

ACADEMIC FREEDOM AND THE FIRST AMENDMENT IN THE *GARCETTI* ERA

HILARY HABIB*

*The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. . . . Teachers and students must always remain free to inquire, to study, and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.*¹

I. INTRODUCTION

In the 2005 aftermath of Hurricane Katrina, Louisiana State University (“LSU”) professor Ivor van Heerden, a coastal geologist and hurricane researcher,² was chosen by LSU to lead “Team Louisiana,” a group of scientists commissioned to research what was responsible for the catastrophic flooding in New Orleans.³ At the onset, van Heerden was guaranteed “full operational support” by the LSU Board of Regents.⁴ Based on his research, van Heerden concluded that a “catastrophic structural failure” of the levees had caused the flooding, which implicitly placed blame on the Army Corps of Engineers who had designed the levees.⁵ Van Heerden issued a report with his conclusions and spoke publicly about the Corps’ engineering failure.⁶

* Class of 2013, University of Southern California Gould School of Law; B.A. History, University of California, Los Angeles. I would like to thank Professor Michael Shapiro for his invaluable guidance throughout the writing process. Special thanks to my parents and Ryan, for their continued support throughout law school.

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

2. AM. ASS’N OF UNIV. PROFESSORS, *ACADEMIC FREEDOM AND TENURE: LOUISIANA STATE UNIVERSITY, BATON ROUGE 2* (2011), <http://www.aaup.org/NR/rdonlyres/28F1CE64-5ABE-4FB0-829C-3D9C9807A44D/0/LSUJuly2011Report.pdf> [hereinafter *FREEDOM AND TENURE*].

3. *Van Heerden v. Bd. of Supervisors of La. State Univ.*, No. 3:10-CV-155-JJB-CN, 2011 WL 5008410, at *1 (M.D. La. Oct. 20, 2011).

4. *FREEDOM AND TENURE*, *supra* note 2, at 5.

5. Michael Grunwald & Susan B. Glasser, *Experts Say Faulty Levees Caused Much of Flooding*, WASH. POST, Sept. 21, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/20/AR2005092001894.html>.

6. For the full report of van Heerden’s findings, see IVOR L. VAN HEERDEN ET AL., LA. DEP’T OF TRANSP. & DEV., *THE FAILURE OF THE NEW ORLEANS LEVEE SYSTEM DURING HURRICANE KATRINA* (2006).

Fearing that the University would lose public funding due to van Heerden's statements, LSU chose not to renew Professor van Heerden's contract in April 2009,⁷ even though he had been employed by LSU since 1992.⁸ Following the administration's decision, van Heerden filed suit in federal district court, asserting, among other things, that LSU had violated his First Amendment rights by terminating him in retaliation for his report.⁹ In October 2011, van Heerden's retaliation claim survived LSU's Motion for Summary Judgment.¹⁰

To many, it seems likely that van Heerden's firing was a blatant violation of his First Amendment right to free speech.¹¹ However, according to the Supreme Court's 2006 decision in *Garcetti v. Ceballos*,¹² the seminal case that established the current "public-employee speech" doctrine, neither the law nor the outcome of van Heerden's claim are so obvious. According to *Garcetti*, "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."¹³ Thus, under *Garcetti*, the viability of van Heerden's First Amendment violation claim first hinges on whether he was speaking within his "official" capacity as a public employee or instead as a private citizen.¹⁴

7. *Van Heerden*, 2011 WL 5008410, at *2. It is notable that Professor van Heerden's position was renewed every few years by contract and that his position was outside of the tenure system. FREEDOM AND TENURE, *supra* note 2, at 3.

8. *Van Heerden*, 2011 WL 5008410, at *1-2.

9. *See id.* at *3. Van Heerden's seven other claims were for: (1) de facto tenure; (2) defamation of character; (3) violation of Louisiana whistleblowing law; (4) a violation of his Fourteenth Amendment rights; (5) emotional distress; (6) breach of contract; and (7) conspiracy to interfere with testimony in federal court. *Id.* at *2. The court granted LSU's motion to dismiss the de facto tenure, defamation, emotional distress, breach of contract, and conspiracy claims. *Id.* at *13. However, it denied LSU's partial motion for summary judgment on the whistleblowing claim. *Id.* at *2.

10. *Id.* at *7.

11. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

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

13. *Id.* at 421.

14. *Id.* According to *Garcetti*, if an employee is not speaking in his official capacity, the court inquires whether the employee was speaking on a matter of public concern. *See id.* at 418. If so, a balancing test is used to determine if the employee's interest in protecting the speech is greater than the employer's interest in restricting the speech. *See id.* at 417-21. The balancing test weighs an individual's interest in addressing a matter of public concern with the government employer's interest in "promoting the efficiency of the public services it performs through its employees." *Id.* at 417.

Notably, as justification for *Garcetti*'s restriction of a public employee's speech, the Supreme Court referenced the government-speech doctrine.¹⁵ It explained that restricting speech that is part of a public employee's official duties does not infringe that employee's rights as a private citizen because the public (government) employer has "control over what the employer itself has commissioned or created."¹⁶

Garcetti's holding has considerably decreased the number of public employment cases finding in favor of First Amendment protection.¹⁷ Numerous scholars have harshly criticized *Garcetti*'s denial of First Amendment protection, especially in light of its negative implications for academic freedom in public universities¹⁸—concerns that Justice Souter raised in his dissent in *Garcetti*.¹⁹

This Note argues that *Garcetti* is problematic and should not apply in a public university setting.²⁰ Whether the *Garcetti* standard is appropriate in some cases of public-employee speech or not, it is incredibly misplaced within a public university setting.²¹ The purpose of the public university is to promote "active discourse, critical debate, free exchange of ideas, and communication of ideas that characterize effective scholarship, teaching, and learning."²² Professors facilitate this exchange of ideas by researching, writing, and designing probative and cutting-edge curricula. All of these responsibilities should be inside the realm of constitutional protection.

Although the *Garcetti* Court addressed the balancing test, it never explicitly stated whether it was using intermediate or strict scrutiny.

15. See *id.* at 421–22.

16. *Id.* at 422.

17. Gia B. Lee, *The First Amendment Enforcement in Government Institutions and Programs*, 56 UCLA L. REV. 1691, 1702 (2009). See *Garcetti*, 547 U.S. at 421–24.

18. See Sheldon Nahmod, *Academic Freedom and the Post-Garcetti Blues*, 7 FIRST AMENDMENT L. REV. 54 (2008); Robert M. O'Neil, *Academic Speech in the Post-Garcetti Environment*, 7 FIRST AMENDMENT L. REV. 1 (2008).

19. *Garcetti*, 547 U.S. at 438–39 (Souter, J., dissenting).

20. It is necessary for university professors to have academic freedom, as will be discussed in Part III. "Such [academic] freedom is a [] condition of hiring learning; without it, our institutions would become mere appendages to economic interests, party politics, and dramatic if evanescent shifts in public opinion." AM. ASS'N OF UNIV. PROFESSORS, PROTECTING AN INDEPENDENT FACULTY VOICE: ACADEMIC FREEDOM AFTER *GARCETTI* V. *CEBALLOS* 69 (2009), <http://www.aaup.org/NR/rdonlyres/B3991F98-98D5-4CC0-9102-ED26A7AA2892/0/Garcetti.pdf> [hereinafter PROTECTING AN INDEPENDENT FACULTY VOICE].

21. Since the First Amendment only applies to public institutions, the *Garcetti* rule is (for the most part) not applicable to private schools and universities. However, some states have laws requiring private institutions to adhere to the same First Amendment and other constitutional standards as public institutions. See, e.g., CAL. EDUC. CODE. § 94367(a) (2012).

22. ROBERT K. POCH, ACADEMIC FREEDOM IN HIGHER EDUCATION: RIGHTS, RESPONSIBILITIES, AND LIMITATIONS 18 (1993).

An additional, highly important role of university professors is also now removed from First Amendment protection: professors' criticism of the university's policies and operations. Although university professors and staff are in the best positions to provide cogent criticism, *Garcetti* renders their criticism especially vulnerable to retaliation.²³ Under some plausible readings of *Garcetti*, faculty criticism of a public university has virtually no First Amendment protection. The resulting fear of retaliatory firings likely stifles professors' academic freedom, diminishing the intrinsic value of the public university as a marketplace for ideas.

This Note examines how *Garcetti* fails to adequately protect the academic speech of professors and, thus, limits public universities' academic freedom. It also explains the flaws in applying the government-speech analysis to academic speech. This Note proposes that, given the unique nature of academic freedom in the public university setting, the *Garcetti* standard should apply to speech in universities only if the standard is substantially modified.²⁴ This change is necessary to maintain the free flow of ideas, criticism, and discourse in public universities, as well as to maintain proper internal management of the universities.²⁵ Part II gives the background of the *Garcetti* decision and explains the evolution of the public-employee speech doctrine. Part II also examines the *Garcetti* ruling and its effect on the government-speech doctrine. Part III explains the concept of academic freedom, defines the significance of academic freedom in a professional and judicial context, and explains the difference between public-employee speech and academic speech. Part III also briefly touches on the limits of academic freedom. Part IV explains the problems with *Garcetti*, dissects its impact on lower court cases involving speech in public universities, and suggests a possible solution to *Garcetti*'s stifling effects on professors' academic freedom. Part V concludes.

23. Many recent public-employee speech cases focus on retaliatory actions against professors due to professors' criticism of a university. See *Sadid v. Idaho State Univ.*, 265 P.3d 1144 (Idaho 2011) (professor fired for making critical comments of university administration in local newspaper); *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008) (professor claimed university retaliated against him after the university returned grant funds in response to the professor's criticism of the administration); *Isenalumhe v. McDuffie*, 697 F. Supp. 2d 367 (E.D.N.Y. 2010) (professor subjected to various retaliatory actions in response to criticism of the hiring of an administrator).

24. It is arguable that the *Garcetti* standard is misguided and should only be partially applied to any public-employee speech case—not just cases of academic freedom. For purposes of this Note, I will focus specifically on how *Garcetti* is unsuitable in a public-university setting.

25. This Note will not address the academic freedom of public elementary or secondary school teachers. Nor will it address public university professors' ability to plan their curricula in the classroom.

II. FREEDOM OF SPEECH AND THE FIRST AMENDMENT

The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech.”²⁶ First Amendment jurisprudence is rooted in the common law.²⁷ The First Amendment is not absolute, as the Supreme Court has carved out numerous exceptions restricting the rights of individuals to speak freely.²⁸ In many instances, these limitations—such as time, place, and manner restrictions—are necessary to preserve the fundamental values of the First Amendment.²⁹ Other First Amendment limitations promote societal order.³⁰ In addition, some categories of speech enjoy less First Amendment protection than others.³¹ For instance, the Supreme Court has found that commercial speech warrants less constitutional protection than other forms of speech.³²

Another type of regulated speech is public-employee speech. The *Garcetti* doctrine, which provides the constitutional standard for public-employee speech, has received significant criticism for excessively quelling

26. U.S. CONST. amend. I.

27. See CARL J. FRANKLIN, CONSTITUTIONAL LAW FOR THE CRIMINAL JUSTICE PROFESSIONAL 77–80 (1999) (explaining the adoption of the First Amendment and its common law background).

28. See, e.g., *Morse v. Frederick*, 551 U.S. 393 (2007) (holding that the First Amendment allows educators to quell some types of student speech at a school-supervised event); *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (holding that Congress can set statutory funding guidelines that may discriminate against some forms of expression).

29. Time, place, and manner regulations help preserve the power of the First Amendment by allowing the government to regulate some aspects of free speech that are content-neutral, thereby promoting needed regulation while protecting other forms of free speech. See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (holding that requiring a rock group to use a specific type of sound equipment and designated technicians did not violate the First Amendment, because the city had a substantial interest in lowering the noise of the concert and because the ordinance was content-neutral); *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753 (1994) (holding that the state could put place and manner limitations on protestors of an abortion clinic in order to allow the clinic to run efficiently and the staff to come and go without interference).

30. Some exclusions from presumptive First Amendment protection have long been recognized. For instance, fighting words and obscenity are categorically excluded by the First Amendment in order to secure societal order. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (rejecting the claim that the right to see obscene films was protected by the First Amendment); *Roth v. United States*, 354 U.S. 476 (1957) (holding that obscenity is not within the realm of First Amendment protection); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (holding that fighting words should not have any constitutional protection).

31. See HENRY COHEN, CONG. RESEARCH SERV., 95–815, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT (2009), <http://www.fas.org/sgp/crs/misc/95-815.pdf>.

32. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980) (in which the Supreme Court created a test with which the government can regulate commercial speech). In *Hudson*, the Court explained that “[t]he Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.” *Id.* at 563.

First Amendment protection and free speech.³³ Although *Garcetti* did not propose a categorical denial of public employees' First Amendment rights,³⁴ it did severely limit the protections afforded by prior precedent, virtually eliminating the First Amendment protection of public employees who speak within their official duties.³⁵ This denial creates a substantial problem for professors at public universities because their publications, research, scholarship, and criticisms of the university likely fall within their official duties and are, thus, left unprotected by the First Amendment.³⁶

Section A discusses the development of the public-employee speech doctrine by analyzing three key cases: *Pickering v. Board of Education*,³⁷ *Connick v. Myers*,³⁸ and *Garcetti v. Ceballos*.³⁹ Section B explains the evolution of the government speech doctrine

A. EVOLUTION OF THE PUBLIC-EMPLOYEE SPEECH DOCTRINE

Prior to the 1960s, as a constitutional matter, the speech of a public employee could be restricted without cause by the employer.⁴⁰ Justice Oliver Wendell Holmes explained this unchallenged dogma in a Massachusetts Supreme Court opinion, stating that a police officer "may have a constitutional right to talk politics, but [] has no constitutional right to be a policeman."⁴¹ In other words, public employment was subject to virtually unlimited restriction, and a public employee could not object to unfair conditions placed on his or her employment.⁴² This view remained

33. See generally Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of Garcetti v. Ceballos*, 42 U. RICH. L. REV. 561 (2008) (analyzing and dissecting the ramifications of *Garcetti*); AM. ASS'N OF UNIV. PROFESSORS, PROTECTING AN INDEPENDENT FACULTY VOICE: ACADEMIC FREEDOM AFTER *GARCETTI V. CEBALLOS* 67 (2009), <http://www.aaup.org/NR/rdonlyres/B3991F98-98D5-4CC0-9102-ED26A7AA2892/0/Garcetti.pdf> [hereinafter PROTECTING AN INDEPENDENT FACULTY VOICE].

34. *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006) ("The Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment.").

35. See *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). However, if the public employee is not acting within his official duties, the *Pickering* balancing test still applies. See *Garcetti*, 547 U.S. at 424–25.

36. Stacy E. Smith, Note, *Who Owns Academic Freedom?: The Standard for Academic Free Speech at Public Universities*, 59 WASH. & LEE L. REV. 299, 351–52 (2002).

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

38. *Connick*, 461 U.S. 138.

39. *Garcetti*, 547 U.S. 410.

40. See Kathryn B. Cooper, Note, *Garcetti v. Ceballos: The Dual Threshold Requirement Challenging Public Employee Free Speech*, 8 LOY. J. PUB. INT. L. 73, 73–74 (2006). However, employment contracts could contain protective positions for employees.

41. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 518 (Mass. 1892).

42. See *id.*

unchanged until it was refined in the 1968 case, *Pickering v. Board of Education*.⁴³

1. *Pickering v. Board of Education*

In *Pickering*, Marvin L. Pickering was fired from his position as a public school teacher after his letter criticizing the way the School Board and district superintendent handled proposals to raise funds for the school was published in a local newspaper.⁴⁴ At a hearing regarding the dismissal, the School Board explained Pickering's termination by charging that numerous statements he made in the publication were false and that the statements "impugned" the competence and respect of the School Board and the school administration, damaged the professional reputations of the administrators, and "would tend to foment controversy, conflict, and dissension" among the staff.⁴⁵ Pickering challenged his dismissal as a violation of his First Amendment right to free speech.⁴⁶ The Illinois Supreme Court found that, as a public employee, Pickering had no First Amendment right to speak out against the operations of his school; however, the Supreme Court disagreed.⁴⁷

The Supreme Court held that Pickering's termination violated his First Amendment right to free speech.⁴⁸ Writing for the majority, Justice Marshall acknowledged the need for First Amendment cases to balance the interests of individuals in commenting on matters of public concern against the interests of states in maintaining efficiency as an employer.⁴⁹ The Court created a two-part balancing test to analyze public-employee speech. First, the Court evaluates whether the speech involves an issue of "public concern."⁵⁰ Second, if the speech does address a matter of "public concern," a court then asks whether the employee's interest in expressing himself outweighs the government's interests in promoting workplace efficiency.⁵¹ Justice Marshall did not discuss the applicable standard of review, but he did suggest that if the speech does involve an issue of public

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

44. *Id.* at 564.

45. *Id.* at 566–67.

46. *Id.* at 567.

47. *Id.*

48. *Id.* at 574–75.

49. *Id.* at 568 ("The problem in any [First Amendment] case is to arrive at a balance between the interests of the [individual], as a citizen, in commenting on 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.").

50. *Id.*

51. *Id.*

concern, more than minimal scrutiny would be required when determining if the speech was protected.⁵²

Applying that test, the Court determined that Pickering's letter regarding the allocation of school funds was a matter of public concern.⁵³ It also found that Pickering's criticism of his employer did not hinder his ability to fulfill his duties as an employee and, therefore, did not impede the efficiency of his employer.⁵⁴ After balancing these elements, the Court concluded that "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."⁵⁵

A main problem with the *Pickering* decision is that the Court did not provide further guidance for determining what subjects are matters of public concern.⁵⁶ Nor did the Court discuss what factors should be considered when balancing the government's interests in efficiency against the employee's interests in free speech.⁵⁷ Instead, lower courts had to create their own factors when applying the *Pickering* analysis, which caused considerable confusion among the courts as to the appropriate standard.⁵⁸

2. The *Connick* "Public Concern Threshold"

Fifteen years later, the Supreme Court's ruling in *Connick v. Myers* modified the *Pickering* balancing test by creating a "public concern" threshold inquiry for determining whether public-employee speech should be protected.⁵⁹ In *Connick*, Sheila Myers, an assistant district attorney in

52. *See id.* at 569–74.

53. *Id.* at 571–72.

54. *Id.* at 572–73.

55. *Id.* at 573.

56. *See id.* at 571–72. This will be examined in Part IV.C.3.

57. The *Pickering* Court uses a common type of judicial minimalism. Judicial minimalists believe in narrow court rulings instead of expansive decisions. Those who endorse judicial minimalism contend that a low-guidance function of rulings is justified, because it will avoid inevitable mistakes that would occur if an over-broad ruling was applied in a different circumstance and because saying more is not necessary to determine the specific issues of an individual case. *See* CASS R. SUNSTEIN, RADICALS IN ROBES 27–30 (2005).

58. *See* Joseph O. Oluwole, *On the Road to Garcetti: 'Unpick'erring Pickering and its Progeny*, 36 CAP. U. L. REV. 967 (2008); Joseph O. Oluwole, *The Pickering Balancing Test and Public Employment-Free Speech Jurisprudence: The Approaches of Federal Circuit Courts of Appeals*, 46 DUQ. L. REV. 133 (2008) (explaining how circuit courts of appeals have attempted to identify the "ingredients of the contending interests under the [*Pickering* balancing] test").

59. *Connick v. Myers*, 461 U.S. 138 (1983). *See also* Elizabeth A. Riley, Note, *Waters v. Churchill: The Procedural Due Process Disguise of Public Employee Free Speech Rights*, 24 CAP. U. L. REV. 893, 894 (1995).

New Orleans, opposed her transfer to a different division of the court.⁶⁰ After raising her concerns to her superiors, she created and distributed a questionnaire to other employees that solicited their views on certain issues in the office, such as the employee transfer policy and the level of confidence they had in their superiors.⁶¹ She was fired from her position for distributing the questionnaire, and she sued, alleging a violation of her First Amendment rights.⁶²

The Supreme Court held that if the speech is considered a matter of “public concern,” the public employee is protected by the First Amendment; but, if the speech is a matter of internal workplace concern, an employer is free to retaliate and dismiss the employee.⁶³ The Court defined a matter of “public concern” as “any matter of political, social, or other concern to the community.”⁶⁴ The Court also said that “the content, form, and context of a given statement, as revealed by the whole record,” could help shed light on whether an issue was a matter of “public concern.”⁶⁵

Here, the Court found that the only inquiry on the questionnaire that could be considered a matter of public concern was whether the employees had ever felt pressured to participate in political campaigns for specific candidates.⁶⁶ However, according to the Court, Myers’ First Amendment interest was quite limited and did not outweigh the harmful effects the employee’s speech could have on the office.⁶⁷ Consequently, Myers’ First Amendment retaliation claim failed.⁶⁸

60. *Connick*, 461 U.S. at 140.

61. *Id.* at 140–41. Myers’ questionnaire contained questions on “office transfer policy, office morale, the need for a private grievance committee, the level of confidence in superiors, and whether employees felt pressured to work on political campaigns.” *Id.* at 141.

62. *See id.* Myers filed suit under 42 U.S.C. § 1983 for deprivation of her right to free speech. *Id.*

63. *Id.* at 146. “When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment . . .” *Id.*

64. *Id.*

65. *Id.* at 147–48.

66. *Id.* at 149.

67. *Id.* at 151–52. The Court held that “[t]he limited First Amendment interest involved here does not require that *Connick* tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships.” *Id.* at 154.

68. *Id.*

3. *Garcetti v. Ceballos*

The 2006 Supreme Court case *Garcetti v. Ceballos* ushered in a new era for the public-employee speech doctrine by requiring an additional inquiry into whether a public employee's actions were "pursuant to official duties."⁶⁹ If the employee's speech was made pursuant to official duties, there would be no First Amendment protection; however, if the speech was not made pursuant to official duties, the *Pickering* test would be used to determine whether it was subject to First Amendment protection.⁷⁰

In *Garcetti*, Richard Ceballos, a deputy district attorney in Los Angeles, was reviewing a case when he discovered that an affidavit police had used to obtain a search warrant contained "serious misrepresentations."⁷¹ Although Ceballos wrote a memorandum about his findings and voiced his concerns to his supervisors in a meeting that became "heated," the district attorney's office continued to prosecute the case.⁷² At trial, Ceballos discussed his findings about the affidavit.⁷³ Thereafter, Ceballos was reassigned to a different division, transferred to another courthouse, and denied a promotion.⁷⁴ Ceballos filed a retaliation action in the Central District of California under 42 U.S.C. § 1983,⁷⁵ claiming that his First and Fourteenth Amendment rights had been violated by his employer's retaliation.⁷⁶

The district court granted defendants' motion for summary judgment, holding that Ceballos's memorandum did not warrant First Amendment protection because it was written pursuant to his official duties.⁷⁷ The Ninth Circuit Court of Appeals reversed that ruling under the *Pickering* analysis.⁷⁸ It first found that Ceballos's memorandum was "inherently on a matter of public concern," then balanced Ceballos's interest in free speech against the government's interest in restricting it.⁷⁹ The Court did not

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

70. *See id.* at 420–21.

71. *Id.* at 413–14.

72. *Id.* at 414.

73. *Id.* at 414–15.

74. *Id.* at 415.

75. *Ceballos v. Garcetti*, No. CV 0011106AHMAJWX, 2002 WL 34098285, at *1 (C.D. Cal. Jan. 30, 2002). Ceballos filed his suit under 42 U.S.C. § 1983, a statute that provides the basis for a federal action for a deprivation of constitutionally protected rights. *Id.*

76. *Id.* at *2.

77. *Id.* at *6–7.

78. *Garcetti*, 547 U.S. at 415–16; *Ceballos v. Garcetti*, 361 F.3d 1168, 1180, 1185 (9th Cir. 2004).

79. *Ceballos*, 361 F.3d at 1173–74.

specify a standard of review beyond “balancing.”⁸⁰ Because the defendants offered no evidence of how Ceballos’s memorandum disturbed the workplace, the Ninth Circuit determined that Ceballos’s speech should be protected by the First Amendment.⁸¹

In 2006, the Supreme Court reversed the Ninth Circuit in a 5-4 decision.⁸² The majority opinion, written by Justice Kennedy, clarified that public employees do not sacrifice all of their First Amendment rights.⁸³ However, “[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom” because a government employer needs some control over its employees’ speech to promote efficiency in the workplace.⁸⁴

The Court then announced a new bright-line rule for the employee-speech doctrine, which stated 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.”⁸⁵ In other words, if an employee speaks while acting as a citizen and addressing matters outside the scope of official workplace duties, the speech may have First Amendment protection.⁸⁶ But, because Ceballos’s memorandum addressed the validity of an affidavit that was clearly related to his “official duties,” he was acting not as a private citizen but as a government employee.⁸⁷ The Court ended its analysis there and did not examine the *Pickering* “public concern” factor.⁸⁸ Rather, the Court stated that balancing employee and employer interests in free speech is only relevant when one is speaking as a private citizen: “a similar degree of scrutiny” is unnecessary when an employee is acting pursuant to his or her official job duties.⁸⁹ This result is problematic because Ceballos’s “official duties” were, indeed, of public concern.

80. *See id.* at 1178–80.

81. *Id.* at 1179–80.

82. *Garcetti*, 547 U.S. at 417–18.

83. *Id.* at 417.

84. *Id.* at 418.

85. *Id.* at 421.

86. *See id.*

87. *See id.*

88. *See id.* Ceballos did not dispute that writing the memorandum was part of his official duties as a calendar deputy. *Id.* at 414. Advising his supervisor about the status of an open case was part of his official duties. *Id.* at 421.

89. *Id.* at 423.

However, the *Garcetti* Court did not articulate a test for determining whether an employee is speaking within his or her official duties or as a private citizen.⁹⁰ All the Court offered were examples of speech outside official duties, suggesting that the *Pickering* teacher who wrote the newspaper article criticizing fund allocations at his school may be considered a private citizen,⁹¹ as might an employee discussing politics with a co-worker.⁹²

It is important to note that the *Garcetti* decision did not overrule *Pickering* and, to an extent, the two decisions are consistent. Rather, what *Garcetti* did was add a threshold inquiry to the *Pickering* analysis. To illustrate, imagine that Ceballos had made an ill-advised comment about his supervisor's wife and was fired as a result. The Court likely would have determined that the comment was not within Ceballos's "official duties," but instead speech made as a private citizen, subject to First Amendment protection. Then the Court would use the *Pickering* test to determine first whether the speech was a matter of "public concern" and, second, would balance Ceballos's interest in free speech against the government's interest in promoting workplace efficiency.⁹³ Notably, the Court would only impart a balancing test if Ceballos's interest in free speech was a matter of public concern.⁹⁴ Given Ceballos's circumstances, it would be extremely difficult for him to prevail under the *Pickering* test for precisely the same reason that he did not succeed under the official-duties test: his comment was of private, not public, concern, and it was not related to his official duties. Therefore, the official-duties test probably does not change the outcome in cases of solely private concern from their result under *Pickering*.

In his dissent, Justice Stevens explained a central problem of *Garcetti*'s bright-line rule: "public employees are still citizens while they are in office" and, in many cases, whether a statement is made pursuant to official job duties is "immaterial."⁹⁵ In other words, the spheres of speaking as an employee and as a private citizen often intersect, and this distinction

90. *See id.* at 423–24.

91. *Id.* at 423.

92. *Id.* at 423–24. With regard to the political comment, Justice Kennedy referenced the facts of *Rankin v. McPherson*, 483 U.S. 378 (1987).

93. The impact of *Garcetti* on First Amendment protection of personal comments as a private citizen is not the subject of this Note. Through this analogy, I am simply trying to show *Garcetti*'s effect on *Pickering*. However, First Amendment protection of one's private speech serves as the theoretical and doctrinal backdrop for the public-speech arena.

94. *See Connick v. Myers*, 461 U.S. 138, 146 (1983).

95. *Garcetti*, 547 U.S. at 427 (Stevens, J., dissenting).

is insignificant for First Amendment purposes. Justice Souter, in a separate dissent, also touched on the point of conflicting spheres.⁹⁶

Justice Souter's comments in dissent reflect the very problem this Note addresses. He warned that the view of the majority could "imperil First Amendment academic freedom in public colleges and universities, whose teachers necessarily speak and write pursuant to 'official duties.'"⁹⁷ Justice Souter's position may be somewhat overstated. If one examines all of the likely contexts, situations, and internal forums of a public college and university, there are clearly some in which a professor would not be acting pursuant to official duties.⁹⁸ Regardless, the cases following *Garcetti* have validated Justice Souter's concerns about the impact the *Garcetti* holding would have on academic freedom.

Yet, writing for the majority, Justice Kennedy refused to address the issue of academic freedom because it was not pertinent in the *Garcetti* case:

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.⁹⁹

Although the facts of *Garcetti* did not involve academic freedom and there was no reason for Justice Kennedy to determine how the Court would rule in such a case, his reference to academic freedom is problematic. By stating that the effects of the *Garcetti* doctrine on academic freedom are "not fully accounted for" by the new doctrine, Justice Kennedy is suggesting at least the possibility that the doctrine may not be fully compatible with the concept of academic freedom. Justice Kennedy's inference that the *Garcetti* doctrine may face difficulties in an academic-freedom scenario is extremely troubling given that the doctrine would apply to any public employee in an academic setting.¹⁰⁰

96. *Id.* at 428–33. Justice Souter's dissent also critiqued the majority's reliance on a "fallacious" reading of the government-speech doctrine, an issue this Note takes up in later Sections. *Id.* at 436–39 (Souter, J., dissenting).

97. *Id.* at 438.

98. For instance, if a university professor privately writes a novel that has no affiliation to his scholarship or the university, he would not be writing within his official duties as a professor.

99. *Garcetti*, 547 U.S. at 425. The concept of academic freedom will be discussed in Part III.

100. Justice Kennedy's statement that the formulation of the *Garcetti* doctrine may not be "fully accounted for" with regard to academic freedom is especially concerning due to the large number of public schools in the United States. As of 2009, there were 98,817 public elementary or secondary

B. DEVELOPMENT OF THE GOVERNMENT-SPEECH DOCTRINE

In *Garcetti*, the Court noted that restricting a public employee's speech pursuant to his or her official duties "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."¹⁰¹ This rationale is strikingly similar to the notion that, when the government is speaking, it is shielded from First Amendment claims—which is the theory behind the government-speech doctrine.¹⁰² The *Garcetti* majority incorrectly relied on the government-speech doctrine to support its holding. To comprehend this misplaced reliance and the doctrine's inapplicability to academic freedom, it is necessary to understand the concept of the government-speech doctrine.¹⁰³ Although the First Amendment is silent on whether its protection extends to government speech, courts have ruled that, when the government is speaking, its message is not constrained by the First Amendment, and the government can engage in viewpoint discrimination.¹⁰⁴ Courts have not precisely defined government speech, and this has further muddled the doctrine.¹⁰⁵

In *Rust v. Sullivan*, the plaintiffs challenged a regulation that gave doctors federal grants for providing family-planning services to patients, but barred the doctors from providing, counseling, or promoting abortions.¹⁰⁶ The Court held that the regulation was valid because, when the government provides a subsidy for a program, it can control the scope of the program and engage in viewpoint discrimination.¹⁰⁷ The *Rust*

schools and 6742 post-secondary public schools in the United States. *Fast Facts: Educational Institutions*, NAT'L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/fastfacts/display.asp?id=84> (last visited Feb. 22, 2013). Given the number of public schools and public school employees, public employee suits that implicate *Garcetti* in an academic freedom setting occur frequently, and *Garcetti* has had far-reaching consequences.

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

102. Nahmod, *supra* note 33, at 562. See *Garcetti*, 547 U.S. at 421. Justice Souter disagreed with the Court's analysis of the government-speech doctrine. *Id.* at 436–39 (Souter, J., dissenting). The government-speech doctrine was first established in *Rust v. Sullivan*, 500 U.S. 173 (1991).

103. See Darryn Cathryn Beckstrom, Note, *Reconciling the Public Speech Doctrine and Academic Speech After Garcetti v. Ceballos*, 94 MINN. L. REV. 1202, 1209–13 (2010).

104. See *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005); *Bd. of Regents v. Southworth*, 529 U.S. 217, 229 (2000).

105. See Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543, 545 (1996) (noting the Supreme Court's "hopelessly incoherent analysis" in *Rust*).

106. *Rust*, 500 U.S. at 178–81.

107. *Id.* at 194.

doctrine has been the subject of immense criticism.¹⁰⁸ It is noteworthy that, as in *Garcetti*, the Court warned that its holding should not restrict the First Amendment in cases involving public universities because they are “traditional sphere[s] of free expression so fundamental to the functioning of our society.”¹⁰⁹ This warning indicates that the Court was concerned about the impact of its ruling on academia and did not want the government-speech doctrine to be extended easily into public universities.

Despite *Rust*’s warning, the government-speech doctrine was addressed in the public-university context four years later in *Rosenberger v. Rector and Visitors of the University of Virginia*,¹¹⁰ a case that determined whether a public university violated the First Amendment when it refused to use money from the school’s Student Activity Fund to support a Christian newsletter, but used money from that same account to fund other school publications.¹¹¹ The Court found that the Student Activity Fund was meant to “encourage a diversity of views from private speakers,” not to subsidize a government message.¹¹² Thus, as private speech, the publication was granted First Amendment protection and was outside the reach of the government-speech doctrine.¹¹³ Distinguishing the government-speech doctrine, the Court stated:

[w]e recognized [in *Rust*] that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.¹¹⁴

Although *Rosenberger*’s government-speech standard granted the government significant leeway to make sure its message was not distorted

108. See William W. Van Alstyne, *Second Thoughts on Rust v. Sullivan and the First Amendment*, 9 CONST. COMMENT. 5, 5 (1992); Michael Fitzpatrick, Note, *Rust Corrodes: The First Amendment Implications of Rust v. Sullivan*, 45 STAN. L. REV. 185 (1992). For a full critique on the government-speech doctrine, see generally MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* (1983).

109. *Rust*, 500 U.S. at 199–200.

110. *Rosenberger v. Rector*, 515 U.S. 819 (1995).

111. *Id.* at 825–28.

112. See *id.* at 833, 840–41.

113. *Id.* at 833. Although the speech was private in this case, in some public-employee speech cases, there are instances in which private speech is also public speech. In that context, it is the task of the court to determine which characterization of the speech is more important.

114. *Id.* Note that that same quotation was cited in the *Garcetti* opinion. *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006). It is important to note that the government’s exercise of power in this instance is not due to its First Amendment right but instead based on its governmental powers.

by private entities it helped fund, subsequent Supreme Court cases have limited that standard. One example is *Legal Services Corporation v. Velazquez*.¹¹⁵ The Legal Services Corporation (“LSC”) is a federal organization that gives grants to organizations that provide free legal support to indigent clients. In *Velazquez*, a group of lawyers sued the LSC because it refused to allow recipients of their funds to challenge welfare laws.¹¹⁶ The attorneys claimed that the funding attachments resulted in viewpoint discrimination and a violation of their right to free speech.¹¹⁷ The Court agreed, finding the funding recipients’ speech protected because, unlike the regulation in *Rust* but similar to the university in *Rosenberger*, the LSC was created not to convey a “programmatically message,” but to promote private speech.¹¹⁸

In *Johanns v. Livestock Marketing Association*¹¹⁹ the Court provided another definition of government speech. In *Johanns*, the Court explained that the mark of government speech is “whether the government sets the overall message to be communicated and approves every word that is disseminated to distinguish from private and public speech.”¹²⁰ In his dissent, Justice Souter explained that the inquiry into whether something was government speech should not depend on the nature of the speech, but should instead depend on whether a reasonable person would assume that the government is speaking.¹²¹ Similarly, lower courts have held that the distinction between government and private speech should depend on who the “literal speaker” of the message is and “whether the government or the private entity bears the ‘ultimate responsibility’ for the content of speech.”¹²² Part of the rationale for this definition is that, if the public knows that the government is speaking and disagrees with the message, it can raise its concerns through the political process,¹²³ thereby minimizing the ability of the government to “falsify consent” without fear of any repercussions.¹²⁴

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

116. *Id.* at 536–39.

117. In some instances, litigation has been viewed as a type of speech and expression that can be protected by the First Amendment. *NAACP v. Button*, 371 U.S. 415, 431 (1963).

118. *Velazquez*, 531 U.S. at 542.

119. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005).

120. *Id.* at 562.

121. *Id.* at 578 (Souter, J., dissenting).

122. *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 860 (7th Cir. 2008) (quoting *Wells v. City & Cnty. of Denver*, 257 F.3d 1132, 1141 (10th Cir. 2001)) (explaining that the Fourth Circuit’s four-factor test for determining government speech is more suitable than the *Johanns* test).

123. *See Bd. of Regents v. Southworth*, 529 U.S. 217, 235 (2000).

124. YUDOF, *supra* note 108, at 15.

Even this cursory review of the government-speech doctrine suggests that the doctrine generally should not apply in a university setting. Although the *Rosenberger* Court held that when the government appropriates funds to promote a policy it can choose what viewpoint to promote,¹²⁵ this view should only apply when the government hires workers to “promote a particular policy.”¹²⁶ Yet, university professors generally are not hired to promote a particular policy of the institution.¹²⁷ As will be discussed in the following Section, the promotion of a wide variety of viewpoints that expand students’ minds and of lively scholarly debate are the very crux of the university setting.

III. ACADEMIC FREEDOM

A. THE PROFESSIONAL CONCEPT OF ACADEMIC FREEDOM

In order to fully analyze *Garcetti*’s inapplicability to academic freedom, it is necessary to establish academic freedom as a professional standard, as well as its significance within American jurisprudence. The concept of academic freedom can be traced back to the beginning of the twentieth century.¹²⁸ It was first developed in 1915 when the American Association of University Professors (“AAUP”) selected a team of professors to draft its *Declarations of Principles on Academic Freedom and Academic Tenure* (“1915 Declaration”).¹²⁹ Before the tenets of the 1915 Declaration were widely accepted in universities, professors were usually considered servants of the university, and were not able to speak out on issues of political, social, religious, or other matters that conflicted with the views of the university.¹³⁰

125. *Rosenberger v. Rector*, 515 U.S. 819, 833 (1995).

126. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001).

127. However the government-speech doctrine can be applied within the university in some circumstances. For instance, a university athletic director would likely be expected to support the university’s disagreement with NAACP sanctions. He would be promoting a specific policy or message of his employer, and he was likely hired with the expectation that he would do so. However this scenario rarely happens with academic university professors.

128. See generally RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* (1955).

129. PROTECTING AN INDEPENDENT FACULTY VOICE, *supra* note 33, at 67. The AAUP is a group of academic professionals who work to promote academic freedom.

130. PROTECTING AN INDEPENDENT FACULTY VOICE, *supra* note 33, at 68. For instance, in 1925 a Tennessee law stated that, in order to receive funding, all public universities and schools must teach the story of divine creation instead of an evolutionary theory in science class. *Id.* This law has now come full circle: in March of 2012, the Tennessee Senate passed a bill that allows teachers to introduce “alternate” scientific theories in their classrooms. Cara Santa Maria, *Scopes Monkey Trial Revisited: Tennessee Is Still Officially Anti-Evolution as Science Education*, HUFFINGTON POST (Sept. 20, 2012,

The authors of the *1915 Declaration* disagreed with this servant-master notion. They defined academic freedom for the teacher or professor as “freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action.”¹³¹ They also believed that, although taxpayers help fund public schools, the taxpayers should not be able to restrict the scholarship of professors.¹³² The AAUP posited that, in a democracy, it was common “for men to think alike, to feel alike, and to speak alike,” and not approve of messages that differed from what one would consider “normal,” creating a tyranny of the majority and strong pressure for professors to conform to society.¹³³ But, in scholarship, this requirement of conformity could stifle a professor’s ability to research myriad diverse and cutting-edge topics.

The AAUP not only believed that taxpayers’ “public opinion” should not dictate a professor’s scholarship, but they also believed that, if professors’ scholarship was not well-received, the professors should still be protected from retaliatory actions by the university.¹³⁴ Instead, they saw the university setting as “a venue within which certain highly important public goals are pursued, none of which is compatible with a locus of control external to the content fields within which the teacher or research is done.”¹³⁵ The AAUP compared the relationship of control between professors and university administration to the relationship between judges and the president:

University teachers should be understood to be, with respect to the conclusions reached and expressed by them, no more subject to the control of the trustees, than are judges subject to the control of the president, with respect to their decisions; while of course, for the same reason, trustees are no more to be held responsible for, or to be presumed to agree with, the opinions or utterances of professors, than

5:38 AM), http://www.huffingtonpost.com/2012/03/20/tennessee-evolution-scope-education_n_1368636.html.

131. AM. ASS’N OF UNIV. PROFESSORS, 1915 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE 292 (1915), *available at* <http://www.aaup.org/AAUP/pubsres/policydocs/contents/1915.htm> [hereinafter 1915 DECLARATION]. Some modern academic theorists such as Stanley Fish believe that this description is too broad. *See infra* notes 140–41, and accompanying text.

132. JOAN DELFATTORE, KNOWLEDGE IN THE MAKING 217 (2010).

133. 1915 DECLARATION, *supra* note 131.

134. *Id.*

135. DELFATTORE, *supra* note 132, at 217.

the president can be assumed to approve of all the legal reasonings of the courts.¹³⁶

The AAUP adopted the *1915 Declaration* in its *1940 Statement of Principles on Academic Freedom and Tenure* (“*1940 Declaration*”), which is currently endorsed by more than two-hundred educational groups.¹³⁷ The *1940 Declaration* refines the concepts of academic freedom. Specifically, it states that: (1) educators should have “full freedom in research and in the publication of their results,” but should have an “understanding” with the institution or university, and can have their scholarship conditioned upon performing other academic duties; (2) teachers should not have undue academic freedom in the classroom, as they should not introduce “controversial” material unrelated to their scholarship; and (3) although university professors should not be censored, their scholarship should be “accurate,” “show respect for the opinions of others,” and attempt to make clear that they are speaking as citizens, not as representatives of the university.¹³⁸ The main change between the *1940 Declaration* and the *1915 Declaration* is in its explanation of conditions that should attach to being a university professor, thereby constraining their academic license.¹³⁹

Although the AAUP has set the guidelines for academic freedom, some notable academic theorists have different views on the concept of end limits of academic freedom. Scholar Stanley Fish believes these limits should not be expansive because some professors take academic freedom too far and “contrive to turn serial irresponsibility into a form of heroism under the banner of academic freedom.”¹⁴⁰ Fish believes that university professors should not have the leeway to do whatever they please under the guise of academic freedom and should have to conform to the wishes of the university.¹⁴¹ Under this view of academic freedom, Fish would likely believe that the university should have some control over a professor’s

136. 1915 DECLARATION, *supra* note 131. See Robert S. Rosborough IV, Comment, A “Great” Day for Academic Freedom: The Threat Posed to Academic Freedom by the Supreme Court’s Decision in *Garcetti v. Ceballos*, 72 ALB. L. REV. 565, 572–73 (2009).

137. AM. ASS’N OF UNIV. PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE (1940), available at <http://www.aaup.org/AAUP/pubsres/policydocs/contents/1940statement.htm> [hereinafter 1940 DECLARATION].

138. *Id.* at 3.

139. See Rosborough, *supra* note 136, at 573–74 (explaining the impact of the *1940 Declaration*).

140. Stanley Fish, *The Two Languages of Academic Freedom*, N.Y. TIMES OPINIONATOR (Feb. 8, 2009, 10:00 PM), <http://opinionator.blogs.nytimes.com/2009/02/08/the-two-languages-of-academic-freedom>. See also STANLEY FISH, *SAVE THE WORLD ON YOUR OWN TIME* (2008).

141. Stanley Fish, *Are Academics Different?*, N.Y. TIMES OPINIONATOR (Feb. 15, 2009, 8:30 PM), <http://opinionator.blogs.nytimes.com/2009/02/15/are-academics-different>.

scholarship and criticism of the university. For instance, in the earlier case of van Heerden, Fish likely would find that van Heerden did not have the academic freedom to discuss the failure of the levees because it was a political issue.

Fish's limited scope of academic freedom is critiqued by others, who believe that the concept of academic freedom should be more expansive.¹⁴² As scholar Matthew Finkin notes, "[a] university is a great and indispensable organ of the higher life of a civilized community, in the work of which the trustees hold an essential and highly honorable place, but in which the faculties hold an independent place, with quite equal responsibilities."¹⁴³ Furthermore, in a recent book, scholars Finkin and Robert Post argue that academic freedom is "grounded firmly in a substantive account of the purposes of higher education and in the special conditions necessary for faculty to fulfill those purposes," which should give professors the ability to assert academic freedom with respect to "all forms of university regulation."¹⁴⁴

Although scholars differ on the meaning and scope of academic freedom, most still acknowledge that, to an extent, it should be protected by the First Amendment.¹⁴⁵ As the following Section discusses, courts, too, have repeatedly noted academic freedom's special characteristics within a democracy. Courts have warned that professors must be free "to inquire, to study and to evaluate, to gain new maturity and understanding" or scholarship will die and students will not receive an education of much value.¹⁴⁶ Without academic freedom, professors likely would worry that their statements could put their jobs in jeopardy and refrain from probative research, publications, and discussions, ultimately damaging the university system.

B. THE LEGAL CONCEPT OF ACADEMIC FREEDOM

Although the judiciary has never expressly defined academic freedom,¹⁴⁷ numerous cases have lent insight into the concept and

142. See Robert Post, *The Job of Professors*, 88 TEX. L. REV. 185 (2009) (reviewing FISH, *supra* note 140).

143. Matthew W. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323, 1335 (1988) (quoting 1915 DECLARATION, *supra* note 131, at 295).

144. MATTHEW W. FINKIN & ROBERT C. POST, *FOR THE COMMON GOOD* 7, 58 (2009).

145. See *id.*

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

147. See J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 YALE L.J. 251, 256–58 (1989) (discussing the problems courts have faced when defining academic freedom).

highlighted its importance.¹⁴⁸ Briefly reviewing some of these cases will provide doctrinal background, after which its application to the public-employee sphere will be discussed.

The judiciary's first reference to academic freedom occurred in Justice Douglas's 1952 dissent in *Adler v. Board of Education*.¹⁴⁹ In *Adler*, the Supreme Court upheld a law that allowed teachers to be fired for advocating an overthrow of the government.¹⁵⁰ Justice Frankfurter, in a separate dissent, warned of the effects firing a teacher for being associated with a "subversive group" could have on academic freedom.¹⁵¹

Five years later, the majority in *Sweezy v. New Hampshire* found that the government's attempt to question a guest lecturer at the University of New Hampshire about the content of his lectures and his political affiliations invaded his academic freedom and violated his constitutional rights.¹⁵² In *Sweezy*, the Supreme Court cautioned of the harmful effects of putting "strait jacket[s]" on professors because it could harm the future of the country and impinge on the probability of new discoveries.¹⁵³ In his concurrence, Justice Frankfurter again emphasized the concept of academic freedom when he argued, quoting another source, "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment, and creation."¹⁵⁴

The next notable case to discuss academic freedom was *Keyishian v. Board of Regents*,¹⁵⁵ which involved teachers who refused to sign loyalty oaths.¹⁵⁶ Justice Brennan, writing for the majority, stated: "Our Nation is deeply committed to safeguarding academic freedom 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."¹⁵⁷

148. See, e.g., *Dow Chem. Co. v. Allen*, 672 F.2d 1262, 1275 (7th Cir. 1982); *Cooper v. Ross*, 472 F. Supp. 802, 813 (E.D. Ark. 1979).

149. *Adler v. Bd. of Educ.*, 342 U.S. 485, 509 (1952) (Douglas, J., dissenting).

150. *Id.* at 490, 494–96 (majority opinion).

151. *Id.* at 497–98 (Frankfurter, J., dissenting).

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

153. See *id.*

154. *Id.* at 263 (Frankfurter, J., concurring).

155. *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967). The loyalty oaths required professors to certify that they were not a communist and that, if they ever had been a communist, they had communicated that fact to the president of the university.

156. *Id.* at 591–93.

157. *Id.* at 603.

In a final case of note, *Dow Chemical Company v. Allen*,¹⁵⁸ the Seventh Circuit addressed academic freedom within a professor's scholarship. Specifically, the Environmental Protection Agency had attempted to subpoena a public university professor's research data on animal toxicity studies.¹⁵⁹ The Seventh Circuit noted that this type of interference in research could "inevitably tend[] to check the ardor and fearlessness of scholars."¹⁶⁰ The Seventh Circuit went on to define academic freedom as "the right of the individual faculty member to teach, carry on research, and publish without interference from the government, the community, the university administration, or his fellow faculty members."¹⁶¹

The Supreme Court has never given a precise definition of what academic freedom is or what special protection it should be granted under the law, but recent judicial trends acknowledging its importance within our society show promise for a delineation of the concept. This judicially recognized importance suggests that *Garcetti*'s bright-line rule should not apply to academic freedom within the university.

C. ACADEMIC SPEECH VERSUS PUBLIC-EMPLOYEE SPEECH

Academic speech must be distinguished from public-employee speech. First, the nature of the university setting is, in many respects, unique among other places of public employment.¹⁶² A professor is not a mere public employee of the university:

The academic organization does not function like a business corporation. It is and must be . . . a community of scholars. From its earliest beginnings this community was not a hierarchical or authoritarian group. In fact its unique form as a gathering of scholars interested in a common endeavor predated the modern constitutional democracy . . . [T]he dual role of the faculty member—as teacher, scholar, and citizen on the one hand, and as a member of an organization sharing responsibility for its operation on the other—must be taken into account.¹⁶³

158. *Dow Chem. Co. v. Allen*, 672 F.2d 1262 (7th Cir. 1982).

159. *Id.* at 1265–66.

160. *Id.* at 1276 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957)).

161. *Id.* See also Barbara B. Crabb, *Judicially Compelled Disclosure of Researchers' Data, A Judge's View*, 59 *LAW & CONTEMP. PROBS.* 9, 21–22 (1996) (explaining the scope of academic freedom expressed in *Dow*).

162. See Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 *GEO. L.J.* 945, 974, 976 (2009).

163. See Thomas I. Emerson & David Haber, *Academic Freedom of the Faculty Member as Citizen*, 28 *LAW & CONTEMP. PROBS.* 525, 549 (1963).

There are many reasons why a professor's academic speech is often different from a public employee's speech. For example, professors must plan their curricula and the ideas they want to disseminate to their students. This targeting creates a special relationship between professor and student, in which ideas are exchanged freely and intellectual discourse peaks. As the AAUP suggests, to be successful and influential instructors, professors must have the respect of their students, and this respect hinges on the students' views of instructors' "intellectual integrity."¹⁶⁴ If professors are worried that they have no First Amendment protection for anything that they say within the classroom, they may choose to pass on only simple truths to their students and avoid providing thoughtful and inquiring curricula or engaging in probative research. As a result, students may lose a valuable part of the university experience and fail to develop a "mature independence of mind."¹⁶⁵ Yet, this pursuit of insight and truth within a university is quite different from other places of government employment, where employees may be paid to disseminate a government message or provide a service.

Furthermore, academic governance structures require the freedom for internal critique in a way other public workplaces do not. Unlike most public employers, universities often have a policy of shared governance between faculty and administration.¹⁶⁶ This governance structure involves a hierarchy within the university faculty: the president sits on the board of trustees; the budget is drafted by the dean to be approved by the president; and a student-faculty council helps govern other university policies, such as academic matters, admission and matriculation standards, and course schedules. Although other public employers may promote staff critique of policies or a shared governance system, it is most prevalent in the university setting, where professors have a duty to engage in university governance.¹⁶⁷

The input of professors is essential to structuring university policy and curricula: hindering professors' ability to voice their concerns without fear of termination could destroy this vital aspect of the university system of shared governance. Further, as there is now a historic budget crisis in the

164. 1915 DECLARATION, *supra* note 131; FINKIN & POST, *supra* note 144, at 81.

165. See FINKIN & POST, *supra* note 144, at 81–82.

166. See Areen, *supra* note 162, at 983. Even though professors have a duty to communicate and associate to advance the governance process, they do not necessarily have a legal role in governance. Usually, the faculty has only an advisory role under the Faculty Handbook and University By-Laws. Furthermore, internal departmental rules are still subject to university review.

167. See *id.*

public school system, university governance issues and fund allocations are of the utmost importance,¹⁶⁸ university professors are the most apt parties to discuss those issues and should have the freedom to do so. To be sure, these differences do not automatically demonstrate that *Garcetti*'s bright-line rule should not extend to academic speech, but they provide a strong basis for this conclusion.

D. THE LIMITS OF ACADEMIC SPEECH

“Academic freedom is not a doctrine to insulate a teacher from evaluation by the institution that employs him.”¹⁶⁹ Indeed, the unique nature of academic freedom should not allow scholars to have unbridled reign over the material they teach their students or what they say inside of the classroom.¹⁷⁰ As the Washington Court of Appeals explained:

Academic freedom is not a license for activity at variance with job-related procedures and requirements, nor does it encompass activities which are internally destructive to the proper function of the university or disruptive to the education process. . . . Academic freedom does not mean freedom from academic responsibility to students, colleagues and the orderly administration of the university.¹⁷¹

For instance, a physics professor cannot go into a classroom and begin teaching American history. Scholars should not have complete autonomy over their actions in the classroom because they must still adhere to standards of their job. Furthermore, some scholars have suggested that there should be a different level of First Amendment protection for elementary, middle, and high school teachers than for public university professors.¹⁷² These scholars' logic is that children in lower grades are a “captive audience” and have more impressionable minds.¹⁷³ But, whatever the setting, academics must adhere to the basic standards of their jobs and should not be given more leeway than the average citizen or public employee to, for instance, engage in racially discriminatory behavior or obscenity. But, when educators make decisions that are “genuinely

168. See NICHOLAS JOHNSON, PHIL OLIFF & ERICA WILLIAMS, CTR. ON BUDGET & POLICY PRIORITIES, AN UPDATE ON STATE BUDGET CUTS (2011), available at <http://www.cbpp.org/cms/?fa=view&id=1214>.

169. *Carley v. Ariz. Bd. of Regents*, 737 P.2d 1099, 1103 (Ariz. Ct. App. 1987).

170. See *Stastny v. Bd. of Trs.*, 647 P.2d 496, 504 (Wash. Ct. App. 1982) (explaining that academic freedom does not give a “license” to disregard job expectations or standards).

171. *Id.*

172. Academic freedom in elementary and high school education has not been altered by *Garcetti*, so the decision should govern these institutions; however, academic freedom in public universities should not be governed by *Garcetti*. See generally Nahmod, *supra* note 18.

173. See *id.*

academic in nature,” the courts should grant substantial deference to their academic freedom.¹⁷⁴

IV. THE IMPLICATIONS OF *GARCETTI*

A. THE LACK OF NECESSITY OF *GARCETTI*

Garcetti's “pursuant to official duties” requirement has drastically reduced the likelihood that a public employee’s speech will be protected by the First Amendment.¹⁷⁵ Advocates of the *Garcetti* ruling, such as Jin S. Choi, who litigated the *Garcetti* case, defend the ruling as promotion of government efficiency: Choi has argued that “[a] seed of a constitutional claim should not be allowed to be planted whenever an employee discusses a matter of public concern. This fundamental clarification will certainly aid the ability of public agencies to effectively manage their workforce and to provide services to the general public.”¹⁷⁶

However, Choi does not address that “efficiency” is a relative term. What is efficient depends on not just the end goal, but also on the means. The narrow form of efficiency that Choi describes relates to the inner-workings of a business, such as maximizing productivity of workers, reducing time spent on gossiping or criticizing the employer, and comparing costs and benefits. Yet, a much more imperative form of efficiency involves the employer achieving its public goal and fulfilling its mission statement. In *Garcetti*, the public goals of the prosecutor would be to promote the public interest by distinguishing the guilty from the innocent and to adhere to the tenets of the law. Therefore, stifling Ceballos’s incentives to question an affidavit supporting a search warrant would actually be inefficient and not support the public goal of the district attorney’s office.¹⁷⁷ In this regard, *Garcetti* does not help promote

174. This can involve decisions that relate to academic scholarship or the infrastructure and management of the university. See Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1539–44 (2007) (explaining the necessary limits on and scope of academic freedom).

175. South Texas College of Law professor Charles W. “Rocky” Rhodes says, “*Garcetti* has sharply curtailed the likelihood of public employees prevailing on a speech retaliation claim against their governmental employer. The reported post-*Garcetti* cases almost always favor the employer.” David L. Hudson, J., *The Garcetti Effect*, A.B.A. J. (Jan. 1, 2008, 2:14 PM), available at http://www.abajournal.com/magazine/article/the_garcetti_effect.

176. *Id.*

177. Another example is *Bowie v. Maddox*, 653 F.3d 45 (D.D.C. 2011), in which Bowie, an official in the Office of the Inspector General (“OIG”), “refused to sign an affidavit written by his employer that supported its firing of another employee.” *Id.* at 46. Bowie also criticized the firing and was then terminated. *Id.* Hiring competent employees and not firing them without cause would likely

efficiency.

Instead, the *Pickering* analysis better protects First Amendment rights while promoting government efficiency. For instance, imagine that a DMV clerk disapproves of how slowly the computers in the office work. She mentions the slow computers to her supervisor once or twice, and is coincidentally fired for that. Under *Pickering*, a court would find that she did not impair the efficiency of her workplace and, thus, should not have been fired for her comments.¹⁷⁸ Therefore, her ability to suggest minor improvements in the workplace and voice her concerns in a reasonable manner would be protected. However, because she is using a computer pursuant to her job, a court applying *Garcetti* would likely find that she is acting pursuant to her “official duties” without reaching the *Pickering* balancing test. Therefore, the court would deny her First Amendment protection regardless of the inefficiency she caused to her employer.¹⁷⁹

As illustrated in the above example, the *Garcetti* analysis is both unnecessary and flawed in general public-employment settings. However, *Garcetti*'s failures are most disturbing for professors in public universities. At public universities, professors' “official duties” are often expansive. The core of professors' profession—their curricula, lectures, scholarly writings and comments, and critiques of the administration—likely would be considered within their official duties, not entitled to First Amendment protection. Thus, applying *Garcetti* to university professors has had a chilling effect on academic research and a negative impact on the university setting.

help the overall mission of efficiency in the OIG. This mission is to stop abuses in Medicare, Medicaid, and other governmental health programs. However, under *Garcetti*, Bowie does not have First Amendment protection, because he was acting within his official duties.

178. This scenario might play out differently if, for example, a surgical nurse repeatedly complained about contamination in the operating room. Because the nurse's complaints would likely be considered more a matter of public concern than a slow computer, the disruption that the nurse caused with her continuous, vocal complaints would probably not outweigh the interest in ensuring a safe and clean operating room.

179. Now, imagine the DMV clerk instead tells her supervisors and customers about her grievances while working, puts her complaints in signs around the DMV, and sends emails to the her coworkers. As a result, she is also fired. Since it is certainly not efficient for her to constantly address such a small concern with her supervisors, coworkers, and customers, her First Amendment claim would probably fail under *Pickering*, as the disruption she caused by obsessively repeating her claim would certainly outweigh her own interests in voicing concerns about her computer. Again, this hypothetical shows that *Pickering* would likely reach a fair and efficient conclusion, and *Garcetti* is largely unnecessary.

B. THE NEGATIVE IMPLICATIONS OF *GARCETTI* IN ACADEMIC CASES

Justice Souter's concerns about the effects of the *Garcetti* ruling on academics have been validated. A university is a setting unique from the public institutions like the DMV because, in a public university setting, professors' First Amendment protection is crucial to engaging students in critical thought. *Garcetti* should not be used to overshadow professors' free thought, academic freedom, and First Amendment rights in the marketplace of ideas. Unfortunately, that is exactly what has occurred. Recent academic-speech cases after *Garcetti* show how the application of *Garcetti* has led to a troubling minimization of First Amendment rights.

In the 2011 case *Saenz v. Dallas County Community College District*,¹⁸⁰ Dr. Matilda Saenz, Vice President of Instruction for Mountain View College ("MVC"), and five other deans wrote a memorandum to the President of MVC, Felix Zamora, expressing their concerns regarding budget problems.¹⁸¹ Zamora told Saenz that he was extremely unhappy with her memorandum.¹⁸² Following the memorandum, and despite four years of "exemplary" evaluations, Zamora gave Saenz a negative performance review and refused to renew her employment contract unless she agreed to a performance plan.¹⁸³ Saenz filed suit, alleging that her First Amendment rights to free speech and academic freedom had been violated.¹⁸⁴ Following *Garcetti*, the threshold question for determining whether there was a First Amendment violation rested on whether Saenz was acting "as a citizen or in her capacity as a Vice President."¹⁸⁵ If she was acting within her capacity as a private citizen, the court would then consider whether her memorandum involved an issue of "public concern." If she was acting as Vice President, she would lose the case. The court found that, because she disseminated the memorandum at her workplace, wrote it with other academic deans, and addressed fiduciary and budgetary concerns—concerns stemming from her job as Vice President—she was acting as an employee within her official duties.¹⁸⁶

180. *Saenz v. Dallas Cnty. Cmty. Coll. Dist.*, No. 3:10-CV-742-O, 2011 WL 1935742 (N.D. Tex. May 16, 2011).

181. *Id.* at *1.

182. *Id.*

183. *Id.*

184. *Id.* at *4.

185. *Id.* at *9.

186. *Id.* at *9–10. As a result, the defendant's Motion for Summary Judgment was granted. *Id.* at *30.

Similar cases following *Garcetti* have demonstrated a lack of First Amendment protection against university disciplinary actions arising from professors' academic speech, whether the discipline is for criticism of the administration or for issues involving scholarship.¹⁸⁷ As these cases demonstrate, the *Garcetti* rule basically eliminates any possibility of a public university professor having First Amendment speech protection. By adding the "official duty" threshold inquiry to the *Pickering* test, courts will rarely have the opportunity to balance professors' free-speech rights against the University's interest in efficiency. This blatant lack of First Amendment protection is "inconsistent with the democracy- promoting purposes of higher education: the ability to engage in moral reasoning or, more broadly, the development of critical intellectual faculties and the advancement of knowledge."¹⁸⁸ It is also inconsistent with the AAUP's concept of academic freedom, as expressed in its *1915 Declaration* and *1940 Declaration*.¹⁸⁹

C. THE PROBLEMS WITH APPLYING *GARCETTI*

1. Concurrent Spheres and Arbitrary Distinctions: Speaking as a Private Citizen Versus Speaking as a Public Employee

The *Garcetti* majority's distinction between speaking as a private citizen and speaking as a public employee is problematic. The notion that there should be a categorical difference in protection depending on whether one is speaking as a public employee or a citizen is "quite wrong," as Justice Stevens suggests.¹⁹⁰ Rather, speech as a citizen and as a public employee often precisely coincide—the roles have concurrent characterizations. This overlap is quite apparent when people speak about matters of public concern that relate to their employment. Take, for instance, the facts of *Garcetti*. Ceballos wrote a memorandum pursuant to his official duties, critiquing an affidavit that he thought contained "serious misrepresentations."¹⁹¹ Arguably, his job duties were strongly intertwined with the mission of the District Attorney's office: to guarantee justice and equality under the law by following constitutional and statutory constraints to identify and prosecute criminal offenders, while refraining from

187. See *Gorum v. Sessoms*, 561 F.3d 179, 185–86 (3d Cir. 2009) (explaining that a professor's comments critiquing the administration fell within his official duties); *Renken v. Gregory*, 541 F.3d 769, 775 (7th Cir. 2008) (holding that a professor's speech involving his criticism on the administration of a grant was within his official duties).

188. Nahmod, *supra* note 18, at 68.

189. See *supra* Part III.A.

190. *Garcetti v. Ceballos*, 547 U.S. 410, 427 (2006) (Stevens, J., dissenting).

191. *Id.* at 414 (majority opinion).

prosecuting the innocent. At the same time, this mission certainly falls under the broad umbrella of public concern. Therefore, most of Ceballos's practice of law within the District Attorney's office would be of public concern, yet his speech would not be protected in any way.

Similarly, in the public-university setting, most of a professor's official duties—such as promoting debate, conducting research, answering students' inquiries, and participating in the shared governance of the university—are matters of public concern.¹⁹² Why should university professors lose First Amendment protection for job pursuits that are an integral part of the public interest and thus inherent to their constitutional rights as citizens? After all, “a government paycheck does nothing to eliminate the value to an individual of speaking.”¹⁹³

Further, the logic behind the distinction between private-citizen and public-employee speech is arbitrary. For example, in *Givhan v. Western Line Consolidated School District*,¹⁹⁴ a teacher was fired for criticizing her school's racially discriminatory hiring policies.¹⁹⁵ The Court applied the *Pickering* balancing test and found that the teacher's speech was a matter of public concern and that her interests in free speech outweighed the government's efficiency interest.¹⁹⁶ But, as Justice Souter asked, what if *Givhan* had been decided after *Garcetti* and a member of the school's hiring committee brought the claim?¹⁹⁷ Criticizing school hiring policies would certainly be an “official duty” of her job. Therefore, under *Garcetti*, she would have no First Amendment protection. However, if the school's athletic director criticized discriminatory hiring practices, he would have a much better chance of receiving First Amendment protection because commenting on those issues would not be considered part of his official duties.

This result seems somewhat counterintuitive. Arguably, hiring personnel are best suited to address concerns on an issue of discriminatory hiring policies, in part because they have a better understanding of the available candidates, the broader university hiring situation, and the university's specific hiring criteria and anti-discrimination policies. Why should they be denied First Amendment protection when less-informed

192. See 1915 DECLARATION, *supra* note 131.

193. *Garcetti*, 547 U.S. at 428 (Souter, J., dissenting).

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

195. *Id.* at 413–14.

196. See *id.* at 414–15.

197. See *Garcetti*, 547 U.S. at 430 (Souter, J., dissenting).

critics can voice any concern without repercussions?¹⁹⁸ In a university setting, professors are often very involved with their universities and can provide great insights and critiques to the administration regarding curricula, budgets, and tenure policies, among others. But, under *Garcetti*, the more knowledge employees have on a subject, the more likely their speech will fall within their official duties, increasing the likelihood of being disciplined for discussing it.¹⁹⁹ Thus, although professors are “plainly entitled to no less freedom than the ordinary citizen,”²⁰⁰ under *Garcetti*, this is not the case.

Another problem with the public employee versus private citizen distinction is that *Garcetti* did not provide a “dispositive test” to determine when one is speaking as an employee within his or her official duties.²⁰¹ *Garcetti* did vaguely note that “formal job descriptions” are not necessary or sufficient in determining whether employees are acting with the scope of their job duties, and that the inquiry must be a “practical one.”²⁰² This lack of a standard has caused lower courts to use several different tests. And, the vagueness is even more problematic when applied to a university setting, as basically everything professors do within the university setting could be considered part of their official duties, given that their responsibilities are often wide-ranging and ill-defined.²⁰³

The Fourth Circuit, for example, acknowledged the difficulty of defining whether a professor’s scholarship relates to his or her official duties. In *Adams v. Trustees of the University of North Carolina-Wilmington*,²⁰⁴ a professor expressed his conservative and religious views through a book, radio show, and other media, which drew the criticism of

198. It is debatable whether a teacher would be more or less suited for comment on discriminatory hiring policies than personnel specifically hired for public communication. The main point of this illustration is that under *Garcetti*, the most informed person is best suited to comment on particular issues. In most circumstances, they are best-informed if the speech relates to their job description. Under *Garcetti*, the closer the relationship the speech has to that person’s job, the less First Amendment protection the person will have.

199. For example, a university physics professor is more likely to be disciplined for critiquing the administration’s funding for the physics department than for critiquing some aspect of a department unrelated to his field, such as athletic funding.

200. Emerson & Haber, *supra* note 163, at 553.

201. *Caruso v. Massapequa Union Free Sch. Dist.*, 478 F. Supp. 2d 377, 382 (E.D.N.Y. 2007).

202. *Garcetti*, 547 U.S. at 424–25.

203. See PETER J. MARKIE, A PROFESSOR’S DUTIES: ETHICAL ISSUES IN COLLEGE TEACHING 3–7 (1994) (outlining the numerous duties of a professor, such as “guiding students to knowledge,” grading, and research).

204. *Adams v. Trs. of the Univ. N.C.*, 640 F.3d 550 (4th Cir. 2011).

the university administration.²⁰⁵ Due to the nature of his publications and public appearances, he was denied a promotion.²⁰⁶ In its ruling, the court explained the limiting effects that *Garcetti* could have on academic scholarship if the “official duties” standard was broadly construed.²⁰⁷ Moreover, the court found that the professor’s speech was not “tied to any more specific or direct employee duty than the general concept that professors will engage in writing, public appearances, and service within their respective fields,” thereby adopting a narrower view of the “official duties” standard. The court also noted that the professor’s scholarship was related to a matter of public concern and not sanctioned by the university itself.²⁰⁸ Conversely, the Third Circuit, in *Gorum v. Sessoms*, found a professor’s speech to be part of his official duties if the speech related to “special knowledge” or “experience” that he got on the job.²⁰⁹ Unfortunately, most courts after *Garcetti* have adopted a view similar to *Gorum*, which has significantly limited First Amendment protection for professors.

2. Problems with the “Official Duties” Standard

The *Garcetti* “official duties” standard has effectively limited public employees’ ability to address matters of public concern. Consider the facts of *Pickering*. Assuming the “official duties” test was in place during *Pickering*, the high school teacher in that case would argue that he had no “official duty” to his high school to write letters to the press and that his letters did not further the educational mission of the public high school. Criticism of the school’s administration, sent to an outside publication, is not directly related to his specific duties as a teacher, but is a matter of public concern shared with private citizens. However, because *Garcetti* offers no guidance on what constitutes “official duties,” courts can apply—and have applied—the employee-duty concept so expansively that most communications of any public concern are part of a public employee’s duties. Because public institutions are presumably acting to protect the public interest, nearly all issues of public concern become a public employee’s official duty; thus, every time a public employee discusses a matter of public concern, it is part of his or her duty as an employee. And, such speech falls outside the realm of First Amendment protection.

205. *Id.* at 553–54.

206. *Id.* at 555–56.

207. *See id.* at 562–65.

208. *Id.* at 564. The court also acknowledged the importance of the academic freedom of a university professor. *See id.* at 562–65.

209. *Gorum v. Sessoms*, 561 F.3d 179, 185 (3d Cir. 2009).

This lack of protection is troubling. Public employees need the ability to speak about matters of public concern or “the community would be deprived of informed opinions on important public issues.”²¹⁰ This is especially necessary in a public-university setting. Education, particularly higher education, provides a foundation for young individuals who currently, or one day will, have a broad influence on society. It is imperative that these institutions operate at the highest caliber. In order to grant professors the security to speak without a chilling fear of reprisal, they must have some First Amendment protection when addressing matters of public concern within the university.

3. Problems with the “Public Concern” Standard

Garcetti’s “public concern” test poses significant problems. First, the *Garcetti* Court did not uphold “the First Amendment’s primary aim[s] [of] the *full protection* of speech on issues of *public concern*”²¹¹ and the promotion of “[t]he public[’s] interest in having free and unhindered debate on matters of public importance.”²¹²

In addition, the Supreme Court failed to properly define a test to determine whether an issue is a matter of public concern, forcing different circuits to create their own tests. The differing tests have led to contradictory results. For example, in *Hong v. Grant*, the district court held that a professor’s comments criticizing hiring practices within the university were not a matter of public concern.²¹³ Yet, in *Sadid v. Idaho State University*, the Idaho court of appeal reversed the lower court to find that one of a professor’s criticisms *was* a matter of public concern.²¹⁴ As these differing results illustrate, it remains questionable whether a professor’s critique of the administration or other constituents of the institution will be considered a matter of public concern protected by the First Amendment. As a result, professors may refrain from offering

210. *Garcetti v. Ceballos*, 547 U.S. 410, 420 (2006) (citing *San Diego v. Roe*, 543 U.S. 77, 82 (2004)).

211. *Connick v. Myers*, 461 U.S. 138, 154 (1983) (emphasis added).

212. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573 (1968). See Matthew D. Rose, Comment, *Prisoners and Public Employees: Bridges to a New Future in Prisoners’ Free Speech Retaliation Claims*, 5 SEVENTH CIRCUIT REV. 159, 216–17 (2009), available at <http://www.kentlaw.edu/7cr/v5-1/rose.pdf>.

213. *Hong v. Grant*, 516 F. Supp. 2d 1158, 1169 (C.D. Cal. 2007).

214. *Sadid v. Idaho State Univ.*, 265 P.3d 1144, 1152 (Idaho 2011). Professor Habib Sadid repeatedly criticized the administration’s decisions to merge the College of Engineering with the University of Iowa to create a medical school, and the court of appeal found the creation of a medical school to be a matter of public concern. *Id.*

valuable insight into and criticism of how universities should operate in order to serve the public in the most efficient manner.

4. The Limits of the Government-Speech Doctrine

As previously mentioned, the *Garcetti* Court implicitly relied on the government-speech doctrine in its decision. The Court stated: “Restricting speech that owes its existence to a public employee’s professional responsibilities . . . reflects the exercise of employer control over what the employer itself has commissioned or created.”²¹⁵ This reliance on the government-speech doctrine is extremely misguided.²¹⁶ It is understandable that the government needs to be able to speak in certain circumstances to promote efficiency and disseminate certain messages of critical importance to the public.²¹⁷ But in the context of *Garcetti*, the government-speech doctrine is used to impinge on the speech of individuals. This is especially harmful in the university arena, as “[t]he job of faculty is to produce and disseminate new knowledge and to encourage critical thinking, not to indoctrinate students with ideas selected by the government.”²¹⁸

While it is essential to have some forms of government speech, government-speech principles should not be used in the university setting. Government speech can be useful for the government to disseminate a particular message, such as public health warnings.²¹⁹ But when a professor speaks, he or she is not speaking as the government and, therefore, there is no reason for the government to control that speech. The government does not hire professors to disseminate a particular message to students and other individuals.²²⁰ If anything, professors are hired to engage in critical thought and to create their own messages, both for teaching students and for disseminating ideas to the broader community. This free flow of information in public universities fosters a myriad of opinions and an interplay of ideas.

If the government was able to pick and choose what professors could research, study, and teach, or could dictate when they must remain silent

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

216. See Beckstrom, *supra* note 103, at 1226–32.

217. See Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?*, 95 IOWA L. REV. 1259, 1307–08 (2010) (explaining that if the president gave a speech about an economic stimulus plan or a bank bailout, he would be imparting a necessary message to the public as an official voice of the government on a matter of public concern, and government speech is applicable in that situation).

218. Areen, *supra* note 162, at 991–92.

219. YUDOF, *supra* note 108, at 6–8 (examining the ways that the government can speak).

220. Beckstrom, *supra* note 103, at 1227.

about unfair university policies, the public would have no way of knowing whether the professor's speech reflected the government's message or the professor's own opinions. This level of government control is a type of fraud on the public. It would unfairly sway public opinion, cause professors to lose much needed autonomy, and lessen the value of democratic self-government.²²¹

D. A POSSIBLE SOLUTION TO *GARCETTI*

Because "an extension of *Garcetti* to university professors would not only disserve the core values of academic freedom, but would also dramatically disserve the public interest,"²²² university professors should be categorically exempt from the extension of *Garcetti*. The judiciary would be most suited to impose this exemption, as it has extended First Amendment protection to various groups, as well as created tests to determine if certain actors and speech warrant protection.²²³ Although there should be some regulation of what academics say, *Garcetti*'s "official duties" standard is far too broad.²²⁴ And, if university professors are exempt from the holding of *Garcetti*, courts would be forced to pursue a more in-depth First Amendment analysis in these speech cases, revealing the weaknesses of *Garcetti* as applied to all public employees.²²⁵

Instead of using the *Garcetti* standard to evaluate whether a university professor has First Amendment protection, courts should use the *Pickering* balancing test.²²⁶ As discussed above, the *Pickering* test weighs an employee's interest in commenting on matters of public concern with her

221. Some scholars suggest other frameworks for analyzing government speech to avoid public persuasion. See, e.g., David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637, 1676–77 (2006) (arguing that a better framework for analyzing whether the First Amendment protects government speech would examine whether the speech "is congruent with the original purpose for which it was created; falls within the ambit of its delegated or original authority; or represents a subject matter over which the speaker possesses distinctive expertise" and "furthers the values of democratic self-government").

222. O'Neil, *supra* note 18, at 20.

223. See, e.g., *Bolger v. Young Drug Prod. Corp.*, 463 U.S. 60 (1983) (creating a three-prong test to determine if advertisements are protected by the First Amendment); *Miller v. California*, 413 U.S. 15 (1973) (expanding a test to determine whether something is obscene, and therefore not protected under the first Amendment); *Tinker v. Des Moines Ind. Comm. Sch. Dst.*, 393 U.S. 503 (1969) (extending free speech rights to students).

224. For instance, a public university professor of physics should not be allowed to teach political science to his students because he wants to. He should not be able to ignore the duties of his job description—the reason he was hired; that would give him far more protection than academic freedom should warrant.

225. See O'Neil, *supra* note 18, at 21.

226. See *supra* Part II.A.1.

employer's interest in maintaining efficiency in the workplace.²²⁷ Using the *Pickering* test would be more effective at ensuring that public university professors are not unfairly sanctioned for appropriately asserting their First Amendment rights.²²⁸

V. CONCLUSION

As it stands under *Garcetti*, in most circumstances, professors are left with inadequate First Amendment protection, and their academic freedom is severely threatened. Yet, van Heerden and other professors whose academic research or critique of the university administration is related to their "official duties" should have the ability to express their opinions without fear of retaliation. As the court in *van Heerden* said, "[a]llowing an institution devoted to teaching and research to discipline the whole of the academy for their failure to adhere to the tenets established by university administrators will in time do much more harm than good."²²⁹ Indeed, academic freedom is unique in its nature and professors should have the opportunity to be protected from university retaliation. Professors' freedom to teach, research, publish, and criticize will further the ultimate goal of the university and benefit society as a whole.

227. See *supra* Part II.A.1.

228. Some scholars argue that the *Pickering* test has evolved into a "pseudo-balancing test", with "greater weight being assigned to the interests of the public employer." Oluwole, *supra* note 58, at 1026. Here, I am not evaluating how Courts have interpreted the *Pickering* test, but instead am suggesting that if the test was applied as a true balancing test, courts would likely reach a just result in evaluating the constitutional protection of public university professors' speech.

229. *Van Heerden v. Bd. of Supervisors of La. State Univ.*, No. 3:10-CV-155-JJB-CN, 2011 WL 5008410, at *6 (M.D. La. Oct. 20, 2011).

