

Academic Freedom and Professorial Speech in the Post-*Garcetti* World

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I. INTRODUCTION

Academic freedom, a coveted feature of higher education, is the concept that faculty should be free to perform their essential functions as professors and scholars without the threat of retaliation or undue administrative influence. The central mission of an academic institution, teaching and research, is well served by academic freedom that allows the faculty to conduct its work in the absence of censorship or coercion. In support of this proposition, courts have long held that academic freedom is a special concern of the First Amendment, granting professors and faculty members cherished protections regarding academic speech.

As early as 1957, in *Sweezy v. New Hampshire*,¹ and as recent as 2006 in *Garcetti v. Ceballos*,² the Supreme Court has grappled with clarifying academic-freedom protections. In *Garcetti*, the Supreme Court held that when public employees make statements in the course of performing their official duties, they are not insulated by the Constitution from employer discipline.³ Pursuant to *Garcetti*, it becomes plausible that a faculty member's expression or speech, at least at a public college or universi-

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

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

3. *Id.* at 421.

ty, would not be entitled to constitutional protection under the First Amendment and may be the basis for disciplinary action. The ramifications could be significant for academics who speak and write in the course of performing their official job duties. In the majority opinion, however, Justice Kennedy attempted to set aside such concerns by stating that the *Garcetti* holding may not forestall *some* constitutional protection for professorial speech.⁴ But the majority opinion only implicates academic scholarship and classroom instruction as perhaps deserving of constitutional protection.

At the outset, this article recounts the *Garcetti* majority opinion and the accompanying opinions offered by the dissenters. Secondly, the article explores the meaning of academic freedom for individual academics and faculty as expressed through various judicial decisions, including the post-*Garcetti* case law, as well as other higher education advocates. Next, the article delves into the complexity of academic speech and some intriguing contemporary examples. Finally, the article discusses the challenges confronting academic-freedom protections going forward and the opportunity created by the Supreme Court's decision in *Garcetti*. In sum, this article seeks to address the current state of individual academic freedom at America's colleges and universities.

II. A VIEW OF THE *GARCETTI* DECISION

In *Garcetti v. Ceballos*, Richard Ceballos, a public employee working as a deputy district attorney for the Los Angeles County District Attorney's Office, became embroiled in a dispute with his supervisors regarding the contents of an affidavit that was used to obtain a search warrant critical to a criminal prosecution.⁵ Ceballos believed that the affidavit included various inaccuracies and misrepresentations and concluded that the criminal case should be dismissed after receiving an unsatisfactory explanation for the inaccuracies from the warrant affiant, a Los Angeles County deputy sheriff.⁶

Further, Ceballos submitted his memo and findings to his supervisors, which resulted in a heated discussion about the search warrant and the merits of the criminal case.⁷ Despite Ceballos's contrary recommendation, the criminal prosecution proceeded.⁸ The defense attorney for the accused filed a motion challenging the search warrant, and Ceballos was

4. See generally *id.*

5. *Id.* at 413.

6. *Id.* at 414.

7. *Id.*

8. *Id.*

called by the defense to testify regarding the deficiencies within the search warrant.⁹ Subsequently, Ceballos claimed that he was subject to a string of retaliatory employment actions that included an unwanted reassignment and transfer, as well as the denial of a promotion.¹⁰ Ceballos responded by filing a grievance and eventually suing the District Attorney's Office for violation of his First and Fourteenth Amendment rights.¹¹

The District Attorney's Office argued that Ceballos's memo was not protected speech under the First Amendment because the memo was written pursuant to his employment duties.¹² The district court agreed, granting defendant's motion for summary judgment.¹³ On appeal, the Ninth Circuit reversed, holding that Ceballos's memo was protected speech under the First Amendment pursuant to the reasoning set out in *Pickering v. Board of Education*¹⁴ because the memo concerned speech regarding a matter of public concern, i.e., alleged government misconduct.¹⁵ The court of appeals did not address whether the speech was made in Ceballos's capacity as a private citizen or public employee.¹⁶ On certiorari before the Supreme Court, Justice Kennedy, writing for the majority in the 5–4 decision, reversed, stating the following: “We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”¹⁷

Justice Kennedy indicated that Ceballos wrote the memo because that was within the scope of his employment.¹⁸ “The fact that his duties sometimes required him to speak and write does not mean his supervisors were prohibited from evaluating his performance.”¹⁹ Further, the majority observed that job-related expressions outside of a public employee's official duties were protected by the First Amendment, such as informed opinions that may be offered by a teacher to a school board on matters related to school operations.²⁰

9. *Id.* at 414–15 (the trial court rejected the challenge of the warrant by the defense attorney).

10. *Id.* at 415.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Pickering v. Bd. of Ed.*, 391 U.S. 563 (1968).

15. *Garcetti*, 547 U.S. at 416.

16. *See id.*

17. *Id.* at 421.

18. *Id.* at 422.

19. *Id.*

20. *Id.*

The Court's opinion included dissenting responses from Justices Stevens²¹ and Breyer,²² with a more extensive response from Justice Souter.²³ Although briefly discussed, Justice Stevens disagreed with the notion that a categorical difference existed between speaking as a citizen and speaking in the course of one's employment.²⁴ Stevens found it immaterial whether a public employee's speech was made pursuant to one's job duties.²⁵ Relying on the Court's decision in *Givhan v. Western Line Consolidated School District*, wherein concerns raised by a teacher about a school district's racist employment practices were entitled to First Amendment protection, Stevens announced that a new rule dependent on a job description was senseless and misguided.²⁶

Justice Breyer's dissenting opinion took note of the complexity that beset free speech concerns for public-sector employees and employers generally, and contended that the degree of First Amendment protection afforded public employees will differ based on the category of speech at issue.²⁷ Breyer was unable to join the majority, however, because it held that public employees speaking pursuant to their official duties are never insulated from employer discipline.²⁸

Finding this position too narrow, Breyer explained that *Pickering* balancing—weighing an employee's free speech interests against an employer's interests in promoting efficient public service operations—should apply to public employee speech regarding matters of public concern made in the course of performing job duties.²⁹ Ceballos's position as a prosecutor and lawyer obligated him to share exculpatory evidence with defense counsel, thereby establishing a basis to protect speech offered in the course of performing his job as a deputy district attorney.³⁰ Breyer indicated that pursuant to *Brady v. Maryland*,³¹ Ceballos's memorandum was entitled to First Amendment protection, and because Ceballos was acting as a lawyer, his speech was subject to examination by canons of the profession that obviated the need for government authority to control the public employee's speech.³²

21. *Id.* at 426 (Stevens, J., dissenting).

22. *Id.* at 444 (Breyer, J., dissenting).

23. *Id.* at 427 (Souter, J., dissenting).

24. *Id.*

25. *Id.*

26. *Id.* (citing *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414–16 (1979)).

27. *Id.* at 444 (Breyer, J., dissenting).

28. *Id.* at 446.

29. *Id.*

30. *Id.*

31. *Brady v. Maryland*, 373 U.S. 83 (1963).

32. *Garcetti*, 547 U.S. at 446 (Breyer, J., dissenting).

Further, Breyer endorsed *Pickering*, balancing on the facts presented in *Garcetti*, because professional and special constitutional obligations mandate protection for Ceballos's employee speech.³³ As a lawyer, Ceballos's speech was subject to regulation by canons of the profession.³⁴ Also, as a prosecutor, he was required by constitutional obligations to communicate with the defense regarding exculpatory evidence and scrutinize evidence relied upon by the government.³⁵ Based on these circumstances, Breyer held that First Amendment protection should be granted to such employee speech and that *Pickering* balancing should be applied.³⁶

Justice Souter, with whom Justice Stevens and Justice Ginsburg joined, offered a third dissenting opinion indicating that the reach of the majority's holding went too far by categorically discounting public employee speech.³⁷ Agreeing that a government employer has a substantial interest in effectuating its policy objectives, Souter observed that employee speech is not entitled to absolute First Amendment protection.³⁸ Thus, employee speech that represents a distraction or obstacle to the implementation of lawful public policy may be correctly denied First Amendment protection.³⁹ Contrary to the majority's view, however, Souter argued that *Pickering* balancing was the proper approach to determine eligibility for First Amendment protection when an employee speaks critically about his or her employer.⁴⁰

Souter took specific issue with the categorical bar to First Amendment protection for statements made in the course of performing official job duties by stating the following:

[T]here is no adequate justification for the majority's line categorically denying *Pickering* protection to any speech uttered 'pursuant to . . . official duties' As all agreed, the qualified speech protection embodied in *Pickering* balancing resolves the tension between individual and public interests in the speech, on the one hand, and the government's interest in operating efficiently without distraction or embarrassment by talkative or headline-grabbing employees.⁴¹

33. *Id.* at 447.

34. *Id.*

35. *Id.*

36. *Id.* at 446–47.

37. *Id.* at 427 (Souter, J., dissenting).

38. *Id.* at 428.

39. *Id.* at 429.

40. *Id.*

41. *Id.* at 430.

Souter, however, further explained that the feasibility of *Pickering* balancing is advanced by adjustments that would allow an employee to prevail only when speaking within the scope of his or her job duties on matters of unusual importance.⁴²

Also, Souter pointed to the majority's flawed belief that any public employee speech constitutes government speech, which requires espousal of a particular policy or substantive position, consistent with the Court's previous decisions in *Rosenberger v. Rector & Visitors of University of Virginia* and *Rust v. Sullivan*.⁴³ Souter, here, observed that Ceballos was not employed to broadcast a particular message.⁴⁴ Certainly, the Los Angeles County District Attorney had an interest in what Ceballos might say as a part of his job, but the speech uttered in the course of his job duties was not preset or prescribed as found in the *Rust* decision.⁴⁵ It is this expansive notion of government speech as a means of controlling or restricting public employee free expression that may have troubling consequences for public colleges and universities.⁴⁶

Souter further opined that the majority's holding in *Garcetti* posed a threat to academic freedom for public university professors who speak and write pursuant to their official job duties.⁴⁷ The majority's opinion found that the First Amendment does not protect speech or written expression by public employees uttered in the course of performing their jobs.⁴⁸ For college and university professors at public institutions, the Court's decision left open the question of whether academic freedom extended under the First Amendment protects faculty speech relative to teaching and scholarly activities, as well as assessments of administrative processes such as promotion, tenure, hiring, and the management of institutional resources.⁴⁹ Moreover, Souter took no comfort in the majority's argument that public employees may rely on state and federal whistleblower statutes, rather than the First Amendment, to remedy retaliatory disciplinary action unlawfully imposed by their supervisors as a con-

42. *Id.* at 435. Justice Souter listed matters such as "official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety" that would "weigh out in an employee's favor." *Id.*

43. *Id.* at 436 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Rust v. Sullivan*, 500 U.S. 173 (1991)).

44. *Id.* at 437.

45. *Id.* at 438.

46. *Id.*

47. *Id.* at 438.

48. *Id.* at 421 (majority opinion); see also *supra* text accompanying note 18.

49. Joan DelFattore, *To Protect Academic Freedom, Look Beyond the First Amendment*, THE CHRON. OF HIGHER EDUC. (Oct. 31, 2010), <http://chronicle.com/article/To-Protect-Academic-Freedom/125178/>.

sequence of job-related speech.⁵⁰ Referring to available whistleblower statutes as a “patchwork” of definitions and protections, Souter argued that whistleblower provisions were ill-equipped to address the concerns that would be raised by public sector employees.⁵¹

Arguably, *Garcetti* denies First Amendment protection to any public employee who speaks within the scope of performing official job duties. Faculty at public colleges and universities, however, enjoy academic freedom to express themselves on various academic and intellectual topics without the threat of censorship, intimidation, or adverse employment retaliation. Thus, a conflict may exist as to whether *Garcetti*’s application undermines academic freedom at colleges and universities. Justice Kennedy, perhaps in anticipating such conflict, indicated the following in the *Garcetti* majority opinion:

There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.⁵²

Thus, for those most concerned with *Garcetti*’s implication for higher education, the Court left uncertain whether academic freedom remains a special concern of the First Amendment and the scope of academic-freedom protections available to faculty. *Garcetti* strikes a strange chord in light of the Court’s well-settled position that faculty must remain free to pursue scholarship, teach, and “to gain new maturity and understanding.”⁵³ Such maturity and understanding is gained by speech and inquiry beyond the campus grounds without fear of reprisal or discipline for commentary that administrators or governmental officials find objectionable. At the same time, however, academic freedom cannot be a passcard for mayhem. The challenge is to sustain academic freedom without surrendering practical administrative controls.

Conceptually, the *Garcetti* dissenters appear to be correct when they recognize that categorically denying First Amendment protection to public employee speech uttered in the course of performing job duties is fraught with hazards. *Pickering* balancing, with or without adjustments, offers a well-reasoned, flexible method to resolve complex First

50. *Garcetti*, 547 U.S. at 439 (Souter, J., dissenting).

51. *Id.* at 440.

52. *Id.* at 425 (majority opinion).

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

Amendment claims because workplace speech and the right to free expression can hardly be understood without consideration of context or content, as well as the relative interests of the employee and employer. For professors at public colleges and universities, it may not be feasible to reconcile traditional academic freedom principles that encourage scholarly exploration on difficult and sometimes controversial topics with *Garcetti*'s categorical "official duties" reasoning.⁵⁴ Likewise, *Pickering* balancing, even given its virtues, may not be the proper approach for resolving delicate academic freedom concerns that may disrupt the important work performed by scholars and academics in American higher education. Thus, reconsideration of the analytical framework used to assess academic freedom and the First Amendment protection accorded academic speech is required.

III. WHAT IS ACADEMIC FREEDOM?

A. *The Meaning and Protections of Academic Freedom*

The meaning of academic freedom and the scope of any safeguards that flow from such freedom are the source of considerable debate.⁵⁵ Courts have observed that the term academic freedom is "often used, but little explained,"⁵⁶ and also have indicated that "[w]hile the exact parameters of the freedom are less than clear, it is evident that the freedom is intended only to prevent government action that 'cast[s] a pall of orthodoxy over the classroom.'"⁵⁷ Academic freedom is highly acclaimed in American higher education by academic faculty, students, and the educational institution itself as the freedom to engage in intellectual expression without censorship or fear of adverse retaliatory action.⁵⁸ Since the 1950s, courts have acknowledged that colleges and universities play a vital role in the development of our nation's citizenry and rely on academic freedom to create and maintain an environment conducive for intellectual discourse and learning.

From an institutional perspective, the meaning of academic freedom was perhaps best captured in the often-cited language from Justice

54. See *Garcetti*, 547 U.S. at 421.

55. See *Academic Freedom Is a Touchstone of a Democratic Society*, IRISH TIMES, Feb. 8, 2011; Robert Akerman, *Academic Freedom Isn't Necessarily a Federal Case*, ATLANTA J. CONST., Sept. 9, 1991.

56. *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000).

57. *Heublein v. Wefald*, 784 F. Supp. 2d 1186, 1199 (D. Kan. 2011) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

58. ERIC BARENDT, *ACADEMIC FREEDOM AND THE LAW: A COMPARATIVE STUDY* 2–3 (2010).

Frankfurter's 1957 concurrence in *Sweezy v. New Hampshire*.⁵⁹ In this landmark Supreme Court decision, which tested whether faculty academic speech was entitled to constitutional protection, Frankfurter declared that the "business of a university" depends on essential freedoms to foster an atmosphere for learning: "It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."⁶⁰

Thus, the impact of academic freedom permits colleges and universities to develop degree programs; retain faculty and staff; recruit and admit students; and distinguish their academic mission in the higher education community without compromise.

In a 1923 lecture, Harvard University professor Charles Homer Haskins described academic freedom as a professor's intellectual liberty—the right to teach truth as he or she sees it.⁶¹ In concert with academic-freedom protections that extend to the institution, academic freedom grants faculty substantial discretion regarding scholarship and teaching without the threat of reprisals or disciplinary action to influence their academic work. For professors and scholars, academic freedom allows autonomy regarding the selection of classroom content and determining how academic work shall be performed.⁶² As the activities performed by faculty expand beyond teaching and scholarly research, it is unclear whether academic freedom will protect all manner of faculty speech.⁶³

In resolving this uncertainty, academic freedom should not be understood as an isolated concept or self-serving proposition that protects the interest of academics without respect to the entire university community. For individual faculty, academic freedom must be viewed within the institution's organizational and operational framework. Colleges and universities are comprised of students, faculty, support staff, and administrators with stakeholders that include parents, elected officials, trustees, taxpayers, and private donors. In this context, faculty play a vital role in the institution, but academic freedom does not provide faculty with an unqualified license to free expression. Instead, academic freedom exists

59. *Sweezy v. New Hampshire*, 354 U.S. 234, 257 (1957) (Frankfurter, J., concurring).

60. *Id.* at 263.

61. See CHARLES HOMER HASKINS, *THE RISE OF UNIVERSITIES* (1957).

62. See Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907 (2006). Schauer's discussion on individual academic freedom points out the difficulty in asserting that academic freedom exists as a right but also observes the evidence of academic freedom in our jurisprudence. See *id.*

63. Gary A. Olson, *The Limits of Academic Freedom*, THE CHRON. OF HIGHER EDUC. (Dec. 9, 2009), <http://chronicle.com/article/The-Limits-of-Academic-Freedom/49354>.

to facilitate the scholarly and teaching functions performed by faculty and to allow faculty to express themselves freely on academic matters that are a central component of the college or university mission. Thus, for purposes of this article, academic freedom pertains to potential content-based restrictions on research, writing, and the viewpoints expressed in the classroom.

Besides the protections academic freedom provides faculty, it also distinguishes the faculty from administrators and support-staff members of the university community who do not enjoy academic freedom. Routinely, non-faculty personnel have an at-will relationship with the institution and may be dismissed without recourse. Less settled or obvious is whether faculty members who occupy administrative positions, in addition to a faculty appointment, remain entitled to academic-freedom protection and, if so, to what degree. Academics engaged in administrative work, depending on the nature and content of the work, may be entitled to academic-freedom protection. For example, faculty serving on a promotion and tenure decision-making committee may engage in legitimate academic speech that deserves academic-freedom protection. On the other hand, faculty engaged in administrative work on topics such as strategic planning, editorial boards, or fundraising and alumni affairs might be outside the scope of academic-freedom protection. In either case, academic-freedom protection hinges on the connection academic speech has to a particular scholarly or teaching concern.

The Supreme Court has repeatedly admonished courts to respect the academic judgment of university faculty and avoid second-guessing the professional judgment of faculty on academic matters.⁶⁴ Hence, the voice of the faculty has an important role in managing the academic affairs of the institution due to the unique skills they bring to the higher education enterprise. But, where faculty speech uttered while performing administrative duties does not entail a scholarly or academic context, academic-freedom protection would be misplaced.

Likewise, faculty “speech” that constitutes disruptive behavior, unduly interferes with the institution’s operations, creates a hostile environment, or includes profanity, threats, or racial or gender slurs might easily be deemed unworthy of academic-freedom protection. Where such

64. See *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985); *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1985); see also *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000) (arguing that academic freedom rests with the university, not the faculty).

speech has no value from a scholarly or pedagogical perspective, academic freedom is improper.⁶⁵

Also, it is worth noting that students enjoy a measure of academic freedom as well. For instance, among German universities, *Lehrfreiheit* acknowledges the right of students to attend any lecture and the absence of required courses.⁶⁶ Students have the freedom to study and learn free from harassment or unlawful discrimination but at all times, a student's scholarly status is subject to the faculty. Indeed, for the individual faculty, including full-time faculty, adjunct professors, lecturers, and research fellows, academic freedom provides substantial protections that center on their roles as teachers and scholars.

B. Academic Freedom As a Professional Construct

While academic freedom as a legal concept has garnered significant attention in the wake of *Garcetti* because of concern that the decision could lead lower courts to construe academic freedom in an increasingly limited manner, it is important to appreciate that academic freedom has been characterized and defined as a professional concept as well.⁶⁷ The formation and work of the American Association of University Professors (AAUP) ushered into American higher education a dynamic definition of academic freedom. The AAUP's 1915 *Declaration of Principles on Academic Freedom and Academic Tenure* and the 1940 *Statement of Principles on Academic Freedom* represented the earliest efforts to set out academic freedom as a focal point of American higher education and

65. See *Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir. 2001) (dealing with professor disciplined for vulgar and profane classroom speech that was not germane to the course subject matter).

66. See Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265 (1988).

67. See WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION: A COMPREHENSIVE GUIDE TO LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING* 615 (4th ed. 2007); see also Colleen M. Galambos, *Academic Freedom: A Right Worth Protecting*, J. SOC. WORK EDUC. (Jan. 1, 2010); Robert M. O'Neil et al., *Protecting an Independent Faculty Voice: Academic Freedom After Garcetti v. Ceballos*, ACADEME (Nov. 1, 2009); Encarnacion Pyle, *Christian Librarian Loses Suit vs. OSU*, THE COLUMBUS DISPATCH, (June 9, 2010); Katherine Wolfe, *U Pushes to Protect Faculty Freedom of Speech*, U-WIRE (Apr. 2, 2009). American colleges and universities were introduced to academic freedom as a professional concept as a result of the exposure many Americans received while earning graduate and doctoral degrees at universities in England, France, and Germany during the nineteenth century. In particular, German universities recognized academic freedom as *Lehrfreiheit*—the right of faculty to teach on any subject, and other concepts such as *Freiheit der Wissenschaft*—freedom of scientific research. According to noted historian Professor Walter P. Metzger, “[b]etween 1870 and 1900, some eight thousand American college graduates had flocked to German universities for advanced instruction in a variety of disciplines, and many had returned convinced that the Germans’ concept of academic freedom held the key to their cynosure achievements and should be transplanted onto American soil.” Metzger, *supra* note 66, at 1267–72.

the academic profession.⁶⁸ The 1915 *Declaration* identifies three elements of academic freedom: “[F]reedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action.”⁶⁹

The joint 1940 *Statement of Principles on Academic Freedom and Tenure* issued by the AAUP and the Association of American Colleges and Universities sought to define the role of faculty in American higher education beyond the typical master-servant relationship, recognizing academic freedom as essential for scholars to pursue truth and serve society.⁷⁰ Moreover, the 1940 *Statement* indicated that college and university teachers remain free to speak and write as private citizens, but as scholars they should remain aware that their utterances may be judged by the public.⁷¹ “Hence, [faculty] should at all times be accurate, should exercise appropriate restraint, should show respect for opinions of others, and should make every effort to indicate that they are not speaking for the institution.”⁷²

Subsequently, the AAUP attempted to refine its position as to extramural speech in the 1964 *Committee A Statement on Extramural Utterances*. In pertinent part, this 1964 statement provides:

The controlling principle is that a faculty member’s expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member’s unfitness for his or her position. Extramural utterances rarely bear upon faculty member’s fitness for the position. Moreover, a final decision should take into account the faculty member’s entire record as teacher and scholar.⁷³

While the AAUP and its collaborative work with the Association of American Colleges and Universities represent the collective voices of faculty members at the nation’s premiere institutions of higher education, the pressing questions raised by these efforts throughout the twentieth century appear to be two-fold: “uncertainty as to what academic freedom

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

69. AM. ASS’N OF UNIV. PROFESSORS, GENERAL REPORT OF THE COMMITTEE ON ACADEMIC FREEDOM AND ACADEMIC TENURE 393 (1915).

70. JOAN DELFATTORE, KNOWLEDGE IN THE MAKING: ACADEMIC FREEDOM AND FREE SPEECH IN AMERICA’S SCHOOLS AND UNIVERSITIES 219 (2010).

71. See AM. ASS’N OF UNIV. PROFESSORS, *1940 Statement of Principles on Academic Freedom and Tenure*, in AAUP POLICY DOCUMENTS & REPORTS 3 (1940) [hereinafter *1940 Statement*].

72. *Id.*

73. See Am. Ass’n of Univ. Professors, *Committee A Statement on Extramural Utterances*, 51 AAUP BULL. 29 (1965), reprinted in AAUP Policy Documents and Reports (1968), available at <http://www.aaup.org/report/committee-statement-extramural-utterances>.

is” and “if faculty do not know what academic freedom is, who does?”⁷⁴ The AAUP has remained an important defender of academic freedom rights for faculty, and courts have relied on the policy statements issued by the AAUP in numerous judicial opinions. For almost 100 years, the AAUP has stood as an important voice in the higher education community, advocating a broad interpretation of academic freedom. But there is evidence that the AAUP has had its share of failures, as observed by Ellen W. Schrecker.⁷⁵ Her writing regarding academic freedom during the McCarthyism era indicated a troubling willingness at local AAUP chapters to avoid academic freedom cases involving individual faculty members. Schrecker addressed the AAUP’s practice during this period:

It was the Association’s standard policy that once a complaint had been received, jurisdiction over the case would immediately shift to Committee A and the national office. The wisdom of such a policy was obvious: local people were often too close to the individuals involved to preserve the detachment necessary for an impartial investigation. In addition, as was demonstrated at many schools where violations of academic freedom occurred, the members of the AAUP were reluctant to confront their administration.⁷⁶

While the AAUP remains a leading voice given the wide array of stakeholders that colleges and universities must account for, including the government and the private sector, the importance of academic freedom is a priority for an increased number of academic groups such as the Society for American Law Teachers (SALT), the American Association for Law Schools (AALS), the American Library Association (ALA), the American Sociological Association (ASA), and various other organizations. In sum, the meaning of academic freedom may remain difficult to define, but the AAUP stands as one of many advocates for academic speech protections going forward.

C. Reflective Academic Freedom Legal Precedent

Perhaps the darkest period in American history for faculty members, academics, and scholars at colleges and universities was the McCarthy era.⁷⁷ During the 1950s, the U.S. political landscape was con-

74. ELLEN W. SCHRECKER, *NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES* 13 (1986) (discussing the 1953 debate among academics at Wesleyan University in Middletown, Connecticut on academic freedom and responding to the U.S. Congressional House Un-American Activities Committee).

75. *Id.* at 318.

76. *Id.*

77. *See generally* SCHRECKER, *supra* note 74.

sumed with the prosecution of those engaged in “un-American activities.”⁷⁸ Known as McCarthyism in recognition of Senator Joseph McCarthy’s vehement opposition to communism, state and federal officials led the nation’s charge against ideological and practical threats to democracy and national security. Among those caught up in the whirlwind of suspicion of un-American, unpatriotic behaviors were higher education faculty members.⁷⁹ For scholars and professors at American colleges and universities, the legal meaning of academic freedom would be seriously examined as a constitutional matter for the first time. Moreover, the legal question as to whether the First Amendment sustained academic freedom as a constitutional protection would remain a perplexing constitutional question for years to come.⁸⁰

The challenge of understanding a contemporary judicial meaning of academic freedom requires appreciation of the treatment courts have historically extended this seemingly murky subject. For instance in 1951, a University of New Hampshire faculty member was subject to a state attorney general investigation intended to determine whether his class lectures and activities violated the New Hampshire Subversive Activities Act in *Sweezy v. New Hampshire*.⁸¹ The New Hampshire law declared subversive organizations unlawful, and persons in subversive activities (i.e., subversive persons) were disqualified from employment at public educational institutions.⁸² In *Sweezy*, the petitioner-faculty member appeared in two hearings as part of the attorney general’s investigation to identify subversive persons within state government.⁸³ At both hearings, the faculty member declined to answer questions about his alleged contact and involvement with the Communist Party or any program that might seek the overthrow of the government.⁸⁴ In particular, the faculty member refused to answer questions about the Progressive Party or the Progressive Party of America and its members, and refused to answer questions regarding a lecture given to students in a humanities course.⁸⁵

78. *Id.* at 3.

79. J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251, 294 (1989) (examining the First Amendment’s impact on the concept of academic freedom).

80. Constitutional principles of academic freedom were developed in two periods. The 1950s and 1960s involved cases on faculty and institutional freedom interference from external governmental bodies. By contrast, the 1970s and 1980s focused on faculty freedom from institutional intrusion. See KAPLIN & LEE, *supra* note 67, at 615.

81. See *Sweezy v. New Hampshire*, 354 U.S. 234, 236 (1957).

82. *Id.*

83. See *id.* at 239, 243.

84. *Id.*

85. *Id.* at 244.

The attorney general's questions were intended to determine whether the faculty member was indeed a subversive person as defined by New Hampshire law.⁸⁶ Sweezy refused to answer the questions propounded by the attorney general because the questions were not pertinent to the matter under inquiry, and the questions infringed upon an area protected under the First Amendment.⁸⁷ Subsequently, the faculty member was brought before the New Hampshire Superior Court to answer these questions; he again refused and was held in contempt.⁸⁸ The New Hampshire Supreme Court affirmed that decision.⁸⁹ On certiorari, the U.S. Supreme Court reversed the lower court, finding that Sweezy was denied due process as guaranteed by the Fourteenth Amendment.⁹⁰

The Court found that the faculty member's rights to lecture and associate with others were constitutionally protected freedoms that had been abridged by the attorney general's investigation.⁹¹ "We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression"⁹² Further, the Court characterized the necessity for academic freedom at American universities as "self-evident" based upon the "vital role in a democracy that is played by those who guide and train our youth."⁹³ It is worth noting that the Court's focus here is fixed not on the generalized entity that is the college, university, or institution, but rather on "those who guide."⁹⁴ Holding that the Bill of Rights acts as a safeguard that bars invasion of the petitioner's academic liberties, the Court declined to place what it referred to as a straitjacket on intellectual leaders at American colleges and universities.⁹⁵ To do so, the Court appeared to surmise, would have tremendous consequences: "Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, *to gain new maturity and understanding*; otherwise our civilization will stagnate and die."⁹⁶

Expanding on the majority's holding, Justice Frankfurter offered a concurring opinion that characterized the scope of academic freedom and

86. *Id.* at 246.

87. *Id.* at 244.

88. *Id.* at 244–45.

89. *Id.* at 245.

90. *Id.* at 254–55.

91. *See id.*

92. *Id.* at 250.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* (emphasis added).

its importance to democracy.⁹⁷ Acknowledging that the petitioner/faculty member had a constitutionally guaranteed right to lecture, Frankfurter indicated that New Hampshire's justification for the intrusion was *grossly inadequate*.⁹⁸ In particular, the state's reliance on evidence that the petitioner was a Socialist affiliated with anti-American groups and co-editor of an article sympathetic to non-capitalist countries failed to justify the government's intrusion on the petitioner's intellectual freedoms.⁹⁹ Further, the concurring opinion made clear that there was a compelling reason to reverse the judgment of the New Hampshire courts because the intrusion made by the state's attorney general represented the kind of evil that may erode the spirit of free inquiry that is necessary to sustain a university.¹⁰⁰

Relying on arguments advanced by academic leaders from Johns Hopkins University and Harvard University, Frankfurter compares thoughts and actions that are academic and political, and deems both presumptively immune from inquisition by political authority.¹⁰¹ Also, finding that university activities regarding the pursuit of knowledge must be left as unfettered as possible, the concurrence stated: "Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling."¹⁰² Hence, although the Court's decision denounced intrusions not by university administrators, but off-campus governmental officials, the Court's decision affirmed the nation as a progressive society and academic freedom as a presumptive shield against government intrusion. The decision took great care to point out the importance of democracy and teaching to the development of youth, and the harm that may result from an invasion of academic freedom.

In a similar case, in *Keyishian v. Board of Regents*,¹⁰³ faculty members at the State University of New York, formerly the University of Buffalo, argued that a condition of their employment contracts allowing removal for seditious statements or acts was unconstitutionally vague.¹⁰⁴

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

98. *Id.* at 261 (emphasis added).

99. *Id.*

100. *Id.* at 262.

101. *Id.*

102. *Id.*

103. See *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).

104. *Id.* at 596–98 (the conditions emerged from the Feinberg Law, which was intended to enforce provisions of certain New York statutes (§§3021 and 3022 of the Education Law and § 105 of the Civil Service Law), that found dismissal proper for treasonable or seditious utterances, or advocating the overthrow of government by force, violence, or any unlawful means).

The faculty members (appellants) had refused to sign a certificate disavowing Communist ties before the State University implemented new provisions in their employment contracts.¹⁰⁵ The new contract provisions, statute §§ 3021 and 3022 of the Education Law and § 105 of the Civil Service Law, would presumptively disqualify one from public sector employment as a university professor for mere membership in or association with a group defined as a subversive organization.¹⁰⁶ Further, disqualification could not be rebutted by showing non-active membership or the absence of intent to pursue unlawful aims.¹⁰⁷

The Court explained that language stating that “seditious” or “treasonable” acts pose certain danger to First Amendment freedoms was left ill-defined.¹⁰⁸ The New York law relied upon for purposes of the university’s plan applied virtually no limits to what might be meant as seditious utterances or acts.¹⁰⁹ In support of the appellants’ view—that the university plan designed to prevent hiring and retention of persons committed to subversive behavior was unconstitutionally vague—the Court observed that where academic freedom may be stifled, precision in communicating that expression or speech that is not protected is necessary.¹¹⁰ Faculty can and ought to police their classroom speech as well as ideas and views they express in the larger marketplace.¹¹¹ For the individual faculty member, this may create a challenge if objectionable utterance and expression are defined by abstractions.¹¹² In this case, the Court found that the State University of New York had a legitimate interest—protecting the educational system from subversion—but that the approach utilized was unconstitutionally vague.¹¹³

The very intricacy of the plan and the uncertainty as to the scope of its proscriptions make it a highly efficient *in terrorem* mechanism. It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery The result must be to

105. *Id.* at 592.

106. *See id.* at 594.

107. *Id.* at 608 (noting that disqualification could only be rebutted by denying membership, denying that the organization advocated overthrow of the government by force, or denying that the teacher had knowledge positions advocated by the group).

108. *See id.* at 598–99.

109. *Id.* at 599.

110. *Id.*

111. *See id.*

112. *Id.*

113. *Id.* at 601 (citation omitted).

stifle ‘that free play of the spirit which all teachers ought especially to cultivate and practice’¹¹⁴

Put another way, the Court found that the university’s approach to eradicating subversion could be viewed as having a chilling effect that stifled the “free play of spirit” and fundamental personal liberties upon which academic freedom depends.¹¹⁵ Moreover, the Court was compelled to strike down the State University of New York program as unconstitutionally vague for practical reasons as well:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the *First Amendment*, which does not tolerate laws that cast a pall of orthodoxy over the classroom.¹¹⁶

The individual faculty member serves as a resource for the academic process. However, academic employment should not be contingent on the forfeiture of constitutional liberties. Acceptance of such tenets would undermine the mission of American higher education and place an intellectual ban on the development of our country’s leadership. Our jurisprudence has rejected such an approach and protects the liberty rights of faculty in the interests of freedom, democracy, and preparation of the future citizenry.¹¹⁷

The U.S. Supreme Court’s decisions in *Sweezy* and *Keyishian* support the freedom of individual faculty members to pursue associations or activities guided by their intellectual interests. These decisions acknowledge the importance that the individual faculty member maintain the freedom to pursue intellectual matters at his or her discretion without fear of reprisal and the harm that might result from stifling free expression. Subsequent decisions have also embraced the viewpoint that faculty should be extended significant discretion.¹¹⁸ Moreover, our jurisprudence does not dismiss the place of the educational institution. “Academic freedom thrives not only on the independent and uninhibited exchange of

114. *Id.* (Frankfurter, J., concurring) (emphasis added) (quoting *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952)).

115. *Id.*

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

117. *See* *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff’d*, 326 U.S. 1 (1945) (the Nation’s future depends on training future leaders); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (freedom at American universities require that teachers and students remain free to inquire, study, evaluate, and gain new understanding, or our civilization will die).

118. *See* *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 96 n.6 (1985) (Powell, J., concurring) (stating that faculty members must have wide discretion to make judgment about academic performance).

ideas among teachers and students . . . but also, and somewhat inconsistently, on autonomous decision making by the academy itself.”¹¹⁹

In *NLRB v. Yeshiva*,¹²⁰ the Court addressed whether full-time faculty functioned as supervisory and managerial employees entitled to collectively bargain under the National Labor Relations Act (NLRA).¹²¹ The National Labor Relations Board (Board) granted the Yeshiva University Faculty Association (Union) petition for certification allowing the Union to organize as a collective bargaining unit.¹²² The university, however, refused to bargain with the Union, arguing that the faculty members were managerial employees and thus excluded from the benefits of the NLRA.¹²³ The Court of Appeals for the Second Circuit agreed with the university, denying the petition, and the U.S. Supreme Court affirmed.¹²⁴ In discussing the scope of the faculty’s role in the modern university, the Supreme Court recognized that the question of whether faculty employees were managerial personnel was dependent on how a faculty is structured and operates.¹²⁵ Also, the Court’s decision was influenced by the belief that notions of shared authority and collegiality often involve faculty participation in academic and non-academic matters such as personnel decisions, student affairs, and campus facilities.¹²⁶ Are faculty members entitled to academic freedom regarding non-academic tasks performed in the course of their academic employment? Obviously, the scope of protections provided by academic freedom may be viewed as identifying those professorial functions that are highly valued versus those activities that are not. For this reason, academic freedom is and has remained a treasured asset for college and university professors.

1. Balancing Faculty and Institutional Interests

Whether the *Garcetti* holding undermines academic freedom for faculty speech regarding teaching, research, or related service activities is the critical question going forward. A general decision that First Amendment protection does not extend to the speech of public-sector

119. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (holding that student’s dismissal from combined undergraduate medical education program was not arbitrary and capricious because university engaged in conscientious and careful deliberations despite his assumed property interest in the program) (citation omitted).

120. *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980).

121. *Id.*

122. *Id.*

123. *Id.* at 679.

124. *Id.*

125. *Id.* at 680.

126. *Id.* at 677.

employees offered in performance of their official job duties would strike a tremendous blow to professorial expression at public colleges and universities. Without more guidance from the Supreme Court, *Garcetti*'s impact on academic speech may be difficult to determine.

Garcetti arguably impacts academic freedom from three plausible perspectives. First, *Garcetti* could be viewed as categorically underestimating the corrosive effect the "official duties" test might have on academic-freedom protections because a faculty member's official duties include core speech activity, such as scholarship and teaching. Second, *Garcetti* could be seen as the Court's continuing effort to elevate the public employer's interest in workplace efficiency while being almost dismissive of academic speech and its complexities. In either case, understanding academic or professorial speech is essential to distinguishing the work performed by college professors from that of other public sector employees. Finally, *Garcetti* may usher in an era that may advance academic freedom for core academic functions while assessing the scope of academic-freedom protection provided to faculty performing administrative work as part of their official duties on a case-by-case basis.

The official duties of a public university professor or academic are distinguishable from those performed by other public-sector employees. While sharing expertise and counseling others may represent the full-range of job responsibilities performed by some public-sector employees, this is just the beginning for a faculty member in American higher education. The college professor's job duties are varied and often defy a simple explanation. The day-to-day tasks and responsibilities of a professor might routinely include classroom teaching, advising students and colleagues, scholarly research, preparing manuscripts for publication, symposia participation, committee service, faculty governance, public speaking, media communications, as well as the numerous foundational activities that underlie these tasks. The varied nature of the activities on this list hint at the complexity involved in actually determining a faculty member's "official job duties." As Justice Kennedy indicated in the *Garcetti* majority opinion, however, the proper method of determining an employee's job duties relies on a practical inquiry.¹²⁷ But that inquiry can be complex for academics due to the nature of academic speech. Recently, scholars have discussed the broad reach of professorial free speech rights:

The right to speak freely on matters of public concern most obviously covers the extramural speech of professors when, for exam-

127. *Garcetti v. Ceballos*, 547 U.S. 410, 424–25 (2006).

ple, they publish in newspapers, appear on television or write blogs to comment on matters of current political debate. But it may also cover intramural speech, commenting on the administration of their universities or criticizing [sic] the poor running of a department or research centre [sic].¹²⁸

Others have agreed that defining duties inherent in a faculty job is not a simple matter. “When it comes, for example, to ‘official duties,’ the clarity with which a court can determine the responsibilities of an assistant district attorney . . . simply does not apply to college professors.”¹²⁹

For public employees, including faculty and professors at public universities, the First Amendment does protect their right to speak on matters of public concern. This protection, however, does not extend to matters that are purely internal or disruptive to the operation of the organization. *Pickering*¹³⁰ and *Connick*¹³¹ both deal with the question of whether the speech of public employees is entitled to constitutional protection. In *Pickering*, a public high school teacher was discharged for sending a letter to a local newspaper that criticized efforts by the school board and superintendent to raise new revenue for the schools.¹³² The teacher’s speech was found to be detrimental to the efficient operation of the school district.¹³³ Justice Marshall, writing for the majority, observed that the teacher’s speech involved a matter of public concern and as such, “statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors.”¹³⁴ Here, the teacher’s right to freely voice his concerns on matters of public importance was not outweighed by the employer’s efficiency interests relative to the management of its workforce.

In *Connick*, Shelia Myers, an assistant district attorney in the Orleans Parish District Attorney’s Office, was notified that she would be transferred to a different section of the criminal court to perform her duties as a prosecutor.¹³⁵ Myers opposed the transfer and shared her concerns with her superiors.¹³⁶ Although urged to accept the transfer, Myers

128. BARENDT, *supra* note 58, at 188.

129. Robert M. O’Neil, *Academic Speech in the Post-Garcetti Environment*, 7 FIRST AMEND. L. REV. 1, 18 (2008).

130. See *Pickering v. Bd. of Ed.*, 391 U.S. 563 (1968).

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

132. *Pickering*, 391 U.S. at 564.

133. *Id.*

134. *Id.* at 574.

135. *Connick*, 461 U.S. at 148.

136. *Id.*

took matters into her own hands by preparing and circulating a questionnaire among her co-workers regarding the office transfer policy, office morale, the need for a grievance committee, and whether employees felt pressured to work on political campaigns.¹³⁷ Once Myers distributed the questionnaires, she was credited with creating a “mini-insurrection” within the office, which led to the decision to terminate her employment for refusing to accept the transfer.¹³⁸

Myers filed suit in federal court alleging that she was wrongfully terminated in violation of her constitutional right to free speech.¹³⁹ The district court agreed, finding that the questionnaire, not her refusal to accept the transfer, was the true reason for her termination.¹⁴⁰ Moreover, the district court found that the questionnaire dealt with a matter of public concern and that the district attorney, herein the public employer, had failed to demonstrate that Myers’s speech interfered with the operations of the district attorney’s office.¹⁴¹ The U.S. Court of Appeals for the Fifth Circuit affirmed the decision.¹⁴²

The Supreme Court accepted this matter for review, noting that “[f]or most of this century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights.”¹⁴³ The Court further indicated that after a series of disputes during the 1950s and thereafter, the primary issue became whether public-employee speech could be suppressed by threat of employment termination when the employees joined political associations that public officials deemed subversive.¹⁴⁴ Finding that the First Amendment was designed to assure free expression and the unfettered interchange of ideas, *Connick* followed *Pickering*’s rationale that the First Amendment protects public-employee speech on matters of legitimate concern.¹⁴⁵

On this basis, the Supreme Court found that Myers’s speech involved only a matter of personal interest, rather than public concern, and was not entitled to First Amendment protection:

When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community,

137. *Id.* at 146.

138. *Id.* at 141.

139. *Id.*

140. *Id.* at 142.

141. *Id.*

142. *Id.*

143. *Id.* at 143.

144. *Id.* at 144.

145. *Id.* at 145.

government officials should enjoy wide latitude in managing their offices without intrusive oversight by the judiciary in the name of the First Amendment.¹⁴⁶

The Court also determined that the question of whether an employee's speech addresses a matter of public concern turns on "the content, form, and context of [the] given statement"¹⁴⁷ In sum, the *Connick* Court gave significant attention to the employer's interest in the effective and efficient operation of its public office and to the argument that "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs."¹⁴⁸ Myers's questionnaire was characterized as an employee grievance regarding internal office policy and therefore undeserving of First Amendment protection.

Under *Pickering*, and confirmed in *Connick*, the Court embraced a multi-part analysis for public-employee free speech challenges that could apply to college and university faculty members.¹⁴⁹ First, the employee's speech must address a "matter of public concern."¹⁵⁰ Next, the employee's interest in free expression must be balanced against the public employer's interest in efficient operation of the workplace.¹⁵¹ Finally, the employee must show that her protected speech was a motivating factor that led to the disciplinary action. Likewise, if the public employer can show that the disciplinary action would have been imposed regardless of the employee's protected speech, no First Amendment protections should be extended.¹⁵² Though the analytical approach applied in *Pickering* and *Connick* provided no bright-line rule regarding the scope of free-speech protection that may be available to any public employee, the Supreme Court's guidance effectively offered an avenue to accommodate the complexity of free-speech disputes in higher education. It directed lower courts and college and university decision makers to weigh the interests of the parties rather than rely exclusively on content-based and role-based analyses.

146. *Id.* at 146.

147. *Id.* at 147–48.

148. *Id.* at 149.

149. See Seog Hun Jo, *The Legal Standard on the Scope of Teachers' Free Speech Rights in the School Setting*, 31 J.L. & EDUC. 413 (2002).

150. *Id.* at 415.

151. See *id.* at 417.

152. See Kevin L. Cope, *Defending the Ivory Tower: A Twenty-First Century Approach to the Pickering-Connick Doctrine and Public Higher Education Faculty After Garcetti*, 33 J.C. & U.L. 313 (2007).

The concerns examined in *Connick*, with regard to the operational and efficiency interests of the public-sector employer, again were addressed by the Court in *Waters v. Churchill*.¹⁵³ *Waters* involved the termination of a nurse at a public hospital after she made personal and disruptive remarks.¹⁵⁴ The nurse argued that her comments, indicating that nurses worked in certain areas without proper training, only criticized the hospital's cross-training policy.¹⁵⁵ But her supervisor believed that her comments promoted a negative atmosphere, reflected poorly on the hospital, and could not be tolerated.¹⁵⁶ In the plurality opinion issued by the Court, Justice O'Connor, writing for four Justices, relied on the standard announced in *Connick* and *Pickering* as to when public employee's speech is protected by the First Amendment:

To be protected, the speech must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.¹⁵⁷

Believing that insufficient weight was given to the public employer's interest in efficient employment decision making, Justice O'Connor appeared to support application of the *Connick* approach where the employer makes a reasonable investigation to determine the content of the speech before firing an employee.¹⁵⁸ In this case, Justice O'Connor observed that the potential disruptive impact of the nurse's speech threatened to undermine the public employer's authority.¹⁵⁹ Thus, the matter was vacated and remanded to determine whether the nurse was indeed terminated for her disruptive, unprotected comments rather than her statements about cross-training.¹⁶⁰

A worthwhile example of the *Pickering-Connick* approach in the higher education context is found in the convoluted dispute in *Webb v. Board of Trustees of Ball State University*.¹⁶¹ Professor Gary L. Webb, a tenured faculty member in Ball State's criminology department, filed a complaint in federal court alleging, among other things, that changes to

153. 511 U.S. 661 (1994).

154. *See id.* at 661.

155. *Id.*

156. *Id.* at 665.

157. *Id.* at 668 (internal quotation marks omitted).

158. *Id.* at 676.

159. *Id.* at 681.

160. Justice Scalia, writing for three Justices, concurred in the judgment but declined to require any constitutional investigation terminating an employee. *Id.* at 686 (Scalia, J., concurring).

161. 167 F.3d 1146, 1148-49 (7th Cir. 1999).

his teaching schedule and the decision to replace him as chairperson for the criminology department were implemented by the university in retaliation for Webb's protected speech.¹⁶² In 1994, Webb complained that another faculty member sexually harassed a student, alleged that administrators were guilty of "ethical lapses," and made various accusations of misconduct against other members of the department.¹⁶³ Professor Webb argued that his sexual harassment complaint and the related complaints that he later presented in a 225-page document were protected speech, which prompted him to file a complaint with the Equal Employment Opportunity Commission and, thereafter, seek a preliminary injunction directing the university to stop any retaliatory action.¹⁶⁴

Circuit Judge Frank H. Easterbrook, writing for the Seventh Circuit, affirmed the decision denying the preliminary injunction, finding an absence of irreparable harm, and acknowledging the potential disruptive effects to the faculty at large caused by an injunction requiring the university to implement changes to its teaching schedule.¹⁶⁵ Moreover, relying on the *Pickering-Connick* analysis, Judge Easterbrook was not persuaded that Professor Webb's speech represented a matter of public concern under the *Pickering* analysis or that changing his teaching schedule violated his constitutional right to free expression.¹⁶⁶ Although Judge Easterbrook maintained that the university's decision to change Professor Webb's teaching schedule and to replace him as chair of the criminology department, viewed in the context of the numerous administrative disputes, could be deemed as retaliatory action, the court chose to balance the university's right to set curriculum and a faculty member's right to free expression—in effect, seeking to balance academic freedom interests held by the faculty and institution.¹⁶⁷

In sum, the court resolved that Professor Webb's contentions embodied nothing more than a mangled dispute between faculty and administrators at the university. According to the court, a university's "ability to set a curriculum is as much an element of academic freedom as any scholar's right to express a point of view."¹⁶⁸ Where the core functions of teaching and scholarship are at issue, the court stated the following:

162. *Id.* at 1148.

163. *Id.*

164. *Id.*

165. *Id.* at 1149.

166. *Id.* at 1150.

167. *Id.*

168. *Id.* at 1149.

Universities are entitled to insist that members of the faculty (and their administrative aides) devote their energies to promoting the goals such as research and teaching. When the bulk of a professor's time goes over to fraternal warfare, students and the scholarly community alike suffer, and the university may intervene to restore decorum and ease tensions.¹⁶⁹

While not denouncing individual academic freedom, the court expressed an unwillingness to intervene or set out when courts might interfere with a university's curriculum planning or staffing decisions.¹⁷⁰ The Seventh Circuit framed academic freedom in the context of research and teaching but with limits that recognized the institution's voice apart from that of the individual faculty member.

Furthermore, the court's exercise of restraint in *Webb*, with respect to faculty demands that their views be given unlimited protection, is consistent with prior rulings. Academic freedom is neither a license for unlimited expression nor a basis to permit dysfunctional operations within the institution.¹⁷¹ While academic freedom is not a right enumerated in the Constitution, it is safeguarded by the First Amendment to preserve the exchange of intellectual ideas at colleges and universities.¹⁷² The *Pickering* and *Connick* decisions, while not higher education cases *per se*, have been applied to resolve academic speech disputes where First Amendment academic-freedom protections are concerned.¹⁷³ *Garcetti* imposes new analytical concerns regarding academic speech and constitutional protections.

Public employees do not abandon their First Amendment right to free speech upon entering the government-sponsored workplace; they retain the right to speak out publicly as citizens on matters of public concern—not purely internal matters or matters intended to disrupt workplace operations. Despite these safeguards, *Garcetti*'s “official duties” test triggers important questions regarding what constitutional protections are available for statements uttered by professors at public universities in the course of performing their official job duties.¹⁷⁴

Under *Garcetti*, legitimate academic speech on controversial subject matter may not have an adequate umbrella of protection. College and university professors do not exclusively speak out as citizens on matters

169. *Id.* at 1150.

170. *Id.*

171. *See* Clark v. Holmes, 474 F.2d 928, 931 (7th Cir. 1972) (holding that academic freedom did not grant a professor the uncontrolled right to expression with established curricular content).

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

173. *See* Fong v. Purdue Univ., 692 F. Supp. 930 (N.D. Ind. 1988).

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

of public concern. At public colleges and universities, academics speaking and writing as teachers, scholars, researchers, committee members, or public servants on matters within the scope of their professorial duties may or may not address matters of public concern. This does not suggest that faculty should be granted an absolute right to free expression under the guise of academic freedom. But the law should permit a balance to be struck between professorial free speech interests and institutional interests regarding workforce control. For instance, with regard to classroom speech, Professor Michael Olivas has observed the following:

[E]xpression of controversial ideas and criticism of the status quo must be protected, even at the risk of discomfort for the teacher or class, when a professor is teaching within her field. . . . But academics still must adhere to professional standards in voicing their views. This “professorial function” approach protects classroom utterances so long as they meet professional standards and result from training, developed expertise, and scrupulous care in presenting material. . . . Faculty should be entitled to special consideration only in pursuing academic endeavors (hence “academic” freedom), such as in the classroom. Extending the protections of academic freedom to extra-academic speech, in this light, is unprincipled.¹⁷⁵

Moreover, curtailing professorial speech that cannot survive a germaneness inquiry—a test that determines whether an individual’s academic speech is sufficiently close to the university’s academic mission—may also serve as a justifiable control on academic freedom.¹⁷⁶

However, applying *Garcetti*’s “official duties” analysis to academic speech, whether uttered inside or outside the classroom, may lead to a determination that such speech offered in the course of performing one’s official job duties is not protected speech. Because professors at public colleges and universities may engage in intramural and extramural speech within the scope of their employment, *Garcetti* may go too far. Pursuant to *Pickering* and *Connick*, the First Amendment appears to protect professorial expression on matters of public concern. “Academics’ extramural expression is protected by the First Amendment, unless a university can show that it has the potential seriously to disrupt working relations on campus and that this risk outweighs the value of the

175. Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third “Essential Freedom,”* 45 STAN. L. REV. 1835, 1844, 1845 (1993).

176. See Alan K. Chen, *Bureaucracy and Distrust: Germaneness and the Paradoxes of the Academic Freedom Doctrine*, 77 U. COLO. L. REV. 955 (2006); see also KAPLIN & LEE, *supra* note 67, at 648–52 (discussing other methods to ferret out the viability of academic freedom claims).

speech.”¹⁷⁷ Further Supreme Court guidance is necessary because public college or university professors do not exclusively speak out as “citizens” within the *Pickering* or *Garcetti* sense, but as academics and experts. Faculty should be free to comment on an array of matters important to society without looking over their collective shoulders to see whether they are being monitored.¹⁷⁸ *Garcetti*, therefore, has opened the door to a renewed conversation about academic freedom. Do the prevailing arguments set out in *Pickering*, *Connick*, *Waters*, and now *Garcetti* mark only support for the public employer’s efficiency interests at the expense of individual academic freedom? Or, does *Garcetti* represent confirmation that the First Amendment secures the core academic freedoms for teaching and scholarship, but that academic speech without an academic foundation and critical of administrative matters is not constitutionally protected? The post-*Garcetti* case law provides helpful insight.

2. Contemplating the Post-*Garcetti* Case Law

The *Garcetti* decision has led lower courts to carefully construe the work performed by individual faculty and its connection to core academic functions at public colleges and universities. In assessing whether a faculty member’s speech represents official job duties, some courts have been inclined to set aside academic-freedom protections and uphold disciplinary action by college and university administrators for faculty speech unrelated to teaching or scholarship. Also, lower courts have recognized *Garcetti* as an opportunity to take pause before affirming an employer’s disciplinary action. Among these post-*Garcetti* decisions, *Kerr v. Hurd*¹⁷⁹ represents a well-reasoned application of the *Garcetti* holding.

In *Kerr*, the interplay between the official-duties analysis and academic freedom was examined within the context of statements made during classroom instruction.¹⁸⁰ Elton R. Kerr, an assistant professor at the Wright State School of Medicine (WS-SOM) filed an action in federal court alleging, *inter alia*, a violation of his rights to expression under the United States and Ohio constitutions.¹⁸¹ Dr. Kerr, a specialist of obstetrics and gynecology, contended that he was subject to discipline for “teaching certain gynecological surgery techniques, advocacy [sic] of vaginal delivery over unnecessary cesarian procedures, and lecturing

177. BARENDT, *supra* note 58, at 292.

178. See JOHN S. BRUBACHER, ON THE PHILOSOPHY OF HIGHER EDUCATION 43 (1982).

179. 694 F. Supp. 2d 817 (S.D. Ohio 2010).

180. See *id.*

181. *Id.* at 827–28.

WS-SOM residents on the proper and appropriate use of forceps.”¹⁸² Dr. William W. Hurd, the chair for the Department of Obstetrics and Gynecology at WS-SOM and a named defendant in the action, argued that Dr. Kerr’s speech on the use of forceps and vaginal delivery was within his *role* as an employee and not entitled to First Amendment protection.¹⁸³

In applying the precedent set by the *Garcetti* decision, the court indicated that the Supreme Court’s holding represented a refinement of its “*Connick* jurisprudence” requiring a role-based analysis and content-based analysis.¹⁸⁴ The court found that Dr. Kerr’s speech advocating vaginal deliveries was within his role as a teacher of obstetrics; however, rather than applying the official-duty analysis and declaring Dr. Kerr’s speech unprotected, the district court observed that the Supreme Court left undecided whether the official-duty analysis would apply in an academic setting.¹⁸⁵ More specifically, the court declined to apply the official-duty analysis and instead applied the “traditional *Pickering-Connick* approach” to Dr. Kerr’s in-class speech.¹⁸⁶ Furthermore, the court observed that an academic freedom exception was important to protecting First Amendment values:

Universities should be the active trading floors in the marketplace of ideas. Public universities should be no different from private universities in that respect. At least where, as here, the expressed views are well within the range of accepted medical opinion, they should certainly receive First Amendment protection, particularly at the university level. The disastrous impact on Soviet agriculture from Stalin’s enforcement of Lysenko biology orthodoxy stands as a strong counter example to those who would discipline university professors for not following the “party line.”¹⁸⁷

Even if academic freedom was viewed as a narrow exception to *Garcetti*, the court found no basis to construe Dr. Kerr’s teaching as a medical professor as outside the classroom or clinical context. Hence, speech grounded in a professor’s academic or clinical expertise may be entitled to constitutional protection. Of course, speech in a clinical con-

182. *Id.* at 834.

183. *Id.* at 843.

184. *Id.*

185. *Id.*

186. *Id.*; *see also* *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006); *Evans-Marshall v. Bd. of Educ.*, No. 3:03cv091, 2008 WL 2987174 (S.D. Ohio July 30, 2008), *aff’d*, 624 F.3d 332 (6th Cir. 2010); *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687 (4th Cir. 2007) (describing the Supreme Court’s decision in *Garcetti* as “not clear” regarding cases involving speech related to scholarship or teaching).

187. *Kerr*, 694 F. Supp. 2d at 844.

text may go beyond typical classroom instruction, raising an important question regarding the fundamental role of the college or university professor and the scope of academic freedom.

Whether *Garcetti* categorically denies constitutional protection to academic speech was also at issue in *Adams v. Trustees of the University of North Carolina-Wilmington*.¹⁸⁸ In this case, a criminology professor, Michael S. Adams, alleged a First Amendment retaliation claim after being denied a promotion to full professor.¹⁸⁹ Professor Adams joined the faculty at UNCW in 1993 and was granted tenure in 1998.¹⁹⁰ In 2000, Professor Adams became a Christian; this had a significant influence on his scholarly writing and service activities, which took a decidedly conservative tone.¹⁹¹ On occasion, the university received complaints from faculty, staff, and university trustees regarding Professor Adams's public expressions.¹⁹² In 2004, Professor Adams's application for promotion to the rank of full professor was denied for, among other reasons, an insufficient record of tangible academic productivity.¹⁹³

In response to Professor Adams's complaint, UNCW filed a motion for summary judgment that was granted by the district court.¹⁹⁴ On appeal, the Fourth Circuit identified several errors in the lower court's ruling as to the First Amendment claim, all of which demonstrated a misreading of *Garcetti*.¹⁹⁵ While the district court correctly understood that *Garcetti*'s analysis focused on the role of the speaker, not the content of the speech, it held that Professor Adams's speech—comprised of books and written commentaries—was not protected by the First Amendment because it was included in his application for promotion to full professor.¹⁹⁶ Finding that “the nature of the employee's speech at the time it was made” significant, the Fourth Circuit held that the district court erred as a matter of law by concluding that Professor Adams's speech was converted to unprotected speech.¹⁹⁷

Furthermore, the Fourth Circuit observed that the district court ignored the Supreme Court's language that left uncertain whether *Garcetti*

188. See *Adams v. Trs. of Univ. of N.C.-Wilmington*, 640 F.3d 550 (4th Cir. 2011).

189. *Id.* at 552.

190. *Id.* at 553.

191. *Id.*

192. *Id.* Professor Adams espoused conservative ideological views in columns, books, and commentaries and became increasingly vocal on political and social issues, offering commentary on radio and television broadcast prior to applying for promotion to full professor. *Id.*

193. *Id.*

194. *Id.* at 556.

195. *Id.* at 561.

196. *Id.*

197. *Id.* at 562.

applied in an academic context at a public university.¹⁹⁸ According to the court, “[t]he plain language of *Garcetti* thus explicitly left open the question of whether its principles apply in the academic genre where issues of ‘scholarship or teaching’ are in play.”¹⁹⁹ Also, the court noted that “[t]here may be instances in which a public university faculty member’s assigned duties include a specific role in declaring or administering university policy, as opposed to scholarship or teaching.”²⁰⁰ In such a situation, *Garcetti* would appear to apply. But where the speech at issue centered on *scholarship* and *teaching*, the Fourth Circuit held that the district court erred in applying *Garcetti* and identified the *Pickering-Connick* standard as the proper analytical approach.²⁰¹ The court’s reasoning gave ample consideration to professorial work and the nature of faculty speech:

Applying *Garcetti* to the academic work of a public university faculty member under the facts of this case could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment. That would not appear to be what *Garcetti* intended, nor is it consistent with our long-standing recognition that no individual loses his ability to speak as a private citizen by virtue of public employment. In light of the above factors, we will not apply *Garcetti* to the circumstances of this case.²⁰²

Thereafter, the court determined that Professor Adams’s speech was that of a citizen speaking on a matter of public concern, but remanded the case for further proceedings under the *Pickering-Connick* analytical framework.²⁰³

Despite *Garcetti*’s holding that public-employee statements made in the course of official job duties are not constitutionally protected, *Kerr* and *Adams* signify that where academics at public colleges and universities engage in speech involving core academic functions, such expression may be protected. Regardless of whether the speech involves a faculty member teaching surgical procedures to medical students, or a professor writing scholarly articles and books that examine social or political issues, courts appear unwilling to endorse administrative decision-making

198. *Id.* at 561.

199. *Id.* at 563.

200. *Id.*

201. *Id.*

202. *Id.* at 564.

203. *Id.* at 565. The court also referred to this as the *McVey* test from *McVey v. Stacy*, 157 F.3d 271, 277–78 (4th Cir. 1998), which explained and discussed the elements of the *Pickering-Connick* approach.

that interferes with fundamental academic freedoms regarding teaching and research.

Although *Kerr* and *Adams* extend First Amendment protection to speech involving core academic functions, the role of a professor routinely involves the opportunity or obligation to comment on managerial or administrative matters that may involve the allocation of resources, personnel decisions, or institutional procedures. For example, in *Hong v. Grant*,²⁰⁴ a chemical engineering professor at the University of California-Irvine (UC Irvine) filed a complaint in federal court alleging an academic freedom violation regarding critical remarks he made about hiring and promotion decisions within the department.²⁰⁵ In particular, Professor Hong objected to administrative decisions made in 2003 that led to the use of lecturers, rather than tenured faculty, to teach undergraduate courses, and a decision to grant a professor's application for an accelerated merit salary increase.²⁰⁶ Professor Hong also objected to a 2004 decision to extend an informal offer of employment to another individual.²⁰⁷ Subsequently, Hong applied for a merit salary increase, which was allegedly denied because his research activities were insufficient.²⁰⁸ This led to his pro se complaint in the U.S. District Court for the Central District of California.²⁰⁹

Professor Hong alleged that he was a victim of illegal retaliation in response to his vocal criticism of various decisions by university administrators.²¹⁰ The district court dismissed the complaint finding that Hong's statements did not constitute a matter of public concern and were therefore not protected by the First Amendment.²¹¹ Further, the district court found that Hong's criticisms were merely internal administrative comments uttered in the context of Hong's official duties, consistent with the reasoning set out in *Garcetti*.²¹² This finding compelled the district court to disagree with Hong's contention that his statements represented speech entitled to First Amendment protection.²¹³ To hold otherwise, ac-

204. 516 F. Supp. 2d 1158 (C.D. Cal. 2007), *aff'd*, 403 F. App'x 236 (9th Cir. 2010).

205. *Id.* at 1160.

206. *Id.*

207. *Id.* at 1163.

208. *Id.* at 1164.

209. *Id.*

210. *Id.*

211. *Id.* at 1169.

212. *Id.*

213. *Id.* at 1170; *see also* *McReady v. O'Malley*, 804 F. Supp. 2d 427 (D. Md. 2011), *aff'd*, 468 F. App'x 391 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 577 (2012) (granting university's motion for summary judgment against free speech claims raised by pro se faculty member who expressed

ording to the district court, would invite expansive constitutionalism that would perhaps trigger endless judicial supervision for routine university administrative decisions.²¹⁴

Professor Hong's argument that his intramural speech criticizing decisions implemented by administrators at UC Irvine should be granted First Amendment protection was defeated by the defendant's summary judgment motion. The court relied largely on the *Garcetti* holding but gave little attention to Justice Kennedy's cautionary proviso that speech related to academic matters may be afforded some protection. While Professor Hong's speech was viewed relative to context, content, and form, it appears that the undisputed fact that Hong's statements were made in the context of his faculty duties triggered no First Amendment protection.

Particularly interesting was the court's characterization that Professor Hong's speech represented "internal administrative disputes which have little or no relevance to the community as a whole."²¹⁵ While Hong's objections to certain hiring and promotion decisions may not relate to traditional academic duties like teaching or research, his statements concerning the use of lecturers to staff departmental courses could be construed as an academic matter. "Mr. Hong . . . felt it was the department's obligation to its students to staff courses with experienced faculty, rather than younger, transient lecturers."²¹⁶ By assessing that Hong's speech essentially represented an "internal administrative dispute," the case contrasts the circumstances at issue in *Kerr* and *Adams*, which protect "core" academic freedom concerns. Hence, faculty speech performing dual administrative and academic functions arguably will be subject to more scrutiny to determine whether such speech merits academic-freedom protection post-*Garcetti*.

Hong's application of the *Garcetti* decision appears to indicate that faculty speech on administrative or quasi-administrative matters shall neither garner First Amendment protection nor represent an exercise of academic freedom. But what remains unanswered is what speech or

dissatisfaction with curricular and staffing decisions by university administrators where there was no evidence that professor spoke as a citizen on a matter of public concern).

214. The district court's decision was appealed and affirmed by the U.S. Court of Appeals for the Ninth Circuit. *Hong v. Grant*, 403 F. App'x 236 (9th Cir. 2010). However, it is important to note that the Ninth Circuit observed the following: "It is far from clearly established today, much less in 2004 when the university officers voted on Hong's merits increase, that university professors have a First Amendment right to comment on faculty administrative matters without retaliation." *Id.* at 237-38; *see also* *Connick v. Myers*, 461 U.S. 138 (1983).

215. *Hong*, 516 F. Supp. 2d at 1169.

216. *Id.* at 1163.

statements uttered by individual faculty members are entitled to First Amendment protection. Further, how ought higher education administrators and faculty determine whether individual faculty speech uttered in the course of performing official duties merits employer disciplinary action?

In *Renken v. Gregory*,²¹⁷ the Seventh Circuit reviewed a retaliation complaint raised by Professor Kevin Renken for allegedly engaging in protected academic speech related to a National Science Foundation (NSF) grant to support programs at the University of Wisconsin-Milwaukee, College of Engineering and Applied Sciences.²¹⁸ After differences arose as to the conditions under which the grant would be administered and how the university would contribute matching funds, the university decided to return the grant to the NSF.²¹⁹ Professor Renken filed a complaint in federal court alleging that the decision to terminate the grant, *inter alia*, was a retaliatory act by the university in response to his extensive criticisms of the university's proposed use of the grant funds.²²⁰

Professor Renken's involvement with the NSF grant included the dual role of principal investigator (PI) and university faculty member.²²¹ Acknowledging Renken's numerous complaints about the grant's administration, the court observed that "Renken was speaking as a faculty employee, and not as a private citizen because administering the grant as a PI fell within the teaching and service duties that he was employed to perform."²²² The court found that Professor Renken's administration of the NSF grant fell squarely within his teaching duties: "[H]is employment status a[s] full professor depended on the administration of grants, such as the NSF grant. It was in the course of that administration, that Renken made his statements about funding improprieties within the confines of the University system and as the principal PI."²²³

The court found Renken's speech undeserving of First Amendment protection, but simultaneously framed the speech as part of his official teaching duties.²²⁴ With little or no consideration of Justice Kennedy's caveat that speech regarding teaching and scholarship might deserve constitutional protection, the court surmised that Renken's speech, while

217. 541 F.3d 769 (7th Cir. 2008).

218. *Id.* at 770.

219. *Id.* at 772.

220. *Id.* at 773.

221. *Id.* at 771.

222. *Id.* at 774.

223. *Id.*

224. *Id.* at 775.

part of his teaching duties, was not protected pursuant to *Garcetti*.²²⁵ Moreover, the *Renken* decision demonstrates the inadequacy of Justice Kennedy's majority opinion wherein he chose not to address the extent to which the *Garcetti* holding supported the protection of speech related to teaching.²²⁶

Likewise, other post-*Garcetti* decisions have granted public university employers wide latitude to impose disciplinary action in response to individual faculty speech uttered in the course of performing official duties, especially those duties involving administrative functions. In *Gorum v. Sessoms*,²²⁷ a 2005 decision by the Delaware State University president to terminate a faculty member and department chairperson for changing withdrawals, incompletes, and failing grades without authorization was challenged on First Amendment grounds.²²⁸ President Sessoms found Professor Gorum's conduct unprofessional and highly reprehensible.²²⁹ Professor Gorum admitted that he made the changes but claimed that he had sufficient authorization.²³⁰ Moreover, Gorum countered that the termination decision was a retaliatory act intended to punish him for acting as an advisor to a student-athlete charged with violating university policy barring weapons possession in 2002, and as chairman of a speakers committee in 2004 for rescinding an invitation to President Sessoms to speak at a prayer breakfast event.²³¹ The district court granted the university's motion for summary judgment, and the Third Circuit affirmed the finding that Professor Gorum's speech was not protected by the First Amendment.²³²

The court relied on *Garcetti* but took some care to explain that the Supreme Court did not answer whether the "official duty" analysis would apply in a case involving speech related to scholarship or teaching.²³³ As such, the court acknowledged Justice Kennedy's caveat in *Garcetti* that an argument may be sustained that expressions related to academic scholarship and classroom instruction may trigger constitutional concerns not addressed by customary employee-speech jurisprudence.²³⁴ Because Professor Gorum's speech was unrelated to scholarship and

225. *Id.* at 773.

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

227. 561 F.3d 179 (3d Cir. 2009).

228. *Id.* at 182.

229. *Id.* at 183.

230. *Id.* at 182.

231. *Id.* at 183–84.

232. *Id.* at 188.

233. *Id.* at 185–86.

234. *Id.* at 186 (citing *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006)).

classroom instruction, the court believed it was bound to apply the official duties test, thereby resolving that Professor Gorum's speech was not entitled to First Amendment protection.²³⁵ Moreover, the court attempted to clarify when the official duty test should not apply:

Where *Garcetti's* official duty test does not apply to a public instructor's speech "related to scholarship or teaching," courts apply the traditional First Amendment protected speech analysis established in [*Pickering* and *Connick*] . . . This is a two-step analysis. The first considers whether the employee's speech was on a matter of public concern. If so, the second requires balancing "between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."²³⁶

It is worth noting that Professor Gorum's advising activities with the student-athlete, DaShaun Morris, were found within the scope of his official duties because it was through his position as a faculty member and department chair that he was able to advise the student.²³⁷ Despite this finding, Professor Gorum's speech was not entitled to First Amendment protection.²³⁸ This suggests that speech made in the course of advising or mentoring students may not be constitutionally protected as a function of academic freedom; however, it is plausible that the nature of the "advising" might dictate a different result. For example, faculty speaking in an advisory capacity regarding the content of a student essay would make a stronger case for academic-freedom protection as compared to advising on a student disciplinary matter.²³⁹ There may be no other task performed by a professor or teacher more sensitive than mentoring a student, sometimes through difficult situations. While individual faculty may rely on academic freedom to protect speech regarding their scholarly and instructional activities, student mentoring and advising that lacks an academic foundation is arguably outside the reach of academic-freedom protection.

In another academic affairs decision at the University of Illinois, College of Medicine at Chicago, the head of the department of surgery alleged that the university and certain administrators retaliated against

235. *Id.* at 187.

236. *Id.* at 186 n.6 (citations omitted).

237. *Id.* at 186.

238. *Id.* at 188.

239. *See Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 78 (1985) (discussing the court's exercise of the utmost restraint in matters regarding academic standards).

him in violation of his First Amendment rights.²⁴⁰ Specifically in *Abcarian v. McDonald*, Dr. Herand Abcarian claimed that the defendants conspired to damage his professional reputation by executing a settlement agreement regarding a medical malpractice lawsuit filed as a result of a patient's death.²⁴¹ Abcarian believed that because he voiced disagreement with university officials on numerous administrative matters (faculty recruitment, risk management, compensation, etc.), the settlement agreement was implemented and reported to state and federal authorities as a retaliatory act to connect Abcarian to the medical malpractice claim.²⁴² Abcarian brought a lawsuit against the university and various individual employees, raising several claims including a First Amendment retaliation claim.²⁴³ The district court dismissed the lawsuit, finding that *Garcetti* barred the First Amendment claims because the speech that triggered the alleged retaliation was made in the course of Abcarian performing his official duties as a public employee.²⁴⁴

Before the Seventh Circuit, Abcarian argued that *Garcetti* applied only to bar retaliation claims against employers, not individual co-employees, and that his speech was not offered pursuant to his official job responsibilities.²⁴⁵ Reading *Garcetti* broadly, the court rejected this argument, finding that the decision applied to retaliation claims against fellow employees.²⁴⁶ Also, the court noted that *Garcetti* established that public employees speaking as part of their official duties are speaking as employees, not citizens, and their speech is not protected regardless of the content.²⁴⁷ This conclusion may have serious ramifications for any argument that attempts to limit the import of *Garcetti* to professors and academics relative to the content or purpose of academic speech. While the court resolved that Abcarian was not speaking in a purely academic sense, the court's willingness to read *Garcetti* broadly may impact the extent to which academic-freedom protection is granted going forward.²⁴⁸

240. *Abcarian v. McDonald*, 617 F.3d 931 (7th Cir. 2010).

241. *Id.* at 933.

242. *Id.* at 934.

243. *Id.*

244. *Id.* at 935.

245. *Id.* at 935–36.

246. *Id.* at 936.

247. *Id.* at 937.

248. Further, some scholars have argued that the emergence of academic freedom as a constitutional right may not be a sound legal or political position:

It is certainly true that professors have a functional societal role that can be pressed to the service of justifying protection for academic freedom, including the transmitting of knowledge to students; developing in students a sense of intellectual curiosity, apprecia-

Further, the court found unpersuasive Abcarian's alternative argument that his speech was not made pursuant to his official responsibilities: "When determining whether a plaintiff spoke as an employee or as a citizen, we take a practical view of the facts alleged in the complaint, looking to the employee's level of responsibility and the context in which the statements were made."²⁴⁹

Abcarian held a position of significant authority at the University of Illinois College of Medicine and had a wide range of responsibilities important to the management of the institution. The court cautiously noted that Abcarian's speech did not warrant academic-freedom protection because of its administrative nature and resolved that his speech sprang from his public employment, not his status as citizen.²⁵⁰ Thus, *Garcetti* was properly applied and Abcarian's First Amendment claim dismissed because the speech at issue—policy-driven and administrative in origin—was not constitutionally protected.²⁵¹

tion for the human quest for a life's meaning, and civic engagement; advancing the frontiers of knowledge and discourse. As a matter of ideal and aspiration, universities and university professors may think of themselves as pursuing these functions with especially dedicated intellectual elevation, intellectual honesty, objectivity, and rigor. But as the Supreme Court's cases persistently insist, there is a difference between the recognition of these functions as justifications for our societal policies, and the recognition of these functions as justifications for the creation of a distinct constitutional right. . . . Constitutional doctrines can at times be stultifying, tending to act as both floors and ceilings, diminishing autonomy and diversity. It is not a good idea to try to constitutionalize everything. When constitutional law appropriates too many of our important societal decisions, the currency of the Constitution as a fundamental law is devalued. When everything is constitutionalized, nothing is constitutionalized.

RODNEY A. SMOLLA, *THE CONSTITUTION GOES TO COLLEGE: FIVE CONSTITUTIONAL IDEAS THAT HAVE SHAPED THE AMERICAN UNIVERSITY* 36–37 (2011).

249. *Abcarian*, 617 F.3d at 937.

250. *Id.* at 938. The court recognized that *Garcetti* includes a possible exemption for speech related to academic scholarship or classroom instruction. *Id.* at 945 n.5 Whether understood as an exemption or exception to *Garcetti*, the *Abcarian* decision appears to suggest that administrative or policy expression may not be entitled to academic-freedom protection. This contention is important for identifying the role the faculty has traditionally had in university governance. See Judith Areen, *Government As Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945 (2006).

251. See *Savage v. Gee*, 716 F. Supp. 2d 709 (S.D. Ohio 2010), *aff'd*, 665 F.3d 732 (6th Cir. 2012), where a librarian at the Ohio State University campus in Mansfield serving on a faculty-staff committee became involved in a tumultuous debate with faculty members regarding whether certain books ought to be included on a reading list for incoming freshmen. The librarian recommended a book that some faculty believed to condone homophobic views; they called for the librarian's termination. The librarian eventually resigned but thereafter filed an action in federal court alleging a violation of his First Amendment rights. The court found that the librarian's speech—the book recommendation that discussed homosexuality—addressed a matter of public concern but was made pursuant to his official duties, thus not protected by the First Amendment under *Garcetti*. *Id.* at 717. Further, the district court indicated that while the Supreme Court in *Garcetti* had not resolved whether academic expression, other than perhaps scholarship and classroom teaching, was constitu-

In *Hong*, *Renken*, *Gorum*, and *Abcarian*, the alleged academic speech at issue did not draw a direct connection to scholarship or teaching, but rather was aligned with quasi-administrative matters. The speech at issue in *Hong* may make the best argument for some scholarly or teaching affiliation, as Professor Hong's expression dealt with the appointment of lecturers versus fulltime tenured faculty to teach certain classes. However, the court characterized Professor Hong's speech as a matter regarding "internal departmental staffing and administration," which constituted unprotected speech.²⁵²

These decisions suggest that while the work performed by faculty is indeed multifaceted, academic freedom does not protect speech that lacks a well-defined academic or scholarly nexus. At best, in cases such as *Hong*, *Renken*, *Gorum*, and *Abcarian*, where faculty are not speaking purely within their professorial job responsibilities of teaching and scholarship, but are speaking pursuant to administrative or managerial functions that they are professionally obligated to perform and that touch upon internal administrative and non-academic matters, courts appear willing to apply *Garcetti* and assess the speech as outside the realm of academic-freedom protection. From this standpoint, *Garcetti* can be construed as an extension of *Connick* granting the public employers wide latitude to manage public sector organizations.²⁵³

While academic speech that centers on core academic functions is likely to enjoy academic-freedom protection, and academic speech loosely connected to core academic functions involving quasi-administrative activities is less likely to receive academic-freedom protection under the First Amendment in the wake of *Garcetti*, it is worth noting that certain faculty utterances are wholly undeserving of academic-freedom protection. The Seventh Circuit examined a university's decision to take action regarding a faculty member's involvement in certain controversial acts of expression. In *Piggee v. Carl Sandburg College*,²⁵⁴ a part-time community college instructor gave a homosexual student enrolled in her cosmetology class religious pamphlets that espoused the sinfulness of homosexuality.²⁵⁵ The college admonished the instructor in writing and directed her to cease the behavior, which was considered a violation of the college's sexual harassment policy.²⁵⁶ A year later, the college notified

tionally protected, the librarian's speech that concerned neither scholarship nor teaching was not protected by the First Amendment. *Id.* at 718.

252. *Hong v. Grant*, 516 F. Supp. 2d 1158, 1167 (C.D. Cal. 2007).

253. *Connick v. Myers*, 461 U.S. 138, 146 (1983); *see also* text accompanying notes 146–48.

254. 464 F.3d 667 (7th Cir. 2006).

255. *Id.* at 671.

256. *Id.* at 669.

the instructor that she would not be offered a teaching contract to remain employed with the institution.²⁵⁷ The faculty member brought suit claiming a violation of her free speech rights in addition to other various constitutional violations.²⁵⁸

The faculty member's case failed, but it provided an opportunity for the court to discuss the importance of the *Garcetti* decision. According to the court, *Garcetti* highlights concern for the importance accorded to public-sector employer's interests.²⁵⁹ The faculty member's free speech concerns were deemed subordinate to the community college's instructional objectives because "the college had an interest in ensuring that its instructors stay on message"²⁶⁰ While faculty views on assigned course subject matter are indeed protected speech, the instructor's speech in the instant case, verbal and through the religious pamphlets, was not related to instructing the students on the course subject matter—cosmetology.²⁶¹ Hence, the speech was not constitutionally protected, and the college was empowered to take remedial measures in response to the unprotected speech.²⁶²

A tenured mathematics professor at Kansas State University, John Heublein, was the subject of complaints from students and fellow faculty members regarding alleged sarcastic remarks and discourteous behavior in *Heublein v. Wefald*.²⁶³ Following an administrative appeal to the provost and a grievance hearing as provided by the university handbooks, the associate dean for academics, defendant David Delker, required that Heublein comply with various corrective measures.²⁶⁴ In response, Heublein filed a lawsuit alleging due process and free speech violations.²⁶⁵

The free speech claim focused on statements made by Professor Heublein in class and outside the classroom. In this case, the court applied *Garcetti* only to speech uttered *outside the classroom* setting because the Supreme Court left undecided whether the *Garcetti* standard would apply to classroom teaching.²⁶⁶ The court dismissed the free

257. *Id.*

258. *Id.*

259. *Id.* at 672.

260. *Id.*

261. *Id.*

262. *Id.*

263. 784 F. Supp. 2d 1186 (D. Kan. 2011).

264. *Id.* at 1190.

265. *Id.* at 1192.

266. *Id.* at 1197 n.34.

speech claim and ruled that Professor Heublein failed to satisfy the *Garcetti* test.²⁶⁷

Piggee and *Heublein* offer examples of faculty speech that compel college and university administrators to manage their academic workforce. Because faculty are given unique access to students and a platform from which to teach and express scholarly views, when that access is abused for non-academic purposes, academic freedom should grant no protection to speech that harbors misconduct.

A view of post-*Garcetti* jurisprudence suggests that lower courts are prepared to determine that academic speech outside of teaching or scholarly functions, but within the scope of a faculty member's professional duties, may be beyond the protective reach of the First Amendment. However, when the speech at issue is related to scholarship or teaching, the *Pickering-Connick* analytical framework shall remain applicable to resolve public sector free speech claims. This raises important questions about the scope of academic speech and the consequences of academic freedom denied to professorial speech in forums outside of scholarship and teaching. What are the official duties of a professor employed at a public university, and what speech offered in the course of performing those official job duties is not entitled to First Amendment protection? Justice Kennedy warned that certain academic speech may be entitled to constitutional protection, but scarce guidance exists regarding application of the *Garcetti* rationale to the public university scholar. Perhaps a better understanding of the modern day professoriate is necessary.

IV. PROFESSORIAL OBLIGATIONS AND EXPECTATIONS

A disturbing concern generated by the *Garcetti* decision is that the "official duties" analysis could be viewed as diminishing academic-freedom protections to the extent that faculty are not distinguished from the vast ranks of public employees. Whether the work of the college professor centers on teaching, research, or service, these activities represent the faculty member's official duties and may constitute unprotected

267. *Id.* at 1198. Specifically, the court characterized *Garcetti* as a four-part test: (1) whether the employee was speaking pursuant to his official duties; (2) whether the employee's speech can be fairly characterized as constituting speech on a matter of public concern; (3) whether the employee's interest in commenting upon matters of public concern outweigh the state's interest, as an employer, in promoting the efficiency of the public services it renders; and (4) whether the employee's speech was the motivating factor for the adverse employment action. *Id.* Interestingly, the court did not reconcile the elements of this four-part test with Justice Kennedy's holding on behalf of the *Garcetti* majority. Rather, the court observed that Professor Heublein did not meet the second prong of the test. *Id.*

speech, unless Justice Kennedy's caveat²⁶⁸ affirms fundamental protection for academic speech. Whether the Supreme Court is prepared to carve out a rule that confirms that academic freedom remains a special concern of the Constitution that extends First Amendment protection post-*Garcetti* may ultimately depend on a better understanding of the American professoriate.

A noteworthy observation regarding professorial obligations in the classroom is revealed in an essay prepared by Professor Leonard V. Kaplan from the University of Wisconsin Law School. In 2007, Professor Kaplan was involved in a controversy surrounding comments raised during his legal process class in which he discussed the problems experienced by the Hmong people who immigrated to Wisconsin.²⁶⁹ While Professor Kaplan's comments during the class were intended to advance the study of legal formalism, some took offense and Professor Kaplan expressed regret for his statements. However, Professor Kaplan pointed out that the controversy ignited by his legal process class unveiled important principles regarding the professor's role and the obligations of educational institutions. For instance, Professor Kaplan submitted that "[i]t is a law school's obligation to provide an environment in which faculty can address and teach students how to assess volatile issues."²⁷⁰ In the legal process class at issue, an attempt was made to examine the inadequacy of legal formalism through the trials and tribulations of a new immigrant group in an American community. The fact that the intended teachable moment became lost in controversy reveals the importance of the professor's role. Addressing the professoriate directly, Professor Kaplan offered the following:

We have an obligation to our students. We best meet that obligation by showing legal principles at work in difficult and controversial settings. We are all harmed if professors avoid controversial materials in deference to some accepted or imposed correctness or an apprehension that a topic may offend sensitivities. The law inevitably must resolve questions that many find offensive. If law professors avoid these questions, they no longer teach law. Most of us want security and to be left alone. Learning to question assumptions and values can be painful. *But if professors avoid certain issues because they might offend someone's sensitivities, we will cease to be a university in all but name . . .* I also think that professors are losing

268. See *supra* text accompanying notes 17–20.

269. Leonard V. Kaplan, *Teaching, Principles and the Role of the Professor*, INSIDE HIGHER ED (Dec. 14, 2007), <http://www.insidehighered.com/views/2007/12/14/kaplan>.

270. *Id.*

authority, in part by failing to raise these difficult issues. Academic literature has been cautioning about what has been called the twilight of authority. *Law students are in danger of becoming mere consumers and not students, law professors of becoming entertainers and not teachers.*²⁷¹

Professor Kaplan's essay, while offered from the perspective of a legal educator, speaks to the duty of the professoriate and how the potential failure of professors represents nothing less than the university's demise.

Also, there is evidence to suggest that the state of the professoriate is in decline. In a survey of full-time faculty published by Schuster and Finkelstein in 2006, a rising percentage of faculty believed that respect for the profession had deteriorated.²⁷² The study indicated that 83.9% of faculty in 1969 felt free to express relevant views in the classroom as compared to only 62.9% in 1998.²⁷³ Further, there is reason to believe that administrators are considered less likely to support academic freedom. In 1969, 76.1% of faculty surveyed indicated that academic freedom was supported by the administration but in 1997, only 55.3% of full-time faculty members surveyed believed academic freedom was supported by the administration.²⁷⁴ These perspectives may be the outgrowth of various concerns regarding the impact of controversial faculty speech. Moreover, in the context of the perceived decline of the American professoriate, *Garcetti* may signal an uncertain future for academic-freedom protections.

A. *The Ward Churchill Example: Lessons from the Debacle*

The impact of the *Garcetti* decision on academic speech may be better understood through faculty speech examples that illuminate the scope of faculty work. In particular, because *Garcetti* concerns the legality of disciplinary action imposed against a public sector employee and has unique implications for professorial work at public academic institutions, the decision triggers difficult questions regarding academic speech. This may be especially troubling for faculty speech on contentious topics.

Consider the controversial essay *Some People Push Back: On the Justice of Roosting Chickens*, written by University of Colorado profes-

271. *Id.* (emphasis added).

272. JACK H. SCHUSTER & MARTIN J. FINKELSTEIN, *THE AMERICAN FACULTY: THE RESTRUCTURING OF ACADEMIC WORK AND CAREERS* 137 (2006).

273. *Id.* at Figure 5.5.

274. *Id.* at 137.

sor Ward Churchill shortly after the September 11, 2001, terrorist attacks. The essay criticizes America's *economic and foreign policies*, and compares some victims in the World Trade Center attack to "little Eichmanns" after the Nazi Adolf Eichmann who was responsible for orchestrating the extermination of European Jews in World War II.²⁷⁵ Specifically, the essay provides, in part, the following:

Well, really. Let's get a grip here, shall we? True enough, they were civilians of a sort. But innocent? Gimme a break. They formed a technocratic corps at the very heart of America's global financial empire – the "mighty engine of profit" to which the military dimension of U.S. policy has always been enslaved—and they did so both willingly and knowingly. Recourse to "ignorance"—a derivative, after all, of the word "ignore"—counts as less than an excuse among this relatively well-educated elite. To the extent that any of them were unaware of the costs and consequences to others of what they were involved in—and in many cases excelling at—It was because of their absolute refusal to see. More likely, it was because they were too busy braying, incessantly and self-importantly, into their cell phones, arranging power lunches and stock transactions, each of which translated, conveniently out of sight, mind and smelling distance, into the starved and rotting flesh of infants. If there was a better, more effective, or in fact any other way of visiting some penalty befitting their participation upon the little Eichmanns inhabiting the sterile sanctuary of the twin towers, I'd really be interested in hearing about it.²⁷⁶

In 2005, Professor Churchill's essay garnered national attention following a decision by Hamilton University to rescind an invitation to Professor Churchill to participate on an academic panel.²⁷⁷ Several professors at Hamilton University objected to Professor Churchill's views, which led to increased media attention, and university officials received more than 6,000 messages protesting Professor Churchill's appearance.²⁷⁸ Further reaction led the Board of Regents for the University of Colorado to call a special meeting wherein the board passed a resolution ordering an investigation to determine whether Professor Churchill

275. Felisa Cardona, *Churchill Wins CU Suit, but Awarded Just \$1*, DENVER POST (Aug. 20, 2013), http://www.denverpost.com/breakingnews/ci_12055632.

276. Ward Churchill, "Some People Push Back": *On the Justice of Roosting Chickens*, KERSPLEBEDEB.COM, <http://kersplebedeb.com/mystuff/s11/churchill.html> (last visited Aug. 20, 2013).

277. Jennifer Elrod, *Critical Inquiry: A Tool for Protecting the Dissident Professor's Academic Freedom*, 96 CAL. L. REV. 1669, 1674 (2008).

278. Patrick Healy, *College Cancels Speech over 9/11 Remarks*, N.Y. TIMES, Feb. 2, 2005, http://www.nytimes.com/2005/02/02/education/02hamilton.html?pagewanted=all&position=&_r=0.

should be dismissed from his position as a tenured faculty member and chair of the Ethnic Studies Department at the University of Colorado, Boulder.²⁷⁹

Subsequently, a protracted battle ensued between the University of Colorado and Professor Churchill that led to a formal investigation of Professor Churchill's comments related to the September 11th attacks.²⁸⁰ Following a lengthy investigation, the University of Colorado Board of Regents decided to terminate Professor Churchill from his tenured position for cause, asserting that he engaged in research misconduct including plagiarism, fabrication, and falsification.²⁸¹ Professor Churchill immediately sued the university for wrongful discharge and sought reinstatement.²⁸²

Professor Churchill's alleged acts of research misconduct may have been a compelling issue for the University of Colorado, but his speech that compared the 9/11 victims to the Nazis is what drew public criticism to Professor Churchill. Was Professor Churchill's speech within the scope of his "official job duties?" To the extent that Professor Church-

279. Press Release, Univ. of Colo. at Boulder, CU Board of Regents to Hold Special Meeting, Jan. 30, 2005, available at <http://www.colorado.edu/news/releases/2005/39.html>.

280. WARD CHURCHILL, REPORT AND RECOMMENDATIONS OF THE STANDING COMMITTEE ON RESEARCH MISCONDUCT (2006), available at <https://portfolio.du.edu/portfolio/getportfoliofile?uid=141203>; Terry Smith, *Speaking Against Norms: Public Discourse and the Economy of Racialization in the Workplace*, 57 AM. U. L. REV. 523, 552 (2008).

281. The scope of the university's investigation was extensive and included all of Churchill's writings and public statement. In the final analysis, Churchill was not dismissed for his controversial 9/11 comments but for his academic misconduct. See Elrod, *supra* note 277, at 1676.

282. In April 2009, a Denver jury unanimously decided in Ward Churchill's favor finding that he was terminated in retaliation for his controversial essay about the September 11, 2001, terrorists attacks which was protected free speech. The jury awarded \$1 in damages. Subsequently, on post-trial motions by both parties, the district court vacated the jury's verdict finding that the defendants were entitled to quasi-judicial immunity and denied Churchill's motion for reinstatement and front pay. The court found that even if equitable remedies were permissible, reinstatement would be inappropriate given that Churchill's relationship with the university was irreparably damaged and that reinstatement would likely result in undue interference with the academic process. The district court's decision was upheld on appeal and Churchill sought review by the Colorado Supreme Court. See Cardona, *supra* note 275; Valerie Richardson, *Jury Says Professor Wrongly Booted*, WASH. TIMES (Apr. 3, 2009), <http://p.washingtontimes.com/news/2009/apr/3/jury-says-professor-was-wrongly-booted/print/>. On September 10, 2012, the Colorado Supreme Court re-affirmed the previous district court and appellate court decisions. The Colorado Supreme Court held that (1) the university, standing in the shoes of its board of regents, by stipulation, could properly raise regents's personal immunity defenses; (2) the regents's decision to terminate Churchill was a quasi-judicial decision, and therefore, the regents were entitled to absolute immunity regarding suits involving Churchill's termination; (3) Churchill was not entitled to reinstatement or front pay, despite the jury's finding that his termination was retaliatory; and (4) the regents were entitled to qualified immunity on the claim of retaliatory employment investigation. Churchill filed a petition for the U.S. Supreme Court to hear his case, however it denied certiorari. *Churchill v. Univ. of Colo. Boulder*, 285 P.3d 986 (Colo. 2012), *cert. denied*, 133 S. Ct. 1724 (2013).

ill's speech focused on his view of U.S. economic and foreign policy, the answer would be yes, but whether *Garcetti* would impose disciplinary action is uncertain. The matter may hinge on the link between the speech and Professor Churchill's academic scholarship or teaching. Without an adequate academic foundation, academic freedom should provide no sanctuary for unchecked faculty speech, and *Garcetti* may authorize administrative action for such unprotected speech. But knowing what is and what is not entitled to academic-freedom protection may be difficult for faculty to determine. Academics may become reluctant to speak publicly at conferences or symposiums on any topic, fearing reprisals for speech that fails to fall within Justice Kennedy's caveat cited in *Garcetti*. Therefore, *Garcetti* can be viewed as a wake-up call for academics and institutions to clarify their support for academic freedom and define the umbrella of protection available to faculty.

Applying the post-*Garcetti* case law to circumstances such as those found in the *Churchill* matter, it is likely that the analysis utilized in *Adams* would be most relevant. In *Adams*, the court determined that a professor's writings in books and commentaries constituted protected speech in spite of its conservative tone on political and social issues.²⁸³ Churchill's essay that criticized American economic and foreign policy might be considered core academic speech subject to scrutiny pursuant to *Pickering* balancing; however, it should be observed that Churchill's scathing reference to the 9/11 victims as "little Eichmanns" could so undermine the university's teaching mission that it is undeserving of First Amendment protection because it is outside the realm of academic discourse. From this standpoint, *Garcetti* would be applicable. Under either approach, specific clarification regarding the scope of academic-freedom protection relative to teaching and scholarship would be beneficial to lower courts.

B. The John Yoo Example: The Faculty Voice and Its Range

Recall that in *Sweezy*, the Supreme Court noted that "[t]eachers . . . must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."²⁸⁴ Academics and professors at American universities are typically offered a broad set of parameters for teaching and scholarly purposes, and dread the consequences that might flow from any real or perceived bar on individual faculty academic freedom. At the

283. *Adams v. Trs. of Univ. of N.C.-Wilmington*, 640 F.3d 550, 555–56 (4th Cir. 2011).

284. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (emphasis added).

University of California Law School, Professor John Yoo took a leave of absence after earning tenure in 1999 to serve as a government lawyer in the Department of Justice in the Bush Administration.²⁸⁵ While it is possible that Professor Yoo joined the Department of Justice to gain new maturity and understanding about the practice of law to enhance his skills and knowledge as a legal educator, he may be best known for the role he played in justifying the Bush Administration's policy in the War on Terrorism.

Professor Yoo is credited for writing a 2002 interrogation opinion known as the Torture Memos.²⁸⁶ The memos advised the Central Intelligence Agency, the Department of Defense, and the President on the use of mental and physical torment and coercion to obtain information. The methods included prolonged sleep deprivation, binding in stress positions, and water-boarding. While these acts are widely regarded as torture in the international community, the Torture Memos claimed that these activities might be legally permissible under an expansive interpretation of the Presidential authority during the War on Terrorism. Yoo further argued that the President was not bound by the War Crimes Act,²⁸⁷ thereby providing a legal opinion backing the Bush Administration's warrantless wiretapping programs

Secretary of State Colin Powell, as well as U.S. Navy General Counsel Alberto Mora, argued that Professor Yoo's views were extremist and represented "catastrophically poor legal reasoning," criticizing Professor Yoo's arguments as a violation of the Geneva Convention.²⁸⁸ Also, once the Torture Memos became public in 2004, they were repudiated by conservatives such as Jack Goldsmith, the head of the Office of Legal Counsel (OLC), a division within the Department of Justice responsible for advising the President on the limits of executive powers.²⁸⁹ Although

285. See Christopher Edley, Jr., *The Torture Memos and Academic Freedom UC Berkeley Law School*, BERKLEY L. (Apr. 10, 2008), <http://www.law.berkeley.edu/news/2008/edley041008.html>.

286. OFFICE OF LEGAL COUNSEL, U.S. DEP'T OF JUSTICE, MEMORANDUM FOR ALBERTO R. GONZALES, RE: STANDARDS OF CONDUCT FOR INTERROGATION UNDER 18 U.S.C. §§ 2340–2340A (2002), available at <http://www.justice.gov/olc/docs/memo-gonzales-aug2002.pdf> [hereinafter Torture Memo] (memorandum signed by Jay S. Bybee, the U.S. Assistant Attorney General, but generally understood to be written by Yoo); see also Joseph Marchesano, *Where Lawfare Meets Lawsuit in the Case of Padilla v. Yoo*, 34 SEATTLE U. L. REV. 1575 (2011).

287. Michael Isikoff, *Memos Reveal War Crimes Warnings*, NEWSWEEK (May 16, 2004), <http://www.thedailybeast.com/newsweek/2004/05/16/memos-reveal-war-crimes-warnings.html>.

288. Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees Was Thwarted*, NEW YORKER (Feb. 27, 2006), http://www.newyorker.com/archive/2006/02/27/060227fa_fact.

289. Jeffrey Rosen, *Conscience of a Conservative*, N.Y. TIMES MAG. (Sept. 9, 2007), <http://www.nytimes.com/2007/09/09/magazine/09rosen.html>; see also JACK GOLDSMITH, TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 9, 143–144 (2007).

the Bush Administration initially relied upon the Torture Memos, the election of Barack Obama resulted in the new administration's decision to immediately rescind all the OLC's guidance on interrogation and surveillance policy.²⁹⁰

Since leaving the Department of Justice, Professor Yoo has been subject to extensive questions and scrutiny regarding the Torture Memos. In 2009, Professor Yoo was called to testify before the House Judiciary Committee about his work at the Justice Department.²⁹¹ Furthermore, the Justice Department ethics unit, the Office of Professional Responsibility (OPR), initiated an investigation into Professor Yoo's role in developing a legal justification for water-boarding and other harsh interrogation methods.²⁹² Some media reports indicated that the OPR investigation would determine that Professor Yoo engaged in intentional misconduct.²⁹³ However, the final report determined that Professor Yoo and others merely exercised poor judgment.²⁹⁴

Also, a debate ensued at the University of California as to whether disciplinary action should be taken against Professor Yoo for his role in the Torture Memos. Some believe that academic freedom should be used as a shield to those engaged in unethical activities and professional misconduct. On the other hand, universities are not equipped to respond to the wide array of outside ventures that result in public complaints about a controversial professor. As a general proposition, Professor Yoo's leave of absence to join the Justice Department enhanced his ability in the classroom and as a scholar upon his return to the University of California, Berkeley law school.²⁹⁵ Institutional support for externships, sabbaticals, or professional leave is routinely granted to faculty for academic purposes. As such, Professor Yoo's work on the Torture Memos while at the Justice Department may well be within the reach of academic-

290. Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 27, 2009), available at <http://www.gpo.gov/fdsys/pkg/FR-2009-01-27/pdf/E9-1885.pdf>.

291. Dan Eggen, *Bush Policy Authors Defend Their Actions*, WASH. POST (June 27, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/06/26/AR2008062601966_pf.html.

292. Scott Shane, *Justice Dept. to Critique Interrogation Methods Backed by Bush Team*, N.Y. TIMES (Feb. 16, 2009), <http://www.nytimes.com/2009/02/17/us/17justice.html>.

293. Michael Isikoff, *Report: Bush Lawyer Said President Could Order Civilians to Be 'Massacred'*, NEWSWEEK (Feb. 19, 2010), <http://www.thedailybeast.com/newsweek/blogs/declassified/2010/02/19/report-bush-lawyer-said-president-could-order-civilians-to-be-massacred.html>.

294. Michael Isikoff & Daniel Klaidman, *Justice Official Clears Bush Lawyers in Torture Memo Probe*, NEWSWEEK (Jan. 29, 2010), <http://www.thedailybeast.com/newsweek/blogs/declassified/2010/01/29/justice-official-clears-bush-lawyers-in-torture-memo-probe.html>.

295. See generally Richard Byrne, *Scholars See Need to Redefine and Protect Academic Freedom*, THE CHRON. OF HIGHER EDUC. (Apr. 7, 2008), <http://chronicle.com/article/Scholars-See-Need-to-Redefine/661> (discussing attacks on academic freedom and need for a strong response by scholars).

freedom protection if the academic leave was indeed granted to influence his teaching and scholarship.

To the extent that Professor Yoo enjoyed academic freedom before his leave of absence, it is difficult to pinpoint at what point he ceased to have academic-freedom protection once joining the Justice Department. In sum, Professor Yoo's situation provides a wonderful example of how professorial work differs in complexity and scope from other public sector jobs (e.g., city manager, police officer, tax assessor, etc.). Moreover, given that Professor Yoo was not convicted of any illegal activity, academic freedom is difficult to deny. To do so would likely discourage faculty from gaining new insight and perspective that can be attained through external outreach and ventures outside the college campus.

In cases such as *Renken* and *Abcarian*, academic freedom was unavailable to the faculty members because their speech involved official duties of a managerial nature—administrating a National Science Foundation grant and management of a medical college, respectively. Also, an initial survey of Professor Yoo's case might indicate that academic-freedom protection is improper because his work at the Justice Department was not an academic matter but rather the official duties of a professional government lawyer. However, professors take leave from their on-campus academic work frequently to gain practical experience to augment their scholarship and classroom teaching. In this context, *Garcetti* would not appear to apply.

Faculty speech that triggers an emotional response, such as Professor Churchill's reference to September 11th victims as "little Eichmanns," or speech that may be criticized as politically partisan and ill-founded, such as Professor Yoo's Torture Memos, present a tempting opportunity for college and university administrators to impose disciplinary actions or sanction faculty for this type of speech. But academics must be allowed the latitude to express themselves on matters that are perhaps controversial. Of course, speech that creates a hostile work environment—gender or racial slurs, profanity, etc.—or speech that unduly interferes with the operations of the institution ought not receive academic-freedom protection. Unfortunately, *Garcetti* does not clearly distinguish faculty from other public employees, although it offers an optimistic view that speech regarding classroom instruction and scholarship might be entitled to constitutional protection.

V. A CONCEPTION OF ACADEMIC FREEDOM GOING FORWARD

A. *The Value of the Garcetti Caveat*

At the close of the *Garcetti* majority opinion, Justice Kennedy states that “[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence.”²⁹⁶ While somewhat vague, this caveat appears to signal that academic freedom, as a constitutional protection, may be sustainable for faculty at public colleges and universities. Lower courts seem to agree, however, that the *Garcetti* caveat leaves various questions regarding academic freedom unsettled that will require substantial consideration from the courts going forward.

For instance, the *Garcetti* caveat indicates that speech regarding scholarship and teaching may be entitled to constitutional protection but is silent as to speech related to university governance and public service. Confining academic-freedom protection to expression related to scholarship and classroom teaching arguably may be too narrow to adequately protect the legitimate role faculty should play in the higher education community. Also, the *Garcetti* caveat leaves uncertain under what circumstances the majority’s “official duties” analysis applies to academic speech, and some courts have shared this concern and been reluctant to apply *Garcetti*.²⁹⁷ Thus, future decisions relying on *Garcetti* regarding the breadth of academic-freedom protection, especially in matters that do not exclusively involve teaching or scholarship, may be significantly inconsistent.²⁹⁸

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

297. See *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687 (4th Cir. 2007) (holding that *Garcetti* does not necessarily apply in cases involving speech related to scholarship and teaching); *Evans-Marshall v. Bd. of Educ.*, No. 3:03cv091, 2008 WL 2987174 (S.D. Ohio July 30, 2008), *aff’d*, 624 F.3d 332 (6th Cir. 2010); *Pittman v. Cuyahoga Valley Career Ctr.*, 451 F. Supp. 2d 905, 929 (N.D. Ohio 2006).

298. Moreover, clarification of the *Garcetti* caveat may not be forthcoming for political reasons. Only two of the dissenters to the 2006 *Garcetti* decision, Justice Ginsburg and Justice Breyer, remain on the Supreme Court. Justice Souter’s departure is particularly noteworthy in light of his concerns that the *Garcetti* majority “does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write ‘pursuant to . . . official duties.’” *Garcetti*, 547 U.S. at 438 (citation omitted). For these reasons, the value of the *Garcetti* caveat is best understood as a signpost that individual academic freedom remains a precarious topic in higher education.

B. *Academic Freedom and Professorial Responsibility*

In recent years, *Garcetti*'s impact on higher education has been examined relative to institutional governance, as well as the decision's influence on the general meaning and strength of academic freedom.²⁹⁹ While academic freedom may have been best served by the U.S. Supreme Court's admonition that academic freedom is a special concern of the First Amendment, *Garcetti*, at the very least, has given many pause to wonder about the future of academic freedom. Certainly, there are those who believe that academic freedom provides nothing but a cloak or pretext that allows faculty to use their academic position as a platform to engage in mischief by expressing themselves on matters that have no academic foundation.

Consider the March 2011 open records request by the Wisconsin Republican Party's Deputy Executive Director Stephen Thompson for email records of University of Wisconsin Professor Bill Cronon.³⁰⁰ The GOP's request for Professor Cronon's email records was made while the state of Wisconsin was receiving national and international media attention over an ongoing budget controversy that placed the state's Republican governor at odds with Democrats in the legislature. Finding the Republican Party's open records request authorized by state law, University of Wisconsin at Madison Chancellor Biddy Martin indicated that "the university would comply with the law and . . . apply the kind of balancing test that the law allows, taking such things as right to privacy and free expression into account."³⁰¹ In complying with the open records request, the university withheld certain materials in the interests of academic freedom as announced by Chancellor Martin:

We are . . . excluding what we consider to be the private email exchanges among scholars that fall within the orbit of academic freedom and all that is entailed by it. Academic freedom is the freedom to pursue knowledge and develop lines of argument without fear of reprisal for controversial findings and without the premature disclosure of those ideas.

Scholars and scientists pursue knowledge by way of open intellectual exchange. Without a zone of privacy within which to conduct and protect their work, scholars would not be able to produce new knowledge or make life-enhancing discoveries. Lively, even heated

299. See Areen, *supra* note 250; Cope, *supra* note 152; O'Neil, *supra* note 129.

300. Don Walker, *GOP Fails to Get All Professor's Email*, J. SENTINEL ONLINE (Apr. 1, 2011), <http://www.jsonline.com/news/statepolitics/119103214.html>.

301. *Chancellor's Message on Academic Freedom and Open Records*, UNIV. OF WIS-MADISON NEWS (Apr. 1, 2011), <http://www.news.wisc.edu/19190>.

and acrimonious debates over policy, campus and otherwise, as well as more narrowly defined disciplinary matters are essential elements of an intellectual environment and such debates are the very definition of the Wisconsin Idea.

When faculty members use email or any other medium to develop and share their thoughts with one another, they must be able to assume a right to the privacy of those exchanges, barring violations of state law or university policy. Having every exchange of ideas subject to public exposure puts academic freedom in peril and threatens the processes by which knowledge is created. The consequence for our state will be the loss of the most talented and creative faculty who will choose to leave for universities where collegial exchange and the development of ideas can be undertaken without fear of premature exposure or reprisal for unpopular positions.

This does not mean that scholars can be irresponsible in the use of state and university resources or the exercise of academic freedom.

To our faculty, I say: Continue to ask difficult questions, explore unpopular lines of thought and exercise your academic freedom, regardless of your point of view. As always, we will take our cue from the bronze plaque on the walls of Bascom Hall. It calls for the “continual and fearless sifting and winnowing” of ideas. It is our tradition, our defining value, and the way to a better society.³⁰²

Although Chancellor Martin’s message represents the University of Wisconsin, it is likely embraced at colleges and universities throughout the nation.

Besides the endorsement for academic freedom, Martin’s message rejects the irresponsible exercise of academic freedom or the pursuit of unpopular lines of thought that have no linkage to scholarly exploration. Academic freedom is not free and all speech is not protected. Professors and academics are granted an expanded level of freedom as part of their employment, but that freedom is accompanied by a heightened level of trust and duty. When that trust and duty are breached, no academic-freedom protection is available. But how to evaluate the breach of that trust/duty covenant is the challenge.

At Northwestern University, Professor John Michael Bailey invited students in his human sexuality course to observe a live in-class sex demonstration. He was initially supported by university officials, who said “[t]he university supports the efforts of its faculty to further the ad-

302. *Id.*

vancement of knowledge.”³⁰³ Further, a university spokesperson indicated that “Northwestern University faculty members engage in teaching and research on a wide variety of topics, some of them controversial.”³⁰⁴ As news spread that about 100 students actually watched a man penetrate a woman with an electric-powered device, the university was compelled to explain its dismay with the incident and directed a full investigation.³⁰⁵

Reacting to the professor’s decision to permit the in-class sex demonstration, Northwestern University President Morton Schapiro stated, “I feel it represented extremely poor judgment on the part of our faculty member I simply do not believe this was appropriate, necessary or in keeping with Northwestern University’s academic mission.”³⁰⁶

President Schapiro’s comments, like those of Chancellor Martin’s, strike at the core professorial function—advancing the university’s academic mission without abandoning the institution’s responsibility to embrace ethical and professional standards. The University of Wisconsin was prepared to withhold information in the interest of protecting materials that, if disclosed, would place academic freedom in peril. Northwestern University may refuse to recognize academic freedom as a shield to insulate a professor from disciplinary action because the professor allowed expression that arguably did not constitute an appropriate academic pursuit.

Given the complex array of circumstances that frequently raise academic freedom concerns, *Garcetti* gingerly confirms that professorial speech regarding teaching and scholarship remains protected. Beyond that consideration, faculty speech regarding administrative matters or quasi-administrative matters is less likely to receive protection. Without question, a burden is placed on individual faculty to police themselves, especially when their speech lacks a firm academic foundation.

While more guidance is welcome from the Supreme Court regarding what academic speech is constitutionally protected and to what extent, American higher education would also be well served by taking the initiative and defining individual academic freedom for itself. If these primary stakeholders are unable define academic freedom in some meaningful fashion, perhaps the courts will continue address academic freedom in bits, pieces, and caveats. Again, *Garcetti* and the post-*Garcetti*

303. Kevin Helliker, *College Condemns Classroom Sex Show*, WALL ST. J. (Mar. 6, 2011), <http://online.wsj.com/article/SB10001424052748703752404576178791072808496.html>.

304. *Id.*

305. Kara Spak, *Live Sex Demonstration Troubles, Disappoints Northwestern President*, CHICAGO SUN-TIMES (Apr. 6, 2011), <http://www.suntimes.com/4115230-417/northwestern-president-troubled-over-live-sex-demonstration.html>.

306. *Id.*

cases should serve notice that the scope of individual academic freedom requires renewed clarification, which will only benefit the American higher education system.

VI. CONCLUSION

While colleges and universities are complex organizations that depend on contributions from various skilled and dedicated professionals, the academic faculty plays a vital role in the mission of any higher education institution. Professors rely on academic freedom to pursue their work without the threat of retaliatory disciplinary action influencing their teaching or research. The Supreme Court's decision in *Garcetti* raises important questions regarding free speech and the scope of academic-freedom protection. The post-*Garcetti* case law appears to unveil a distinction as to speech that centers on core academic matters, such as teaching and scholarship, versus speech that involves administrative and managerial concerns. Although academic freedom has been characterized as a difficult concept to define, *Garcetti* has provided an opportunity for the judiciary, as well as institutions of higher education, to re-examine academic freedom and the protections available to individual professors and faculty members.