 1336

183. *Id.*

184. *Id.*

185. *Id.* at 1337.

186. *Id.*

187. *Id.* at 1339.

188. *Id.* at 1340.

189. Kermit Roosevelt III, *Not As Bad As You Think: Why Garcetti v. Ceballos Makes Sense*, 14 U. PA. J. CONST. L. 631 (2012). Roosevelt argues that academic scholarship should be deemed unprotected as well. *Id.* at 658.

190. *Id.* at 651.

191. *Id.*

192. *Id.*

irrelevant, a point emphatically made by the district court in *Gentilello v. Rege*, a case involving the demotion of a professor:¹⁹³

Plaintiff argues that the seriousness of the “concrete violations” he witnessed firsthand distinguishes his case from the investigation into potential violations undertaken in *Garcetti*. The court finds, however, that Plaintiff confuses the content of the speech with the role of the speaker. The seriousness or veracity of the violations complained of does not affect the role occupied by the speaker in voicing his complaints. “Even if the speech is of great public importance, it is not protected by the First Amendment so long as it was made pursuant to the worker’s official duties.”¹⁹⁴

This is what *Garcetti* has wrought. Content is irrelevant. Context—the role of the speaker—is the only thing that matters.

III. GARCETTI VERSUS ACADEMIC FREEDOM

Academic speech is special and deserves separate judicial attention, not because faculty members as individuals are special. When speaking on matters outside of their academic disciplines they should be treated, constitutionally, like any other public employee. But when expression is within the realm of their academic disciplines they are speaking as experts, furthering the public interest.

That is precisely why Justice Souter expressed concern about the impact of the *Garcetti* per se rule on academic freedom.¹⁹⁵ It is the reason Justice Kennedy acknowledged the possibility of different constitutional treatment for speech related to “academic scholarship or classroom instruction.”¹⁹⁶

Unfortunately, the Caveat has led to confusion. Some lower courts have applied the per se rule in the academic setting with little or no analysis. Others have read it as carving out an exception for speech relating to teaching and scholarship. Still others read it as an open question.¹⁹⁷

Academic speech is generally divided into three categories. “Extramural Speech”¹⁹⁸ involves “public pronouncements as citizens about matters that

193. No. 3:07-cv-1564-L, 2008 WL 2627685 (N.D. Tex. June 30, 2008).

194. *Id.* at *4. See also *Hrapkiewicz v. Bd. of Governors. of Wayne State Univ.*, No. 11-13418, 2012 WL 393133, at *8 (E.D. Mich. Feb. 6, 2012) (holding that because the faculty member was fulfilling job responsibilities, “[t]hat the matters are also a concern to the public does not change this fact and this fact results in her speech being afforded no First Amendment protection”)

195. *Garcetti v. Ceballos*, 547 U.S. 410, 438 (2006) (Souter, J., dissenting).

196. *Id.* at 425.

197. See *infra* Part III.C.

198. See generally Walter P. Metzger, *The 1940 Statement of Principles of Academic Freedom and Tenure*, 53 LAW & CONTEMP. PROBS. 3, 53 (1990).

are unrelated” to the faculty member’s expertise.¹⁹⁹ Speech related to scholarship and teaching, or “Core Academic Speech,” is made “within the professor’s sphere of expertise.”²⁰⁰ Most problematic is “Intramural Speech,”²⁰¹ which relates to the faculty member’s service obligations, the “capacity of faculty to discuss the internal governance of universities.”²⁰² Intramural Speech is part and parcel of contractual duties yet, as will be seen by the review of cases below, most courts do not consider it worthy of protection.

Section A explains the Supreme Court’s 60-year tradition of extolling academic freedom. Section B summarizes the scholarly debate about the constitutional contours of academic freedom. Representative examples of cases decided after *Garcetti*, involving all three categories of academic speech, are discussed in Section C.

A. A Special Concern of the First Amendment

Commentators have written extensively about the history of academic freedom, encompassing both its professional tradition (“Professional Academic Freedom”),²⁰³ and as a constitutional doctrine (“Constitutional Academic Freedom”).²⁰⁴ While the constitutional contours are in dispute,²⁰⁵ the Supreme Court has consistently extolled the importance of academic freedom to society.

One of the earliest references to academic freedom was by Justice Felix Frankfurter in his concurring opinion in *Wieman v. Updegraff*,²⁰⁶ one of the loyalty oath cases during the McCarthy era.²⁰⁷ Justice Frankfurter referred to teachers, from “the primary grades to the university,” as “priests of our

199. Robert Post, *Discipline and Freedom in the Academy*, 65 ARK. L. REV. 203, 204 (2012).

200. Larry D. Spurgeon, *A Transcendent Value: The Quest to Safeguard Academic Freedom*, 34 J.C. & U.L. 111, 115–16 (2007).

201. See Ailsa W. Chang, Note, *Resuscitating the Constitutional “Theory” of Academic Freedom: A Search for a Standard Beyond Pickering and Connick*, 53 STAN. L. REV. 915, 945 (2001); MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 1324 (2009).

202. Post, *supra* note 199, at 205.

203. See, e.g., Spurgeon, *supra* note 200, at 117; Areen, *supra* note 11, at 949.

204. See Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, TEX. L. REV. 1265, 1266 (1988), for an excellent overview of both the professional and constitutional aspects of academic freedom. See also, e.g., J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 J.C. & U.L. 79 (2004); Neal H. Hutchens, *A Confused Concern of the First Amendment: The Uncertain Status of Constitutional Protection for Individual Academic Freedom*, 36 J.C. & U.L. 145 (2009).

205. See discussion *infra* Part III.B.

206. 344 U.S. 183 (1952).

207. *Id.* at 184.

democracy.”²⁰⁸ He stressed that teachers “must be exemplars of open-mindedness and free inquiry” and “must have the freedom of responsible inquiry, by thought and action.”²⁰⁹

Justice Frankfurter is better known in academic freedom lore for describing the “Four Essential Freedoms” of a university in *Sweezy v. New Hampshire*,²¹⁰ taken from a conference in South Africa. These freedoms are for the university to “determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”²¹¹ Once again he took up the importance of academic freedom in a concurrence:

For society’s good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people’s well-being, except for reasons that are exigent and obviously compelling.

These pages need not be burdened with proof, based on the testimony of a cloud of impressive witnesses, of the dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor.²¹²

Chief Justice Earl Warren was equally eloquent in his *Sweezy* plurality opinion:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . 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.²¹³

The most important academic freedom case to date is *Keyishian v. Board*

208. *Id.* at 196.

209. *Id.*

210. 354 U.S. 234 (1957).

211. *Id.* at 263.

212. *Id.* at 262.

213. *Id.* at 250.

of *Regents*,²¹⁴ providing one of the most cherished statements about academic freedom, from the pen of Justice Brennan:

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.”²¹⁵

This principle is not intended to provide absolute license to the academic community. Rather it seeks to promote a robust debate and freedom of inquiry for the benefit of citizens.

The most recent discussion of the importance of academic freedom came in *Grutter v. Bollinger*,²¹⁶ an affirmative action case arising out of admissions to the University of Michigan’s law school.²¹⁷ Justice O’Connor, writing for the majority, explained the Court had “long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”²¹⁸

The public policy for academic freedom as special concern of the First Amendment is strong and clear. The nature of the constitutional right, if any, is not.

B. The Constitutional Contours of Academic Freedom

Scholars have long debated whether the Court has recognized a distinct constitutional right of academic freedom for the individual, for the institution, or both. J. Peter Byrne is the leading proponent for the view that Constitutional Academic Freedom “protects primarily the university as an institution from government interference with core academic functions.”²¹⁹ He argues that, in *Grutter*, the Court clarified that

214. 385 U.S. 589 (1967).

215. *Id.* at 603 (citation omitted).

216. 539 U.S. 306 (2003).

217. *Id.* at 311.

218. *Id.* at 329.

219. J. Peter Byrne, *Book Review: Neo-Orthodoxy in Academic Freedom*, 88 TEX. L. REV. 143, 167 (2009).

Constitutional Academic Freedom is a right.²²⁰ This right should be limited to “core academic areas,” however, because “university scholarship and teaching uniquely advance the search for truth and model a fruitful discourse based on freedom, rigor, and accountability.”²²¹ Frederick Schauer wrote that the institutional right “is best understood as a right of academic institutions against their political and bureaucratic and administrative supervisors, whether those supervisors be elected legislators or appointed administrators.”²²²

David Rabban disagrees, arguing that while the right does inure to the university, the courts “have also recognized that the first amendment [sic] protects individual academic freedom.”²²³ Most scholars today believe the Court has recognized some type of constitutional protection for institutions, but over the years “courts and commentators have cast doubt on an individual First Amendment right of academic freedom.”²²⁴ Byrne believes that academic freedom for the individual is primarily connected to the non-legal tradition of autonomy for the individual professor, but that “constitutional academic freedom should primarily insulate the university in core academic affairs from interference by the state.”²²⁵

To some the erosion of an individual right is ultimately for the betterment of academic freedom,²²⁶ because deference to colleges or universities, private or public, is due to a desire to “protect ongoing collective application of professional norms within the institutional setting of the university.”²²⁷ In a recent book, noted academic freedom scholars Matthew Finkin and Robert C. Post wrote that the “traditional idea of

220. J. Peter Byrne, *Constitutional Academic Freedom After Grutter: Getting Real About the “Four Freedoms” of a University*, 77 U. COLO. L. REV. 929 (2006). *But see* Hutchens, *supra* note 204, at 154 (stating that while Grutter recognizes “constitutional protection for some type of academic freedom, important questions regarding the contours of First Amendment protection for academic freedom remain unanswered”).

221. Byrne, *supra* note 220, at 930.

222. Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 921 (2006).

223. David M. Rabban, *A Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 230 (1990).

224. Aziz Huq, *Easterbrook on Academic Freedom*, 77 U. CHI. L. REV. 1055 (2010). *See* Schauer, *supra* note 222, at 908–09 (“[I]t is doubtful that, except in a surprisingly small number of instances, the Supreme Court’s references to academic freedom were intended to recognize, or had the effect of recognizing, a genuinely distinct individual academic freedom right, as opposed to simply pointing out an important but undifferentiated instantiation of a more general individual right to freedom of speech.”).

225. J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment”*, 99 YALE L.J. 251, 255 (1989).

226. Huq, *supra* note 224, at 1062 (arguing that the academic freedom opinions by Judge Frank Easterbrook of the Seventh Circuit have “rejected individual claims by professors and students in order to preserve academic freedom”).

227. *Id.* at 1065.

academic freedom,” based upon its commitment to research and scholarly standards, would be harmed if an individual right insulated scholars from “professional regulation.”²²⁸

While no doubt the college’s or university’s interests in academic matters are a special concern of the First Amendment it seems a non-starter to argue that a corporeal entity has an affirmative right. Suppose, for example, a state legislature enacted a statute mandating that all public educational institutions must teach intelligent design in science classes. Might a college or university bring a Section 1983 lawsuit on the grounds that it infringes the college or university’s First Amendment right of academic freedom?

*University of Pennsylvania v. EEOC*²²⁹ is one of the few instances of a college or university asserting academic freedom directly, and even there it was raised as a shield, not as a cause of action. The EEOC subpoenaed tenure documents after an associate professor was denied tenure and claimed sexual harassment.²³⁰ The university urged the Supreme Court to recognize a qualified common-law privilege for peer review documents, asserting a “First Amendment right of ‘academic freedom’ against wholesale disclosure of the contested documents.”²³¹

The Court acknowledged that it had described academic freedom as a “special concern of the First Amendment”²³² but found the university’s reliance on academic freedom “somewhat misplaced,” because the subpoenas were not attempting to direct the content of what is taught.²³³ The Court distinguished previous academic freedom cases where the government attempted to direct the content of speech, and where “complicated First Amendment issues are presented because government is simultaneously both speaker and regulator.”²³⁴ The Court added that it had cautioned judges that in reviewing academic decisions they should “show great respect for the faculty’s professional judgment.”²³⁵ The Court stressed that nothing in its decision should be a “retreat from this principle of respect for legitimate academic decisionmaking.”²³⁶

Erica Goldberg and Kelly Sarabyn point out that after *Grutter* courts must address the question of whether the institutional right of academic freedom “can be invoked by the university against state action, or whether

228. FINKIN & POST, *supra* note 201, at 43.

229. 493 U.S. 182 (1990).

230. *Id.* at 185–86.

231. *Id.* at 188.

232. *Id.* at 195 (quoting *Keyishian v. Bd. of Regents of Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967)).

233. *Id.* at 197–98.

234. *Id.* at 198.

235. *Id.* at 199 (quoting *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985)).

236. *Id.*

it can be invoked only as part of the balancing test when a public university asserts an interest in overriding another party's constitutional right."²³⁷ The Court's statements should be read instead to mean that the Court has expressed a policy of deference to the community of scholars—and not the corporate entity.

Despite disagreements on specifics, the Court has unquestionably placed the issue of academic freedom in the constitutional realm. That constitutional principle clashes with the *Garcetti* per se rule. Matthew Finkin observed that the chilling effect of *Garcetti* is particularly egregious to academic speech because if “before speaking, the professor must first question the capacity in which the speech is uttered” she will “tend to steer clear of the forbidden zone.”²³⁸

When constitutional doctrines collide something must give. Academic freedom has the better case because of its importance to society. The Court's support of academic freedom and its policy of deference to the college and university community form the backdrop for understanding the legal effect of the Caveat and its contradictory and confusing reading by lower courts in higher education cases.

C. The Post-*Garcetti* Cases

The Caveat has been interpreted in several ways. Some commentators and courts believe the *Garcetti* majority reserved the question of whether the per se rule applies to teaching and scholarship.²³⁹ That reading is understandable, but what is its legal effect? To reserve the question for

237. Erica Goldberg and Kelly Sarabyn, *Measuring a “Degree of Deference”:* *Institutional Academic Freedom in a Post-Grutter World*, 51 SANTA CLARA L. REV. 217, 220 (2011).

238. Matthew W. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323, 1342–43 (1988).

239. See Areen, *supra* note 11, at 946–47 (“[T]he majority agreed to leave undecided for now whether *Garcetti* signals the end of constitutional protection for academic freedom.”); Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1500 (2007) (“[T]he Court's apparent unwillingness to extend the rule in that case to the academic context signals a continuing recognition that something about universities demands a different approach to otherwise generally applicable First Amendment principles.”). See also *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 563 (4th Cir. 2011) (“The plain language of *Garcetti* thus explicitly left open the question of whether its principles apply in the academic genre where issues of ‘scholarship or teaching’ are in play.”); *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332, 343 (6th Cir. 2010) (noting that “*Garcetti*'s caveat” did not aid the plaintiff because she was not a teacher at a public college or university, concluding that the *Garcetti* “majority disclaimed any intent to resolve the point.”); *Panse v. Eastwood*, 3030 F.App'x 933, 934 (2d Cir. 2008) (“It is an open question in this Circuit whether *Garcetti* applies to classroom instruction.”); *Borden v. Sch. Dist. of E. Brunswick*, 523 F.3d 153, 171 n.13 (3rd Cir. 2008) (“After reaching its conclusion, the Court expressly stated that it left the determination of whether this analysis would apply in the educational context for another day.”).

another day can only mean one of two things, legally: either the per se rule applies to academic speech as a matter of law now and someday the Court might carve out an exception, or the Court imposed a moratorium on the application of the per se rule to academic speech until it has the opportunity to fully analyze the question.

Dicta is defined as statements not necessary to the holding,²⁴⁰ and “anything in a judicial opinion that is not the holding.”²⁴¹ For the Caveat to be dicta, by definition, means that it is not necessary for the holding and the per se rule was intended to apply to academic speech. The Caveat would therefore be mere comfort to the academic community that the Court is sympathetic to concerns about academic freedom. If the Caveat is not dicta, logically the Court must have ruled that academic speech is exempt from the per se rule.

This article posits that the per se rule does apply to academic speech until further notice for two reasons. First, if the Court intended to carve out an exception for academic speech it would do so expressly and clearly. The statement, “[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests,”²⁴² is hardly a clear expression of a legal carve-out from a per se rule. Rather, it is an acknowledgement that Justice Souter had raised a valid concern which merits consideration in the future.

Second, the statement “[w]e need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner”²⁴³ is a classic formulation of dictum. The holding was sweeping – when a public employee speaks pursuant to official duties her speech is not protected. Putting off the question does not mean there is a moratorium on academic speech or that an exception has already been recognized. It means that someday the Court will consider whether an exception should be made.

A comprehensive survey of post-*Garcetti* cases in higher education is beyond the scope of this article. This section presents representative examples of cases concerning Extramural Speech, Core Academic Speech, and Intramural Speech.

1. Extramural Speech

In *Dixon v. University of Toledo*,²⁴⁴ the plaintiff was an interim Associate Vice President for Human Resources.²⁴⁵ Her problems began

240. Marc McAllister, *Dicta Redefined*, 47 WILLAMETTE L. REV. 161, 166 (2011).

241. Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219, 223 (2010).

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

243. *Id.*

244. 842 F. Supp. 2d 1044 (N.D. Ohio 2012).

245. *Id.* at 1046.

when she wrote a letter to the newspaper taking exception to an opinion piece comparing the struggle for homosexual rights to the African-American experience.²⁴⁶ She identified herself as an alumnus of the university, but did not mention her job title or duties.²⁴⁷ Negative response to her letter led to her being placed on leave and the university president wrote his own op-ed piece in the newspaper, repudiating Dixon's opinion on behalf of the university and explaining the university policy on diversity.²⁴⁸ Eventually Dixon was terminated and she filed suit.²⁴⁹ The district court concluded the university had not presented any job duty that Dixon was trying to satisfy in writing the letter; accordingly, the speech was not made pursuant to official duties. That conclusion did not help Dixon, however, since the court also found that because of her position in human resources her statements could do serious damage to the university and disrupt the human resources department, thus holding that Dixon failed to pass the *Pickering* balancing test.²⁵⁰

In *van Heerden v. Louisiana State University*,²⁵¹ an associate professor of research and deputy director of the LSU Hurricane Center was selected by the Louisiana Department of Transportation to head "Team Louisiana," a group of scientists asked to determine the cause of flooding in New Orleans after Hurricane Katrina.²⁵² Before and after his appointment van Heerden was outspoken in his criticism of the U.S. Army Corps of Engineers.²⁵³ LSU administrators feared losing federal funds and ordered him to stop making public statements and testifying about the levee failures.²⁵⁴ Undeterred, he continued to make public statements and testified before the Louisiana Legislature and the United States Congress, even writing a book called "The Storm," which amplified his opinions.²⁵⁵ He was stripped of his teaching duties and his contract was not renewed.²⁵⁶ Opining that the Caveat indicated that the U.S. Supreme Court "reserved the question" whether *Garcetti* would apply to scholarship or teaching,²⁵⁷ Judge Brady wrote that he "shares Justice Souter's concern that wholesale application of *Garcetti* analysis to the type of facts presented here could lead to a whittling-away of academics' ability to delve into issues or

246. *Id.* at 1047.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* at 1054.

251. 2011 WL 5008410 (M.D. La. 2011).

252. *Id.* at 1.

253. *Id.* at 4.

254. *Id.* at 1.

255. *Id.*

256. *Id.* at 1.

257. *Id.* at 3.

express opinions that are unpopular, uncomfortable or unorthodox.”²⁵⁸

He concluded that “although it is a close question, van Heerden was not acting within his official job duties.”²⁵⁹ LSU’s administration changed his job description “to focus solely on research” rather than through the press or government agencies.²⁶⁰ These actions reflected an attempt by LSU to “disavow itself of van Heerden’s statements regarding the cause of levee failure.”²⁶¹ As a result, van Heerden’s statements survived for another day.²⁶²

One of the ramifications of *Garcetti*’s inverted logic is that now an aggrieved faculty member is forced to go to great lengths to portray the speech as being as far away from classroom and research duties as possible, while administrators go to just as much trouble to squeeze the speech into official duties.²⁶³

2. Core Academic Speech

The language of the Caveat covers “academic scholarship and classroom instruction.”²⁶⁴ Both fall under Core Academic Speech, though there are important differences. Each area is discussed in the following.

(a) Teaching

A literature teacher is lecturing on “*Ulysses*” by James Joyce. Her professional obligation is to teach literature and *Ulysses* heads many lists of great novels.²⁶⁵ A student who happens to be the child of a major donor to the college complains to administrators about the sexual content in the novel. It was, after all, banned in the United States initially.²⁶⁶ Pressure is brought to bear and the teacher is told not to use the book again. Is the speech protected by the First Amendment? It involves public concern in a general sense of course, but if *Garcetti* is applied the speech is unprotected

258. *Id.* at 5.

259. *Id.* at 4.

260. *Id.* at 5.

261. *Id.* at 5.

262. *Id.* (“Based 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.”).

263. *Id.* at 3. *See also* *Casey v. West Las Vegas Ind. Sch. Dist.*, 473 F.3d 1323, 1330 (10th Cir. 2007) (noting that after the *Garcetti* decision “the parties seemed to swap positions to meet their respective litigation objectives”).

264. *Garcetti*, 547 U.S. 410, 425 (2006).

265. *See, e.g., Modern Library’s Choices, a list of the greatest novels of the 20th century*, N.Y. TIMES, <http://www.nytimes.com/library/books/072098best-novels-list.html> (last visited Sep. 20, 2011) (ranking *Ulysses* as number one).

266. *See United States v. One Book Called “Ulysses”*, 5 F. Supp. 182, 183 and 185 (S.D.N.Y. 1933) (rejecting the argument that the book was pornographic and permitting its entry into the U.S.).

because the teacher was “speaking” pursuant to her official duties.” This hypothetical is all too realistic in a post-*Garcetti* world.

Contrast a literature teacher expressing her opinion in class about abortion laws. She is speaking as a citizen, not as an expert. Many citizens express opinions about abortion laws, yet there is not a relevant analogue in the sense that most citizens cannot do so in a college classroom to a captive audience. May the college prohibit this speech?

For primary and secondary schools the answer is clear. Judge Frank Easterbrook has written several interesting opinions on academic freedom.²⁶⁷ *Mayer v. Monroe County Community School Corporation*²⁶⁸ is one of them. He explained that primary and secondary school teachers do not have a constitutional right to introduce their own views, but “must stick to the prescribed curriculum—not only the prescribed subject matter, but also the prescribed perspective on that subject matter.”²⁶⁹ This is so, he wrote, because:

[T]he school system does not “regulate” teachers’ speech as much as it *hires* that speech. Expression is a teacher’s stock in trade, the commodity she sells to her employer in exchange for a salary. A teacher hired to lead a social-studies class can’t use it as a platform for a revisionist perspective that Benedict Arnold wasn’t really a traitor, when the approved programs calls him one; a high-school teacher hired to explicate *Moby Dick* in a literature class can’t use *Cry, The Beloved Country* instead, even if Paton’s book better suits the instructor’s style and point of view; a math teacher can’t decide that calculus is more important than trigonometry and decide to let Hipparchus and Ptolemy slide in favor of Newton and Leibniz.²⁷⁰

He stressed that K-12 education is compulsory and students should not be “subject to teachers’ idiosyncratic perspectives.”²⁷¹ Majority rule about viewpoints may lead to indoctrination, but “if indoctrination is likely, the power should be reposed in someone the people can vote out of office, rather than tenured teachers.”²⁷² This evokes the government mission rationale in *Garcetti*.

267. See Huq, *supra* note 224, for a thorough analysis of Judge Easterbrook’s opinions.

268. 474 F.3d 477 (7th Cir. 2007), *cert denied*, 552 U.S. 823 (2007).

269. *Id.* at 479.

270. *Id.* (emphasis in original).

271. *Id.*

272. *Id.* at 479–80. See also *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332, 343 (6th Cir. 2010), *cert. denied*, 131 S.Ct. 3068 (2011) (Justice Souter’s concern did not help the plaintiff teacher because in his dissent he was talking about higher education, and the plaintiff was a high school teacher. The court noted that both culturally and legally academic freedom arises out of colleges and universities.).

The courts do seem to be making a distinction for college and university speech to some extent, because the education is not compulsory.²⁷³ Yet *Piggee v. Carl Sandburg College*,²⁷⁴ also from the Seventh Circuit, extended the reasoning to a college. Piggee was a part-time cosmetology instructor at a community college.²⁷⁵ She placed religious pamphlets in a smock of a student she believed to be gay.²⁷⁶ The student was offended and complained to the director of the cosmetology program.²⁷⁷ The college concluded that the teacher's conduct constituted sexual harassment.²⁷⁸ Piggee's contract was not renewed and she filed suit, alleging infringement of her right of speech.²⁷⁹

The Seventh Circuit referred to its precedents that academic freedom has two aspects, the first being the right of faculty members to engage in academic debate and inquiry.²⁸⁰ The second is the right of the college or university to establish curriculum.²⁸¹ Curiously, the court stated that *Garcetti* "is not directly relevant to our problem,"²⁸² without further elaboration, adding that "[c]lassroom or instructional speech, in short, is inevitably speech that is part of the instructor's official duties."²⁸³ The court noted almost in passing that Piggee's speech "was not related to her job of instructing students in cosmetology,"²⁸⁴ and if anything, the speech undermined her relationship with students who disagreed with her.²⁸⁵ Ultimately, the court's holding is based on a narrow issue, that it could "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."²⁸⁶

*Nichols v. University of Southern Mississippi*²⁸⁷ involved a non-tenured faculty member who alleged his contract was not renewed in retaliation for

273. See *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 966 (9th Cir. 2011), cert denied, 132 S.Ct. 1807 (2012) (holding the academic "carve-out" in *Garcetti* applies only to colleges and universities); and *Evans-Marshall*, 624 F.3d at 343 ("Garcetti's caveat offers no refuge to Evans-Marshall. She is not a teacher at a 'public college[]' or 'universit[y]'" and thus falls outside of the group the dissent wished to protect.").

274. 464 F.3d 667 (7th Cir. 2006).

275. *Id.* at 668.

276. *Id.* at 669.

277. *Id.* at 668–69.

278. *Id.* at 669.

279. *Id.* at 669–70.

280. *Id.* at 671.

281. *Id.*

282. *Id.* at 672.

283. *Id.* at 671.

284. *Id.* at 672.

285. *Id.*

286. *Id.* at 673.

287. 669 F.Supp.2d 684 (S.D. Miss. 2009).

comments to a student after a voice lesson, while still in the classroom, about homosexuality.²⁸⁸ Applying *Garcetti*, the district court held that the conversation was not protected,²⁸⁹ finding the “speaking as a citizen” element a more difficult task than determining whether the subject matter was a public concern:

On one hand, Dr. Nichols’s duties as a University employee included giving voice lessons, not giving moral, sexual, or religious advice to his students, so his statements were not made pursuant to his official duties. Therefore, the content of the conversations with Lunsford, although tangentially related to the challenges of New York City’s entertainment industry, are best characterized as speech unrelated to Dr. Nichols’s official duties. However, the context and form of the statements lead to a contrary conclusion. The statements were made in the classroom setting by a professor to a student, and the courts have consistently taken a broad view of what constitutes classroom speech that is not afforded protection under the First Amendment.²⁹⁰

The court ruled the speech was best characterized as made in his “official capacity and was not afforded First Amendment protection.”²⁹¹ Using this line of reasoning, anything said by a faculty member in or around the classroom is unprotected.

Other courts have been more reluctant to apply *Garcetti*. In *Sheldon v. Dhillon*²⁹² the contract for an adjunct biology instructor was not renewed after a student complained about offensive statements the instructor made in response to a question in the classroom.²⁹³ The subject matter was the genetic basis of homosexuality and the course did, to some extent, relate to that subject.²⁹⁴ The college relied on *Garcetti*, arguing that classroom instruction is not protected speech.²⁹⁵ The district court disagreed, stating that the majority in *Garcetti* “expressly reserved the question of whether its holding extends to scholarship or teaching-related speech.”²⁹⁶ The court read the Caveat as an indication of the Court’s “reluctance to apply its public-employee speech rule in the context of academic instruction,” and chose to apply the previous Ninth Circuit framework.²⁹⁷

288. *Id.* at 689.

289. *Id.* at 699.

290. *Id.* at 698.

291. *Id.* at 699.

292. 2009 WL 4282086 (N.D. Cal. 2009).

293. *Id.* at 2.

294. *Id.* at 1.

295. *Id.* at 3.

296. *Id.*

297. *Id.* at 4.

In *Kerr v. Hurd*²⁹⁸ an OB/GYN physician and assistant professor alleged retaliation because of his teaching about the importance of “vaginal delivery over unnecessary cesarian procedures,” and for lecturing residents on the proper use of forceps.²⁹⁹ Defendant Hurd, the department chair, argued that because these teaching methods were within Kerr’s official duties as an employee of the university, the speech was barred by the *Garcetti* per se rule.³⁰⁰ The district court acknowledged that “Dr. Kerr’s speech as to vaginal deliveries was within his ‘hired’ speech as a teacher of obstetrics,”³⁰¹ but concluded that the Supreme Court left undecided the application of the per se rule in an “academic setting.”³⁰² Judge Merz provided, in dicta, a compelling argument for academic freedom:

Even without the binding precedent, this Court would find an academic exception to *Garcetti*. Recognizing an academic freedom exception to the *Garcetti* analysis is important to protecting First Amendment values. Universities should be the active trading floors in the marketplace of ideas. Public universities should be no different from private universities in that respect. At 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. See Justice Souter’s dissent in *Garcetti*, citing *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967). The disastrous impact on Soviet agriculture from Stalin’s enforcement of Lysenko biology orthodoxy stand as a strong counter example to those who would discipline university professors for not following the “party line.”³⁰³

Judge Merz rejected an argument by the defendants that the academic freedom “exception” be limited to “classroom teaching,”³⁰⁴ noting there was no indication in the motion papers that “Dr. Kerr’s advocacy for forceps deliveries was outside either the classroom or the clinical context in which medical professors are expected to teach.”³⁰⁵

These cases, no matter how sincerely decided, are sometimes result-oriented. How can they be otherwise, given the confused state of academic speech after *Garcetti*, not to mention the uncertain landscape of constitutional law for academic freedom itself?

298. 694 F.Supp.2d 817, 828 (S.D. Oh. 2010).

299. *Id.* at 834.

300. *Id.* at 843.

301. *Id.*

302. *Id.*

303. *Id.* at 843–44 (footnote omitted) (citations omitted).

304. *Id.* at 844.

305. *Id.*

(b) *Scholarship*

In *Adams v. Trustees of the University of North Carolina-Wilmington*,³⁰⁶ a tenured assistant professor of criminology applied for promotion to full professor.³⁰⁷ To support his research credentials Adams listed non-refereed books and articles, as well as media appearances and speeches.³⁰⁸ He had become a very public commentator on religious and conservative political topics.³⁰⁹ A committee of senior faculty voted seven to two to oppose his promotion.³¹⁰ Adams brought a Section 1983 and Title VII action alleging several constitutional deprivations.³¹¹ The district court granted summary judgment to the university defendants and the Fourth Circuit affirmed in part and reversed in part.³¹² The court referred to the Supreme Court's "directive" that courts have been "reluctant to trench on the prerogatives of state and local educational institutions [because of the courts'] responsibility to safeguard their academic freedom, a special concern of the First Amendment."³¹³

The Court held that the district court misread *Garcetti* and that its opinion rested upon several "fundamental errors."³¹⁴ Foremost among those errors was that the district court had applied *Garcetti* "without acknowledging, let alone addressing, the clear language in that opinion that casts doubt on whether the *Garcetti* analysis applies in the academic context of a public university."³¹⁵ Judge Agee, writing for a unanimous panel, said the "plain language of *Garcetti* thus explicitly left open the question of whether its principles apply in the academic genre where issues of 'scholarship or teaching' are in play."³¹⁶ *Lee v. York County School*

306. 640 F.3d. 550 (4th Cir. 2011).

307. *Id.* at 553.

308. *Id.* at 554–55.

309. *Id.* at 554–55.

310. *Id.* at 555.

311. *Id.* at 556.

312. *Id.*

313. *Id.* at 557 (alteration in original).. This statement, without citation, refers to *Keyishian v. Bd. of Regents of the Univ. of the State of N. Y.*, 385 U.S. 589, 603 (1967) where the Court stated:

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.

314. *Adams*, 640 F.3d at 561. One of the significant issues in the case was that the district court had concluded that Adams' speech, which even the university defendants conceded was protected when given, because it had nothing to do with his teaching and scholarship, was converted to unprotected speech because he later referred to it in his application for promotion. Thus, the Fourth Circuit held that the district court had failed to take into account Adams' role as a speaker at the time the speech was made. *Id.* at 561–62.

315. *Id.* at 561 (citing *Garcetti*, 547 U.S. at 425 (2006)).

316. *Id.* at 563.

*Division*³¹⁷ was cited for the principle that the Supreme Court “explicitly did not decide” whether the *Garcetti* ruling would apply to a case involving speech relating to teaching.³¹⁸

The Fourth Circuit provided a detailed review of the *Garcetti* problem in academic speech:

There may be instances in which a public university faculty member’s assigned duties include a specific role in declaring or administering university policy, as opposed to scholarship or teaching. In that circumstance, *Garcetti* may apply to the specific instances of the faculty member’s speech carrying out those duties. However, that is clearly not the circumstance in the case at bar. Defendants agree Adams’ speech involves scholarship and teaching. . . . But the scholarship and teaching in this case, Adams’ speech, was intended for and directed at a national or international audience on issues of public importance unrelated to any of Adams’ assigned teaching duties at UNC.³¹⁹

The court was concerned that applying *Garcetti* to the “academic work of a public university faculty member” under these facts could preclude many forms of public speech or service a professor engages in,³²⁰ a result which does not appear to be what *Garcetti* intended. Thus, the court did not apply the per se rule to the facts before it.³²¹

The Seventh Circuit has no hesitation in applying the per se rule to higher education. In *Renken v. Gregory*,³²² a tenured professor accused administrators of imposing improper conditions on the university’s matching of funds for a NSF grant.³²³ He complained to a university committee and to the Board of Regents about harassment and discrimination by the dean’s office.³²⁴ Unable to work out a compromise with Renken the university returned the grant money.³²⁵ Renken sued, alleging reduction in pay and retaliation for exercising his speech rights.³²⁶ Applying *Garcetti*’s per se rule, the Seventh Circuit held that his complaints about the grant conditions were made pursuant to his official job duties and therefore not protected.³²⁷ In fulfilling his research responsibilities Renken had applied for the grant and he admitted it was

317. 484 F.3d 687, 694 (4th Cir. 2007), *cert. denied*, 552 U.S. 950 (2007).

318. *Adams*, 640 F.3d at 563 (quoting *Lee*, 484 F.3d at 694).

319. *Id.* at 563–64.

320. *Id.* at 564.

321. *Id.*

322. 541 F.3d 769 (7th Cir. 2008).

323. *Id.* at 771–72.

324. *Id.*

325. *Id.* at 773.

326. *Id.*

327. *Id.* at 775.

“an education grant for the benefit of students.”³²⁸ In addition, the grant entitled him to a reduction in teaching load.³²⁹ The court emphatically applied the per se rule with no reference to the Caveat.

3. *Intramural Speech*

A proper exploration of the role of faculty governance is outside the scope of this article. To provide context, however, it is helpful to begin with judicial support of the importance of university governance. In *NLRB v. Yeshiva University*³³⁰ the legal issue was whether full-time faculty fall within the exclusion under the National Labor Relations Act for supervisors and managerial employees.³³¹ The schools within the university were “substantially autonomous,” with faculty committees “concerned with special areas of educational policy.”³³² Faculty recommendations for “faculty hiring, tenure, sabbaticals, termination and promotion” carried great weight with the administrators.³³³ Justice Powell wrote that the “business” of a university is education, and its vitality ultimately must depend on academic policies that largely are formulated and generally implemented by faculty governance decisions.³³⁴

One of the best judicial discussions of the importance of faculty governance is found in Judge Edwards’ concurring opinion in *Emergency Coalition to Defend Educational Travel v. U.S. Department of Treasury*.³³⁵ An association of professors challenged federal regulations regarding the Cuba trade embargo,³³⁶ alleging the regulations violated academic freedom by restricting what they could teach.³³⁷ The majority opinion observed that any “substantive governmental restriction” on lectures would “obviously violate the First Amendment,”³³⁸ yet concluded these regulations were content neutral and did not violate the First Amendment.³³⁹ Judge Edwards agreed with the result and accordingly believed it was unnecessary for the court to “parse the many difficult issues” regarding the scope of academic freedom, including the Caveat, and whether it is a constitutional right at all.³⁴⁰ Citing Professor Areen’s article on governance,³⁴¹ he referred to the Supreme Court’s decisions which expressed reluctance to second guess

328. *Id.* at 773.

329. *Id.* at 774.

330. 444 U.S. 672 (1980).

331. *Id.* at 674.

332. *Id.* at 676.

333. *Id.* at 677.

334. *Id.* at 688.

335. 545 F.3d 4 (D.C. Cir. 2008).

336. *Id.* at 6.

337. *Id.* at 12.

338. *Id.*

339. *Id.* at 12–13.

340. *Id.* at 15.

341. *Id.* See also Areen, *supra* note 11.

college and university actions, and observed that the “four essential freedoms” from Justice Frankfurter in the *Sweezy* case,³⁴² have come to “include notions of shared governance.”³⁴³

Despite the recognition that governance is important, lower courts routinely reject arguments that Intramural Speech is worthy of constitutional protection. *Gorum v. Sessoms*,³⁴⁴ involved a tenured professor who was dismissed after being accused of changing student grades without instructor approval.³⁴⁵ Gorum argued that his dismissal was in retaliation for opposition to the university president’s hiring, cancellation of an invitation to the president for a university breakfast, and advising a star football player.³⁴⁶ The district court granted summary judgment to defendants and Gorum appealed.³⁴⁷ The Third Circuit concluded the speech was made pursuant to his official duties and therefore was not protected.³⁴⁸

The court held that Gorum was unable to prove either that his speech was made as a citizen or that its content was a matter of public concern.³⁴⁹ Student advising came within the scope of official duties because it related to the professor’s knowledge and experience with the university’s disciplinary code.³⁵⁰ Revocation of the speaking invitation to a fraternity’s Martin Luther King, Jr. breakfast was pursuant to his official duties because the Faculty Senate Bylaws include responsibilities to aid student organizations and clubs as mentors and advisors.³⁵¹ The court acknowledged the “Supreme Court did not answer in *Garcetti* whether the ‘official duty’ analysis ‘would apply in the same manner to a case involving speech related to scholarship or teaching.’”³⁵² Nevertheless, the court applied the *Garcetti* per se rule because “Gorum’s actions so clearly were not ‘speech related to scholarship or teaching,’ . . . and because we believe that such a determination here does not ‘imperil First Amendment protection of academic freedom in public colleges and universities.’”³⁵³ In a footnote, the Third Circuit explained that the “full implications” of *Garcetti* on scholarship and teaching are not clear, and consequently the

342. *Emergency Coal. to Defend Educ. Travel v. Dep’t of Treasury*, 545 F.3d 4, 15–16 (D.C. Cir. 2008).

343. *Id.* at 16.

344. 561 F.3d 179 (3rd Cir. 2009).

345. *Id.* at 182.

346. *Id.* at 182–83.

347. *Id.* at 184.

348. *Id.* at 185–86.

349. *Id.* at 185.

350. *Id.* at 185–86.

351. *Id.* at 186.

352. *Id.*

353. *Id.*

circuits differ about its application to academic instructors.³⁵⁴

In *Abcarian v. McDonald*,³⁵⁵ 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 premiums,”³⁵⁶ was protected because it was exempted by *Garcetti* due to the Caveat.³⁵⁷ The court rejected this “unsupported assertion” because his speech “involved administrative policies that were much more prosaic than would be covered by principles of academic freedom.”³⁵⁸

In *Hong v. Grant*³⁵⁹ a chemistry professor raised concerns about a potential conflict of interest during a mid-tenure review.³⁶⁰ He complained that too many department courses were taught by lecturers.³⁶¹ He opposed a colleague’s merit pay increase and the handling of a faculty appointment.³⁶² After being denied a merit increase, Hong alleged retaliation.³⁶³ The district court granted summary judgment to the defendants.³⁶⁴ The court noted that in the University of California’s system, a “faculty member’s official duties are not limited to classroom instruction and professional research,” but rather includes a “wide range of academic, administrative and personnel functions in accordance with UCI’s self-governance principle.”³⁶⁵ Consequently, Hong has a “professional responsibility to offer feedback, advice and criticism about his department’s administration and operation from his perspective as a tenured, experienced professor.”³⁶⁶ No mention was made of the Caveat.

*Miller v. University of South Alabama*³⁶⁷ held that comments by a tenure track assistant professor at a faculty meeting discussing candidates for the English Department were not protected.³⁶⁸ Miller was not reappointed, allegedly due to her lack of collegiality, weak scholarly record, and average

354. *Id.* at 186 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), *cert. denied*, 552 U.S. 950 (2007)).

355. 617 F.3d 931 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 1685 (2011).

356. *Id.* at 933.

357. *See Garcetti*, 547 U.S. at 425 (2006).

358. *Id.* at 938 n.5.

359. 516 F. Supp. 2d 1158 (C.D. Cal. 2007), *aff’d. on other grounds*, 403 Fed. App’x. 236 (9th Cir. 2010).

360. *Id.* at 1162.

361. *Id.* at 1162–63.

362. *Id.* at 1163.

363. *Id.* at 1164.

364. *Id.* at 1170.

365. *Id.* at 1166.

366. *Id.* at 1167.

367. 2010 WL 1994910 (S.D. Ala. 2010).

368. *Id.* at *11.

teaching evaluations.³⁶⁹ She believed it was because of statements she had made expressing concern about the lack of diversity among faculty candidates.³⁷⁰ The district court reasoned that because Miller was attending a faculty meeting to discuss applicants for department positions she was speaking as part of her job duties and not as a private citizen.³⁷¹

*Demers v. Austin*³⁷² involved allegations arising out of both scholarship and governance. An associate professor at Washington State University alleged retaliation in response to his expression about changes to the communication program, including a decreased emphasis in theoretical research, but also for a book he wrote while on sabbatical criticizing university bureaucracies.³⁷³ The district court held that all of the instances of speech were made pursuant to his official duties and therefore unprotected, finding that the book “does not represent speech made by a private citizen.”³⁷⁴

In *Cunningham v. Louisiana State University*³⁷⁵ an assistant professor alleged retaliation for reporting two students for plagiarism.³⁷⁶ The district court held that the speech was not protected because all of it was made in connection with his work as a professor.³⁷⁷ Nothing is more important in an academic setting than disciplining students for academic misconduct, yet the First Amendment did not afford Cunningham any cover.

The speech by the tenured professor in *Capeheart v. Hahs*³⁷⁸ included advocacy on behalf of student protesters who were members of student organizations she had advised.³⁷⁹ 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.³⁸⁰ The court applied the per se rule to find that the speech was unprotected because it was made pursuant to her duties.³⁸¹

A case involving Idaho State University involved a controversy about the use of a university mass-mail email service.³⁸² The university president had established a “provisional faculty senate” and instructed it to develop a

369. *Id.* at *5.

370. *Id.* at *3.

371. *Id.* at *11.

372. 2011 WL 2182100 (E.D. Wa. 2011).

373. *Id.* at *1.

374. *Id.* at *3, *4.

375. 2008 WL 4346422 (M.D. La. 2008).

376. *Id.* at *5–6.

377. *Id.* at *6.

378. 2011 WL 657848 (N.D. Ill. 2011).

379. *Id.* at *1, *2.

380. *Id.*

381. *Id.* at *4.

382. *Idaho State Univ. Faculty Ass’n for the Pres. of the First Amendment v. Idaho State Univ.*, 2012 WL 1313304 (D. Id. 2012).

new constitution and bylaws for a “full faculty senate” to be approved by the president and the State Board of Education.³⁸³ When the vice chair of the provisional faculty senate tried to send the draft constitution to the entire faculty for an upcoming vote, through the “Faculty memos” email service, the Vice President of Academic Affairs objected.³⁸⁴ She wanted faculty to have more time to review and discuss the draft and disagreed with some of the provisions.³⁸⁵ She argued that the official faculty email service should not be used because “it would give the mistaken impression that the poll was sanctioned by the Administration.”³⁸⁶ The faculty employees conceded they were not speaking as citizens in this process, but rather as employees.³⁸⁷ Accordingly, the district court concluded that *Garcetti’s* per se rule precluded protection.³⁸⁸

The governance activities of faculty members in hiring, tenure review, promotion, and curriculum are unique not only to public employment, but are unlike any other business. Intramural Speech is essential to achieve the mission of the college or university, going hand in hand with Core Academic Speech. The beat goes on and on.³⁸⁹ Intramural Speech is not being protected. It is smashed from two directions. It is part of the faculty member’s professional duties yet is outside of the “academic scholarship or classroom instruction” umbrella raised in the Caveat. A new analytical framework is needed. Part V will discuss how that might be accomplished.

IV. FIXING THE *GARCETTI* PROBLEM

The experiment has failed. Collateral damage from the per se rule to the public interest is disproportionate to any perceived benefits. For most public employees the optimal solution is for the Court to overturn *Garcetti* and return to the *Pickering/Connick* test. For college and university faculty, the elimination of the per se rule is a vital first step, but as explained in Part V, a separate approach is needed to protect academic freedom.

How realistic is a reversal of *Garcetti*? Section A discusses some recent Supreme Court decisions which send mixed signals. The Court seems to have reinforced autonomy for the government as employer. Yet it has also demonstrated a desire to expand First Amendment speech rights generally,

383. *Id.* at *1.

384. *Id.* at *1, *2.

385. *Id.* at *2.

386. *Id.*

387. *Id.* at *7.

388. *Id.*

389. *See* Flyr v. City Univ. of N.Y., 2011 WL 1675997, 3 (S.D.N.Y. Apr. 25, 2011) (holding that plaintiff’s stance on a departmental chair election and his involvement with grant writing was both pursuant to his official duties and outside of *Garcetti’s* academic speech exception).

in particular showing a disdain for recognizing new categorical exclusions for speech. Perhaps it will acknowledge that the establishment of the categorical exclusion in *Garcetti* was ill-advised.

Recognizing that a complete reversal of *Garcetti* is unlikely, a modified approach is needed, one that dispenses with the per se rule and permits the reviewing court to consider the relative value of the speech to the public interest. Section B sets out my suggestion for that modified approach.

A. Recent Supreme Court Cases

The Court doubled down on autonomy for the government as employer in *Borough of Duryea v. Guarnieri*.³⁹⁰ A police chief filed a Section 1983 lawsuit, alleging that his union grievance was protected by the Petition Clause of the First Amendment.³⁹¹ A jury found in his favor and the Third Circuit affirmed, except for the punitive damage award.³⁹² The Supreme Court vacated and remanded, holding that Petition Clause cases should be subject to the public concern test.³⁹³ The Court began with an homage to the doctrine that accepting public employment is not a waiver of constitutional protection; stating “[t]here are some rights and freedoms so fundamental to liberty that they cannot be bargained away in a contract for public employment. Our responsibility is to ensure that citizens are not deprived of [these] fundamental rights by virtue of working for the government.”³⁹⁴

Still, a citizen who accepts public employment must also accept “certain limitations on his or her freedom.”³⁹⁵ The justification for these restraints is due to the “consensual nature of the employment relationship” and the “unique nature of the government’s interests.”³⁹⁶ As in *Garcetti*, the Court relied upon the rationale that the “government has a substantial interest in ensuring that all of its operations are efficient and effective.”³⁹⁷

The Court reasoned that the “substantial government interests that justify a cautious and restrained approach” for public employee speech is just as relevant when public employees raise Petition Clause claims.³⁹⁸ Ruling against the police chief, the Court emphasized that the “government’s interest in managing its internal affairs requires proper restraints on the

390. 131 S. Ct. 2488 (2011).

391. *Id.*

392. *Id.* at 2492–93.

393. *Id.* at 2491, 2497.

394. *Id.* at 2493–94. (quoting *Connick v. Myers*, 461 U.S.138, 147 (1983)); *See also* *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 605–606 (1967).

395. *Id.* at 2494 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006)).

396. *Id.*

397. *Id.*

398. *Id.* at 2495.

invocation of rights by employees” when the “government employer’s responsibilities may be affected.”³⁹⁹

For public speech generally the Court’s decisions have been supportive of broad protection. The most controversial, *Snyder v. Phelps*,⁴⁰⁰ involved public picketing by members of the Westboro Baptist Church near a funeral for Marine Lance Corporal Matthew Snyder.⁴⁰¹ In an 8 to 1 decision the Court affirmed the Third Circuit ruling⁴⁰² that had overturned a judgment for Matthew’s father for intentional infliction of emotional distress.⁴⁰³

The protestors were located 200 to 300 feet from the funeral procession,⁴⁰⁴ holding signs with statements such as “God Hates the USA/Thank God for 9/11,” “Thank God for IEDs,” “God Hates Fags,” and “Thank God for Dead Soldiers.”⁴⁰⁵ The Court stated that whether the lower court judgment would be supported turned on whether the speech was of public or private concern, the “heart of the First Amendment’s protection.”⁴⁰⁶ The Court defined matters of public concern to “any matter of political, social, or other concern to the community,”⁴⁰⁷ or things of “legitimate news interest; that is, a subject of general interest and of value and concern to the public.”⁴⁰⁸ Courts are to make an independent examination of the entire record to ensure there is no intrusion on free expression.⁴⁰⁹

*U.S. v. Stevens*⁴¹⁰ struck down a federal statute criminalizing the creation, sale, or possession of certain depictions of animal cruelty.⁴¹¹ *Brown v. Entertainment Merchants Association*⁴¹² invalidated a California video game law.⁴¹³ In each case the Court was asked to recognize a new category of unprotected speech, and in both cases it declined to do so.

In *Stevens*, the defendant was convicted and sentenced to prison.⁴¹⁴ The *en banc* Third Circuit vacated the conviction on the grounds the statute was facially unconstitutional.⁴¹⁵ The Government argued on appeal to the

399. *Id.* at 2497.

400. 131 S. Ct. 1207 (2011).

401. *Id.* at 1213.

402. *Id.* 1207 .

403. *Id.* at 1215, 1221; *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009).

404. *Snyder*, 131 S. Ct. at 1213.

405. *Id.*

406. *Id.* at 1215 (quoting *First Nat’l. Bank of Boston v. Bellotti*, 435 U.S. 765, 766 (1978)).

407. *Id.* at 1216 (quoting *Connick*, 461 U.S. 138, 146 (1983)).

408. *Id.* (quoting *San Diego v. Roe*, 543 U.S. 77, 83–84 (2004)).

409. *Id.*

410. 130 S. Ct. 1577 (2010).

411. *Id.* at 1586.

412. 131 S. Ct. 2729 (2011).

413. *Id.* at 2734.

414. *United States v. Stevens*, 130 S. Ct. 1577, 1583(2010).

415. *Stevens*, 130 S. Ct. at 1580; *United States v. Stevens*, 533 F.3d 218 (2008).

Supreme Court that depictions of animal cruelty should be added to the list of historical categories of unprotected speech, proposing a balancing test that weighs the “value of the speech against its societal costs.”⁴¹⁶ The Court explained that since 1791 it had recognized a very limited group of categorically unprotected areas of speech, namely obscenity, defamation, fraud, incitement, and speech integral to criminal conduct,⁴¹⁷ adding:

The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document “prescribing limits, and declaring that those limits may be passed at pleasure.”⁴¹⁸

The principle elucidated by the Court is that rarely should a categorical exclusion for speech be adopted. Declining to recognize a new categorical exclusion in *Stevens*,⁴¹⁹ the Court explained:

As the Government correctly notes, this Court has often described historically unprotected categories of speech as being “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” [citation omitted] In *New York v. Ferber*. . . we noted that within these categories of unprotected speech, “the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required,” because “the balance of competing interests is clearly struck.”⁴²⁰

Did the Court conclude in *Garcetti* that the “evil” of permitting a government employee to claim First Amendment protection in *some* instances when speaking pursuant to job duties, “overwhelmingly outweighs” the benefit to the public of receiving information from informed citizen servants? The more likely explanation is that the Court did not fully appreciate that it was effectively establishing a categorical exclusion in *Garcetti*, an unfortunate and harmful oversight.

B. A Modified Approach

In the event the Court chooses not to overturn *Garcetti*, an alternative

416. *Stevens*, 130 S. Ct. at 1585 (quoting Brief for United States at 8).

417. *Id.* at 1584.

418. *Id.* at 1585 (quoting *Marbury v. Madison*, 5 U.S. 137, 178 (1803)).

419. *Id.* at 1586.

420. *Id.* at 1585–86 (citations omitted).

approach is needed. How can the *Garcetti* test be calibrated to return the public interest to center stage while addressing the Court's concerns? The starting point is a return to the Court's justification for adopting the "public concern" threshold in *Connick*:⁴²¹

[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.⁴²²

Two phrases merit attention. The first is the reference to an employee speaking on "matters only of personal interest." If the statement is *only* of personal interest—having no connection to the public interest—it should not be protected. The threshold prong established in *Connick* was intended to screen public employee speech cases so that only those which related to public concerns would be eligible for the *Pickering* balancing test.

The second statement is that federal courts should not be available to public employees in speech cases "absent the most unusual circumstances." Would it not be a matter of "unusual circumstances" for a government employee to be threatened with retaliation when he reports to a supervisor that the government agency is jeopardizing public health?

In the spirit of *Connick's* principles, I propose a modified approach that trusts lower courts to assess the relative value of the speech to society and afford protection if of substantial interest to the public. As the Court observed in *Garcetti*, the *Pickering* approach

[A]cknowledged the necessity for informed, vibrant dialogue in a democratic society. It suggested, in addition, that widespread costs may arise when dialogue is repressed. The Court's more recent cases have expressed similar concerns. See, e.g., *San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam) ("Were [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it" (citation omitted)); *cf.* *Treasury Employees*, 513 U.S., at 470 ("The large-scale disincentive to Government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said.").⁴²³

421. *Connick v. Myers*, 461 U.S. 138 (1983).

422. *Id.* at 147.

423. *Garcetti v. Ceballos*, 547 U.S. 410, 419–20 (2006) *See, e.g., San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam) ("Were [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed

Well stated. If a public employee's speech is primarily related to internal administrative matters or personnel issues, with little or no connection to the public interest, it is not worthy of protection. No harm to the public exists. At the other end of the spectrum, if leaving public employee speech unprotected harms the public interest, the courts must be able to shield the messenger.⁴²⁴

The modified approach would consist of an initial question about whether the public employee was speaking on a subject related to job duties. The answer to that question would determine which of two tests should be applied.

For speech unrelated to the employee's job duties, the court would apply the second and third prongs of the *Garcetti* test - the original two prongs of *Pickering/Connick*, just as it does under *Garcetti*. If the speech relates to job duties, however, the court would proceed to make a qualitative evaluation of the content of the speech by asking if, reviewing the record as a whole, it appears that leaving the speech unprotected would deprive the public of information which is of substantial interest. If the answer to that question is "no", the analysis ends. The speech is unprotected. This approach adheres to the Court's stated concern for the autonomy of the government as employer, while permitting the judicial gatekeeper to protect the citizen servant when the message is important to the public interest.

If the court concludes that the content of the speech is of substantial interest to the public, it would move directly to the *Pickering* balancing test to weigh the employee's rights against the employer's interests. This revised approach would eliminate the per se rule, the most onerous aspect of *Garcetti's* legacy. It is a qualitative approach and inevitably a difficult one, analogous to the "clear and convincing" evidentiary standard in civil cases—an "intermediate standard" which lies "between a preponderance of the evidence and proof beyond a reasonable doubt."⁴²⁵

It may seem foolhardy to urge the Supreme Court to throw out the per se rule, but there is recent precedent for doing so. In *Leegin Creative Leather*

opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it" (citation omitted); cf. *Treasury Employees*, 513 U.S., at 470 ("The large-scale disincentive to Government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said.").

424. See, Steven J. Stafstrom, Jr., Note, *Government Employee, Are You a "Citizen"?: Garcetti v. Ceballos and the "Citizenship" Prong to the Pickering/Connick Protected Speech Test*, 52 ST. LOUIS U. L.J. 589, 603 (2008) ("[W]ell informed views of government employees provide an overall benefit to society by perpetuating civil discourse, a necessity in a democratic society.")

425. *Kenyeris v. Ashcroft*, 538 U.S. 1301, 1305 (2003) (quoting *Addington v. Texas*, 441 U.S. 418, 425 (1979)).

Products, Inc. v. PSKS, Inc.,⁴²⁶ the Court overturned a per se rule, established in 1911, which made it automatically illegal for a manufacturer and retailer to set a minimum retail price.⁴²⁷ In most antitrust cases the “rule of reason” is applied, enabling the fact finder to weigh “all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”⁴²⁸

By contrast, the per se rule treats certain types of restraints on competition as “necessarily illegal” by eliminating the “need to study the reasonableness of an individual restraint in light of the real market forces at work.”⁴²⁹ The per se rule “can give clear guidance” and is used in cases involving competition restraints that would “always or almost always tend to restrict competition and decrease output.”⁴³⁰ However, the adoption of a per se rule is “appropriate only after courts have had considerable experience with the type of restraint at issue” and even then, “only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason.”⁴³¹

Concluding that the risks of unlawful conduct in resale price maintenance agreements “cannot be stated with any degree of confidence” to restrict competition, the Court overturned a 96-year old precedent and held the rule of reason would thereafter be applied.⁴³² This conclusion was based upon persuasive economic scholarship.⁴³³ Though acknowledging that “[p]er se rules may decrease administrative costs,” the Court observed that they can also be counterproductive by “prohibiting procompetitive conduct the antitrust laws should encourage.”⁴³⁴

The same reasoning applies here. A per se rule for public employee speech, especially one based on technical job duties, is counterproductive. It silences some speech of importance to the public in the name of administrative efficiency. If the Court is willing to overturn a per se rule with a 100 year track record as settled law involving a statute, it should be even more willing to do so for a recent per se rule involving the First Amendment. The Court was willing to do so in *Leegin* because it had moved away from the precedent’s “doctrinal underpinnings.”⁴³⁵ The Court should move away from *Garcetti*’s doctrinal underpinnings, revise the

426. 551 U.S. 877 (2007).

427. *Id.* at 881 (citing *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911)).

428. *Id.* at 885.

429. *Id.* at 886.

430. *Id.* (quoting *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988)).

431. *Id.* at 886–87.

432. *Id.* at 894.

433. *Id.* at 889.

434. *Id.* at 895.

435. *Id.* at 900.

three-prong *Garcetti* test and rectify the harm caused by the per se rule to the public interest.

V. FIXING THE ACADEMIC SPEECH PROBLEM

Overturing *Garcetti* and returning to the *Pickering/Connick* test, or adopting the modified approach proposed in Part IV, would mitigate the damage to academic speech to a significant extent. Yet *Garcetti* is not the whole story. The original *Pickering/Connick* test rendered academic speech vulnerable, as acknowledged by Justice Kennedy in the Caveat when he wrote that there are “constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence.”⁴³⁶ He was referring to the public employee speech doctrine itself, not just the *Garcetti* holding.

Pickering/Connick was designed for typical government agencies, and public colleges and universities are anything but typical. That test does not measure the accuracy of the statement or the quality of the opinion. Nothing demonstrates this point more than the Court’s ruling in *Rankin v. McPherson*,⁴³⁷ that the employee’s statement at work expressing a death wish for President Reagan was protected speech.⁴³⁸

Academic freedom was intended to shield scholars from undue influences, to encourage innovation and discovery. Standing by a lectern in a lecture hall is not the same thing as standing on a soapbox on a street corner. And this is where many in academia have it wrong. Academic freedom does not shield all expression within the walls of the classroom. It is not so much the location of the speech as it is the subject matter.

A faculty member’s expression within her academic discipline fulfills duties not only to a college or university contract but to the academic discipline itself. It is a privilege to teach and research but one that carries with it the responsibility to be accurate, to be competent. Paradoxically, that means that the college or university must be able to evaluate the speech, as explained by Robert C. Post:

Although the First Amendment would prohibit government from regulating the *New York Times* if the newspaper were inclined to editorialize that the moon is made of green cheese, no astronomy department could survive if it were prevented from denying tenure to a young scholar who was similarly convinced. Academic freedom thus depends upon a double recognition: that knowledge cannot be advanced “in the absence of free inquiry,” and that “the right question to ask about a teacher is whether he is

436. *Garcetti v. Ceballos*, 547 U.S. 410, 425.

437. *Rankin v. McPherson*, 483 U.S. 378 (1987).

438. *Id.* at 381.

competent.”⁴³⁹

As Judge Frank Easterbrook wrote in *Feldman v. Ho*,⁴⁴⁰ the government “as an abstraction could not penalize any citizen for misunderstanding the views of Karl Marx or misrepresenting the political philosophy of James Madison, but a Department of Political Science can and should show such a person the door.”⁴⁴¹ He explained that to transfer an academic decision to a jury undermines the university’s mission by committing it to amateurs.⁴⁴²

The challenge is to develop a framework which defers to the college or university for speech relating to the professor’s expertise, yet provides constitutional protection to the professor when the college or university abuses that autonomy. Section A summarizes a recent proposal by Judith Areen for a doctrinal approach to this problem. Section B discusses the work of Robert C. Post addressing the distinction between public discourse and expert speech. Section C presents my suggested framework for resolving the question raised by the Caveat and for judicial review of academic speech.

A. Government as Educator

Professor Judith Areen has made an original and important argument to protect academic speech.⁴⁴³ In responding to the Court’s “invitation in *Garcetti* to identify constitutional interests that support academic freedom”⁴⁴⁴ her focus is not limited to the *Garcetti* problem. Her thesis is that the Court should recognize a third role of government, beyond its roles as sovereign and employer—the role of government-as-educator.⁴⁴⁵ Merely carving out an exception from *Garcetti* for academic speech is hard to defend for three reasons: first, the Court has been reluctant to make distinctions for institutions, second, academic freedom was never intended to benefit the faculty, but rather “for its value to the First Amendment and to the nation,” and third, because it would not resolve the “deeper problems” of trying to apply the public employee speech doctrine to academia.⁴⁴⁶

Recognizing a separate role of the government-as-educator would not focus on the “delivery of services to the general public,” but on research and teaching.⁴⁴⁷ Moreover, the kind of debate that would be deemed disruptive in most government agencies would be an “accepted, and even

439. ROBERT C. POST, DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM 67 (2012).

440. 171 F.3d 494 (7th Cir. 1999), *cert denied.*, 528 U.S. 928 (1999).

441. *Id.* at 496.

442. *Id.* at 497.

443. Areen, *supra* note 11.

444. *Id.* at 947.

445. *Id.* at 948–49.

446. *Id.* at 988–89.

447. *Id.* at 990.

necessary, part of the production of new knowledge” in this new role.⁴⁴⁸

A separate but related issue, addressed by Areen, is that the “constitutional understanding of academic freedom has been compromised by its failure to encompass governance as being at the heart of the ideal.”⁴⁴⁹ Tracing the evolution of governance from the 1915 Declaration of General Principles on Academic Freedom and Academic Tenure by the AAUP (1915 Declaration), she argues that it has received too little attention from legal scholars,⁴⁵⁰ and deserves protection along with teaching and scholarship. She provides an excellent analysis of the tradition of governance and how vital it is to the mission of the university.⁴⁵¹

Urging the Court to recognize the special role of “government-as-educator” is an admirable goal, though an uphill climb. Government as employer doctrine is nearly 130 years old,⁴⁵² and as the majority in *Garcetti* noted, the government has “broader discretion to restrict speech when it acts as employer,”⁴⁵³ than when it acts as a sovereign. Moreover, the reason the Court adopted the government-as-employer concept was to provide *more* discretion to the employer, and thus *less* constitutional protection to the employee.

Areen is correct that shared governance is essential to promote “[g]enuine boldness and thoroughness of inquiry” in the college or university, quoting the 1915 Declaration.⁴⁵⁴ After all, what makes a university unique is the collective faculty vetting, sometimes hotly contested, but always informed, in matters of curriculum, hiring, promotion, and tenure in the great tradition of Professional Academic Freedom. Professor Areen’s approach should receive serious consideration by the Court. Many hurdles must be overcome, however, not least of which, as Areen acknowledged, is that the Court held in *Minnesota State Board for Community Colleges v. Knight*⁴⁵⁵ that faculty members do not have a constitutional right to participate in academic governance.⁴⁵⁶

B. The Faculty Member as Expert

When a scholar conceives a new idea it is often met with skepticism, even scorn. The castle walls of orthodoxy are not easily scaled, but that is a good thing. The idea must run through the academic gauntlet to be worthy of joining the pantheon and this can only be accomplished if both

448. *Id.*

449. *Id.* at 948.

450. *Id.* at 947–48.

451. *Id.* 953–66.

452. *Ex Parte Curtis*, 106 U.S. 371, 373 (1882).

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

454. Areen, *supra* note 11, at 958.

455. 465 U.S. 271 (1984).

456. *Id.* at 273.

the creator of the idea and her academic peers have the freedom to express their respective professional opinions without fear of retribution, the essence of academic freedom as it was originally conceived.

Robert C. Post has written an important book on the distinction between expression in public discourse and in the role as an expert.⁴⁵⁷ He observed that “three major purposes for the First Amendment” have been put forward over the years:

The first, embodied in the marketplace of ideas theory, is cognitive; the purpose of First Amendment protections for speech is said to be “advancing knowledge and discovering truth.” The second is ethical; the purpose of the First Amendment is said to be “assuring individual self-fulfillment” so that every person can realize his or her “character and potentialities as a human being.” And the third is political; the purpose of the First Amendment is said to be facilitating the communicative processes necessary for successful democratic self-governance.⁴⁵⁸

He refers to the latter purpose as “democratic legitimation,” reflecting the hope that personal views might lead to a belief that citizens are the “potential authors of the laws that bind them.”⁴⁵⁹ The doctrine of content neutrality for public discourse furthers democratic legitimation by “ensuring that public opinion remains open to the subjective engagement of all, even of the idiosyncratic and eccentric.”⁴⁶⁰

Yet as Post observes, “expert knowledge, by contrast, is not to be determined by the indiscriminate engagement of all.”⁴⁶¹ Expert knowledge is often not protected, nor should it be.⁴⁶² Post uses the examples of a doctor who provides bad advice to a patient and a lawyer who gives incompetent legal advice to a client, neither form of expression being shielded by the First Amendment.⁴⁶³ He refers to the first purpose of the First Amendment, to advance knowledge, as “democratic competence,”⁴⁶⁴ which “requires that speech be subject to a disciplinary authority that distinguishes good ideas from bad ones.”⁴⁶⁵ He elaborated on this concept in a lecture at the University of Arkansas:

Put bluntly, if the marketplace of ideas requires that there be no such thing as a false idea, then the marketplace of ideas cannot ever acknowledge any such thing as a true idea. The marketplace

457. POST, *supra* note 439 .

458. *Id.* at 6.

459. *Id.* at 27–28.

460. *Id.* at 28.

461. *Id.* at 29.

462. *Id.* at 45.

463. *Id.*

464. *Id.* at 33.

465. *Id.* at 34.

of ideas requires an equality of status in the field of ideas, but the advancement of knowledge by contrast requires precisely that we distinguish better ideas from worse ideas. In the context of knowledge, especially in the context of the complex forms of expertise that are taught in universities, we require disciplinary norms to distinguish good ideas from bad ideas.⁴⁶⁶

How can courts balance the university's need to evaluate the competency of faculty speech while ensuring that the faculty member is not discouraged from staking out new ground? This delicate balance is critical to academic freedom, yet is rarely discussed and more rarely understood.

The answer must lie in a new framework for academic freedom. Post believes that academic freedom is an "obvious candidate" for the doctrine of "extending First Amendment coverage" to the "creation of expert knowledge."⁴⁶⁷

C. Deference to the Community of Scholars

The road to academic freedom is paved with good intentions, but the Court's academic freedom jurisprudence is in a "state of shocking disarray and incoherence."⁴⁶⁸ Suggestions for clarification and reform come in many forms and from many directions. The Supreme Court expresses a policy of deference to colleges and universities for the Four Essential Freedoms, yet slammed the door on First Amendment protection through a categorical exclusion designed for traditional government agencies.

The starting point for reform is for the Supreme Court to hold that academic speech is exempted from *Garcetti* and the public employee speech analysis. Yet that is only the first step. A new approach is needed, one that is realistic, simple to apply, and furthers the goals of academic freedom. Further, it must account for the differences between the three types of faculty speech.

1. Extramural Speech

Extramural Speech correctly defined covers anything a college or university faculty member expresses outside her academic discipline. The speaker may well be speaking as a citizen about a matter of public concern. If so, the court should apply the public employee speech analysis. The notion that speech within the classroom may not be worthy of the same level of protection as speech made outside the classroom may be shocking to some, but that is because of the Court's failure to clarify both the Caveat and the constitutional basis of academic freedom.

466. POST, *supra* note 439, at 211.

467. *Id.* at 61.

468. *Id.* at 62.

In *Heublein v. Wefald*⁴⁶⁹ a tenured math professor brought a Section 1983 action alleging infringement of his First Amendment speech rights.⁴⁷⁰ The statements were made both inside and outside of the classroom, much of it stemming from allegations of demeaning comments to students over many years.⁴⁷¹ The district court chose to apply a Tenth Circuit test established in 1991,⁴⁷² thus avoiding the per se rule, but noted that even if *Garcetti* was applied “the result would be no different” because the professor had not “alleged that any of his speech related to a matter of public concern.”⁴⁷³ The district court was correct. Making demeaning comments to students inside the classroom or elsewhere should not be protected under any test. The court reasoned that whatever academic freedom might be “it is evident that the freedom is intended only to prevent government action that ‘cast[s] a pall of orthodoxy over the classroom.’”⁴⁷⁴

Expression outside of one’s academic discipline is essential to the public discourse, but no more valid, nor entitled to greater constitutional treatment, than the personal views of any other public employee or citizen.

2. Core Academic Speech

Applying the *Garcetti* per se rule to colleges and universities leads to a surprising result. Core Academic Speech—long believed by faculty to be the most sacred of cows—is the most vulnerable. Robert M. O’Neil explains this bizarre result:

Professors would, in effect be able to speak freely only about matters that are remote from their academic disciplines and expertise, while being denied such protection when speaking or writing within that realm . . . Such a perverse application of *Garcetti*’s notion of “official duties” would effectively deprive the larger community, as well as the academic world, of that information and expertise which university professors are best equipped to derive from their scholarship and research within their academic disciplines.⁴⁷⁵

Curiously, the “public concern” aspect of *Pickering/Connick* does not square well with academic speech. On the one hand, the Supreme Court could well hold that anything relating to teaching and scholarship—at least that which relates to the professor’s discipline—is a matter of public concern because of the importance of colleges and universities to our

469. 784 F. Supp. 2d 1186 (D. Kan. 2011).

470. *Id.* at 1189.

471. *Id.* at 1189–90.

472. *Miles v. Denver Pub. Schools*, 944 F.2d 773 (10th Cir. 1991).

473. *Heublein v. Wefald*, 784 F.Supp. 2d at 1197, n.34.

474. *Id.* at 1199 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

475. Robert M. O’Neil, *Academic Speech in the Post-Garcetti Environment*, 7 FIRST AMEND. L. REV. 1, 20 (Fall 2008).

democracy. Yet “public concern” does not quite capture the principles of academic freedom:

Because the criterion of “public concern” is about reconciling the value of democratic legitimization with the value of organizational effectiveness, it should have nothing to do with triggering First Amendment coverage in matters of academic freedom. The “public concern” test is entirely misplaced in an academic freedom inquiry. First Amendment coverage should be triggered whenever the freedom of the scholarly profession to engage in research and publication is potentially compromised.⁴⁷⁶

Freedom of expression is vital for all Americans but no one “needs it more than the teacher.”⁴⁷⁷ The great paradox is that the teacher when speaking as an expert cannot have unfettered discretion in what is said—the college or university must be able to take adverse action when the speech is incompetent.

Furthermore, too much attention has been paid to the location of the speech rather than the subject matter. When a teacher speaks as an expert, whether in the classroom, in a scholarly journal, at a conference, or giving an interview to the press, she is a representative not only of the college or university, but also of her academic discipline. The speech is worthy of protection for the good of the public as well as the teacher.

For Core Academic Speech there should be a judicial presumption of deference to the college or university for academic decision making. The Court has a solid foundation for deference, beginning with Justice Frankfurter’s statement about the Four Essential Freedoms of “who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”⁴⁷⁸ As Paul Horwitz observed, in *Grutter v. Bollinger*⁴⁷⁹ Justice O’Connor reasoned that due to the “complex educational judgments” in admissions decisions, the Court has a “tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.”⁴⁸⁰ Horwitz argues that courts seek a “set of rules by which the law of the First Amendment can be understood as a purely, formally legal phenomenon, untainted by the brute contingencies of the actual world.”⁴⁸¹ In other words, the courts seek acontextuality—a desire to squeeze all speakers, involving all factual scenarios, into one slot.⁴⁸²

476. POST, *supra* note 437, at 84.

477. *Adler v. Bd. of Educ.*, 342 U.S. 485, 508 (1952).

478. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957).

479. 539 U.S. 306 (2003).

480. Horwitz, *supra* note 238, at 1501 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003)).

481. *Id.* at 1504.

482. *Id.* at 1504–05.

Horwitz believes the Court should move towards giving certain institutions a measure of autonomy for self-governance.⁴⁸³ And why should colleges and universities receive this special treatment?

Universities, at their best, are places of discovery, innovation, and heterodoxy. They provide knowledge, debate, and a meaningful foundation to the intellectual, professional, and civic life of students; resources, collegial support, and a haven for the free and unfettered work for scholars; and direct and indirect collateral benefits for the broader society.⁴⁸⁴

Most recently, the Court reiterated its policy of deference in *Christian Legal Society v. Martinez*.⁴⁸⁵ Though speaking in the context of the college or university's right to impose restrictions on student organizations, the principle is the same:

This Court is the final arbiter of the question whether a public university has exceeded constitutional constraints, and we owe no deference to universities when we consider that question. Cognizant that judges lack the on-the-ground expertise and experience of school administrators, however, we have cautioned courts in various contexts to resist "substitut[ing] their own notions of sound educational policy for those of the school authorities which they review."⁴⁸⁶

As Judge Easterbrook succinctly stated that "the only way to preserve academic freedom is to keep claims of academic error out of the legal maw."⁴⁸⁷

Deference does not mean absolute immunity for all college and university decisions. It would be a qualified immunity, a presumption of judicial deference to academic decisions, not a complete delegation of authority. The presumption can be rebutted. Justice Souter in *Board of Regents of the Univ. of Wisconsin v. Southworth*,⁴⁸⁸ a student speech case, explained an analogous situation. The university did not argue that the speech was its own—it was not government commissioned speech.⁴⁸⁹ The Court distinguished student speech from "speech by an instructor or a professor in the academic context, where principles applicable to government speech would have to be considered."⁴⁹⁰ In a concurring opinion, Justice Souter wrote:

483. *Id.* at 1511.

484. *Id.* at 1514.

485. 130 S. Ct. 2971 (2010).

486. *Id.* at 2988 (internal citations omitted).

487. *Feldman v. Ho*, 171 F.3d 494, 497 (7th Cir. 1999), *cert. denied*, 528 U.S. 928 (1999).

488. 529 U.S. 217 (2000).

489. *Id.* at 229.

490. *Id.* at 235.

While we have spoken in terms of a wide protection for the academic freedom and autonomy that bars legislatures (and courts) from imposing conditions on the spectrum of subjects taught and viewpoints expressed in college teaching (as the majority recognizes . . .), we have never held that universities lie entirely beyond the reach of students' First Amendment rights. Thus our prior cases do not go so far as to control the result in this one, and going beyond those cases would be out of order, simply because the University has not litigated on grounds of academic freedom. As to that freedom and university autonomy, then, it is enough to say that protecting a university's discretion to shape its educational mission may prove to be an important consideration in First Amendment analysis of objections to student fees.⁴⁹¹

Using the same reasoning, colleges and universities would not lie beyond the reach of faculty speech. The presumption of deference can be overcome when a faculty member shows that the institution has infringed her First Amendment rights for reasons other than legitimate academic reasons. The reviewing court must have the discretion to intercede to ensure that the institution is not abusing its qualified immunity.

3. *Intramural Speech*

Intramural Speech is the outlier. Courts rarely give it much attention, let alone deem it worthy of First Amendment protection for several reasons. First, it is difficult for anyone outside the ivied walls to appreciate the autonomy faculty have in academic decisions, not because of formal lines of authority so much as because of the tradition of Professional Academic Freedom. Second, governance activities must appear to outsiders like mundane administrative matters, with endless committees, subcommittees, and ad hoc task forces. What could that possibly have to do with scientific discovery? Finally, the Caveat itself made no mention of college or university service or governance. Perhaps it was an oversight, but I doubt it.

The weakness of deference is that while it is necessary for democratic competence, it potentially grants too much authority to institutional bureaucracy and politics. Constitutional protection of college and university governance activities introduces an antidote. Protecting the speech of a faculty member who serves on a tenure committee, as one example, discourages improper motives for tenure decisions by raising the specter that outside light may be shined upon the process. To disallow protection would have the opposite effect.

In *University of Pennsylvania v. EEOC*⁴⁹² the university argued that

491. *Id.* at 238–39.

492. 493 U.S. 182 (1990).

forcing it to turn over tenure review files would create a chilling effect in the review process, making it less likely that the committee members would make candid evaluations.⁴⁹³ The Court rejected this argument, in part because the subpoena by the EEOC did not affect the Four Essential Freedoms.⁴⁹⁴ Declining to define the “precise contours of any academic-freedom right,”⁴⁹⁵ the Court noted that when the “government attempts to direct the content of speech at public educational institutions, complicated First Amendment issues are presented because government is simultaneously both speaker and regulator.”⁴⁹⁶ Ironically, the Court refused the university’s request for an “*expanded* right of academic freedom to protect confidential peer review materials from disclosure.”⁴⁹⁷

What I am suggesting is that the Court should include Intramural Speech—governance activities related to the Four Essential Freedoms—within the ambit of protected academic speech, to make sure that the governance process is not tainted. In short, including Intramural Speech in the protected zone of academic freedom helps to provide the counterweight to deference. Deference is essential for the development of knowledge for the highest quality of scholarship. However, without protecting Intramural Speech, the constitution cannot touch the internal governance processes constructed over time to guarantee academic excellence.

VI. CONCLUSION

Garcetti is an enigma. It clashes with two constitutional principles. The first is the harm to the public interest by endangering the citizen servant, those who serve with the best of civic intentions, combining their avocations with vocations, as Justice Souter noted.⁴⁹⁸ The second is the threat to academic freedom.

The Court should overturn *Garcetti*, eliminate the per se rule, and at a minimum, return to the original *Pickering/Connick* test. Short of that, the Court should adopt the modified approach proposed in this article. By making the initial inquiry turn on whether the subject matter of the speech relates to job duties, the Court can focus attention on the importance of the government’s role as employer. Speech outside of job duties would be subjected to the same standard in use for more than forty years.

If the speech relates to job duties, the reviewing court would determine the relative value of the speech. If it were of substantial interest to the public, the court would apply the *Pickering* balance test. This approach ensures that the public interest is not relegated to second class status, but

493. *Id.* at 196–97.

494. *Id.* at 198.

495. *Id.*

496. *Id.* at n.6.

497. *Id.* at 199.

498. *Garcetti v. Ceballos*, 547 U.S. 410, 432.

rather to its rightful place.

Though fixing the *Garcetti* problem for public employee speech mitigates the harm to academic freedom, it does not address the fundamental problem that speech in the public arena is very different from academic speech. Therefore, the Court should exempt academic speech from the public employee speech doctrine once and for all, clarifying the Caveat. In addition, the Court should apply its tradition of deference to the college or university, not as a corporeal entity, but to the community of scholars, for expression by faculty within their academic disciplines. To ensure the autonomy granted to college or universities is not abused, the Court should also grant constitutional protection to the shared governance activities of faculty.