

# A CONFUSED CONCERN OF THE FIRST AMENDMENT: THE UNCERTAIN STATUS OF CONSTITUTIONAL PROTECTION FOR INDIVIDUAL ACADEMIC FREEDOM

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## INTRODUCTION

The question of whether the First Amendment protects the individual academic freedom of faculty members at public colleges and universities has resulted in divergent views among courts<sup>1</sup> and legal scholars.<sup>2</sup> In joining the ongoing discourse regarding constitutional protection for academic freedom, this article considers using academic freedom policies and standards voluntarily adopted by institutions as a basis to provide First

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1. Compare, e.g., *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000) (en banc) (stating that “to the extent the Constitution recognizes any right of ‘academic freedom’ above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors . . .”), with *Piarowski v. Ill. Cmty. Coll. Dist.* 515, 759 F.2d 625, 629 (7th Cir. 1985) (describing academic freedom as an “equivocal” term that “is used to denote both the freedom of the academy . . . and the freedom of the individual teacher (or in some versions—indeed in most cases—the student) to pursue his ends without interference from the academy . . .”). Part II of this article discusses treatment of academic freedom by the U.S. Supreme Court, and Part III discusses treatment of academic freedom issues by lower federal courts.

2. For a discussion of various positions taken by authors, see *infra* Part IV.

Amendment protection for faculty speech at public colleges and universities. The article proposes that such policies present one alternative to help clear some of the legal fog regarding First Amendment protection for individual academic freedom, especially in relation to the U.S. Supreme Court's decision in *Garcetti v. Ceballos* and its applicability to public higher education.<sup>3</sup> I suggest that it is legally inconsistent to permit colleges and universities to tout adoption of academic freedom policies and standards but then rely on *Garcetti* when facing a speech claim by a faculty member.

Uncertainty concerning constitutional protection for individual academic freedom represents a longstanding issue, but *Garcetti* marked a new phase in the ongoing debate. In the decision, the Supreme Court held that statements made by a public employee pursuant to carrying out his or her official duties do not constitute speech for First Amendment purposes.<sup>4</sup> While acknowledging that applying the decision's standards to speech by faculty members at public colleges and universities potentially raised thorny First Amendment concerns related to individual academic freedom, the majority opinion in *Garcetti* stated that such an issue was not before the Court.<sup>5</sup> In leaving the issue unaddressed, the case opened a new chapter in legal wrangling over constitutional protection for individual academic freedom in public higher education. Several recent cases where courts have unflinchingly applied the decision's standards to faculty speech<sup>6</sup> show that the potential impact of the decision on faculty speech rights in public higher education is poised to become more than speculative.

Following an overview of the *Garcetti* decision in Part I, in Part II the article reviews several key U.S. Supreme Court decisions dealing with issues related to academic freedom. Part III of the article examines positions taken by lower federal courts regarding First Amendment protection for individual academic freedom, including discussion of several post-*Garcetti* cases. Part IV examines the position that constitutional academic freedom should only apply to institutions and not to individual faculty members.

The article considers in Part V using academic freedom policies and standards voluntarily adopted by public colleges and universities as a basis to ground legal protection for individual academic freedom, including limiting application of *Garcetti* to faculty speech. I conclude that courts

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3. 547 U.S. 410 (2006).

4. *Id.* at 421.

5. *Id.* at 425.

6. *See, e.g.,* *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008); *Hong v. Grant*, 516 F. Supp. 2d 1158 (C.D. Cal. 2007). As discussed *infra* Part III.A, the decisions did not address issues involving speech related to research or classroom matters, but the courts did not hesitate in applying the *Garcetti* standards to the faculty members' speech.

should give serious consideration to such policies and standards as creating zones of legally protected faculty speech. Rather than supplanting the established system of peer review and professional norms widely accepted by colleges and universities, judicial inquiry would focus on whether institutions had in fact adhered to their own voluntarily adopted policies and standards. Such policies, in blunting the potential impact of *Garcetti*, could provide a basis to give some degree of First Amendment protection to faculty speech in the areas of scholarship, teaching, and intramural communications.

### I. OVERVIEW OF GARCETTI V. CEBALLOS

In *Garcetti*, a deputy district attorney, Richard Ceballos, recommended dismissal of a case based on alleged misrepresentations in an affidavit used to obtain a search warrant.<sup>7</sup> Besides discussing his concerns with supervisors, Ceballos wrote a memorandum recommending the case's dismissal.<sup>8</sup> Ceballos' supervisors refused to heed his recommendations, and he eventually revealed his views concerning the warrant during questioning by the defense.<sup>9</sup> In a lawsuit, Ceballos argued that his employer retaliated against him for views expressed in or related to the memorandum in violation of his First Amendment rights.<sup>10</sup> While the district court held that the memorandum contained no protected speech, the U.S. Court of Appeals for the Ninth Circuit decided that it did.<sup>11</sup>

The Supreme Court, reversing the Ninth Circuit, held that because Ceballos made the communications pursuant to carrying out his official duties, they did not constitute speech protected by the First Amendment.<sup>12</sup> While noting that public employees do not forfeit all their First Amendment rights,<sup>13</sup> Justice Kennedy's majority opinion determined that the balancing test articulated in *Pickering v. Board of Education*<sup>14</sup> and later

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7. *Garcetti*, 547 U.S. at 414–15.

8. *Id.* at 414.

9. *Id.* at 414–15.

10. *Id.* at 415.

11. *Id.* at 415–16.

12. *Id.* at 421.

13. *Garcetti*, 547 U.S. at 417.

14. 391 U.S. 563 (1968). In *Pickering*, the Supreme Court held that a school district could not dismiss a teacher for submitting a letter critical of the financial practices of the school board to a newspaper. *Id.* at 566. The majority stated that the school district had not shown that the writing of the letter had interfered with the teacher carrying out his “daily duties . . . or [had] interfered with the regular operation of the schools generally.” *Id.* at 572–73. The Court held that “in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.” *Id.* at 574 (footnote omitted).

public employee speech cases<sup>15</sup> did not apply to Ceballos' communications.<sup>16</sup> The *Garcetti* decision separated employee speech into two distinct categories: speaking as a private citizen or speaking as an employee carrying out official employment duties.<sup>17</sup> If speaking as a private citizen on a matter of public concern, an employee's speech receives First Amendment protection absent a sufficient justification by the employer to restrict such speech.<sup>18</sup> But when speaking pursuant to performing official employment duties, public employees do not speak as "citizens for *First Amendment* purposes, and the Constitution does not insulate their communication from employer discipline."<sup>19</sup>

In a dissenting opinion, Justice Souter stated that he hoped that the majority did not intend for the standards announced in the case to apply to public college and university professors, which he wrote would hamper their intellectual freedom.<sup>20</sup> While declining to address the decision's applicability to faculty members in public higher education, the majority opinion acknowledged that "expression related to academic scholarship or classroom instruction" might raise constitutional issues not considered by the Court in its decision.<sup>21</sup> Justice Kennedy stated, however, that the issue of additional constitutional protections for the speech rights of faculty members at public colleges and universities was not before the Court.<sup>22</sup>

The *Garcetti* decision added a new wrinkle to ongoing debates regarding First Amendment protection for individual academic freedom at public colleges and universities. At least one federal circuit has already applied the case's holding to intramural speech by a faculty member.<sup>23</sup> In an opinion issued before *Garcetti*, the Fourth Circuit took the position that if First Amendment protection for academic freedom exists at all, then it accrues to the institution rather than the individual scholar.<sup>24</sup> The Fourth Circuit stated that faculty members at public colleges and universities should not possess any additional First Amendment rights other than those

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15. *See, e.g.*, *Connick v. Myers*, 461 U.S. 138 (1983). The Supreme Court rejected a First Amendment challenge by an assistant district attorney who claimed that she was terminated, in part, for distributing a questionnaire to co-workers seeking their views on "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." *Id.* at 141 (footnote omitted).

16. *Garcetti*, 547 U.S. at 420–21.

17. *Id.* at 420–22.

18. *Id.* at 420–21.

19. *Id.* at 421 (emphasis added).

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

21. *Id.* at 425.

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

23. *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008). *See infra* Part III.A.

24. *Urofsky v. Gilmore*, 216 F.3d 401, 409–11 (4th Cir. 2000) (en banc). *See infra* Part III.B.

granted to all other public employees.<sup>25</sup> If other courts adopt this rationale, then the *Garcetti* standards would arguably mean that faculty members in public higher education enjoy little to no First Amendment protection for many communications made in relation to teaching, research, or intramural speech. Such a result remains far from settled, especially given the majority's hesitation in *Garcetti* to suggest that the standards announced in the case should presumably apply to faculty members in public higher education.<sup>26</sup>

## II. AMBIGUITY IN SUPREME COURT ACADEMIC FREEDOM DECISIONS

Despite statements strongly supportive of academic freedom in several opinions, Supreme Court decisions have failed to offer clear guidance on standards that courts should follow in evaluating academic freedom claims by faculty members in public higher education.<sup>27</sup> A clear divide which has emerged centers on whether First Amendment protection for academic freedom applies to individual scholars or is limited to institutions.<sup>28</sup> While the decision in *Grutter v. Bollinger*,<sup>29</sup> which permitted the use of race as a factor in higher education admissions,<sup>30</sup> seemingly represents recent affirmation of some type of First Amendment protection for institutions,<sup>31</sup> division exists over how to interpret precedent in relation to individual scholars. This section provides an overview of several key Supreme Court cases dealing with academic freedom, before the article turns to various positions taken by lower federal courts and legal scholars regarding constitutional protection for academic freedom.

Supreme Court decisions addressing academic freedom have received discussion from many able scholars,<sup>32</sup> but an overview of several pivotal

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25. *Id.* at 412 n.13.

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

27. See, e.g., J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 257–58 (1989); Alan K. Chen, *Bureaucracy and Distrust: Germaneness and the Paradoxes of the Academic Freedom Doctrine*, 77 U. COLO. L. REV. 955, 959 (2006); Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. REV. 461, 469 (2005).

28. Compare, e.g., Byrne, *supra* note 27, with Matthew W. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323, 1333–43 (1988).

29. 539 U.S. 306 (2003).

30. *Id.* at 325.

31. J. Peter Byrne, *Constitutional Academic Freedom after Grutter: Getting Real about the "Four Freedoms" of a University*, 77 U. COLO. L. REV. 929, 929 (2006); Horwitz, *supra* note 27, at 466–72.

32. See generally, e.g., Byrne, *supra* note 27; Finkin, *supra* note 28; Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265 (1988); David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 230 (1990).

decisions is helpful in understanding the legal fault lines that have developed regarding First Amendment protection for academic freedom. Academic freedom first received mention as deserving of constitutional protection in a dissenting opinion by Justice Douglas in *Adler v. Board of Education*.<sup>33</sup> The case dealt with the validity of a state law that, among other proscribed activities, prohibited employment in a public educational institution of any individual identified as a member of an organization designated as subversive.<sup>34</sup> The *Adler* majority determined that the state possessed a legitimate interest in excluding individuals who supported or belonged to groups advocating the unlawful overthrow of the government from employment in public education.<sup>35</sup> In a dissenting opinion, Justice Douglas stated that no individuals are more deserving of intellectual freedom than teachers.<sup>36</sup> Describing the public school as the “cradle of our democracy,” Justice Douglas wrote that the law threatened to “raise havoc with academic freedom” by turning schools into places of distrust and spying instead of an arena for the open exchange of ideas.<sup>37</sup>

In the same year that *Adler* was decided, the Supreme Court, in a case that included higher education faculty, refused to uphold an Oklahoma law requiring state employees to take loyalty oaths.<sup>38</sup> Reversing the Supreme Court of Oklahoma, the Supreme Court held that it was impermissible to punish individuals who had unknowingly belonged to an organization deemed subversive.<sup>39</sup> In a concurring opinion, Justice Frankfurter discussed the importance of protecting the First Amendment rights of educators:

To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered

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33. 342 U.S. 485, 508 (1952) (Douglas, J., dissenting).

34. *Id.* at 486–91. The law was known as the Feinberg Law. *Id.* at 487.

35. *Id.* at 492.

36. *Id.* at 508.

37. *Id.* at 508–509.

38. *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952).

39. *Id.* at 190.

history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by National or State government. The functions of educational institutions in our national life and the conditions under which alone they can adequately perform them are at the basis of these limitations upon State and National power.<sup>40</sup>

Five years later, in *Sweezy v. New Hampshire*,<sup>41</sup> academic freedom again received significant attention in an often cited concurring opinion by Justice Frankfurter.<sup>42</sup> The case dealt with an individual refusing to respond to questions from the New Hampshire attorney general's office about lectures given by him at the University of New Hampshire, his scholarship, and his personal life.<sup>43</sup> In a concurring opinion, Justice Frankfurter stated that protecting inquiry at colleges and universities is of vital importance to the nation and that governmental intrusion into the affairs of these institutions should be minimized.<sup>44</sup> According to his opinion, in order to allow unfettered inquiry in higher education, "[p]olitical 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."<sup>45</sup> Quoting from a statement by South African scholars, Justice Frankfurter offered four essential freedoms of the higher education institution: "[the freedom] to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."<sup>46</sup>

With *Keyishian v. Board of Regents*,<sup>47</sup> discussion of academic freedom found its way into a majority opinion. In the decision, the Supreme Court once again dealt with New York's education law prohibiting employees from belonging to organizations deemed subversive.<sup>48</sup> This time, a majority of the Court invalidated requirements in the law.<sup>49</sup> While acknowledging the state's interest in preventing the "subversion" of students by teachers and professors, the opinion pointed out the importance

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40. *Id.* at 194, 196–97 (Frankfurter, J., concurring).

41. 354 U.S. 234 (1957).

42. *Id.* at 255 (Frankfurter, J., concurring).

43. *Id.* at 238–44.

44. *Id.* at 261–62.

45. *Id.* at 262.

46. *Id.* at 263.

47. 385 U.S. 589 (1967).

48. *Id.* at 593.

49. *Id.* at 604, 609–10.

of protecting constitutional rights of speech, press, and assembly, which also included free inquiry for educators.<sup>50</sup> In a well-known passage, 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 therefore is a special concern of the *First Amendment*, which does not tolerate laws that cast a pall of orthodoxy over the classroom.<sup>51</sup>

Periodically, the Supreme Court has referred to the importance of protecting academic freedom announced in earlier cases. In *Regents of the University of Michigan v. Ewing*,<sup>52</sup> for instance, the Court upheld the dismissal of a student from a combined undergraduate/medical degree program.<sup>53</sup> In rejecting the student's substantive due process claim, the opinion discussed the need to "safeguard" the university's academic freedom.<sup>54</sup> *Ewing* is noteworthy among the academic freedom cases because the Court also acknowledged in a footnote the potential tension between academic freedom for the individual and the institution: "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students . . . but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself . . ." <sup>55</sup>

More recent Supreme Court opinions, while not addressing the potential conflict mentioned in *Ewing*, have demonstrated continued concern with protecting principles associated with academic freedom. In *Board of Regents v. Southworth*,<sup>56</sup> the Supreme Court held that the University of Wisconsin could charge students a mandatory activity fee to fund extracurricular student speech.<sup>57</sup> In the case, students objecting to certain speakers supported by the fee contended that such a funding mechanism resulted in compelled speech in violation of their First Amendment rights.<sup>58</sup> The Supreme Court had previously struck down somewhat analogous fees in other contexts. In one decision, non-union teachers challenged a requirement for them to pay a fee to a union serving as the school district's exclusive bargaining agent that went to support political speech that was objectionable to the non-union teachers.<sup>59</sup> Another case dealt with

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50. *Id.* at 602.

51. *Id.* at 603 (emphasis added).

52. 474 U.S. 214 (1985).

53. *Id.* at 215.

54. *Id.* at 226.

55. *Id.* at 226 n.12 (citations omitted).

56. 529 U.S. 217 (2000).

57. *Id.* at 221.

58. *Id.*

59. *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977).



mandatory attorney bar dues being used to support political speech.<sup>60</sup> In those cases, the Court held that the mandatory fees could be used to support speech “germane” to the organizations’ core functions but not to support political speech unrelated to such activities.<sup>61</sup>

In *Southworth*, the Court determined that such a germaneness standard was unworkable at public colleges and universities, where institutions seek to promote speech on an array of issues.<sup>62</sup> The opinion stated: “To insist upon asking what speech is germane would be contrary to the very goal the University seeks to pursue. It is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning.”<sup>63</sup> While the majority did not expressly rely on academic freedom as a basis for its determination (though Justice Souter did in a concurring opinion)<sup>64</sup> the Court acknowledged the special environment of higher education in declining to impose the same standard for compelled speech applied in other contexts.

The Supreme Court explicitly upheld the continuing place of academic freedom as a special concern of the First Amendment, at least in relation to institutional interests, in *Grutter v. Bollinger*.<sup>65</sup> In that decision, the Court relied on principles associated with academic freedom to support the use of race as a permissible factor in higher education admissions.<sup>66</sup> Writing for the majority, Justice O’Connor referred to how in *Bakke v. Regents of the University of California*,<sup>67</sup> Justice Powell had “grounded his analysis . . . in academic freedom.”<sup>68</sup> The Court in *Grutter* accepted Justice Powell’s argument that compelling reasons, including academic freedom concerns, permitted the use of race as a factor in higher education admissions.<sup>69</sup> The decision in *Grutter* appears to reaffirm that First Amendment protection exists for academic freedom, at least at the institutional level.<sup>70</sup>

While *Grutter* marks a recent Supreme Court recognition of constitutional protection for some type of academic freedom, important

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60. *Keller v. State Bar of Cal.*, 496 U.S. 1, 13–14 (1990).

61. *Southworth*, 529 U.S. at 231–32.

62. *Id.* at 232.

63. *Id.*

64. *Id.* at 236, 237–38 (Souter, J., concurring). In a similar vein, Barbara K. Bucholtz has criticized the majority’s reliance in *Southworth* on viewpoint neutrality as not affording sufficient deference to the academic freedom and associational rights of public colleges and universities. *What Goes Around, Comes Around: Legal Ironies in an Emergent Doctrine for Preserving Academic Freedom and the University Mission*, 13 TEX. WESLEYAN L. REV. 311, 318–326 (2007).

65. 539 U.S. 306 (2003).

66. *Id.* at 325.

67. 438 U.S. 265 (1978).

68. *Grutter*, 539 U.S. at 324.

69. *Id.* at 325.

70. *See* Byrne, *supra* note 31, at 929.

questions regarding the contours of First Amendment protection for academic freedom remain unanswered. Despite lofty rhetoric in decisions such as *Keyishian* concerning the importance of academic freedom, the Supreme Court has failed to articulate the extent to which First Amendment protection for academic freedom extends to faculty members, including those in public higher education. Ambiguity over constitutional protection for individual academic freedom has resulted in differing views among lower federal courts and legal scholars. The *Garcetti* decision and questions over its applicability to faculty members at public colleges and universities added another layer of uncertainty to ongoing debate regarding First Amendment protection for individual academic freedom. The article now turns to how lower federal courts and legal scholars have addressed issues related to academic freedom.

### III. LOWER FEDERAL COURTS AND ACADEMIC FREEDOM

As highlighted in the previous section, the Supreme Court has consistently espoused support for academic freedom. Unfortunately, decisions have not provided clear standards detailing the nature of First Amendment protection for academic freedom, including whether protection applies to institutions, individuals, or both. While the Court noted apparent tension between individual and institutional protection for academic freedom in *Ewing*,<sup>71</sup> it did not address how to resolve the issue. Faced with ambiguous Supreme Court precedent, lower federal courts have taken differing stances regarding First Amendment protection for individual academic freedom in public higher education. This section looks at how several federal courts have already applied the *Garcetti* standards to faculty speech as well as how lower federal courts dealt with First Amendment protection for faculty speech in several pre-*Garcetti* decisions.

#### A. Post-*Garcetti* Decisions

Before the *Garcetti* decision, rather than directly addressing the issue of independent constitutional protection for academic freedom, courts faced with an individual academic freedom claim could turn to the public employee speech cases and consider whether the faculty member had addressed a matter of public concern.<sup>72</sup> Using this standard, courts at times

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71. *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226 n.12 (1985).

72. *See, e.g., Burnham v. Ianni*, 119 F.3d 668, 679–80 (8th Cir. 1997) (determining that faculty members had engaged in speech related to matters of public concern in relation to objects displayed in a history exhibit). *See also* Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 976 (2009) (stating that “after *Pickering*, most lower courts treated faculty-initiated internal disputes as ordinary public-employee speech cases”).

have determined that faculty members engaged in protected speech in contexts such as the classroom, but under *Garcetti*, such speech would now arguably relate to a faculty member's official employment duties. Post-*Garcetti*, it appears courts cannot easily sidestep the question of individual academic freedom under the First Amendment by relying on the public employee speech cases to consider whether a professor had addressed an issue of public concern that merits First Amendment protection. Cases decided after *Garcetti* have not yet directly addressed the issue of individual academic freedom under the First Amendment, but several courts have without hesitation applied the decision's standards to faculty speech.

In *Renken v. Gregory*,<sup>73</sup> a tenured professor claimed that his employer university violated his First Amendment rights by reducing his pay and terminating a grant because he had criticized the university's use of grant funds.<sup>74</sup> The faculty member, Renken, had served as a principal investigator on a grant that was funded by the National Science Foundation (NSF).<sup>75</sup> Renken and another member of the grant team sent their dean a letter objecting to proposed conditions on grant funds and other issues related to the grant's administration.<sup>76</sup> Among their complaints, the professors contended that certain of the proposed conditions violated NSF regulations.<sup>77</sup> As part of the ongoing dispute, Renken filed grievances against the dean and also emailed his allegations to the board of regents.<sup>78</sup> After Renken and a fellow professor rejected a compromise to settle the dispute, the university chose to terminate the grant project and return the funds to the NSF.<sup>79</sup> In the ensuing lawsuit, Renken claimed that the institution had violated his First Amendment rights by reducing his pay and terminating the grant to retaliate against him for complaining about its administration.<sup>80</sup>

In seeking to avoid the strictures of *Garcetti*, Renken argued that tasks carried out and communications made in relation to the grant constituted discretionary activities on his part and were not a ““*requirement* of his job.””<sup>81</sup> A panel for the Seventh Circuit rejected this argument, interpreting a faculty member's official employment duties related to teaching, research, and service broadly.<sup>82</sup> In defining Renken's official duties, the

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73. 541 F.3d 769 (7th Cir. 2008).

74. *Id.* at 773.

75. *Id.* at 770–71.

76. *Id.* at 771.

77. *Id.*

78. *Id.* at 771–72.

79. *Renken*, 541 F.3d at 773.

80. *Id.*

81. *Id.*

82. *Id.*

court looked to the university's manual for policies and procedures, which described faculty members as responsible for teaching, research, and service.<sup>83</sup> Based on this open-ended view of a professor's job duties, the Seventh Circuit panel determined that Renken's activities as a principal investigator on the grant fell within his official duties related to research.<sup>84</sup> Therefore, the communications at issue were made by Renken in his role as an employee and not as a private citizen.<sup>85</sup>

Another case, *Hong v. Grant*,<sup>86</sup> resulted in a similar outcome regarding the applicability of *Garcetti* to faculty speech. In the case, a professor, Hong, alleged that he was denied a merit salary increase because of criticisms of the university's hiring and promotion decisions and of the institution using lecturers to teach certain classes rather than tenured or tenure-track faculty members.<sup>87</sup> In one instance, the professor raised concerns that a faculty member who had been awarded a matching institutional grant had not received the initial grant through a competitive, refereed process, but, instead, through a company owned by the professor's spouse.<sup>88</sup> Two other incidents also involved hiring or promotion decisions,<sup>89</sup> and in one of these, Hong sent a reply to all members of a listserv stating that a professor's receipt of a merit increase had been made improperly and that an investigation into the matter was warranted.<sup>90</sup>

In reviewing Hong's claims, a federal district court applied the *Garcetti* standards, stating that a public employer "is extended unfettered discretion to regulate employee speech that it has 'commissioned or created.'"<sup>91</sup> In addition to activities related to teaching and research, the district court stated that Hong's official employment duties "also include a wide range of academic, administrative and personnel functions."<sup>92</sup> According to the opinion, "[a]s an active participant in his institution's self-governance, Mr. Hong has a professional responsibility to offer feedback, advice and criticism about his department's administration and operation from his

83. *Id.* at 770.

84. *Id.* at 774.

85. *Renken*, 541 F.3d at 774.

86. 516 F. Supp. 2d 1158 (C.D. Cal. 2007).

87. *Id.* at 1160.

88. *Id.* at 1162. According to the opinion, the professor in question had resigned, but it is not clear if the allegations raised by Hong were related to the departure. *Id.*

89. *Id.* at 1162-64.

90. *Id.* at 1163. The email to which Hong replied was a message sent by the professor-in-question thanking colleagues for their support in relation to the promotion. *Id.* Hong had stated that he had doubts about the faculty member's integrity based on his determination that the professor had improperly listed two doctoral students as under the faculty member's supervision and had listed two papers presented at conferences as refereed publications. *Id.*

91. *Id.* at 1165 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006)).

92. *Hong*, 516 F. Supp. 2d at 1166.

perspective as a tenured, experienced professor.”<sup>93</sup> As in *Renken*, the district court described a faculty member’s employment responsibilities expansively and determined that Hong had made the communications at issue pursuant to carrying out his official employment duties.<sup>94</sup> *Hong*, like *Renken*, did not address whether any First Amendment protection exists for individual academic freedom.<sup>95</sup>

In contrast, the decision in *Gorum v. Sessoms*<sup>96</sup> did consider that faculty speech may not fall under the purview of *Garcetti*. In that case, a panel for the Third Circuit considered claims from a department chair who had been dismissed for improperly awarding or altering grades for numerous students.<sup>97</sup> The faculty member, Gorum, alleged that, rather than for the grading improprieties, he was fired for opposing the selection of the university’s president in 2003, for his efforts to intercede on behalf of a star student athlete facing disciplinary actions for violating the school’s ban on weapons possession, and for the withdrawal of a speaking invitation to the university’s president that had been accidentally extended.<sup>98</sup>

The court held that Gorum did not engage in protected First Amendment speech in any of these circumstances.<sup>99</sup> In relation to the assistance provided to the student athlete, the opinion stated that even though his activities perhaps went beyond the specific duties outlined in the collective bargaining agreement, the faculty member’s special knowledge relating to the drafting of the student disciplinary code and attempting to exert his influence in the matter in his role as a department chair meant that the professor acted within the scope of his official employment duties.<sup>100</sup> Similarly, in relation to the withdrawal of the speaking invitation, the opinion stated that the faculty bylaws directed professors to assist student and alumni organizations and that the incident took place in relation to Gorum fulfilling that faculty role.<sup>101</sup> The court also determined that none of the incidents raised by the professor involved matters of public concern.<sup>102</sup>

In *Gorum*, the court did discuss that a question existed regarding application of the *Garcetti* standards to faculty speech related to teaching

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93. *Id.* at 1167.

94. *Renken v. Gregory*, 541 F.3d 769, 774 (7th Cir. 2008); *Hong*, 516 F. Supp. 2d at 1168.

95. *Hong*, 516 F. Supp. 2d at 1168.

96. 561 F.3d 179 (3d Cir. 2009).

97. *Id.* at 182–83.

98. *Id.* at 183.

99. *Id.* at 185.

100. *Id.* at 185–86.

101. *Id.* at 186.

102. *Gorum*, 561 F.3d at 187. Any communications regarding the selection of the president were not considered to have been made in the course of carrying out official employment duties. *Id.*

and research, though no such type of speech was at issue in the case.<sup>103</sup> In a footnote, the opinion noted that circuits had disagreed over the application of *Garcetti* to issues related to teaching and scholarship,<sup>104</sup> comparing the approach in *Renken* with a Fourth Circuit decision involving a secondary teacher, *Lee v. York County School Division*.<sup>105</sup> While noting the division among courts regarding *Garcetti* and faculty speech, the court did not look to principles of academic freedom as a potential avenue to evaluate faculty communications related to teaching and scholarship. Instead, the opinion referred to the *Pickering* two-step analysis of whether the communication dealt with a matter of public concern and, if so, the extent of the employer's interest in regulating the speech.<sup>106</sup> Still, the court did not automatically assume that *Garcetti* covers all forms of faculty speech.

In *Piggee v. Carl Sandburg College*,<sup>107</sup> a panel for the Seventh Circuit also discussed the idea that faculty members may possess speech rights that protect their communications related to scholarship and teaching. A part-time instructor, Piggee, who had worked in a student beauty clinic operated by the college, sued after she was not retained by the institution to teach in its cosmetology department.<sup>108</sup> The former instructor claimed that she was not retained because she had distributed two religious pamphlets, which espoused disapproval of homosexuality, to a student who was gay.<sup>109</sup> The student complained to college officials, and following an investigation, Piggee and another teacher were instructed to stop seeking to influence students' religious, social, and sexual beliefs.<sup>110</sup> Following the incident, the college did not offer Piggee a teaching position for the following semester.<sup>111</sup>

In assessing Piggee's claims, the panel for the Seventh Circuit, unlike in *Renken* and *Hong*, considered that limits may exist on *Garcetti*'s application to faculty speech, noting that such an inquiry "require[d] an appreciation of the way in which teachers, professors, or instructors

103. *Id.* at 186.

104. *Id.* at 186, n.6.

105. 484 F.3d 687, 695 n.11 (4th Cir. 2007) (stating that because *Garcetti* did not determine whether the case applied to "speech related to teaching," the court would "continue to apply the *Pickering-Connick* standard"). In *Lee*, a teacher challenged a school district's authority to make him remove items posted on a bulletin board in his classroom. *Id.* at 689.

106. *Gorum*, 561 F.3d at 186 n.6.

107. 464 F.3d 667 (7th Cir. 2006).

108. *Id.* at 668.

109. 464 F.3d at 668. For example, one of the pamphlets had a character threatening "that all gay males will pollute the blood supply unless people give more money for AIDS research." *Id.* Both pamphlets drew a comparison between support for homosexuality and the biblical tale of Sodom and Gomorrah. *Id.*

110. *Id.* at 669.

111. *Id.*

communicate with their students.”<sup>112</sup> In relation to faculty speech rights, the opinion stated “that ‘the First Amendment protects the right of faculty members to engage in academic debates, pursuits, and inquiries’ and to discuss ideas. The idea of some kind of government-sponsored orthodoxy in the classroom is repugnant to our values.”<sup>113</sup> But the opinion also pointed out that institutions possess considerable authority to set curricula and that “[c]lassroom or instructional speech . . . is inevitably speech that is part of the instructor’s official duties, even though at the same time the instructor’s freedom to express her views on the assigned course is protected.”<sup>114</sup>

The court held that the college possessed “an interest in ensuring that its instructors stay on message while they were supervising the beauty clinic, just as it had an interest in ensuring that the instructors do the same while in the classroom.”<sup>115</sup> While noting that *Garcetti* was “not directly relevant” to the speech at issue in the case since the instructor had made the comments outside of any formal instructional context, the court stated that the decision did “signal the Court’s concern that courts give appropriate weight to the public employer’s interests.”<sup>116</sup> As with *Gorum*, the court was sensitive to the fact that it represents an open question whether *Garcetti* applies to all types of faculty speech.

As Leonard M. Niehoff discusses, the *Renken* and *Hong* cases “are not remarkable because they reveal the tension between *Garcetti* and academic freedom. Rather, they are remarkable because the discussion of any such tension is almost wholly absent.”<sup>117</sup> He states that the overall lack of discussion in the small pool of cases dealing with faculty speech and the appropriate role of *Garcetti* may be attributable to the “idiosyncratic nature of these cases” or, alternatively, the cases may serve as a bellwether of the willingness of courts to apply the *Garcetti* standards to faculty speech.<sup>118</sup> According to Niehoff, while enough cases have not yet been decided by courts to predict how courts will apply *Garcetti* to faculty speech:

[I]f the courts decide a dozen or so more faculty speech cases through a simple application of *Garcetti*—with no consideration of competing academic freedom considerations—then a precedential consensus will begin to emerge. That consensus

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112. *Id.* at 670–171.

113. *Piggee*, 464 F.3d at 671 (quoting *Trejo v. Shoben*, 319 F.3d 878, 884 (7th Cir. 2003)).

114. *Id.*

115. *Id.* at 672. The former instructor had placed the pamphlets with the students in a clinical salon that was operated by the school and that was open to the public. *Id.* at 668.

116. *Id.* at 672.

117. Leonard M. Niehoff, *Peculiar Marketplace: Applying Garcetti v. Ceballos in the Public Higher Education Context*, 35 J.C. & U.L. 75, 92 (2008).

118. *Id.*

would probably have no impact on *institutional* academic freedom. But it could effectively extinguish constitutionally based faculty academic freedom in the classroom.<sup>119</sup>

While it still remains unclear what impact *Garcetti* may have on faculty speech, the cases decided thus far demonstrate that some courts have shown little hesitation in applying the *Garcetti* standards to faculty speech.

#### B. Pre-*Garcetti* Decisions from Lower Federal Courts

The courts in *Renken* and *Hong* closely followed the approach by the Fourth Circuit in a pre-*Garcetti* decision, *Urofsky v. Gilmore*, which concluded that faculty members at public colleges and universities enjoy no other First Amendment protections than those available to other public employees.<sup>120</sup> The *Urofsky* opinion squarely rejected the position that faculty members at public colleges and universities possess any First Amendment protection for academic freedom.<sup>121</sup> The Fourth Circuit, sitting en banc, considered whether a Virginia law that prohibited public employees from accessing sexually explicit material on computers owned or leased by the state violated the First Amendment rights of professors employed at public higher education institutions.<sup>122</sup> The professors argued that the law prohibited them from engaging in legitimate research activities.<sup>123</sup> While the district court had ruled in favor of the professors, a panel for the Fourth Circuit reversed.<sup>124</sup>

In reviewing the panel's decision, the full court applied a public employee speech framework to assess the professors' claims, turning to the standards of *Pickering* and *Connick*.<sup>125</sup> Foreshadowing the decision in *Garcetti*, the court stated that because the speech at issue took place in relation to the faculty members "carrying out [their] employment duties," the law did not regulate their speech as private citizens.<sup>126</sup> The opinion also considered whether the employees' status as professors should affect the law's applicability to them based on academic freedom considerations.<sup>127</sup> The majority opinion, describing academic freedom as an ambiguous concept applied unevenly by courts, stated: "Our review of the law . . . leads us to conclude that to the extent the Constitution recognizes any right of 'academic freedom' above and beyond the *First Amendment* rights to which every citizen is entitled, the right inheres in the University, not in

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119. *Id.* at 96.

120. 216 F.3d 401, 412 n.13, 415 (4th Cir. 2000) (en banc).

121. *Id.* at 415.

122. *Id.* at 404.

123. *Id.* at 405–06.

124. *Id.* at 404.

125. *Id.* at 406–07.

126. *Urofsky*, 216 F.3d at 408–09 (emphasis added).

127. *Id.* at 409.



individual professors.”<sup>128</sup>

The court argued that Justice Frankfurter’s often cited concurring opinion in *Sweezy* conceived of institutional rights enjoyed by an institution rather than of individual First Amendment academic freedom rights also possessed by faculty members.<sup>129</sup> Additionally, the court stated that *Sweezy* dealt with a professor seeking to speak in his capacity as a private citizen.<sup>130</sup> The opinion also questioned the fairness of granting professors a constitutional right not given to other public employees.<sup>131</sup> To support the view that individual academic freedom does not have a constitutional basis, the majority discussed how the concept of academic freedom did not exist early in the history of American higher education and how it emerged as the result of looking to the German system of higher education.<sup>132</sup> When the idea of academic freedom began to emerge in this country, the opinion stressed that the American Association of University Professors’ (“AAUP”) initial efforts to promote and establish individual academic freedom did not rely on First Amendment justifications.<sup>133</sup> Accordingly, for the *Urofsky* court, the issue of individual protection for academic freedom, while representing an important facet of higher education, did not trigger any special First Amendment safeguards for faculty members.

Several other pre-*Garcetti* decisions also emphasized institutional interests, especially in classroom related matters, when denying First Amendment claims by faculty members. In *Brown v. Armenti*,<sup>134</sup> for example, the Third Circuit stated that precedent had established that “in the classroom, the university was the speaker and the professor was the agent of the university for *First Amendment* purposes.”<sup>135</sup> Based on this standard, the court determined that grading fell under an institution’s right to determine how a course is taught and did not infringe on a professor’s First Amendment rights.<sup>136</sup> The court refused to recognize that an instructor possessed any independent First Amendment right to assign grades, though the court did not address individual academic freedom rights that might exist for scholarship-related activities.<sup>137</sup>

In another case dealing with speech related to the classroom and

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128. *Id.* at 410.

129. *Id.* at 412–13.

130. *Id.* at 413.

131. *Id.* at 411 n.13.

132. *Urofsky*, 216 F.3d at 410–11.

133. *Id.* at 411.

134. 247 F.3d 69 (3d Cir. 2001).

135. *Id.* at 74 (emphasis added).

136. *Id.* at 74–75.

137. *Id.* See also *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3d Cir. 1998) (stating “a public university professor does not have a First Amendment right to decide what will be taught in the classroom”). In *Edwards*, the court also expressly rejected the professor’s academic freedom claims. *Id.* at 491–92.

teaching, *Johnson-Kurek v. Abu-Absi*,<sup>138</sup> the Sixth Circuit considered claims by an instructor, Johnson-Kurek, that her First Amendment rights were violated when administrators ordered her to send letters to students that included more detailed reasons for why they had received grades of incomplete in a course and that described how to fix deficiencies in their work in order to obtain a final grade in the class.<sup>139</sup> The court distinguished the case from the decision in *Parate v. Isibor*,<sup>140</sup> discussed below, where the court held that grading represented protected First Amendment speech.<sup>141</sup> Rather than being required to communicate a particular message of university officials, Johnson-Kurek was required to communicate her particular standards of evaluation to students, with the court comparing the request similar to the requirements of making a course syllabus.<sup>142</sup> According to the opinion:

While the First Amendment may protect Johnson-Kurek's right to express her ideas about pedagogy, it does not require that the university permit her to teach her classes in accordance with those ideas. The freedom of the university to decide what may be taught and how it shall be taught would be meaningless if a professor were entitled to refuse to comply with university requirements whenever they conflict with his or her teaching philosophy.<sup>143</sup>

While the Sixth Circuit emphasized institutional authority to control conditions in the classroom, as the Third Circuit did in *Brown*, the *Johnson-Kurek* decision did not address whether under certain circumstances a professor might still possess some type of constitutional protection for academic freedom.

The approach toward individual academic freedom taken in pre-*Garcetti* cases such as *Urofsky* has certainly not been followed by all courts. For instance, some courts, though in pre-*Garcetti* decisions, have determined that professors possess some First Amendment protection for comments made in the classroom.<sup>144</sup> In a case in stark contrast to *Brown*, the Sixth

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138. 423 F.3d 590 (6th Cir. 2005).

139. *Id.* at 591–92.

140. 868 F.2d 821 (6th Cir. 1989).

141. *Johnson-Kurek*, 423 F.3d at 594.

142. *Id.* at 595.

143. *Id.*

144. *See, e.g., Dube v. State Univ. of N.Y.*, 900 F.2d 587, 598 (2d Cir. 1990) (“Assuming the defendants retaliated against Dube based upon the content of his classroom discourse, such conduct was, as a matter of law, objectively unreasonable.”); *Silva v. Univ. of N.H.*, 888 F. Supp. 293, 315 (D.N.H. 1994) (holding that disciplinary actions taken by a professor based on statements made in class violated the professor's First Amendment rights). Cases relying on a *Pickering* approach as a basis to find protection for speech by faculty members in the classroom, however, rest on uncertain legal ground with the *Garcetti* decision and its emphasis that no First Amendment

Circuit held in *Parate v. Isibor*<sup>145</sup> that a professor had communicated for First Amendment purposes when assigning grades.<sup>146</sup> Looking to Judge Posner's opinion in *Piarowski v. Illinois Community College District 515*,<sup>147</sup> discussed below, the Sixth Circuit stated that both the school and the professor may raise academic freedom concerns protected by the First Amendment.<sup>148</sup> The Sixth Circuit in *Parate* described a grade assignment as a form of symbolic speech.<sup>149</sup> In discussing the professor's role in assigning grades as involving the "professional judgment"<sup>150</sup> of the faculty member, the court in *Parate* sounded a different chord than that heard in *Brown*, which described a professor as a spokesperson for the university in the classroom.

In *Piarowski*, a case involving placement of an exhibition of a professor's art work that was sexual in nature,<sup>151</sup> Judge Posner's opinion for the Seventh Circuit discussed the "equivocal" nature of academic freedom: "It is used to denote both the freedom of the academy to pursue its ends without interference from the government. . . . and the freedom of the individual teacher (or in some versions—indeed most cases—the student) to pursue his ends without interference from the academy."<sup>152</sup> The opinion stated that both the community college and the professor possessed interests in the location of a sexually explicit art display that might offend some viewers.<sup>153</sup> Rather than using a bright-line test, Judge Posner balanced the interests of the academic institution and the professor. For instance, the opinion stated that had the exhibit contained a likeness of the chair of the board of trustees or presented female students in a sexually graphic manner, then the community college arguably enjoyed an interest

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protection exists for speech made pursuant to fulfilling employment duties. *See, e.g., Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 679 (6th Cir. 2001) ("Because the essence of a teacher's role is to prepare students for their place in society as responsible citizens, classroom instruction will often fall within the Supreme Court's broad conception of 'public concern.'").

145. 868 F.2d 821 (6th Cir. 1989).

146. *Id.* at 827–28.

147. 759 F.2d 625 (7th Cir. 1985).

148. *Parate v. Isibor*, 868 F.2d 821, 827 (6th Cir. 1989).

149. *Id.*

150. *Id.* at 828.

151. *Piarowski*, 759 F.2d at 627–28.

152. *Id.* at 629. This statement also raises the issue that students should also perhaps possess some type of academic freedom rights. *See Byrne, supra* note 27, at 262, (contending that students may possess substantial First Amendment rights, but not ones that should be considered to flow from some form of constitutional academic freedom).

153. *Piarowski*, 759 F.2d at 627–28. Though noting the "equivocal" status of constitutional protection for academic freedom, the court stated that it could "assume . . . that public colleges do not have carte blanche to regulate the expression of ideas by faculty members in the parts of the college that are not public forums." *Id.* at 629.

in moving the exhibit to a more “inconspicuous” area of campus.<sup>154</sup> Judge Posner noted that the faculty members, in conceding that the school could have placed blinds up to screen the exhibit, acknowledged “some scope for a managerial judgment concerning access to sexually frank pictorial art.”<sup>155</sup> The court, after weighing the interests of the professor and the institution, held that the community college did not violate the professor’s First Amendment rights in ordering the exhibit moved to another area of campus.<sup>156</sup>

The pre-*Garcetti* cases illustrate the divergent stances among lower federal courts regarding individual academic freedom. At times, courts have referred to individual academic freedom as protected by the First Amendment, as in *Piarowski*. Still, even when viewing individual academic freedom as protected under the First Amendment, courts have often relied on the public employee speech cases and determined that a professor had addressed an issue of public concern, and therefore engaged in protected speech.<sup>157</sup> That option, of course, faces significant hurdles following *Garcetti*. Courts are now more likely faced with directly addressing the issue of constitutional protection for individual academic freedom.

#### IV. VIEW OF CONSTITUTIONAL ACADEMIC FREEDOM AS ACCRUING ONLY TO INSTITUTIONS

##### A. Supporters of Institutional Perspective

Other than their consensus that First Amendment academic freedom represents a hazy legal doctrine, legal scholars have taken divergent positions regarding academic freedom under the First Amendment. Major fault lines have developed concerning whether First Amendment academic freedom is limited to institutions or also includes individuals; or whether it is restricted to individuals, to the exclusion of institutions. Given the importance of this issue concerning the overall contours of academic freedom protected by the First Amendment, the article first examines the view that constitutional academic freedom attaches only to institutions before turning to individual faculty members and academic freedom.

J. Peter Byrne, a leading figure on issues related to academic freedom, represents one of the foremost voices for the position that First Amendment academic freedom applies to institutions rather than directly protecting the individual scholar.<sup>158</sup> In his analysis, Byrne criticizes how academic

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154. *Id.* at 630.

155. *Id.*

156. *Id.* at 632.

157. *See, e.g.,* *Omosegbon v. Wells*, 335 F.3d 668, 676–77 (7th Cir. 2003); *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 679 (6th Cir. 2001).

158. *See generally* Byrne, *supra* note 27.

freedom “has been thought to encompass all First Amendment rights exercisable on campus or by members of the academic community.”<sup>159</sup> He argues that the “term ‘academic freedom’ should be reserved for those rights necessary for the preservation of the unique functions of the university, particularly the goals of disinterested scholarship and teaching.”<sup>160</sup> For Byrne, student speech and what he terms “faculty political speech,” while potentially covered by the First Amendment, should not constitute speech covered by principles of constitutional academic freedom.<sup>161</sup>

In asserting that First Amendment academic freedom should not apply directly to individual scholars,<sup>162</sup> Byrne argues that focusing on protecting institutions does not place courts in the position of second guessing evaluations of academic speech they are ill equipped to assess.<sup>163</sup> Courts should limit their inquiry to whether institutions have followed accepted academic standards in making decisions.<sup>164</sup> According to Byrne, the system of peer review established in higher education represents a more appropriate means to evaluate academic speech.<sup>165</sup> He also states that an inconsistency exists in providing First Amendment academic freedom protection to faculty members at public colleges and universities but denying such protection to professors in private higher education.<sup>166</sup>

As conceived by Byrne, armed with institutional protection for academic freedom, colleges and universities are placed in a position to fend off excessive interference with their internal functions.<sup>167</sup> This institutional academic freedom, according to Byrne, extends to both public and private institutions.<sup>168</sup> Thus, in the case of public institutions, institutional academic freedom, as interpreted by Byrne, also places limits on state governmental interference.<sup>169</sup> To support his position for institutional academic freedom as the proper concern of the First Amendment, Byrne looks to the historic reliance by courts on academic abstention in matters involving colleges and universities<sup>170</sup> as well as to the use of constitutional provisions in some states to shield institutions from undue interference from state government.<sup>171</sup>

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159. *Id.* at 262.

160. *Id.*

161. *Id.* at 262–64.

162. *Id.* at 310–12.

163. *Id.* at 304–07.

164. Byrne, *supra* note 27, at 308.

165. *Id.* at 310–11.

166. *Id.* at 299.

167. *Id.* at 301–04.

168. *Id.* at 299–300.

169. *Id.* at 300, 320.

170. Byrne, *supra* note 27, at 323–27.

171. *Id.* at 327–31.

Seeking to expand accepted legal views of institutional speech rights, Paul Horowitz has argued that in addition to colleges and universities, other entities in society such as the press and libraries should receive special First Amendment deference.<sup>172</sup> In relation to colleges and universities, as with Byrne, he describes First Amendment autonomy for institutions of higher education as coming into play when a school adheres to accepted academic norms and practices.<sup>173</sup> Like Byrne, Horowitz asserts that public higher education institutions should possess First Amendment rights that shield them from the authority of other state actors.<sup>174</sup> He recognizes that permitting a public college or university to exercise a First Amendment right against state government “presents an awkward fit with standard assumptions about the limited or nonexistent nature of First Amendment rights for state actors.”<sup>175</sup> Still, he advocates that important considerations related to safeguarding and promoting free speech merit First Amendment protection for certain institutions, both public and private.<sup>176</sup> Horowitz also argues for a potentially broader view of First Amendment discretion for public colleges and universities than that envisioned by Byrne.<sup>177</sup> He contends that colleges and universities should receive considerable discretion to determine “what their academic mission requires, and their own sense of what academic freedom entails, rather than evaluate those claims against a top-down judicially imposed understanding of academic freedom.”<sup>178</sup>

Other commentators have also determined that First Amendment protection for academic freedom should reside at the institutional level. Lawrence Rosenthal, an advocate of *Garcetti*'s application to public employees, contends the decision reflected a “new inquiry” by the Supreme Court that gave appropriate deference to the “managerial prerogative” of public employers to control the speech of subordinates.<sup>179</sup> Rosenthal states that “public employees who are hired to speak (and write) are not hired to say just anything, but are hired to speak (and write) in the fashion desired by their superiors.”<sup>180</sup> He points to *Garcetti* as properly placing control over government activities and “speech-related duties” in the hands of individuals subject to political accountability.<sup>181</sup> Turning to public colleges

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172. Paul Horowitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1502 (2007).

173. *Id.* at 1518.

174. *Id.* at 1526–30.

175. *Id.* at 1526–27.

176. *Id.* at 1526–30.

177. *Id.* at 1547–49.

178. Horowitz, *supra* note 172, at 1547–48.

179. Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33, 39 (2008).

180. *Id.* at 45–46.

181. *Id.* at 46–47.

and universities, Rosenthal cites cases involving government sponsored funding of art and broadcasting as providing a basis for public universities to exercise their managerial prerogative in a manner that permits them to make content and viewpoint distinctions in carrying out their missions.<sup>182</sup>

According to him:

The First Amendment concept of academic freedom . . . reflects the influence of the managerial prerogative. The Court has invoked academic freedom when it has granted academics protection from forms of coerced ideological conformity, but in this line of cases, the coercion was imposed by external forces rather than by the university leadership.<sup>183</sup>

For Rosenthal, academic freedom cases support the managerial prerogative and should be viewed as emphasizing an institutional right.<sup>184</sup>

In relation to faculty speech, Rosenthal, though making it clear that courts may eventually realize an exception under *Garcetti* for faculty speech, discusses how one could interpret the decision as permitting an institution to treat extramural speech by a professor as constituting part of a faculty member's employment duties.<sup>185</sup> He states that faculty members are hired to express their ideas to the public and that communications such as those engaged in by Ward Churchill should potentially be viewed as related to a professor's employment duties.<sup>186</sup> This view of the official employment duties of faculty members would seem to provide even less First Amendment protection than that given to other public employees under *Garcetti*. He does state, though, that limits exist on the managerial prerogative and that institutional regulation of faculty speech should be consistent with scholarly norms and not the product of external political interference.<sup>187</sup>

Some writers view colleges and universities as receiving a special deference from courts to promote principles associated with academic freedom but do not agree that institutions possess special First Amendment academic freedom rights. Larry D. Spurgeon, for instance, contends that while neither institutions nor individuals possess any special First Amendment academic freedom rights, colleges and universities receive special judicial deference:

The premise of this article is that the Supreme Court has never recognized a distinct constitutional right of academic freedom, either for professors or colleges and universities. It did not need

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182. *Id.* at 100–01.

183. *Id.* at 97.

184. *Id.* at 98.

185. Rosenthal, *supra* note 179, at 105–09.

186. *Id.* at 108–09.

187. *Id.* at 109.

to do so for professors because the First Amendment already covers individuals. Moreover, the Court has not extended such a “right” to colleges and universities to be exercised affirmatively. Rather, the Court has expressed a policy that the academic community should make academic decisions with minimal court interference. In short, institutional academic freedom is a sort of qualified immunity to be used as a shield against unwarranted interference by the state, not a right to be wielded as a sword.<sup>188</sup>

Spurgeon points to Byrne’s discussion of academic abstention in relation to colleges and universities as providing support for the view that institutions should receive special judicial deference.<sup>189</sup>

Given disagreements over the nature of constitutional academic freedom, not surprisingly, other commentators dispute the view of constitutional academic freedom as reserved to institutions. Richard H. Hiers contends that any notion of institutional academic freedom is misplaced, arguing that the view is largely attributable to a flawed opinion by Justice Powell in *Bakke*.<sup>190</sup> He states that Justice Powell mistakenly interpreted language in previous Supreme Court opinions addressing academic freedom in conceiving of some sort of institutional academic freedom right.<sup>191</sup> Matthew W. Finkin has argued that judicial acceptance of institutional academic freedom threatens the constitutional protection of individual faculty members.<sup>192</sup> While stating that protection of institutions could be viewed as permissible at times as “a necessary condition for freedom of teaching and inquiry,” Finkin rejects the idea that academic freedom represents an institutional prerogative, and, instead, would protect the speech of individual scholars.<sup>193</sup>

David M. Rabban has contended that the concept of academic freedom exists as “more than just a desirable policy promoted by the AAUP and adopted within the academic world. Core [F]irst [A]mendment values—such as critical inquiry, the search for knowledge, and toleration of dissent—support constitutionalizing some, but not all, of the speech covered by the professional definition of academic freedom.”<sup>194</sup> Beyond a concern for protecting the individual interests of faculty members, Rabban argues that “constitutional academic freedom promotes [F]irst

188. Larry D. Spurgeon, *A Transcendent Value: The Quest to Safeguard Academic Freedom*, 34 J.C. & U.L. 111, 150 (2007).

189. *Id.* at 164.

190. Richard H. Hiers, *Institutional Academic Freedom or Autonomy Grounded upon the First Amendment: A Jurisprudential Mirage*, 30 HAMLINE L. REV. 1, 3–4 (2007).

191. *Id.* at 5.

192. Matthew W. Finkin, *On “Institutional” Academic Freedom*, 61 TEX. L. REV. 817, 851 (1982–1983). *See generally* Finkin, *supra* note 28.

193. Finkin, *supra* note 192, at 856.

194. Rabban, *supra* note 32, at 230.



[A]mendment values of general concern to all citizens in a democracy.”<sup>195</sup> Looking to general societal benefits of academic freedom identified in Supreme Court cases, including *Sweezy* and *Keyishian*, Rabban points to discussion in the cases of the importance to a democratic society of unencumbered critical inquiry and of how intellectual freedom also “promotes discoveries and understanding necessary for civilization.”<sup>196</sup>

In defending constitutional protection for individual professors, Rabban discusses that “understandable skepticism” results from viewing faculty members as possessing First Amendment rights not available to other citizens,<sup>197</sup> but points out:

[T]he institutional context of speech often has [F]irst [A]mendment significance. Under this approach, constitutional academic freedom is simply a convenient name to describe special speech rules governed by the functions of professors and universities, just as other special speech rules, which may not have been separately named, are required by the distinctive yet different functions of institutions as varied as prisons, libraries, the military, the civil service, public schools, and the media.<sup>198</sup>

In challenging the position taken by Byrne, Rabban argues that such an approach “would heighten the danger that administrators and trustees might violate the academic freedom of professors.”<sup>199</sup> He also disputes the assertion that courts would unduly interfere with academic decisions, stating that “[c]ourts are likely to be more sensitive than legislators or members of the executive branch to the need for independent critical inquiry in universities and to their democratic role as sanctuaries for unpopular ideas.”<sup>200</sup> He looks to Title VII cases as providing an example of courts being able to evaluate “whether stated academic grounds are pretexts.”<sup>201</sup> But Rabban does agree with Byrne that courts should limit their inquiries to whether institutions had demonstrated academic good faith.<sup>202</sup>

195. *Id.*

196. *Id.* at 239.

197. *Id.* at 246.

198. *Id.* at 247.

199. *Id.* at 284.

200. Rabban, *supra* note 32, at 286–87.

201. *Id.* at 287.

202. *Id.* at 291–92. While wary of including intramural faculty speech under the umbrella of First Amendment protection for institutional academic freedom, Rabban expressed this view before *Garcetti*. He stated that certain types of intramural speech related to “critical inquiry” constituted an appropriate area to be protected by constitutional academic freedom. *Id.* at 295–96. I contend that considerations of First Amendment protection for faculty speech should take into account the realm of intramural speech. Otherwise, as in *Hong* and *Renken*, such speech could be denied constitutional protection.

Caution is warranted in adopting an overly simplistic view of the debate over institutional versus individual academic freedom under the First Amendment. Byrne, for instance, views institutional academic freedom as the most appropriate and workable mechanism to ultimately safeguard the academic freedom of individual scholars.<sup>203</sup> Accordingly, one should not assume that a supporter of institutional academic freedom is opposed to academic freedom for individual faculty members. Instead, as the preceding discussion illustrates, disagreement tends to center on the appropriate means to safeguard individual academic freedom. Advocates of institutions as the proper concern of constitutional academic freedom, then, should not be viewed as necessarily antagonistic to protecting the intellectual freedom of the individual scholar. Still, as the next section discusses, obstacles exist for the view that institutional academic freedom sufficiently protects the academic freedom of individual professors at public colleges and universities.

#### B. Potential Pitfalls with Limiting Constitutional Academic Freedom to Institutions

A significant hurdle institutional academic freedom must overcome in relation to public colleges and universities concerns the extent to which these institutions possess federal constitutional academic freedom rights easily wielded against state governments.<sup>204</sup> In support of this position, Byrne, as noted, discusses how some states have provided special autonomy to public colleges and universities in their state constitutions<sup>205</sup> and also looks to the concept of academic abstention<sup>206</sup> as legal doctrines that help justify judicial recognition of institutional academic freedom under the Federal Constitution. He conceives of institutional academic freedom as restricted to when institutions make judgments and decisions that are academic in nature and related to core enterprises of the college or university in the areas of teaching and scholarship.<sup>207</sup> According to Byrne, institutional academic freedom for public colleges and universities means, for instance, that they may include race as a factor in their admissions, even if voters or legislatures have approved measures rejecting race-conscious admission policies.<sup>208</sup> As another example, he states that adoption by a state legislature of a form of the Academic Bill of Rights advocated by David Horowitz would seemingly violate institutional academic freedom.<sup>209</sup>

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203. Byrne, *supra* note 27, at 331–39.

204. See Byrne, *supra* note 31, at 934–38.

205. Byrne, *supra* note 27, at 327–31.

206. *Id.* at 323–27.

207. *Id.* at 301–11.

208. Byrne, *supra* note 31, at 937.

209. *Id.* at 939–44. The Academic Bill of Rights represents draft legislation

As Byrne points out,<sup>210</sup> a select number of states, with California, Michigan, and Minnesota serving as the foremost examples,<sup>211</sup> have enacted constitutional provisions meant to shield public colleges and universities from undue legislative influence.<sup>212</sup> This special grant of independence is often referred to as constitutional autonomy.<sup>213</sup> Like Byrne, Horowitz also looks to the existence of constitutional autonomy provisions as well as statutes in some states granting considerable autonomy to public colleges and universities as justifications for First Amendment rights for institutions.<sup>214</sup> He states that while the people of a state are not required to support and maintain a public college or university, “[s]o long as the people have chosen to maintain . . . a university, however, they must stand by the bargain.”<sup>215</sup>

While Horowitz and Byrne may certainly be correct that public institutions enjoy substantial constitutional academic freedom rights that may be exercised against state government, such a result is far from settled. Robert O’Neil, in discussing the Academic Bill of Rights,<sup>216</sup> states that considerable uncertainty exists as to whether a public college or university could successfully assert a federal constitutional right grounded in institutional academic freedom against a state government seeking to

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promoted by David Horowitz as a means to address alleged ideological bias at colleges and universities against conservative students and faculty members. ROBERT O’NEIL, *ACADEMIC FREEDOM IN THE WIRED WORLD* 241 (2008). Supporters of the measure have sought to have it included in federal and state legislation, though they have so far achieved little success. *Id.* at 241–55.

210. Byrne, *supra* note 27, at 327–28.

211. Joseph Beckham, *Reasonable Independence for Public Higher Education: Legal Implications of Constitutionally Autonomous Status*, 7 J.L. & EDUC. 177, 181 (1978).

212. Neal H. Hutchens, *Preserving the Independence of Public Higher Education: An Examination of State Constitutional Autonomy Provisions for Public Colleges and Universities*, 35 J.C. & U.L. 271, 271–72, 275 (2009).

213. Beckham, *supra* note 211, at 179; Hutchens, *supra* note 212, at 272. To gain a better understanding of the similarities and differences between academic freedom law and constitutional autonomy, see Karen Petroski’s comparison of constitutional autonomy in California with concepts of academic freedom as developed in federal law. *Lessons for Academic Freedom Law: The California Approach to University Autonomy and Accountability*, 32 J.C. & U.L. 149 (2005).

214. Horowitz, *supra* note 172, at 1529.

215. *Id.* at 1551. Jeff Todd has also examined issues related to institutional academic freedom for public colleges and universities and the authority of state government. Jeff Todd, Note, *State University v. State Government: Applying Academic Freedom to Curriculum, Pedagogy, & Assessment*, 33 J.C. & U.L. 387 (2007). While also supportive of institutional academic freedom and looking to Supreme Court cases, academic abstention, and separation of powers as potential legal sources to support institutional independence from state government, he acknowledges uncertainty with the degree to which public colleges and universities can claim such autonomy from governmental regulation. *Id.* at 398–402.

216. See O’NEIL, *supra* note 209.

impose governance changes.<sup>217</sup> Rabban has also noted that public institutions may not be able to rely on institutional academic freedom to the same extent as private institutions, noting that cases make it uncertain the degree to which a public institution could use institutional academic freedom to fend off state legislative initiatives.<sup>218</sup> He states, “[t]he extent to which institutional academic freedom insulates state universities from other branches of government, though presenting numerous complicated and unresolved issues, remains largely hypothetical.”<sup>219</sup> Rabban does suggest that, under certain conditions, limits may exist on external governmental control over public colleges and universities. He discusses *Federal Communications Commission v. League of Women Voters*<sup>220</sup> as instructive of when First Amendment limits may exist on “government regulation of its own institutions.”<sup>221</sup>

The view that public colleges and universities should enjoy considerable autonomy in the control of their internal affairs is strongly shared by this author, but I also believe that considerable difficulties exist in establishing that state-supported public colleges and universities possess significant federal constitutional independence from state governmental control. In contrast to Byrne and Horowitz, I contend that the existence of constitutional autonomy provisions actually may make it more difficult to establish that state public colleges and universities possess institutional academic freedom rights easily asserted against state government.

In the majority of states, authorization for public higher education has stemmed from legislative enactments, with the state constitution often at most only establishing an institution and/or its governing board.<sup>222</sup> In contrast, states with constitutional autonomy for public colleges and universities have made a deliberate political decision to grant some degree of state constitutional independence for public higher education.<sup>223</sup> Several states, such as Utah and Missouri, have had explicit legal battles regarding the issue of constitutional autonomy under the state constitution, where

217. *Id.* at 259.

218. Rabban, *supra* note 32, at 278–79. As an example, Rabban asks what would be the outcome in relation to the First Amendment and institutional academic freedom if a Texas law required state-supported colleges or universities to offer a government or political science course that included consideration of the United States and Texas Constitutions and also required the offering of courses in American or Texas history. *Id.*

219. *Id.* at 280.

220. 468 U.S. 364 (1984). In the case, the Supreme Court struck down a provision that prohibited editorializing by stations that received grants from the Corporation for Public Broadcasting. *Id.* at 402–03.

221. Rabban, *supra* note 32, at 273.

222. See Education Commission of the States, Postsecondary Governance Structures Database, <http://www.ecs.org/clearinghouse/31/02/3102.htm> (last visited Nov. 4, 2009).

223. See generally Hutchens, *supra* note 212.

courts have refused to recognize independent constitutional authority for public institutions, despite constitutional language seeming to indicate otherwise.<sup>224</sup> In a relatively recent case in Utah, the state's supreme court considered a constitutional autonomy claim in relation to a state law permitting possession of concealed weapons in public places, including at colleges and universities in the state.<sup>225</sup> In the decision, the court, in rejecting constitutional autonomy for the University of Utah, described the university as completely subject to the authority of the legislative and executive branches of government.<sup>226</sup> Even in Michigan, and in other states with judicial recognition for constitutional autonomy, courts have fashioned an exception to constitutional independence where a clearly determined statement of public policy by the legislature may override constitutional autonomy.<sup>227</sup> A federal court considering recognition of an institutional academic freedom right that operates against state government might well hesitate to do so when faced with the fact that a number of states have already made deliberate legislative and judicial choices regarding state control over public colleges and universities, including whether to grant constitutional autonomy.

Rather than as a justification for an independent grant of federal constitutional autonomy for public institutions to shield them from undue interference by state government, constitutional autonomy provisions could actually be used to demonstrate that state legislatures have been quite conscious regarding issues related to any independent state constitutional authority that public higher education institutions should possess. Recognition of an extensive institutional academic freedom right that operates against state government could strike some, if not many courts, as overriding the deliberate choices made by states in relation to public higher education governance. It is far from certain the extent to which courts would recognize such an institutional academic freedom right in relation to state government, and constitutional autonomy provisions and litigation related to such provisions might actually undercut judicial support for such a position.

Still, commentators have looked to cases dealing with arts funding<sup>228</sup> and control over school libraries<sup>229</sup> to suggest that limits may exist on political

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224. *Id.* at 309–10.

225. *Univ. of Utah v. Shurtleff*, 144 P.3d 1109, 1118–21 (Utah 2006).

226. *Id.* at 1118.

227. *Hutchens*, *supra* note 212, at 282–92.

228. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (rejecting a claim that standards imposed on the National Endowment for the Arts to consider factors that included standards related to decency in awarding grants violated the First Amendment).

229. *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982) (holding that a local board of education violated the First Amendment in removing certain books from a school library because of disagreement with ideas contained in the works).

interference with state entities under certain circumstances. Frederick Schauer discusses that some sort of First Amendment protection for public colleges and universities against state government might come into play when “decisions made by primary professionals inside some speech-focused institution” are subjected to external interference from other officials.<sup>230</sup> Such meddling could trigger First Amendment concerns based on governmental officials seeming to impose particular viewpoints on institutional decisions.<sup>231</sup> Under certain circumstances, then, institutions might be able to assert a First Amendment right against state government, but the contours of such an institutional right are unclear and may apply only in limited circumstances.

It should be pointed out that in contrast to an institutional academic freedom right that limits state government, some form of First Amendment right for public institutions in relation to the federal government seemingly faces fewer difficulties. Cases such as *Grutter*,<sup>232</sup> *Ewing*,<sup>233</sup> and *Southworth*<sup>234</sup> already have dealt with the Supreme Court applying federal constitutional standards to public higher education and recognizing some degree of First Amendment consideration for institutional academic freedom. One justification for such an institutional right is to view the state government (a public college or university) as exercising a special educational function. Under this view, protection of institutional academic freedom places emphasis on respecting the role of states in educational matters, including higher education. In *Grutter*, for instance, the Supreme Court recognized a compelling governmental interest in using race as a factor in higher education admissions.<sup>235</sup> Similarly, in *Southworth* the Court took into account the unique context of public higher education in applying its compelled speech standards under the First Amendment.<sup>236</sup> Thus, constitutional protection for institutional academic freedom appears more viable in relation to public colleges and universities and the federal government than to state governments.

Recognition of some form of constitutional protection for institutional academic freedom that applies to the federal government still leaves the problem, however, of defining an institutional right in relation to state government. Beyond this obstacle, limiting academic freedom to institutions may also provide insufficient constitutional protection for the

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230. Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 922–23 (2006).

231. *Id.* See also Laura A. Jeltama, Comment, *Legislators in the Classroom: Why State Legislatures Cannot Decide Higher Education Curricula*, 54 AM. U.L. REV. 215 (2004)

232. See *infra* Part II.

233. *Id.*

234. See *infra* Part II.

235. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

236. *Bd. of Regents v. Southworth*, 529 U.S. 217, 221 (2000).

individual scholar. Alan K. Chen, for instance, warns of the threats that arise in showing too much deference to institutions.<sup>237</sup> He discusses several factors that may undermine institutional support for academic freedom: (1) institutions are subject to external boards that may not be sensitive enough to protecting the intellectual freedom of faculty members; (2) college and university presidents now often come from non-academic backgrounds; and (3) schools increasingly rely on part-time instructors or ones employed full time but not on the tenure track.<sup>238</sup> He also discusses the growing importance of corporate funding for higher education, which raises additional academic freedom concerns.<sup>239</sup>

Another potential issue, when considering the protection of individual academic freedom, stems from an increased scrutiny of particular scholars by political leaders and in the media. Writing in 1989, Byrne stated that “[t]oday, few politicians seek political capital by attacking academics for their political opinions, and those who do only provide their victims with lawsuits that usually fortify their academic positions against more subtle or justifiable assault.”<sup>240</sup> Such a statement arguably has diminished currency in the years since Byrne’s article. As indicated by several authors, individual scholars have now indeed become the targets of individual attacks by politicians and other figures.<sup>241</sup>

Accordingly, beyond difficulties with establishing an institutional right that significantly restricts interference from state government, individual faculty members have now become the targets of politicians and other individuals and groups critical of higher education. Especially given the emergence of alternative media and the ease with which groups or individuals may post information (accurate or otherwise) on the internet, faculty members are increasingly susceptible to individual critiques and attacks. Depending on the politically charged nature of such instances and the level of media coverage, some institutions might be slow in moving to

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237. Chen, *supra* note 27, at 970–72.

238. *Id.* at 972.

239. *Id.* For additional discussion of potential problems for academic freedom stemming from increased corporate influence in higher education and institutions assuming a more market oriented approach to research, see Risa L. Lieberwitz, *Education Law: The Corporatization of Academic Research: Whose Interests are Served?*, 38 AKRON L. REV. 759 (2005).

240. Byrne, *supra* note 27, at 298.

241. MATTHEW W. FINKIN & ROBERT C. POST, *FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM* 2–3 (2009) (discussing the backlash that ensued based on the selection of a particular book for a common reading for incoming freshman at the University of North Carolina, including a state senator asking for the political affiliations of professors on the committee that selected the work); O’NEIL, *supra* note 209, at 235–56 (offering several examples of increasing allegations of bias against faculty members, including the publishing of a list by David Horowitz, drafter of the Academic Bill of Rights, containing the names of 101 professors he deemed politically biased and harmful to higher education).

defend their faculty members in certain instances. Robust constitutional protection for academic freedom may be incomplete without an individual dimension, and the article now shifts to consideration of one alternative upon which to base First Amendment protection for individual academic freedom.

## V. INDIVIDUAL ACADEMIC FREEDOM

### A. Institutional Policies: A Potential Justification for Constitutional Protection

Articulating a framework for constitutional protection of individual academic freedom requires addressing the legal justification for such a right and defining workable standards for courts to employ in assessing individual academic freedom claims. In considering First Amendment protection for individual academic freedom, one view is that Supreme Court opinions have established an independent constitutional right for faculty members that public colleges and universities are bound to respect.<sup>242</sup> This article certainly does not reject the position that such an independent First Amendment right for individual academic freedom conceivably exists based on Supreme Court decisions. While not seeking to undercut the viability of such a position, I do consider a somewhat alternative basis to ground First Amendment protection for individual academic freedom at public colleges and universities: the academic freedom policies and standards voluntarily adopted by institutions.

In light of *Garcetti*'s emphasis on the control that public employers exercise over employee speech made pursuant to carrying out official duties, it seems relevant to consider the legal significance of speech policies voluntarily adopted by public employers. In the context of public colleges and universities, it is legally incongruous for institutions to adopt and tout academic freedom policies, which encourage professors to express their views openly, but then to fall back on *Garcetti* when a faculty member claims that he or she has suffered retaliation for accepting the invitation to engage in free speech. While the court in *Urofsky* complained about treating public higher education faculty members differently from other public employees,<sup>243</sup> public colleges and universities have made a deliberate decision to treat their employees in a way distinct from other public employees.<sup>244</sup> It seems reasonable therefore for courts to consider

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242. See generally Areen, *supra* note 72; Finkin, *supra* note 28; Rabban, *supra* note 32.

243. *Urofsky v. Gilmore*, 216 F.3d 401, 412 n.13 (4th Cir. 2000) (en banc).

244. For instance, what if Ceballos had worked in an office with an established formal policy that employees possessed discretion to express their views on any legal matters pending in the office to superiors and even to external audiences as long as such communications were handled with civility and related to an area of expertise of



how institutional policies and standards should impact the speech claims of faculty members.

Giving legal weight to the academic freedom policies and standards adopted by public colleges and universities can also be grounded in a broader conception of these institutions as occupying a special governmental role. Along these lines, Judith Areen contends that in evaluating the First Amendment academic freedom rights of faculty members, courts should distinguish between the government (a public college or university) as educator versus as an employer.<sup>245</sup> Areen looks to *Rust v. Sullivan*<sup>246</sup> as an instance of the Supreme Court recognizing the government as the speaker<sup>247</sup> and contrasts it with *Legal Services Corporation v. Velazquez*,<sup>248</sup> where the Court invalidated a rule that legal services attorneys could not represent clients seeking to challenge existing welfare law.<sup>249</sup> In *Velazquez*, the Court stated that the regulation could interfere with the established role of attorneys in the judicial system.<sup>250</sup> According to Areen, “restricting faculty to promote governmental messages would [also] alter their traditional role and distort public higher education.”<sup>251</sup> She also distinguishes government as educator from its role as sovereign, where content neutrality is often the First Amendment touchstone.<sup>252</sup> In performing its role as educator, a public college or university would be able to make content and viewpoint distinctions in fulfilling its teaching and research functions.<sup>253</sup>

Along somewhat similar lines, Robert M. O’Neil discusses how *Rust* contained language from Chief Justice Rehnquist regarding the special nature of higher education in approving restrictions on federal funding for family planning clinics that disallowed the funds from being used in programs that provided abortions or counseling about abortion.<sup>254</sup> O’Neil writes that one lesson from *Rust* could be to limit application of *Garcetti* in circumstances when “government control of the employee’s message is integral to the agency’s responsibility for management of the workplace and those [situations] in which such government power or control is

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the attorney? No such policy appeared to exist in Ceballos’s office, but faculty members at public colleges and universities indeed work in environments in which official institutional policy encourages them to speak as independent voices.

245. Areen, *supra* note 72, at 989–90.

246. 500 U.S. 173 (1991).

247. Areen, *supra* note 72, at 991.

248. 531 U.S. 533 (2001).

249. Areen, *supra* note 72, at 992.

250. *Velazquez*, 531 U.S. at 544.

251. Areen, *supra* note 72, at 992.

252. *Id.* at 992–93.

253. *Id.*

254. Robert M. O’Neil, *Academic Speech in the Post-Garcetti Environment*, 7 FIRST AMEND. L. REV. 1, 15 (2008).

incidental to performance of the tasks and functions of the workplace.”<sup>255</sup> He states that “[t]he setting in which such an approach might most effectively mitigate government speech restriction would, of course, be that of the university campus.”<sup>256</sup>

O’Neil points out how previous Supreme Court cases have recognized the uniqueness of the higher education environment, including Justice Kennedy’s statement in *Garcetti* that it was not settled that the holding would apply to professors in public higher education.<sup>257</sup> Looking to the *Yeshiva* decision, O’Neil notes how court cases have previously recognized that the work of faculty members in higher education differs from the functions of other employees.<sup>258</sup> He also discusses that applying *Garcetti* to the speech of faculty members would create a result in which faculty members would “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.”<sup>259</sup>

The difficulties with applying *Garcetti* within the context of the college or university environment have also been noted by supporters of institutional academic freedom. Spurgeon predicts that the Supreme Court will carve out some sort of exception to the *Garcetti* standards that protects faculty members, though he states that any exception will not be based on an individual right to academic freedom.<sup>260</sup> While an advocate of *Garcetti*, Rosenthal writes that though scholarly speech by faculty members might appear “within the scope of managerial prerogative . . . because they are incidents of academic duties,” the speech at issue involved “public employees acting as agents of the government,” and “[i]t is far from clear that scholarly work can be described in a similar fashion.”<sup>261</sup> Accordingly, even to some generally supportive of *Garcetti*, the decision appears ill suited to apply to the work of faculty members.

The academic freedom policies and standards voluntarily adopted by institutions provide one specific basis upon which to craft an exception to the *Garcetti* standards and also emphasize the special role of government as educator in a higher education context. While often discussed in relation to the professional norms safeguarding academic freedom, the AAUP standards on faculty speech and shared governance<sup>262</sup> which have been

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255. *Id.* at 16.

256. *Id.* at 17.

257. *Id.*

258. *Id.* at 18 (citing *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980)).

259. *Id.* at 20.

260. Spurgeon, *supra* note 188, at 167.

261. Rosenthal, *supra* note 179, at 97.

262. Am. Ass’n of Univ. Professors, *1940 Statement of Principles on Academic Freedom and Tenure*, in *POLICY DOCUMENTS & REPORTS* 3–4 (9th ed. 2001).

(a) Teachers are entitled to full freedom in research and in the publication of the results, subject to adequate performance of their other academic duties . . .

adopted in one form or another by the overwhelming majority of public colleges and universities also could be viewed as relevant to First Amendment faculty claims, especially in light of *Garcetti*. Permitting public colleges and universities, after they have voluntarily adopted policies that encourage faculty members to express their views, to then pick and choose favored and disfavored faculty speech and rely on *Garcetti* to deny faculty legal protection for such invited speech is troubling and turns notions of basic legal fairness on its head.

While the focus of this article is faculty members and their speech, the standard I am discussing could be applied to the *Garcetti* standards more generally, though, as a practical matter, most public employers do not have official speech policies like those adopted by colleges and universities. Even assuming a governmental employer may, in general, exercise almost complete control over employee speech related to official employment duties, it seems reasonable that the employer should be able to relinquish such control and designate an employee as speaking in an individual capacity for First Amendment purposes. That is, an employer's own actions could be viewed as being able to trigger an exception to the general standards announced in *Garcetti*.

The notion that voluntary governmental action may result in constitutional obligations for government in relation to free speech is not novel. Legal standards related to the designated or limited public forum are somewhat analogous to how a public institution's voluntary actions could be viewed as resulting in First Amendment constraints on colleges or universities in relation to their academic freedom policies.<sup>263</sup> While this

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(b) Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has not relation to their subject . . . (c) College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

*Id.* at 3–4. The AAUP has also adopted a statement entitled *On the Relationship of Faculty Governance to Academic Freedom*. *Id.* at 224. According to the statement:

The academic freedom of faculty members includes the freedom to express their views (1) on academic matters in the classroom and in the conduct of research, (2) on matters having to do with their institution and its policies, and (3) on issues of public interest generally, and to do so even if their views are in conflict with one or another received wisdom . . . . Protecting academic freedom on campus requires ensuring that a particular of faculty speech will be subject to discipline only where that speech violates some central principle of academic morality . . . . *Id.* at 226.

263. Sheldon Nahmod has made similar points in arguing that classroom-related

article does not argue that institutional policies related to faculty speech should be viewed as creating some type of limited or designated public forum,<sup>264</sup> the voluntary nature of the creation of such forums is relevant. Once a college or university chooses to open a limited or designated public forum then it must follow certain constitutional standards in how the forum operates.<sup>265</sup> Similarly, I argue that when a public college or university through official policy encourages and expects its faculty members to espouse independent views in relation to teaching, research, and intramural issues, the institution should have to operate by the speech standards that it has voluntarily established.

Looking to institutional policies as a source of constitutional protection for individual academic freedom does raise several questions. One issue deals with using the standards to help shore up constitutional protection for individual academic freedom rather than looking to such language as only raising contractual concerns. Viewing the policies and standards as only implicating contractual issues would avoid making distinctions between

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speech and scholarship should not be viewed as falling under the *Garcetti* standards. *Academic Freedom and the Post-Garcetti Blues*, 7 FIRST AMEND. L. REV. 54, 69 (2008). He describes the classroom as “an intentionally created educational forum for the enabling of professorial (and student) speech” as opposed to representing government speech. *Id.* According to Nahmod, faculty scholarship is also not some form of government speech and should be viewed as “an intentionally created metaphorical educational forum for the dissemination of knowledge by academics.” *Id.*

264. My emphasis is to point out the well-established acceptance of the concept that voluntary action by the government can create First Amendment protection for speech. Reasons not to extend an analogy with the designated or limited public forum too far involve uncertainties that generally exist with forum analysis and the fact that courts have been reluctant to apply forum analysis to the classroom and certain other educational contexts.

A designated public forum is one that the government, though not required to, has opened to the public. Once the forum has been created, however, the same governmental restrictions that exist with a traditional public forum come into play. But when the government limits access to a forum it has voluntarily created, based on subject matter or particular groups such as student organizations, this gives rise to what has been termed the “designated limited public forum” or “limited public forum[.]” Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1403–04 (2001) or “limited-purposed designated public forum.” Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1149 (2005). Some commentators do not even consider the limited public forum (or limited designated public forum) a meaningful subset of forum analysis, with one writer describing it as “a doctrinally incoherent concept.” Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV. 439, 449 (2006). Other questions also exist regarding distinctions dealing with forums and the government as “regulator” versus when the government is exercising more of a communicative role. *See generally* Bezanson & Buss, *supra*. In addition to these general issues regarding forum analysis, courts have also been resistant to extended forum analysis to the “school, curriculum, laboratory, and the classroom.” Bezanson & Buss, *supra*, at 1422.

265. *See, e.g.,* *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981).

faculty members in public colleges and universities and those in private institutions. Another issue involves the ability of institutions to alter the terms of these policies as a way to restrict the academic freedom rights of faculty members. An additional question relates to whether relying on institutional speech policies for First Amendment academic freedom purposes would elevate other institutional policies to some sort of constitutional status.

In relation to contractual standards and institutional standards, while suggesting that academic freedom policies should trigger First Amendment concerns, I am not necessarily opposed to the contractual approach and view it as an option with merit to blunt the potential impact of *Garcetti*. To strengthen the connection between institutional academic freedom policies and contractual obligations to faculty members, some advocates support the insertion of language in contracts or collective bargaining agreements which would emphasize this relationship.<sup>266</sup> While not addressing the issue at length, I suggest, however, that some difficulties might arise with reliance on contract principles. One potential pitfall is that institutions would be able to tweak the language in individual contracts or of small numbers of faculty members without drawing as much attention as an alteration to an institution-wide policy. This might be especially true for faculty members who fill contingent teaching positions.

Another potential problem is that courts, in applying the *Garcetti* standards, may not look to such policies as raising a legal impediment through contractual principles. In *Hong*, for instance, the court referred to official institutional policies concerning teaching, research, and service to describe the official employment duties of faculty members broadly.<sup>267</sup> But the court seemingly ignored institutional policy statements that referred to academic freedom standards for faculty members in carrying out their employment duties.<sup>268</sup> The court did not find such language regarding

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266. Peter Schmidt, *Under Multiple Assaults, Academic Freedom is Poorly Defended, Scholars Warn*, CHRON. HIGHER EDUC., June 22, 2009, available at <http://chronicle.com/article/Under-Multiple-Assaults-Ac/444498>. The article, covering an AAUP conference on academic freedom and shared governance, notes how Richard J. Peltz, a professor of law at the University of Arkansas at Little Rock, sought to have additional language added to faculty contracts to cover faculty speech related to intramural issues such as student advising. *Id.*

267. *Hong v. Grant*, 516 F. Supp. 2d 1158, 1166–67 (C.D. Cal. 2007).

268. See, for example, UNIV. OF CAL. OFFICE OF THE PRESIDENT, ACADEMIC PERS. MANUAL 010, (1995), available at <http://www.ucop.edu/acadadv/acadpers/apm/apm010.pdf>, which states:

The University of California is committed to upholding and preserving principles of academic freedom. These principles reflect the University's fundamental mission, which is to discover knowledge and to disseminate it to its students and to society at large. The principles of academic freedom protect freedom of inquiry and research, freedom of teaching, and freedom of expression and publication. These freedoms enable the University to advance

academic freedom important to mention when describing a faculty member's official employment duties. Despite noting some potential problems, I am not suggesting these kinds of concerns are insurmountable, only that viewing academic freedom policies as limited to contractual concerns may make it easier and/or more likely for institutions to weaken possible legal protections otherwise provided through such policies.

The issue of creating differences in the legal treatment between public and private institutions is also one reason to rely on contractual principles. Byrne, as pointed out, has argued that avoiding such distinctions between faculty members at public and private colleges and universities is one mark against individual academic freedom.<sup>269</sup> As discussed previously, however, significant differences may exist in the type of institutional academic freedom possessed by public and private institutions.<sup>270</sup> Institutional protection for academic freedom as a mechanism to protect ultimately the academic freedom of individual faculty members may fall short in relation to public colleges and universities. These institutions may not be able to assert institutional academic freedom as the kind of shield from external interference Byrne envisions.

Besides the fact that important differences may exist between constitutional academic freedom for public and private institutions in relation to state government, public colleges and universities may also face pressure from external governmental actors because of their state-supported status, which is not present at private institutions. Legislators, for instance, may be more likely to assume a prerogative, with some justification, to affect the internal operations of a public college or university. Thus, these institutions might possess less constitutional protection for institutional academic freedom to protect their faculty members but then also be subject to more external pressure from state governmental actors. Giving a constitutional dimension to the academic policies and standards at public institutions which protects individual academic freedom provides one

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knowledge and to transmit it effectively to its students and to the public. The University also seeks to foster in its students a mature independence of mind, and this purpose cannot be achieved unless students and faculty are free within the classroom to express the widest range of viewpoints in accord with the standards of scholarly inquiry and professional ethics. The exercise of academic freedom entails correlative duties of professional care when teaching, conducting research, or otherwise acting as a member of the faculty.

*Hong*, of course, dealt with a First Amendment analysis, and the court did not engage in a contractual analysis regarding these policies. Perhaps one lesson from cases such as *Hong* and *Renken* is that faculty claimants need to raise contractual claims based on academic freedom policies when challenging regulation of faculty speech under *Garcetti*. Another potential message is that faculty members may need to make sure that such academic freedom statements are clearly incorporated into faculty contracts as a matter of standard practice or into collective bargaining agreements.

269. Byrne, *supra* note 27, at 299.

270. See *infra* Part IV.B.

avenue to counterbalance some of these forces.

Another issue deals with the ability of colleges and universities to alter their academic freedom policies and standards, and this also raises an interesting point. Holding aside the fact that other constitutional grounds may exist to protect individual academic freedom independent of such policies, there are good reasons to think that institutions would not lightly seek to alter their academic freedom policies. I do not assume that institutions are run by officials actively seeking to subvert the intellectual freedom of professors. Instead, a premise of the article is that most institutional officials and officers generally support the academic freedom of individual professors. I am viewing the policies as a safeguard to protect individual faculty members when the normal operation of the peer review system has gone awry.

Beyond this general institutional support for individual academic freedom, however, several other factors would also likely make institutions hesitant to repeal or revise significantly their academic freedom standards. Byrne and Horowitz highlight the importance of colleges and universities adhering to accepted professional norms and standards as a condition of receiving constitutional academic freedom for institutional decisions.<sup>271</sup> A college or university that strays from its academic freedom policies and standards has arguably lost a major justification to rely on institutional academic freedom under the First Amendment. Additionally, a school that has retreated from academic freedom for individual faculty members would lose not only institutional prestige but also diminish its ability to attract and retain high quality academic talent.

As an additional matter, vesting institutional academic freedom policies with a constitutional dimension does not automatically elevate all other institutional policies to some kind of constitutional significance. I suggest that the close relationship of these policies to speech and academic freedom, areas clearly touching on matters of First Amendment concern, raise particular constitutional issues, ones not necessarily present with other types of institutional policies and standards. In particular, institutional academic freedom policies could provide something of a constitutional counterbalance to the *Garcetti* standards in public higher education, where the decision's standards appear ill suited to apply to faculty speech. In a more general sense, I am suggesting that at least one avenue to construct a sensible exception to *Garcetti* could come from recognizing that a public employer (a college or university for purposes of this article) may waive some or much of its autonomy over employee speech. This waiver of employer control over speech could be viewed as the constitutional trigger that permits an institution's academic freedom policies to have constitutional significance.

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271. Byrne, *supra* note 27, at 308; Horowitz, *supra* note 172, at 1518.

Public colleges and universities have adopted official policies and standards, based on accepted professional norms in higher education, that encourage faculty members to speak as independent voices. In *Garcetti*, the Supreme Court simply did not consider the potential constitutional implications of such an official employee speech policy. Once a public college or university has sought to encourage faculty speech, essentially creating a sort of free speech zone for professors, it should not then be allowed arbitrarily to select favored and disfavored speech. Viewing institutional academic freedom policies as triggering constitutional protection for faculty speech and preventing application of the *Garcetti* standards recognizes that schools have not hired professors to serve simply as institutional spokespersons. *Garcetti* is premised on the notion that public employees are speaking for their employers,<sup>272</sup> but faculty members are hired because of their educational background and special expertise to engage in independent thought and speech.<sup>273</sup>

In relation to government speech cases and the view I am offering of faculty speech as distinct from that of many public employees, consideration of *Rust v. Sullivan*<sup>274</sup> is useful. In *Rust*, the Supreme Court upheld regulations that limited physicians and other employees in federally supported family planning facilities from giving information about abortion-related services as part of family planning counseling.<sup>275</sup> The Court held that the government could choose to favor a particular view when it was acting as the speaker:

The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.<sup>276</sup>

One way to consider application of the *Rust* principles to our discussion of institutional academic freedom policies and standards is to reflect on the case's outcome under an altered set of governmental regulations. What if the rules at issue had expressly encouraged physicians to provide

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

273. See, e.g., Areen, *supra* note 72, at 991–92 (“The job of faculty is to produce and disseminate new knowledge and to encourage critical thinking, not to indoctrinate students with ideas selected by the government.”); Jennifer Elrod, *Academics, Public Employee Speech, and the Public University*, 22 BUFF. PUB. INT. L.J. 1, 62 (2004) (stating that “the current version of the public employee speech doctrine . . . is an uncomfortable and uneven fit between the purposes of higher education and the principles of the First Amendment”).

274. 500 U.S. 173 (1991).

275. *Id.* at 177–78.

276. *Id.* at 193.



counseling related to family planning without restriction other than adhering to accepted professional standards, but government officials had then, with no prior warning, chosen to retaliate against physicians who, for our speculative purposes, had decided to provide information and counseling regarding adoption as one family planning option? The facts, of course, were not so in *Rust*, but such a scenario is much more akin to permitting colleges and universities to rely on *Garcetti* and cases like *Rust* despite the fact that faculty members have been offered an invitation through official institutional policy to engage in free speech, consistent with professional norms, in carrying out their employment duties.

Constitutional standards related to academic freedom and faculty speech should reflect the fact that public colleges and universities have voluntarily adopted policies and standards meant to safeguard and promote intellectual freedom for faculty members. Courts should take these policies and practices into account when assessing speech claims by faculty members, including the applicability of the *Garcetti* standards to faculty speech. Permitting institutional officials in an arbitrary manner to select favored and disfavored speech despite the existence of academic speech policies, rather than simply respecting the managerial prerogative, actually undercuts the roles and missions of public colleges and universities.

#### B. Academic Standards and Judicial Scrutiny of Individual Academic Freedom Claims

Giving more legal weight to the academic freedom policies and standards adopted by institutions could play a useful role as well in establishing standards for courts to follow when dealing with professors' speech claims. Some commentators have already looked to professional practices and norms and institutional missions as a basis to structure judicial inquiry into individual academic freedom claims. Accordingly, in addition to providing a potential justification for constitutional protection for individual academic freedom and limiting application of the *Garcetti* standards to faculty speech, institutional policies could provide guidance as well in crafting workable legal standards in relation to faculty speech claims.

Chen proposes a germaneness test for individual academic freedom, defining "germaneness as the degree or closeness of connection between an individual academic's speech or the state's interest in restricting that speech and a specifically articulated component of the university's academic mission."<sup>277</sup> For this approach to have "teeth," Chen states that public colleges and universities must develop their "academic mission interests as specifically as possible."<sup>278</sup> I suggest that the academic

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277. Chen, *supra* note 27, at 976.

278. *Id.* at 978. Rebecca Gose Lynch states that courts should engage in a

freedom policies adopted by numerous public colleges and universities provide an existing source to discern the relevancy or germaneness of an institutional regulation of faculty professional speech. These standards already represent an institutional commitment to adhere to the professional standards related to academic freedom commonly shared and accepted in higher education.

Vesting institutional policies with a certain degree of constitutional significance would not require courts to second guess professional judgments regarding faculty speech made in good faith. Courts would limit their inquiry to make sure that an institution has followed policies and practices already in place. Julie H. Margetta, for example, in contending that institutional academic freedom fails to adequately protect individual faculty members,<sup>279</sup> states that colleges and universities should have to satisfy such a “good faith” standard before being able to restrict the speech of professors.<sup>280</sup> She describes the proposed standard as similar to Byrne’s position regarding how institutions must function to merit institutional academic freedom.<sup>281</sup> Since many public institutions have adopted the AAUP’s standards on academic freedom, courts would not be faced with interpreting wildly divergent policies and practices among public institutions in making a “good faith” inquiry. This consistency in academic freedom policies among institutions provides a standardized framework for accepted professional standards and practices that would aid courts in evaluating whether an institution had acted in good faith in making decisions related to faculty speech.

As Matthew W. Finkin and Robert C. Post discuss, the AAUP’s committee charged with investigating academic freedom violations (known as Committee A)<sup>282</sup> “has systematically developed the principles of the 1915 *Declaration* by applying them to the circumstances of concrete cases. Its decisions have been carefully reasoned and have largely adhered to the rule-of-law discipline of *stare decisis*. Taken together, these decisions provide a rich and useful common law of academic freedom.”<sup>283</sup> It perhaps cannot be overemphasized that this article does not suggest that courts

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“functional necessity” approach in considering whether a college or university “regulation is necessary for the institution to achieve its objectives.” Comment, *Pawns of the State or Priests of Democracy? Analyzing Professors’ Academic Freedom Rights Within the State’s Managerial Realm*, 91 CAL. L. REV. 1061, 1074, 1078 (2003). While perhaps arguing for more of an inquiry than that called for by Chen, Lynch’s proposed standard still would seem to relate to an institution’s established mission and the academic freedom policies and practices it has adopted.

279. Julie H. Margetta, *Taking Academic Freedom Back to the Future: Refining the “Special Concern of the First Amendment,”* 7 LOY. J. PUB. INT. L. 1, 31 (2005).

280. *Id.* at 32–33.

281. *Id.*

282. FINKIN & POST, *supra* note 241, at 1, 48–52.

283. *Id.* at 6.

should displace the system of peer review established in higher education. Rather, this system provides a set of established standards to evaluate whether institutions have acted in good faith in following their voluntarily adopted statements and policies related to academic freedom. Finkin and Post point out how “academic freedom has assumed a surprising uniformity of meaning throughout the United States.”<sup>284</sup> The role of courts, then, would not be to supplant accepted professional standards, but to make sure that institutions had acted in good faith and followed commonly accepted academic freedom norms and practices when assessing a faculty member’s speech claim.

Looking to the widely accepted professional norms in higher education related to academic freedom that have been incorporated through institutional policies and practices would also help courts make useful legal distinctions in a good faith inquiry regarding faculty speech related to research and scholarship, to the classroom and teaching, or to intramural contexts such as that taking place in departmental meetings. In relation to scholarship, the peer review process requires institutions to make content-based judgments concerning the quality of a faculty member’s scholarship. Recognition of legal protection for scholarship-related speech would still permit institutions to make the kinds of content-based decisions that are integral to the peer review process and academic life.

Limitations on institutional discretion would arise when a college or university takes action against a faculty member based on his or her scholarship outside the normal channels of the peer review process. For example, a decision not to renew a professor’s contract because of displeasure with the faculty member’s research by an influential state legislator would not be permitted. At the same time, courts would not be placed in the position of second guessing good faith professional evaluations of scholarship that are part and parcel of the peer review process. As Byrne states, courts are not well suited to engage in such independent inquiries of academic speech, especially that related to scholarship,<sup>285</sup> but a standard based on ensuring that a college or university had followed accepted professional practices as voluntarily adopted in institutional policy would not place courts in such a position.

In the context of intramural speech, where institutions have already relied on *Garcetti* in responding to faculty speech claims,<sup>286</sup> academic freedom policies and shared governance statements adopted by numerous institutions suggest that faculty members should enjoy considerable protection for this category of speech. While institutions should arguably enjoy latitude in such matters as requiring a certain level of civility in

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284. *Id.* at 52.

285. *Id.* at 305–06.

286. See *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008); *Hong v. Grant*, 516 F. Supp. 2d 1158 (C.D. Cal. 2007).

intramural speech as an attribute of professional conduct, if a college or university has adopted policies that encourage faculty members to engage in open discourse in relation to an institution's internal affairs, then it should arguably not be able to rely on *Garcetti* once a faculty member has accepted the invitation to engage in free speech. The institution should not be able, after the fact, to withdraw an invitation to speak freely on intramural matters simply because it does not approve of the views expressed by a particular faculty member. Absent an important institutional interest, such as prohibiting abusive language that falls outside the boundary of acceptable professional behavior, the institution would not be able to punish faculty members for the content of their intramural speech.

The classroom environment and teaching-related speech represents a somewhat thornier context to establish a workable standard for courts to employ when faced with an individual academic freedom claim by a faculty member. Faculty members arguably should not have unilateral control over the classroom, at least from a constitutional perspective, and legitimate institutional interests should be recognized. Still, the policies and practices adopted by institutions could still provide courts with guidance on how to address academic freedom claims related to teaching and the classroom. As with other types of faculty speech, the key inquiry for courts would be to assess whether a college or university had followed its own policies and practices and adhered to the accepted professional norms that undergird such institutional policies.

Buss discusses that university policies and practices may create a classroom environment that is akin to a limited public forum for purposes of a faculty member's speech.<sup>287</sup> While this article does not take such a position, at a minimum, a faculty member's speech based on his or her professional expertise would seem most likely to garner protection. In assessing claims involving faculty speech in the classroom, courts could also recognize that in teaching-related matters, institutional interests merit considerable weight, even if professors have been granted substantial discretion under relevant institutional policies and standards. For instance, as in *Parate*, the court determined that the assigning of a grade represented a form of communication on the part of the professor, but still allowed the institution discretion to change a grade assigned by the professor.<sup>288</sup> Providing some degree of First Amendment protection for classroom speech by faculty members does not mean ignoring important institutional interests. Just as with faculty speech related to scholarship and intramural matters, though, public colleges and universities should be made to adhere to their own standards.

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287. William G. Buss, *Academic Freedom and Freedom of Speech: Communicating the Curriculum*, 2 J. GENDER RACE & JUST. 213, 276-77 (1999).

288. *Parate v. Isibor*, 868 F.2d 821, 827-28 (6th Cir. 1989).

Academic freedom policies indicate a public institution's intent to permit open dialogue, along accepted professional norms and practices, for its faculty members. These policies, resting on a commonly accepted set of academic values in higher education, provide a basis for courts to make an inquiry regarding whether an institution acted in good faith in relation to regulating faculty speech. Instead of substituting their own version of the peer review process, courts could limit their inquiry into making sure that a public college or university had honored an institutional commitment to respect standards of academic freedom that are commonly shared and embraced in higher education.

#### VI. CONCLUSION

First Amendment protection for academic freedom represents a contested issue, and the *Garcetti* decision further roiled the constitutional waters regarding individual academic freedom for professors at public colleges and universities. While some scholars and courts argue that the institution represents the appropriate concern of constitutional academic freedom, such a position may fail to protect sufficiently the intellectual freedom of faculty members at public colleges and universities, especially given the potential impact of *Garcetti*. This article suggests that courts should give greater legal consideration to the academic freedom policies and standards adopted by institutions as a basis to exclude faculty members at public colleges and universities from the purview of *Garcetti* and to provide some degree of First Amendment protection for faculty speech.

Rather than second guessing the peer review process and good faith academic decisions by schools, courts would inquire whether a public college or university had adhered to standards voluntarily adopted by the institution. Given the widespread acceptance by colleges and universities of a common set of professional norms related to academic freedom, courts would not be faced with construing widely divergent standards. Drawing upon notions of academic freedom commonly shared in higher education, courts would assess whether a college or university had in acted in good faith in making decisions related to a faculty member's speech.