

“Not Just A Nice Job Perk”

Academic Freedom As A First Amendment Right

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*Much as journalist argue that they have a “right to know,” scholars at public universities lay claim to their “right to academic freedom.” In both cases, these “rights” carry little weight constitutionally. But, just how much protection is actually afforded to academics through the First Amendment? This article addresses this question in light of the convergence of two elements—the corporatization of public universities and the ruling in the 2006 U.S. Supreme Court case *Garcetti v. Ceballos* (which heavily suggests that public employee speech does not qualify for the same level of First Amendment protection as private citizen speech). Finally, this article proposes a solution to the current crises, a solution that includes creating a constitutionally protected category of speech for academic inquiry at state colleges and universities.*

Keywords: AAUP; academic freedom; First Amendment; speech; university; law; Constitution

Much as journalists frequently assert that they have a “right to know,” scholars at public universities lay claim to their right to “academic freedom.” In both cases, rights are argued for with intense rigor. But, just how much protection actually is afforded is questionable. In the case of academic freedom, a convoluted

legal history combined with a contentious present raises serious concerns as to just how much freedom public university professors have today or will have in the future. This article seeks to address this issue in light of two recent phenomenon—the increasing corporatization of the public university and the 2006 ruling in *Garcetti v. Ceballos*, a public employee rights case that could have grave repercussions for academics.¹ Taken together, these circumstances point to what is becoming an increasingly more serious problem for scholars producing controversial or unpopular research at public universities.

The goal of this article is two-fold. First, it is necessary to clearly establish the severity of the current threat to academic freedom. Secondly, this article proposes a solution, one that is based on the development of a more inclusive definition of academic freedom and a movement toward a constitutional category of protected speech. In an attempt to meet the first goal, this paper examines the history of academic freedom—both professional and constitutional. Then, it offers a brief review of contemporary problems including the corporatization of public institutions of higher education and the specifics of the *Garcetti* ruling and its ramifications for the academy and its scholars. Finally, this paper utilizes theories of free speech to argue for a more complex and constitutionally grounded conception of academic freedom.

The Professional Conception of Academic Freedom

Most scholars agree that the U.S. conception of academic freedom has its roots in Germany.² Even the 1915 Declaration of Principles on Academic Freedom and Academic Tenure specifically made references to *Lehrfreiheit* (freedom of the teacher) and *Lernfreiheit* (freedom of the student).³ However, two key differences between the United States and Germany quickly were established. First, the focus in the United States would be on faculty only with virtually no regard for student freedom. As the Declaration emphasized, “It need scarcely be pointed out that

1. 547 U.S. 410 (2006).

2. For in depth discussion of the history of academic freedom in the United States, see Walter P. Metzger, ed., *The American concept of Academic Freedom: A Collection of Essays and Reports* (New York: Arno, 1977); J. Peter Byrne, “Academic Freedom: A ‘Special Concern of the First Amendment.’” 99 *Yale Law Journal* 251 (1989): 267-279; Rebecca Gose Lynch, “Pawns of the State or Priests of Democracy? Analyzing Professors’ Academic Freedom Rights Within the State’s Managerial Realm.” 91 *California Law Review* 1061 (2003): 1066-1070; Robert Post, “The Structure of Academic Freedom,” in *Academic Freedom After September 11*, ed. Beshara Doumani (New York: Zone Books, 2006), 61-106; Judith Areen, “Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance.” 97 *Georgetown Law Journal* 945 (2009), 949-967; and Matthew W. Finkin and Robert C. Post, *For the Common Good: Principles of American Academic Freedom* (New Haven: Yale University Press, 2009), 11-27.

3. General Report of the Committee on Academic Freedom and Academic Tenure, 1 AAUP BULL., Dec. 1915, reprinted in *Appendix A: General Report of the Committee on Academic Freedom and Academic Tenure* (1915), 53 *Law and Contemporary Problems* 393 (1990) [hereinafter 1915 Declaration].

the freedom which is the subject of this report is that of the teacher."⁴ Secondly, and likely more importantly, is the difference in the overall organization of the university, the key aspect being that American universities had an additional layer of power—the board of trustees. These boards, which still figure prominently in universities today, consisted not of scholars but of businessmen, and the primary concern of board members was not education, but financial solvency.⁵ Because of this obvious tension between faculty goals and trustee expectations, faculty in the early 1900s began to call for greater job security and increased teaching and research freedom and this in turn led to the creation of the American Association of University Professors. The AAUP would become the driving force in faculty rights. Much of our current conception of academic freedom comes from two key AAUP documents—the 1915 Declaration of Principles and the 1940 Statement of Principles on Academic Freedom and Tenure.

The 1915 Declaration begins by clearly demarcating the committee's assessment of the parameters of academic freedom. Specifically, the committee found that academic freedom should be comprised of three key elements: "freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action."⁶ To support the protection of those elements, the committee focused on defending them in relation to the overall purpose of the university in American society as a cornerstone for advanced civilization.⁷ The committee highlighted three purposes for universities: "(a) to promote inquiry and advance the sum of human knowledge, (b) to provide general instruction to students; and (c) to develop experts for various branches of the public service."⁸ By defining academic freedom in relation to societal good, the Declaration placed the focus on the distinctive role of the university, not on the individual rights of the faculty, thus making academic freedom something valuable for society as a whole, not a special employment right for academics.

To ensure this level of academic freedom, the Declaration promoted a set of professional norms for university faculty. These norms included the need to see faculty as appointees of the public trust, not as public employees. According to the Declaration, this shift from employee to appointee would afford faculty greater independence from university trustees. The Declaration states that in regard to the relationship between trustees and faculty members "the latter are the appointees, but not in any proper sense the employees, of the former. For, once

4. *Id.*

5. For a lengthy discussion of the impact of this organizational system on the development of the concept of Academic Freedom in the United States, see Byrne, "Academic Freedom."

6. 1915 Declaration.

7. *Id.*

8. *Id.*

appointed, the scholar has professional functions to perform in which the appointing authorities have neither competency nor moral right to intervene.”⁹ So long as a professor is performing his or her functions in a manner consistent with professional norms set up through tenure and promotion, then that professor’s academic freedom should not be subject to infringement by university trustees or other governmental agencies. This freedom is not absolute, however. According to the Declaration, academic freedom carries with it a corresponding responsibility to maintain high integrity and professional standards in regard to teaching and scholarship.¹⁰ Clearly, the committee intended the Declaration to serve as a protection of faculty freedom only to the degree that the expression of that freedom was promoting the social good and that faculty members were adhering to high academic standards as defined by their peers.¹¹

While the 1915 Declaration laid the groundwork for understandings of academic freedom today, it read more like a manifesto than a working set of guidelines.¹² In order to add credence to the ideas presented in the document, the AAUP subsequently proposed the 1940 Statement of Principles on Academic Freedom and Tenure. The new document reaffirmed the university as a necessity for a well-functioning society and it also called for continued protection of teaching and research as a way of maintaining that societal role. The 1940 Statement reiterated the ideas expressed in the 1915 Declaration, but did so using more concrete language, thus codifying the 1915 principles. In addition, the 1940 document was written with and endorsed by both faculty members and academic administrators. As a result, it was widely and quickly adopted by universities and colleges throughout the country. The 1940 Statement has proven to be a critical document in helping to protect faculty from censure. However, the document, as I will discuss later in this article, has on several occasions fallen short, due in part to a lack of concrete definition for the parameters of academic freedom. As Matthew Finkin and Robert Post noted, “The 1940 Statement provides assurances for the protection of academic freedom, but defines ‘academic freedom’ only in the most general terms.”¹³ This lack of specificity leaves the principle of academic freedom open for perhaps too much room for interpretation. In addition, while

9. 1915 Declaration.

10. *Id.*

11. For further discussion of the specifics and implications of the 1915 Declaration of Principles on Academic Freedom and Academic Tenure, see Byrne, “Academic Freedom,” 273-283; R. Menton Bird and Elizabeth Barker Brandt, “Academic Freedom and 9/11: How the War on Terrorism Threatens Free Speech on Campus,” *Communication Law and Policy* 7:4 (2002), 437-440; Jennifer Elrod, “Academics, Public Employee Speech, and the Public University,” 22 *Buffalo Public Interest Law Journal* 1 (2003/2004), 17-21; Lynch, “Pawns of the State,” 1066-1067; and Areen, “Government as Educator,” 953-962.

12. Bird, “Academic Freedom and 9/11,” 438.

13. Matthew W. Finkin and Robert C. Post, *For the Common Good: Principles of American Academic Freedom*. (New Haven: Yale University Press), 48.

the document is in no way legally binding, the courts have frequently referenced it, reproducing the general language and adding yet another layer of confusion to an already complex issue. Thus, while the AAUP’s Statement remains an important guiding document, it does not carry any legal weight and, as a result, leaves academic freedom in a tenuous position at best.

The Constitutional History of Academic Freedom

While the professional history of academic freedom in the United States has proceeded along a relatively straightforward path, the constitutional history has not been quite as orderly. The discussion of the level of protection academic speech should or can be afforded has been subsumed in a variety of First Amendment cases spanning an array of topics including faculty tenure, admissions requirements and student speech on university campuses. All of these rulings have added to a broad body of case law. However, because of the diversity of topics reviewed, not to mention the various doctrinal approaches utilized by the Court, breadth exists with little depth, and few rulings specifically focusing on academic freedom as a First Amendment right. As we will see in the following section, no recent Supreme Court cases have directly focused on academic freedom and early cases have left little clear direction.¹⁴

The concept of academic freedom did not receive even the slightest nod from the judicial system until 1940¹⁵ and did not garner U.S. Supreme Court consideration until nearly a decade later. In 1952, the Court heard *Adler v. Board of Education*, a case coming to the forefront during the height of the McCarthy era.¹⁶ *Adler* involved review of the constitutionality of the Feinberg Law, a statute that required the Board of Education of the city of New York to refuse to appoint or to fire teachers at public institutions who belonged to groups that the board found to advocate or teach the overthrow of the U.S. government. The Supreme Court voted to uphold the statute, but both Justices Douglas and Black dissented, concerned about the intimidating effects of such legislation on academic inquiry. Justice Douglas took a particularly firm stance in favor of academic freedom, calling the public school the “cradle of democracy”¹⁷ and arguing that legislation such as the Feinberg Law cast a pall over the classroom, completely eradicating real academic inquiry.¹⁸ He asserted, “A school system producing students trained

14. My discussion of academic freedom cases is not intended to be comprehensive, but instead merely offers the most relevant cases dealing with the concept of academic freedom as defined by the U.S. Supreme Court.

15. Areen, “Government as Educator,” 967.

16. 342 U.S. 485 (1952)

17. *Id.* at 508.

18. *Id.* at 510.

as robots threatens to rob a generation of the versatility that has been perhaps our greatest distinction.”¹⁹ In this way, Douglas tied the protection of academic freedom not to employee rights but to what he saw as the role of academe in protecting and promoting a healthy democratic society.

During that same term, the Supreme Court ruled on a similar academic freedom case, *Wieman v. Updegraff*, this time striking down an Oklahoma statute that required all state employees to take a loyalty oath.²⁰ The statute was struck down on the basis of associational rights of public employees. However, in the concurrence written by Justice Frankfurter and joined by Justice Douglas, Frankfurter again made a plea for the special role of the educator in our society. He wrote: “The process of education has naturally enough been the basis of hope for the perdurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards. To regard teachers – in our entire educational system, from the primary grades to the university – as the priests of our democracy is therefore not to indulge in hyperbole.”²¹ According to Frankfurter’s reasoning, scholars are different from other state employees because of the peculiarly distinct role they play in maintaining a functioning democracy.

Despite the initial setback in *Adler*, five years later the Supreme Court was ready to begin to embrace the concept of academic freedom. In *Sweezy v. New Hampshire*, the Court held that the University of New Hampshire denied a faculty member his due process under the 14th Amendment after he was found to be in contempt of court for refusing to answer questions concerning the contents of one of his lectures and his possible connection to the Progressive Party.²² Again, as in the previous cases, the Court did not rule in relation to the First Amendment. However, the Court’s dicta in the majority opinion did provide a defense for academic freedom. Chief Justice Earl Warren wrote, “The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straightjacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.”²³ Intellectual leaders, according to Warren’s estimation, play a crucial role in preparing the populace of capable democratic citizens. In his concurrence, Justice Frankfurter also spoke to the importance of academic freedom, going so far as to tie it directly to the First Amendment.²⁴ While only dicta, these sentiments by both the majority

19. *Id.* at 511.

20. 344 U.S. 183 (1952).

21. *Id.* at 196.

22. 354 U.S. 234 (1957).

23. *Id.* at 250.

24. *Id.* at 262-263.

and concurring opinions do indicate a strong commitment to academic freedom as worthy of some level of constitutional protection.

The Court took a similar position in 1967 in *Keyishian v. Board of Regents*, making its most forceful statement to date in regard to the importance of protecting academic freedom.²⁵ In *Keyishian*, the Court again revisited New York’s Feinberg Law, this time striking down the provisions that it held acceptable in *Adler*. Unlike *Adler*, however, *Keyishian* was decided on First Amendment grounds with the Court finding the statute in question to be vague and overly broad.²⁶ Justice Brennan acknowledged the need for the state of New York to protect its education system from subversive activity but added that it could only do so in narrowly defined ways.²⁷ In language that has been heavily cited in scholarly discussions of academic freedom, Brennan stated: “Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”²⁸ While the sentiment was strongly stated, the legal reasoning was not. The Court failed to develop any legal test to determine to what degree academic speech should be protected.²⁹ One year later in *Whitehill v. Elkins*, another case dealing with loyalty oaths, the Court would continue this trend of relying on the vague conception of academic freedom without defining the parameters of that freedom or offering a specific doctrinal approach.³⁰

In two later cases, the U.S. Supreme Court attempted to discern to whom the right of academic freedom belonged. *University of California Regents v. Bakke* and *Regents of the University of Michigan v. Ewing* both dealt directly with questions of academic freedom as a constitutional right under the First Amendment. *Bakke* did so in 1978 in regard to admissions policies and *Ewing* addressed the same point in 1985, this time in regard to the removal of a student due to poor academic performance.³¹ In *Bakke*, the Court began its discussion of the possible right of academic freedom by stating, “Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of

25. 385 U.S. 589 (1967).

26. Overbreadth and vagueness are two doctrines applied in First Amendment analysis to determine the constitutionality of laws enacted to restrict speech.

27. 385 U.S. 589 (1967) at 602.

28. *Id.* at 603.

29. *Id.* at 620-21. In his dissent in *Keyishian*, Justice Clark took the majority to task for writing an opinion void of much legal reasoning.

30. 389 U.S. 54, 59 (1967). Writing for the majority, Douglas stated, “We are in the First Amendment field. The continuing surveillance which this type of law places on teachers is hostile to academic freedom.” He then went on to quote *Sweezy* at length with no additional doctrinal support.

31. 438 U.S. 265 (1978).

the First Amendment.”³² *Bakke* goes on to clearly establish that it is the university administration that is empowered under the Court’s definition of academic freedom.³³ In *Ewing*, conversely, the Court seemed to indicate that faculty members held the right to academic freedom under the First Amendment.³⁴ Justice Stevens, writing for the majority, noted, “When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty’s professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.”³⁵ While this sentiment by Stevens seems to offer some support for a broader conception of academic freedom than merely protection of the institution proper, it does so in a limited manner. In *Ewing*, the tension was between professional judgment and judicial review; it did not address a conflict between the professor and his institution. In addition, Stevens added an interesting footnote to the discussion. He wrote, “Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself.”³⁶ Faculty judgment then should be considered important but the institution itself will set those parameters.

Taken together, these cases can on one hand be seen to form a cohesive, if not solid, history of support for some protection of academic freedom under the First Amendment. On the other hand, much of what comes from those early cases is merely discourse about the importance of academic freedom. The majority of the cases were not even decided on First Amendment grounds and so the support, because it is almost exclusively discursive, lacks any real legal power. In addition, when the Court does address academic freedom under the First Amendment, such as in *Bakke*, it tends to defer to the university as being the most entitled entity on the campus. As a result of these two key points, what becomes apparent is that academic freedom has little to no real constitutional support and where it does, that support has been defined as allowing university administration to maintain autonomy from the government. The Court, in fact, empowered university administration to determine what type and to what extent it wishes to offer academic freedom to its faculty.

32. *Id.* at 311-312.

33. *Id.* at 312.

34. 474 U.S. 214 (1985).

35. *Id.* at 225.

36. *Id.* at 226.

Exigent Circumstances

While this doctrinal confusion concerning the constitutional parameters of academic freedom protection has existed for more than 60 years, it has become particularly problematic in the past decade. This exigent situation can be attributed in part to the corporatization of higher education. The AAUP continues to document the reduction of funding to state universities by state governments.³⁷ This decrease in state funding has led to more private funding and more possibilities for administrators to feel pressure from external influences. Legal scholar Alan Chen explains that many academic administrators are “subject to the same political pressures (public and private) as other public officials, particularly where something as vital as speech is concerned.”³⁸ He goes on to explain that trustees or regents are the “ultimate decision makers” and that they likely are not professional educators themselves.³⁹ While boards of trustees have always carried weight in U.S. public institutions of higher education, some trends are wholly new. For example, in the past decade, universities have moved toward hiring less tenured (protected) faculty and more contingent faculty.⁴⁰ According to a recent AAUP report, more than 50 percent of all faculty hold part-time appointments and non-tenure track appointments now account for 76 percent of all instruction appointments at higher education institutions in the United States.⁴¹

Not only does this move make contingent faculty vulnerable to the increasing political pressures, but also it weakens the fabric of the university itself. Contingent faculty have to fear retribution much more than their tenured counterparts and they also lack the same respect and authority on campus in terms of the university as a whole. Given that the dire economic situation isn’t likely to change soon and that even when it does, it is even more unlikely that higher education will recoup the funds from state government lost during the past decade, other means must be found to ensure that academics can continue doing rigorous and robust scholarship. Considering that academic freedom is “a transcendent value to all of us,”⁴² the First Amendment would seem the most likely shield. Unfortunately, the First Amendment, or at least one of the most recent applications of it, actually serves as another level of difficulty.

37. For information about reduced state funding, as well as other situations impacting university faculty today, go to www.aaup.org.

38. Alan K. Chen, “What Next for Academic Freedom?: Bureaucracy and Distrust: Germaneness and the Paradoxes of the Academic Freedom Doctrine,” 77 *University of Colorado Law Review* 955 (2006): 972.

39. *Id.*

40. *Id.* Also, see also Ellen Schrecker, *The Lost Soul of Higher Education: Corporatization, the Assault on Academic Freedom and the End of the American University*. (New York: New Press, 2010)

41. “Background Facts on Contingent Faculty,” AAUP, www.aaup.org/issues/contingency/background-facts.

42. 385 U.S. 589 (1967) at 603.

Garcetti v. Ceballos was not an academic freedom case *per se*. In fact, *Garcetti* did not consider the issue of higher education at all. Instead, it dealt with public employee speech rights and as a result could have major implications for the speech rights of faculty (and staff) at public institutions of higher education. In *Garcetti*, Richard Ceballos, a deputy for a district county attorney's office, wrote a memorandum in which he pointed out problems he saw with an affidavit in an ongoing criminal prosecution.⁴³ He would later file suit against his employer, claiming that he was retaliated against for writing the memo and that his free speech rights under the First Amendment were violated. The District Court concluded that Ceballos was not entitled to First Amendment protection because the memo was written as part of his job. However, in 2004, the United States Court of Appeals opted to reverse and remand. Relying heavily on the opinions in *Pickering v. Board of Education*⁴⁴ and *Connick v. Myers*,⁴⁵ the 9th Circuit concluded that the memo was indeed a matter of public concern and that Ceballos' interest in his speech outweighed that of his supervisor's prerogative in responding to that speech.⁴⁶ In 2006, in a divided U.S. Supreme Court decision, the plurality led by Justice Kennedy overturned the 9th Circuit ruling.⁴⁷

The major legal point established by the plurality in *Garcetti* is a new application of the First Amendment in regard to public employee speech. Kennedy wrote: "We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communication from employer discipline."⁴⁸ In other words, the Court in *Garcetti* would draw a distinction between a public employee speaking as an employee and that same person speaking as a citizen with the latter having free speech rights coextensive with the First Amendment and the former having none at all.⁴⁹

In order to reach this conclusion, the majority opted to distinguish previous public employee speech cases from the facts in *Garcetti*. Prior to *Garcetti* the two ruling cases concerning free speech protection parameters for public employee

43. 547 U.S. 410 (2006)

44. 91 U.S. 563 (1968). This case dealt with the First Amendment parameters surrounding public employee speech and found that when the speech was not directly related to the employee's job, that speech was protected.

45. 461 U.S. 138 (1983). In *Connick*, the Court built off its ruling in *Pickering*, adding a public concern test to public employee speech doctrine.

46. 361 F. 3d 1168 (2004)

47. 547 U.S. 410 (2006)

48. *Id.* at 421.

49. This argument was made first by Judge O'Scannlain in his concurrence in the 9th Circuit Court of Appeals decision. O'Scannlain wrote: "When public employees speak in the course of carrying out their routine, required employment obligations, they have no personal interest in the content of that speech that gives rise to a First Amendment right." 361 F. 3d 1168, 1189 (9th Cir. 2004).

speech came from *Pickering and Connick*. Through those cases, the Court developed employee speech doctrine and “made clear that public employees do not surrender all their First Amendment rights by reason of their employment.”⁵⁰ Specifically, the Court found that public employees do retain their rights to speak as citizens addressing matters of public concern.⁵¹ The majority in *Garcetti* explained, “So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.”⁵² That statement appears to reaffirm *Pickering* and *Connick*; however, the majority in *Garcetti* would end up emphasizing efficient operations over matters of public concern. The majority agrees with the importance of protecting public discourse but argues that employees’ speech rights, even on topics that might be of public concern, must be tempered by the government’s need to operate as an efficient business.

This focus on the government-as-business model shifts the discussion away from the First Amendment rights of public employees to instead the rights of the government as employer. Relying on the reasoning in *Rosenberger v. Rector and Visitors of Univ. of Virginia*, a case dealing with the usage of public funds at a state university, the Court found that “Restricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.”⁵³ In this way, the majority in *Garcetti* has now placed any conversations about public employee speech squarely in the realm of government speech doctrine, a move that places an emphasis on government spending over public discourse and leaves all public employee speech rights in jeopardy.⁵⁴

The *Garcetti* decision not only expands the ability of the government to restrict speech when it acts as employer but also has additional ramifications for faculty at state institutions. Specific concerns about the impact of the ruling on higher education were expressed by Justice Souter in his dissent. According to Souter, the newly created domain of government speech that exists outside of the reach of the First Amendment is “spacious enough to include even the teaching of a public university professor.”⁵⁵ The majority’s response offered no definitive

50. 547 U.S. 410 (2006), 417.

51. *Id.*

52. *Id.* at 419.

53. *Id.* at 422.

54. During the past two decades, the U.S. Supreme Court has been developing the government speech doctrine. Under this new doctrine, the Court has determined that when the government is engaging in speech, then that speech is not within the parameters of First Amendment coverage.

55. 547 U.S. 410 (2006), 438.

statement. Kennedy stated: “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 scholarship or teaching.”⁵⁶ In other words, the Court would neither acknowledge nor disavow the possible application of the *Garcetti* ruling to academic speech cases. Despite that fact, *Garcetti* has been used as the basis in lower court academic freedom cases.⁵⁷

Several of those lower court cases have made their way to the U.S. Court of Appeals level with confusing results. For example, the 3rd and 7th Circuits ruled against faculty members, holding that the *Garcetti* decision allows universities to restrict or punish the speech made by faculty at state higher education institutions when that speech is related to their jobs. The 4th and 9th Circuit Courts, on the other hand, went in the opposite direction. In 2011 in *Adams v. The Trustees of the University of North Carolina – Wilmington*, the Fourth Circuit ruled that the university could not deny promotion to Michael S. Adams based on writings of his that the university had claimed were part of his job.⁵⁸ In its ruling, the court explicitly addressed the language in *Garcetti* concerning the possibility that speech by professors at state institutions would not be implicated by that ruling. The court wrote: “Applying *Garcetti* to the academic work of a public-university faculty member under the facts of this case could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment... That would not appear to be what *Garcetti* intended, nor is it consistent with our long-standing recognition that no individual loses his ability to speak as a private citizen by virtue of public employment.”⁵⁹ In other words, *Garcetti* would impinge on too much speech if applied to faculty. In 2014, the 9th Circuit echoed those concerns in a case that pitted a Washington State University professor of communication against the university.⁶⁰ In its ruling upholding the right of faculty to produce critical academic writing, the court

56. Id. at 425.

57. For a discussion of these lower court rulings, see Robert Rosborough IV, “A ‘Great’ Day for Academic Freedom: The Threat Posed to Academic Freedom by the Supreme Court’s Decision in *Garcetti v. Ceballos*,” 72 *Albany Law Review* 565 (2009); Carol N. Tran, “Recognizing an Academic Freedom Exception to the *Garcetti* limitation on the First Amendment Right to Free Speech,” 45 *Akron Law Review* 945 (2011/2012); Peter Schmidt, “Professors Try to Shore Up Speech Protections Undermined by Courts,” *The Chronicle of Higher Education*, June 21, 2010, <http://chronicle.com/article/Professors-Try-to-Shore-Up/66007/>; and Peter Schmidt, “Professors’ Freedoms Under Assault in the Courts,” *The Chronicle of Higher Education*, February 27, 2009, <http://chronicle.com/article/Professors-Freedoms-Under-/8067/>.

58. 640 F.3d 550.

59. Id. at 564.

60. *Demers v. Austin*, 746 F.3d 402 (2014).

wrote: “We conclude that if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court.”⁶¹ The 9th Circuit clearly believed that *Garcetti* should not be a binding precedent in cases related to the job duties of professors at state institutions. Reviewing these Court of Appeals cases, it becomes obvious that there is no clear direction on how the U.S. Supreme Court will rule when one of these academic freedom cases makes its way back up the legal ladder.

Toward A More Inclusive Doctrine

The *Garcetti* ruling combined with the economic and political climates at public higher education institutions today creates a perfect storm setting for the dissolution of academic freedom as we know it. Examples of restrictions on faculty freedom are many and varied. In some cases, the situations involve veiled or not-so-veiled threats against faculty, ranging from public rebukes to suggestions for early retirement.⁶² For example, in October 2013 the president at University of Wisconsin – La Crosse publically admonished a faculty member after an email she sent out critiquing the state government was disseminated on Facebook and led to a media firestorm.⁶³ In other instances, university administrators have taken more active steps, including Johns Hopkins asking a faculty member to remove his blog critical of the NSA, Michigan State University suspending a faculty member who posted a YouTube video critical of the government, and Columbia College Chicago canceling a section of an adjunct faculty member’s course after students complained about the content.⁶⁴ And, some universities are beginning to take extra steps to ensure that faculty speak carefully in public arenas. In May 2014, for example, the Kansas Board of Regents unanimously approved a revised

61. *Id.* at 412.

62. For a recent discussion of infractions against faculty, see Peter Schmidt, “AAUP Members Are Warned of Growing Threats to Academic Freedom,” *The Chronicle of Higher Education*, June 13, 2014, chronicle.com/article/AAUP-Members-Are-Warned-of/147067/. <http://chronicle.com/article/Professors-Freedoms-Under-/8067/>.

63. Michelle Chen, “Instructors Often Pressured to Censor Themselves, Say Professor Scolded for ‘Tea Party’ Email,” *In These Times*, November 14, 2013, http://intehsetimes.com/article/print/15878/instructors_forced_censor_themselves_rachel_sloucm.

64. For additional information about these occurrences, see Chen, “Instructors Often Pressured”; Jacob Gershman, “Dean Apologizes for Censoring Professor’s NSA Blog Post,” *Law Blog – WSJ*, September 10, 2013, <http://wsj.com/law/2013/09/10/johns-hopkins-dean-apologizes-for-censoring-professors-nsa-blog-post/>; Nick DeSantis, “Columbia College Chicago Is Accused of Violating Academic Freedom,” *The Chronicle of Higher Education*, March 27, 2014, <http://chronicle.com/blogs/ticker/columbia-college-chicago-is-accused-of-violating-adjuncts-academic-freedom/74909>

social-media policy that will allow administration to punish or fire employees whose postings are found to be improper.⁶⁵

Despite the direness of the situation, remedies are still available to bolster the protection of academic freedom. Throughout the past several decades various legal scholars have constructed arguments in support of some level of constitutional protection for academic freedom. Thus far, the suggested doctrinal mechanisms have included reliance on public forum doctrine,⁶⁶ application of strict scrutiny,⁶⁷ treating faculty as special in terms of First Amendment analysis,⁶⁸ and creating a new category of protected speech specifically for academic freedom⁶⁹, among other more specialized approaches.⁷⁰ Each of these options is intriguing but ultimately problematic for various reasons, the most prevalent issue being a lack of a consistent definition. In fact, many legal scholars analyzing academic freedom cases have failed to offer any concrete definition. Those scholars have instead relied on some ethereal conception of what academic freedom does or should encompass. Many of them have relied on a faculty-based definition derived from the professional standards laid out by the AAUP in the 1915 Declaration and reiterated through the 1940 Statement of Principles. Through that version of academic freedom, the First Amendment would be used to protect faculty in their research and teaching.⁷¹ Other scholars have depended on the other standard definition, taken by many members of the Court as well as legal scholars, which locates the constitutional First Amendment protection squarely in the hands of the univer-

65. Nick DeSantis, “Kansas Board Adopts Policy Allowing Discipline for Misuse of Social Media,” May 15, 2014, *The Chronicle of Higher Education*, <http://chronicle.com/blogs/ticker/kansas-board-adopts-revised-policy-allowing-discipline-for-improper-social-media-use/77807>

66. Darryn Cathryn Beckstrom, “Reconciling the Public Employee Speech Doctrine and Academic Speech after *Garcetti v. Ceballos*,” 94 *Minnesota Law Review* 1202 (2010) (arguing that public forum doctrine is more compatible with academic speech than public employee speech law).

67. R. George Wright, “The Emergence of First Amendment Academic Freedom,” 85 *Nebraska Law Review* 793 (2007) (suggesting that the best way to treat possible restrictions against academic freedom is to apply strict scrutiny).

68. Aziz Huq, “Easterbrook on Academic Freedom,” 77 *University of Chicago Law Review* 1055 (2010) (using prior case law to develop a standard for protecting faculty speech) and Elrod, “Public Employee Speech,” (arguing for a special category of speech to protect faculty scholarship).

69. Byrne, “Academic Freedom” (contends that focusing of the role of academic speech in society moves us away from the university administration/faculty dichotomy).

70. For example, see Helen Norton, “Public Citizens, Public Servants: Free Speech in the Post-*Garcetti* Workplace,” 7 *First Amendment Law Review* 75 (2008) (proposed a two part test in which the public agency must prove that it intended the questionable speech to be expressly its own and that onlookers understood the speech to be the government’s at the time of its delivery); Areen, “Government as Educator” (developed what she called the doctrine of the government-as-educator); Chen, “Bureaucracy and Distrust” (proposing a germaneness test in which the courts would examine both the nature of the academic speech involved and the government interest in regulating that speech); Lynch, “Pawns of the State” (developing what she terms a functional necessity approach)

71. In some versions, faculty also would be protected in their extramural speech and in certain areas of faculty governance.

sity administration. Both of these approaches to defining academic freedom are increasingly problematic. Following the *Garcetti* decision, the ability to create a constitutionally viable argument in support of academic freedom based solely on the faculty is extremely difficult. Even though two court of appeals courts have ruled that faculty should be exempt from *Garcetti*, two other courts ruled completely opposite, thus leaving the question open. Some scholars are continuing to argue for this special legal exemption for faculty only.

Various colleges and universities throughout the United States have adopted a wide range of policies, all intended to offer additional support for academic freedom. The AAUP is calling on faculty to create internal policies to ensure that university administrations will have to respect their academic freedom in relation to scholarship, teaching, and, in some cases, shared governance. Most recently, the University of Oregon adopted a policy whose breadth goes beyond faculty speech to include all members of the campus. While all of these efforts by faculty are commendable, they are a toothless tiger response. Board of regents or state governing bodies could still pass contradictory policies and easily weaken these faculty-led attempts to protect academic freedom. Also, if the Supreme Court chooses at some point to resolve the questions raised by the various court of appeals rulings and rules that *Garcetti* does indeed apply to university faculty, then those policies will be virtually useless. Current case law seems to indicate that claiming faculty are inherently more deserving of free speech protection than any other public employee could be a fruitless approach. Past and current history show us that locating power in the domain of university administration may be more palatable to the Court, yet this practice raises significant questions for the future of open academic inquiry. As previously discussed, the current economic and political climate does not bode especially well for open dialogue and critical, unpopular speech.

Doctrine of Academic Inquiry

A third option exists that will add a level of complexity necessary to most adequately incorporate the essence of why we should protect academic freedom under the First Amendment. I am proposing that we establish a doctrine of academic inquiry in place of the incomplete models of academic freedom offered previously. Specifically, the doctrine of academic inquiry would be defined based on speech at state colleges and universities that directly advances the intellectual mission of the university. Included within the sphere of protection in this doctrine of academic inquiry would be faculty, administrative and student speech, and could have subsumed in it areas including classroom lecture/discussion, student press, scholarly research and presentation, faculty governance, and administrative speech relating to the overall sphere of intellectual activity such as admissions requirements and tenure and promotion. Under this new doctrine, the courts

would be better equipped to balance the competing interests at public institutions of higher education by applying a two-part analysis.

The first part of the analysis would require that when the Court deals with a speech restriction at a public institution of higher education, it must ask: Does the speech in question promote intellectual inquiry into academic areas defined as part of the institution's mission? If the answer is yes, then the speech restriction should be considered under strict scrutiny, with the speech in question carrying the weight of pure political speech. If the answer is no, then the doctrine created through *Pickering*, *Connick* and *Garcetti* should apply to speech restrictions impacting faculty and staff and where student speech is in question, then student conduct codes should apply.

Justification of New Standard

The first part of the test in the doctrine of academic inquiry requires the court to raise the question: Does the speech in question promote intellectual inquiry into academic areas defined as part of the institution's mission? This question serves two functions. First, it more clearly defines parameters for what speech on campuses should garner extra protection and what speech might fall outside of that purview. Just as we don't protect all speech because it is speech (for example libel and obscenity), we do not need to protect all speech that occurs at an institution of higher education simply because of its location. The Courts do not need to develop these parameters for academic inquiry because they have already been developed by individual universities. Every university has a mission statement that lays out the school's defining attributes. These statements are (or at least should be) used to direct the university in its fundamental approach to education. These mission statements also are posted publicly as a selling point for the university and so, in a way, serve as a sort of contract between the university and the larger social community. In addition to mission statements, many universities have codes or policies developed by the administration or faculty that further define the university's understanding of academic freedom and afford a specific commitment to it. Under the doctrine of academic inquiry, speech that occurs as part of the campus environment (both physically and on-line), that supports the university's written academic mission or that is addressed in other faculty codes or policies would be found to be promoting the university's intellectual goals. Attempts to restrict that type of speech would trigger the same level of strict scrutiny as would be applied to attempts to restrict pure political speech. Strict scrutiny is a legal doctrine applied often in First Amendment cases to determine if the speech restrictions in question are narrowly tailored to serve a compelling state interest. Under this heightened level of judicial scrutiny, any attempts to restrict speech falling within the parameters of academic inquiry would immediately require the application

of strict scrutiny. If the Court, upon review of the restriction, does not find the speech to fit within those parameters defined by the university documents, then the speech would fall outside of the doctrine of academic inquiry and other legal standards or campus policies would be invoked – such as the application of the *Pickering/Connick/Garcetti* standard for employee speech or campus speech codes for student speech.

Because of the way in which this new category defines protected speech, it more closely emphasizes the values embedded both specifically in Supreme Court dicta concerning academic freedom and within broader philosophical and theoretical arguments for protecting speech. As noted earlier, the Supreme Court, despite the lack of consensus in many regards to academic freedom, has held firm to one supposition – academic freedom, in so much as it is a special interest of the First Amendment, is so, not because faculty and students are more important than other members of society, but because of the university's "significant role in American society."⁷² In other words, although the Court has struggled with questions of whose academic freedom should be protected, exactly how and to what degree, it has consistently agreed upon *why* we should offer it some special level of First Amendment protection. For more than 50 years, the Supreme Court has reiterated its position that academic freedom warrants extra First Amendment protection because public higher education is a necessity for a well-functioning, democratic society.

Perhaps the longevity and single-mindedness of the Court in regard to the special role that public higher education plays in our society is because it ties directly to major themes present in traditional First Amendment theory as to why it is so important to protect speech in general. John Stuart Mill, one of the earliest theorists relied on by the U.S. Supreme Court in the defense of freedom of speech, called for an almost absolutist approach to the protection of free speech and particularly for complete protection of purely political speech.⁷³ Key to Mill's views on speech was that only through open discussion would the truth be discovered. Other First Amendment scholars would add to the discussion of the core values of speech, frequently disagreeing on the finer points but all in unison on the necessity of freedom of speech and press for the country to remain a successful, democratic enclave. For example, in the early 1960s, political theorist Alexander Meiklejohn would revisit the role of free speech in society and determine that the key reason for valuing and thus protecting speech was to foster a well-functioning democracy.⁷⁴ His focus is much more narrowly focused than

72. *University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. 182, 193 (1990).

73. John Stuart Mill, *On Liberty*, Emery Neff, ed. (New York: The Book League of America, reprint 1926).

74. Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Westport, Conn.: Greenwood Press Publishers, 1960).

Mill's but still entrenched in the idea of protecting individual speech for the good of society at large. First Amendment Scholar Thomas Emerson expanded earlier conceptions of free speech theory by espousing that in addition to its necessity for political debate, the ability to participate in open discussion also carries with it some intrinsic "human" value.⁷⁵ Building on Emerson's work, legal scholars C. Edwin Baker and Martin Redish would restructure discussions of speech to include its importance to self-fulfillment⁷⁶ and self-realization.⁷⁷ Other contemporary scholars such as Lee Bollinger,⁷⁸ Kent Greenawalt,⁷⁹ and Steven Shiffrin⁸⁰ also have attempted to address what the First Amendment should and does mean in U.S. society. While each of these scholars looked at slightly different subsections of the free speech debates, ultimately they all developed theoretical frameworks for First Amendment jurisprudence that relied on Mill's notion of truth, the importance of speech in the U.S. version of democracy, and the role of free speech in creating and maintaining fully developed individuals. What becomes apparent, even from this brief review of First Amendment theory, is its reliance on the interconnectedness of free speech and a healthy society. This relationship is exactly the same as the one identified throughout the dicta in the academic freedom cases. In fact, viewing academic freedom through this lens of both First Amendment theory and case law offers an overwhelmingly compelling argument for the special protection of academic speech – not only does it embody the values implicit in free speech in general but it also serves to bolster society's ability to maintain those values over time and in all aspects of life. This category, because of its centrality to the key values protected by the First Amendment, should receive the same level of protection as purely political speech.

Application

Applying the doctrine of academic inquiry suggested in this article allows us to think more broadly about speech rights on public university campuses while also enabling the courts to distinguish between speech that promotes intellectual inquiry and speech that just happens to occur in an academic setting. While in-depth case analysis is out of the purview of this paper, I do want to use ex-

75. Thomas Emerson, *Toward a General Theory of the First Amendment* (New York: Random House, 1963).

76. C. Edwin Baker, *Human Liberty and Freedom of Speech* (New York: Oxford University Press, 1989).

77. Martin Redish, *The Value of Free Speech* (Charlottesville, Va: The Mitchie Company, 1974).

78. Lee Bollinger, *The Tolerant Society: Freedom Of Speech and Extremist Speech in America* (Oxford: Oxford University Press, 1989).

79. Kent Greenawalt, *Fighting Words: Individuals, Communities, and Liberties of Speech* (Princeton: Princeton University Press, 1995).

80. Steven Shiffrin, *Dissent, Injustice and the Meaning of America* (Princeton: Princeton University Press, 1999).

amples from three recent Court of Appeals rulings to illustrate how the doctrine of academic inquiry would create a more substantive analytical framework for case analysis. In *Renken v. Gregory*, the 7th Circuit applied the *Garcetti* ruling to a professor’s speech and found his speech to be not protected because “Renken made his complaints regarding the University’s use of NSF funds pursuant to his official duties as a University professor.”⁸¹ In other words, according to the 7th Circuit’s reasoning, any speech made as a part of a university professor’s job would be unprotected. The doctrine of academic inquiry would add a much-needed level of scrutiny through which to determine what specific instances of speech should be protected. In the case of *Renken*, the doctrine of academic inquiry would have shifted the analysis away from Renken as a public employee to a focus on the nature of the speech itself. The court would have first asked: Does the speech in question promote intellectual inquiry into academic areas defined as part of the institution’s mission? Without even reviewing the mission statement in question, it is easily apparent that an NSF grant pertains to intellectual inquiry. In other words, this is not an employee right’s issue but one with far greater ramifications for the academic integrity of the university.

In recent Circuit Court cases where the courts did not apply the *Garcetti* standard, the new doctrine would serve to bolster the courts’ reasoning. For example, in *Demers v. Austin*, the 9th Circuit reviewed a claim by a tenured faculty member that he had been retaliated against because of a public critical stance he took in regard to certain administrative decisions.⁸² Demers had published his criticisms both in a short pamphlet and in drafts of an in-progress book. The Court found that Demers’ pamphlet was related to his scholarship and teaching and so did not fall under the *Garcetti* standard. The 9th Circuit took a hard line in regards to the application of *Garcetti* in the academic environment. The opinion stated: “We conclude that if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court.”⁸³ The court’s conclusion is in fitting with protection of academic freedom, and unfortunately, much as early Supreme Court cases have done, the 9th Circuit opinion failed to offer a concrete definition of what defines academic speech. In other words, the *Demers* ruling illustrates just how flimsy the basis is currently for protecting academic freedom. Because this ruling, as well as similar recent rulings, is still built off of earlier vague dicta espousing the importance of academia to society at large, these cases could easily be overturned at the Supreme Court level. Under the doctrine proposed here, the ruling outcome likely would have been the same but it would have been supported by a more nuanced discus-

81. 541 F.3d 769 (2008), 775.

82. 746 F.3d 402 (2014).

83. *Id.* at 411.

sion of the speech in question and its relationship to the university's academic mission.

In both *Renken* and *Demers*, the speech in question would fall squarely under the first question in the doctrine of academic inquiry and then the court would need to apply a stricter level of scrutiny to determine whether the speech restrictions were narrowly tailored to serve a compelling state interest. A 3rd Circuit Court case, *Gorum v. Sessoms*, offers a more complex fact pattern in which some of the speech in question would likely not fall under the scope of intellectual inquiry. In this case, former tenured professor Wendell Gorum claimed he had been dismissed as a form of retaliation for three reasons – his critique of the selection of the new university president, his advising of a student who was on academic probation, and his revoking of an invitation for the university president to speak at a prayer breakfast.⁸⁴ Here, his role as advisor might likely be considered part of the intellectual inquiry on the campus but his critique of selection of the president would require a much more nuanced review to determine if it has some academic merit. His withdrawal of the speaker invitation to the university president would likely not fit into this category at all. So, the speech that was found to support intellectual inquiry, then strict scrutiny would be applied. For that speech that did not, that was in effect simply employee speech occurring as part the employee's job, then the *Pickering/Connick/Garcetti* standard would be applied. Here again, we see that the doctrine of academic inquiry would add a more sophisticated level of analysis of speech cases on university campuses. What becomes apparent from this brief case review is that the doctrine of academic inquiry can offer a viable option for the courts, an option that would both protect the intellectual integrity of state universities and the administrative function of the campus.

Conclusion

Given the financial pressures on higher education, and the most recent U.S. Supreme Court employee speech rights case, it is apparent how tenuous academic freedom is at this point in time. Professor Louis Menand recently wrote, "Academic freedom is not just a nice job perk. It is the philosophical key to the whole enterprise of higher education."⁸⁵ Not only do I agree with this statement, but from the review of the pertinent case law and some of the most respected First Amendment theories, it is apparent that our Supreme Court jurists and free speech scholars are on board as well. Despite this agreement at the philosophical level, much disagreement exists as to the best way to ensure that higher educa-

84. 561 F.3d 179 (2009).

85. Louis Menand, *The Marketplace of Ideas: Reform and Resistance in the American University* (New York: W.W. Norton, 2010) at 131.

tion continues to fulfill that laudable societal goal. In this article, I have suggested that some level of constitutional protection must be awarded to academic freedom under the First Amendment. Further, I offered a more inclusive definition of academic freedom, one which considers protection based on the special role that higher education plays in society as opposed to individual First Amendment rights of professors or the managerial power of university administrators. Finally, I suggested that this new category of speech should receive the utmost protection under the First Amendment. That suggestion still needs further fleshing out before it would be defensible as a constitutionally protected category of speech. Specifically, a thorough review of both Supreme Court and lower court rulings pertaining to academic freedom would need to be analyzed in light of this alternative approach.

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