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Recognizing an Academic Freedom Exception to the Garcetti Limitation on the First Amendment Right to Free Speech

Carol N. Tran

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**RECOGNIZING AN ACADEMIC FREEDOM EXCEPTION TO
THE *GARCETTI* LIMITATION ON THE FIRST AMENDMENT
RIGHT TO FREE SPEECH**

*Carol N. Tran**

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I. INTRODUCTION

In the United States, academic freedom is generally understood to be the idea that “[t]eachers are entitled to freedom in the classroom in discussing their subject.”¹ In particular, professional academic freedom for *university faculty* involves: (1) freedom in research and publication, (2) freedom in classroom discussion concerning the curriculum, and (3) freedom to speak or write as citizens.² In the United States, academic freedom³ is seen as a key component to a normal, functioning public university⁴ environment.⁵ As such, it would seem natural for academic

1. The 1940 Statement of Principles on Academic Freedom and Tenure (“1940 Statement”) defined “academic freedom.” The American Association of University Professors (“AAUP”) and the Association of American Colleges (“AAC”) jointly authored the 1940 Statement after a series of joint conferences on the subject of academic freedom and tenure. *See* AM. ASS’N OF UNIV. PROFESSORS & ASS’N OF AM. COLLS., 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE 3 (1940) [hereinafter 1940 STATEMENT], available at <http://www.aaup.org/NR/rdonlyres/EBB1B330-33D3-4A51-B534-CEE0C7A90DAB/0/1940StatementofPrinciplesonAcademicFreedomandTenure.pdf>.

2. The 1940 Statement is a restatement of principles. Thus, it serves as a guideline, and not binding law. But, the AAUP does “enforce” the Statement in a way by listing colleges and universities that it finds to be in violation of the 1940 Statement. *See generally* Am. Ass’n of Univ. Professors, *Censure List*, AAUP, available at <http://www.aaup.org/AAUP/about/censuredadmins/> (last visited Mar. 3, 2012).

3. *See generally* Philip G. Altbach, *Academic freedom: International realities and challenges*, 41 HIGHER EDUC. 205 (2001). Academic freedom is generally strong in major industrialized countries such as the United States, Japan, and Germany. *Id.* at 215. But, academic freedom has come under attack in many parts of the world, especially in less industrialized areas where dictatorial forms of government are prevalent. *Id.* at 207. For example, professors may be prosecuted and imprisoned for activities viewed to be anti-regime in China, Vietnam, and Cuba. *Id.* at 211. In addition, Singapore and Malaysia have long had informal bans on certain research topics such as ethnic conflict, religion, and local corruption, because the topics might raise questions and doubt about government policies. *Id.* at 213. And in countries with limits on academic freedom, academic faculty must act and express themselves in a particular way in order to ensure budgetary allocations and research funds from the government. *Id.*

But academic freedom restriction is not just a problem in non-industrialized countries. Even in places such as the United States, academic freedom is restricted in subtle ways. For example, the academy restricts itself through efforts to enforce “political correctness”—imposing academic orthodoxy from a liberal or radical perspective. *Id.* at 215. Opposing views are not welcomed. In fact, 34% of academics in the United States feel that there are political and ideological restrictions on what a scholar may publish. *Id.* at 216-17.

4. The majority opinion in *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332, 343-44 (6th Cir. 2010) (citations omitted), distinguishes the importance of academic freedom in an university environment, as opposed to in primary and secondary education:

As a cultural and a legal principle, academic freedom ‘was conceived and implemented in the university’ out of concern for ‘teachers who are also researchers or scholars-work not generally expected of elementary and secondary school teachers.’ . . . ‘[U]niversities occupy a special niche in our constitutional tradition’ and the constitutional rules applicable in higher education do not necessarily apply in primary and secondary schools, where students generally do not choose whether or where they will attend

personnel to be given extra constitutional protection not afforded to other public employees under the First Amendment.⁶ However, the current constitutional law framework does not adequately reflect this seemingly intuitive understanding.⁷

The leading case on the First Amendment and free speech in the workplace is *Garcetti v. Ceballos*,⁸ in which the United States Supreme Court held that governmental employees who speak out pursuant to job

school.

5. In *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 312 (1978) (citations omitted), Justice Powell explained:

Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. Mr. Justice Frankfurter summarized the ‘four essential freedoms’ that constitute academic freedom:

‘It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. 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.’

Our national commitment to the safeguarding of these freedoms within university communities was emphasized in *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967):

‘Our Nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’

6. U.S. CONST. amend. I. However, extra constitutional protection would have to be a product of constitutional interpretation because the First Amendment does not actually contain any express recognition of academic freedom. See also David M. Rabban, *Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment*, 53-SUM LAW & CONTEMP. PROBS. 227, 237 (1990) (“Fitting academic freedom within the rubric of the first amendment is in many respects an extremely difficult challenge. The term ‘academic freedom,’ in obvious contrast to ‘freedom of the press,’ is nowhere mentioned in the text of the first amendment.”).

7. J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment”*, 99 YALE L.J. 251, 252-53 (1989):

The First Amendment protects academic freedom. This simple proposition stands explicit or implicit in numerous judicial opinions, often proclaimed in fervid rhetoric. Attempts to understand the scope and foundation of a constitutional guarantee of academic freedom, however, generally result in paradox or confusion. The cases, shorn of panegyrics, are inconclusive, the promise of rhetoric reproached by the ambiguous realities of academic life.

The problems are fundamental: There has been no adequate analysis of what academic freedom the Constitution protects or of why it protects it. Lacking definition or guiding principle, the doctrine floats in law, picking up decisions as a hull does barnacles.

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

responsibilities are not protected by the First Amendment from employer discipline for that speech.⁹ While the United States Supreme Court has stated in dicta that an academic freedom exception to this limit may exist, the Court has not yet provided any guidance for this hypothetical exception.¹⁰ As a result of these uncertain circumstances, few lower courts have recognized an academic freedom exception to the First Amendment.¹¹ Of those that have, even fewer have attempted to define the boundaries for this exception, leading to an inconsistent interpretation of educators' constitutional rights.¹² This discrepancy amongst jurisdictions threatens to undermine the First Amendment freedom of speech by chilling an area of expression (academic) that depends on the *lack* of restriction to be of any inherent value; academic speech is based upon the free, unrestricted exchange of thoughts and ideas.

In order to uphold the integrity of the First Amendment, it is essential that the Supreme Court establish a clear academic freedom exception to First Amendment jurisprudence. This Comment proposes that an academic freedom exception should exist based upon the history of academic freedom. The Comment will also discuss the limits and bounds for such an exception. Part II will begin by looking at the history of First Amendment law surrounding free speech in the workplace. Part III will then examine different circuit approaches to the *Garcetti* limitation to the First Amendment right to freedom of speech in the academic context. Part IV will lay out a proposed test and the

9. *Id.* at 421 (“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.”).

10. *Id.* at 425 (“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.”).

11. *Kramer v. New York City Bd. of Educ.*, 715 F. Supp. 2d 335, 352 (E.D.N.Y. 2010) (quoting Karen C. Daly, *Balancing Act: Teachers’ Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 1 (2001)) (“In the absence of any Supreme Court precedent squarely addressing the scope of public school teachers’ free speech rights in the classroom, lower federal courts and state courts have been forced to rely on the [inadequate] precedents established in either *Pickering v. Board of Education* [, 391 U.S. 563 (1968)] or *Hazelwood School District v. Kuhlmeier*.”).

12. For example, the United States Court of Appeals for the Fourth Circuit decided to not apply the *Garcetti* academic freedom exception in a case involving a high school teacher who posted religious material on a bulletin board because “[t]he Court explicitly did not decide whether this analysis would apply in the same manner to a case involving speech related to teaching.” *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 694-95 n.11 (4th Cir. 2007). Instead, the court analyzed the issue under the old *Pickering/Connick* test. *See id.* at 689, 694-95 n.11.

reasoning behind each element. Finally, the Comment will demonstrate how this test can serve as a guiding point for future free speech cases in the academic workplace.

II. BACKGROUND

For most of the 20th century, it was unchallenged that a public employee had no right to object to conditions placed upon the terms of employment, including those which restricted constitutional rights.¹³ However, a series of cases during the Cold War led the United States Supreme Court to revisit this issue.¹⁴

During the 1950s-60s, public employees were required to swear oaths of loyalty to the state and reveal the groups with which they associated.¹⁵ The Court responded by striking down statutes and regulations that required an employee to deny membership in any particular party (usually the Communists around that time).¹⁶ In the landmark case of *Keyishian v. Board of Regents*,¹⁷ the Court upheld the Second Circuit Court of Appeal's reasoning that the "theory that public employment . . . may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."¹⁸ Many statutes and actions seeking to suppress the rights of public employees were invalidated.¹⁹

13. *Connick v. Myers*, 461 U.S. 138, 143-44 (1983) (citations omitted):

The classic formulation of this position was Justice Holmes', who, when sitting on the Supreme Judicial Court of Massachusetts, observed: 'A policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.' For many years, Holmes' epigram expressed this Court's law.

14. *Id.* at 144.

15. *Id.*

16. *Id.*

17. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605-06 (1967).

18. *Connick*, 461 U.S. at 144.

19. *Id.* (citations omitted):

In *Wieman v. Updegraff*, the Court held that a State could not require its employees to establish their loyalty by extracting an oath denying past affiliation with Communists. In *Cafeteria Workers v. McElroy*, the Court recognized that the government could not deny employment because of previous membership in a particular party. By the time *Sherbert v. Verner* was decided, it was already 'too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.'

It was therefore no surprise when in *Keyishian v. Board of Regents* the Court invalidated New York statutes barring employment on the basis of membership in 'subversive' organizations, observing that the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, had been uniformly rejected.

However, *Keyishian* did not stand for the ruling that *no* conditions could be placed on public employees.²⁰ In fact, the government has greater power to regulate the speech of its employees than its citizens²¹ because the government has a legitimate reason to be concerned about operational efficiency and effectiveness in performing its tasks.²² The right to speak out in the workplace is qualified because certain speech can impair the effective functioning of the unit; dissension can distract and impede policy.²³ For example, “in the context of a harmonious working and learning environment,” academic personnel do not “enjoy an unqualified First Amendment right to engage in offensive speech that would compromise relationships with colleagues or students,” “undermine administrative direction,” or “advocate for a particular candidate.”²⁴ At the same time, however, public employers cannot use

20. *Keyishian*, 385 U.S. at 605-06 (citing *Keyishian v. Bd. of Regents*, 345 F.2d 236, 239 (2d Cir. 1965)).

21. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (citations omitted) (“When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. Government employers, like private employers, need a significant degree of control over their employees’ words and actions; without it, there would be little chance for the efficient provision of public services.”).

22. Robert J. Tepper & Craig G. White, *Speak No Evil: Academic Freedom and the Application of Garcetti v. Ceballos to Public University Faculty*, 59 CATH. U. L. REV. 125, 147 (2009) (“The government is rightly concerned with operational efficiency and effectiveness in performing its tasks.”).

23. *Rankin v. McPherson*, 483 U.S. 378, 390-91 (1987):

But in weighing the State’s interest in discharging an employee based on any claim that the content of a statement made by the employee somehow undermines the mission of the public employer, some attention must be paid to the responsibilities of the employee within the agency. The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee’s role entails. Where, as here, an employee serves no confidential, policymaking, or public contact role, the danger to the agency’s successful functioning from that employee’s private speech is minimal.

24. *Waters v. Churchill*, 511 U.S. 661, 672-74 (1994):

[W]e have never expressed doubt that a government employer may bar its employees from using Mr. Cohen’s offensive utterance to members of the public or to the people with whom they work. . . . [W]hen an employee counsels her co-workers to do their job in a way with which the public employer disagrees, her managers may tell her to stop, rather than relying on counterspeech. . . . [T]hough a private person is perfectly free to uninhibitedly and robustly criticize a state governor’s legislative program, we have never suggested that the Constitution bars the governor from firing a high-ranking deputy for doing the same thing. Even something as close to the core of the First Amendment as participation in political campaigns may be prohibited to government employees.

[W]e have given substantial weight to government employers’ reasonable predictions of disruption, even when the speech involved is on a matter of public concern, and even though when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential.

authority over their employees to silence discourse simply because they disagree with the content of employees' speech.²⁵

Traditionally, however, public employees have a right to speak out on matters of public concern.²⁶ To determine whether an employee should prevail in a First Amendment claim, pre-*Garcetti* courts relied on the *Pickering/Connick* test, which requires an employee to prove that the speech involved a matter of public concern and that the speech was a motivating factor in the adverse employment decision.²⁷ On the other

....

[T]he above examples do show that constitutional review of government employment decisions must rest on different principles than review of speech restraints imposed by the government as sovereign. The restrictions discussed above are allowed not just because the speech interferes with the government's operation. Speech by private people can do the same, but this does not allow the government to suppress it.

Rather, the extra power the government has in this area comes from the nature of the government's mission as employer.

See also *Tepper & White*, *supra* note 22, at 149-50. There are other limits on academic personnel's constitutional rights as a result of the public employment context. *Id.* For example, citizens enjoy a Fourth Amendment right to be free from unreasonable searches and seizures, which normally includes a requirement that the search be founded upon probable cause and a court-issued warrant. *Id.* However, neither is required when an academic employer performs a non-investigatory search of an employee's office or investigates work-related misconduct. *Id.* While academic personnel may have a reasonable expectation of privacy in certain areas of the workplace, the reasonableness of a search is influenced by the needs of the employer to maintain an effective workplace. *Id.*

Regarding due process, at-will academic personnel do not possess a liberty interest providing protection from discharge based upon an employer's mistaken reasons, when the reasons are not made public. *Id.* As a result, an at-will academic employee can be discharged for inadequate or even false reasons. *Id.* The United States Supreme Court recently held that the "class-of-one" theory of equal protection (based on irrational treatment of one person rather than class-based discrimination) is not available in the public employee context. *Id.* Discretion is granted to supervisory personnel to make subjective, individualized decisions. *Id.*

25. *Rankin*, 483 U.S. at 384 ("Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech.").

26. *Id.* at 383-84.

27. *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1186 (6th Cir. 1995):

The threshold question . . . is whether [the employee's] speech may be 'fairly characterized as constituting speech on a matter of public concern.' . . . If the First Amendment violation was a substantial or motivating factor in the termination, the employer may present evidence the employee would have been terminated in the absence of protected conduct. . . The *Connick* court noted, however, 'if [the speech] cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reason for [the] discharge.' Thus, if *Dambrot's* speech is not a matter of public concern, the court's inquiry ends.'

Schrier v. Univ. of Colorado, 427 F.3d 1253, 1262 (10th Cir. 2005):

First, we must determine whether the employee's speech involves a matter of public concern. If so, we then balance the employee's interest in commenting upon matters of public concern against the interest of the State, as an employer, in promoting the

hand, regardless of whether the employee has carried his or her burden, an employer prevails if it proves that its interest in an effective workforce outweighs the employee's free speech interest, or that the adverse employment action would have been the same regardless of the protected speech.²⁸ *Garcetti* added an extra element to this balancing test by asking whether the speech was made pursuant to the employee's job responsibilities or involved the employee speaking out as a citizen.²⁹ In the former instance, an affirmative answer would weigh in the employer's favor.³⁰ In the latter instance, an affirmative answer would weigh in the employee's favor.³¹

A. *Pickering v. Board of Education Of Township High School*
District: *The Balancing Test*

One of the seminal cases on the issue of free speech in the workplace is *Pickering v. Board of Education Township High School District*.³² In this 1968 case, the plaintiff was a high school teacher.³³ In a reaction to a recently proposed tax increase, the teacher sent a letter to a local newspaper, criticizing the School Board and district superintendent's handling of past proposals to raise new revenue for the school.³⁴ Specifically, the teacher criticized the allocation of financial

efficiency of the public services it performs through its employees. Third, if the balance tips in favor of the employee, the employee then must show that the speech was a substantial factor or a motivating factor in the detrimental employment decision. Fourth, if the plaintiff establishes that speech was such a factor, the employer may demonstrate that it would have taken the same action against the employee even in the absence of the protected speech.

28. *Dambrot*, 55 F.3d at 1186; *Schrier*, 427 F.3d at 1262. The U.S. Supreme Court has also noted that there may be some positions in public employment where the need for confidentiality is so great that even completely correct public statements may furnish a permissible ground for dismissal. Also, there may be instances in public employment where the relationship between a superior and inferior is so intimate that public criticism of the superior by the subordinate could seriously undermine the effectiveness of the working relationship. *Pickering*, 391 U.S. 563, 570 n.3 (1968).

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

30. *Id.* at 421.

31. *Id.* at 422.

32. *Pickering*, 391 U.S. 563.

33. *Id.* at 564. As of 1961, Plaintiff Marvin L. Pickering was a teacher in the Township High School District 205, Will County, Illinois. *Id.*

34. *Id.* ("[Plaintiff sent] a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools.").

resources between the school's education and athletic programs, and charged the superintendent with attempting to prevent teachers in the district from opposing or criticizing the recent proposal.³⁵ The letter was published in the newspaper.³⁶ Subsequently, the Board held a hearing during which it determined that the letter contained many false statements and was ultimately "detrimental to the efficient operation and administration of the schools of the district."³⁷ As a result, the teacher was dismissed.³⁸

The plaintiff sought review of the Board's dismissal on First and Fourteenth Amendment grounds.³⁹ However, his dismissal was affirmed all the way up through the Supreme Court of Illinois.⁴⁰ Then, the United States Supreme Court granted certiorari to hear the case.⁴¹

35. *Id.* at 566 ("The letter constituted, basically, an attack on the School Board's handling of the 1961 bond issue proposals and its subsequent allocation of financial resources between the schools' educational and athletic programs. It also charged the superintendent of schools with attempting to prevent teachers in the district from opposing or criticizing the proposed bond issue.").

36. *Id.* at 565-66. These circumstances lead to Plaintiff's issue and letter:

In February of 1961 the appellee Board of Education asked the voters of the school district to approve a bond issue to raise \$4,875,000 to erect two new schools. The proposal was defeated. Then, in December of 1961, the Board submitted another bond proposal to the voters which called for the raising of \$5,500,000 to build two new schools. This second proposal passed and the schools were built with the money raised by the bond sales. In May of 1964 a proposed increase in the tax rate to be used for educational purposes was submitted to the voters by the Board and was defeated. Finally, on September 19, 1964, a second proposal to increase the tax rate was submitted by the Board and was likewise defeated. It was in connection with this last proposal of the School Board that appellant wrote the letter to the editor (which we reproduce in an Appendix to this opinion) that resulted in his dismissal.

Prior to the vote on the second tax increase proposal a variety of articles attributed to the District 205 Teachers' Organization appeared in the local paper. These articles urged passage of the tax increase and stated that failure to pass the increase would result in a decline in the quality of education afforded children in the district's schools. A letter from the superintendent of schools making the same point was published in the paper two days before the election and submitted to the voters in mimeographed form the following day. It was in response to the foregoing material, together with the failure of the tax increase to pass, that appellant submitted the letter in question to the editor of the local paper.

37. *Id.* at 564.

38. *Id.* at 564-65 ("Appellant's dismissal resulted from a determination by the Board, after a full hearing, that the publication of the letter was 'detrimental to the efficient operation and administration of the schools of the district' and hence, under the relevant Illinois statute, Ill.Rev.Stat., c. 122, s 10-22.4(1963), that 'interests of the schools require(d) (his dismissal).").

39. *Id.* at 565.

40. *Id.* ("Appellant then sought review of the Board's action in the Circuit Court of Will County, which affirmed his dismissal on the ground that the determination that appellant's letter was detrimental to the interests of the school system was supported by substantial evidence and that

The United States Supreme Court recognized that public employees do not entirely forego their First Amendment right to comment as citizens on matters of public interest.⁴² On the other hand, the State has an interest as an employer in regulating the speech of its employees that differs significantly from those of the general citizenry.⁴³ The Court posited a fact-intensive test that would “balance between the interests of the teacher 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.”⁴⁴

Applying its newly-created balancing test to the facts, the United States Supreme Court reversed the judgment below,⁴⁵ holding that the plaintiff-teacher had a right to speak on issues of public importance (whether a school system requires additional funds was a matter of legitimate public concern), which may not furnish the basis for his dismissal from public employment.⁴⁶

B. *Connick v. Myers: The Rationale Behind the Pickering Decision*

The second case to weigh in on the issue of free speech in the workplace was *Connick v. Myers*⁴⁷ in 1982. In this case, Sheila Myers was an Assistant District Attorney in New Orleans for five and a half years.⁴⁸ Then in early 1980, Myers was unwillingly transferred to prosecute cases in a different section of the criminal court.⁴⁹ Her protests to her supervisors were unsuccessful and her concerns about various office matters were ignored.⁵⁰ On October 7, 1980, Myers distributed a questionnaire to her fellow district attorneys, polling their

the interests of the schools overruled appellant’s First Amendment rights. On appeal, the Supreme Court of Illinois, two Justices dissenting, affirmed the judgment of the Circuit Court.”)

41. *Id.*

42. *Id.* at 568 (citations omitted):

To the extent that the Illinois Supreme Court’s opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court. ‘(T)he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.’

43. *Id.*

44. *Id.*

45. *Id.* at 575.

46. *Id.* at 574.

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

48. *Id.* at 140.

49. *Id.*

50. *Id.* at 140-41.

satisfaction level with the management.⁵¹ Consequently, her distribution of the questionnaire was considered an act of insubordination and Myers was immediately terminated for her refusal to accept the transfer.⁵² Myers brought a civil rights action, alleging that she had been wrongfully terminated for exercising her constitutionally guaranteed right of free speech.⁵³ But in applying the *Pickering* balancing test, the United States Supreme Court held that the discharge did not violate Myer's First Amendment right of free speech.⁵⁴

51. Myers distributed the following questionnaire:

Please take the few minutes it will require to fill this out. You can freely express your opinion *WITH ANONYMITY GUARANTEED*.

* * *

1. How long have you been in the Office?
2. Were you moved as a result of the recent transfers?
3. Were the transfers as they effected [sic] you discussed with you by any superior prior to the notice of them being posted?
4. Do you think as a matter of policy, they should have been?
5. From your experience, do you feel office procedure regarding transfers has been fair?
6. Do you believe there is a rumor mill active in the office?
7. If so, how do you think it effects [sic] overall working performance of A.D.A. personnel?
8. If so, how do you think it effects [sic] office morale?
9. Do you generally first learn of office changes and developments through rumor?
10. Do you have confidence in and would you rely on the word of:

Bridget Bane

Fred Harper

Lindsay Larson

Joe Meyer

Dennis Waldron

11. Do you ever feel pressured to work in political campaigns on behalf of office supported candidates?
 12. Do you feel a grievance committee would be a worthwhile addition to the office structure?
 13. How would you rate office morale?
 14. Please feel free to express any comments or feelings you have.
- THANK YOU FOR YOUR COOPERATION IN THIS SURVEY.

Id. at 155-56.

52. *Id.* at 141.

53. *Id.*

54. *Id.* at 154.

The *Connick* opinion delved into the *Pickering* test's policy and rationale.⁵⁵ The Court stated that the "repeated emphasis in *Pickering* on the right of a public employee 'as a citizen, in commenting upon matters of public concern,' was not accidental."⁵⁶ Rather, that language reflected a "historical evolvment of the rights of public employees and the common sense realization that government offices could not function if every employment decision became a constitutional matter."⁵⁷

The *Connick* Court recognized that the *Pickering* Court formulated its balancing test with the First Amendment in consideration.⁵⁸ The First Amendment is recognized as being "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."⁵⁹ And so "speech concerning public affairs is more than self-expression; it is the essence of self-government."⁶⁰ Consequently, the United States Supreme Court has frequently reaffirmed that speech on public issues occupies the "highest rung of the hierarchy of First Amendment values, and is entitled to special protection."⁶¹

The *Connick* Court proceeded to flesh out the idea of "public concern," noting that cases following the *Pickering* decision safeguarded employees who spoke as a citizen on matters of public concern.⁶² The

55. *Id.* at 142-54.

56. *Id.* at 143 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)).

57. *Id.*

58. *Id.* at 145.

59. *Id.* (quoting *Roth v. United States*, 354 U.S. 476, 284 (1957)).

60. *Id.* (quoting *Garrison v. La.*, 379 U.S. 64 (1964)).

61. *Id.* (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)) (internal quotation marks omitted).

62. *See id.*, which cites and describes several examples:

The controversy in *Perry v. Sindermann* 408 U.S. 593 (1972), arose from the failure to rehire a teacher in the state college system who had testified before committees of the Texas legislature and had become involved in public disagreement over whether the college should be elevated to four-year status—a change opposed by the Regents. In *Mt. Healthy City Bd of Ed v. Doyle*, 429 U.S. 274 (1977), a public school teacher was not rehired because, allegedly, he had relayed to a radio station the substance of a memorandum relating to teacher dress and appearance that the school principal had circulated to various teachers. The memorandum was apparently prompted by the view of some in the administration that there was a relationship between teacher appearance and public support for bond issues, and indeed, the radio station promptly announced the adoption of the dress code as a news item. Most recently, in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), the court held that First Amendment protection applies when a public employee arranges to communicate privately with his employer rather than to express his views publicly. Although the subject-matter of Mrs. Givhan's statements were not the issue before the Court, it was clear that her statements concerning the school district's allegedly racially discriminatory policies involved a matter of public concern.

Court recognized that an expression is considered a matter of public concern if it is related to a matter of political, social, or other concern to the community.⁶³ But, the speech must transcend personal interest or opinion in order to be considered a matter of public concern.⁶⁴ To make such a determination, the Court must look to “the content, form, and context of a given statement” as revealed by the entire record.⁶⁵ Not all matters that transpire within a government office are of public concern because that would mean that every remark or criticism directed at a public official “would plant the seed of a constitutional case.”⁶⁶ But the United States Supreme Court has often found teachers’ comments to be protected in public education settings.⁶⁷ Some speech, not touching upon a matter of public concern, may still be within the protection of the First Amendment; the Court has not completely ruled out speech on private matters.⁶⁸

But, in cases where the speech is not of public concern or carries so little social value, the Court gives government officials “wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.”⁶⁹ In these instances, even mistaken or unreasonable dismissals are acceptable so long as they do not violate a fixed tenure or applicable statute or regulation.⁷⁰ “[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum” to review the agency’s reaction to that behavior.⁷¹ The scope of

63. *Id.* at 146.

64. *See* Urofsky v. Gilmore, 216 F.3d 401, 406-07 (4th Cir. 2000) (en banc).

65. *Connick*, 461 U.S. at 147-48.

66. *Id.* at 149.

67. *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563, 569-70 (a teacher criticized a school board’s allocation of funds between athletics and education programs, and the lack of transparency in seeking additional revenue in a letter to the local newspaper); *Perry*, 408 U.S. at 595 (a teacher advocated in favor of the institution’s shift from a 2-yr to a 4-yr academic program); *Doyle*, 429 U.S. at 282 (a teacher disclosed a school dress code to the media in an effort to garner public support for a bond issue).

68. *Connick*, 461 U.S. at 147 (“We do not suggest, however that Myers’ speech, even if not touching upon a matter of public concern, is totally beyond the protection of the Amendment. ‘The First Amendment does not protect speech and assembly only to the extent it can be characterized as political. ‘Great secular causes, with smaller ones, are guarded.’”)

69. *Id.* at 146.

70. *Id.* at 146-47 (“Perhaps the government employer’s dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable.”).

71. *Id.* at 147. *But see id.* (citations omitted):

We do not suggest, however, that Myers’ speech, even if not touching upon a matter of

the court's responsibility extends to ensuring that citizens are not deprived of fundamental rights in working for the government.⁷²

The *Connick* Court recognized that the *Pickering* balancing test "requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public."⁷³ Over a hundred years ago, the Court noted that the government had a legitimate purpose in "promot[ing] efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service."⁷⁴

To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.⁷⁵

When close working relationships are required to fulfill public responsibilities, the courts give a wide degree of deference to the employer's judgment.⁷⁶ In addition, the employer is not required to

public concern, is totally beyond the protection of the First Amendment. "The First Amendment does not protect speech and assembly only to the extent it can be characterized as political. 'Great secular causes, with smaller ones, are guarded.'" We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction. For example, an employee's false criticism of his employer on grounds not of public concern may be cause for his discharge but would be entitled to the same protection in a libel action accorded an identical statement made by a man on the street. We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

72. *Id.* at 147. *But see id.* ("[The Court's] responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state.").

73. *Id.* at 150.

74. *Id.* at 150-51 (quoting *Ex parte Curtis*, 106 U.S. 371, 373 (1882)).

75. *Id.* at 151 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring)).

76. *Id.* at 151-52 ("When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate.").

allow events to run their full course and destroy working relationships before taking action.⁷⁷

While the employee may successfully prove that his or her speech was matter of public concern, the *Pickering* balancing test is only considered if an employee can satisfy two additional elements: (1) a public employee must show that the speech was a substantial or motivating factor in adverse employment action,⁷⁸ and (2) the employee's speech implicated the government's interest as an employer.⁷⁹

C. *Garcetti v. Ceballos: A Modification to the Pickering/Connick Balancing Test*

Currently, the controlling case on the issue of free speech in the workplace is *Garcetti v. Ceballos*.⁸⁰ At the time *Garcetti* was decided in 2006,⁸¹ two inquiries guided the constitutional protections accorded to

77. *Id.* at 152 (“[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.”).

78. *See* Bd. of Cnty. Comm’rs v. Umbehr, 518 U.S. 668, 675 (1996).

79. *Connick*, 461 U.S. at 157 (Brennan, J., dissenting) (“When public employees engage in expression unrelated to their employment while away from the work place, their First Amendment rights are . . . no different from those of the general public.”).

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

81. *Id.* at 413-17:

The plaintiff was a deputy district attorney for the Los Angeles County District Attorney’s Office. In February 2000, he was contacted by a defense attorney about a pending criminal case. The defense attorney said there were inaccuracies in an affidavit used to obtain a critical search warrant, and wanted the plaintiff to review the case. The plaintiff concluded that the affidavit indeed contained serious misrepresentations, and prepared a disposition memorandum, explaining his concerns and recommending dismissal of the case. Despite his recommendation, the case proceeded forwards. At trial the defense called the plaintiff as a witness to testify about his observations concerning the affidavit. Afterwards, the plaintiff was reassigned to a trial deputy position, transferred to another courthouse, and denied a promotion. Eventually, the plaintiff brought suit in state court. However, the District Court granted the defendant’s motion for summary judgment, noting that the memo was written pursuant to the plaintiff’s employment duties and, thus, the plaintiff was not entitled to First Amendment protection for the memo’s contents. The decision was reversed on appeal under the *Pickering* and *Connick* weighing test. The Court of Appeals for the Ninth Circuit concluded that the plaintiff’s memo recited what he thought to have been governmental misconduct, which is “inherently a matter of public concern.” Having determined that the memo satisfied the public-concern requirement, the Court of Appeals weighed it against his supervisors’ interest in responding to it and the court struck the balance in the plaintiff’s favor. The court did not consider whether the speech was made in the plaintiff’s capacity as a citizen. The United States Supreme Court granted certiorari and reversed the Court of Appeal’s decision.

public employee speech.⁸² First, the court had to determine whether the employee spoke as a citizen on a matter of public concern.⁸³ If the employee was not speaking as a citizen on a matter of public concern, the employee had no First Amendment cause of action based on his or her employer's reaction to the speech.⁸⁴ If the employee was speaking as a citizen on a matter of public concern, the employee would possibly have a First Amendment claim.⁸⁵ The court had to additionally ask whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public under the *Pickering* balancing test.⁸⁶ The government entity then had greater discretion in restricting speech that could affect the entity's operations.⁸⁷

This current framework requires a very fact-intensive analysis. But the Court's overarching objectives remain the same.⁸⁸ On one hand, a citizen must necessarily accept certain limitations on his or her freedom when he or she enters government service.⁸⁹ Government employers, like private employers, need a significant degree of control over their employees' words and actions or there would be little chance for the efficient provision of public services.⁹⁰ Because of the unique position that government employees occupy in the public eye and society, they have a greater potential to contravene governmental policies or impair the proper performance of governmental functions through their words and actions.⁹¹ Supervisors need to ensure that their employee's official communications are accurate, demonstrate sound judgment, and promote the employer's mission.⁹²

On the other hand, a citizen who works for the government is still a citizen and does not "shed all of his or her constitutional rights at the

82. *Id.* at 418 ("*Pickering* and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech.").

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* ("Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services.").

91. *Id.* at 419 ("Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.").

92. *Id.* ("At the same time, the Court has recognized that a citizen who works for the government is nonetheless a citizen.").

workplace door.”⁹³ The First Amendment limits a public employer from leveraging the employment restriction to restrict the liberties employees enjoy in their capacities as private citizens.⁹⁴ So, when an employee is speaking as a citizen about matters of public concern, he or she is only restricted to the extent that it is necessary for the employer to operate efficiently and effectively.⁹⁵

These First Amendment interests extend beyond the individual speaker.⁹⁶ The public also has an “interest in receiving the well-informed views of government employees engaging in civic discussion.”⁹⁷ In all, the Court has tried to promote both the individual and societal interests served when employees speak as citizens on matters of public concern and respect the need of government employers attempting to perform their important public functions.⁹⁸

The fact that speech is made inside the office, rather than publicly, and concerns the employee’s employment is not dispositive in the employee-speech test.⁹⁹ But, it is dispositive if the expression is made pursuant to an employee’s duties.¹⁰⁰ 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.¹⁰¹

“Restricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.”¹⁰² In this case, that would be speech.¹⁰³ *Garcetti* rejected the

93. *Id.*

94. *Id.* (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

95. *Id.* (quoting *Connick v. Myers*, 461 U.S. 138, 147 (1983)).

96. *Id.*

97. *Id.*

98. *Id.* at 420 (quoting *Rankin v. McPherson*, 483 U.S. 378, 384 (1987)).

99. *Id.* (“That Ceballos expressed his views inside his office, rather than publicly, is not dispositive. Employees in some cases may receive First Amendment protection for expressions made at work.”).

100. *Id.* at 421 (“The controlling factor in Ceballos’ case is that his expressions were made pursuant to his duties as a calendar deputy. . . . The significant point is that the memo was written pursuant to Ceballos’ official duties.”).

101. *Id.* (“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.”).

102. *Id.*

103. *Id.* at 421-22 (“Restricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen.”).

idea that public employees may also function as citizens even though the topic pertains to employment responsibilities and most public employees are not commissioned to carry a specific governmental message.¹⁰⁴

The Court was also concerned that imposing a strict balancing test when an employee is simply performing his or her job duties would demand permanent judicial intervention into the conduct of governmental operations, which would be inconsistent with sound principles of federalism and separation of powers.¹⁰⁵ Federal courts should minimize intrusion into local affairs and should not try to manage other governmental units.¹⁰⁶

This holding is consistent with the potential societal value of employee speech.¹⁰⁷ Refusing First Amendment claims based on government employees' work product does not prevent them from participating in public debate because employees retain the prospect of constitutional protection for their contributions to the civic discourse.¹⁰⁸

Justice Souter's dissenting opinion in *Garcetti* expressed a concern that the majority opinion imperils "First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties.'"¹⁰⁹ Justice

104. *Id.* at 426-27 (Stevens, J., dissenting), 436-38 (Souter, J., dissenting).

105. *Id.* at 423 ("Ceballos' proposed contrary rule, adopted by the Court of Appeals, would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business. This displacement of managerial discretion by judicial supervision finds no support in our precedents. . . . To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.").

106. *Id.*

107. *Id.* at 422 ("This result is consistent with our precedents' attention to the potential societal value of employee speech.").

108. *Id.* ("Refusing to recognize First Amendment claims based on government employees' work product does not prevent them from participating in public debate. The employees retain the prospect of constitutional protection for their contributions to the civic discourse.").

109. *Id.* at 438-39 (Souter, J., dissenting). See *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition"); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (citations omitted) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'"); *Sweezy v. N.H.*, 354 U.S. 234, 250 (1957) (a governmental enquiry into the contents of a scholar's lectures at a state university "unquestionably was an invasion of [his] liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread").

Kennedy responded to Justice Souter's concerns¹¹⁰ by noting that there might be an argument that additional constitutional interests are implicated for expression related to academic scholarship or class room instruction that are not fully accounted for by the Court's customary employee-speech jurisprudence.¹¹¹ After making this note, though, Justice Kennedy declined to explore what the analysis would be for a case involving speech related to scholarship or teaching.¹¹²

This additional limitation imposed by *Garcetti* does not effectuate a large change to the traditional *Pickering/Connick* framework for several reasons.¹¹³ First, the United States Supreme Court expressly declined to decide whether this limitation should apply to scholarship or teaching,¹¹⁴ and thus refused to adopt any exceptions to the *Pickering/Connick* test. Second, the *Garcetti* limitation may not apply when the employee speaks or complains outside the course of performing his or her official duties.¹¹⁵ Presumably, an employee speaking or complaining outside of his or her official duties would be exempted in the traditional balancing test anyways because the speech would be characterized as a matter of "public concern."¹¹⁶ Third, the *Pickering/Connick* test only provided limited protection to employee speech.¹¹⁷ *Garcetti* would simply abolish any protection of employee speech made pursuant to an employee's job responsibilities.¹¹⁸

110. *Id.* at 425.

111. *Id.* ("Second, Justice SOUTER suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. 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.")

112. *Id.* ("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.")

113. *Id.* at 424.

114. *Id.* at 425 ("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.")

115. *Tepper & White, supra* note 22, at 148 ("the limitation may not apply when the employee speaks or complains outside the chain of command").

116. *Garcetti*, 547 U.S. at 421-23 ("The First Amendment protects some expressions related to the speaker's job. . . Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government.")

117. *Id.* at 424.

118. *Id.*

III. STATEMENT OF THE ISSUE

While universities may have self-regulating professional standards concerning academic freedom, constitutional academic freedom is a narrower concept in caselaw.¹¹⁹ Even though federal and state courts have frequently referenced principles of academic freedom in their opinions, “[t]he Court has been far more generous in its praise of academic freedom than in providing a precise analysis of its meaning.”¹²⁰ The principles of academic freedom have rarely formed the sole basis for court decisions and serve instead as a policy argument in support of their decisions.¹²¹

Without any clear guidance from the United States Supreme Court, lower courts (including district courts and court of appeals) have been unsure as to whether an academic freedom exception to the *Garcetti* limitation on the First Amendment right to free speech exists.¹²²

119. Many institutions have committed themselves to the 1940 Statement. The Court, on the other hand, has praised this concept of academic freedom, yet has not provided a precise analysis of its meaning. Byrne, *supra* note 8, at 256-57.

120. *Id.* at 257 (“The Court has been far more generous in its praise of academic freedom than in providing a precise analysis of its meaning. The Court has proclaimed that ‘[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation,’ that ‘our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us,’ and even that ‘the classroom is peculiarly the ‘marketplace of ideas.’”).

121. See, e.g., *Emergency Coal. to Defend Educ. Travel v. U.S. Dep’t of Treasury*, 545 F.3d 4, 18 (D.C. Cir. 2008) (Silberman, J., concurring) (“The very notion of academic freedom—as a concept distinct from the actual textual provisions of the First Amendment—is elusive.”); *Burt v. Gates*, 502 F.3d 183, 189 (2d Cir. 2007) (“Thus, although the Third Circuit viewed academic freedom as adding weight to the FAIR plaintiffs’ expressive association claim, academic freedom was not itself necessary to its holding that *Dale* deference was appropriate. Indeed, *FAIR I* did not hold that academic freedom altered the normal First Amendment analysis. Therefore, it would be inaccurate to assume based on *FAIR I*, that the *FAIR II* court necessarily considered and rejected an argument that academics have a heightened First Amendment right in speech or association or a First Amendment academic-freedom right that is not subsumed in the freedoms of speech or association.”); *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1265-66 (10th Cir. 2005) (rejecting a claim that a professor’s comments about university operations should enjoy more protection because of academic freedom and concluding that such an argument would elevate academic personnel over other governmental workers); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1293 n.14 (10th Cir. 2004) (“Although we recognize and apply this principle [of academic freedom] in our analysis, we do not view it as constituting a separate right apart from the operation of the First Amendment within the university setting.”); *Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991) (“Though we are mindful of the invaluable role academic freedom plays in our public schools, particularly at the post-secondary level, we do not find support to conclude that academic freedom is an independent First Amendment right.”).

122. Richard T. Geisel & Brenda R. Kallio, *Employee Speech in K-12 Settings: The Impact of Garcetti on First Amendment Retaliation Claims*, 251 ED. LAW REP. 19, 33 (2010) (“An analysis of published, post-*Garcetti* cases indicates the federal appellate courts are divided as to whether

Conveniently, however, all of them have determined that if an academic freedom exception *did* exist, it would not apply in their particular scenario.¹²³

A. Circuit Approaches to the Academic Freedom Exception

The Second Circuit in *Kramer v. New York City Board of Education*¹²⁴ acknowledged that there were two possible standards to use when analyzing teacher classroom speech. On one hand, teacher classroom speech could be analyzed under the more protective standard applicable to student speech.¹²⁵ On the other hand, the *Garcetti* decision left open the possibility that teacher's official speech on matters of public concern may qualify for additional protection under certain circumstances.¹²⁶ In this scenario, the teacher's speech would be analyzed as the official speech of the teacher as a public employee.¹²⁷

Garcetti should be applied to cases involving claims of retaliation for employee-related speech in K-12 public schools.”).

123. *See id.*

124. *Kramer v. N.Y. City Bd. of Educ.*, 715 F. Supp. 2d 335, 352-53 (E.D.N.Y. 2010).

125. *Id.* at 353 (citations omitted):

Students' free speech rights are limited “in light of the special characteristics of the school environment.” Schools may regulate student speech in three circumstances: when the speech is (1) school-sponsored, (2) “offensively lewd and indecent,” or (3) likely to cause substantial and material disruption of school activities.

.....

School-sponsored speech includes words or their equivalent that “might reasonably [be] perceive[d] to bear the imprimatur of the school.” Restrictions on such school-sponsored verbalizations comport with the First Amendment if they are reasonably related to legitimate teaching considerations. Whether a school's speech restriction is “reasonably related to a legitimate pedagogical concern ‘will depend on, among other things, the age and sophistication of the students, the relationship between teaching method and valid educational objective, and the context and manner of the presentation.’”

“The makeup of the curriculum . . . is by definition a legitimate pedagogical concern.” In particular, a recognized concern is a school's interest in accounting for “the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics” such as “the particulars of teenage sexual activity.”

Lewd, indecent, or vulgar speech by students is subject to broad restrictions and regulations by schools. This authority is based in part on the state's greater ability to restrict the availability of sexually explicit material with respect to children than with respect to adults.

126. *Id.* (“But the possibility remains that teachers' official speech on matters of public concern may qualify for protection in some circumstances.”).

127. *Id.* (“Should teacher classroom speech be analyzed as the official speech of the teacher as a public employee . . .”).

Without any binding authority to guide it, the *Kramer* court was unable to choose one standard over the other.¹²⁸ In the past, the Court of Appeals for the Second Circuit had extended the United States Supreme Court's standard for student speech to teachers' instructional speech.¹²⁹ But, other federal appellate courts were analyzing teacher speech using the United States Supreme Court's more restrictive standard for analyzing official speech of public employees.¹³⁰ Faced with these divergent viewpoints, the *Kramer* court decided, "because of the lack of national uniformity, teacher speech in the instant case [was to be] analyzed below under both public employee and student speech standards."¹³¹

The Courts of Appeals for the Third, Fourth, and Fifth Circuits have determined that teacher instructional speech is not entitled to First Amendment protection because teachers do not speak on matters of public concern when they follow a school-mandated curriculum.¹³² For example, in *Gorum v. Sessoms*, the United States Court of Appeals for the Third Circuit recognized that school faculty often engage in service activities pursuant to their responsibilities.¹³³ In this case, a tenured professor and department chair claimed that he was terminated in retaliation for opposing the candidacy of the university president, for advising a student during a disciplinary proceeding, and for rescinding

128. *Id.* at 354.

129. See, e.g., *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 722-23 (2d Cir.1994); see also *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 428 F.3d 223, 236 (Sutton, J., concurring) (6th Cir. 2005) (citing as examples of this approach: *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir.1993); *Silano*, 42 F.3d at 724; *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1008 (7th Cir.1990); *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 719 (8th Cir.1998); *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 775 (10th Cir.1991); *Bishop v. Aronov*, 926 F.2d 1066, 1074 (11th Cir.1991)). But see, e.g., *Weintraub v. Bd. of Educ.*, 593 F.3d 196, 198 (2d Cir.2010) (determining that a grievance filed by a teacher was unprotected speech made pursuant to an official duty, without considering the relevance of his position as an educator).

130. *Kramer*, 715 F. Supp. 2d at 354 ("Other federal appellate courts analyzing teacher speech have applied the Supreme Court's more restrictive standard for analyzing official speech of public employees.").

131. *Id.*

132. See *Edwards v. Cal. Univ. of Penn.*, 156 F.3d 488, 491 (3d Cir.1998) (concluding "that a public university professor does not have a First Amendment right to decide what will be taught in the classroom"); *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 368 (4th Cir.1998) (en banc) (limiting Hazelwood standard to cases of student speech); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 798 (5th Cir.1989), cert. denied, 496 U.S. 926 (1990) (holding teacher speech attains "protected status if the words or conduct are conveyed by the teacher in his role as citizen and not in his role as an employee of the school district").

133. *Tepper & White*, *supra* note 22, at 160 (citing *Gorum v. Sessoms*, 561 F.3d 179, 186 (3d Cir. 2009)).

an invitation for the president to speak at a prayer breakfast.¹³⁴ “The Third Circuit concluded that the professor was speaking ‘within his official duties’ and found that he could advise the student because he was a faculty member familiar with the disciplinary procedures through his university committee work.”¹³⁵ In addition, “the description of faculty responsibilities included assisting and advising student organizations.”¹³⁶ The Third Circuit applied the *Garcetti* limitation (unlike the Seventh Circuit) “because it viewed the professor’s activities as clearly not within the realm of either teaching or scholarship.”¹³⁷ As such, the limitation would “not imperil academic freedom.”¹³⁸ The court also agreed with the lower court in “that the speech was not a matter of public concern and not a substantial factor in the termination.”¹³⁹ Thus, the court agreed that the decision to terminate would have been made regardless of the speech.¹⁴⁰

The Court of Appeals for the Sixth Circuit, in a pre-*Garcetti* decision, applied the public employee test to teacher curricular expression,¹⁴¹ but it did not categorically hold that instructional speech was not protected by the First Amendment. Instead, the court looked to the content of the speech to determine if it was protected.¹⁴² The United States Court of Appeals for the Seventh Circuit has concluded that if the academic exception is to apply at all, it would only be to post-secondary education.¹⁴³ For example, an elementary school teacher who spoke on a political issue as part of her official duties would not be protected under the First Amendment.¹⁴⁴

The Seventh Circuit has demonstrated that it is capable of determining what faculty members do because faculty functions may be specifically defined by job descriptions and annual performance

134. *Id.* (citing *Gorum*, 561 F.3d at 182-84).

135. *Id.*

136. *Id.* (citing *Gorum*, 561 F.3d at 186).

137. *Id.*

138. *Id.*

139. *Id.* (citing *Gorum*, 561 F.3d at 187-88).

140. *Id.*

141. *See Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 428 F.3d 223, 228-29 (6th Cir. 2005).

142. *Id.* at 228-31.

143. *Tepper & White, supra* note 22, at 158 (citing *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 689, 694, 695 n.11 (4th Cir. 2007)).

144. *Id.* (citing *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 480 (7th Cir. 2007)).

reviews.¹⁴⁵ “In *Renken v. Gregory*, a professor who obtained a National Science Foundation grant claimed that he had been retaliated against when he took issue with the university’s proposed allocation of grant funds.”¹⁴⁶ “Acknowledging that university professors have teaching, research, and service responsibilities,” the court applied *Garcetti*, and held “that administering the grant was a part of those responsibilities.”¹⁴⁷ “Although the professor argued that he had discretion [when] applying for and administering the grant, the Seventh Circuit recognized that securing and administering grant funds was done in fulfillment of his teaching and research responsibilities, as well as the requirements underpinning his promotion to full professor.”¹⁴⁸ “The court adopted this broad but practical view of what university faculty do, suggesting that faculty members’ discretion over their research and service responsibilities does not” mean that speech made on those subjects is not made pursuant to employment responsibilities.¹⁴⁹

B. *The Dilemma Exemplified in Savage v. Gee*

The lack of national uniformity has become a problem that has trickled down to the lowest courts. A prime example of this problem was illustrated in *Savage v. Gee*.¹⁵⁰ The plaintiff, Savage, was a State university librarian, who volunteered to serve on his university’s book selection committee to choose the reading assignment for all incoming freshman.¹⁵¹ During the course of choosing a book, several critical emails circulated regarding the nature of the book to be selected.¹⁵² One

145. *Id.* at 159 (citing *Gorum v. Sessoms*, 561 F.3d 179, 188 (3d Cir. 2009); *Renken v. Gregory*, 541 F.3d 769, 774-75 (7th Cir. 2008); *Hong v. Grant*, 516 F. Supp. 2d 1158, 1168-69 (C.D. Cal. 2007), *appeal docketed*, No. 07-56705 (9th Cir. Nov. 23, 2007)).

146. *Id.* (citing *Renken*, 541 F.3d at 773).

147. *Id.* (citing *Renken*, 541 F.3d at 773-74).

148. *Id.* at 159-60 (citing *Renken*, 541 F.3d at 774).

149. *Id.* at 160 (citing *Renken*, 541 F.3d at 774).

150. *Savage v. McGee*, 716 F. Supp. 2d (S.D. Ohio 2010), *aff’d*, 665 F.3d 732 (6th Cir. 2012).

151. *Id.* at 710:

Plaintiff, Scott A. Savage (“Savage”), was Head of Reference and Library Instruction at Ohio State University’s campus in Mansfield, Ohio from August 2004 until June 27, 2007, when he resigned . . . Savage was an elected staff representative to the faculty-staff Executive Committee, which met regularly to exchange ideas with OSU-Mansfield Dean Evelyn Freeman. In December 2005, Donna Hight (“Hight”), Student Affairs Director, proposed to the Executive Committee that all incoming freshmen be assigned a particular book to read. This proposal was accepted and, in 2006, Savage agreed to serve on the committee formed to choose the book.

152. *Id.* at 711:

After several committee members made initial recommendations for books with liberal points of view, Savage wrote to Hight to propose the book *Freakonomics* by Stephen

of those emails seemed to underhandedly attack the polarizing nature of one of the Savage's suggestions.¹⁵³ In response, Savage replied with what he claims to have been a "sarcastic" email to the committee, including four new book suggestions and a short description of each.¹⁵⁴ One of those book suggestions was *The Marketing of Evil* by David Kuplian.¹⁵⁵ The librarian's description neglected to mention that this book "contain[ed] a chapter discussing homosexuality as aberrant human behavior that has gained general acceptance under the guise of political correctness."¹⁵⁶ Savage's off-hand suggestion set off a flurry of critical emails from certain committee members, who questioned Savage's competence and professionalism as a librarian for suggesting what they considered to be a bigoted and homophobic book.¹⁵⁷ The dispute gained

Dubner. Hight forwarded this proposal to the entire committee on March 2, 2006, noting that she had received 'a request that we . . . don't choose an ideologically or politically or religiously polarizing book.' On March 3, 2006, Hamlin responded by email to the committee, stating: 'If the idea is to seriously engage the students in an issue or issues of real importance, it is bound to be at least somewhat divisive.' He further stated: 'Furthermore, I think the university can afford to polarize, and in fact has an obligation to, on certain issues.'

153. *Id.* at 711 ("In this lengthy email, Hamlin also made references to Christian fundamentalism, which Savage inferred were directed at him.")

154. *Id.* at 711. On March 8, 2006, Savage replied to the committee:

I am wondering if when Hannibal says "the university can afford to polarize, and in fact has an obligation to, on certain issues," he means the book chosen should necessarily present views in line with University Human Resources policies or the University mission statement? As a librarian, I wouldn't agree with the imposition of any test of academic orthodoxy. . . . But if we are decided that we want to engage our students in the kind of exchange of ideas on which the "secular" university of founded, then let's choose something that confronts the accepted wisdom of Ohio State University! Like students and young profs did in the 60's, man! In that spirit, here are four more suggested titles . . .

Savage's email then listed four book recommendations, each with a short description of its subject. Savage testified that he was not seriously suggesting that anyone read those books or that he was trying to make any point about homosexuality. Instead, trying to make a sarcastic point in response to Hamlin's remark about polarization. *Id.*

155. *Id.* at 711.

156. *Id.*

157. *Id.* On March 9, 2006, Jones wrote:

[W]hatever book we choose should have some scholarly merit. The anti-gay book Scott Savage endorses falsely claims that "the widely revered father of the "sexual revolution" has been irrefutably exposed as a full-fledged sexual psychopath who encouraged pedophilia." . . . By any scholarly standards . . . this kind of claim is . . . anti-factual rabble-rousing that has no place in any university. I am frankly embarrassed for you, Scott, that you would endorse this kind of homophobic tripe.

On March 9, 2006, Savage responded to Jones, copying other committee members, defending his suggestion of *The Marketing of Evil*. Savage, Hamlin, and Jones exchanged more increasingly agitated emails, with Jones and Hamlin criticizing Savage for suggesting what they characterized as

publicity as senior faculty and staff, and various members of the gay faculty community became aware of the recommendation.¹⁵⁸ Eventually, sexual harassment charges were filed against Savage.¹⁵⁹ Even though the charges were dropped, the faculty environment became so hostile towards Savage that he resigned.¹⁶⁰

On March 10, 2008, Savage filed an action in federal court asserting various federal constitutional claims.¹⁶¹ One of the types of relief he sought was an order finding that he had been constructively discharged in retaliation for the exercise of his First Amendment right to

a bigoted and homophobic book. These exchanges degenerated to the point where Jones questioned Savage's competence and professionalism as a librarian. *Id.*

158. *Id.* at 711-12. Jones emailed Savage's supervisor, Library Director Beth Burns:

I feel it is important as a faculty member here who relies on the library to tell you that Scott Savage's decision to stand by his recommendation of this anti-gay book for our First Year Reading Experience, especially based on the reasoning he offers, severely damages my confidence in the library and its staff here at OSU-Mansfield. It will affect not only my use of the library staff in conducting my own research, but also my use of the library staff in teaching and constructing research for my students.

On March 9, 2006, Burns emailed Dean Freeman complaining that Jones and Hamlin had engaged in a "personal assault" on Savage. Meanwhile, another gay professor, Jim Buckley, emailed all OSU-Mansfield faculty and staff, stating to Savage: "You have made me fearful and uneasy being a gay man on this campus. I am, in fact, notifying the OSU-M campus, and Ohio State University in general, that I no longer feel safe doing my job. I am being harassed." This barrage of emails continued over the next few days. On March 12, 2006, Jones sent an email to all faculty at the Mansfield campus summarizing the dispute over Savage's book recommendation and stating, in part:

The fact that Scott continues to endorse a book that calls me and Jim and other gay and lesbian people "evil," and that he justifies this book on grounds that are ludicrous by scholarly standards, says to me this is about homophobia-that the hatred ("evil") and irrationality (anti-scholarly defense) this term implies are clearly operative here. This kind of defense would be unacceptable in support of a book that denied the Holocaust or that argued that African-Americans were inherently biologically inferior to other people. This is a matter of professional standards and competence, and it is also a matter of harassment-of creating a hostile work environment insofar as part of our jobs (mine and Jim's, but also the faculty's) is to use the library for research and teaching. . . .

Some of my senior colleagues intend to raise this issue in Monday's Faculty Assembly, and we are all interested in the entire faculty's therefore being sufficiently informed about the precise nature of the problem.

159. *Id.* at 713 ("... a regularly-scheduled faculty assembly meeting was held. Various faculty members spoke and, at the conclusion of the meeting, a motion carried to forward the matter as a sexual harassment issue to Human Resources.").

160. *Id.* at 713-14 ("On April 20, 2006, Savage received a letter from Hill stating that the University had determined that Savage was not guilty of the harassment charges filed against him Savage states that the "nasty and derisive tone of the University's attorneys in both their written and oral arguments to the Court of Claims convinced Mr. Savage that he would have no institutional backing at the highest administrative level were he to return" to his position at OSU-Mansfield. On June 27, 2007, Savage submitted a letter of resignation.").

161. *Id.* at 714.

free speech.¹⁶² The defendant's motion for summary judgment was considered in the United States District Court for the Southern District of Ohio (Eastern Division).¹⁶³

To come to a resolution of the issue, the court looked to the standard that had been developed in the United States Supreme Court from the interaction of *Pickering v. Board of Education of Township High School District*,¹⁶⁴ *Connick v. Myers*,¹⁶⁵ and *Garcetti v. Ceballos*.¹⁶⁶ Those three cases laid out the general framework of rules barring First Amendment retaliation claims based on statements made by public employees in the course of their official duties.¹⁶⁷ However, these three cases left open the issue of whether there is an academic freedom exception for "scholarship and teaching" to the general rule, and if there is, what the scope of it is.¹⁶⁸

With such a dearth of binding authority, the United States District Court for the Southern District of Ohio's decision in *Savage v. Gee* could only rely on two local cases.¹⁶⁹ These two cases found an academic freedom exception because the disputed expression concerned

162. *Id.* at 715.

163. *Id.* at 710.

164. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist.*, 391 U.S. 563 (1968).

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

166. *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Savage*, 716 F. Supp. 2d at 716 ("The outcome of this claim depends largely on the correct interpretation of the decisions of the United States Supreme Court in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), *Connick v. Myers*, 461 U.S. 138 (1983), and *Pickering v. Bd. of Educ. of Twp. High Sch. Dist.*, 391 U.S. 563 (1968).").

167. *Savage*, 716 F. Supp. 2d at 716-17 ("[*Pickering* and *Connick*] held that one who spoke on a matter of public concern was protected by the freedom of speech clause of the First Amendment from retaliation by government, usually the plaintiff's employer. The speech right had to be balanced against the employer's need to preserve the efficiency of the workplace . . . *Garcetti* added the corollary that the speech, although it might be of public concern, is not protected by the First Amendment if it is made pursuant to the public employee's job duties."). Applying these standards to *Savage v. Gee*, the court would have to ask:

1. When *Savage* recommended *The Marketing of Evil* for the book list, was he speaking as a citizen (as opposed to purely as an employee) on a matter of public concern? If not, he has no cause of action based on the freedom of speech. If his speech meets both criteria, *Savage* is protected from retaliation for it by his government employer (or here, the employer's alleged failure to protect him from the retaliation of others).
2. If *Savage's* speech is of public concern but made in the line of duty as set forth in *Garcetti*, should it nevertheless be protected under an "academic freedom" exception?
3. Since [sic] *Savage* resigned rather than being fired, was he constructively discharged?

Id. at 716.

168. *Id.* at 718 (citing *Garcetti*, 547 U.S. at 425) ("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.").

169. *Id.* at 718.

“scholarship and teaching.”¹⁷⁰ However, the two cases did not set out any legal standards for what constitutes “scholarship and teaching”.¹⁷¹ Ultimately, the court in *Savage v. Gee* decided that the Ohio State University librarian’s expression did not fall within the “academic freedom” exception because it did not “look” like the speech in these other two cases.¹⁷² The District Court declined to explore the existence or scope of an academic freedom exception.¹⁷³ Thus, the defendant’s motion for summary judgment was granted.¹⁷⁴

On appeal, the Court of Appeals for the Sixth Circuit again revisited the issue of “academic freedom” exception.¹⁷⁵ Once again, the court declined to comment as to whether an “academic freedom” exception existed because it had only been alluded to in Supreme Court dicta.¹⁷⁶ The court simply stated that if an exception *did* exist, *Savage*’s speech fell outside its scope.¹⁷⁷ As a committee member commenting on a book recommendation, *Savage*’s speech was not related to classroom instruction and only loosely related to academic scholarship.¹⁷⁸ Yet, the

170. *Id.* (“The Sixth Circuit has not weighed in on this issue. Two decisions of the United States District Court for the Southern District of Ohio have held that such an academic freedom exception exists, however.”) (citing *Kerr v. Hurd*, 694 F. Supp. 2d 817, 842-44 (S.D. Ohio 2010) (holding that *Garcetti* does not apply to First Amendment claim by professor for state medical school) and *Evans-Marshall v. Bd. Of Educ. of Tipp City Exempted Vill. Sch. Dist.*, No. 3:03cv091, 2008 WL 2987174, at *8 (S.D. Ohio July 30, 2008) (holding that *Garcetti* does not apply to First Amendment claim by high school teacher), *aff’d*, 624 F.3d 332 (6th Cir. 2010)).

171. *See Kerr*, 694 F. Supp. 2d 817, 843-44; *Evans-Marshall*, 2008 WL 2987174, at *8-9.

172. *Savage*, 716 F. Supp. 2d at 718:

In both of these cases, however, it was clear that the plaintiff’s expression concerned “scholarship or teaching.” The *Garcetti* Court recognized no broader exception to the rule it propounded. *Savage*’s recommendation of a book for a book list cannot, in the opinion of this court, be classified as “scholarship or teaching,” however. The recommendation was made in the line of duty, but it was made pursuant to an assignment to a faculty committee. This court holds that, without exceptional circumstances, such activities cannot be classified as “scholarship or teaching” in the *Garcetti* sense.

173. *Id.*

174. *Id.* at 721.

175. *Savage v. Gee*, 665 F.3d 732, 739 (6th Cir. 2012).

176. *Id.*

177. *Id.* (“Thus, even assuming *Garcetti* may apply differently, or not at all, in some academic settings, we find that *Savage*’s speech does not fall within the realm of speech that might fall outside of *Garcetti*’s reach.”).

178. *Id.* (“*Savage*’s speech as a committee member commenting on a book recommendation was not related to classroom instruction and was only loosely, if at all, related to academic scholarship.”); *see also Evans-Marshall v. Bd. of Educ. of Tipp City*, 624 F.3d 332 (6th Cir. 2010) (teacher curricular choices, including assignment of several books, were made in connection with official duties as teacher and thus not protected speech); *Fox v. Traverse City Area Public Schs. Bd. of Educ.*, 605 F.3d 345 (6th Cir. 2010) (teacher’s complaint to supervisor about number of students assigned to her was not entitled to First Amendment protection under to *Garcetti* limitation).

court failed to define what “classroom instruction” or “academic scholarship” would look like.¹⁷⁹

C. *Unresolved Issues*

As different circuit decisions have shown, several legal issues remain unresolved that must be answered in order to come to a resolution: (1) should an academic freedom exception to the *Garcetti* limitation on the First Amendment right to free speech be recognized and why?; (2) if an academic freedom exception were recognized, what would be its scope?

These questions must be answered in order to uphold the integrity of the First Amendment right to free speech. Currently, a large area of speech, i.e. academic speech, remains unprotected by the First Amendment. The United States Supreme Court has already suggested that academic speech should be excepted from the *Garcetti* limitation.¹⁸⁰ But, without any clear standard to follow, lower courts are unable to definitively protect an area of speech that the United States Supreme Court has stated is deserving of First Amendment protection. The clock is ticking as to when a lower court will be confronted with a scenario it believes *would* fall within the academic freedom exception. Its existence and scope need to be defined before that time.

IV. ANALYSIS

A. *Should an Academic Freedom Exception Exist? Why?*

While the struggle for academic freedom has been most frequently characterized as a struggle between universities and external forces, the struggle exists just as strongly internally between faculty and the university.¹⁸¹ Even though courts have been loath to get involved in internal university affairs,¹⁸² I propose that the First Amendment should extend to protect all academic speech because of the overriding importance of unencumbered academic speech.

179. *Id.* at 738-39.

180. *Id.*

181. Byrne, *supra* note 8, at 288 (“When the Supreme Court came to constitutionalize academic freedom, it encountered a tradition of values and personnel procedures protecting the individual scholar from non-academic judgments by college administrators.”).

182. *Id.* at 325 (“[J]udges feel themselves incompetent to evaluate the merits of academic decisions.”).

Academic speech, as opposed to other types of speech that may be exercised on a campus or by members of the academic community, is necessary to the preservation of the unique functions of the university, particularly the goals of disinterested and systematic scholarship and teaching.¹⁸³ “[T]he essence of constitutional academic freedom” depends on “the insulation of scholarship and liberal education from extramural political interference,”¹⁸⁴ which can come from within the university or from the outside community.

Academic speech is unique because it is produced under specific disciplinary and ethical constraints.¹⁸⁵ Scholars work within a particular discipline, primarily directing their work at an audience of other scholars and students within the same discipline.¹⁸⁶ In turn, their audience “evaluates their speech within a tradition of knowledge, shared assumptions and arguments about methodology and criteria, and common objectives of exploration or discovery.”¹⁸⁷ This audience provides a basic foundation for the scholar, because it “will listen with care, consider with knowledge, and challenge with intelligence.”¹⁸⁸ The audience will be unlikely swayed by social standing, but rather objective reason and evidence.¹⁸⁹ A scholar has succeeded when he or she improves on some worthy subject that the discipline has previously accepted.¹⁹⁰

A large part of academic speech’s value comes from the fact that academic speech is rigidly formalistic:

Every lecture or article must presuppose the history and current canon of the discipline; every departure from common understandings must be explained and justified. Many lovely and personally satisfying styles of expression are outlawed: The physicist may not sing, the historian may not whine, the economist may not offer the primordial scream. More seriously, the persons who may engage in this speech are rigorously controlled. To enter the discourse, the scholar must proceed through the university course of study—at great expense and personal sacrifice—in order to be certified by her peers as competent

183. *Id.* at 262.

184. *Id.* at 255.

185. *Id.* at 258.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* (“The speaker cannot persuade her colleagues by her social standing, physical strength or the raw vehemence of her argument; she must persuade on the basis of reason and evidence (concepts vouchsafed, if only contingently, by her discipline).”).

190. *Id.*

to engage in scholarly exchange. Students, even though adults in civil society, are admitted as neophytes and treated as intellectual dependents, so long as they lack mastery or certification. Students and junior professors suffer real punishment for speech deemed inadequate by the masters. In general civil society, the First Amendment opposes both prior and subsequent restraint on the speaker by a class of officials determining which speech is valuable and which is not.¹⁹¹

However, within this formalistic framework, the academic speaker is free to reach conclusions that contradict previous dogma.¹⁹² The speaker may even be driven to conclusions that contradict his or her own preconceptions and cherished assumptions because of methodology and evidence.¹⁹³ “Academic speech can be freer than the speaker.”¹⁹⁴ This essential freedom has been the core reason for professorial insistence on faculty autonomy within the university power structure.¹⁹⁵ The scholar cannot argue merely for his or her political party, religion, class, race, or gender; he or she must acknowledge the force of traditional views of the subject matter, the inadequacies of colleagues’ arguments, and the arguments her critics.¹⁹⁶ Disinterested argument is “not indifference to the outcome, but insistence that commitment not weaken the rigor and honesty by which the argument is pursued.”¹⁹⁷

“The First Amendment value of academic speech rests on its commitment to truth . . . its honesty and carefulness, its richness of meaning, its doctrinal freedom, and its invitation to criticism.”¹⁹⁸

191. *Id.* at 258-59.

192. *Id.* at 259 (“Indeed, such contradiction is prized as new knowledge, the mark of contribution, the sine qua non of the doctoral dissertation.”). In fact, the community of scholars will stand behind even the most mediocre scholar whenever civil authority threatens to punish unorthodox scholarship. Those instances where it has failed to defend its fellow scholars are incidents of permanent shame and regret. *Id.*

193. *Id.*

194. *Id.* (“The unique point is that academic speech can be more free than the speaker”).

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 259-60. However:

These are not often identified as the justifications for the First Amendment protection of speech. In society at large, freedom of speech insulates from penalty expression that is vulgar, pernicious, incomprehensible, and mad. Even advertising, which is wholly self-interested and manipulative, is protected. Only genitalia and false statements of fact may usually be regulated. Only verbal provocations to crime, violence and riot may be prohibited. The justifications for this regime are various but persuasive. First Amendment doctrine recognizes the danger to a democratic political process if officials proscribe some subjects or modes of expression. This sensitivity is heightened by the enormous cultural diversity of the American polity. Advocates of free expression also properly cast doubt both on the wisdom of officials, even when acting in good faith,

Among the systems of discourse within our society, academic speech is preeminent in holding expression to high standards and “provides our most important model of expression that is meaningful as well as free, coherent yet diverse, critical and inspirational.”¹⁹⁹ Much of its value is social because “we employ the expositors of academic speech to train” those “who exercise[] leadership within our society.”²⁰⁰ “Beyond whatever specialized learning our graduates assimilate,” they must also learn “that careful, honest expression demands an answer in kind.”²⁰¹ “The experience of academic freedom helps secure broader, positive liberties of expression.”²⁰²

But, the history of academic freedom has been long wrought with struggle between universities and lay trustees or regents, who sought to impose their ideologies and political preferences on their professors’ scholarship.²⁰³ Professors demanded that their work be free from any ideological test and that evaluation be reserved for their professional peers.²⁰⁴ Their demands were justified by an appeal to science—that any error in theory could only be perceived by trained specialists and error must be tolerated if truth is to be advanced.²⁰⁵ Laypersons’ opinions were not scientific and their interference would only retard the discovery of truth.²⁰⁶

to decide which ideas are out of bounds and on the efficacy of combating apparently dangerous ideas by suppressing them. Finally, many recognize the value to the individual citizen of being the sole legal arbiter of what she shall say, read or think; such freedom and responsibility dignify the citizen in a democracy.

Yet can it be said that these familiar themes exhaust the value to democratic society of free expression? The First Amendment ought also to be aspirational. Society ought to strive toward speech that is truthful, gracious, well-considered, and generous to opponents. It ought not settle for, though it must often permit, speech that is ignorant, self-interested, manipulative, hateful or vapid. Without some such ideal, actively pursued, speech loses its value as communication, and thought loses its power to persuade through appeal to reason. When discourse becomes debased, conflict of interests within democratic society cannot be resolved or lessened through debate or deliberation (because no one will take them seriously) but only through the parlay of money, numbers and force. Speech should be protected because it is beneficial.

199. *Id.* at 261.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 273 (“In America, the problem was not the state as such, but interference by lay trustees or regents.”).

204. *Id.*

205. *Id.*

206. *Id.* (“There are two important aspects of this struggle. First, academics wanted to wrest control over the evaluation of scholarly thought from ‘lay thinking’ as represented by boards of trustees. Professors were virtually the only spokespersons for academic freedom, and their efforts

The same arguments that were made decades ago to preclude laypersons' interference in university affairs apply with equal force to the proposition that academic speech must also be protected in addition to being left alone. A freedom from lay interference is necessary for scholars to perform uniquely valuable work.²⁰⁷ Unlike mere political or religious opinion, scholarship bears a special relationship to the search for truth, making it a form of elite speech that demands protection from popular prejudices.²⁰⁸

Science also provides a strong rationale for the protection of this freedom:

Scientific endeavor presupposes a progressive conception of knowledge. Understanding at any one moment is imperfect, and defects can be only exposed by continually testing hypotheses through either adducing new data or experimentation. The process of hypothesis-experimentation-new hypotheses improves knowledge and brings us closer to a complete, more nearly objective truth about the world. Error is not dangerous so long as the process is continued, because acknowledged means will expose it; in fact, it is actually beneficial (and inevitable) as part of progressive discovery.²⁰⁹

But, this scientific process will fail if academic speech is affirmatively suppressed from within the university. It is not enough that that external interference is unpermitted.

Universities face a unique type of danger from their own internal contradictions.²¹⁰ One contradiction is the university's reliance on the notion of professional competence.²¹¹ Trouble often ensues when scholars depart from or challenge basic suppositions of a discipline.²¹² Unusual scholarship often generates visceral negative reactions while

were largely responsible for its eventual acceptance. In one sense, it was a self-interested struggle for professional autonomy and dignity directed at improved salary and employment security.”).

207. *Id.*

208. *Id.* (“A primary condition was respect for the special character of academic speech: Scholarship bore a special relationship to the search for truth and should not be confused with mere political or religious opinion. Scholarship was a form of elite speech that demanded protection from popular prejudices.”).

209. *Id.* at 273-74.

210. *Id.* at 283 (“Graver than the threat to academic freedom from other academic values is the danger from its own internal contradictions.”).

211. *Id.*

212. *Id.* at 284 (“Norman Birnbaum has advised us to pay ‘explicit attention to the mechanisms of academic succession, with their customary confusion of criteria of competence and of adherence to conventional categories of thought.’”).

professional disagreement and political opposition may lead to claims and accusations that the challenger is incompetent.²¹³

Furthermore, “those who challenge disciplinary axioms are likely to be held to higher standards of competence than those who” remain in safe and established pathways.²¹⁴

“Academic freedom has taken firm root in American society because of the widespread view that academic speech matters.”²¹⁵ Disciplined attempts to challenge accepted and popular opinions provide weight and depth to academic discourse and education.²¹⁶ Beyond their capacity to train students for white-collar jobs, colleges and universities are also valued

because their work and the time we spend in them affirm the worth of free inquiry and the capacity of the trained mind to see things, however partially, as they are. The modern university epitomizes a liberal faith that a free people can . . . cast off as authoritarianism without lapsing into total relativism or incoherence.²¹⁷

It is a well-established institutional norm of academic freedom that “teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties,” and that “[t]eachers are entitled to freedom in the classroom in discussing their subject.”²¹⁸ These institutional norms are so valuable that

the limitations of *Garcetti* should not apply because the core functions of the university are research and teaching. Academic freedom furthers the mission of the university: faculty become experts in a discipline through research and analysis, and they teach students to think critically. Professional competence is determined by faculty peer review, and shared governance often is the means of implementing that review. All of these functions have the potential to create controversy and offend powerful internal and external constituencies; however, they are essential to the credibility of universities and academic disciplines.²¹⁹

213. *Id.* (“The sociologist who maintains that the entrails of an owl can render more useful information than can a statistical survey is likely to be met with derision as well as disagreement. The competence of a modern historian who insisted on a Whig interpretation of events while focusing largely on the affairs of ‘great men’ would likewise be suspect.”).

214. *Id.*

215. *Id.* at 287.

216. *Id.* at 287-88.

217. *Id.* at 288.

218. 1940 STATEMENT, *supra* note 1, at 3.

219. Byrne, *supra* note 8, at 267.

B. What Should the Academic Freedom Exception Protect?

The *Garcetti* limitation to the First Amendment right of free speech should not apply when the speech involves scholarship or teaching because it would be contrary to the academic freedom's objective of critical inquiry.²²⁰ But what is scholarship and teaching? Some have simply boiled it down to an issue of location, i.e. did the speech occur in the classroom or in a published article, book, seminar, or presentation relating to scholarship?²²¹

A more thoughtful analysis is warranted, such as the careful consideration made by representatives of the American Association of University Professors and of the Association of American Colleges in formulating the 1940 Statement of Principles on Academic Freedom and Tenure. Their summary of "academic freedom" provides a working model for the scope of an academic freedom exception. With respect to the "scholarship" prong, professors should be entitled to: "full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution."²²² With respect to the "teaching" prong, professors:

are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.²²³

Using this model, the Supreme Court could begin to lay the framework for an academic freedom exception to the *Garcetti* limitation.

220. Tepper & White, *supra* note 22, at 148 ("[E]ven though some content-based regulation is an inevitable result of academic judgments about promotion and tenure, content-based censorship of scholarship and teaching, whether the government restricts speech on non-academic grounds because of disagreement with the message, is contrary to principles of academic freedom.").

221. Brief of Appellees at *22, *Capeheart v. Hahs*, No. 11-1473, 2011 WL 5154818 (7th Cir. Oct. 19, 2011) ("Capeheart's claim is not premised upon speech in the classroom or scholarly research. None of Capeheart's speech took place in the classroom; none of it occurred in a published article, book, seminar, or presentation relating to her scholarship.").

222. 1940 STATEMENT, *supra* note 1, at 3.

223. *Id.*

C. *What Should be the Limits on the Academic Freedom Exception?*

i. The exception should only apply to universities.

Only universities should get special treatment from the First Amendment because universities are different and unique forms of institutions.²²⁴ As stated by the United States Supreme Court: “in light of ‘the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.’”²²⁵ Many of the concerns discussed earlier in Part IV.A are unique to university environments and do not apply to lower levels of education.²²⁶ Furthermore, the interest with workplace efficiency and order is higher with lower levels of education where schooling is mandatory as opposed to voluntary.²²⁷

ii. The exception should only apply to faculty and staff, not students.

Academic freedom does not include all First Amendment rights exercisable on a campus or by members of the academic community²²⁸ such as student speech. Student rights of free speech are not properly a

224. Byrne, *supra* note 8, at 254:

American law operates on an impoverished understanding of the unique and complex functions performed by our universities. All too often, courts fail to recognize that universities are fundamentally different from business corporations, government agencies, or churches. Concepts and categories developed in the law to regulate these institutions are applied to university problems with varying degrees of awareness that square pegs are being pressed into round holes. Our universities require legal provisions tailored to their own goals and problems.

225. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 724 (2007) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003)).

226. *See supra* Part IV.A.

227. *See generally* Drew Appleby, *The Differences Between High School and College and the Importance of Student-Faculty Interaction for College Success*, IUPUI (June 27, 2005), <http://www.iupui.edu/parents/success1.html>.

228. Byrne, *supra* note 8, at 261-62:

Academic freedom was constitutionalized during a period in which the Court announced other First Amendment rights of teachers and students. Understandably, but erroneously, academic freedom has been thought to encompass all First Amendment rights exercisable on a campus or by members of the academic community. The term “academic freedom” should be reserved for those rights necessary for the preservation of the unique functions of the university, particularly the goals of disinterested scholarship and teaching. The First Amendment rights I here wish to put aside are those general civil rights of free speech incidentally exercised by members of the academic community and enforced against public universities only because they are viewed as instrumentalities of the state. These “civil” rights fall essentially into two categories.

part of academic freedom because it does not have anything to do with scholarship or systematic learning.²²⁹ Instead, students exercise the same kind of rights of free speech enjoyed by citizens against the government.²³⁰ Even academic evaluations of students by universities are not a part of constitutional academic freedom because student civil rights enforce social norms against schools but constitutional academic freedom enforces academic norms against society.²³¹

iii. The exception should not apply to speech made pursuant to administrative duties.

The exception should not swallow the general rule that speech made pursuant to an employee's job duties is not protected by the First Amendment, for the policy reasons leading to this *Garcetti* limitation.²³² In fact, numerous decisions following *Garcetti* have held specifically that “*faculty* member speech is not protected when made pursuant to administrative duties to public universities.”²³³

But how are a faculty member's administrative duties defined? After *Garcetti*, many courts have recognized that a simple “duties” analysis focusing solely on “core job functions is too narrow”²³⁴ and impractical. Instead, the “duties” analysis should also involve looking into an employee's level and responsibility and context in which the statements were made.²³⁵ Thus, speech could technically be made

229. *Id.* at 262-63:

First, no recognized student rights of free speech are properly part of constitutional academic freedom, because none of them has anything to do with scholarship or systematic learning. Cases allowing public school students to wear armbands, demonstrate in good order, distribute newspapers, and form political organizations grant students rights against public education officials plainly analogous to those enjoyed generally by citizens against government. Moreover, such activities have little to do with the formal academic training of the students; even if the activities so protected have learning value, the learning seems more the product of experience than that of intellectual training. Indeed, sometimes these political activities threaten academic work and values, and courts have drawn the limit on the exercise of student civil rights at the point where they interfere with the primary educational work of the school.

230. *Id.* at 262.

231. *Id.* at 263.

232. *See supra* Part II.C.

233. Brief of Appellees at *10, *Capeheart v. Hahs*, No. 11-1473, 2011 WL 5154818 (7th Cir. Oct. 19, 2011).

234. *Id.* at *13 (quoting *Renken v. Gregory*, 541 F.3d 769, 774 (7th Cir. 2008)).

235. *Id.* (citing *Abcarian v. McDonald*, 617 F.3d 931, 937 (7th Cir. 2010)).

pursuant to an employee's official job duties even though it is not expressly required or included in an employee's job description.²³⁶

iv. The exception should not apply to extracurricular activities.

The right of a professor to participate in political activity off campus and on her own time without institutional consequence should also not be viewed as a matter of constitutional academic freedom.²³⁷ Professors have no greater or lesser right to participate in political affairs than do other government employees, and would simply be exercising their general civil rights as opposed to any right unique to the university setting.²³⁸

V. CONCLUSION

Recognizing an academic freedom exception to the *Garcetti* limitation on the First Amendment right to free speech would clear up any misunderstanding amongst the lower courts. In addition, the

236. *Id.* (citing *Weintraub v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 593 F.3d 196, 203 (2d Cir. 2010)). This standard of looking beyond an employee's job description has been applied in several cases where a university faculty member has spoken in his or her administrative or service role. *E.g.*, *Renken*, 541 F.3d at 774; *Gorum v. Sessions*, 561 F.3d 179, 185 (3d Cir. 2009) (speech as student advisor unprotected).

237. *Byrne*, *supra* note 8, at 263-64:

Second, and more complicated, the right of a professor to participate in political activity off campus and on her own time without institutional reprisal should not be viewed as a matter of constitutional academic freedom. This assertion may seem perverse. The notorious investigations of professors by state and federal officials for "disloyalty" during the 1950's have often been portrayed as the quintessential violation of academic freedom, even though the conduct investigated nearly always involved non-academic political organizing rather than scholarship or teaching. Also, the AAUP has always included some protection of outside political speech within its principles of academic freedom.

Yet, Professor Van Alstyne surely was right when he argued that professors at state universities have no greater (or lesser) right to participate in political affairs than do other government employees. Since the 1960's, the First Amendment has protected state employees from employment penalties for exercising general civil rights of free speech, but it does not distinguish among professors, prosecutors, or janitors. Like student free speech, the professor's right to speak publicly on matters of public concern reflects the permeation of the campus by general civil rights rather than an elaboration of a right unique to the university. Advocates extended academic freedom to extramural speech because, prior to 1950, civil liberty had not yet developed to the point where those who exercised rights were protected against losing public employment. Moreover, at a time when the state civil service was small, professors, by training and inclination, were the most conspicuous state employees participating in public affairs; given their visibility in politics, it is understandable that their right to participate should have been seen as part of their academic freedom rather than as a general right of all state employees.

238. *Id.* at 264.

exception would protect an area of speech that the United States Supreme Court has already recognized to be uniquely important. However, this exception should be limited to faculty academic speech, which only includes scholarship and teaching. These and other limitations will narrow the scope of this exception to only protect speech that is uniquely dependent on the lack of restriction in order to remain valuable.

Academic speech has been traditionally praised by courts. However, academic speech cannot thrive in its fullest form unless it is afforded protection under the First Amendment. Academic speech doesn't simply face the obvious threats from external lay interference; it also is threatened from within the university system. Recognizing a First Amendment right to free academic speech would recognize the fundamental importance and value of academic speech. The creation of an academic freedom exception is essential to free academic speech so that society may reap its unhindered benefits.