

**Academic Freedom, Shared Governance, and  
the First Amendment after *Garcetti v. Ceballos*<sup>1</sup>**

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**I. Introduction**

The First Amendment to the U.S. Constitution generally limits the right of the government (including public institutions, like public colleges or universities) to regulate expression on all sorts of topics and in all sorts of settings. In a trend beginning at least several decades ago and accelerating in recent years, courts have increasingly distinguished between the speech rights of citizens generally (where the government has very limited power to restrict speech) and the speech rights of public employees (where the government is given a much freer hand to regulate speech). Among other things, this trend points to the fact that the First Amendment is what the courts – and particularly the Supreme Court – say it is.

Academic freedom, on the other hand, is at its core a professional, not a legal, principle. It addresses faculty rights – and responsibilities – both inside and outside the classroom, for individuals at private as well as at public institutions. It is often (though not always) regarded as including a right to “extramural speech” – that is, the right to speak about matters outside of the university and to participate in political activities as a citizen. (Some commentators have argued instead that the right of extramural speech is simply a right that is granted to all citizens, and does not form part of the special privilege of academic freedom that is accorded to faculty because of their role as scholars.) In addition, as described more fully below, the American Association of University Professors (AAUP) includes within academic freedom the right of faculty to participate in the governance of the institution on academic-related matters. Courts have frequently held that the First Amendment also protects a right to academic freedom, though they have disagreed over the precise nature of the right protected, and the fit between the legal doctrine on the one hand and the professional principle on the other has become increasingly uneasy.

The tension produced by the radically different First Amendment protections for

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general citizen speakers on the one hand and governmental employees on the other, as well as the acknowledged but somewhat amorphous place for academic freedom within the First Amendment, came to a head in the 2006 Supreme Court case *Garcetti v. Ceballos*, 547 U.S. 410 (2006). With the overlay of the Court's recognition in that case of the special importance of the professional notion of academic freedom, the consequences of *Garcetti* for faculty members at public institutions – as well as for students, parents, and a public benefitting from freedom of academic inquiry – are still being written.

This outline addresses the intersection of the First Amendment and academic freedom, including shared governance, after *Garcetti v. Ceballos*. Because it is impossible to understand the significance of the recent post-*Garcetti* cases without understanding the genesis of academic freedom and its place within the First Amendment, I begin with a brief overview of the (sometimes peculiar) development of the professional and legal notions of academic freedom in this country. I will be focusing as well on speech related to institutional governance, which the AAUP considers to be an integral part of academic freedom but which has been the most vulnerable under the Supreme Court's and other courts' conception of constitutional protection for academic freedom.

I will also try to dispel a misconception I often hear (primarily from faculty) that academic freedom rights and First Amendment rights have a multiplier effect on each other – that is, that academic freedom and the First Amendment together comprise a significantly larger bundle of rights for faculty members at public colleges and universities than either academic freedom or the First Amendment standing alone.<sup>2</sup> While First Amendment rights *are* a critical element of faculty rights at public institutions, academic freedom and the First Amendment intersect in sometimes complex ways. Although they do protect the same speech under some circumstances – and the First Amendment can provide a powerful backstop to the professional protections of academic freedom – they are analytically distinct legal concepts that have different focuses and that even explicitly leave different types of speech *unprotected*.

In addition, while the connection between the professional principle of academic freedom and the legal principle of the First Amendment gave academic freedom some judicial protection for some time, as First Amendment rights are increasingly being narrowed for all public employees, so too are constitutional rights to academic freedom in the public sector. I will be addressing this and other tensions and paradoxes arising out the recent line of federal court cases, and will briefly note the steps that some flagship public universities have taken to affirmatively protect a broad notion of academic freedom in response to the legal uncertainty arising from the post-*Garcetti* line of cases.

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<sup>2</sup> Because the First Amendment applies only to governmental entities, it is relevant as a legal matter only at public colleges and universities, and this outline will therefore focus on public-sector higher education. The academic freedom issues that are implicated are, of course, relevant at both public and private institutions.

## II. History

### A. Development of the Professional Concepts of Academic Freedom and Shared Governance

Academic freedom as a professional notion was largely developed and refined in this country by the American Association of University Professors. At the AAUP's first meeting, in January 1915, a committee of fifteen faculty members – drawn from Princeton, Harvard, Yale, Johns Hopkins, and the Universities of California, Pennsylvania, and Wisconsin, among others – developed an initial statement on academic freedom and tenure. This statement, the 1915 Declaration of Principles on Academic Freedom and Academic Tenure, cited prominently to the freedoms that were standard at German universities, then considered the global standard for excellence in higher education.<sup>3</sup>

In the century since, AAUP committees have developed additional statements – often in concert with, or endorsed by, associations representing institutional interests – further defining and describing various aspects of academic freedom.<sup>4</sup> The Committee on Academic Freedom and Tenure, otherwise known as Committee A, has been the progenitor of many of those statements.<sup>5</sup> A number of public and private colleges and universities have incorporated AAUP policies into their faculty handbooks and other guiding documents; whether those policies and documents have the force of law is generally dependent on state law.<sup>6</sup>

#### 1. *1915 Declaration of Principles on Academic Freedom and Academic Tenure*

The AAUP's 1915 Declaration of Principles on Academic Freedom and Academic Tenure describes three elements that comprise academic freedom: freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action. The Declaration also emphasizes the public interest

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<sup>3</sup> For further description of the development of the 1915 Declaration and the structure of German universities, see Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L. J. 945 (2009), as well as Am. Ass'n of Univ. Professors, *The A.A.U.P.'s "General Declaration of Principles," 1915*, in 2 AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY 860 (Richard Hofstadter & Wilson Smith eds., 1961) and Richard Hofstadter & Walter P. Metzger, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* (1955).

<sup>4</sup> Nearly 70 of the AAUP's statements, including all of those referenced in this outline, are collected in its POLICY DOCUMENTS AND REPORTS, now in its 10th edition and available for purchase through the AAUP's website. In addition, many of the seminal statements, including the 1915 Declaration, the 1940 Statement, and the Statement on Government of Colleges and Universities, are available online; see <http://www.aaup.org/AAUP/pubsres/policydocs/contents/>.

<sup>5</sup> For more information on Committee A, see <http://www.aaup.org/AAUP/comm/default.htm#ComA>.

<sup>6</sup> The AAUP publishes a guidebook on state-by-state legal treatment of faculty handbooks; it is available for download at <http://www.aaup.org/NR/rdonlyres/3F5000A9-F47D-4326-BD09-33DDD3DBC8C1/0/FacultyHandbooksasEnforceableContractsmall.pdf>.

in an independent professoriate, on the grounds that “education is the cornerstone of the structure of society and . . . progress in scientific knowledge is essential to civilization.”

The Declaration continues: “[O]nce appointed, the scholar has professional functions to perform in which the appointing authorities have neither competency nor moral right to intervene. The responsibility of the university teacher is primarily to the public itself, and to the judgment of his own profession . . . .” With respect to the public value of the university and the faculty, universities exist “to promote inquiry and advance the sum of human knowledge;” “to provide general instruction to the students;” and “to develop experts for various branches of the public service.” Because of this responsibility of the university to the community as a whole, the university has an obligation to “accept[] and enforc[e] to the fullest extent the principle of academic freedom.”

The Declaration also observes that these rights are accompanied by responsibilities to be scholarly and fair; it also states – in language that foreshadows the most critical tension between academic freedom and the First Amendment – that it is “in no sense the contention of this committee that academic freedom implies that individual teachers should be exempt from all restraints as to the matter or manner of their utterances, either within or without the university.”

## 2. *1940 Statement of Principles on Academic Freedom and Tenure*

Some two decades after the release of the 1915 Declaration, the AAUP entered into a collaboration with what is now called the American Association of Colleges and Universities (AAC&U) to develop a revised statement on academic freedom and tenure. The two groups released the Statement of Principles on Academic Freedom and Tenure in 1940, and it has since been endorsed by over 200 organizations.

With respect to academic freedom, the 1940 Statement says that teachers are entitled to “full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties,” and to “freedom in the classroom in discussing their subject.” The Statement also links academic freedom and tenure, explaining: “Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.”

With respect to extramural speech, the 1940 Statement adds:

College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember

that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

Immediately after the release of the 1940 Statement, however, the two authoring organizations adopted a clarifying interpretation:

If the administration of a college or university . . . believes that the extramural utterances of the teacher have been such as to raise grave doubts concerning the teacher's fitness for his or her position, it may proceed to file charges [as described in the Statement's section addressing tenure]. In pressing such charges, the administration should remember that teachers are citizens and should be accorded the freedom of citizens.

The AAUP and the AAC&U subsequently met in 1969 to formulate additional interpretations of the 1940 Statement, and observed that the 1940 Statement's language on extramural speech "should also be interpreted in keeping with the 1964 *Committee A Statement on Extramural Utterances*," which states in part:

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

As the 1964 Committee A statement continues, "In a democratic society freedom of speech is an indispensable right of the citizen. Committee A will vigorously uphold that right."

### 3. *1966 Statement on Government of Colleges and Universities*

The 1915 and 1940 Statements implicitly suggested that faculty would also take part in institutional governance; the 1940 Statement refers, for instance, to faculty as "officers of an educational institution." In 1966, however, the AAUP issued a statement that explicitly asserted and reaffirmed that right and obligation: the Statement on Government of Colleges and Universities. As with the 1940 Statement, this was a joint effort, this time with the American Council on Education (ACE) and the Association of Governing Boards of Universities and Colleges (AGB).

The Statement begins by paying tribute to "the variety and complexity of the tasks performed by institutions of higher education" and the "inescapable interdependence among governing board, administration, faculty, students, and others." As the Statement observes, "the relationship calls for adequate communication among these components,

and full opportunity for appropriate joint planning and effort.” In areas including determination of general educational policy, internal operations of the institution, including use of physical resources, budgeting, and selection of a president and other academic officers, all components play a role. The Statement notes, however, that different bodies may carry more weight than another in a given decision, and it sets out what the three authoring organizations saw as the appropriate allocation of responsibility.

With respect to the governing board’s authority, the Statement speaks to the board’s role in defining the institution’s overall policies and procedures, stewarding and nurturing the institution’s funds, and “pay[ing] attention” to personnel policy. The Statement adds that “although the action to be taken by it will usually be on behalf of the president, the faculty, or the student body, the board should make clear that the protection it offers to an individual or a group is, in fact, a fundamental defense of the vested interests of society in the educational institution.”

The president’s role is described as relating primarily to institutional leadership; in addition to sharing responsibility for defining and achieving goals, for administrative action, and for ensuring communication among the components of the academic community, the president “has a special obligation to innovate and initiate.” The Statement recognizes that the president must “at times, with or without support, infuse new life into a department; relatedly, the president may at times be required, working within the concept of tenure, to solve problems of obsolescence. The president will necessarily utilize the judgments of the faculty but may also, in the interest of academic standards, seek outside evaluations by scholars of acknowledged competence.”

Finally, with respect to faculty involvement in institutional matters, the Statement is quite broad. It explains that the faculty have primary responsibility for “curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process,” while noting that “[b]udgets, personnel limitations, the time element, and the policies of other groups, bodies, and agencies having jurisdiction over the institution may set limits to realization of faculty advice.” The faculty thus “sets the requirements for the degrees offered in course, determines when the requirements have been met, and authorizes the president and board to grant the degrees thus achieved.”

In addition, because of its responsibility over faculty status, faculty in a specific scholarly area may judge the work of their colleagues when necessary, and the faculty as a whole has the authority to make judgments regarding “appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal.” Moreover, faculty “should actively participate in the determination of policies and procedures governing salary increases.”

The Statement also notes that “the right of a board member, an administrative officer, a faculty member, or a student to speak on general educational questions or about the administration and operations of the individual’s own institution is a part of that person’s right as a citizen and should not be abridged by the institution. There exist, of

course, legal bounds relating to defamation of character, and there are questions of propriety.”

4. *1994 Statement on the Relationship of Faculty Governance to Academic Freedom*

Finally, in 1994, the AAUP made explicit the connection between academic freedom and shared governance, in the Statement on the Relationship of Faculty Governance to Academic Freedom. The Statement says in part:

[A] sound system of institutional governance is a necessary condition for the protection of faculty rights and thereby for the most productive exercise of essential faculty freedoms. Correspondingly, the protection of the academic freedom of faculty members in addressing issues of institutional governance is a prerequisite for the practice of governance unhampered by fear of retribution.

The Statement also provides that the faculty’s voice shall be more or less authoritative on various issues depending upon “the relative directness with which the issue bears on the faculty’s exercise of its various institutional responsibilities.” Thus, for example, because “the faculty has primary responsibility for . . . teaching and research” under the 1966 Statement on Government of Colleges and Universities described above, the faculty’s voice on matters relating to teaching and research “should be given the greatest weight.” And in general, since

such decisions as those involving choice of method of instruction, subject matter to be taught, policies for admitting students, standards of student competence in a discipline, the maintenance of a suitable environment for learning, and standards of faculty competence bear directly on the teaching and research conducted in the institution, the faculty should have primary authority over decisions about such matters—that is, the administration should “concur with the faculty judgment except in rare instances and for compelling reasons which should be stated in detail.” [Quoting the Statement on Government of Colleges and Universities.]

The 1994 Statement goes on to articulate three reasons “why the faculty’s voice should be authoritative across the entire range of decision making that bears . . . on its responsibilities.” The Statement emphasizes that on the basis of these reasons, “it is also essential that faculty members have the academic freedom to express their professional opinions without fear of reprisal.”

First, the allocation of authority described “is the most efficient means to the accomplishment of the institution’s objectives,” because of the expertise offered by both individual scholars in their departments and by faculty committees. Second, “teaching and research are the very purpose of an academic institution and the reason why the public values and supports it;” faculty – who carry out those tasks – should therefore

have a “special status” within the university. Finally (and most importantly, in the view of the drafters of the 1994 Statement), allocating authority to the faculty in its areas of responsibility “is a necessary condition for the protection of academic freedom within the institution.”

In expanding on this point, the Statement describes academic freedom as including the freedom of faculty members “to express their views (1) on academic matters in the classroom and in the conduct of research, (2) on matters having to do with their institution and its policies, and (3) on issues of public interest generally, and to do so even if their views are in conflict with one or another received wisdom.” The justifications for these freedoms are that:

In the case (1) of academic matters, good teaching requires developing critical ability in one’s students and an understanding of the methods for resolving disputes within the discipline; good research requires permitting the expression of contrary views in order that the evidence for and against a hypothesis can be weighed responsibly. In the case (2) of institutional matters, grounds for thinking an institutional policy desirable or undesirable must be heard and assessed if the community is to have confidence that its policies are appropriate. In the case (3) of issues of public interest generally, the faculty member must be free to exercise the rights accorded to all citizens.

The Statement stresses that the protection of academic freedom requires that faculty speech be subject to discipline “only where that speech violates some central principle of academic morality” (as with plagiarism or some other type of fraud or deceit) and that faculty status must turn on a faculty member’s substantive views “only where the holding those views clearly supports a judgment of competence or incompetence.” The Statement concludes that it is

in light of these requirements that the allocation to the faculty . . . of authority over faculty status and other basic academic matters can be seen to be necessary for the protection of academic freedom. It is the faculty – not trustees or administrators – who have the experience needed for assessing whether an instance of faculty speech constitutes a breach of a central principle of academic morality, and who have the expertise to form judgments of faculty competence or incompetence.



## B. Legal Treatment of Academic Freedom and the First Amendment

Of course, the development of the *professional* notions of academic freedom and shared governance is only half the story. When there have been disputes over academic freedom and a whole range of faculty speech, including speech relating to involvement in institutional governance, faculty and administrations have gone not just to their faculty handbooks, their colleagues, and their own internal grievance and appeal mechanisms, but also to court. To the extent that courts have found legal protections for speech in the academy, they have generally been under the umbrella of the First Amendment to the U.S. Constitution. (In addition, of course, collective bargaining agreements are an external source of protection and definition of the relationship between the faculty and the administration, and some courts have also found that faculty handbooks confer legal rights upon the faculty.)

With respect to the current discussion, the relevant piece of the First Amendment states that “Congress shall make no law . . . abridging the freedom of speech.” This has been extended by federal legislation to mean that no person acting “under color of state law” – that is, no one acting on behalf of a component of the government, including a public college or university – can deprive a citizen of his or her constitutional rights, including the “freedom of speech.” Of course, as described below, that has been vastly narrowed in the context of public employees.”

This connection between academic freedom and the First Amendment causes some tension and some misunderstanding about the scope of their relative protections. As described above, academic freedom is a professional notion – it protects a whole variety of speech, potentially including inflammatory and disruptive speech (depending upon the circumstances); on substantive matters, faculty members are accountable to peers in their own discipline, and in the case of disciplinary issues, they are entitled to due process by a broader committee of faculty members. In addition, as discussed above, the AAUP’s conception of academic freedom protects a variety of kinds of speech about institutional governance.

Academic freedom arguably does not, however, protect a range of speech that would be protected by the First Amendment if uttered in a non-academic context, because of the different standards applied in the two contexts. The First Amendment, for instance, protects a speaker’s right to stand on a (public) street corner and opine about the laws of physics, even if she has no particular expertise in the field of physics. She can even make utterly specious claims about the laws of gravity without running afoul of her constitutional protections. Academic freedom, too, quite clearly protects the ability of a professor of English to raise points or questions about physics, if it is a legitimate part of the pedagogical process – i.e., used to draw a connection, to make an analogy, or to stimulate a discussion. Academic freedom does not, however, generally permit an English professor to spend her entire class instructing on the laws of physics (whether accurate or not), nor does it permit a physics professor to teach obviously inaccurate information about gravity (as determined by her peers in the physics community).

The *responsibilities* that accompany the exercise of academic freedom therefore restrict some faculty speech in a way that the First Amendment does not for speakers in the general public. On the flip side, however, the professional notion of academic freedom allows for much broader and freer involvement in a whole variety of scholarly and institutional matters than may be the case under the increasingly narrow legal framework of the First Amendment, as described in this section.

### 1. *Pre-Garcetti Judicial Treatment of Academic Freedom*

Over the course of about two decades beginning in the McCarthy era, the Supreme Court found a special place for academic freedom in the First Amendment. The first reference to academic freedom came in a 1952 dissent by Justice Douglas to a Supreme Court decision on loyalty oaths. The case, *Adler v. Board of Education*, 342 U.S. 485 (1952), involved a New York state statute that essentially banned state employees from belonging to “subversive groups” – that is, groups that advocated the use of violence in order to change the government. Under the statute, public employees were forced to take loyalty oaths stating that they did not belong to subversive groups in order to maintain their employment.

While the Supreme Court’s decision upheld the state statute (which was later overturned by *Keyishian v. Board of Regents*, described below), Justice Douglas’s dissent invoked the sensitivity and importance of academic freedom. Referring to the process by which organizations were found “subversive,” Justice Douglas asserted that “[t]he very threat of such a procedure is certain to raise havoc with academic freedom. . . . A teacher caught in that mesh is almost certain to stand condemned. Fearing condemnation, she will tend to shrink from any association that stirs controversy. In that manner freedom of expression will be stifled.” As Douglas continued, “Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect. . . . [I]t was the pursuit of truth which the First Amendment was designed to protect.” 342 U.S. at 509-511. Douglas argued that because the law excluded an entire viewpoint without a showing of an overt act or any dereliction of the teacher’s duties, it impermissibly invaded academic freedom.

In the same year, Justice Frankfurter – in a concurrence to a Supreme Court opinion – lauded the importance of freedom of academic inquiry. *Wieman v. Updegraff*, 344 U.S. 183 (1952), decided shortly after *Adler*, involved a state-imposed loyalty oath that required Oklahoma professors to promise that they had never been part of a communist or subversive organization. Professors at one state college refused to take the oath, and an Oklahoma taxpayer sued to block the college from paying their salaries.

The Supreme Court overturned the statute, observing that “under the Oklahoma Act, the fact of association alone determines disloyalty and disqualification”; because the “inhibit[ion of] individual freedom of movement . . . stifle[s] the flow of democratic expression and controversy at one of its chief sources,” the Court ruled that the oath requirement violated the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.

A joint concurring opinion by Justices Frankfurter and Douglas emphasized the importance of academic freedom and of teaching as a profession uniquely requiring protection under the First Amendment. In Justice Frankfurter's words:

Such unwarranted inhibition upon the free spirit of teachers affects not only those who . . . are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers. . . . **Teachers must . . . be exemplars of open-mindedness and free inquiry.** They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma.

344 U.S. at 196-97 (emphasis added).

By near the end of the decade, the Supreme Court had explicitly recognized a constitutional right to academic freedom, referring to "academic freedom and political expression" as being areas in which government should be reluctant to tread. In *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), New Hampshire's Attorney General interrogated a professor at the University of New Hampshire about his suspected affiliations with communism. The professor, Paul Sweezy, refused to answer a number of questions about his lectures and writings, but did say that he thought Marxism was morally superior to capitalism. After Sweezy refused to answer the questions in a court hearing, he was found in contempt of court and thrown in jail.

A plurality of the Supreme Court (with whom two Justices concurred) cited approvingly to the New Hampshire Supreme Court's holding that the "right to lecture and the right to associate with others for a common purpose . . . are individual liberties guaranteed to every citizen by the State and Federal Constitutions but are not absolute rights . . . ." The inquiries about the contents of Professor Sweezy's lecture and about the Progressive Party "undoubtedly interfered with the defendant's free exercise of those liberties." The plurality accepted Justice Frankfurter's reasoning from *Wieman v. Updegraff*:

[T]here unquestionably was an invasion of **petitioner's liberties in the areas of academic freedom and political expression – areas in which government should be extremely reticent to tread.** 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 strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students

must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

354 U.S. at 250 (emphasis added).

In a concurrence, Justice Frankfurter also outlined the oft-cited “four essential freedoms” of a university: “to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”<sup>7</sup> *Id.* at 263.

Finally, in the late 1960s, the Supreme Court went so far as to call academic freedom a “special concern of the First Amendment.” At the time, faculty at the State University of New York at Buffalo were forced to sign documents swearing that they were not members of the Communist Party. The faculty members refused to sign the documents and, because *Adler* was still in effect, were fired as a result.

In *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), the Court overturned its decision in *Adler*, ruling that by imposing a loyalty oath and prohibiting membership in “subversive groups,” the law unconstitutionally infringed on academic freedom and freedom of association. As the Court held: “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.” *Id.* at 603. The Court continued, “The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection.” *Id.* (internal quotation marks and citations omitted).

Subsequent Supreme Court cases, while not arising in the academic context, further fleshed out the First Amendment rights of public employees as a whole (presumably including faculty members at public universities).<sup>8</sup> The two best-known

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<sup>7</sup> This concurrence has produced a lively scholarly and judicial debate about whether academic freedom properly resides with the faculty or with the institution – and indeed, whether it is coherent to say that the institution has academic freedom as against the faculty. That debate is outside the scope of this paper; for two excellent treatments of these issues, however, see Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L. J. 945 (2009), and David M. Rabban, *Functional Analysis of “Individual” and “Institutional” Academic Freedom under the First Amendment*, LAW AND CONTEMP. PROBS. 242 (1990).

<sup>8</sup> There are, of course, a number of other cases addressing academic freedom, and this outline does not address all of them. For a more expansive treatment of pre-*Garcetti* caselaw, see, among others, “Academic Freedom and the First Amendment,” a 2007 outline available on the AAUP website, at <http://www.aaup.org/AAUP/programs/legal/topics/firstamendment.htm>. One notable though troubling case – both in its anticipation of the Supreme Court’s decision in *Garcetti* and its treatment of academic freedom – is *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000) (*en banc*). In *Urofsky*, the United States Court of Appeals for the Fourth Circuit upheld the constitutionality of a Virginia law restricting state employees from accessing sexually explicit material on state computers without approval by the head of a state

cases, which set out the framework for analysis of public employee speech claims prior to *Garcetti*, are *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983).

*Pickering* involved a high school teacher, Marvin Pickering, who wrote a letter to a local newspaper criticizing the school board's budget decisions and its communications with taxpayers. The Board of Education concluded that the statements in the letter were false and that they impugned the Board and the school administration, and dismissed Pickering from his teaching position. The Illinois state courts upheld the dismissal, and Pickering appealed to the U.S. Supreme Court.

The Supreme Court first noted that “to the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court.” 391 U.S. at 568 (citing to *Wieman v. Updegraff* and *Keyishian v. Board of Regents*, among others). The Court went on to observe that Pickering's criticism reflected merely “a difference of opinion that clearly concerns an issue of general public interest.” *Id.* at 571.

In the particular context of Pickering's comments, the Court held that “Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.” *Id.* at 571-72. In the Court's eyes, although Pickering identified himself as a public school teacher and wrote on matters that related intimately to his profession, his employment was “only tangentially and insubstantially involved in the subject matter of the public communication.” The Court concluded that “a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.” *Id.* at 575 (footnote omitted).

In *Connick*, the Supreme Court considered the case of a deputy district attorney agency. The court reasoned that the Supreme Court had generally protected the speech of government employees only when the challenged speech was made “primarily in the [employee's] role as citizen” as opposed to “primarily in his role as employee.” *Id.* at 407 (citation and internal quotation marks omitted). The majority also ruled that while “the claim of an academic institution to status as a ‘university’ may fairly be said to depend upon the extent to which its faculty members are allowed to pursue knowledge free of external constraints,” the legal right to academic freedom “inheres in the University, not in individual professors . . . .” *Id.* at 409-10. Chief Judge Harvey Wilkinson – a former academic himself – wrote separately to emphasize the difference between faculty members at public universities and all other public employees. As the Chief Judge said, “[T]hese particular employees are hired for the very purpose of inquiring into, reflecting upon, and speaking out on matters of public concern. A faculty is employed professionally to test ideas and to propose solutions, to deepen knowledge and refresh perspectives. Provocative comment is endemic to the work of a university faculty whose function is primarily one of critical review.” *Id.* at 428 (citation and internal quotation marks omitted).

who was terminated after sending a questionnaire to fellow staff members asking them about various internal office issues as well as whether they felt pressured to work in political campaigns. The Court articulated its inquiry into the First Amendment issues at stake as “seeking ‘a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.’” 461 U.S. at 142 (quoting *Pickering*, 391 U.S. at 568).

The Court held that “when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee’s behavior.” *Id.* at 147. The Court indicated that in carrying out its balancing test, it would consider the “content, form, and context of a given statement, as revealed by the whole record,” to determine whether it was on a matter of public concern, and would also consider the “manner, time, and place” of the speech. *Id.* at 148, 152. The Court concluded by observing that its holding was “grounded in our longstanding recognition that the First Amendment’s primary aim is the full protection of speech upon issues of public concern, as well as the practical realities involved in the administration of a government office.” *Id.* at 154.

Taking *Pickering* and *Connick* together, then, federal courts in the pre-*Garcetti* regime generally utilized a balancing test to determine whether speech by public employees was protected. The court would first consider whether the employee had uttered the challenged speech in the course of the employee’s job responsibilities or as a private citizen, and whether the speech addressed a “matter of public concern.” If the employee failed to show either of these things, then the speech was not protected by the First Amendment. If the public employee could show that he or she spoke as a private citizen on a matter of public concern, then the court would balance the employee’s interest in speaking against the public employer’s interest in the overall functioning of the workplace. If the employee’s interest in speaking on the issue in question outweighed the employer’s interest in a functioning workplace, then his or her speech was deemed protected by the First Amendment.

### **III. *Garcetti v. Ceballos***

It is obvious that even before the Supreme Court handed down its ruling in *Garcetti v. Ceballos*, both the Supreme Court and lower courts had, in considering government regulation of speech, explicitly distinguished between the latitude of the government in its role as a sovereign (where the government has fairly minimal rights to restrict its citizens’ speech) and the government in its role as an employer (where the government has much more freedom to control speech). Nevertheless, there was a common (though perhaps misplaced) presumption that the First Amendment swept fairly broadly even in the workplace, and that academic freedom (and perhaps by extension involvement in shared governance) was protected by the First Amendment.

In retrospect, of course, the writing may have been on the wall since *Pickering* and *Connick*. Nevertheless, *Garcetti v. Ceballos* was a wake-up call for public employees as a whole, and – despite positive language by the Supreme Court majority – for faculty members at public institutions in the wake of lower courts’ interpretations of *Garcetti*.

*Garcetti* itself involved a California deputy district attorney, Richard Ceballos, who complained to his supervisors and the defense attorney in one of his cases about what he believed were false statements given by a deputy sheriff. 547 U.S. 410 (2006). After disputes over how to handle the evidence, Ceballos was demoted and transferred to a remote office, in what he believed was retaliation for speaking out about the misconduct. He sued, alleging that his speech about the deputy sheriff’s misconduct was protected by the First Amendment and that his rights had been violated.

The case eventually went up to the Supreme Court, and a majority of the Court ruled that when public employees speak “pursuant to their official duties,” they are not protected by the First Amendment, **even** if they are speaking about matters of public concern (such as alleged misconduct by a person in a position of public trust, like a sheriff’s deputy). 547 U.S. at 421. Thus, the government in its role as their public employer can demote, fire, transfer, or otherwise discipline them, in retaliation for their expression, without running afoul of the Constitution (though that action may violate state whistleblower laws, other state laws, or collective bargaining agreements).

The majority did cite approvingly to *Pickering*, acknowledging “the importance of promoting the public’s interest in receiving the well-informed views of government employees engaging in civic discussion.” *Id.* at 419. In the context of this case, however, the majority relied on the fact that Ceballos had spoken “as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case,” and held 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.” *Id.* at 421. As the majority further explained, “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.*” *Id.* at 421-22 (emphasis added). Only speech that has a “relevant analogue to speech by citizens who are not government employees” is protected under this analysis. *Id.* at 424.

The Court recognized, however, that speech related to scholarship or teaching might be treated differently. As the majority observed, “[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by the Court’s decision.” *Id.* at 425. The majority therefore concluded that it was not deciding whether its core analysis – the “official duties” inquiry – “would apply in the same manner to a case involving speech related to scholarship or teaching.” *Id.*

In dissent, Justice Souter called attention to the academic freedom concern even more explicitly, saying that he hoped that the majority did not “mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write ‘pursuant to official duties.’” *Id.* at 438.

There was, therefore, reason to think after that *Garcetti*, courts might at least continue to apply the *Pickering-Connick* balancing test to cases involving faculty members at public universities, and perhaps even incorporate the Supreme Court’s recognition of a heightened First Amendment interest in academic freedom. History has proven otherwise, however; with few exceptions, courts have applied the “official duties” test wholesale to public faculty members, highlighting the very strange paradoxes that the *Garcetti* decision creates for all public employees and, in particular, for those in the academic arena. The next section offers an overview of cases invoking *Garcetti* in the faculty context.

#### **IV. Post-*Garcetti* Cases on Academic Speech and the First Amendment**

One of the most significant aspects of the *Garcetti* decision for faculty has been the stripping of First Amendment protection for speech on matters related to institutional functioning. As the cases below demonstrate, the rare circumstances in which courts have been sympathetic to faculty First Amendment claims have largely involved speech arising in the classroom or other instructional context. We have not yet seen a case squarely raising whether a faculty member’s choice of research agenda would be protected by the First Amendment after *Garcetti* (though one imagines that that would fall within the “speech related to scholarship or teaching” reservation). For the most part, however, where faculty members allege that they have been retaliated against for criticizing institutional decision-making, courts have excluded that speech from the umbrella of First Amendment protection. The cases below flesh out this trend, while also demonstrating that there are exceptions in every category. (The categories below are necessarily somewhat arbitrary, as many cases involve more than one kinds of speech; in particular, speech by faculty as committee members could also be put under the umbrella of speech about institutional, departmental, personnel, and student matters. They are divided, however, according to the main kind of speech upon which the various courts focused in their decisions.)

##### **A. Speech in the Classroom and About Scholarly Matters**

###### **1. *Kerr v. Hurd*, 694 F. Supp. 2d 817 (S.D. Ohio 2010)**

In this case, currently on appeal, a federal trial court in Ohio ruled that a medical professor’s speech to his students was protected by the First Amendment. In doing so, the court explicitly declared that in-class faculty speech should fall within an academic freedom exception to *Garcetti*.

Dr. Elton Kerr, an OB/GYN, was hired by Wright State School of Medicine to teach as an assistant professor and to work part-time as a physician at Miami Valley



Hospital (MVH), where the school's clinical work was done. Several years later, in 2000, Dr. William Hurd became the chair of the Department of Obstetrics and Gynecology at Wright State, overseeing Dr. Kerr's academic and clinical work. Dr. Hurd appointed Dr. Kerr as Director of the Center for Women's Health at MVH. In 2004, however, Dr. Kerr violated his employment contract by ceasing to maintain "active privileges" at MVH and by accepting employment at a separate clinic, and he moved out of his Wright State offices in late 2004. In 2005, the university terminated his appointment with Wright State School of Medicine, automatically ending his employment at MVH as well.

After the termination, Dr. Kerr sued in federal court on a number of grounds, including that his rights to free expression under the First Amendment had been violated. As part of his job, Dr. Kerr taught his students and residents about surgery and delivery techniques, and in doing so he advocated for vaginal delivery via forceps over Caesarean section and lectured on the use of forceps. Dr. Kerr alleged that Dr. Hurd, in his capacity as department chair, subjected Dr. Kerr to "harassment, unwarranted disciplinary action, and false allegations of professional misconduct" in retaliation for his advocacy of vaginal delivery in his teaching, violating his First Amendment rights to free expression.

The court began its analysis by looking at whether Dr. Kerr's speech about methods of delivery was on a matter of public concern. Dr. Hurd had argued that Dr. Kerr's speech was not on a matter of public concern because Dr. Kerr had characterized forceps delivery as not being "a theory of medicine," indicated that he had not published on the topic, and said that he had not discussed forceps delivery except with medical professionals "because I don't discuss things like that with people that wouldn't even know what we're talking about."

Rejecting Dr. Hurd's argument, the court cited approvingly to *Hardy v. Jefferson Community College*, 260 F.3d 671 (6th Cir. 2001), in which the U.S. Court of Appeals for the Sixth Circuit determined that a college professor's use of disparaging words was protected where they were used in the context of a classroom discussion examining the impact of such words. In *Hardy*, the appeals court said:

Because the essence of a teacher's role is to prepare students for their place in society as responsible citizens, classroom instruction will often fall within the Supreme Court's broad conception of 'public concern.' . . . Although *Hardy's* in-class speech does not itself constitute pure public debate, it does relate to matters of overwhelming public concern – race, gender, and power conflicts in our society.

The court here concluded that Dr. Kerr's advocacy of vaginal delivery as opposed to Caesarean section was a matter of public concern, even if "not as overwhelming" as the issues of race, gender, and power discussed in *Hardy*. The court noted that on the morning it penned its decision, the local newspaper carried an AP story about the backlash against C-sections, and NPR had broadcast a story earlier in the week about the consequences of previous C-sections. The court therefore concluded that while Dr. Kerr

may not have published his opinions, “communicating them to his obstetrical students was an important vehicle to further debate on the question,” and his speech to medical students on forceps and vaginal delivery was therefore “on a matter of public concern.”

The next issue for the court was whether Dr. Kerr’s speech was part of his job as an employee of the medical school and, if so, whether it was therefore unprotected under *Garcetti*. The court ruled that Dr. Kerr’s speech about delivery was “without doubt . . . within his ‘hired’ speech as a teacher of obstetrics.”

Unlike many other courts that have considered faculty speech in the post-*Garcetti* context, however, the court here did not believe that that determination ended the matter for Dr. Kerr. Instead, the court pointed to the majority’s acknowledgement in *Garcetti* that its “official duties” analysis did not necessarily apply “in the same manner to a case involving speech related to scholarship or teaching.” The *Kerr* court therefore found an “academic freedom exception” to *Garcetti*:

Recognizing an academic freedom exception to the *Garcetti* analysis is important to protecting First Amendment values. Universities should be the active trading floors in the marketplace of ideas. Public universities should be no different from private universities in that respect. At least where, as here, the expressed views are well within the range of accepted medical opinion, they should certainly receive First Amendment protection, particularly at the university level. The disastrous impact on Soviet agriculture from Stalin’s enforcement of Lysenko biology orthodoxy stand[s] as a strong counterexample to those who would discipline university professors for not following the “party line.”

The court also observed that Dr. Hurd had argued that an academic freedom exception to *Garcetti* must be limited to classroom teaching. The court did not decide this issue one way or the other, but did indicate that there was no suggestion that Dr. Kerr’s advocacy for forceps delivery was “outside either the classroom or the clinical context in which medical professors are expected to teach.”

Because there was an open question about whether Dr. Kerr’s protected speech was one of the reasons for his termination, the court ordered the case to be heard by a jury. The university appealed the court’s ruling on the First Amendment issues to the U.S. Court of Appeals for the Sixth Circuit, where the case is currently in mediation.

2. *Adams v. University of North Carolina-Wilmington*, 7:07-cv-00064-H (E.D.N.C. Mar. 15, 2010)

In this complex case, currently on appeal, a federal trial court in North Carolina suggested that materials in a promotion packet would not be protected by the First Amendment after *Garcetti*.

Michael Adams was a tenured associate professor in criminology at the

University of North Carolina-Wilmington. According to Adams, at the time he started at UNC-Wilmington (in 1993) he was an atheist with liberal political beliefs. During this time, he won multiple teaching and scholarship awards, with peer faculty members calling him “outstanding” and a “master,” “gifted,” “accomplished,” and “natural” teacher. He was also named the Faculty Member of the Year twice.

In 2000, Adams had a change of heart and became a self-described Christian conservative. Problems surfaced between Adams and his colleagues when Adams criticized his colleagues via e-mail for questioning job candidates about their political views and expressing “anti-religious sentiments during the interview process.” Another faculty member responded that “[everyone] know[s] our country allows discrimination on the basis of political orientation.”

In 2003, Adams began writing a column for a website on “issues of academic freedom, constitutional abuses, discrimination, race, gender, homosexual conduct, feminism, Islamic extremism, and morality.” The column showcased Adams’ conservative religious beliefs, and the university was flooded with complaints from upset readers, including potential donors. Various publications by Adams were also critical of other members of the faculty and the administration at the university.

At the end of July 2006, Adams formally applied for promotion to full professor. Adams’ department ultimately voted 7-2 against recommending promotion; the chair adopted the vote and denied Adams’ application for promotion, which ended the process. In a letter to Adams, the chair said the decision was based upon Adams’ thin record of productivity, his undistinguished teaching, and his insufficient record of service to the university and the profession.

Adams filed suit in federal court claiming, among other things, viewpoint discrimination in violation of his First Amendment rights.<sup>9</sup> The court stated at the outset that “federal courts review university tenure and promotion decisions ‘with great trepidation,’ consistently applying ‘reticence and restraint’ in reviewing such decisions.” The court therefore limited its review to “deciding only ‘whether the appointment or promotion was denied because of a discriminatory reason.’”

Adams’ free speech claim rested on his columns, publications, and presentations, many of which criticized UNC-Wilmington administrators or staff, and others of which addressed controversial issues and incorporated Adams’ conservative views. Adams either referred to these materials in his promotion packet or explicitly included them in the packet (the facts are unclear); in the court’s words, however, his inclusion of the materials in his promotion application (as the court believed he did) “forc[ed] the very people he criticized to make professional judgments about this speech.”

Citing to *Garcetti*, the court characterized the inclusion of the materials as an

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<sup>9</sup> Adams also claimed that he had been denied his rights under the Equal Protection Clause of the Fourteenth Amendment and been discriminated against on the basis of his religion; this outline does not address those claims.

“implicit acknowledgement that they were expressions made pursuant to his professional duties – that he was acting as a faculty member when he said them.” The court reasoned that Adams’ “inclusion of the speech in his application for promotion . . . marked his speech, at least for promotion purposes, as made pursuant to his official duties” under *Garcetti*.

The court made no inquiry as to whether these promotion materials would also constitute the kind of “speech related to scholarship or teaching” that the *Garcetti* majority indicated might not be governed by its “official duties” analysis. Indeed, the court went one step further and seemed to suggest that *any* materials included in a faculty member’s promotion packet would be unprotected under *Garcetti*. As the court said, it found “no evidence of **other protected speech** (i.e., **speech not presented by plaintiff for review as part of his application**) playing any role in the promotion denial” (emphasis in bold added). The court thus appeared to conflate “protected speech” with materials *not* presented for peer review, and materials presented for peer review with unprotected speech – a truly chilling suggestion for any faculty who engage in controversial research or study. The court therefore dismissed Adams’ claim that his First Amendment rights were violated during the promotion review process.

Adams has appealed the court’s decision to the U.S. Court of Appeals for the Fourth Circuit, and the AAUP submitted an *amicus* brief in the case – in concert with the Thomas Jefferson Center for the Protection of Free Expression and the Foundation for Individual Rights in Education – urging the Fourth Circuit to recognize an academic freedom exception to *Garcetti*.

3. *Sheldon v. Dhillon*, 2009 U.S. Dist. LEXIS 110275 (N.D. Cal. Nov. 25, 2009)

In this case, a federal district court in California held that a biology professor’s comments in class about possible scientific causes of homosexuality was protected by the First Amendment, recognizing that the “official duties” analysis in *Garcetti* does not apply to such academic speech.

June Sheldon began teaching biology at California’s San Jose Community College in 2004, after teaching for seven years at a different community college in the same district. During her summer 2007 Human Heredity course, a student filed a complaint about a class discussion regarding homosexuality. During that discussion, a student had asked Sheldon about a hereditary connection to homosexuality, on the basis of class materials and discussion. Sheldon gave several answers to the question, including that students would learn that both genes and environment affected homosexuality. The anonymous, undated student complaint alleged that Sheldon also made “offensive and unscientific” statements, including that there “aren’t any real lesbians” and that “there are hardly any gay men in the Middle East because the women are treated very nicely.”

In September 2007, Sheldon met with the dean of the Division of Math and

Science and agreed to meet with the full-time biology faculty to discuss the issues raised in the complaint. In December of that year, the community college's administration withdrew a previous offer to teach in spring 2008 on the grounds that Sheldon was teaching misinformation as science.

Sheldon sued in federal court, alleging that she was fired in retaliation for her in-class answer to a student's question, and that her classroom instruction was protected by the First Amendment. The community college's response relied heavily on *Garcetti*'s "official duties" analysis, arguing that classroom speech is not protected by the First Amendment because when a teacher engages in classroom instruction, she is performing her official duties as a public employee, not speaking as a private citizen.

In this decision, the district court rejected the college's reliance on *Garcetti*, noting that "by its express terms," *Garcetti* did "not address the context squarely presented here: the First Amendment's application to teaching-related speech." The court also observed that prior decisions in the Ninth Circuit, the appeals court that makes law for states including California, had "recognized that teachers have First Amendment rights regarding their classroom speech, albeit without defining the precise contours of those rights." In addition, the court noted that the Supreme Court has held that "a teacher's instructional speech is protected by the First Amendment, and if the defendants acted in retaliation for her instructional speech, those rights will have been violated unless the defendants' conduct was reasonably related to a legitimate pedagogical concern" (quoting *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)).

Because the court could not determine at that stage whether the community college did terminate Sheldon's employment on the grounds of reasonable pedagogical concerns, it denied the college's motion to dismiss, and the litigation continued. The court also denied the college's motion to dismiss Sheldon's claim that she had been discriminated against on the basis of viewpoint, on the same grounds.

In the summer of 2010, Sheldon and the community college district reached a settlement, in which the district agreed to remove Sheldon's termination from her record and pay her \$100,000 for lost work.

B. Speech About Institutional, Departmental, Personnel, and Student Matters

1. *Hong v. Grant*, 516 F. Supp. 2d 1158 (C.D. Cal. 2007); 2010 U.S. App. LEXIS 23504 (9th Cir. Nov. 12, 2010)

In this case, a federal trial court in California not only failed to recognize the *Garcetti* majority's reservation for speech in the academic context but also construed a public university's ability to control and restrict its employees' speech extremely broadly. Juan Hong was a full professor in the engineering department at the University of California-Irvine, a public university, where he had taught since 1987. In 2002, he challenged the university on a number of issues relating to hiring, promotions, and staffing – specifically, the use of lecturers instead of tenured faculty, the procedure for a

merit promotion review, and an offer to a new colleague that he believed violated the faculty's role in shared governance. The university subsequently denied him a merit salary increase, and Dr. Hong filed suit against the university, claiming that the denial was in retaliation for his exercise of his First Amendment rights. The court concluded that because Professor Hong's criticisms were made in the course of his job and were not on matters of "public concern," they were not protected by the First Amendment. A recent appeals court decision, however, has cast doubt on whether that is still a good holding.

In rejecting Dr. Hong's claim, the trial court relied heavily on the "official duties" analysis set forth in *Garcetti*, without acknowledging the Supreme Court's explicit recognition that speech in the academic context may be treated differently. The key question for the court, therefore, was whether Dr. Hong's critical statements were made "pursuant to his official duties" as a UCI faculty member.

The University of California system, of which UC-Irvine ("UCI") is a part, has a robust system of shared governance that allocates authority among the faculty, the Board of Regents, and the system's president. In the court's description:

a faculty member's official duties are not limited to classroom instruction and professional research. . . . Mr. Hong's professional responsibilities . . . include a wide range of academic, administrative and personnel functions in accordance with UCI's self-governance principle. As an active participant in his institution's self-governance, Mr. Hong has a professional responsibility to offer feedback, advice and criticism about his department's administration and operation from his perspective as a tenured, experienced professor. UCI allows for expansive faculty involvement in the interworkings of the University, and it is therefore the professional responsibility of the faculty to exercise that authority.

Relying on this "official duties" analysis, the court concluded that Dr. Hong's criticisms of his colleague's mid-career review were unprotected by the First Amendment, because "UCI 'commissioned' Mr. Hong's involvement in the peer review process and his participation is therefore part of his official duties as a faculty member. The University is free to regulate statements made in the course of that process without judicial interference." (Note that the beginning of the court's statement above suggests that it might have found even "classroom instruction and professional research" to be subject to the university's total control, as those are, as the court notes, also "official duties" of a faculty member.)

In reaching this conclusion, the court appeared to conflate professional *rights* and professional *responsibilities* as set out in UCI's Academic Personnel Manual. Faculty members at UC-Irvine have the right to participate in a whole range of governance matters; faculty responsibilities, however, are limited to a much smaller category of matters, such as the prevention of conflicts of interest. Moreover, the court disregarded the fact that Dr. Hong was not part of an official peer review faculty committee; he was

merely speaking in his capacity as a tenured member of the department.

The court also found that Dr. Hong's criticism of the department's use of lecturers, which the court characterized as addressing "only . . . internal departmental staffing and administration," was unprotected. The court opined that Dr. Hong was under a "professional obligation to actively participate in the interworkings and administration of his department, including the approval of course content and manner of instruction. . . . The form, content, and context of Mr. Hong's statements all indicate he was fulfilling a professional obligation and not acting as a private citizen." The court held broadly that "UCI is entitled to unfettered discretion when it restricts statements an employee makes on the job and according to his professional responsibilities."

Finally, the court ruled that Dr. Hong's comments did not implicate matters of public concern under the First Amendment. "Each of Mr. Hong's statements – regarding faculty performance reviews, departmental staffing and faculty hiring – involved only the internal personnel decisions of his department. In no way did they implicate matters of pressing public concern such as malfeasance, corruption or fraud." The court therefore ruled in favor of the university.

Dr. Hong subsequently appealed the decision to the U.S. Court of Appeals for the Ninth Circuit. (The AAUP, along with the Thomas Jefferson Center for the Protection of Free Expression, filed an *amicus* brief in support of his appeal, asserting that the lower court badly misconstrued the application of *Garcetti* to cases involving academic-related speech.) In November 2010, the appeals court issued a brief, unpublished decision. With respect to the First Amendment issues, the court decided to "leave the question of whether faculty speech such as Hong's is protected under the First Amendment for consideration in another case." The decision therefore suggested that the district court's reasoning, while not overturned, would not necessarily prevail in a subsequent similar case.

2. *Ezuma v. City Univ. of New York*, 2010 U.S. App. LEXIS 3495 (2d Cir. Feb. 22, 2010)

In *Ezuma*, the U.S. Court of Appeals for the Second Circuit concluded that a faculty department chair was not protected by the First Amendment when he relayed a subordinate's accusations of sexual harassment to the university administration.

Chukwumeziri Ezuma was a professor and Chair of the Department of Accounting, Economics, and Finance at the City University of New York (CUNY). While he was chair, Evelyn Maggio, a faculty member in his department, reported that another faculty member, Dr. Emmanuel Egbe, was sexually harassing her. Ezuma relayed the complaints to administration officials; after Maggio sued Egbe and CUNY, Ezuma also recounted Maggio's accusations to lawyers and police investigating the complaints. Ezuma was then removed from various academic committees and from his position as department chair, to which Egbe was appointed in his stead. Ezuma sued, claiming that these actions were unconstitutional retaliation for his speech about the

sexual harassment.

The Second Circuit ruled that Ezuma’s speech, including his discussions with lawyers and the police, were “pursuant to his official duties” because, as department chair, he was obliged to report accusations of sexual harassment. Therefore, the court held, the speech was not protected under *Garcetti*. Although noting that *Garcetti* had exempted speech concerning “academic scholarship or classroom instruction,” the court ruled that this case had “nothing to do with academic freedom or a challenged suppression of unpopular ideas. . . . The speech at issue here could have occurred just as easily in a private office, or on a loading dock.”

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

In this case, a federal appeals court upheld a decision by the U.S. District Court for the District of Delaware ruling that speech by a tenured faculty member – none of which specifically related to his classroom duties – was within his role as a public employee and was therefore not protected pursuant to *Garcetti*’s “official duties” analysis.

Wendell Gorum was a tenured professor who taught at Delaware State University (DSU) from 1989 until he was suspended from the university in 2004. Before his suspension, he had several conflicts with the administration, including speaking in opposition to several presidential candidates (including the eventual president, Allen Sessoms); advising a student to sue the university after the student was suspended on weapons possession charges; and disinviting Sessoms from a student fraternity’s annual dinner. Finally, the university discovered in 2004 that Gorum had improved students’ grades in other professors’ courses without obtaining the relevant professor’s or the registrar’s permission. When Gorum admitted that he had altered the students’ grades in violation of DSU policies, Sessoms initiated termination proceedings. After grieving the termination, which was recommended against by the Grievance Committee but ultimately upheld by the Board of Trustees, Gorum filed suit against President Sessoms and the Board of Trustees, alleging that his termination was in violation of his First Amendment rights.<sup>10</sup>

Gorum sued, alleging that Sessoms and the Board of Trustees terminated him in retaliation for the activities described above (other than the grade manipulation). The district court, relying on the *Garcetti* “official duties” analysis but failing to mention the Supreme Court’s reservation of speech related to academic matters, concluded that all three were in Gorum’s capacity as a public employee, pursuant to his official duties.

Gorum appealed the district court’s decision (only with respect to the expression related to the dinner invitation and the student advising) to the U.S. Court of Appeals for the Third Circuit. The Third Circuit unanimously upheld the district court’s decision,

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<sup>10</sup> Gorum’s manipulation of student grades would be grounds for termination under AAUP policy, and the Third Circuit recognized that those actions justified his termination. Because the court nevertheless also addressed the First Amendment claims that Gorum raised, the case is relevant in that context as well.



holding that Gorum's speech was not protected because it was pursuant to his official duties and was not on a matter of public concern. The appeals court also ruled that Gorum would have been terminated irrespective of his speech because of the grading misconduct.

In reaching its decision, the Third Circuit used a broad definition of "pursuant to official duties," holding that "a claimant's speech might be considered part of his official duties if it relates to 'special knowledge' or 'experience' acquired through his job" (quoting to an earlier Third Circuit decision, *Foraker v. Chaffinch*, 501 F.3d 231, 240 (3d Cir. 2007)).

The court also acknowledged the *Garcetti* reservation for speech in the academic context, while distinguishing Gorum's speech here:

In determining that Gorum did not speak as a citizen when engaging in his claimed protected activities, we are aware that the Supreme Court did not answer in *Garcetti* whether the "official duty" analysis "would apply in the same manner to a case involving speech related to scholarship or teaching." 547 U.S. at 425. We recognize as well that "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by . . . customary employee-speech jurisprudence." *Id.* But here we apply the official duty test because Gorum's actions so clearly were not "speech related to scholarship or teaching," *id.*, and because we believe that such a determination here does not "imperil First Amendment protection of academic freedom in public colleges and universities." *Id.* at 438 (Souter, J. dissenting).

561 F.3d at 186.

Finally, observing that "[t]he full implications of the Supreme Court's statements in *Garcetti* regarding 'speech related to scholarship or teaching' are not clear," the court recognized that federal appeals courts "differ over whether (and, if so, when) to apply *Garcetti*'s official-duty test to academic instructors."

4. *Fusco v. Sonoma County Junior College District*, 2009 U.S. Dist. LEXIS 91431 (N.D. Cal. Sept. 30, 2009); 2010 U.S. Dist. LEXIS 7363 (N.D. Cal. Jan. 29, 2010)

In this September 2009 decision, a federal trial court in Northern California gave the green light to a lawsuit by a professor who alleged that her dean had violated her First Amendment rights.

Joanne Fusco was an adjunct faculty member for the Sonoma County Junior College District. She attempted without success to place on a department meeting agenda "issues relating to academic freedom, class assignment procedures, peer evaluations, duties regarding the chair and co-chair, nominations for department chair and procedures

for voting on faculty elections day.” She then separately complained to the dean of her department that students in her class – some of whom were ultimately removed from other classrooms – were disruptive and might become violent. She offered to return to the classroom if the dean or a security officer were present, but the dean declined and told her she would no longer be allowed to teach the class. Fusco sued, alleging that she had been constructively discharged in retaliation for complaining about unsafe working conditions and for trying to place various academic-related items on the agenda.

In its decision, the court found that Fusco’s multiple attempts to place items related to academic freedom and governance on the department agenda might be protected speech. The court reasoned first that Fusco’s actions were not necessarily related only to her individual employment and could be found, with more information, to be on matters of public concern and therefore covered under the First Amendment. Second, the court could not find based solely on the complaint that Fusco was acting pursuant to her official duties when she tried to place matters on the department’s agenda, and *Garcetti* therefore did not prevent her lawsuit from moving forward. Finally, when Fusco’s dean attempted to discipline her by issuing her various letters and emails, he may have caused her to be constructively discharged, adversely affecting her employment and potentially violating the First Amendment. The court therefore allowed the lawsuit to go forward.

The case went to mediation in April 2010, and as of November 2010, the Board of Trustees for the community college district had agreed to offer Fusco a \$25,000 settlement.

5. *Sadid v. Idaho State University*, CV-2008-3942-OC (Idaho Dist. Ct. 2009)

In this case, currently on appeal, an Idaho state trial court ruled that a professor’s public statements criticizing his university were not protected under the First Amendment.

In 2001, Idaho State University Civil Engineering Professor Habib Sadid published several letters to faculty and administrators criticizing the university’s plan to merge two colleges, the College of Engineering and the College of Applied Technology. Several years later, he spoke to a state newspaper about the plan. Sadid claimed that in retaliation for his comments, he did not receive faculty evaluations, was not appointed to a chair position, was defamed in an email, and received the lowest possible salary increase. He filed suit, alleging that his First Amendment rights were violated.

Invoking the *Hong* district court decision described above, the Idaho state trial court concluded that Sadid’s letters related to his personal grievances rather than to a matter of public concern. The court was not persuaded by Sadid’s assertion that his grievances were on a matter of public concern because they discussed a plan to merge two colleges at a public university, a plan Sadid asserted was done without public knowledge or input. Instead, the court found that the letters contained only personal

grievances in relation to Sadid's employment, and held that "simply because it involves a matter that may have occurred behind closed governmental doors does not make it a public concern."

In addition, relying primarily on cases that arose outside of the academic context, the court reasoned that "government employers need a significant degree of control over their employees' words and actions." The court therefore disagreed with Sadid's assertion that because his job description did not include writing letters to the newspaper critiquing the ISU administration, he was writing as a private citizen (whose expressions would be protected under the First Amendment from governmental restriction) rather than as a public employee. The court decided that the "tone" of Sadid's letters "is that of an employee of ISU," and added that Sadid "should understand that he has limitations of his speech that he accepted when becoming a state employee." Finally, the court noted that Sadid had identified himself as an ISU employee in the published letters. The court concluded that "due to the tone and language of the letter," Sadid was speaking as an employee and not as a private citizen, and his comments were therefore not protected by the First Amendment.

Sadid has appealed the case to the Idaho Supreme Court, which is expected to hear oral arguments in spring 2011.

#### 6. *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008)

Kevin Renken, a tenured professor in the College of Engineering at the University of Wisconsin-Milwaukee, applied with some collaborators for a National Science Foundation (NSF) grant. The university and the NSF both approved the grant application, but after Professor Renken got into a series of disputes with the dean over the grant, including alleging that the funds were potentially being misused and filing a complaint with a university committee asserting that the dean had failed to pay undergraduates who were working on the project, the university returned the money to the NSF.

Professor Renken sued the university, claiming the university had reduced his pay and returned the grant in retaliation for his criticism about the university's use of grant funds. The federal district court concluded that his complaints about the grant funding were made pursuant to his official duties, not as a citizen, and therefore were not protected by the First Amendment under *Garcetti*.

Renken appealed, arguing that his grant-related tasks were conducted "*while* in the course of his job and not as a *requirement* of his job." The U.S. Court of Appeals for the Seventh Circuit disagreed, however, stating:

As a professor, Renken was responsible for teaching, research, and service to the University. In fulfillment of his acknowledged teaching and service responsibilities, Renken acted as a PI [principal investigator], applying for the NSF grant. This grant aided in the fulfillment of his teaching

responsibilities because . . . the grant was an education grant for the benefit of students as “undergraduate education development.” . . . In his capacity as PI, Renken administered the grant by filing a signed proposal, including a budget regarding the proposed grant and University funds involved in the project, seeking compensation for undergraduate participants, applying for course releases, and noting what appeared to be improprieties in the grant administration. Renken complained to several levels of University officials about the various difficulties he encountered in the course of administering the grant as a PI. Thereby, Renken called attention to fund misuse relating to a project that he was in charge of administering as a University faculty member[]. In so doing, Renken was speaking as a faculty employee, and not as a private citizen, because administering the grant as a PI fell within the teaching and service duties that he was employed to perform.

541 F.3d at 773-74.

The court added that administration of the grants did not need to be within Renken’s *core* job functions; according to the court, the *Garcetti* inquiry simply asked whether the challenged expression was pursuant to official responsibilities. Again, neither the trial court nor the appeals court addressed the question of whether the Supreme Court’s reservation in *Garcetti* for academic-related speech was relevant to its decision.

7. *Payne v. University of Arkansas Fort Smith*, 2006 U.S. Dist. LEXIS 52806 (W.D. Ark. July 26, 2006)

Diana Payne was a tenured professor at the University of Arkansas for nineteen years, until she was fired in 2005. Before her termination, Payne sent Sandi Sanders, the university’s senior vice chancellor and chief of staff, an email regarding the university’s new policy increasing the minimum number of hours that faculty members were expected to be on campus. Payne expressed her belief that she did not in fact have to be physically present on campus, and told Sanders that she thought the policy would affect donations to the university and was “a huge disservice to the community.” Payne was then assigned the rank of Instructor, rather than the higher rank of Assistant Professor, and she sued, alleging (among other things) that she was being retaliated against for her criticism of the university’s policy.

The federal trial court in Arkansas determined that even though the email invoked community concerns, the “crux” of it was Payne’s “dissatisfaction with an internal employment policy and not an issue of public concern.” The court therefore concluded that under *Garcetti*, the email was not protected speech under the First Amendment, and dismissed Payne’s claim of retaliation.<sup>11</sup>

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<sup>11</sup> Payne did prevail on some other elements of her suit, and in September 2006, the court awarded her \$161,803.40 in compensatory damages and lost wages and benefits, and awarded her attorney approximately \$86,000 in fees and costs. The court also reinstated Payne to her previous teaching position,

### C. Speech as Committee Members

#### 1. *Isenalumhe v. McDuffie*, 697 F. Supp. 2d 367 (E.D.N.Y. 2010)

In *Isenalumhe*, a federal trial court in New York relied on *Garcetti*'s "official duties" holding to dismiss the First Amendment claims of two faculty members who complained about the way their department chair was utilizing university governance procedures.

Anthony Isenalumhe and Jean Gumbs are tenured nursing professors at Medgar Evars College of the City University of New York. In 2001, Georgia McDuffie was hired as an associate professor and chairperson of the Nursing Department. Isenalumhe and Gumbs opposed McDuffie's appointment, and began to complain that she was bypassing faculty committee processes and was biased in her handling of faculty evaluations. They alleged that McDuffie then retaliated against them for these complaints by subjecting them to extra evaluations, assigning their usual courses to other teachers, and assigning Gumbs to a non-teaching, administrative position. Isenalumhe and Gumbs filed suit in federal court, alleging that these actions were in retaliation for their free speech and violated their First Amendment rights.

The court concluded that their complaints about committee matters were not protected speech under *Garcetti*. As the court explained, "Many of the complaints in this category were explicitly lodged by plaintiffs (sometimes with others) *as committee members*. Moreover, all of the complaints contended that McDuffie was undermining the committee process." The court concluded that Isenalumhe's and Gumbs' complaints were therefore "'undertaken in the course of performing' their responsibilities as committee members; that is, they were 'part and parcel' of plaintiffs' concerns about their ability to properly execute their duties as faculty members elected to, and serving on, various committees." 697 F. Supp. 2d at 378 (emphasis in original) (citations omitted). The court acknowledged that neither professor was required to serve on committees or to report wrongdoing, but held that in choosing to serve, "plaintiffs took on the responsibility of discharging the duties of those committees and, if necessary, bringing to light matters that interfered with their operations." *Id.* at 379.

The court also held that the faculty members' various other complaints to higher-ups were not protected by the First Amendment because they were about personnel decisions that did not involve matters of public concern; instead, the court concluded that Isenalumhe and Gumbs "were complaining about matters affecting them, and them alone," and that their motivation in complaining "was plainly to redress personal grievances."

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with the salary and benefits she would have had if she hadn't been discharged, and ordered the university to remove from its website a report on a finding of plagiarism against Payne and to expunge all documents relating to her termination from her personnel file. The order does not provide any details on the reasoning underlying the court's ruling. *Payne v. University of Arkansas Fort Smith*, 2006 U.S. Dist. LEXIS 64798 (W.D. Ark. Sept. 8, 2006).

2. *Savage v. Gee*, 716 F. Supp. 2d 709 (S.D. Ohio 2010)

In *Savage*, a federal trial court in southern Ohio dismissed the First Amendment claim of a faculty member, appearing to take the view that all speech made as a member of a faculty governance committee would be unprotected under the “official duties” analysis in *Garcetti*.

Scott Savage was the head reference librarian at Ohio State University at Mansfield. In 2006, Savage served on a committee choosing a book to assign to all incoming freshman. His suggestion, *The Marketing of Evil* – a book that the Ohio district court found contained “a chapter discussing homosexuality as aberrant human behavior that has gained general acceptance under the guise of political correctness” – led to considerable controversy among campus faculty. Several gay faculty members filed sexual harassment complaints with the university against Savage, and Savage filed his own complaints of harassment against several faculty members. After the university rejected both sides’ charges, Savage resigned and then sued, claiming he had been retaliated against in violation of the First Amendment.

The court held that Savage’s recommendation was made “pursuant to his official duties” in serving on the committee, and therefore was not protected speech under *Garcetti*. As in *Isenalumhe*, the court decided that “it [made] no difference that [Savage] was not strictly required to serve on the committee.” Although noting that several other decisions from courts in the Southern District of Ohio had recognized *Garcetti*’s academic freedom reservation (including *Kerr v. Hurd*, described above), the court held that Savage’s speech did not fall within this category: “The recommendation was made pursuant to an assignment to a faculty committee... [and], without exceptional circumstances, such activities cannot be classified as ‘scholarship or teaching.’”

Professor Savage has appealed the decision to the U.S. Court of Appeals for the Sixth Circuit.

**V. Consequences and Paradoxes of *Garcetti***

As noted above, the line of Supreme Court cases leading up to *Garcetti*, as well as the subsequent federal court cases interpreting *Garcetti*, has created some unforeseen consequences, and even absurdities, for public employees both generally and in the higher education context. This section briefly explores some of the ramifications of *Garcetti* and its progeny.

A. Are Faculty Members Like DMV Employees?

The first, and perhaps most problematic, outcome of *Garcetti* is that the Supreme Court’s primary conclusion in the case – that First Amendment rights for public employees are contingent upon their “official duties,” and that public employees are less protected when their speech arises from their official duties – is a strikingly poor fit in the

faculty context.

The Court's "official duties" approach in *Garcetti* appears to assume that all government employees are hired for a particular *kind* of speech – that is, that the government seeks someone to advance a particular viewpoint or pursue a particular agenda and to speak on behalf of the governmental entity, and that the employee is hired to fulfill that agenda. This is obviously true for a number of kinds of governmental employees – anyone from a local DMV employee to a high-ranking city deputy.

To state the obvious, however, this framework does not reflect what faculty members are hired to do, or the particular value that they offer to students, to a community of scholars, and to the community as a whole who is interested in expert, dispassionate analysis and the development of knowledge. Simply put, faculty members are not hired to speak *for* the state; they are hired simply to *speak* (and research, etc.) – within, of course, the professional bounds imposed by the responsibilities attendant to academic freedom. (Faculty members who are appointed to administrative positions – deans, department chairs, etc. – are in a different situation with respect to their service in that position; if they fail to carry out the administrative agenda for which they were appointed, it may not be inappropriate to remove them, as long as they are not also removed from their underlying faculty position.)

In addition, faculty members can serve a particularly valuable role as members of the community at large, as civic citizens who *will* speak out about issues. And the system of shared governance in higher education – which, as noted above, AAUP sees as an integral part of academic freedom – is vastly different from the hierarchical arrangement that not unreasonably prevails in most other public employment settings (and most employment settings overall).

A regime that punishes faculty for speaking out on issues in academe and the community, taking iconoclastic positions, and participating in the shared management of the university in the appropriate areas does not reflect the model of higher education that has typically prevailed at the respected colleges and universities in this country. The Supreme Court appeared tentatively to recognize that fact, at least with respect to speech related to scholarship and teaching. However, few lower courts so far have openly grappled with the critical distinctions between faculty members and the structure of higher education on the one hand, and the general class of public employees and the structure of most public employment on the other.

B. The More You Know, The Less You Can Say – Unless You Go Straight to the *New York Times*

The second serious paradox of *Garcetti* is that public employees may be *more* protected for speaking on issues that they were *not* hired to speak about. They may also be *more* protected if they go *outside* the normal channels of complaints. This seems not just counterintuitive but profoundly counter both to the public interest in knowledgeable contributions to public debate on matters of importance and to the productive resolution

of employee disputes.

The majority in *Garcetti*, however, explicitly recognized that under its “official duties” doctrine, speech that wasn’t protected when uttered within public employees’ employment duties might be transformed into protected speech when included in a letter sent to the local paper:

Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. The same goes for writing a letter to a local newspaper, or discussing politics with a co-worker. When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees. [547 U.S. at 423-24, citations omitted]

As Justice Stevens recognized in dissent, the majority appeared to have fashioned a “perverse . . . new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors.” *Id.* at 427. And indeed, as Justice Souter further observed in his separate dissent (in which Justice Stevens joined), “The need for a balance hardly disappears when an employee speaks on matters his job requires him to address; rather, it seems obvious that the individual and public value of such speech is no less, and may well be greater, when the employee speaks pursuant to his duties in addressing a subject he knows intimately for the very reason that it falls within his duties.” *Id.* at 430-31.

For better or worse, *Garcetti* suggests to alert public employees that they would be best-served by sharing their thoughts and concerns about those subjects with a wide audience in the first instance rather than with their colleagues and superiors.

### C. Breadth of Interpretation of “Official Duties”

Even if faculty were appropriately covered by the “official duties” analysis, courts have been interpreting the phrase extraordinarily broadly, both inside and outside of the educational context. *Garcetti* itself, as described above, involved a deputy district attorney who was disciplined after sending a memo to his supervisors relaying serious concerns about a pending criminal case, followed by a contentious meeting with his supervisors and his testifying for the defense in the case. Regardless of whether the discipline was appropriate or implicated First Amendment concerns, it is undeniable that Ceballos’ speech – his memorandum and the subsequent conversations – arose *directly* out of his job responsibilities.

Indeed, as the Supreme Court described it, conducting analyses of cases and relaying his judgments about the cases were precisely what the district attorney’s office was employing him to do: “Ceballos spoke as a prosecutor *fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case,*” and the speech in



fact arose out of duties that the district attorney's office "commissioned" Ceballos to carry out. 547 U.S. at 421, 422 (emphasis added). Had he not been employed as a deputy district attorney, he would not have been in a position to engage in the expression that led to his discipline. The Court distinguished Ceballos's speech from "the kind of activity engaged in by citizens who do not work for the government," including "writing a letter to a local newspaper," as Marvin Pickering did. *Id.* at 423. As the Court stated, "When a public employee speaks pursuant to employment responsibilities . . . there is no relevant analogue to speech by citizens who are not government employees." *Id.* at 424.

One could argue that since Ceballos was a professional who was hired to exercise independent judgment, it is ultimately detrimental to the operation of the office and to the public interest in a fair and transparent criminal justice system to penalize him for exposing his significant misgivings about the case. (Justice Souter in fact made this very point in his dissent, observing that Ceballos's only obligation to his employer was "to exercise the county government's prosecutorial power by acting honestly, competently, and constitutionally." *Id.* at 437.) But, at the very least, the Supreme Court's reasoning in *Garcetti* could reasonably be read to address a fairly narrow category of expression by public employees. As the Court put it, "Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. *Official communications* have official consequences, creating a need for substantive consistency and clarity." *Id.* at 422 (emphasis added). And the Court explicitly recognized and reaffirmed its concern in *Pickering* for "informed, vibrant dialogue in a democratic society," as well as the individual and societal interests that are served when employees speak as citizens on matters of public concern." *Id.* at 419, 420.

As described above, however, a number of courts have interpreted "official duties" much more broadly than suggested by the Supreme Court's actual decision in *Garcetti*. In *Weintraub v. Board of Education*, for instance, the U.S. Court of Appeals for the Second Circuit concluded (over a strong dissent) that when a fifth-grade teacher filed a union grievance over the principal's handling of an incident with a student, that grievance was unprotected under the First Amendment because it was "pursuant to his official duties."

In the appeals court's words, the grievance was "part-and-parcel of his concerns about his ability to properly execute his duties as a public school teacher – namely, to maintain classroom discipline, which is an indispensable prerequisite to effective teaching and classroom learning." 593 F.3d 196, 203 (2d Cir. 2010) (citation and internal quotation marks omitted). It is, needless to say, nearly inconceivable that the school district was paying Weintraub to file union grievances, or that the union grievance constituted an "official communication" that was part of the duties that his employer "commissioned" from him.

The court also essentially confirmed that Weintraub likely would have been shielded by the First Amendment had he taken his complaint public rather than going through established channels:

The lodging of a union grievance is not a form or channel of discourse available to non-employee citizens, as would be a letter to the editor or a complaint to an elected representative or inspector general. Rather than voicing his grievance through channels available to citizens generally, Weintraub made an internal communication pursuant to an existing dispute-resolution policy established by his employer, the Board of Education.

*Id.* at 204. This points again to the somewhat paradoxical conclusion that public employees seeking First Amendment protection post-*Garcetti* should immediately take their complaints to the public rather than communicating through internal channels, lest their use of those internal channels be construed as acting pursuant to their official duties.

D. Faculty Committees May Cease – and That’s Actually Not a Good Thing

An additional potential consequence of the sweeping scope of the *Garcetti* decision – and particularly of decisions like *Savage* and *Isenalumhe*, described above – is that they may make faculty reluctant to serve on college and university committees, if courts are going to construe such service as “official duties” unprotected under *Garcetti*. While fewer faculty committees may sound like the fulfillment of a fondest dream for some, the AAUP pointed to a potentially significant downside in a 2009 committee report, produced by a committee chaired by Robert O’Neil, on academic freedom and the First Amendment in the post-*Garcetti* era:

Faculty involvement in institutional decision-making helps ensure campus-wide “buy-in,” with respect to both the decision-making process and the decision itself. Decisions reached without faculty input may be insufficiently attentive to core academic values, may not reflect the realities on campus, or may simply be difficult to execute. Moreover, once a decision is made and implementation begun, ongoing faculty involvement and cooperation are essential. Without the freedom to engage deeply in that decision-making and implementation process – including the freedom to voice disagreement over the direction of a policy or the method of execution – the entire academic community will be ill-served.

See “Protecting an Independent Faculty Voice: Academic Freedom after *Garcetti v. Ceballos*,” *Academe* (Nov.-Dec. 2009) at 87 (available at <http://www.aaup.org/NR/rdonlyres/B3991F98-98D5-4CC0-9102-ED26A7AA2892/0/Garcetti.pdf>). In the absence of an independent administrative commitment to protect involved faculty from retaliation for their services, therefore, decreased judicial sympathy for this kind of faculty service could lead reasonable faculty to conclude that participation in institutional decision-making is no longer worth the risk.

E. What Will it Really Mean if Everything a Public Employee Does is Within His Official Duties?

One final point remains: the odd specter of any public employer, including a public college or university, asserting that a wide range of speech falls within its employees' "official duties." In many circumstances, an employer would seem to have an incentive to argue that its employees' communications on a variety of topics are entirely on the employee's own initiative, and that they do not represent official communications of the employer, lest they be held responsible for the speech.

Although I am not aware of any court yet concluding that an employer is liable for employee speech that it claims as "official," the AAUP's 2009 report did note the obvious danger, saying:

[A] university that insists in litigation that it has the "unfettered discretion" to regulate or control all faculty speech within the scope of broadly defined "official duties" inescapably implies its obligation to exercise that authority, and would thus be potentially liable for faculty transgressions (verbal or physical) otherwise likely to be dismissed (and potential liability thus avoided) as outside the scope of the faculty member's appointment by the university. Such risks could extend to compliance with conditions on government and other research grants, to cite but one of many collateral contexts.

"Protecting the Faculty Voice" at 87.

## VI. Institutional Responses to *Garcetti* and its Progeny

In the wake of the *Garcetti* decision, and particularly the lower court cases finding that faculty members have sharply limited First Amendment rights to participation in shared governance, a number of public universities have passed policies explicitly protecting faculty speech on institutional matters (as well as in the areas more frequently viewed as protected by academic freedom, such as teaching and research).

For instance – with strong support from General Counsel Larry White – the new collective bargaining contract for the faculty at the University of Delaware contains the following language:

Academic freedom is the freedom to teach, both in and outside the classroom, to conduct research and other scholarly or creative activities, and to publish or otherwise disseminate the results. **Academic freedom also encompasses the freedom to address any matter of institutional policy or action whether or not as a member of any agency of institutional governance.** Faculty have the freedom to address the larger community with regard to any social, political, economic, or other interest. [See <http://www.udel.edu/aaup/CBA%2010-13%20FINAL.pdf> (emphasis added).]

Similarly, the University of Minnesota Board of Regents adopted a policy in June 2009 that provides protection to faculty speech on matters related to the university:

Academic freedom is the freedom to discuss all relevant matters in the classroom, to explore all avenues of scholarship, research, and creative expression, and to speak or write without institutional discipline or restraint on matters of public concern **as well as on matters related to professional duties and the functioning of the University.** [See [http://www1.umn.edu/regents/policies/academic/Academic\\_Freedom.html](http://www1.umn.edu/regents/policies/academic/Academic_Freedom.html) (emphasis added).]

Several other institutions have policies that are at the proposal stage, including – as of the time of this writing – the University of California, the University of North Carolina-Chapel Hill, and Pennsylvania State University.

The AAUP maintains a list of institutional policies, which it updates periodically; it is available at <http://www.aaup.org/NR/rdonlyres/1211228E-39C3-4CD1-B90A-BE99A4F02B6F/0/ChartpostGarcettpolicies0810.pdf>.