The Onslaught on Academic Freedom

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The Onslaught on Academic Freedom:

I. Introduction

Garcetti v. Ceballos⁴ cast into doubt the degree to which the Constitution protects academic freedom. While the United States Supreme Court has long suggested that protecting teachers both within and outside of the classroom serves important interests, it has not always been clear whether Court members were thereby making a constitutional pronouncement rather than a public policy recommendation. Thus, even assuming that the protection of academic freedom has a variety of salutary consequences, that does not establish that such freedoms are protected by the First Amendment. Further, even assuming that the Constitution affords some protection to academic freedom, there are a number of additional issues requiring clarification, e.g., who is entitled to such protection and under what circumstances will those protections be triggered. The Court has offered much too little direction on these matters, resulting in a confused and confusing jurisprudence that has permitted the circuits to eviscerate protections of academic freedom.

In several opinions, members of the Court have described the importance of academic freedom. The cases in which academic freedom was championed involved a variety of contexts, and many of the Court’s justifications were equally applicable to primary or secondary schoolteachers on the one hand or college or university professors on the other. However, the Garcetti Court in dictum has cast doubt on the viability of the entire line of cases. By mentioning that the Court’s current First Amendment jurisprudence might have important implications for academic freedom but not addressing those possible implications, the Garcetti Court virtually

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invited the circuits to adopt differing approaches, often resulting in the diminution of academic freedom.

Section II of this article describes the evolving First Amendment academic freedom jurisprudence, concluding that the jurisprudence was relatively accepted and straightforward until Garcetti suggested in dicta that the past jurisprudence might not capture the Court’s current understanding of First Amendment protections. Section III of the article describes the circuits’ evolving position on academic freedom, where fewer and fewer protections are being recognized and enforced. The article concludes that unless the Court clarifies the academic freedom protections afforded by the First Amendment, we may well have some of the adverse effects anticipated decades ago by members of the Court.

II. The Evolving Academic Freedom Jurisprudence

The degree to which academic freedom is protected by the First Amendment has been a matter of some dispute for over half a century. More recently, however, the Court seemed to recognize that academic freedom is protected by the First Amendment. But dicta in Garcetti suggest that First Amendment protections of academic freedom either may not exist or may be much less robust than previously thought.

A. The Evolving Relationship between the First Amendment and Academic Freedom

In Sweezy v. State of New Hampshire, the Court suggested that the importance of academic freedom in the university setting is “almost self-evident.” The Court warned that imposing “any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future

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3 Id. at 250.
of our Nation.”

Academic freedom in the classroom is necessary for the creation of optimal learning environments. “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.”

By the same token, researchers will be unable to expand the frontiers of knowledge unless they are free to pursue the avenues of inquiry that they believe most fruitful. “Scholarship cannot flourish in an atmosphere of suspicion and distrust.”

At least two points might be made about the Sweezy Court’s articulated position. First, the freedoms are extremely important. If the failure to respect these freedoms will put the Nation’s future at stake and may well cause our civilization to stagnate and die, then one might expect that these freedoms would be afforded great protection. Second, while the justifications are offered in the context of a defense of academic freedom in the university setting, they are applicable in the primary and secondary education context as well. There, too, both teachers and students need to be free to inquire, evaluate, and mature.

That the same justifications are applicable to differing levels of education does not establish that the policies appropriate on the university level are also appropriate at the primary education level. The state has special concerns when young and impressionable children are involved. In a case prior to Sweezy, Adler v. Board of Education of City of New York, the Court explained that the state has a “vital concern” in shaping “the attitude of young minds towards the society.

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4 Id.
5 Id.
6 Id.
7 See Lemon v. Kurtzman, 403 U.S. 602, 616 (1971) (discussing “the impressionable age of the pupils, in primary schools particularly”). See also Darryn Cathryn Beckstrom, Note, Reconciling the Public Employee Speech Doctrine and Academic Speech after Garcetti v. Ceballos, 94 Minn. L. Rev. 1202, 1236-37 (2010) (“The interests and functions of elementary and secondary schools are vastly different from the functions of the public university.”)
9 Id. at 493.
in which they live.” 10 Because of that interest, “the school authorities have the right and the duty

to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the

schools as a part of ordered society.” 11

Assuring teacher fitness is an important responsibility. But part of fulfilling that

responsibility involves determining which considerations should be used to establish an

individual’s fitness to teach. The Adler Court reasoned that an analysis of teacher qualifications

could include consideration not only of the teacher’s conduct but also of her political

associations. 12

At issue in Adler was a New York law specifying that employment could be terminated if a

teacher belonged to an organization on a disapproved list maintained by the Board of Regents. 13

While such a teacher was entitled to a hearing and might retain her job if, for example, she could

establish that she did not know that the organization to which she belonged was on the list of

prohibited organizations, 14 she could be fired if she could not rebut the presumption that her

membership in the offending organization constituted sufficient grounds for her dismissal. 15

In his Adler dissent, Justice Douglas warned about some of the negative effects associated

with trying to enforce orthodoxy within the schools. After noting that the “public school is in

most respects the cradle of our democracy,” 16 he cautioned that legislation designed to keep “the

10 Id.
11 Id.
12 Id. (“One's associates, past and present, as well as one's conduct, may properly be considered in determining

fitness and loyalty.”).
13 See id. at 494 (discussing provision “directing the Board of Regents to provide in rules and regulations that

membership in any organization listed by the Board after notice and hearing, with provision for review in

accordance with the statute, shall constitute prima facie evidence of disqualification”).
14 See id. at 494-95 (discussing the requirement that the organization be “known by the member to be within the

statute”).
15 See id. at 491.
16 Id. at 508 (Douglas J., dissenting).
school free of ‘subversive influences’” might have a host of pernicious effects. For example, he noted that when “[t]eachers are under constant surveillance [and] … their utterances are watched for clues to dangerous thoughts, [a] pall is cast over the classrooms.” Such an atmosphere cannot help but stultify the educational process. “The teacher is no longer a stimulant to adventurous thinking; she becomes instead a pipeline for safe and sound information.” The undesirable effects of such a policy are easy to predict. “Instruction tends to become sterile; pursuit of knowledge is discouraged; discussion often leaves off where it should begin.” Justice Douglas explained that “[t]here can be no real academic freedom in that environment.” Here, Justice Douglas is defending the importance of academic freedom in the public schools and not merely the virtues of academic freedom in the university setting.

The Court later repudiated the view represented by Adler majority, instead embracing some of the views represented by Justice Douglas’s Adler dissent. For example, in Shelton v. Tucker, the Court noted that “to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.” Where there is required disclosure, “the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy.” The pressure would be even stronger were the disclosure made public. “Public exposure, bringing with it the possibility of public pressures

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17 Id. (Douglas J., dissenting).
18 Id. at 510 (Douglas J., dissenting).
19 Id. (Douglas J., dissenting).
20 Id. (Douglas J., dissenting). See also Wieman v. Updegraff 344 U.S. 183, 193 (1952) (Black, J., concurring) (“Our own free society should never forget that laws which stigmatize and penalize thought and speech of the unorthodox have a way of reaching, ensnaring and silencing many more people than at first intended. We must have freedom of speech for all or we will in the long run have it for none but the cringing and the craven.”).
21 Adler, 342 U.S. at 510 (Douglas J., dissenting).
22 364 U.S. 479 (1960).
23 Id. at 485-86.
24 Id. at 486.
upon school boards to discharge teachers who belong to unpopular or minority organizations, 
would simply operate to widen and aggravate the impairment of constitutional liberty." 25 
Because the state was asking about all associational affiliations within the past five years, the 
"statute's comprehensive interference with associational freedom goes far beyond what might be 
justified in the exercise of the State's legitimate inquiry into the fitness and competency of its 
teachers." 26

Historically, members of the Court have waxed eloquent about the importance of protecting 
academic freedom. The Court was especially exuberant in Keyishian v. Board of Regents: 27 
“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." 28 Because academic freedom is or 
should be important to everyone, it is “a special concern of the First Amendment, which does not 
tolerate laws that cast a pall of orthodoxy over the classroom." 29 The Court explained that the 
“classroom is peculiarly the ‘marketplace of ideas,’” 30 and quoted Sweezy to demonstrate the 
importance of protecting academic freedom on the university level in particular: 31

The Court continued to emphasize the importance of academic freedom in the university 
setting in Papish v. Board of Curators of University of Missouri, 32 noting that “the mere 
dissemination of ideas—no matter how offensive to good taste—on a state university campus 
may not be shut off in the name alone of ‘conventions of decency.’” 33 At issue was a publication 
by a student of a newspaper that had reproduced on the front cover a cartoon depicting

25 Id. at 486-87. 
26 Id. at 490. 
28 Id. at 603. 
29 Id. 
30 Id. (quoting Sweezy, 354 U.S. at 250). 
31 Id. (quoting Sweezy, 354 U.S. at 250). 
33 Id. at 670.
policemen raping the Statue of Liberty and the Goddess of Justice with a caption of “With Liberty and Justice for All.” The newspaper was distributed on the University of Missouri campus on the day that high school seniors were visiting the campus with their parents “for the purpose of acquainting them with its educational programs and other aspects of campus life.” The University seemed especially worried that minors would see the publication, either because they would be visiting the campus that day or because they were already matriculating at the University. The Court nonetheless held that the speech was protected by the First Amendment.

In Tinker v. Des Moines Independent Community School District, the Court made clear that both teachers and students in the primary and secondary grades have rights protected by the First Amendment. “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students.” Thus, although there are relevant differences between the primary and secondary school settings on the one hand and the university setting on the other that can be taken into account in First Amendment analysis, it is nonetheless true that neither “students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”

34 See id. at 667.
35 Id. at 674 (Renquist, J., dissenting).
36 See Papish v. Board of Curators of University of Missouri, 331 F.Supp. 1321, 1330 n. 6 (W.D. Mo. 1971), rev’d, 410 U.S. 667 (1973) (“University records show some 1,031 students enrolled for the 1968 Fall Semester under 17 years of age.”).
37 Papish, 410 U.S. at 671 (“the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech, and because the state University's action here cannot be justified as a nondiscriminatory application of reasonable rules governing conduct, the judgments of the courts below must be reversed”).
39 Id. at 506.
40 Id.
At issue in Tinker was whether three students could wear black armbands in school to protest American participation in the Vietnam War.\textsuperscript{41} The Court noted that the students’ wearing the armbands did not interfere with the school’s work or diminish others’ safety.\textsuperscript{42} The Court understood that whenever individuals do not accept the majority view, there is some risk that an argument or disturbance will result. “Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance.”\textsuperscript{43} The Constitution requires more than the mere possibility that there might be a disturbance—“in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”\textsuperscript{44} After all, “[a]ny departure from absolute regimentation may cause trouble.”\textsuperscript{45} The Tinker Court explained that “[i]n order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”\textsuperscript{46} The Court offered a robust standard to protect speech: “[W]here there is no finding and no showing that engaging in the forbidden conduct would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,’ the prohibition cannot be sustained.”\textsuperscript{47} That standard was not met, even though there was evidence of some disruption.\textsuperscript{48}

\textsuperscript{41} See id. at 504.
\textsuperscript{42} Id. at 508 (“There is here no evidence whatever of petitioners’ interference, actual or nascent, with the schools’ work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.”).
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} Id. at 509.
\textsuperscript{47} Id. (citing Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).
\textsuperscript{48} See id. at 518 (Black, J., dissenting) (“the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw they would, that is, took the students’ minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war’’); id. at 517 (Black J., dissenting)
Some commentators have questioned whether primary and secondary school teachers should enjoy the academic freedom protections as those employed in the university setting, reasoning that “major public college and university faculty members’ primary duty is the creation and public, i.e., extra-institutional dissemination of knowledge.” 49 Yet, there are at least two reasons that such a rationale should be rejected. First, it offers a way to distinguish not only between primary/secondary school teachers on the one hand and college/university professors on the other but also between members of college and university faculties. If, for example, the primary mission of some public post-secondary institutions is to teach rather than to do research for public consumption, then on this account the college and university professors at those institutions would also not be entitled to academic freedom. Second, Court members have often discussed the need for academic freedom in the classroom, so those teachers primarily focused on the provision of “intra-institutional knowledge dissemination” 50 should also receive the relevant protections.

When focusing on the benefits of permitting teachers to explore issues in their research and in the classrooms so that they and their students can reach new understandings and develop critical thinking skills, the Court is offering a justification for individuals’ having academic freedom. However, members of the Court have also emphasized the importance of academic freedom for the educational institutions, themselves. For example, Justice Powell in his Bakke opinion noted: “Academic freedom, though not a specifically enumerated constitutional right,
long has been viewed as a special concern of the First Amendment.”51 There, he was discussing the “freedom of a university to make its own judgments as to education includes the selection of its student body.”52 By the same token, in Grutter v. Bollinger,53 the Court explained that “given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”54 Here, too, the Grutter Court was describing the importance of institutional autonomy to determine the composition of the student body.55

The Court had also discussed the importance of the academic freedom of the institution in Regents of the University of Michigan v. Ewing,56 where the Court upheld the academic freedom of an institution to determine which students might continue to matriculate there.57 The Ewing Court understood that there was some tension in recognizing the academic freedom of the individual and also in recognizing the academic freedom of the institution. “Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and

52 Id.
54 Id. at 329 (citing Sweezy, 354 U.S. at 250).
55 See id. (“Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that composing a diverse student body is at the heart of the Law School's proper institutional mission, and that 'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'”)(citing Bakke, 438 U.S. at 318-19). See also Board of Curators of University of Missouri v. Horowitz, 435 U.S. 78, 90 (1978) (“Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.”).
57 See id. at 225 (“The record unmistakably demonstrates, however, that the faculty's decision was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing's academic career. When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment.”)
students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself.\textsuperscript{59}

The inconsistency might arise if the academic freedom of the individual is pitted against the academic freedom of the institution. For example, in University of Pennsylvania v. Equal Employment Opportunity Commission (EEOC), Rosalie Tung claimed that she had been the victim of illegal discrimination when denied tenure.\textsuperscript{60} The University sought as a matter of academic freedom to keep Tung from seeing the confidential peer review letters in her tenure file as well as certain portions of the files of other individuals who had fared better in the tenure process.\textsuperscript{62} In rejecting the University’s academic freedom claim, the Court sought to clarify what academic freedom involved, emphasizing that academic freedom tends to involve “content-based regulation.”\textsuperscript{63} In this case, there was no allegation that the “subpoenas are intended to or will in fact direct the content of university discourse toward or away from particular subjects or points of view,” and the Court found the University’s academic freedom claim too “attenuated”\textsuperscript{65} to warrant protection under the First Amendment.

Suppose, however, that we modify the facts of EEOC. Suppose that the institution is not trying to discriminate against an individual on the basis of her sex or nationality but, instead, is simply maintaining that it does not wish to award tenure to someone whose research is on a

\textsuperscript{58} citing Keyishian, 385 U.S. at 603; Sweezy, 354 U.S. at 250.
\textsuperscript{59} Ewing, 474 U.S. at 226 (citing Bakke, 438 U.S. at 312; Sweezy, 354 U.S. at 263 (Frankfurter, J., concurring in result)) (emphasis added).
\textsuperscript{60} 493 U.S. 182 (1990).
\textsuperscript{61} Id. at 185 (“the charge alleged that Tung was the victim of discrimination on the basis of race, sex, and national origin”).
\textsuperscript{62} Id. at 186 (“the Commission's Acting District Director issued a subpoena seeking, among other things, Tung's tenure-review file and the tenure files of the five male faculty members identified in the charge”).
\textsuperscript{63} See id. at 197.
\textsuperscript{64} Id. at 198.
\textsuperscript{65} Id. at 199.
subject not valued by the University. In that event, we might have an example pitting the academic freedom of the individual against the academic freedom of the institution, assuming that the institutional claims about wishing to support only certain areas of research were not pretextual. The EEOC Court emphasized that the Constitution affords protection to “legitimate academic decisionmaking,” implying that the institutional claim of academic freedom might have won the day under other circumstances, and it is simply unclear whether the academic freedom of the individual would have trumped the academic freedom of the institution were there no possible bias claims clouding the picture.

B. School Employees and the First Amendment More Generally

Several of the cases involving the First Amendment rights of school employees have involved issues having nothing to do with classroom behavior. For example, in Pickering v. Board of Education, the Court discussed the First Amendment rights of a high school teacher who had been fired for having written a letter to the editor making critical comments about members of the Board. After a proposal to increase the tax rate so as to increase school funding was defeated at the polls, Marvin Pickering wrote a letter to the editor of a local newspaper criticizing “allocation of financial resources between the schools' educational and athletic programs.” In explaining why Pickering was fired, the Board claimed that his published comments “damaged the professional reputations of … the school administrators, would be

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66 See id. at 185 (“the Personnel Committee had attempted to justify its decision ‘on the ground that the Wharton School is not interested in China-related research.’”).
67 See id. (“This [the Personnel Committee’s] explanation, Tung's charge alleged, was a pretext for discrimination: ‘simply their way of saying they do not want a Chinese-American, Oriental, woman in their school.'”).
68 Id. at 199.
70 See id. at 566.
71 See id.
disruptive of faculty discipline, and would tend to foment ‘controversy, conflict and dissension’ among teachers, administrators, the Board of Education, and the residents of the district.”

The Pickering Court rejected 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.” At the same time, however, the Court recognized that “the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.” The difficult job for the courts was to “arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”

The Pickering Court rejected that Pickering’s comments would interfere with daily school functioning, noting that the statements were “in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher.” Because that was so, “no question of maintaining either discipline by immediate superiors or harmony among coworkers [was] presented.” While admitting that Pickering’s relationship with the Board and the superintendent might now be somewhat strained, the Court concluded that those were “not the kind of close working relationships for which it can persuasively be claimed that

72 Id. at 567
73 Id. at 568. See also Madison Joint School District v. Wisconsin Employment Relations Commission, 429 U.S. 167, 175 (1976) (teacher could not be excluded from open forum addressing teacher labor issues).
74 Pickering, 391 U.S. at 568.
75 Id.
76 Id. at 569-70.
77 Id. at 570.
personal loyalty and confidence are necessary to their proper functioning.” The Court held that Pickering’s statements were protected by the First Amendment.

So, too, the Court protected a teacher’s public statements on matters of public interest in *Perry v. Sindermann*, although this plaintiff was teaching in a community college. Sindermann had publicly criticized the Texas Board of Regents, and the Regents eventually decided not to renew his contract. They neither provided an official explanation of their decision nor offered him an “opportunity for a hearing to challenge the basis of the nonrenewal.” The Court explained that the government “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.” In support of its position, the Court cited both *Tucker* and *Keyishian*.

The First Amendment rights of public employees do not merely protect critical speech when there is little chance that the criticized individual will have contact with the person making the critical comments. In *Givhan v. Western Line Consolidated School District*, the Court discussed whether a teacher’s comments to her principal about desegregation efforts were protected by the First Amendment. In a series of private encounters with her principal, Bessie Givhan criticized the school’s employment policies, which she perceived “to be racially

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78 Id.
79 See id. at 574.
80 408 U.S. 593 (1972).
81 Sindermann was employed as a “professor of Government and Social Science at Odessa Junior College.” See id. at 594.
82 Id. at 595 (“on one occasion, a newspaper advertisement appeared over his name that was highly critical of the Regents”).
83 Id. (“they provided him no official statement of the reasons for the nonrenewal of his contract”).
84 Id.
85 Id. at 597.
86 See id. at 598.
88 See id. at 412.
discriminatory in purpose or effect.” 89 The principal had claimed that Givhan’s manner was “‘insulting,’ ‘hostile,’ ‘loud,’ and ‘arrogant,’” 90 which might lead one to infer that Givhan and the principal might have some difficulty working together in the future. The Court nonetheless made clear that Givhan’s statements were protected. 91

An individual who exercises her First Amendment rights will not be immune from punishment for misdeeds unrelated to her expression. Thus, for example, an individual who committed infractions that would justify her being fired would not be immune from disciplinary action just because she had exercised her First Amendment rights on an unrelated matter. 92

There have been other cases in the Supreme Court’s jurisprudence dealing with the First Amendment rights of public employees, 93 although none of them involved teachers. Indeed, Garcetti did not involve a teacher either, and the possible doubts cast on the viability of First Amendment protections for academic freedom arose in dicta.

C. Garcetti

Garcetti v. Ceballos 94 involved an individual, Richard Ceballos, who worked as a deputy district attorney for the Los Angeles County District Attorney’s Office. 95 A defense attorney had asked Ceballos to review one of his cases, 96 a practice that allegedly was not uncommon. 97

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89 Id. at 413.
90 Id. at 412.
91 See id. at 415-16 (“The First Amendment forbids abridgment of the ‘freedom of speech.’ Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public.”).
92 See id. at 416 (adverse employment action will not be overturned if the employer can show that the action would have been taken even if First Amendment rights had not been exercised). See also Mt. Healthy City School Dist. Bd. of Educ. v. Doyle 429 U.S. 274, 286 (1977) (explaining that a “candidate ought not to be able, by engaging in such [First Amendment] conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record”).
95 See id. at 413.
96 Id. at 414.
Ceballos believed that there were serious deficiencies in the affidavit that had provided the basis obtaining a “critical” search warrant, and he communicated his reservations to his superiors both orally and in a memo. Ceballos recommended dismissing the case, although his superior decided to proceed with the case anyway. Ceballos claims that he was later subjected to adverse employment actions for having engaged in protected expressive activities.

The Court rejected that his expressive activities were protected by the First Amendment—“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.” The Court understood that its holding might have broad ramifications. For example, such a formulation of the relevant test is subject to manipulation. Thus, an employer might expand the descriptions of employee job duties and thereby immunize more and more kinds of comments from constitutional review. Nonetheless, the Court rejected that employee rights would be restricted through the creation of “excessively broad job descriptions,” perhaps believing that such manipulative attempts would be easy to spot. That said, however, the Court refused to “articulate a comprehensive framework for defining the scope of an employee's duties.”

The Garcetti Court acknowledged that its adopted position might have implications for the degree to which academic freedom was protected by the Constitution: “There is some argument

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97 See id. (“According to Ceballos, it was not unusual for defense attorneys to ask calendar deputies to investigate aspects of pending cases.”).
98 Id. at 413.
99 See id. at 414.
100 Id.
101 See id.
102 Id. at 415.
103 Id. at 421.
104 Id. at 424.
105 Id.
that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence.”

However, after acknowledging the possibility, the Court chose not to address it: “We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”

But by raising the issue and saying no more about it, the Court virtually invited the circuits to come up with their own views about the extent to which Garcetti modified the existing jurisprudence. Regrettably, the circuits have not only accepted the invitation, but have sometimes chosen to eviscerate academic freedom guarantees in ways that were unnecessary, unwise, and contradicting the spirit if not the letter of the Court’s academic freedom jurisprudence.

In his Garcetti dissent, Justice Souter articulated several worries about the Court’s new approach. For example, he noted that a government might try to limit the speech of publicly employed teachers “by the simple expedient of defining teachers’ job responsibilities expansively, investing them with a general obligation to ensure sound administration of the school.”

Justice Souter’s point is well-taken, although not merely because “excessively broad job descriptions” might be adopted by state employers trying to game the system so that their employment actions would be immunized from First Amendment review. On the contrary, the same result would occur when there were very good reasons to expand job descriptions. For example, universities benefit when the faculty are included in school governance, and an

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106 Id. at 425.
107 Id.
108 See notes 114-end and accompanying text infra.
109 Garcetti, 547 U.S. at 431 n.2 (Souter, J., dissenting).
110 Id. at 424.
academic institution’s decision to expand the faculty role in university affairs need not involve a covert attempt to render constitutional guarantees inapplicable. Nonetheless, the Court may now have added a cost to be weighed in the balance when faculty are deciding the degree to which they wish to take on increased responsibility, namely, that individuals taking on the privilege of faculty governance may now have thereby lost constitutional protection for expression that might otherwise have been subject to First Amendment guarantees.

Justice Souter noted in addition that the newly announced doctrine in Garcetti might have implications for academic freedom both with respect to what occurs in the classroom and with respect to published scholarship. Thus, the “ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor.”

By the same token, Justice Souter noted that part of the job of being a professor is to “speak and write.” But that means that those job-related activities (teaching, speaking, research) might not receive First Amendment protection.

How far does the Garcetti analysis extend? This is unclear. The Garcetti majority refused to discuss whether the academic freedom of state teachers and professors is protected by the First Amendment. As should not be surprising, the circuits have not been unanimous in their analysis of the degree to which academic freedom is protected by the First Amendment, although some of the decisions bode poorly for robust protection of academic freedom even at the university level.

III. The Circuits’ Post-Garcetti response.

Several circuits have addressed academic freedom issues since the Court issued Garcetti. As should not be surprising, there is much disagreement about the extent to which the First

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112 Garcetti, 547 U.S. at 438 (Souter J., dissenting).
113 Id. (Souter J., dissenting).
Amendment protects academic freedom. Courts disagree about the extent to which professors are protected in the classroom, in their research, in matters related to other duties, and even about whether academic freedom applies to individuals at all.

A. Academic Freedom in the Classroom

In Piggee v. Carl Sandburg College,\(^{114}\) the 7th Circuit analyzed whether Martha Piggee’s constitutional rights were violated when she was admonished and eventually not rehired by her department for her communications to a student during clinical instruction time. Jason Ruel was enrolled in the cosmetology program at Carl Sandburg College,\(^{115}\) and he took several classes from Piggee. One day during a clinical class, Piggee stuck some pamphlets in Ruel’s smock advancing the view that “homosexuality is an abomination.”\(^{116}\) Ruel complained to the director of the cosmetology program, because he “did not appreciate being called an abomination, a child molester, or a rapist and a deviant.”\(^{117}\) The Affirmative Action Officer and the Equal Employment Opportunity Officer found that Ruel had been subjected to a hostile work environment.\(^{118}\)

Piggee, who was a part-time instructor, was not rehired the next semester, and she sued. The court characterized her complaint as involving “her ability to speak at the workplace, and in particular her ability to discuss matters of religious concern there.”\(^{119}\) To resolve whether her constitutional rights had been violated, the 7\(^{th}\) Circuit looked to Garcetti, citing the language in that case in which the Court explained that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes,

\(^{114}\) 464 F.3d 667 (7th Cir. 2006).
\(^{115}\) Id. at 668.
\(^{116}\) Id.
\(^{117}\) Id. at 669.
\(^{118}\) See id.
\(^{119}\) Id. at 679.
and the Constitution does not insulate their communications from employer discipline.” 120 The Piggee court then explained, “No college or university is required to allow a chemistry professor to devote extensive classroom time to the teaching of James Joyce's demanding novel Ulysses, nor must it permit a professor of mathematics to fill her class hours with instruction on the law of torts.” 121 Basically, the court was trying to draw a line between speech that was appropriate for the course and speech that was not. Indeed, the court wrote, “Classroom or instructional speech, in short, is inevitably speech that is part of the instructor’s official duties, even though at the same time the instructor’s freedom to express her views on the assigned course is protected.” 122 Here, the court was trying to draw a line between expression related to the course and hence protected, and expression unrelated to the course and thus not protected. While such a distinction is easy to draw in some cases, there will be other cases in which it would be difficult to tell whether the speech was sufficiently closely related to the course to be protected or, instead, had too attenuated a connection to trigger constitutional guarantees..

The Piggee court explained that “the college had an interest in ensuring that its instructors stay on message while they were supervising the beauty clinic, just as it had an interest in ensuring that the instructors do the same while in the classroom.” 123 Because “Piggee's 'speech,' both verbal and through the pamphlets she put in Ruel's pocket, was not related to her job of instructing students in cosmetology,” her academic freedom was not infringed by the college’s refusal to renew her contract.

Suppose that Martha Piggee had instead offered her views of what constituted beauty during class. On the one hand, such views might make the clinic a hostile workplace insofar as the

120 Id. at 670 (citing Garcetti, 547 U.S. at 421).
121 Id. at 671.
122 Id.
123 Id. at 672.
expressed pronouncements about beauty implicitly or explicitly incorporated particular racial, cultural or gendered assumptions about how people should look.\(^{124}\) On the other hand, those comments would reflect Piggee’s sincere professional judgments about beauty, which would certainly be germane to the course. The point here is merely that while the distinction made by the 7th Circuit would be helpful in some cases, there would be other cases where it simply would not be clear whether academic freedom would protect the teacher’s expression.

The 7th Circuit also addressed the academic freedom of primary and secondary school teachers with respect to the subject matters and perspectives covered in the classroom. In \textit{Mayer v. Monroe County Community School Corporation},\(^{125}\) the court suggested that “the first amendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system.”\(^{126}\) The \textit{Mayer} court was not thereby denying that academic freedom applies to primary and secondary school teachers entirely, expressly refusing to “consider what rules apply to publications (scholarly or otherwise) by primary and secondary school teachers or the statements they make outside of class.”\(^{127}\) Nonetheless the court seemed to be distinguishing between the degree of academic freedom enjoyed by primary and secondary professors on the one hand and college and university professors on the other. Yet, the rationale justifying exclusion of viewpoints that were not in accord with the viewpoint of the school

\(^{124}\) Cf. Tristin K. Green, \textit{Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis}, 86 \textit{N.C. L. Rev.} 379, 418 (2008) (“To create space for maintaining identity category salience, I propose that employers be required to provide accommodation for appearance traits that an employee (or applicant) claims signal identification with a subgroup recognized by Title VII, such as race, sex, or national origin.”).  
\(^{125}\) \textit{Id.} at 477 (7th Cir. 2007)  
\(^{126}\) \textit{Id.} at 480. \textit{Id.} at 480. \textit{See also} \textit{Brown v. Armenti}, 247 F.3d 69, 75 (3rd Cir. 2001) (“a public university professor does not have a First Amendment right to expression via the school’s grade assignment procedures”).  
\(^{127}\) \textit{Mayer}, 474 F.3d at 480.
system would seem equally applicable to a professor’s viewpoints that were contrary to the university’s viewpoit.

The point is well-illustrated by Edwards v. California University of Pennsylvania, in which the 3rd Circuit analyzed whether public university professors had a right to determine what was taught in the classroom. The court held that the professors did not, reasoning that “the University was acting as speaker and was entitled to make content-based choices in restricting Edwards's syllabus.” Because the state does not offend constitutional guarantees when it controls its own message, the court reasoned that the plaintiff’s First Amendment rights were not restricted by the university limitation.

The Edwards court held that while the plaintiff had a right to advocate outside the classroom for the use of certain curricular materials within the classroom, such a right did not entitle him in addition to put his recommended ideas into practice if doing so would violate university dictates. Apparently, the case had arisen after one of the students had complained that the professor had used his Introduction to Educational Media class to “advance religious ideas.”

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128 156 F.3d 488 (3rd Cir. 1998).  
129 See id. at 491 (“a public university professor does not have a First Amendment right to decide what will be taught in the classroom”).  
130 See id. (“a public university professor does not have a First Amendment right to decide what will be taught in the classroom”).  
131 Id. at 492.  
132 Id. at 491 (“Our conclusion that the First Amendment does not place restrictions on a public university's ability to control its curriculum is consistent with the Supreme Court's jurisprudence concerning the state's ability to say what it wishes when it is the speaker.”) (citing Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 833-34 (1995))  
133 Id. (“Edwards has a right to advocate outside of the classroom for the use of certain curriculum materials”).  
134 Id. (“he does not have a right to use those materials in the classroom”). See also Sheldon H. Nahmod, Public Employee Speech, Categorical Balancing and § 1983: A Critique of Garcetti v. Ceballos, 42 U. Rich. L. Rev. 561, 583-84 (2008) (“Because public elementary, secondary, and higher education teachers are public employees who are paid to speak, Garcetti could be read for the proposition that little if any speech uttered in the classroom by a public school teacher or professor.”).  
135 Edwards, 156 F.3d at 489.
Both the 3rd and 7th Circuits suggested that professors might well have protection for their comments outside rather than inside the classroom, and it is simply unclear whether the 3rd and 7th Circuits disagree about the extent, if any, to which academic freedom protects comments inside the classroom that are germane to the course. Thus, the 3rd Circuit would give great discretion to the university to decide whether a professor was on message when offering the state’s position on the matter at issue, and it is simply unclear whether the 7th Circuit would also construe a professor’s comments as expressing the state university’s message and hence not subject to First Amendment protections.

B. Academic Freedom for Professors Commenting on University Administration Matters

The focus of the 3rd and 7th circuit opinions discussed above was on comments made in the classroom context. Both circuits suggested that comments made outside of the classroom might receive 1st Amendment protection. Suppose, then, that we consider a professor who is expressing her views outside of the classroom. However, suppose further that the comments at issue are not about the content of the professor’s research but, instead, about the conduct of university business. Decisions in the 7th and 9th Circuits suggest that such comments might also fall outside of 1st Amendment protections.

In Hong v. Grant, a California district court examined whether the First Amendment rights of a professor at the University of California at Irvine were denied when he made critical comments about the hiring and promotion of other professors and when he criticized the use of lecturers to teach courses. The district court reasoned that the “First Amendment does not constitutionalize every criticism made by a public employee concerning the workplace,”

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136 516 F.Supp.2d 1158 (C.D. Cal. 2007).
137 See id. at 1160.
138 Id. at 1161.
reasoning that if “a public employee's speech is made in the course of the employee's job duties and responsibilities, the speech is not protected under the First Amendment.” 139

The Hong court read Garcetti to establish that a “public employer is extended unfettered discretion to regulate employee speech that it 'has commissioned or created.'” 140 Noting the Garcetti Court’s conclusion that “Ceballos did not act as a citizen when he executed his professional responsibilities that included writing and speaking critically of his employer's disposition of criminal cases,” 141 the Hong court reasoned that an “employee's official duties are not narrowly defined, but instead encompass the full range of the employee's professional responsibilities.” 142 Thus, the Hong court suggested that there was no 1st Amendment protection for comments related to any of the plaintiff’s institutional duties.

Yet, immunizing all expression related to any of Hong’s professional responsibilities from constitutional review would in effect cabin a vast amount of expression from 1st Amendment analysis. The court was aware of the wide net that it had thereby cast, noting, “While Mr. Hong's professional responsibilities undoubtedly include teaching and research, they also include a wide range of academic, administrative and personnel functions in accordance with UCI's self-governance principle.” 143

According to the Hong court, the whole range of activities included within Hong’s professional responsibilities could be the basis of adverse employment action without any recourse to the First Amendment. Such a broad reading of Garcetti was especially unfortunate in this case, because there was evidence that the adverse employment action taken in Hong’s case

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139 Id.
140 Id. at 1165 (citing Garcetti, 547 U.S. at 422)
141 Id. (citing Garcetti, 547 U.S. at 421).
142 Id. at 1166.
143 Id.
was based on factors having nothing to do with Hong’s statements, i.e., the sanctions would likely have been upheld, even had academic freedom protections been construed much more broadly.\textsuperscript{144} The \textit{Hong} decision was affirmed on appeal, although on different grounds.\textsuperscript{145}

\textbf{Renken v. Gregory}\textsuperscript{146} involved Kevin Renken, a professor at the University of Wisconsin, Milwaukee, who had complained about the University’s use of grant funds.\textsuperscript{147} Renken had applied for a National Science Foundation grant to enhance the education of engineering undergraduates.\textsuperscript{148} The NSF awarded a grant to the University, conditioned on the university’s providing cost-sharing funds.\textsuperscript{149} Renken claimed that the university’s proposal regarding its own contribution violated NSF regulations.\textsuperscript{150}

After a series of letters between the Dean and Renken and after Renken rejected a compromise proposal,\textsuperscript{151} the University decided to return the grant.\textsuperscript{152} Renken filed suit, claiming that he had been punished for asserting his First Amendment rights.\textsuperscript{153} After citing \textit{Garcetti},\textsuperscript{154} the 7th Circuit wrote, “Only if Renken was speaking as a citizen and not as an employee, will we ‘inquire into the content of the speech’ to ascertain whether his speech touched on a matter of public concern to determine whether it is protected speech.”\textsuperscript{155} The court noted that “Renken

\begin{itemize}
  \item \textsuperscript{144} See id. at 1164 (“The complaint was ultimately rejected because “the merit action was initiated and completed in March 2005, well before the April 2005 whistleblower complaint on April 25, 2005.” (Confidential Factfinder Report, Def. Exh. 38, p. 166.) The report further concluded there was ample evidence to support the denial of Mr. Hong’s merit increase, an increased teaching load and a proposed change in series from full Professor.”).\n  \item \textsuperscript{145} Hong v. Grant, 403 Fed.Appx. 236, 238, 2010 WL 4561419, 1 (9th Cir. 2010) (“Having concluded that each of the defendants is entitled to immunity from Hong’s claims, we need not proceed to the merits of his First Amendment argument.”).\n  \item \textsuperscript{146} 541 F.3d 769 (7th Cir. 2008)\n  \item \textsuperscript{147} See id. at 770.\n  \item \textsuperscript{148} See id. at 771.\n  \item \textsuperscript{149} See id.\n  \item \textsuperscript{150} Id.\n  \item \textsuperscript{151} See id. at 773.\n  \item \textsuperscript{152} See id.\n  \item \textsuperscript{153} Id.\n  \item \textsuperscript{154} See id.\n  \item \textsuperscript{155} Id. (citing Spiegla v. Hull, 481 F.3d 961, 965 (7th Cir.2007)).
\end{itemize}
called attention to fund misuse relating to a project that he was in charge of administering as a
University faculty members [sic],” and reasoned that when doing so he “was speaking as a
faculty employee, and not as a private citizen, because administering the grant as a PI [principal
investigator] fell within the teaching and service duties that he was employed to perform.” At
least in part because he would have received a reduced teaching load for serving as the principal
investigator of the project, Renken’s criticisms were thought to be part of his official duties
and hence beyond First Amendment protection.

One can understand how an individual hired to speak for the government would not have
constitutional protection to deliver a message antithetical to what the government hired the
individual to say. The difficulty in applying that analysis to many cases in the academic
context is that the government did not hire the teacher to offer a particular message.

Suppose that Renken had not complained internally but instead had published a letter to the
editor in the local newspaper about the University’s possible misuse of the grant funds. That
would have made his communication more Pickering-like, and might have made the speech
protected by the First Amendment. However, similarity to Pickering notwithstanding, an

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156 Id. at 774.
157 Id.
158 See id.
Judgments, 83 Iowa L. Rev. 953, 989 (1998) (suggesting that the First amendment does not protect the employee
who is speaking for the government).
160 Beckstrom, supra note 7, at 1227 (“Academic speech is less analogous to the speech of traditional public
employees because universities do not hire academics to promote a specific government message. Universities
provide funding to academics to teach and produce scholarship.”).
161 See Nahmod, supra note 134, at 580 (“Garcetti creates an incentive for public employees who feel strongly about
their concerns to go public with their whistle-blowing and other grievances in an attempt to retain protection under
the First Amendment, thereby potentially causing even greater harm to public employers than purely internal
employee speech would.”). See also Robert J. Tepper & Craig G. White, Speak No Evil: Academic Freedom and the
protection of a faculty member’s freedom to speak or write as a public citizen as a tenet of academic freedom has
always been controversial. In the end, however, if Garcetti applies to teaching, research, and service, it may be the
only tenet that may be judicially enforced.”); Robert S. Rosborough IV, Comment, A “Great” Day for Academic
individual making a public criticism via radio or a newspaper might not receive any more constitutional protection than she would have received had she made the comments within the organizational structure.\textsuperscript{162}

Courts are reluctant to accord First Amendment protections to teacher’s or professor’s statements if their expressions are pursuant to their official duties.\textsuperscript{163} That reluctance may also extend to comments made to the public media.\textsuperscript{164} Suppose, however, that the individual’s comments are not made pursuant to her job duties. Even such comments might not be accorded First Amendment protection.

\textbf{Gorun v. Sessoms}\textsuperscript{165} involved a claim by Wendell Gorum, a tenured professor at Delaware State University, that he had been subject to retaliation for having engaged in speech protected by the First Amendment.\textsuperscript{166} For example, Gorum had spoken out against hiring Allem Sessoms as University President.\textsuperscript{167} Sessums was not only hired for that position but was the person who ultimately decided that Gorum must be dismissed.\textsuperscript{168} Further, Gorum had acted as an advisor to a student, DaShaun Morris, who had been accused of violating the schools “zero-tolerance policy

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\textsuperscript{162} See Omokehnde v. Detroit Board of Educ., 563 F.Supp.2d 717, 726 (E.D. Mich. 2008) (“Under the particular circumstances of this case, the Court finds that Plaintiff’s anonymous letter to a newspaper reporter stands on the same legal footing as her prior, internal complaints to her supervisor—namely, that neither constitutes speech “as a citizen” that qualifies for First Amendment protection.”).

\textsuperscript{163} See Renken, 541 F.3d at 774.


\textsuperscript{165} 561 F.3d 179 (3rd Cir. 2009).

\textsuperscript{166} Id. at 183

\textsuperscript{167} Id.

\textsuperscript{168} Id.
against weapons possession.”\textsuperscript{169} Finally, Gorum had instructed a committee member to withdraw a mistakenly-made invitation to Sessoms to speak at a Martin Luther King Prayer Breakfast.\textsuperscript{170}

The 3rd Circuit reasoned that none of Gorum’s activities was protected by the First Amendment. For example, his assistance to the student, Morris, came within the scope of his duties because of his knowledge of and experience with the student disciplinary code,\textsuperscript{171} notwithstanding Gorum’s having had no duty to come to Morris’s aid.\textsuperscript{172} His advice to withdraw the invitation to speak was made when he was the chairman of the speakers committee for the fraternity’s Prayer Breakfast. Because he had that position by virtue of his being a faulty member, his advice did not constitute an expression protected by First Amendment guarantees.\textsuperscript{173} Rather, the recommendation “was made as a public employee engaging in his official duties.”\textsuperscript{174}

The 3rd Circuit acknowledged Garcetti’s refusal to decide whether “the ‘official duty’ analysis ‘would apply in the same manner to a case involving speech related to scholarship or teaching.’”\textsuperscript{175} However, the court reasoned that “Gorum’s actions so clearly were not ‘speech related to scholarship or teaching,’”\textsuperscript{176} that the court’s holding would not imperil academic freedom in the college and university setting.\textsuperscript{177} Further, the court did not worry, for example, that it was not Gorum’s duty to help defend Morris. Rather, it sufficed that his actions in that context were connected to the function he performed at the university. Thus, while it is correct to

\begin{footnotes}
\footnote{169}{Id.}
\footnote{170}{See id. at 184.}
\footnote{171}{See id. at 186.}
\footnote{172}{Gorum v. Sessoms 561 F.3d 179, 185 (C.A.3 (Del.),2009) (“Gorum asserts that the assistance he provided to Morris was protected citizen speech because it went beyond his specified responsibilities in the Collective Bargaining Agreement.”).}
\footnote{173}{Id.}
\footnote{174}{Id.}
\footnote{175}{Id. (citing Garcetti, 547 U.S. at 425).}
\footnote{176}{Id.}
\footnote{177}{Id.}
\end{footnotes}
note that \emph{Garcetti} did not define the duty that was beyond First Amendment protection,\footnote{Ramona L. Paetzold, \textit{When Are Public Employees Not Really Public Employees? In the Aftermath of Garcetti v. Ceballos}, 7 \textit{First Amend. L. Rev.} 92, 97 (2008) (``\emph{Garcetti} does not provide sufficient guidance on the meaning of `duty’ for purposes of determining how an employee's speech is a part of his or her job. Employees may speak on a variety of topics, but some of that speech is discretionary. Official job duties do not necessarily compel speech on a particular topic.’’) See also Robert M. O'Neil, \textit{Academic Speech in the Post-Garcetti Environment}, 7 \textit{First Amend. L. Rev.} 1, 13 (2008) (``Most federal courts of appeals have taken a fairly expansive view of `official duties’ and accordingly, more often than not, have denied recourse to outspoken public employees. ’’).} that has not prevented the circuits from construing the exception rather broadly.

In addition, the 3rd Circuit noted that the speech at issue of Gorum’s was not a matter of public concern.\footnote{See \textit{Gorum}, 561 F.3d at 187.} Finally, the 3rd Circuit agreed with the district court that Gorum would have been fired even had he never engaged in activities that might have been thought to fall within First Amendment protection.\footnote{See \textit{id.} at 188.} Gorum, “without the professor-of-record's permission, had changed withdrawals, incompletes, and failing grades to passing grades for 48 students in the Mass Communications Department.”\footnote{\textit{Id.} at 182.} But this means that the 3rd Circuit’s expansive reading of \emph{Garcetti} was unnecessary.

Basically, Gorum had changed the grades of almost 50 students in violation of university policy.\footnote{See \textit{id.} at 188.} Assuming that such a violation was itself sufficiently egregious to warrant dismissal,\footnote{\textit{Id.} at 188 (discussing the egregriousness of “Gorum's disregard for the academic integrity of DSU and his violation of students' rights to an impartial educational experience” and that “Sessoms never wavered from his position that Gorum deserved dismissal.”).} then Gorum would not have been protected even in light of the jurisprudence existing prior to \emph{Garcetti}.\footnote{See note 92 and accompanying text \textit{supra} (noting that the First Amendment will not immunize an individual from adverse employment action if misdeeds not involving expression justify that adverse employment action).} Even had all of Gorum’s expression been protected by the First Amendment, the firing would still have been upheld, but he was fired for his non-expressive activities. But this means that \textit{Gorum’s} extension of immunity from First Amendment review to expression that was not even part of Gorum’s official responsibilities was unnecessary. Further, notwithstanding that
the opinion could have upheld the firing without doing mischief to academic freedom, the Gorum opinion may well now be cited to justify a very restrictive view of First Amendment guarantees.  

C. Protection for Comments Made as a Private Citizen

The 4th Circuit in Adams v. Trustees of the University of North Carolina-Wilmington addressed whether Garcetti applies to research conducted by a university professor. The Adams court distinguished among the types of functions performed by a professor, reasoning that there “may be instances in which a public university faculty member's assigned duties include a specific role in declaring or administering university policy, as opposed to scholarship or teaching.” In such an instance, “Garcetti may apply to the specific instances of the faculty member's speech carrying out those duties.” However, the court noted, “[a]pplying Garcetti to the academic work of a public university faculty member … could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment.” The 4th Circuit thus seemed to be protecting academic freedom from potential destruction by Garcetti.

Michael Adams taught at the University of North Carolina Wilmington in the Department of Sociology and Criminal Justice. He was tenured after receiving strong teaching evaluation, publishing several articles, and being involved in several service-related activities.

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185 See, for example, Bellaman v. Corbett, 2011 WL 2893644, 2 (M.D. Pa. 2011) (“If speech arises from ‘“special knowledge or experience”’ an employee acquires while doing her job, the speech ‘might’ be considered part of her official duties.”) (citing Gorum, 561 F.3d at 185 (quoting Foraker v. Chaffinch, 501 F.3d 231, 240 (3d Cir.2007)).

186 640 F.3d 550 (4th Cir. 2011).

187 Id. at 563.

188 Id.

189 Id. at 564.

190 Id. at 553.

191 Id.
Two years after receiving tenure, he had a religious conversion and became very vocal about political and social issues.\textsuperscript{192} He continued to receive strong teaching evaluations, and applied for promotion to full professor six years after having received tenure.\textsuperscript{193}

As part of his promotion file, Adams listed some of his non-refereed publications.\textsuperscript{194} However, according to the Faculty Handbook, those seeking promotion to full professor must meet the following standard under the research prong:

\begin{quote}
[F]aculty are “expected to demonstrate a tangible record of professionally-reviewed substantial contributions to one's discipline” including “more tangible evidence of accomplishment than that of the associate professor rank, [although] the difference in artistic and research expectations for a full professor is not solely quantitative. Greater quality, maturity, significance and originality ... are expected at this rank.”\textsuperscript{195}
\end{quote}

After reviewing “the record in the light most favorable to Adams,”\textsuperscript{196} the 4\textsuperscript{th} Circuit agreed with the district court that the plaintiff “failed to set forth direct evidence of religious discrimination.”\textsuperscript{197} The court of appeals also agreed that the plaintiff had failed to establish “his prima facie case—that he was denied a promotion under circumstances giving rise to an inference of unlawful discrimination.”\textsuperscript{198} Indeed, the Adams court noted that the school had “offered numerous legitimate reasons for the decision not to promote Adams, including the small number of peer-reviewed single author publications since Adams’ last promotion.”\textsuperscript{199}
The 4th Circuit sought to correct a misinterpretation of Garcetti allegedly contained in the district court opinion. The district court had interpreted the inclusion of Adams’s “columns, publications and public appearances in his promotion application” as implicitly acknowledging that he was acting as a faculty member when making them.\(^{200}\) However, the 4th Circuit rejected that protected speech could be “converted into unprotected speech based on its use after the fact.”\(^{201}\)

The 4th Circuit is quite sensibly suggesting that protected speech should not be subject to retroactive transformation by its subsequent use, but a separate issue is whether the speech when delivered was made by a private citizen on a matter of public concern. The 4th Circuit implied that there was no difficulty in offering the proper characterization of the speech at the time it was made—after all, Adams had been addressing a variety of matters of public concern—“Adams' columns addressed topics such as academic freedom, civil rights, campus culture, sex, feminism, abortion, homosexuality, religion, and morality. Such topics plainly touched on issues of public, rather than private, concern.”\(^{202}\) But the question for the court was not whether these matters involved issues of public concern but whether Adams was speaking as a private citizen rather than as a university employee when discussing these matters.

Perhaps Adams was writing his column in his capacity as a private citizen. However, the 4th Circuit’s discussion is misleading because of its emphasis on the subject matter of the columns, as if no other matter would need to be addressed. If, for example, the reason that Adams had

\(^{200}\) See id. at 561.  
\(^{201}\) Id.  
\(^{202}\) Id. at 565.
access to the public media was by virtue of his state position, then a court might well hold that the individual was speaking on a matter of public concern as a state employee.\textsuperscript{203}

It is important to understand the effect of the Adams remand. Adams will not be successful unless he can show that he was not promoted to full professor because of his comments as a private citizen on a matter of public concern. Even if he can show that, however, he still will not be successful if the university can show that there was independent reason for his being denied the promotion and that he would not have received the promotion even had he never made those comments, e.g., because of “the small number of peer-reviewed single author publications since Adams’ last promotion.”\textsuperscript{204}

One reading the Adams opinion might have inferred that the 4\textsuperscript{th} Circuit was saving academic freedom from an overly expansive reading of Garcetti. The court explained, “Applying Garcetti to the academic work of a public university faculty member under the facts of this case could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment.”\textsuperscript{205} But under the facts of this case, the work discussed was not really academic—rather, it involved public comment on matters of public concern by a private citizen. Indeed, the court explained that “no individual loses his ability to speak as a private citizen by virtue of public employment.”\textsuperscript{206}

Yet, this prohibited extension of Garcetti still permits Garcetti to do a great deal of work. Thus, for example, an individual would not be protected by the First Amendment for her comments made pursuant to her academic duties, which might include commenting on school

\textsuperscript{203} See, for example, Foley v. Town of Randolph, 598 F.3d 1 (1\textsuperscript{st} Cir. 1010) (holding that fire chief speaking to the media about a fire was speaking as a public employee rather than as a private citizen).

\textsuperscript{204} Adams, 640 F.3d at 559.

\textsuperscript{205} Id. at 564.

\textsuperscript{206} Id.
policies. Further, academic research involving controversial issues would presumably not count as speech by a private citizen on matters of public interest and hence would not trigger the protections afforded by Adams.

One worry is that the differing circuits’ views will be combined, which will make Garcetti extremely robust in the way that it undercuts academic freedom. In Renken, the 7th Circuit suggested that because Renken’s comments were made in the context of his teaching and research duties, First Amendment protections did not apply. In Gorum, the 3rd Circuit suggested that the plaintiff’s comments were not protected precisely because they were not in the context of his teaching or research. Even Adams only seems to protect comments clearly made by someone as a private citizen on matters of public concern, and even Adams would not be successful in showing that his First Amendment rights had been abridged unless he could show both that he had been disadvantaged because of the public comments and that he would not have been subject to the adverse treatment but for those comments. Together, these cases suggest that the academic freedom of the state teacher or professor protects little if anything.

D. Academic Freedom of the Institution

A separate issue is whether academic freedom is primarily designed to protect the institution rather than an individual employed by the institution. The circuit courts have noted the

208 Sheldon Nahmod, Academic Freedom and the Post-Garcetti Blues, 7 First Amend. L. Rev. 54, 56 (2008) (“If Garcetti is taken seriously and read broadly, then all such speech and scholarship, inherently made pursuant to official employment duties, is unprotected by the First Amendment from discipline imposed by elementary, secondary, and higher level educational officials.”). Rosborough, supra note 161, at 589 (“Presumably, under the rule announced in Garcetti, a public university has the right to dismiss a professor solely because the administration disagreed with the content of his lectures, research, or publications because his speech would fall under the duties he was employed to perform. This would subject professors not only to institutional regulation through their Departments, but also to extensive regulation of the content of their scholarship.”).
209 Tepper & White, supra note 161, at 145 (“Academic freedom is often promoted as a personal right, but substantial authority suggests that courts view it primarily as an institutional right. In fact, some circuits have indicated that constitutional academic freedom is an institutional right, not necessarily an individual right.”).
potential conflict between the university and the individual. For example, the 6th Circuit has noted: “Although judicial concern has been expressed for the academic freedom of the university, the courts have also afforded substantial protection to the First Amendment freedoms of individual university professors.”\textsuperscript{210} That recognition notwithstanding, the court failed to find that a professor’s academic freedom had been infringed, because that professor was not tenured.\textsuperscript{211}

The 7th Circuit has also recognized that the term “academic freedom” is used in different ways: it may involve “the freedom of the academy to pursue its ends without interference from the government”\textsuperscript{212} or it may involve “the freedom of the individual teacher … to pursue his ends without interference from the academy.”\textsuperscript{213} However, the 1st Circuit has suggested that academic freedom is basically about protecting institutions from governmental control.\textsuperscript{214}

The difference between these views is important. If the 1st Circuit is correct, then a state cannot pass a law forcing public schools and universities to fire individuals who are members of particular political organizations. However, an institution can take adverse employment action against an individual for advocating controversial political stances in her scholarship if the institution wants to do so.

IV. Conclusion

\textsuperscript{210} Parate v. Isibor, 868 F.2d 821, 827 (6th Cir. 1989).
\textsuperscript{211} Id. at 830 (“It has long been recognized that the purpose of academic freedom is to preserve the “free marketplace of ideas” and protect the individual professor's classroom method from the arbitrary interference of university officials. University administrators, however, are free to observe, review or evaluate a nontenured professor's competence.”) (citations omitted).
\textsuperscript{212} Piarowski v. Illinois Community College Dist. 515, 759 F.2d 625, 629 (7th Cir. 1985) (citing Justice Powell's opinion in Regents of the University of California v. Bakke, 438 U.S. 265, 312 (1978); EEOC v. University of Notre Dame Du Lac, 715 F.2d 331, 335-36 (7th Cir.1983)).
\textsuperscript{213} Id.
\textsuperscript{214} See Asociacion de Educacion Privada De Puerto Rico, Inc. v. Garcia-Padilla, 490 F.3d 1, 8-9 (1st Cir. 2007) (suggesting that academic freedom protects academic institutions from governmental control).
First Amendment protections for academic freedom are diminishing rapidly for two distinct reasons. First, although the Court has long discussed the importance of academic freedom, it has never explicitly made clear whether academic freedom protects the individual, the academic institution, or both. While the Court has acknowledged that the freedom of the institution and the freedom of the individual may conflict, the Court did not explicitly state which was protected by the First Amendment. Nor has the Court helpfully addressed what courts should do when the academic freedom of the individual conflicts with the academic freedom of the institution.

Second, Garcetti recognized that restrictions on government employee speech might have important ramifications for academic freedom, but never explored that issue. This has led the circuits to fashion their own analyses, which taken together will have significantly limited if not gutted constitutional protection for instructors at all levels.

Members of the Court warned long ago that denying educators’ academic freedom inside and outside of the classroom will have significant adverse effects on students’ education and on the pursuit of knowledge. Regrettably, the Court’s current course may allow us to find out the degree to which former members of the Court were correct about the negative effects of limiting First Amendment guarantees, with education in particular and society more generally the likely victims in this badly-conceived experiment.

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215 See supra note 59 and accompanying text.