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Speak No Evil: Academic Freedom and the Application of *Garcetti v. Ceballos* to Public University Faculty

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SPEAK NO EVIL: ACADEMIC FREEDOM AND THE APPLICATION OF *GARCETTI V. CEBALLOS* TO PUBLIC UNIVERSITY FACULTY

Robert J. Tepper⁺ & Craig G. White^{}*

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Academic freedom is an important component of a public university, but is it valued enough to warrant more First Amendment constitutional protection for academic personnel than for other public employees? This Article considers this question in the context of academic freedom as a means of protecting the rights of academic personnel to speak out on matters involving teaching, research, and service—some of which may be matters of public concern. For example, suppose faculty members, through faculty-governance procedures, return a vote indicating they have no confidence in the university administration based on its spending priorities.¹ Will those faculty members voting for or against the question be protected from retaliation in the name of academic freedom?² In *Garcetti v. Ceballos*, the United States Supreme Court held that governmental employees who speak out pursuant to job responsibilities are not protected from employer discipline, based on that speech, by the First Amendment.³ Undoubtedly, there is tension between *Garcetti* and academic freedom, but to date very few cases have mentioned this tension, let alone provided a means of accommodation.⁴

It is well established that the government may not retaliate against a public employee for speech protected by the First Amendment.⁵ However the First Amendment contains no express recognition of academic freedom;⁶ rather,

1. See Martin Salazar, *Faculty Decisively Votes No Confidence*, ALBUQUERQUE J., Feb. 27, 2009, at A1–2.

2. Cases have reached varying results, yet professional academic freedom has long been thought to encompass a right to comment and criticize—within reason—university policy. See *infra* notes 208–95.

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

4. Leonard M. Niehoff, *Peculiar Marketplace: Applying Garcetti v. Ceballos in the Public Higher Education Context*, 35 J.C. & U.L. 75, 92 (2008). Cases usually offer the advantage of concrete facts and an adversarial presentation with appellate review and a written outcome. Although most cases concerning academic freedom are resolved through a university administrative process, the university counsel plays an important role in advising the institution, providing an awareness of faculty rights and responsibilities. See Robert M. O’Neil, *University Governance and Academic Freedom*, in *COMPETING CONCEPTIONS OF ACADEMIC GOVERNANCE: NEGOTIATING THE PERFECT STORM* 177, 194–98 (William G. Tierney ed., 2004). While cases can be precedential, one cannot overlook the importance of the operative facts developed, the arguments made, and the decisions rendered in the academic freedom context; persuasive value is often a function of actual case holdings—rather than observations—that can be generalized.

5. *Rankin v. McPherson*, 483 U.S. 378, 383–84 (1987) (“Even though McPherson was merely a probationary employee, and even if she could have been discharged for any reason or for no reason at all, she may nonetheless be entitled to reinstatement if she was discharged for exercising her constitutional right to freedom of expression.”).

6. U.S. CONST. amend. 1; see also David M. Rabban, *Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 237 (1990) [hereinafter Rabban, *Functional Analysis*] (“Fitting academic freedom within the rubric of the first amendment is in many respects an extremely difficult challenge. The term ‘academic freedom,’ in obvious contrast to ‘freedom of the press,’ is nowhere mentioned in the text of the first amendment.”).

such freedom is the product of constitutional interpretation and is a “special concern” of the First Amendment.⁷ At its core, professional academic freedom for college and university teachers involves the following: (1) freedom in research and publication, (2) freedom in classroom discussion concerning the curriculum, and (3) freedom to speak or write as citizens.⁸ Universities exist for the common good, which “depends upon the free search for truth and its free exposition.”⁹ As a necessity to that search, academic freedom exists not only to protect the rights of faculty in teaching, but also the rights of students in learning.¹⁰ Closely related to meaningful academic freedom is tenure, an employment status that protects academic employees from dismissal absent serious misconduct, incompetence, or financial exigency.¹¹ Tenure promotes academic freedom by providing job security to an employee after the employee has held the position for a probationary period; tenured faculty may be terminated only for cause with attendant due process.¹² Thus, while academic

7. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

8. Am. Ass’n of Univ. Professors & Ass’n of Am. Colls., 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE 3 (2006), <http://www.aaup.org/NR/rdonlyres/EBB1B330-33D3-4A51-B534-CEE0C7A90DAB/0/1940StatementofPrinciplesonAcademicFreedomandTenure.pdf> (last visited Oct. 16, 2009) [hereinafter 1940 STATEMENT]. This represents a statement of professional academic freedom that the American Association of University Professors (AAUP) has been instrumental in applying, and it certainly has influenced the development of constitutional academic freedom. See William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS. 79, 80–82 (1990). Academic freedom also has been defined more narrowly as “a personal liberty to pursue the investigation, research, teaching, and publication of any subject as a matter of professional interest without vocational jeopardy or threat of other sanction, save only upon adequate demonstration of inexcusable breach of professional ethics in the exercise of that freedom.” WILLIAM VAN ALSTYNE, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, in THE CONCEPT OF ACADEMIC FREEDOM 59, 71 (Edmund L. Pincoffs ed., 1972) [hereinafter VAN ALSTYNE, *Specific Theory of Academic Freedom*].

9. 1940 STATEMENT, *supra* note 8, at 3.

10. *Id.*; see also *Emergency Coal. to Defend Educ. Travel v. U.S. Dep’t of Treasury*, 545 F.3d 4, 15 (D.C. Cir. 2008) (Edwards, J., concurring) (“Academic freedom is not an easy concept to grasp, and its breadth is far from clear. It has generally been understood to protect and foster the independent and uninhibited exchange of ideas among teachers and students and the serious pursuit of scholarship among members of the academy.”); *Aguillard v. Edwards*, 765 F.2d 1251, 1257 (5th Cir. 1985) (“The principle of academic freedom abjures state interference with curriculum or theory as antithetical to the search for truth.”), *aff’d*, 482 U.S. 578 (1987).

11. *Hulen v. Yates*, 322 F.3d 1229, 1242–43 (10th Cir. 2003) (per curiam); *Mayberry v. Dees*, 663 F.2d 502, 514 (4th Cir. 1981). The AAUP also envisions the discontinuance of a department or program of study due to educational considerations, as well as physical or mental disability demonstrated by clear and convincing evidence, as bases for dismissal. Am. Ass’n of Univ. Professors, RECOMMENDED INSTITUTIONAL REGULATIONS ON ACADEMIC FREEDOM & TENURE 3–4 (2007), <http://www.aaup.org/NR/rdonlyres/43B77A60-BA80-4155-B61B-FF76743B5048/0/RecommendedInstitutionalRegulationsonAcademicFreedomandTenure.pdf> (last visited Oct. 16, 2009).

12. *Grimes v. E. Ill. Univ.*, 710 F.2d 386, 388 (7th Cir. 1983) (“The purpose of tenure is to protect academic freedom—the freedom to teach and write without fear of retribution for

freedom and tenure are distinct, and all faculty members have the right to academic freedom, those without tenure are more vulnerable to adverse employment action based on political factors or managerial discretion.¹³

Lay boards govern most American educational institutions, and academic freedom developed as a means of providing some balance and protection for the faculty.¹⁴ While professional standards concerning academic freedom often inform the debate, constitutional academic freedom is a narrower concept.¹⁵

Although federal and state courts have noted principles of academic freedom in their opinions,¹⁶ such principles rarely form the sole basis of the decisions; instead, academic freedom simply serves as a policy consideration supporting the decisions.¹⁷ At times, academic freedom involves a balancing of an academic's right to exchange ideas with an academic institution's right to set policy and conduct operations.¹⁸ More often than not, the balance is struck in favor of the university when university policies or directives are challenged by faculty. Thus, while courts often defer to academic freedom, they are usually

expressing heterodox ideas—and it is faculty who engage in teaching and writing.”); 1940 STATEMENT, *supra* note 8, at 4.

13. J. Peter Byrne, *Academic Freedom Without Tenure* 1 (Am. Ass'n for Higher Educ., New Pathways Working Paper Series # 5, 1997) [hereinafter Byrne, *Academic Freedom Without Tenure*].

14. J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251, 273–79 (1989) [hereinafter Byrne, *Special Concern*]; Matthew W. Finkin, *“Institutional” Academic Freedom*, 61 TEX. L. REV. 817, 825–29 (1983) [hereinafter Finkin, *“Institutional” Academic Freedom*]; Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1278 (1988).

15. Rabban, *Functional Analysis*, *supra* note 6, at 237–39, 255 (noting that fitting academic freedom within the rubric of the First Amendment is challenging and suggesting differences between professional and constitutional academic freedom).

16. *See, e.g.,* Burt v. Gates, 502 F.3d 183, 189 (2d Cir. 2007); Taggart v. Drake Univ., 549 N.W.2d 796, 800 (Iowa 1996).

17. Several circuits have concluded that academic freedom must be tied to a protected free speech or associational right in the context of protected speech. *See, e.g.,* Emergency Coal. to Defend Educ. Travel v. U.S. Dep't of Treasury, 545 F.3d 4, 18 (D.C. Cir. 2008) (Silberman, J., concurring) (“The very notion of academic freedom—as a concept distinct from the actual textual provisions of the First Amendment—is elusive.”); Schrier v. Univ. of Colo., 427 F.3d 1253, 1265–66 (10th Cir. 2005) (rejecting a claim that a professor's comments concerning university operations should enjoy more protection due to academic freedom and concluding that such an argument would elevate academic personnel above other governmental workers); Axson-Flynn v. Johnson, 356 F.3d 1277, 1293 n.14 (10th Cir. 2004) (“Although we recognize and apply this principle [of academic freedom] in our analysis, we do not view it as constituting a separate right apart from the operation of the First Amendment within the university setting.”); Bishop v. Aronov, 926 F.2d 1066, 1075 (11th Cir. 1991) (“Though we are mindful of the invaluable role academic freedom plays in our public schools, particularly at the post-secondary level, we do not find support to conclude that academic freedom is an independent First Amendment right.”).

18. *See* Bd. of Regents v. Southworth, 529 U.S. 217, 237–38 (2000) (Souter, J., concurring); Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1985) (noting that academic freedom thrives on exchange of ideas and independent decision-making by the institution).

deferring to an institutional academic freedom as opposed to an individual academic freedom. It would be a mistake, however, to conclude that academic freedom is exclusively an institutional right for two reasons. First, the roots of American academic freedom are in the faculty; as developed, “academic freedom stood for the freedom of the academic, not for the freedom of the academy.”¹⁹ Second, knowledge creation and teaching remain largely individual endeavors, and it is doubtful that a university could succeed if administrators attempted to force faculty members to research a particular topic or come to a particular conclusion.²⁰

In *Garcetti v. Ceballos*, the United States Supreme Court announced 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.”²¹ Thus, the Court vindicated managerial prerogative, while providing a disincentive for an employee to speak out about job-related matters. In dissent, Justice David Souter argued that this new rule conflicted with academic freedom because academic personnel lecture and produce scholarly work—activities long thought to be protected by academic freedom—in accordance with their official duties.²² In response, the Court explained that it was not deciding whether the new rule was applicable to “speech related to scholarship or teaching.”²³ Consequently, to understand the boundaries of academic freedom, one must also look to the framework that was in place prior to *Garcetti*: speech by a public employee was protected if it (1) involved a matter of public concern and (2) outweighed the public employer’s justification for limiting that speech.²⁴

This Article considers how the limitation established by *Garcetti* applies in the academic context given the varied responsibilities of university faculty. Part I considers the nature and contours of constitutional academic freedom in a public university setting and concludes that the doctrine of academic freedom has important limitations, particularly with respect to many academic responsibilities. This Part utilizes the framework suggested by Justice Felix Frankfurter when he explained the federal judicial concept of academic freedom: “who may teach, what may be taught, how it shall be taught, and who

19. Metzger, *supra* note 14, at 1284.

20. Rabban, *Functional Analysis*, *supra* note 6, at 242 (“It makes no sense to expect professors to engage in critical inquiry and simultaneously to allow punishment for its exercise.”).

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

22. *Id.* at 438–39 (Souter, J., dissenting).

23. *Id.* at 425 (majority opinion).

24. See *Connick v. Myers*, 461 U.S. 138, 146–52 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). A public employee must also establish causation and show that the protected speech was a motivating factor in any adverse employment action. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). A public employer could defend on the basis that the same action would have been taken regardless of the speech. *Id.*

may be admitted to study.”²⁵ Against this backdrop, Part II discusses the constitutional protection afforded employee speech and considers whether public university employees should enjoy greater protection. Finally, Part III concludes that while academic freedom may be best protected by tenure, other mechanisms apart from federal constitutional protection may offer some shelter, including state constitutional and statutory law, freedom of contract and collective bargaining provisions, and academic policy.

I. THE NATURE AND CONTOURS OF CONSTITUTIONAL ACADEMIC FREEDOM

The Supreme Court began its development of the concept of constitutional academic freedom with a series of loyalty cases, which make clear that, absent unusual circumstances, the state cannot condition faculty selection and retention on ideology or loyalty.²⁶ Subsequently, a decidedly institutional view of academic freedom has emerged.²⁷ In cases in which individual faculty

25. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (citation omitted).

26. *See, e.g., Keyishian v. Bd. of Regents*, 385 U.S. 589, 607 (1967) (noting that New York’s teacher loyalty laws, by impinging on freedom of association, had a “stifling effect on the academic mind”); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) (noting that requiring a teacher, hired annually, to list every associational tie was overbroad and “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools”); *Sweezy*, 354 U.S. at 236, 247 (plurality opinion) (noting that compelling a lecturer at a state university to disclose his membership in subversive organizations was an invasion of his academic freedom); *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952) (holding that an Oklahoma loyalty oath that was required of state-employed educators and that barred association with listed organizations violated due process). AAUP’s recognition of academic freedom predates the Court’s recognition of the concept. *See* Am. Ass’n of Univ. Professors, 1915 DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM & ACADEMIC TENURE 291, <http://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf> (last visited Oct. 16, 2009).

27. By institutional academic freedom, the authors mean policies and procedures ultimately attributed to the governing authority of the university or its administrators, recognizing that such policies and procedures often, but not always, involve faculty participation on one or more levels and that faculty are hardly monolithic in their views. *Compare* *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 686 (1980) (noting—in the context of determining that faculty were managerial employees and thus not entitled to collective bargaining—that faculty had absolute authority over academic matters, course selection and staffing, student admission and retention, and other matters), *and* *NLRB v. Lewis Univ.*, 765 F.2d 616, 624–25 (7th Cir. 1985) (noting that faculty had authority in many areas of administrative decision-making), *with* *Loretto Heights Coll. v. NLRB*, 742 F.2d 1245, 1254 (10th Cir. 1984) (discussing limited power of faculty members, who, although involved in governance, were constrained by the administration, which was the primary decision-maker). Of course, while *Yeshiva University* may represent the zenith of faculty authority at one private university, the fact remains that, usually, a governing board has ultimate authority over most decisions, although responsibility is sometimes shared. *See* George Keller, *A Growing Quaintness: Traditional Governance in the Markedly New Realm of U.S. Higher Education*, in *COMPETING CONCEPTIONS OF ACADEMIC GOVERNANCE* 158, 168 (2004) (noting that although many things have changed since the AAUP’s 1966 *Statement on Government of Colleges and Universities*, a board of trustees remains the ultimate legal authority over a university, acting through a president as chief executive officer); Am. Ass’n of Univ. Professors, STATEMENT ON

members challenged tenure and promotion decisions, courts often decide in favor of the institutions, allowing them to rely on their own concepts of academic freedom when shaping their faculties.²⁸ At the same time, institutions may not discriminate in that process, nor may they retaliate in response to an exercise of constitutional rights.²⁹

This institution-favored view of academic freedom permeates almost every facet of academic operations. Thus, admissions policies may favor certain groups over others to encourage diversity, notwithstanding the Fourteenth Amendment's guarantee of equal protection.³⁰ Such student selection policies, however, are subject to limitations requiring them to be narrowly tailored and of fixed duration.³¹ Moreover, curriculum design is another area in which the right of the academic institution is very strong, and the institution may insist that faculty (1) stay on topic, (2) employ authorized teaching methods, and (3) assign grades in accordance with administrative policy and direction.³² Notably, though, universities are made up of academic personnel who often give voice to the policies that are later challenged.

Thus, constitutional academic freedom takes a decidedly institutional look, so it is not surprising that the university employer may well have an advantage when regulating employee speech. That said, given the value universities place on free speech, such advantage may rarely be put to the test. Additionally, public employees enjoy a First Amendment right to speak on matters of public concern so long as they speak as citizens and not in accordance with their job responsibilities.³³ Relying on Justice Frankfurter's academic freedom framework, this Part explores the constitutional protections afforded public university employees, the debate surrounding the adequacy of those protections, and the influence of the institution in this arena.

GOVERNMENT OF COLLEGES AND UNIVERSITIES 138 (1966), <http://www.aaup.org/NR/rdonlyres/431ABA0A-019B-4ECD-B067-14EE81F37ABA/0/StatementonGovernmentofCollegesandUniversities.pdf> (last visited Oct. 16, 2009). A powerful argument is that *Yeshiva* is simply wrong; the faculty have responsibility by virtue of their professional status, but this certainly does not amount to managerial authority. See *Yeshiva*, 444 U.S. at 697–98 (Brennan, J., dissenting); Patrick Shaw, *Prospects for Full-Time Organizing at Private Universities and Colleges*, in *ACADEMIC COLLECTIVE BARGAINING* 78, 80–84 (Ernest Benjamin & Michael Mauer eds., 2006).

28. For a discussion of judicial deference to tenure decisions, see *infra* notes 57–66 and accompanying text.

29. See *infra* note 58 and accompanying text.

30. Compare U.S. CONST. amend. XIV, with *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

31. *Grutter*, 539 U.S. at 341–43.

32. For a discussion of an academic institution's prerogatives in curriculum design and grading policy, see *infra* notes 106–29 and accompanying text.

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

A. *Judicial Development of Academic Freedom: Who May Teach?*

Judicial recognition of academic freedom began with cases involving faculty qualifications; these decisions established that the state should not condition faculty selection and retention on ideology or loyalty.³⁴ The deference shown to the university extends not only to initial faculty selection, but also to tenure and promotion decisions, although such decisions cannot contravene anti-discrimination provisions or constitutional guarantees.³⁵

1. *Loyalty Cases*

The Supreme Court's recognition of academic freedom began with a series of loyalty cases—many involving faculty qualifications—decided during the Cold War.³⁶ In *Sweezy v. New Hampshire*, the New Hampshire legislature tasked the attorney general with investigating subversive activities.³⁷ As a result, a Marxist lecturer at the University of New Hampshire was held in contempt of court for refusing to answer questions about the content of a lecture and certain of his political associations.³⁸ A four-member plurality of the Court concluded that these events constituted an invasion of both personal academic freedom and political expression.³⁹ However, the plurality decided the case on Fourteenth Amendment due process grounds and not on First Amendment grounds.⁴⁰

The plurality decided that although the legislature certainly had the power to investigate subversive activities, it also had to use that power responsibly given the potential impairment of First Amendment freedoms.⁴¹ They concluded that no nexus existed between the information sought by the legislature and the lecturer, and equated that lack of a nexus to a lack of authority.⁴² Concurring in the result, Justice Felix Frankfurter, joined by Justice John Marshall Harlan, relied on First Amendment grounds, concluding that the New Hampshire court had struck the wrong balance in weighing the state's right to self-protection against interference with "the intellectual life of a university" and the individual's right to political privacy.⁴³

Justice Frankfurter's view of academic freedom is perhaps the most encompassing and enduring, even though it was not adopted by a majority. He

34. See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 592–94, 609–10 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 236, 250 (1957) (plurality opinion).

35. See *infra* note 58 and accompanying text.

36. See *Keyishian*, 385 U.S. at 592–95; *Sweezy*, 354 U.S. at 236–37.

37. *Sweezy*, 354 U.S. at 236–37.

38. *Id.* at 243–45.

39. *Id.* at 250.

40. *Id.* at 254–55.

41. *Id.*

42. *Id.* at 254 ("The lack of any indications that the legislature wanted the information the Attorney General attempted to elicit from petitioner must be treated as the absence of authority.")

43. *Id.* at 260–61, 266–67 (Frankfurter, J., concurring).

recognized the “dependence of a free society on free universities” and noted that, in a university setting, knowledge is its own end, not merely a means to an end.⁴⁴ According to Justice Frankfurter, academic freedom includes both the freedom to follow inquiry where it leads without governmental intervention and the freedom “to examine, question, modify or reject traditional ideas and beliefs The concern of [a university’s] scholars is not merely to add and revise facts in relation to an accepted framework, but to be ever examining and modifying the framework itself.”⁴⁵ Although concerned with the political autonomy of the individual, Justice Frankfurter’s opinion also forms the foundation for an institutional view of academic freedom and provides a framework identifying four main academic freedoms: “who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”⁴⁶

In 1967, the Supreme Court plainly endorsed academic freedom as a First Amendment value in *Keyishian v. Board of Regents*.⁴⁷ In *Keyishian*, university personnel refused to provide information concerning whether they were or had been affiliated with the Communist Party or similar organizations.⁴⁸ The requirement was part of a complicated scheme intended to prevent the appointment and retention of state employees who had been deemed subversive.⁴⁹ The Court stated that

[o]ur 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.⁵⁰

Thus, the Court invalidated the New York scheme as overbroad.⁵¹

Cases must be read against their facts. *Sweezy* and *Keyishian* suggest that efforts to regulate faculty qualifications on the basis of ideology or loyalty implicate the First Amendment and academic freedom.⁵² The government may not replace academic criteria for faculty selection and retention because this replacement usurps and eliminates the discretion of the institution to develop and apply such criteria.⁵³ However, these decisions do not directly address whether academic freedom is an individual or institutional right, or both,

44. *Id.* at 262.

45. *Id.* at 262–63.

46. *Id.* at 263 (citation omitted).

47. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

48. *Id.* at 591–92.

49. *Id.* at 593–94.

50. *Id.* at 603.

51. *Id.* at 609.

52. *See Univ. of Pa. v. EEOC*, 493 U.S. 182, 197 (1990) (viewing the decisions as a reaction to content-based regulation of who may teach).

53. *Id.* at 198.

because the issue simply was not before the Court in either case.⁵⁴ Moreover, in these cases, the interest of the university in presenting diverse ideas and the interest of individual employees in retaining their employment were aligned against state interference, which presented an external threat to academic freedom.

That will not always be the case. At times, the threat to academic freedom will be internal, resulting in a faculty member challenging an institutional decision. These are difficult cases for faculty members to win. Even though a faculty member may have a right to advocate a particular viewpoint in his field, the university retains the academic freedom to set the curriculum.⁵⁵ The university, as employer, has a clear right to require the faculty to engage in research and teaching, and the university may step in when internal tensions hinder these objectives.⁵⁶ What is not clear is whether the university may step in when it disagrees with the content, as opposed to the quality, of the research on non-academic grounds. This Article addresses that issue and suggests that such content-based regulation is likely to raise serious First Amendment concerns.

2. Tenure and Promotion

The issue of who may teach involves another area in which the interests of the university and the faculty member may diverge. This issue most frequently arises in the context of the tenure and promotion process. The review process associated with tenure necessarily implies that not every person will receive tenure, so it is not surprising that claims for wrongful denial of tenure are numerous.⁵⁷ Courts often mention institutional academic freedom in upholding an institution's tenure decisions; however, academic freedom will not be a successful defense to tenure decisions made in violation of anti-discrimination law or clearly established constitutional guarantees.⁵⁸

54. Cf. Frederick Schauer, *Is There a Right to Academic Freedom*, 77 U. COLO. L. REV. 907, 909–10 (2006) (suggesting that early Supreme Court cases provide little support for individual academic freedom, because the decisions would have been the same for non-academic public employees on account of the First Amendment).

55. *Webb v. Bd. of Trs.*, 167 F.3d 1146, 1149 (7th Cir. 1999).

56. *Id.* at 1150 (“When the bulk of a professor’s time goes over to fraternal warfare, students and the scholarly community alike suffer, and the university may intervene to restore decorum and ease tensions.”).

57. See, e.g., *Lieberman v. Gant*, 630 F.2d 60, 70 (2d Cir. 1980) (affirming the trial court’s decision that denial of tenure was not based on gender).

58. See, e.g., *EEOC v. Amego, Inc.*, 110 F.3d 135, 145 (1st Cir. 1997) (noting that a court does not sit as a “super-tenure committee”); *Villanueva v. Wellesley Coll.*, 930 F.2d 124, 129 (1st Cir. 1991); *Megill v. Bd. of Regents*, 541 F.2d 1073, 1077 (5th Cir. 1976) (noting that the jurisdictional limitations of federal courts preclude review except where denial of tenure violates a person’s constitutional rights). While courts are deferential to a university’s “academic decisions,” tenure may not be denied in retaliation for the exercise of First Amendment rights. See *Dube v. State Univ. of N.Y.*, 900 F.2d 587, 598 (2d Cir. 1990). Nor may it be denied based on discriminatory reasons, although courts often find that a university’s unfavorable assessment

Academic institutions are thought to have particular competence in judging the qualifications of faculty.⁵⁹ As one court observed, “[c]ourts have wisely recognized the importance of allowing universities to run their own affairs (and to make their own mistakes). To do otherwise threatens the diversity of thought, speech, teaching, and research both within and among universities upon which free academic life depends.”⁶⁰ Tenure decisions involve many subjective factors, including “academic excellence, teaching ability, creativity, contributions to the university community, rapport with students and colleagues, and other factors” that may not be precisely quantified.⁶¹ Thus, institutional decisions concerning tenure and promotion, including decisions involving research quality and productivity, are usually upheld.⁶² After all, a

of a candidate’s academic qualifications provides a legitimate, non-discriminatory reason for the denial of tenure. *Qamhiyah v. Iowa State Univ.*, 566 F.3d 733, 741–42 (8th Cir. 2009); *Weinstock v. Columbia Univ.*, 224 F.3d 33, 41–42, 47 (2d Cir. 2000); *Kumar v. Bd. of Trs.*, 774 F.2d 1, 12, 20 (1st Cir. 1985) (Campbell, C.J., concurring). Additionally, academic freedom does not insulate tenure review materials from disclosure to the authorities charged with investigating discrimination, notwithstanding claims that the lack of confidentiality will impair the process. *Univ. of Pa. v. EEOC*, 493 U.S. 182, 198–99 (1990).

59. *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 455 (2d Cir. 1999). Scholarship is one critical component that institutions examine during the tenure process. See *Jiminez v. Mary Washington Coll.*, 57 F.3d 369, 384 (4th Cir. 1995).

60. *Vargas-Figueroa v. Saldana*, 826 F.2d 160, 162–63 (1st Cir. 1987).

61. *Kumar*, 774 F.2d at 12.

62. See *Weinstock*, 224 F.3d at 43 (holding that a court will not second-guess a tenure decision given a legitimate non-discriminatory reason); *Weinstein v. Univ. of Ill.*, 811 F.2d 1091, 1097 n.4 (7th Cir. 1987); *Mayberry v. Dees*, 663 F.2d 502, 520 (4th Cir. 1981); *Allworth v. Howard Univ.*, 890 A.2d 194, 202 (D.C. Ct. App. 2006); *Brown v. George Washington Univ.*, 802 A.2d 382, 385 (D.C. Ct. App. 2002).

In perhaps the most widely publicized case on academic freedom in decades, Professor Ward Churchill obtained a jury verdict (with a nominal damages award) on his claim that the University of Colorado had terminated him in retaliation for protected political speech. See Order Granting Defendants’ Motion for Judgment as a Matter of Law and Denying Plaintiff’s Motion for Reinstatement of Employment at 26–27, *Churchill v. Univ. of Colo.*, No. 06CV11473 (Denver County Dist. Ct. July 7, 2009) [hereinafter Order], available at http://law.du.edu/documents/corporate-governance/churchill/20090707_122722_churchill.pdf, appeal filed, No. 09-CA-1713 (Colo. App. Aug. 13, 2009). A faculty panel previously considered the matter and was unanimous on research misconduct, but split three-to-two on the recommended sanction, with three favoring suspension and demotion, and two favoring termination. *Id.* at 7–8. The university president recommended termination, which the regents upheld following presentations by university administrators and Professor Churchill. *Id.* at 8. Ultimately, the trial court vacated the jury’s verdict against the defendants, which included the university and its regents, on the basis of quasi-judicial immunity, determining that neither damages nor prospective injunctive relief was available. *Id.* at 9–10, 14, 25–26.

Quasi-judicial immunity protects those serving in quasi-adjudicative functions from liability for damages based upon their service. *Butz v. Economou*, 438 U.S. 478, 514–15 (1978). Although quasi-judicial immunity applies only to individual capacity claims, the trial court held that a stipulation allowed the university and the board of regents to assert individual capacity defenses, despite the fact that they were acting in their official capacities. Order, *supra*, at 4; see also *VanHorn v. Oelschlager*, 502 F.3d 775, 778–79 (8th Cir. 2007). The trial court denied

grant of tenured status should be a product of faculty judgment and should contain adequate procedural safeguards.⁶³ Only where there has been substantial and prejudicial non-compliance with the procedure or a showing of discrimination is relief likely to be granted.⁶⁴ Although courts review cases involving tenure and promotion on the merits, academic freedom is an important value that counsels restraint in judging claims involving the wrongful denial of tenure or promotion. However, to suggest that there should be no review would be unwise. The possibility of review reinforces the need for principled decision-making by the institution, and judicial review may provide a remedy in appropriate cases.⁶⁵ While there may be a concern that institutional academic freedom is displaced, this concern is minor because courts are (1) well aware of the need for institutional autonomy; (2) experienced with claims involving allegations of improper motives and pretext; and (3) sensitive to the principle that academic boards, the administration, and academic departments must comply with the law.⁶⁶

B. *Who May Be Admitted to Study?*

Supreme Court recognition of academic freedom was at its strongest in its approval of a race-conscious university admissions policy over an equal protection challenge.⁶⁷ While such policies must be narrowly tailored and of fixed duration, the Court is willing to defer to academic judgment, at least where the electorate has not adopted a contrary measure.⁶⁸ When it comes to

Professor Churchill's motion for reinstatement in part because it would interfere with the university's academic freedom to define and enforce its standards of scholarship. Order, *supra*, at 34–35.

63. See David M. Rabban, *Does Academic Freedom Limit Faculty Autonomy?*, 66 TEX. L. REV. 1405, 1407–08, 1410–12 (1988) [hereinafter, Rabban, *Faculty Autonomy*] (noting that faculty normally apply standards for scholarship and compliance with professional ethics, but that administrators and governing boards may intervene given “compelling grounds” to suspect deviation from such standards).

64. *Loebl v. N.Y. Univ.*, 680 N.Y.S.2d 495, 496–97 (App. Div. 1998).

65. Unlike many employment situations, tenure presents the possibility of having the same colleagues for decades. This possibility, along with changing academic leadership, also may encourage treating colleagues with respect and fairness. That said, a right of review by others may result in a decision informed by broader concerns. See O’Neil, *supra* note 4, at 179–185 (discussing “rare but meritorious cases” where peer judgment was overridden); Rabban, *Faculty Autonomy*, *supra* note 63, at 1407–08.

66. Alan K. Chen, *Bureaucracy and Distrust: Germaneness and the Paradoxes of the Academic Freedom Doctrine*, 77 U. COLO. L. REV. 955, 972–73 (2006) (explaining that the concern that courts will infringe on institutional academic freedom is overstated, because courts are independent and well-suited to render decisions based on the evidence and assisted by legal analysis); Rabban, *Functional Analysis*, *supra* note 6, at 286–88.

67. *Grutter v. Bollinger*, 539 U.S. 306, 340–41 (2003).

68. *Id.* at 341–42.

student qualifications and academic success in a program, courts generally defer to institutional judgment.⁶⁹

1. Student Selection: Diversity and Admissions Policies

Challenges to admissions policies by students who were not admitted are not unusual, but academic freedom as a rationale to sustain such policies is a relatively recent development.⁷⁰ When it comes to admitting students, the Supreme Court has held that there may be a compelling state interest in student body diversity that can justify race-conscious university admissions policies.⁷¹ In finding this interest, the Court relied upon an academic freedom rationale articulated by Justice Lewis Powell in *Regents of the University of California v. Bakke*.⁷² In *Bakke*, the Court—through a maze of separate opinions—invalidated a racial set-aside program that reserved a specific number of seats in an incoming medical school class for minorities and reversed a state-court injunction that would have prohibited consideration of the race of any applicant.⁷³

In that case, Justice Powell viewed academic freedom “as a special concern of the First Amendment” and recognized that the concept encompassed student selection.⁷⁴ Relying on an article endorsing diversity, he noted that “[t]he atmosphere of ‘speculation, experiment and creation’ . . . is widely believed to be promoted by a diverse student body.”⁷⁵ The article suggested that much learning occurs informally and that diversity encompasses not only ethnic differences, but also geographic, cultural, and gender differences.⁷⁶ Accordingly, a university may select those students who contribute most to an exchange of ideas that will enrich the training and understanding of its graduates. Although the set-aside program violated the Fourteenth

69. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985).

70. This deference to academic freedom, at least in terms of applying strict scrutiny to classifications based on race, only applies to institutions of higher education, and not to elementary and secondary institutions. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 724–25 (2007). Notwithstanding, academic freedom has been used as a rationale in some litigation concerning elementary and secondary schools. *Asociación de Educación Privada de Puerto Rico, Inc. v. García-Padilla*, 490 F.3d 1, 11 n.6 (1st Cir. 2007) (finding that regulation requiring private schools to obtain parental approval of textbook budget and to afford an option of buying previous edition of textbook violated academic freedom).

71. *Grutter*, 539 U.S. at 325, 328. *Grutter* involved the policies of a graduate school, while its companion case, *Gratz v. Bollinger*, involved an undergraduate admissions scheme that was struck down because it was not narrowly tailored; however, the *Gratz* Court suggested that diversity can also be a compelling state interest in the undergraduate admissions context. *Gratz v. Bollinger*, 539 U.S. 244, 268–70 (2003).

72. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312–18 (1978).

73. *Bakke*, 438 U.S. at 274–75, 320; see also *Grutter*, 539 U.S. at 323–24.

74. *Bakke*, 438 U.S. at 312.

75. *Id.* (quoting William G. Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUMNI WEEKLY 7, 9 (Sept. 26, 1977)).

76. Bowen, *supra* note 75, at 7, 9.

Amendment because it focused *exclusively* on race, race could be used as a factor in conjunction with other factors, such as “exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important.”⁷⁷

Classifications based on race run counter to the personal right of equal protection and historically have been subject to strict scrutiny, which requires classifications to be narrowly tailored and to further compelling state interests.⁷⁸ Such classifications are in considerable tension with the Fourteenth Amendment, which was designed to eliminate official discrimination.⁷⁹ The Court applies strict scrutiny because “there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.”⁸⁰ Because the denial of equal treatment, rather than the denial of the benefit itself, is sufficient to confer standing, such classifications are likely to be challenged.⁸¹

In *Grutter v. Bollinger*, the Court considered a challenge by an unsuccessful law school applicant who claimed that the University of Michigan Law School’s use of race in the admissions process gave certain minority applicants a greater chance of admission than others with similar credentials.⁸² The university admissions policy sought to enroll a “critical mass” of students from certain underrepresented groups to enhance classroom discussion and the educational experience and not as a remedy for past discrimination.⁸³ The Court announced that it would defer to the law school’s judgment that diversity

77. *Bakke*, 438 U.S. at 317.

78. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719–20 (2007); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

79. *Shaw v. Hunt*, 517 U.S. 899, 907 (1996).

80. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). Classifications based on gender also receive heightened scrutiny because they often are based on stereotypes that have no basis in actual performance; to be upheld, the classification must be substantially related to a sufficiently important governmental interest. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *see also* *Frontiero v. Richardson*, 411 U.S. 677, 686–87, 689 (1973) (plurality opinion).

81. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (“When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The ‘injury in fact’ in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.”); *accord* *Parents Involved*, 551 U.S. at 718–19; *Adarand*, 515 U.S. at 211.

82. *Grutter v. Bollinger*, 539 U.S. 306, 317 (2003).

83. *Id.* at 316, 319 (noting that the groups expressly included in the policy were African Americans, Hispanics, and Native Americans based upon (1) historical discrimination and (2) underrepresentation in the absence of such a policy).

was essential to its educational mission, noting that strict scrutiny may take into account “complex educational judgments in an area that lies primarily within the expertise of the university.”⁸⁴ The Court made its academic freedom rationale clear when it stated that “[o]ur holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.”⁸⁵ Thus, admissions policies stand as an important part of academic freedom and necessarily incorporate the careful consideration of “complex educational judgments in an area that lies primarily within the expertise of a university.”⁸⁶

Grutter contained two important limits on the academic freedom rationale in the area of student selection: narrow tailoring and fixed duration.⁸⁷ An admissions policy cannot reserve a set number of seats for minority students; the policy must be flexible.⁸⁸ Moreover, while race may be used as a “plus factor,” the policy must allow individual consideration of every applicant.⁸⁹ In sum, race may not be given such weight as to make it the decisive factor. Thus, the Court invalidated the undergraduate admissions policy at the University of Michigan, which granted one-fifth of the necessary points for admission based on an applicant’s status as an underrepresented minority.⁹⁰ Although the university might have had a strong interest in diversity based upon its academic judgment, it could not escape the requirement of narrow tailoring. As a consequence, race-neutral alternatives must be considered, and the policy may not “unduly harm” those who are not members of the preferred racial groups.⁹¹ In this regard, the Court noted various experiments with alternative approaches that had been conducted in California, Florida, and Washington, where state law prohibited racial preferences in admission decisions.⁹² Additionally, consistent with the purpose of the Fourteenth Amendment to ultimately eliminate racial discrimination, such policies must have end points; in fact, the Court suggested that racial preferences in admission policies should not be necessary by 2028.⁹³ The Court’s opinion thus instructs that academic freedom as a value does not subsume independent equal protection limitations.⁹⁴

84. *Id.* at 328.

85. *Id.*

86. *Id.*

87. *Id.* at 333, 342.

88. *Id.* at 334.

89. *Id.* at 336–37.

90. *Gratz v. Bollinger*, 539 U.S. 244, 270–73 (2003).

91. *Grutter*, 539 U.S. at 339, 341.

92. *Id.* at 342.

93. *Id.* at 341–43.

94. Likewise, academic freedom does not subsume other First Amendment constraints on a university’s choices—institutional autonomy is subject to limits. For example, although a university may impose reasonable time, place, and manner restrictions and decide how to allocate meeting facilities for students, it may not discriminate based upon content in the absence of a

Another important limit on academic freedom may result from the choice of the electorate or its elected representatives. A court deferring to academic judgment in the face of a challenge to an admissions policy containing racial preferences differs from a court declaring an affirmative right to such a policy, even if that decision is imbued with academic judgment.⁹⁵ This difference is implicit in *Grutter*, where the Court, as part of its narrow-tailoring analysis, recognized that a state may prohibit racial preferences in admissions.⁹⁶ Indeed, in December 2006, Michigan enacted a constitutional amendment prohibiting public educational institutions from granting preferential treatment based upon race, and other states have followed suit.⁹⁷ In fact, the United States Court of Appeals for the Sixth Circuit had no difficulty in staying a stipulated injunction enjoining the measure, despite claims by universities that academic freedom was at stake.⁹⁸ The court noted that a state may end racial preferences just as it may grant preferences based on high-school class standing or residency.⁹⁹ Any other rule would displace legislative or initiative power to establish

compelling state interest. See *Widmar v. Vincent*, 454 U.S. 263, 265 (1981). In *Widmar v. Vincent*, a university made its facilities available to student groups, and the students paid a fee to defray the costs. *Id.* After meeting in such facilities for four years, an evangelical Christian group was denied meeting space based on a university regulation prohibiting use of the space for religious worship or teaching. *Id.* The Court had no difficulty reasoning that, having created the forum, the university had to apply the prevailing constitutional norms. *Id.* at 267–68. It also rejected the idea that equal access to university facilities available to all had the effect of advancing religion. *Id.* at 273. Justice John Paul Stevens authored a concurring opinion that suggested omitting the compelling state interest requirement and noted that “[j]udgments of this kind should be made by academicians, not by federal judges.” *Id.* at 278–80 (Stevens, J., concurring). The opinion for the Court demonstrates that academic freedom cannot trump other constitutional guarantees, whether they are found in the First Amendment or elsewhere. Similarly, in *State v. Schmid*, a private university’s lack of standards to protect individual expression was required to yield under the state constitution. 423 A.2d 615, 632 (N.J. 1980).

The United States Court of Appeals for the Eighth Circuit rejected the proposition that a law school clinical program could deny representation to a potential client solely on the basis of his viewpoint, even if the potential client was antagonistic to the program. *Wishnatsky v. Rovner*, 433 F.3d 608, 611 (8th Cir. 2006). The court recognized that other concerns, including the academic freedom to select the proper cases for the program and a lawyer’s professional responsibility, may have animated the decision to deny representation and the court remanded the case for further factual development. *Id.* at 612–13. The cases illustrate that institutional academic freedom is not an absolute; at times, it will yield to other constitutional or social values. See Byrne, *Special Concern*, *supra* note 14, at 282; Rabban, *Faculty Autonomy*, *supra* note 63, at 1419–20.

95. *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 247 (6th Cir. 2006); *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 709 (9th Cir. 1997).

96. *Grutter*, 539 U.S. at 342.

97. MICH. CONST. art. I, § 26; see also CAL. CONST. art. I, § 31(a), (f); NEB. CONST. art. I, § 30; WASH. REV. CODE § 49.60.400(1) (2008). Colorado recently defeated such a proposal in an extremely close vote. See Ballotpedia.org, Colorado Civil Rights Initiative (2008): Election Results, http://ballotpedia.org/wiki/index.php/Colorado_Civil_Rights_Initiative_2008 (last visited Oct. 16, 2009).

98. *Coal. to Defend Affirmative Action*, 473 F.3d at 247, 253.

99. *Id.* at 247.

constitutionally permissible classifications in most matters.¹⁰⁰ Provided that such classifications are “rationally related to a legitimate state interest,” such classifications will be upheld.¹⁰¹

2. Student Retention: Satisfactory Academic Progress

Once students are admitted, courts have little difficulty in deferring to institutional academic judgment about academic success or failure within a program. Thus, where a student was dismissed without being allowed to retake a critical examination, the Supreme Court deferred on grounds of academic freedom.¹⁰² Given fair procedures and no impermissible factors, a court will “not override [the decision] unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.”¹⁰³ In other words, a court will not substitute its judgment for that of the institution, even if it recognizes that a different result may have been reasonable. Likewise, the institution can insist on fidelity to curricular norms, notwithstanding challenges from students who may disagree with those norms on First Amendment grounds¹⁰⁴ or on the basis that the norms constitute prohibited disability discrimination.¹⁰⁵

C. What May Be Taught and How Shall It Be Taught?

1. Staying on Topic

It seems clear that the university, as a public employer, may insist that its academic personnel cover the subject matter that they have been assigned to

100. *Coal. for Econ. Equity*, 122 F.3d at 709.

101. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

102. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 224–26 (1985).

103. *Id.* at 225.

104. *Brown v. Li*, 308 F.3d 939, 952–54 (9th Cir. 2002) (holding that a university could decline to approve a student’s master’s thesis, which contained a “Disacknowledgments” section); *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152, 155–56 (6th Cir. 1995) (holding that a junior high school teacher could refuse to accept a paper on an unapproved topic without violating the student’s First Amendment rights).

105. Students have often sought relief under the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified in scattered sections of 42 U.S.C.); Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified in scattered sections of 29 U.S.C.). A university is not required to lower standards or substantially modify a program to accommodate a disability; however, it must consider accommodation, and courts will generally defer to reasonable academic judgment concerning whether a student may be accommodated. *See Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 413 (1979); *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1047–48 (9th Cir. 1999); *McGregor v. La. State Univ. Bd. of Supervisors*, 3 F.3d 850, 858–59 (5th Cir. 1993). This deference is not absolute because the federal courts are the institutions charged with interpreting and applying anti-discrimination measures. *Wong v. Regents of Univ. of Cal.*, 192 F.3d 807, 817–18 (9th Cir. 1999).

teach and do so in a manner not offensive to the university. Indeed the American Association of University Professors (AAUP) recognizes that “[t]eachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject.”¹⁰⁶

A good illustration is *Piggee v. Carl Sandburg College*, where a part-time clinical cosmetology instructor at a community college gave a gay student two religious pamphlets condemning homosexuality and invited him to discuss the issue.¹⁰⁷ The student complained, and the college subsequently found that the clinical instructor had engaged in sexual harassment; the college gave a warning to the instructor to cease proselytizing.¹⁰⁸ The instructor’s contract was not renewed.¹⁰⁹ Characterizing the dispute as the clinical instructor’s right to speak on a matter of religious concern in the workplace, the United States Court of Appeals for the Seventh Circuit assumed that the topic was a matter of public concern, but concluded that the community college had a right to insist that discussions of religion or sexual orientation occur outside of cosmetology classes or clinics.¹¹⁰ Grounding its discussion in the academic freedom of the university to set a curriculum, the court said that

[n]o 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. 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.¹¹¹

In other words, the interest of the employer in avoiding completely off-topic speech that had the potential to violate its sexual harassment policy outweighed the clinical instructor’s right to engage in such speech. The court further found that the speech disrupted the student’s education and interfered with the clinical component of the course of study.¹¹²

This case is made easier because the clinical instructor’s comments have nothing to do with the subject matter she was assigned to teach, even if the

106. 1940 STATEMENT, *supra* note 8, at 3. As the 1970 Interpretive Comments make clear, the idea is to discourage persistent irrelevant material, not academic controversy. *Id.* at 5.

107. *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 668 (7th Cir. 2006).

108. *Id.* at 669. Where the content of the curriculum is reasonably related to legitimate pedagogical concerns, the choice is usually upheld, absent an issue regarding whether the concerns are pretextual. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1292–93 (10th Cir. 2004).

109. *Piggee*, 464 F.3d at 669.

110. *Id.* at 671–72.

111. *Id.* at 671.

112. *Id.* at 671–72.

topic “richly deserves full public discussion.”¹¹³ The resolution is consistent with several cases in which the First Amendment—let alone academic freedom—has not been extended to allow an instructor to inject his or her religious views into the classroom while instructing on secular subjects.¹¹⁴

2. Teaching Methods

This outcome is also consistent with cases holding that, when teaching methods conflict with those advocated by the university or its tenured faculty, the university will prevail.¹¹⁵ Although content-based regulation ordinarily is not favored, when the university speaks—as it does through curriculum choices and methods—it can regulate based upon content, meaning that it can place restrictions on what may and may not be taught and still be in compliance with the First Amendment.¹¹⁶ Thus, the university is the speaker, and the faculty member is the university’s agent or proxy.¹¹⁷ It follows that this concept extends to extra-curricular activities sponsored by the school.¹¹⁸ Of course, some institutional restraint is probably present in this area, as “[u]niversity officials are undoubtedly aware that quality faculty members will be hard to attract and retain if they are to be shackled in much of what they do.”¹¹⁹

3. Assigning Grades and Grading Policies

Closely related to teaching methods are evaluation methods, both in the form of faculty members evaluating students and the university evaluating faculty members’ teaching abilities. A university may require a faculty member to

113. *Id.* at 671.

114. *See, e.g.,* Lee v. York County Sch. Div., 484 F.3d 687, 689, 700 (4th Cir. 2007) (holding that bulletin board postings with religious overtones were curricular speech and, therefore, not matters of public concern entitled to First Amendment protection); Edwards v. Cal. Univ. of Penn., 156 F.3d 488, 489, 491 (3d Cir. 1998); Bishop v. Aronov, 926 F.2d 1066, 1075–76 (11th Cir. 1991). Indeed, such proselytizing is beyond individual academic freedom, and it is not surprising that the academic freedom of the institution prevails. *See* Rabban, *Faculty Autonomy*, *supra* note 63, at 1410 (“Professors violate the norms of academic freedom when they falsify or plagiarize material, indoctrinate students, follow blindly the dictates of political or religious authority, or allow grants from government or industry to distort their research and conclusions.”).

115. *Lovell v. Se. Mass. Univ.*, 793 F.2d 419, 425–26 (1st Cir. 1986) (*per curiam*); *Hetrick v. Martin*, 480 F.2d 705, 709 (6th Cir. 1973).

116. *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 833 (1995); *see also* *Rust v. Sullivan*, 500 U.S. 173, 193–94 (1991) (holding that the government may prohibit abortion-related advice from being offered by those private actors it subsidizes to carry its message concerning family planning).

117. *Brown v. Armenti*, 247 F.3d 69, 74–75 (3d Cir. 2001).

118. *Borden v. Sch. Dist. of E. Brunswick*, 523 F.3d 153, 171–72 (3d Cir. 2008) (holding that a coach had no free speech right to contravene the school board’s policy prohibiting faculty participation in student-led prayer activity).

119. *Bishop*, 926 F.2d at 1075.

conform to its grading policy; the cases, however, vary in their discussion of whether a university may require the faculty member to endorse a grade change contrary to his or her professional judgment.¹²⁰ On the one hand, in *Parate v. Isibor*, the United States Court of Appeals for the Sixth Circuit held that a grade is a symbolic communication from the faculty member to the student and “is entitled to some . . . First Amendment protection.”¹²¹ While the university may change a grade on a student’s transcript (from a “B” to an “A” in this case), it may not require the faculty member to publicly endorse the changed grade.¹²² On the other hand, the United States Court of Appeals for the Third Circuit has concluded that a faculty member lacks a First Amendment right in grade assignment procedures; therefore, a faculty member may be required to change an “F” to an “Incomplete” without compromising academic freedom, which belongs to the institution insofar as grade assignments are concerned.¹²³ Given that the institution generally has the right to set grading policy, surely application of that policy by faculty members is not inviolate.

In addition to claims over final grades, faculty members have claimed individual academic freedom in grading procedures with little success. In *Johnson-Kurek v. Abu-Absi*, a part-time lecturer sued various tenured faculty members, claiming retaliation when she did not receive a teaching assignment.¹²⁴ The controversy arose when the plaintiff gave more than three-quarters of her students a grade of “incomplete” for substandard work and only very general directions—communicated through a listserv—on how that work was to be improved and final grades were to be calculated.¹²⁵ Although her superior required that she offer individual guidance to the students, the plaintiff did not comply, apparently basing her refusal on pedagogical concerns.¹²⁶

The Sixth Circuit held that no First Amendment right or academic freedom was implicated either by the superior’s request that the lecturer communicate further with the students or the university’s failure to give the lecturer another teaching assignment.¹²⁷ Accordingly,

[w]hile the First Amendment may protect Johnson-Kurek’s right to express her ideas about pedagogy, it does not require that the university permit her to teach her classes in accordance with those

120. See *infra* notes 121–29 and accompanying text.

121. *Parate v. Isibor*, 868 F.2d 821, 827 (6th Cir. 1989).

122. *Id.* at 824, 827–29.

123. *Brown v. Armenti*, 247 F.3d 69, 74–75 (3d Cir. 2001). In the First Circuit, a tenured professor’s resistance to changing a grade following a student complaint led to his termination, notwithstanding the professor’s claim of a violation of academic freedom. *Otero-Burgos v. Inter Am. Univ.*, 558 F.3d 1, 2–5 (1st Cir. 2009).

124. *Johnson-Kurek v. Abu-Absi*, 423 F.3d 590, 591 (6th Cir. 2005).

125. *Id.* at 591–92.

126. *Id.* at 592, 595 n.1.

127. *Id.* at 594–95.

ideas. The freedom of a university to decide what may be taught and how it shall be taught would be meaningless if a professor were entitled to refuse to comply with university requirements whenever they conflict with his or her teaching philosophy.¹²⁸

In sum, the Sixth Circuit reaffirmed its holding that a university had the power to override a faculty member's grade by directing that a change be made on the transcript, but that it could not compel a faculty member to publicly endorse such a change.¹²⁹

4. *Whose Academic Freedom Is It, Anyway?*

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.¹³⁰ For example, the United States Court of Appeals for the Third Circuit recognized that a faculty member may have a First Amendment right to speak on matters of public concern outside the classroom, but also that faculty members do not have a right to contravene the institution's policies concerning the four academic freedoms identified by the Supreme Court.¹³¹ It is therefore not surprising that the institution usually prevails when it comes to teaching and evaluation methods.

The United States Court of Appeals for the Fourth Circuit held that academic freedom is an institutional right in a challenge by state university faculty members who objected to a law that restricted state employees from accessing sexually explicit material on computers owned or leased by the state.¹³² The faculty members contended that such a restriction interfered with their research and teaching activities.¹³³ An en banc court concluded that the state could regulate the manner in which state employees performed their duties without implicating the First Amendment, because the complaint did not involve state employees speaking as private citizens on matters of public

128. *Id.* at 595.

129. *Id.* at 594–95.

130. *Borden v. Sch. Dist. of E. Brunswick*, 523 F.3d 153, 172 n.14 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1524 (2009); *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000); *see also* *Asociación de Educación Privada de Puerto Rico, Inc. v. García-Padilla*, 490 F.3d 1, 9–10 (1st Cir. 2007) (dictum); *Miles v. Denver Pub. Schs.*, 944 F.2d 773, 778 (10th Cir. 1991) (noting that the Supreme Court has recognized a right to institutional academic freedom and acknowledging a split in authority as to individual academic freedom). *But see* *Edwards v. Aguillard*, 482 U.S. 578, 586 n.6 (1987) (suggesting, in a religious freedom case, that academic freedom allows instructors to teach material consistent with their professional judgment).

131. *Borden*, 523 F.3d at 172 (citing *Brown v. Armenti*, 247 F.3d 69, 74–75 (3d Cir. 2001) and *Bradley v. Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990)).

132. *Urofsky*, 216 F.3d at 416. Employees could seek permission from state agencies for access in relation to approved research projects. *Id.*

133. *Id.* at 409 n.9.

concern that involve the First Amendment.¹³⁴ Urged to reject the law as interfering with the academic freedom of the faculty members, the Fourth Circuit held that while academic freedom may be a professional norm, it is not a personal constitutional right.¹³⁵ Instead, faculty members, like all state employees, enjoy protection from adverse employment action based on their private First Amendment activities; any academic freedom relates only to the autonomy of the institution.¹³⁶

At the same time, declaring academic freedom an institutional right suggests a monolithic institution possibly aligned against individual faculty members. Yet shared governance and academic decisions often involve faculty input into policies and decisions of the institution. After all, in theory, the faculty drive academic decision-making, and an institutional view of academic freedom may result in one group of faculty aligned against another. In other words, it is not uncommon for faculty to disagree about academic matters, and the academic freedom may reside with the faction in power—a result that may provide little comfort for those in minority positions. On the other hand, where shared governance is weak, an institutional view of academic freedom may empower administrators to make decisions affecting academic matters without building a consensus among the faculty.

D. Conclusion

Judicial recognition of academic freedom began with faculty qualifications but now extends to curriculum, teaching methods, admissions, and retention. Absent unusual circumstances, the state cannot condition faculty selection and retention on ideology or loyalty; rather, the academic institution is charged with creating and implementing a system of faculty qualifications. This notion is consistent with the idea that academic freedom is more an institutional—as opposed to an individual—right, particularly with respect to diversity policies, curriculum design and delivery, and evaluation methods. In matters of pedagogy, the university generally prevails over the individual faculty member, and while a climate of academic freedom may prevail at most universities, constitutional protection may be more limited when it comes to employee speech. At least on matters of public concern, public employee speech has long enjoyed qualified protection under the First Amendment, but that qualified protection may be more limited following the decision in *Garcetti*.

134. *Id.* at 409.

135. *Id.* at 411; see also Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1545–46 (2007) (differentiating between institutional autonomy for universities, which is accepted by the courts, and academic freedom, which encompasses individual rights for faculty members).

136. *Urofsky*, 216 F.3d at 415. Of course, the advantage of institutional academic freedom is that it may protect the institution from external threats to its academic judgments. See Schauer, *supra* note 54, at 920–24.

II. THE CONSTITUTIONAL PROTECTION AFFORDED SPEECH MADE BY PUBLIC UNIVERSITY EMPLOYEES

The government is rightly concerned with operational efficiency and effectiveness in performing its tasks. Accordingly, and to those ends, the government enjoys greater power to regulate the speech of its employees than its citizens.¹³⁷ This is true notwithstanding the fact that academic employment is involved. Other constitutional guarantees found in the Fourth and Fourteenth Amendments are applied without reference to the field of employment. The Supreme Court recently indicated that “class-of-one” equal protection, which dispenses with the requirement that a plaintiff must be a member of a protected class, simply does not apply in the public employee context.¹³⁸ These restrictions are not unique to academic employees.

Traditionally, public employees have a right to speak out on matters of public concern.¹³⁹ In determining whether the employee should prevail, pre-*Garcetti* courts relied on the *Pickering/Connick* test, which requires an employee to prove that the speech involved a matter of public concern and that it was a motivating factor in an adverse employment decision.¹⁴⁰ Under the test, an employer prevails if it proves that its interest in an effective workforce outweighs the free speech interests of the employee, or that the adverse employment action would have been the same absent the protected speech.¹⁴¹ *Garcetti* added a new element to this mix—namely, whether the speech was pursuant to the employee’s job responsibilities or involved the employee speaking out as a citizen.¹⁴²

Academic personnel may choose to speak out in a variety of contexts, such as when teaching, conducting research, or performing service responsibilities. However, where such speech goes beyond personal interest and into the realm of social or political issues, it may be considered to be speech on a matter of public concern.¹⁴³ But when it comes to discipline-related speech regarding curriculum and teaching methods, an academic employer usually will prevail, given its institutional academic freedom to set the curriculum and prescribe its application, including the assessment of student performance.¹⁴⁴ Discipline-related speech outside the classroom may be similarly unprotected where it strongly contravenes institutional norms.¹⁴⁵

137. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

138. *Engquist v. Or. Dep’t of Agric.*, 128 S. Ct. 2146, 2155 (2008).

139. *Rankin v. McPherson*, 483 U.S. 378, 383–84 (1987).

140. *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1186 (6th Cir. 1995); *see also Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1262 (10th Cir. 2005) (citing *Finn v. New Mexico*, 249 F.3d 1241, 1247 (10th Cir. 2001)).

141. *Dambrot*, 55 F.3d at 1186.

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

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

144. *Brown v. Armenti*, 247 F.3d 69, 75 (3d Cir. 2001).

145. *Pugel v. Bd. of Trs.*, 378 F.3d 659, 668 (7th Cir. 2004).

The additional limitation imposed by *Garcetti*—that the speech not be pursuant to job responsibilities—may not effectuate a large change in this area because (1) the Supreme Court expressly declined to decide whether this limitation should apply to scholarship or teaching,¹⁴⁶ (2) the limitation may not apply when the employee speaks or complains outside the chain of command, and (3) the *Pickering/Connick* test provides only limited protection to employee speech.¹⁴⁷ At the same time, a strong argument can be made for not imposing this limitation when the speech involves scholarship or teaching because it is contrary to the objective of critical inquiry that academic freedom promotes. Even though some content-based regulation is an inevitable result of academic judgments about promotion and tenure, content-based censorship of scholarship or teaching, where the government restricts speech on non-academic grounds because of disagreement with the message, is contrary to principles of academic freedom.¹⁴⁸ This type of activity ought to receive a hearing because it has the greatest potential to violate the First Amendment.

Admittedly, *Garcetti* does work some strange results. Constitutional protections may turn on the manner in which an employee brings to light a matter of public concern. Additionally, the implications for faculty governance are troubling. Faculty members are expected to speak out regarding the policy and operations of academic institutions, and while this may not constitute speech on a matter of public concern, it certainly is for the betterment of the academic institution.

A. Academic Personnel as Employees

Any discussion of the constitutional protection accorded public-university-employee speech must begin with the proposition that the government has far more power to regulate the activities of its employees than it does the expression of its citizens.¹⁴⁹ The government functioning as an employer is concerned with operational effectiveness and efficiency, and it may limit the speech of its employees to achieve those ends.¹⁵⁰ Content-based restrictions on speech are problematic vis-à-vis the public but may be appropriate when the sovereign acts as a public employer.¹⁵¹ The First Amendment allows for unpopular and even offensive speech, and political speech is at the core of what is protected.¹⁵² However, in the context of a harmonious working and

146. *Garcetti*, 547 U.S. at 425.

147. *Id.* at 421, 423.

148. The authors readily acknowledge that professional academic freedom is limited by “scholarly standards and professional ethics.” Rabban, *Faculty Autonomy*, *supra* note 63, at 1408–09.

149. *Engquist v. Or. Dep’t of Agric.*, 128 S. Ct. 2146, 2151 (2008) (quoting *Waters v. Churchill*, 511 U.S. 661, 675 (1994)).

150. *Waters*, 511 U.S. at 675.

151. *Id.* at 671.

152. *Id.* at 672.

learning environment, few would suggest that academic personnel enjoy an *unqualified* First Amendment right to engage in offensive speech that would compromise relationships with colleagues or students, speech that would undermine administrative direction, or speech that would advocate for a particular political candidate.¹⁵³ The right to speak out in the workplace is qualified because it can impair the effective functioning of the unit; dissension can impede policy and serve as a distraction.¹⁵⁴ At the same time, caution is necessary, so that “public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees’ speech.”¹⁵⁵

B. Limitations on Other Constitutional Rights in an Academic Setting

The protection afforded academic personnel in other areas is similarly limited as a result of the public employment context and its limitations on constitutional rights. For example, citizens enjoy a Fourth Amendment right to be free from unreasonable searches and seizures.¹⁵⁶ That right normally includes a requirement that searches be founded upon probable cause and a court-issued warrant; however, neither is required when an academic employer performs a non-investigatory search of an employee’s office or conducts an investigation of work-related misconduct.¹⁵⁷ Although academic personnel may have a reasonable expectation of privacy in certain areas of the workplace, the reasonableness of a search is influenced by the needs of the employer to maintain an effective workforce; such a search need only be justified at its inception and reasonably related in scope to that justification.¹⁵⁸ Thus, a search to uncover suspected work-related wrongdoing is acceptable given a reasonable basis for suspicion.¹⁵⁹

In the due process area, at-will academic personnel do not possess a liberty interest providing protection from discharge based upon an employer’s

153. *Id.* at 672–74.

154. *Rankin v. McPherson*, 483 U.S. 378, 390–91 (1987).

155. *Id.* at 384.

156. U.S. CONST. amend. IV.

157. *O’Connor v. Ortega*, 480 U.S. 709, 725–26 (1987) (plurality opinion).

158. *Id.* (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) and *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

159. *Id.* at 726. Inquiries concerning a reasonable expectation of privacy in the workplace are highly fact specific. While a university employee may have a reasonable expectation of privacy in a purse or briefcase carried into a campus office, an office safe not identified and in an open area may not qualify. The safest course for law enforcement is to secure a warrant, as was done in *United States v. Soderstrand*. 412 F.3d 1146, 1153–54 (10th Cir. 2005). In *Soderstrand*, the defendant, a department chair at a state university, unsuccessfully sought to suppress child pornography discovered in an office safe stored in a department supply room. *Id.* at 1151–52. The court held that the clerical person who discovered the contraband was not functioning as a state actor because she was acting for her own purpose, and the warrant that later issued was either valid or the police executed the warrant in good faith reliance upon it. *Id.* at 1152.

mistaken reasons, at least in situations in which those reasons have not been made public.¹⁶⁰ Thus, an at-will academic employee may be discharged for reasons that are inadequate or even false, and no liberty interest is implicated so long as the reasons have not been publicly disclosed.¹⁶¹ In assessing the guarantee of equal protection, the Supreme Court recently held that the “class-of-one” theory of equal protection—based on irrational government treatment of one person, rather than class-based discrimination—is not available in the public employee context.¹⁶² To recognize such a theory would be inconsistent with the discretion granted to supervisory personnel to make subjective, individualized decisions.¹⁶³ Thus, faculty members at public universities will not be able to utilize a “class-of-one” equal protection theory when challenging adverse actions.

C. The Pickering/Connick Test: The Faculty’s Right to Speak Out Without Getting Fired

When it comes to speaking out, the constitutional protection afforded to university employees is already limited—the speech must involve a matter of public concern and not impair the operational effectiveness and efficiency of the program involved.¹⁶⁴ If the speech is on a matter of public concern, an ad-hoc balancing occurs between a public employee’s right to speak out and the government employer’s interest in the operational effectiveness and efficiency of its programs.¹⁶⁵ As such, even in the best case, speech implicating academic freedom would be balanced against the university’s interests.¹⁶⁶ The Court has developed a framework for analysis—the *Pickering/Connick* test—which comes with a wealth of applications.¹⁶⁷ The general rule holds an employer liable for retaliating against an employee who has engaged in protected speech; the analysis, however, is more nuanced.¹⁶⁸ Key inquiries include whether the speech at issue was on a matter of public concern and whether the faculty member’s interest in the speech is outweighed by the university’s reasons for limiting such speech.¹⁶⁹ Under the *Pickering/Connick* test, a faculty member must prove that the speech was on a matter of public concern and that it was a

160. *Bishop v. Wood*, 426 U.S. 341, 348 (1976).

161. *Id.* at 349.

162. *Engquist v. Or. Dep’t of Agric.*, 128 S. Ct. 2146, 2148, 2153–55 (2008).

163. *Id.* at 2156.

164. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

165. *Id.*

166. Metzger, *supra* note 14, at 1307–10.

167. *Garcetti v. Ceballos* modified the *Pickering/Connick* test by requiring a preliminary inquiry of whether the speech is made pursuant to employment responsibilities; if so, the speech is unprotected regardless of how the *Pickering/Connick* test might be resolved. *Garcetti v. Ceballos*, 547 U.S. 410, 424, 426 (2006).

168. *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1262 (10th Cir. 2005).

169. *Connick v. Myers*, 461 U.S. 138, 142 (1983).

substantial or motivating factor in an adverse employment action, such as non-renewal of the employee's teaching contract.¹⁷⁰

The first inquiry—whether the speech in question is on a matter of public concern—depends upon the “content, form, and context” of the speech in reference to the entire record.¹⁷¹ The Supreme Court has often found teachers' comments to be protected in public education settings; specifically, such protection has been afforded in situations in which (1) a teacher criticized both a school board's allocation of funds between athletics and educational programs and the lack of transparency in seeking additional revenue,¹⁷² (2) a teacher advocated in favor of the institution's shift from a two-year to a four-year academic program,¹⁷³ and (3) a teacher disclosed a school dress code to the media in an effort to garner public support for a bond issue.¹⁷⁴ A broad conception of “public concern” might suggest that most of what public universities do qualifies.¹⁷⁵ But in deciding whether speech is on a matter of public concern, the essential inquiry is whether the employee is speaking as an employee on a matter of personal interest or as a member of the public on matters of public concern, regardless of whether those matters are political or social.¹⁷⁶ A faculty member's speech is on a matter of public concern if it transcends personal interest or opinion and implicates social or political issues that are of concern to the community.¹⁷⁷

Under the *Pickering/Connick* test, a university may still prevail if it can prove either that the adverse action would have occurred even in the absence of the protected speech or that its interest in suppressing the speech outweighs the employee's interest in making it.¹⁷⁸ The university may claim threatened or actual disruption, including reduced employee morale and an impairment of work functions, if the speech is allowed to continue.¹⁷⁹ When the state acts as an employer and is, by necessity, concerned with the proper functioning of the government, its predictions of harm that will result from employee speech are

170. *See* Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 675 (1996).

171. *Connick*, 461 U.S. at 147–48.

172. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 569–70 (1967).

173. *Perry v. Sindermann*, 408 U.S. 593, 595 (1972).

174. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 282 (1977).

175. Matthew W. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323, 1346–47 (1988) [hereinafter Finkin, *Intramural Speech*].

176. *Urofsky v. Gilmore*, 216 F.3d 401, 406–07 (4th Cir. 2000) (en banc) (describing a matter of public concern as “an issue of social, political, or other interest to a community” (citing *Connick*, 461 U.S. at 146)).

177. *Connick*, 461 U.S. at 146; *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1189 (6th Cir. 1995).

178. *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 675 (1996).

179. *Waters v. Churchill*, 511 U.S. 661, 675–77 (1994) (plurality opinion) (noting that the degree to which the speech impairs the effective and efficient functioning of the government employer is based on “the facts as the employer reasonably found them to be”); *see also Umbehr*, 518 U.S. at 676–77; *Jeffries v. Harleston*, 52 F.3d 9, 14 (2d Cir. 1995).

given more weight than such predictions accompanying general restrictions on public speech.¹⁸⁰ Many of the cases in this area deal with actual disruption claimed by the university when the adverse action follows the speech in question.¹⁸¹ That said, the university may impose “only those speech restrictions that are necessary for [it] to operate efficiently and effectively.”¹⁸²

From a faculty member’s perspective, academic freedom may involve teaching, researching, or commenting as a faculty member or as a citizen. As noted, the university has the right to prescribe the curriculum and ensure that it is being taught, although instructors certainly have the right to comment on the subject matter.¹⁸³ This means that a public university professor lacks a First Amendment right to decide unilaterally what will be taught in the classroom, particularly where it conflicts with the prescribed curriculum.¹⁸⁴ At the same

180. *Umbehr*, 518 U.S. at 676–77 (quoting *Waters*, 511 U.S. at 673, 675).

181. *See, e.g.*, *Hulen v. Yates*, 322 F.3d 1229, 1238–39 (10th Cir. 2003) (per curiam) (noting that the action being challenged occurred after the speech in question).

182. *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006); *see also* *Tenn. Secondary Sch. Athletic Ass’n v. Brentwood Acad.*, 551 U.S. 291, 299 (2007) (extending speech restrictions intended to promote the effective and efficient operation of a business to public high school athletic leagues).

183. *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 671 (7th Cir. 2006).

184. *Edwards v. Cal. Univ. of Penn.*, 156 F.3d 488, 491 (3d Cir. 1998). In the public elementary and secondary context, disputes about teaching methods that implicate free speech are plentiful. These cases must be viewed in light of the premise that elementary and secondary schools have more control over curricular speech “to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988). Thus, school officials may restrict the content of such speech, provided the restrictions “are reasonably related to legitimate pedagogical concerns.” *Id.* at 273. The rule broadly applies to those school activities directed by faculty members and designed to impart knowledge. *Id.* at 271; *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 722 (2d Cir. 1994). At times, the *Hazelwood* rule has been applied to curriculum matters in the university setting. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1289–90 (10th Cir. 2004); *Brown v. Li*, 308 F.3d 939, 949 (9th Cir. 2002).

One line of authority holds that the institution can insist on neutrality or fidelity to its prescribed message. Thus, a social studies teacher commenting on the war in Iraq in response to a question during current events may have been commenting on a matter of public concern, but the school district could decline to renew her contract on this basis without offending the First Amendment. *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 478–80 (7th Cir. 2007); *accord* *Lee v. York County Sch. Div.*, 484 F.3d 687, 689, 697 (4th Cir. 2007) (holding that a school could insist on removal of items of a religious nature posted on classroom bulletin board when the items were curricular in nature, and that disputes about the curriculum are not matters of public concern); *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1007–08 (7th Cir. 1990) (holding that a school board and superintendent could prohibit a teacher from teaching creation science); *Palmer v. Bd. of Educ.*, 603 F.2d 1271, 1274 (7th Cir. 1979) (holding that a teacher could be discharged for not teaching patriotism as part of the established curriculum due to her religious principles). This rationale is based on several considerations: (1) minor students are a captive audience given compulsory education laws; (2) teachers are hired for the on-topic speech they will provide; (3) changes concerning the curriculum ought to be entrusted to elected school board members who can be voted out of office, rather than tenured teachers; and (4) if

time, the curriculum is generally a product of the considered judgment of the department or area faculty, and such curriculum choices ought to be protected in accordance with the notion of institutional academic freedom.¹⁸⁵

What about discipline-related speech outside the classroom? Where the speech is related or tangentially related to the discipline, but is strongly contrary to institutional norms, the university usually prevails. Thus, in *Pugel v. Board of Trustees of the University of Illinois*, a graduate student employed as a teaching assistant was dismissed for fabricating data submitted to a publication and for presenting it at a conference.¹⁸⁶ On a motion to dismiss, the court assumed that, even if the speech was a matter of public concern, the interest of the university outweighed the teaching assistant's interest in speaking.¹⁸⁷ At stake was the university's interest in the integrity of its intellectual mission and research, which in turn implicated its reputation in the academic and scientific communities.¹⁸⁸ Not surprisingly, academic integrity prevailed over the employee's interest in the presentation, given prior

teachers were given a First Amendment right over the choice of curriculum, judges would displace school board members as arbiters of curriculum choice. *Mayer*, 474 F.3d at 479–80; *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 371 (4th Cir. 1998) (en banc).

Many of these cases were decided using the *Pickering/Connick* test. For example, an employee who was not rehired on account of his use of a non-approved reading list and one who was transferred due to the selection of a controversial play as part of the curriculum simply do not speak on matters of public concern; these issues involved ordinary employment disputes of private interest to the teachers, albeit disputes over the curriculum. *Lee*, 484 F.3d at 694 (holding that bulletin board postings, while not a matter of public concern, involve a dispute over curriculum); *Boring*, 136 F.3d at 370–71 (finding a play to be a matter of school curriculum and not a matter of public concern); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 800 (5th Cir. 1989) (stating that a reading list which varies from the school-approved list is a matter of curriculum and not a matter of public concern).

Another line of authority applies the *Pickering/Connick* test but specifically rejects the notion that a teacher's speech concerning curriculum cannot be a matter of public concern. *Evans-Marshall v. Bd. of Educ.*, 428 F.3d 223, 231–32 (6th Cir. 2005). Thus, in *Cockrel v. Shelby County School District*, the United States Court of Appeals for the Sixth Circuit, in reversing a grant of summary judgment in favor of the school board, held that a fifth grade teacher's discussion of the environmental benefits of industrial hemp was speech on a matter of public concern that was not outweighed by the school district's interest in the efficient and harmonious operation of the workplace. *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1052, 1055 (6th Cir. 2001). Where school administrators or the school board have previously approved the curriculum choices, if not the precise manner of the teacher's delivery, claims of disruption are viewed as the government's own making. *Id.* at 1054–55.

185. Cf. Rabban, *Faculty Autonomy*, *supra* note 63, at 1424–25 (explaining that even though unorthodox and unpopular views may be protected by the notion of academic freedom, a department is not required to hire faculty to represent all professionally acceptable views and approaches).

186. *Pugel v. Bd. of Trs.*, 378 F.3d 659, 660–61 (7th Cir. 2004).

187. *Id.* at 668.

188. *Id.*

proceedings that comported with due process had established that the data was fabricated.¹⁸⁹

Another case offering stark contrasts involved the non-renewal of a non-tenured assistant psychology professor's contract following a series of incidents in which the professor made sexually charged comments that were demeaning to women.¹⁹⁰ The assistant professor claimed that some of the comments were protected under the First Amendment and, presumably, academic freedom, because they occurred after hours at an academic conference and were made in response to a television broadcast on the mating rituals of humans and primates.¹⁹¹ Analyzing the context, form, and content of the speech against the entire record, the United States Court of Appeals for the Seventh Circuit came to the conclusion that the speech was on a matter of *private* concern, involving an attempt to solicit companionship and to irritate others.¹⁹² Abusive behavior toward faculty colleagues, staff, and students is not entitled to First Amendment protection merely because it occurs in an academic environment, whether inside or outside the classroom.¹⁹³ Academic freedom is not a cover for personal failings.¹⁹⁴

Some claims of academic freedom involve an employee's public comments that may relate to the mission of the university or department but differ as to what is expected from the university administration.¹⁹⁵ Cases prior to *Garcetti* had reached divergent results and often involved due process claims¹⁹⁶ in addition to First Amendment claims.¹⁹⁷

In *Hulen v. Yates*, faculty members in the accounting and taxation department at Colorado State University sought to revoke a colleague's tenure

189. *Id.* at 668–69. This result is completely consistent with traditional academic freedom that is predicated on personal responsibility for ethical behavior. See VAN ALSTYNE, *Specific Theory of Academic Freedom*, *supra* note 8, at 71 (“The maintenance of academic freedom contemplates an accountability in respect to academic investigations and utterances solely in respect of their professional integrity, a matter usually determined by reference to professional ethical standards of truthful disclosure and reasonable care.”).

190. *Trejo v. Shoben*, 319 F.3d 878, 881–83 (7th Cir. 2003).

191. *Id.* at 881, 884.

192. *Id.* at 887.

193. *Bonnell v. Lorenzo*, 241 F.3d 800, 824 (6th Cir. 2001) (stating that an educational institution has a strong interest in preventing harassing speech that creates a hostile learning environment); *Mills v. W. Wash. Univ.*, 208 P.3d 13, 21 (Wash. Ct. App. 2009).

194. Rabban, *Faculty Autonomy*, *supra* note 63, at 1410 (noting that academic freedom does not shelter incompetence, lack of productivity, or neglect of duties).

195. Rabban, *Functional Analysis*, *supra* note 6, at 294 (“The status of intramural speech by professors has enormous practical significance, for disputes over university policies and personalities have far outnumbered classic academic freedom cases involving the content of teaching or scholarship.”).

196. Due process claims generally require a property interest in continued employment. See *infra* notes 306–26 and accompanying text.

197. See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 597–98 (1972) (noting that a First Amendment claim is not dependent upon having a property interest in continued employment).

based on a variety of charges ranging from plagiarism to misuse of state funds.¹⁹⁸ The faculty members were warned that adverse actions could occur if the matter was not dropped.¹⁹⁹ Four faculty members were subsequently transferred to different departments within the College of Business.²⁰⁰ Although he taught tax, the plaintiff was transferred from the accounting department to the management department and was restricted to teaching only two tax classes per year.²⁰¹ He sued, claiming that he had been deprived of a property interest—his appointment to the accounting department—without due process and that university officials had retaliated against him for his protected speech in violation of the First Amendment.²⁰² Although the United States Court of Appeals for the Tenth Circuit found that the plaintiff-professor had a property interest in his departmental assignment, it held that his repeated entreaties to the university administration provided him with all of the process that he was due concerning the transfer.²⁰³ But the court also held that his comments concerning the situation in the accounting department constituted speech on a matter of public concern that was not outweighed by the university's stated reason of maintaining departmental harmony.²⁰⁴

Hulen is consistent with several cases that have found public comments about the expenditure of public funds at a public university—as well as comments about the objectives, purposes, and mission of the university—to constitute matters of public concern.²⁰⁵ For example, speaking out about faculty salaries could be categorized as a matter of public concern.²⁰⁶ At the same time, not every employment decision or complaint concerning faculty or university governance, application of the faculty handbook, or resource

198. *Hulen v. Yates*, 322 F.3d 1229, 1233 (10th Cir. 2003) (per curiam).

199. *Id.*

200. *Id.* at 1233 n.1. Then-Department Chair Michael Moore resigned and subsequently left the university. *Id.* at 1233.

201. *Id.*

202. *Id.* at 1234.

203. *Id.* at 1243–44, 1248–49 (concluding that Dr. Hulen received all of the pre- and post-transfer processes to which he was entitled). The university had never made an involuntary transfer such as this one. *Id.* at 1243. The general rule is that a faculty member lacks a property interest in a departmental assignment and will not have a procedural due process claim if he is transferred with the same rank and pay. See *Huang v. Bd. of Governors*, 902 F.2d 1134, 1142 (4th Cir. 1990); *Maples v. Martin*, 858 F.2d 1546, 1550–51 (11th Cir. 1988); *Kelleher v. Flawn*, 761 F.2d 1079, 1087 (5th Cir. 1985) (holding that graduate students lack a property interest in specific teaching duties).

204. *Hulen*, 322 F.3d at 1238–39.

205. See, e.g., *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1263 (10th Cir. 2005) (concerning the expenditure of public funds and the impact on patient care in relation to proposed move of medical school); *Kurtz v. Vickrey*, 855 F.2d 723, 729–30 (11th Cir. 1988) (relating to a concern that public funds were not being used for educational purposes).

206. *Power v. Summers*, 226 F.3d 815, 819–20 (7th Cir. 2000).

allocation is a matter of public concern.²⁰⁷ As the Tenth Circuit observed in the context of a dispute concerning the membership of a university administrative committee, “[a]lthough many an academic donnybrook has been fought over such administrative rules, the issues at stake rarely transcend the internal workings of the university to affect the political or social life of the community.”²⁰⁸ Academic institutions simply could not function if every decision concerning these matters metamorphosed into a constitutional issue.²⁰⁹ At the same time, such comments might be protected pursuant to professional academic freedom.²¹⁰

While there is a well-established body of law applying the First Amendment to faculty comments on matters of public concern, the matter is made more complicated to the extent that those comments are attributable to employment responsibilities, specifically participation in faculty governance. An equally difficult question is whether the scholarly viewpoints of university faculty members—whether published or declared in the classroom—are protected speech given that such viewpoints are the product of employment responsibilities.²¹¹ To analyze these problems, we must consider *Garcetti*.

D. *Garcetti v. Ceballos: The Newest Limitation on Employee Speech*

Garcetti involved a deputy district attorney who complained of retaliatory employment actions after he spoke out about misrepresentations contained in an affidavit supporting a search warrant.²¹² The speech was contained in a memorandum that was prepared as part of the deputy’s job.²¹³ It was thus considered to be “commissioned or created” by the employer, because it was drafted as part of the deputy’s professional responsibilities; therefore, the

207. *Bunger v. Univ. of Okla. Bd. of Regents*, 95 F.3d 987, 992 (10th Cir. 1996). Thus, remarks before a faculty senate criticizing members of a public board of regents and the administration and seeking a vote of no-confidence based on non-compliance with an internal policy on appointments did not involve matters of public concern; rather, they involved disputes concerning internal governance. *Clinger v. Bd. of Regents*, 215 F.3d 1162, 1166–67 (10th Cir. 2000). On the other hand, seeking a vote of no-confidence by the faculty association based on the college president’s alleged misrepresentation of credentials, declining enrollment, and subjective reduction-in-force procedures did involve matters of public concern. *Gardetto v. Mason*, 100 F.3d 803, 812–14 (10th Cir. 1996). Obviously, the cases are fact specific, but where the speaker makes comments pursuant to self-interest, it will be easier to find that the speech is an internal grievance, rather than speech on a matter of public concern. In contrast, where a group of faculty members speaks out concerning the overall well-being of the university, these facts suggest a matter of public concern.

208. *Bunger*, 95 F.3d at 992.

209. *See Connick v. Myers*, 461 U.S. 138, 143 (1983).

210. Finkin, “Institutional” *Academic Freedom*, *supra* note 14, at 852 (remarking that under traditional view of academic freedom, a faculty member is free to comment on and criticize institutional policy, subject to standards for proper internal discourse).

211. *See Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007).

212. *Garcetti v. Ceballos*, 547 U.S. 410, 413–15 (2006).

213. *Id.* at 421.

speech could not be citizen speech entitled to a First Amendment analysis.²¹⁴ *Garcetti* was a watershed case because it mandated that the first inquiry in most public employee speech cases is whether the speech is part of the employee's job responsibilities; if not, courts need not reach the question of whether the speech is on a matter of public concern, nor must they conduct an ad-hoc balancing between the interests of the employee and the public employer.²¹⁵ At least two circuits have supported this conclusion.²¹⁶ At the same time, language in *Garcetti* suggests that the Court left open the question of whether the limitation should apply in cases involving scholarship and teaching:

There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.²¹⁷

Although the Court did not limit application of its comment to post-secondary education, it was responding to Justice Souter's concern that the new rule not "imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties.'"²¹⁸ This suggests that the Court was concerned with academic freedom at public post-secondary—as opposed to elementary and secondary—institutions.²¹⁹

Before discussing the exception to the rule, it should be noted that *Garcetti* took a categorical view of speech made pursuant to employment responsibilities, and no matter how much the speech informs public debate about issues of public concern, it is unprotected.²²⁰ The rationale was based on concerns of federalism and separation of powers: federal courts should minimize intrusion into local affairs and should not undertake to manage other

214. *Id.* at 421–22.

215. *See id.* at 423.

216. *Davis v. Cook County*, 534 F.3d 650, 652–54 (7th Cir. 2008); *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1202 (10th Cir. 2007).

217. *Garcetti*, 547 U.S. at 425. Compare *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 478–79 (7th Cir. 2007) (relying on *Garcetti* to uphold the dismissal of a First Amendment claim brought by a public school teacher regarding a statement made in a current events class), with *Lee v. York County Sch. Div.*, 484 F.3d 687, 694 n.11 (4th Cir. 2007) (declining to apply *Garcetti* to a case involving speech related to teaching).

218. *Garcetti*, 547 U.S. at 438 (Souter, J., dissenting).

219. *Edwards v. Aguillard*, 482 U.S. 578, 586 n.6 (1987) (suggesting that academic freedom is not applicable to elementary and secondary education where the curriculum is proscribed by a central authority).

220. *See Garcetti*, 547 U.S. at 422–26 (majority opinion).

governmental units.²²¹ *Garcetti* also was grounded on the idea that the governmental employer may control what it has created—in this case, speech.²²² *Garcetti* limited the prior qualified privilege, apparently rejecting the notion that public employees may also function as citizens even though (1) the topic pertains to employment responsibilities and (2) most public employees are rarely commissioned to carry a specific governmental message.²²³

Turning to the academic exception, the United States Court of Appeals for the Seventh Circuit concluded that if it applies at all, the exception only has relevance to post-secondary education: an elementary school teacher who spoke on a political issue as part of her official duties could not invoke academic freedom to bypass this rule.²²⁴ On the other hand, the United States Court of Appeals for the Fourth Circuit decided not to apply the exception in a case involving a high school teacher who posted religious material on a bulletin board; instead, the court analyzed the matter under the *Pickering/Connick* test and concluded that the speech was not on a matter of public concern and was therefore not protected by the First Amendment.²²⁵

Many cases arising out of the public post-secondary academic setting involve complaints of adverse employment action based on administrative matters, as opposed to curriculum and scholarship; it is difficult, then, to see why the *Garcetti* limitation would not apply. An argument could be made that because all administrative pursuits are related to scholarship and teaching, all academic speech should be exempt from *Garcetti*'s reach; however, that assertion seems overbroad. In this regard, equity has always been a concern: why should faculty members—as public employees complaining about internal and administrative matters—enjoy greater constitutional protection than other public employees?²²⁶ For example, suppose a faculty member complains about how a grant is administered or how a teaching duty is assigned. While these complaints may have an indirect effect on the academic mission, it is difficult to argue that such complaints are qualitatively different merely because they occur at an academic institution. In addition, analysis of government employee speech under the *Pickering/Connick* test has always been more nuanced, taking particular care to evaluate the nature of the statements and their effect upon the institution.²²⁷

221. *Id.* at 423.

222. *Id.* at 421–22.

223. *Id.* at 426–27 (Stevens, J., dissenting); *id.* at 436–38 (Souter, J., dissenting).

224. *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 480 (7th Cir. 2007).

225. *Lee v. York County Sch. Div.*, 484 F.3d 687, 689, 694, 695 n.11 (4th Cir. 2007).

226. *See, e.g., Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1266 (10th Cir. 2005) (holding that the First Amendment would be applied unequally if professors had “a special constitutional right of academic freedom”); *Urofsky v. Gilmore*, 216 F.3d 401, 415 (4th Cir. 2000) (en banc) (finding that the right of academic freedom does not extend beyond protection from dismissal).

227. *See Connick v. Myers*, 461 U.S. 138, 147–48, 150 (1983).

The statements' effect on the institution may be realized more directly in situations in which faculty members are participating in the governance of the institution, college, or department.²²⁸ Faculty members are expected to participate in such activities, often as part of a service requirement. Such participation may involve serving on committees to (1) evaluate faculty for hiring and promotion, (2) supply programmatic recommendations, and (3) provide recommendations concerning resource allocation and administration.²²⁹ Although administrators are tasked with the duty of implementing policies, the faculty's professional expertise is essential to assess faculty qualifications and to make recommendations and decisions of a programmatic dimension.

Three recent cases suggest that courts are capable of determining what faculty members do.²³⁰ Even though faculty members have discretion, job descriptions do exist and annual performance reviews are commonplace, thereby suggesting that faculty functions are specifically defined. In *Renken v. Gregory*, a professor who obtained a National Science Foundation grant claimed that he had been retaliated against when he took issue with the university's proposed allocation of the grant funds.²³¹ Acknowledging that university professors have teaching, research, and service responsibilities, the Seventh Circuit applied *Garcetti* and held that administering the grant was a part of those responsibilities.²³² One of the purposes of the grant was to improve undergraduate education, and as the "principal investigator/project director who signed and submitted the grant proposal," the professor was to receive course buyouts, which equated to a reduction in teaching load.²³³ Although the professor argued that he had discretion vis-à-vis applying for and administering the grant, the Seventh Circuit recognized that securing and administering grant funds was done in fulfillment of his teaching and research responsibilities, as well as the requirements underpinning his promotion to full

228. Although many structures exist, the foundation for faculty governance and cohesion is probably the academic department, with some department faculty participating in college governance and fewer faculty participating in some university-wide governing body, such as a faculty senate. See Mary Burgan, WHAT EVER HAPPENED TO THE FACULTY? DRIFT AND DECISION IN HIGHER EDUCATION 188 (2006); see also O'Neil, *supra* note 4, at 193 (suggesting that a university-wide forum is usually necessary to maintain academic freedom). The academic department generally has the most participation as the discipline-based unit and also would play a key role in monitoring "on topic" content.

229. Neil W. Hamilton, *Faculty Involvement in System-wide Governance*, in COMPETING CONCEPTIONS OF ACADEMIC GOVERNANCE 77, 96–97 (William G. Tierney ed., 2004).

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

231. *Renken*, 541 F.3d at 773.

232. *Id.* at 773–74.

233. *Id.*

professor.²³⁴ The court adopted this broad but practical view of what university faculty do, suggesting that faculty members' discretion over their research and service responsibilities does not preclude a holding that speech on those subjects is made pursuant to employment responsibilities.²³⁵

Likewise in *Gorum v. Sessoms*, the United States Court of Appeals for the Third Circuit recognized that faculty often engage in service activities pursuant to their job responsibilities.²³⁶ In *Gorum*, a tenured professor and department chair claimed that he was terminated in retaliation for opposing the candidacy of the university president, for advising a student during a disciplinary proceeding, and for rescinding an invitation for the president to speak at a prayer breakfast.²³⁷ The university maintained that the professor was terminated for changing the grades of forty-eight students without the professor-of-record's permission.²³⁸

The Third Circuit concluded that the professor was speaking "within his official duties"²³⁹ and found that he could advise the student because he was a faculty member and familiar with the disciplinary procedures through his university committee work. The court noted that the description of faculty responsibilities included assisting and advising student organizations.²⁴⁰ Without going as far as the Seventh Circuit, the Third Circuit applied the *Garcetti* limitation because it viewed the professor's activities as clearly not within the realm of either teaching or scholarship; therefore, the application of that limitation did not imperil academic freedom.²⁴¹ The court agreed with the district court's reasoning that the speech was not on a matter of public concern nor a substantial factor in the termination; the court further agreed that the decision to terminate would have been the same even in the absence of the speech.²⁴²

Governance activities also would seem to fall within a faculty member's job responsibilities.²⁴³ In *Hong v. Grant*, the university denied a merit-based salary increase to a tenured chemical engineering professor on account of his insufficient research activities.²⁴⁴ The professor had deferred the merit

234. *Id.* at 774.

235. *Id.*

236. *Gorum v. Sessoms*, 561 F.3d 179, 186 (3d Cir. 2009).

237. *Id.* at 182–84.

238. *Id.* at 182.

239. *Id.* at 186.

240. *Id.*

241. *Id.*

242. *Id.* at 187–88.

243. *See Minn. State Bd. of Cmty. Colls. v. Knight*, 465 U.S. 271, 288 (1984) (noting that although there may be a professional obligation to participate, "there is no constitutional right to participate in academic governance").

244. *Hong v. Grant*, 516 F. Supp. 2d 1158, 1164 (C.D. Cal. 2007), *appeal docketed*, No. 07-56705 (9th Cir. Nov. 23, 2007).

increase determination for a year based on his insufficient research productivity, yet when he was denied the merit increase the following year for the same reason that he had previously acknowledged, he sued claiming that the real reason for the denial was his protected speech.²⁴⁵ The court granted summary judgment in favor of the university defendants, holding that the professor's critical comments were all made pursuant to his employment responsibilities.²⁴⁶ The court carefully considered the various statements at issue: the professor had dissented from retention and promotion decisions, complained that the faculty hiring process had been circumvented, and condemned the ratio of full-time faculty members to lecturers.²⁴⁷ The court viewed these statements in light of the professor's professional and job responsibilities and held that faculty members have a responsibility for shared governance and participation in departmental affairs, including setting the curriculum and making staffing, hiring, and promotion decisions.²⁴⁸ Given these responsibilities, the professor's statements were unprotected under *Garcetti*.²⁴⁹ In the alternative, the court held that the statements were not matters of public concern because they involved only internal personnel disputes.²⁵⁰ The court did not consider whether Professor Hong's speech might fall within the *Garcetti* exception for speech related to scholarship or teaching. Regardless, on appeal, the United States Court of Appeals for the Ninth Circuit could well affirm this case without reaching the issue of whether *Garcetti* applies if it agrees with the district court's alternative holding that the statements did not involve matters of public concern.²⁵¹

245. *Id.*

246. *Id.* at 1169–70.

247. *Id.* at 1167–68.

248. *Id.*

249. *Id.* at 1168.

250. *Id.* at 1169–70. Professor Hong's complaints concerning his colleagues centered on the accuracy of hiring and promotion credentials and questioned whether a listed grant was competitive, whether a colleague had actually supervised doctoral students, and whether academic papers at conferences were actually refereed. *Id.* at 1162–63.

251. Recently, a subcommittee of the American Association of University Professors expressed disappointment in the "early post-*Garcetti* cases" as insufficiently attentive as to how *Garcetti* applies in the academic environment, attributing the lack of attention in part to the academic community not pressing the issue. Robert M. O'Neil et al., *Protecting an Independent Faculty Voice: Academic Freedom After Garcetti v. Ceballos*, ACADEME, Nov.–Dec. 2009, at 67, 81–84, 88, available at <http://www.aaup.org/NR/rdonlyres/B3991F98-98D5-4CC0-9102-ED26A7AA2892/0/Garcetti.pdf> [hereinafter AAUP Subcommittee Report]. The subcommittee was tasked with "surveying the landscape of legal and professional protections for academic freedom at public colleges and universities in the wake of the Supreme Court's 2006 decision in *Garcetti v. Ceballos* and to propose institutional policy language aimed at protecting academic freedom where courts cannot or should not be relied upon." *Id.* at 67 (footnote omitted). The subcommittee report noted that proper development of the relationship between *Garcetti* and academic freedom necessarily includes alerting a court as to how a faculty member's speech may come within *Garcetti*'s possible exception for scholarship and teaching, or faculty governance which arguably might receive protection. *Id.* at 81. For example, in *Hong v. Grant*, Professor

To be sure, faculty members have the discipline-based knowledge to make intelligent decisions about a potential or current colleague's contribution to the

Hong's condemnation of the ratio of full-time faculty members to lecturers might be related to "scholarship" in the sense that over-reliance on lecturers might diminish the department's teaching and scholarship. *Id.*

Of core concern, the subcommittee report suggests that the early cases (as well as *Garcetti*) reflect a lack of appreciation of faculty governance and the professional nature of the faculty, both of which are quite different than the "master-servant framework" that animates *Garcetti*. *Id.* at 82, 88. According to the report, the Supreme Court's public employee speech cases—*Pickering*, *Connick*, and *Garcetti*—are based on the need for managerial control of subordinates so as to avoid "disharmony, disruption, and . . . insubordination." *Id.* at 82. It is this need for control that places the speech outside of normally protected speech. *Id.* The report challenges the validity of this assumption insofar as "faculty speech in or concerning institutional government." *Id.* "Institutional rules or policies providing for faculty participation do not delegate authority to subordinates in a hierarchy; they recognize the faculty as a body of cognate authority whose individual and collective counsel should be sought, even whose approval must be secured in some matters before institutional policies may be adopted or actions taken." *Id.* Thus, the report emphasizes that the "faculty cannot be considered to be a subordinate body in a managerial hierarchy even as it exercises effective authority . . . [A] manager may be dismissed for publicly criticizing her superior; a faculty member may not be dismissed for publicly criticizing her dean." *Id.*

Differentiating faculty from other public employees based upon independent professional judgment (even if required for institutional governance) may be a daunting task. *See id.* First, Justice Stephen Breyer made a similar argument when he suggested that professionals who engage in constitutionally required speech (and are subject to independent regulation) should not be subject to the *Garcetti* rule. *Garcetti*, 547 U.S. at 446 (Breyer, J., dissenting). Although some faculty might be subject to independent professional regulation—for example lawyers, medical doctors, and accountants—there is no constitutional right to participate in academic governance. *Minn. State Bd. of Cmty. Colls. v. Knight*, 465 U.S. 271, 287–88 (1984).

Second, an approach based on professional obligations seems inconsistent with *Garcetti*, which is based not only on a need for managerial control, but also federalism and separation of powers concerns, and a stated purpose to achieve parity between public and private employees. *Garcetti*, 547 U.S. at 422–23. The report suggests by way of analogy that the Supreme Court has held that public defenders are not considered state actors given their relationship to their clients, and that for purposes of collective bargaining, faculty have been deemed to be (albeit incorrectly) managers rather than employees. AAUP Subcommittee Report, *supra*, at 82 (citing *Polk County v. Dodson*, 454 U.S. 312, 321 (1981) and *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 686 (1980)). Both cases do take a functional approach to job responsibilities. Thus, in *Polk County*, the public defender was professionally required to exercise independent judgment on behalf of the client to effectuate the Sixth Amendment guarantee of assistance of counsel and therefore did not act under color of state law. 454 U.S. at 320–22. However, the Court recognized that a public defender acting in an administrative or investigative role may well be acting under color of state law. *Id.* at 324–25. Analytically, defending a criminal case is a narrower function than participating in faculty governance regarding "all major campus issues." *See* AAUP Subcommittee Report, *supra*, at 82.

While faculty may be unique insofar as some aspects of institutional governance, there is no denying that faculty members *are* employees and that some management is necessary to achieve institutional goals. Perhaps the degree of protection should logically depend upon how closely related the faculty speech is to those areas where the faculty has governance responsibility. Yet even in those governance matters where faculty judgment is essential, the outcome under *Garcetti* seems apparent, creating some strange results. *See infra* notes 288–95 and accompanying text.

field and certainly can provide valuable input concerning programs and resource allocation. Application of *Garcetti* portends less protection for faculty on this score; even if the speech discusses a matter of public concern, it will not be protected to the extent it is part of job responsibilities.²⁵² This result discourages faculty participation and is undesirable. The argument here is not that every comment made by a faculty member in the name of faculty governance should be protected speech; rather, those comments on matters of public concern that involve faculty governance ought to be entitled to protection, notwithstanding the fact that a faculty member has a responsibility to voice them.²⁵³

A university is not unique in employing professionals who engage in peer and programmatic review within professional constraints. For example, new entrants to a profession, such as lawyers and accountants, are continually evaluated, and peer review is commonplace for researchers. Likewise, government agencies employ professionals, including those engaged in research, and they must evaluate them.²⁵⁴ From a policy perspective, such

252. *Garcetti*, 547 U.S. at 421. One can envision speech formulating policy or speech commenting on those policies that would come within the *Garcetti* limitation. While intellectually the university might have an interest in protecting the integrity of the process by which it formulates policy, a lack of protection for either category is at odds with the open communication needed for trust and effective faculty governance.

253. Professor Judith Areen suggests that while the *Pickering/Connick* test may be appropriate when the government acts as a sovereign, when the government acts as an educator, the speech of faculty members ought to be protected provided the speech involved “academic matters”—namely, teaching, research, or faculty governance matters. Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 994 (2009). Under the framework proposed, the faculty member would have the burden of proving that the speech concerned academic matters and that the speech was responsible for the adverse action; thereafter, the university would have the burden of proving that the action was based on faculty-approved policy or that the action was made on academic grounds and was therefore not retaliatory. *Id.* at 994–96, 998. Thus, the new standard would not address whether the speech was on a matter of public concern, whether it was made pursuant to employment responsibilities, or whether the speech should prevail given an ad-hoc balancing between the interests of the institution and those of the speaker. *Id.* at 994, 996.

Instead, the adverse action would stand to the extent that it was supported by the faculty or a faculty committee, because a court would presume that the decision was made on academic grounds, unless the plaintiff could establish that the decision was such a departure from academic grounds that the faculty did not exercise professional judgment. *Id.* at 995. Professor Areen argues that the test would recognize the importance of higher education and remove the presumption that, ordinarily, the institution prevails. *Id.* at 998–99.

The test would depart only slightly from the current outcomes concerning deference to academic judgment; however, it might expand the involvement of the courts in university affairs. In some sense, every decision made at a university, particularly those pertaining to resource allocation, involves “academic matters.” *Id.* at 994. Moreover, even assuming that speech is protected, removing the ad-hoc balancing in the current test suggests an absolute approach to speech—one that the Court has been hesitant to endorse, particularly given its recognition that public employers, including universities, must be able to manage the institution.

254. *Id.* at 960–61.

reviews ought to be made in an objective and fair manner that is free of retaliation, but it is quite another step to conclude that speech in the aid of such review functions is constitutionally protected because it arises in a university setting.²⁵⁵ In *Garcetti*, the calendar deputy was a lawyer, and his memorandum was evaluated and disapproved of by other lawyers in the district attorney's office—where the exercise of utmost discretion is expected.²⁵⁶ That *Garcetti* should not apply to speech required by professional, discipline-related, or even constitutional standards was Justice Stephen Breyer's position in his dissent.²⁵⁷

At some point, however, when the discourse moves from the micro- to the macro-level, the *Garcetti* limitation could result in less protection for faculty members than for other public employees. For example, where the faculty utilizes established faculty governance procedures and takes the extraordinary step of voting no-confidence in those governing an institution based on spending priorities, those faculty members—no matter how they vote—ought to be protected against retaliation, notwithstanding the fact that the faculty is invited to participate in such activities and assuming that the matter is one of public concern. Either the comments are only generally related to job responsibilities, or the matter is one in which faculty members' comments are made in their role as public citizens. After all, public universities tend to be large employers that are responsible for research and teaching, and the faculty's comments are in the nature of the give and take debate over community issues.

Viewed in other contexts, *Garcetti* does not alter the well-established principle that a university can set the curriculum; therefore, it imposes no additional barrier to relief in the "stay on topic" cases. Thus, in *Piggee v. Carl Sandburg College*, the court remarked that *Garcetti* was "not directly relevant," and resolved the First Amendment issues on the principle that a university can require a faculty member to teach the curriculum and avoid extraneous subjects.²⁵⁸ The Seventh Circuit later explained that its remark

did not reflect doubt about the rule that employers are entitled to control speech from an instructor to a student on college grounds during working hours; it reflected, rather, the fact that Piggee had *not* been hired to buttonhole cosmetology students in the corridors and hand out tracts proclaiming that homosexuality is a mortal sin.²⁵⁹

255. The Supreme Court was unwilling to shield tenure review materials from discovery in an employment discrimination case even in light of an argument that such disclosure would inhibit frank recommendations and contravened academic freedom. See *Univ. of Pa. v. EEOC*, 493 U.S. 182, 193, 197–98 (1990).

256. *Garcetti*, 547 U.S. at 413, 422–23 (noting that supervisors may evaluate an employee's performance).

257. *Id.* at 446–47 (Breyer, J., dissenting).

258. *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 672 (7th Cir. 2006).

259. *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 480 (7th Cir. 2007).

When it comes to pure content-based regulation of scholarship and teaching in a university environment, application of *Garcetti* is also problematic. Research and publication are undeniably within job responsibilities in the broadest sense. While faculty members ordinarily must conduct research and publish scholarly works, the university often does not insist on copyright, and it is doubtful that the university would want to take ownership of the subject matter, methodology, or conclusions of the research.²⁶⁰ Research and publication further a core function of the university: knowledge creation. Teaching involves another core function: knowledge dissemination. These functions suggest that academic professionals are treated differently.²⁶¹ Accordingly, the *Garcetti* limitation should not apply where the adverse action is claimed to be a product of impermissible content-based or viewpoint-based discrimination.²⁶²

Consider two examples, one in the teaching context, and the other in the research and publication context. In an accounting theory class, such an arbitrary restriction might take the form of a directive that permits the professor to address the reasons in favor of fair value accounting and disallows discussion of the reasons opposing the use of fair value accounting.²⁶³ Likewise, a policy prohibiting research that questions the internationalization of accounting standards surely offends academic freedom and the First Amendment. After all, the transcendent values of academic freedom are diversity of thought and advancement of knowledge, and censorship imperils those values.²⁶⁴ These examples suggest that the government is regulating based not on academic concerns, but purely based on its *disagreement* with the message.²⁶⁵

In its capacity as regulator, the government may regulate speech with content-neutral regulation.²⁶⁶ If the purpose of such regulation is justified without reference to the content of the speech, it will be upheld even though it

260. Robert J. Tepper & Craig G. White, "Your" *Intellectual Property: Who Owns It?*, 22 ACCT. HORIZONS 49, 51 (2008).

261. Cf. Rabban, *Functional Analysis*, *supra* note 6, at 255 (noting a functional approach to immunity that may result in some professions receiving greater First Amendment rights).

262. Univ. of Pa. v. EEOC, 493 U.S. 182, 198 (1990). In this regard, peer review by administrators and a governing board may go a long way to ensure that such decisions are the product of academic and professional concerns. See Rabban, *Faculty Autonomy*, *supra* note 63, at 1410–12.

263. See *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 830 (1995) (distinguishing between content regulation, which may be permissible in keeping with the purpose of a limited forum, and viewpoint discrimination "presumed impermissible when directed against speech otherwise within the forum's limitations"); *Burnham v. Ianni*, 119 F.3d 668, 676 (8th Cir. 1997).

264. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

265. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984)).

266. *Id.* (citing *Clark*, 468 U.S. at 293).

may have an incidental effect upon such speech.²⁶⁷ In the academic context, a university may go further; some content-based regulation is inevitable because the university is an academic enterprise concerned with academic merit.²⁶⁸ Thus, a department could specialize in a particular discipline and favor applicants who pursue research and publication in that area. Still, content-based regulation of a faculty member's creative work has the greatest potential for tension with academic freedom and the First Amendment, and such regulation, though at times permissible, ought to allow a hearing on the merits even if it occurs as part of a faculty member's job responsibilities.²⁶⁹

To be sure, the government has greater rights when it "acts as employer rather than regulator."²⁷⁰ A university certainly has the right to establish the curriculum, set the grading procedure, and insist that faculty members stay on topic. It may evaluate the research and performance of its faculty, but it must do so based on legitimate and professional reasons. This conforms to well-established institutional norms of academic freedom: "teachers are entitled to full freedom in research and in the publication of the results, subject to the

267. *Id.*

268. See Byrne, *Special Concern*, *supra* note 14, at 310 (arguing that the political norm of not penalizing citizens on account of the content of their speech should not apply to an academic enterprise like a university where many decisions are based upon content or, rather, intellectual merit); Chen, *supra* note 66, at 966–67; Nancy J. Whitmore, *First Amendment Showdown: Intellectual Diversity Mandates and the Academic Marketplace*, 13 COMM. L. & POL'Y 321, 349, 360–61 (2008) (noting that while *Garcetti* did not address how much control a university has over speech, institutional academic freedom and the employee speech doctrine give a university "a great deal of power over the content of the education it provides). In response to content regulation inherent in the university environment, Professor Chen suggests a balancing test to resolve individual academic freedom claims. Chen, *supra* note 66, at 975. Under the test, a faculty member claiming First Amendment protection of his right to speak would demonstrate some adverse action on account of speech; then, the burden would shift to the university to demonstrate either that the speech is not germane to a specific and articulated part of the university's mission or that the university's interest in suppressing the speech is "substantially related to the advancement of a specific component of its articulated academic mission." *Id.* at 976–78, 982–83. The specificity required of the individual claimant and the university would narrow the analysis. *Id.* at 983.

269. See *Univ. of Pa. v. EEOC*, 493 U.S. 182, 198 n.6 (1990) (stating that the government bears a heavy burden in attempting to justify content-based regulation); *Emergency Coal. to Defend Educ. Travel v. U.S. Dep't of Treasury*, 545 F.3d 4, 12 (D.C. Cir. 2008) ("Any substantive governmental restriction on [the instructor's] academic lectures would obviously violate the First Amendment. Assuming that the right to academic freedom exists and that it can be asserted by an individual professor, its contours in this case are certainly similar to those of the right of free speech."); *Burnham v. Ianni*, 119 F.3d 668, 680 n.19 (8th Cir. 1997) (disapproving of content-based censorship of professor's protected speech because such censorship violated the principle of academic freedom and the First Amendment); Harry F. Tepker, Jr. & Joseph Harroz, Jr., *On Balancing Scales, Kaleidoscopes, and the Blurred Limits of Academic Freedom*, 50 OKLA. L. REV. 1, 34–40, 43–43 (1997) (suggesting that in applying the *Pickering/Connick* test, courts should begin with the consideration "that viewpoint discrimination is a sin worse than other forms of government action").

270. *Engquist v. Or. Dep't of Agric.*, 128 S. Ct. 2146, 2150 (2008).

adequate performance of their other academic duties,” and “[t]eachers are entitled to freedom in the classroom in discussing their subject.”²⁷¹ This is such an important value that the limitations of *Garcetti* should not apply, because the core functions of the university are research and teaching.²⁷² Academic freedom furthers the mission of the university; faculty become experts in a discipline through research and analysis, and they teach students to think critically.²⁷³ Professional competence is determined by faculty peer review, and shared governance often is the means of implementing that review.²⁷⁴ All of these functions have the potential to create controversy and offend powerful internal and external constituencies; however, they are essential to the credibility of universities and academic disciplines.²⁷⁵

Of course, this discussion presupposes that a particular controversy is one that can be characterized as a matter of public concern. Regardless of how devoted the faculty member is to the field, it is difficult to argue that every advance, discovery, or evaluation is a matter of public concern of interest to the community.²⁷⁶ Likewise, it is difficult to argue that every statement is protected by academic freedom.²⁷⁷ At the same time, facts matter, and capable counsel ought to be able to marshal facts demonstrating why the matter is one of public concern—perhaps by explaining that the faculty member’s activities involve resource allocation, the mission of the university, or the like. If the controversy is one of public concern, a careful balancing of the employer’s and employee’s interests ought to occur, and due regard should be given for both parties’ professional interests in academic freedom.²⁷⁸

271. 1940 STATEMENT, *supra* note 8, at 3.

272. Hamilton, *supra* note 229, at 95 (“The mission of higher education is to create and disseminate knowledge.”); Sheldon Nahmod, *Academic Freedom and the Post-Garcetti Blues*, 7 FIRST AMEND. L. REV. 54, 68 (2008) (taking a normative approach and suggesting that application of *Garcetti* to teaching and scholarship is inconsistent with “the democracy-promoting purposes of higher education”).

273. Hamilton, *supra* note 229, at 95–96; *see also* Byrne, *Special Concern*, *supra* note 14, at 265 (noting that academic freedom furthers a university’s mission and demonstrates “the university’s commitment to the pursuit of truth and the controvertibility of dogma”).

274. Hamilton, *supra* note 229, at 95–96.

275. Burgan, *supra* note 228, at 171; *see also* Larry Alexander, *Academic Freedom*, 77 U. COLO. L. REV. 883, 884, 900 (2006) (arguing that academic freedom requires that faculty function as academics and advocate based on arguments and evidence, rather than political preferences, to ensure that the rationale for academic freedom does not disappear).

276. R. George Wright, *The Emergence of First Amendment Academic Freedom*, 85 NEB. L. REV. 793, 820–21 (2007) (suggesting that the primary problem with the *Pickering/Connick* test is that much of what academic freedom seeks to protect does not necessarily involve matters of public concern).

277. The *Pickering/Connick* test and the *Garcetti* limitations are court-created analytical tools designed to narrow the category of protected speech by public employees; the argument that all speech is protected by academic freedom is at odds with what that doctrine was intended to protect, and perhaps the most ingenuous argument is in favor of a more expansive First Amendment doctrine for all employees. *See* Rabban, *Functional Analysis*, *supra* note 6, at 295.

278. Tepler & Harroz, *supra* note 269, at 39–40, 42–43.

E. Applying Garcetti to Public University Faculty

Even if *Garcetti* applies to public university faculty, the rule might not be as limiting as initially thought. In *Garcetti*, the parties agreed that the speech in question was written by the employee in accordance with his job responsibilities.²⁷⁹ No “comprehensive framework” was developed for determining when an employee acts within his or her job responsibilities; the Court acknowledged that the speech concerned the employee’s work and was made at work but noted that such facts were not dispositive.²⁸⁰ The Court rejected Justice Souter’s criticism that employers will merely broaden job descriptions to cover all employee speech and emphasized that an employee’s job description is not determinative.²⁸¹ The Court explained that a practical inquiry into what the employee is expected to do determines whether the speech is within an employee’s job responsibilities.²⁸² To avoid the *Garcetti* limitation, a faculty member must demonstrate that he or she was speaking as a citizen, rather than pursuant to his or her job responsibilities.²⁸³ Courts have identified two factors suggestive of this proposition: (1) the employee’s primary job responsibilities did not relate to alerting authorities to wrongdoing²⁸⁴ and (2) the employee went outside the chain of command in reporting the wrongdoing.²⁸⁵ These factors tend to suggest that an employee is exercising a right of freedom of expression that is granted to every citizen. Nonetheless, the overwhelming majority of cases hold that employees have spoken pursuant to job responsibilities; in the real world of trial and uncertain proof, a contrary showing may be difficult, if not counterintuitive.²⁸⁶ The

279. *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006).

280. *Id.* at 423–24.

281. *Id.* at 424–25.

282. *Id.* at 424.

283. *Id.* at 423.

284. *Thomas v. City of Blanchard*, 548 F.3d 1317, 1325 (10th Cir. 2008) (determining that a housing inspector’s complaints to an outside agency constituted “speech of a concerned citizen”).

285. *Davis v. McKinney*, 518 F.3d 304, 314–16 (5th Cir. 2008) (concluding that an internal auditor’s complaints to the president of the university, the FBI, and the EEOC were not in chain of command); *Frietag v. Ayers*, 468 F.3d 528, 545 (9th Cir. 2006) (concluding that a corrections officer’s complaints to state senator and Inspector General were not in chain of command). *But see Winder v. Erste*, 566 F.3d 209, 215 (D.C. Cir. 2009) (finding no First Amendment protection for testimony that was closely related to official duties). *Davis* and *Frietag* make it clear that it is often necessary to separately analyze statements made by a speaker to determine in what capacity each statement was made. *Davis*, 518 F.3d at 314; *Frietag*, 468 F.3d at 544–45; *see also* *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1204–05 (10th Cir. 2007) (determining that certain instances of speech made by teachers were in the nature of citizen speech because they occurred after hours, involved citizens and parents not employed by the school, and involved topics over which the employees lacked supervisory or monitoring duties).

286. Courts often hold that employees have spoken pursuant to job responsibilities in school settings. *See, e.g., Gorum v. Sessoms*, 561 F.3d 179, 185–86 (3d Cir. 2009) (concerning a department chair’s opposition to university administration); *D’Angelo v. Sch. Bd. of Polk County*, 497 F.3d 1203, 1211–12 (11th Cir. 2007) (concerning a principal’s speech favoring

circuits are split on whether such an inquiry is legal, factual, or somewhere in between.²⁸⁷

Application of the *Garcetti* rule creates some strange results. As suggested by Justice Souter, a faculty member complaining about the discriminatory hiring practices of a university would most likely be speaking as a citizen, while the personnel director would likely be deemed to be speaking within official responsibilities.²⁸⁸ Thus, there may be an “inverse correlation” between one’s knowledge of an issue and the degree of First Amendment protection.²⁸⁹ Additionally, the idea that faculty members speak only in one capacity is perhaps too simple. Faculty members teach, research, publish, and serve the institution, community, and discipline for many reasons. Such activities enhance one’s portfolio of achievements and often further good citizenship and professional responsibilities.²⁹⁰ Including 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.²⁹¹ In the end, however, if *Garcetti* applies to teaching, research, and service, it may be the only tenet that may be judicially enforced.

In arguing that the *Garcetti* limitation is too drastic, Justice Souter suggested requiring the employee speech be of “unusual importance” and satisfy “high standards of responsibility”; he would then leave it to the *Pickering/Connick* balancing test to establish a reasonable balance between the employee’s right to speak out and the employer’s right to manage the workplace.²⁹² Before *Garcetti*, the right to speak out about one’s workplace was always qualified; the issue in *Garcetti* was whether the additional qualification—that the speech

conversion to charter school); *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 694 (5th Cir. 2007) (per curiam) (concerning an athletic director’s memoranda to officials). *Williams* is especially instructive because it considered to what extent comments about potential wrongdoing were part of an employee’s job responsibilities. 480 F.3d at 694.

287. *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1127–28 (9th Cir. 2008) (discussing circuit split).

288. *Garcetti*, 547 U.S. at 429–30 (Souter, J., dissenting).

289. Robert M. O’Neil, *Academic Speech in the Post-Garcetti Environment*, 7 FIRST AMEND. L. REV. 1, 6, 12 (2008) (arguing that job-relatedness is really the test for determining if speech is protected and that First Amendment protection oddly extends to employees when they speak about matters remote from their areas of expertise).

290. Wright, *supra* note 276, at 821.

291. Byrne, *Special Concern*, *supra* note 14, at 263; Rabban, *Functional Analysis*, *supra* note 6, at 243–44; VAN ALSTYNE, *Specific Theory of Academic Freedom*, *supra* note 8, at 63–70. It is difficult to apply the rationale for academic freedom to the non-professional speech of faculty members, yet at the same time some limited protection is surely merited if such speech is incident to professional activities. See Rabban, *Functional Analysis*, *supra* note 6, at 244 (suggesting that a generous definition of professional speech would be better than treating the non-professional speech of academics differently than that of the public at large). Nonetheless, non-professional speech accounts for many controversies involving academic freedom. See Jennifer Elrod, *Critical Inquiry: A Tool for Protecting the Dissident Professor’s Academic Freedom*, 96 CAL. L. REV. 1669, 1685–86 (2008).

292. *Garcetti*, 547 U.S. at 434–35 (Souter, J., dissenting).

not be pursuant to official duties—was necessary to ensure workplace harmony, a consistent message from the employer, and managerial discretion.²⁹³ The *Garcetti* limitation is categorical: while it certainly applies to speech that is patently incorrect, inflammatory, or that compromises the employer's mission, it may also apply to speech that management would rather not hear because it exposes wrongdoing.²⁹⁴ Additionally, the *Garcetti* limitation may encourage public employees to voice their concerns not *through* the chain of command, but rather *outside* the chain of command in order to make the case for citizen speech.²⁹⁵ Of course, a rule that provides incentives for taking complaints outside the chain of command may be more disruptive and counterproductive than one that encourages internal complaints.

Apart from issues of content-based discrimination of scholarship and teaching, it is hard to argue that *Garcetti* should not be applied in an academic setting. To be sure, the public university may be a unique employer because its faculty set the curriculum and are responsible for governance and scholarship. It is difficult, however, to argue that faculty speech regarding every facet of university operations should enjoy greater protection than that afforded to speech of other university staff and government employees.²⁹⁶ At the same time, faculty governance depends on faculty participation, and a rule that has the potential to undermine that participation by making it less likely that the speech qualifies for constitutional protection could deter participation. After all, faculty members—as part of their job responsibilities—are expected to participate in faculty governance for the good of the institution as well as their related discipline.

F. Conclusion

Public employees have qualified rights to speak out on matters of public concern. Although the government has always enjoyed greater power to regulate the speech of its employees, that regulation should be no greater than is necessary to ensure operational efficiency and effectiveness. Such

293. *Id.* at 422–23 (majority opinion) (noting employer interests in controlling speech).

294. *Id.* at 426–27 (Stevens, J., dissenting).

295. *Id.* at 427.

296. See Schauer, *supra* note 54, at 914–15 (explaining that the desire for job autonomy and the freedom to dissent is not unique to academic faculty); Mark G. Yudof, *Three Faces of Academic Freedom*, 32 LOY. L. REV. 831, 840–41 (1987) (advancing arguments that faculty autonomy as a rationale for academic freedom is questionable and noting that “engineers at NASA [lack] the constitutional right to engineer rockets in their most efficient, productive, and self-realizing manner”); see also Keller, *supra* note 27, at 158, 171–74 (suggesting that the faculty voice should be dominant in academic and discipline-related matters, but that contemporary governance should recognize that the university is a large, complex organization in need of professional management, and faculty may be better deployed in task forces dealing with all-university problems).

regulation should not empower administrators to regulate where the sole basis for doing so is disagreement with the content of the speech.

Given the competing interests inherent in these cases, the Supreme Court has developed the *Pickering/Connick* test, which has proved workable for speech on matters of public concern. Application of the test requires careful attention to individual statements, and many statements are simply not of public concern. Moreover, in protecting the academic freedom of the institution, courts readily find that much of what teachers do, including discipline-related speech regarding curriculum and teaching methods, is either not a matter of public concern or is within the prerogative of the institution; thus, a balance is struck in favor of the institution. Discipline-related speech outside the classroom may also be subject to institutional regulation where it strongly contravenes institutional norms.

Garcetti added a new requirement in this area: the speech must involve the public employee speaking as a citizen and must not be pursuant to the employee's job responsibilities.²⁹⁷ It is an open question whether this applies in the academic context to scholarship and teaching. Even if it does, a faculty member may be able to claim that he or she was speaking as a citizen by going outside the chain of command and otherwise taking action consistent with citizen speech.

Garcetti does create some anomalies. The capacity in which the employee complains becomes all-important, and those complaints made outside of one's job responsibilities—and about which the speaker would presumably have less knowledge—are more likely to be protected than complaints by a person in a position to know about the situation by virtue of job responsibilities. Additionally, to the extent that faculty members are expected to contribute to faculty governance, such speech would be unprotected, and an analysis under the *Pickering/Connick* test would be unnecessary. This result certainly suggests that the speech is less protected and that *Garcetti* provides a disincentive to participation.

In light of the above, the *Garcetti* limitation presents another barrier to advancing academic freedom claims involving the teaching and scholarship of faculty members. As an academic enterprise, a university makes content-based decisions affecting both of these areas; concern arises when such decisions are made upon non-academic grounds, including mere disagreement with the message. Such actions may result in the suppression of speech and may have a chilling effect. Freedom of inquiry is important; while most universities require faculty members to pursue research and scholarship, they do not regulate the creative process and often do not claim ownership of the work. Additionally, a faculty member's discipline benefits from more speech, and peer review and critique by others in the same discipline is a better means of accepting or rejecting the work of the faculty member. Although constitutional

297. *Garcetti*, 547 U.S. at 421–22.

protection may be the most desirable outcome, the following Part suggests other remedies to combat retaliation based on speech or creative work.

III. IDENTIFYING OTHER PROTECTIONS OF ACADEMIC FREEDOM

In *Garcetti*, the Court recognized that employees often serve a valuable function by speaking out to “[e]xpos[e] . . . inefficiency and misconduct” and suggested that other mechanisms apart from the First Amendment may serve to promote such functions.²⁹⁸ Several mechanisms are available in the academic setting, the strongest of which is tenure because of its procedural and substantive guarantees that may be of a constitutional dimension. The problem, however, is that relatively few faculty members enjoy tenure. Other sources of protection include contracts, academic regulations, collective-bargaining agreements, state-law retaliatory discharge provisions, and other state-law constitutional protections.

A. Tenure

According to the AAUP, the purpose of tenure is to facilitate academic “freedom of teaching and research and of extramural activities” and to provide “a sufficient degree of economic security to make the profession attractive to men and women of ability.”²⁹⁹ Essentially, tenure is awarded to teachers after their successful completion of a probationary period and it ensures that teachers will not be dismissed without cause, except for unusual financial circumstances.³⁰⁰ A tenured status permits one to be dismissed only on a finding of just cause or “financial exigency,” and it guarantees procedural due process prior to any such dismissal.³⁰¹

The nature of tenure has been explored in the context of public university faculty members asserting constitutional due process claims in the wake of termination or other adverse employment actions. Tenure also has been considered in a series of cases addressing whether tenure buyout payments constitute “wages” and are thus subject to federal employment taxes, or whether they merely constitute payments in exchange for a property right and

298. *Id.* at 425–26.

299. 1940 STATEMENT, *supra* note 8, at 3.

300. *Id.* at 4. With the elimination of age-based mandatory retirement, termination of tenured faculty cannot be justified based on a set retirement age. VALERIE MARTIN CONLEY, AM. ASS’N OF UNIV. PROFESSORS (AAUP), SURVEY OF CHANGES IN FACULTY RETIREMENT POLICIES 1 (2007), available at <http://www.aaup.org/NR/rdonlyres/36818073-DDAE-4CFC-B158-41A1524D62E3/0/AAUP2007RetirementReport.pdf>. Tenured positions have no defined term or age-related end point and departure is primarily at the discretion of the faculty member.

301. *Id.* As noted, dismissal could also be based on discontinuance of a program of study or a department due to educational considerations as determined by the faculty or by clear and convincing evidence of physical or mental disability. See *Peterson v. N.D. Univ. Sys.*, 678 N.W.2d 163, 167 (N.D. 2004) (quoting *Stensrud v. Mayville State Coll.*, 368 N.W.2d 519, 521 n.1 (N.D. 1985)) (reviewing termination for cause of a tenured faculty member and noting that the primary purpose of tenure is to preserve academic freedom).

therefore are not subject to federal employment taxes.³⁰² As part of their analyses, the cases consider whether the faculty member has a property right in continued employment with the university.³⁰³ The Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”³⁰⁴ Thus, a state may not deprive someone of a property interest without due process of law. There are two types of due process: procedural due process and substantive due process. Procedural due process ensures that the state will not deprive a person of property without fair procedures in order to minimize the risk of erroneous deprivations, while substantive due process protects against arbitrary government action regarding certain fundamental rights, regardless of the procedures.³⁰⁵ It is important to

302. See, e.g., *Univ. of Pittsburgh v. United States*, 507 F.3d 165, 166 (3d Cir. 2007) (payments to university faculty in exchange for relinquishing tenure rights constitute wages); *Appoloni v. United States*, 450 F.3d 185, 187 (6th Cir. 2006) (payments to public school teachers in exchange for relinquishing tenure rights granted automatically by statute constitute wages); *N.D. State Univ. v. United States*, 255 F.3d 599, 600, 603 (8th Cir. 2001) (payments to university faculty in exchange for relinquishing tenure rights do not constitute wages). The United States Court of Appeals for the Eighth Circuit held that tenure is the beginning of a new employment relationship, rather than a reward for past service, and that the buyout payments were made in exchange for relinquishment of “constitutional and contractual rights to tenure.” *N.D. State Univ.*, 255 F.3d at 606–07. Thus, the payments were not wages subject to employment taxes. *Id.* at 600. On the other hand, the United States Court of Appeals for the Third Circuit focused on how tenure is earned, and held that tenure buyout payments are compensation for past services, notwithstanding the fact that the grant of tenure is discretionary. *Univ. of Pittsburgh*, 507 F.3d at 173–74; accord *Appoloni*, 450 F.3d at 195. A current revenue ruling probably would classify most tenure buyout payments as wages for past services; only where “the employee provides clear, separate, and adequate consideration for the employer’s payment that is not dependent upon the employer-employee relationship and its component terms and conditions” will the payment not constitute wages. Rev. Rul. 2004-110, 2004-50 I.R.B. 961; see also Robert J. Tepper & Craig G. White, *Academic Early Retirement: Do Tenure Buyout Payments Warrant Unique Employment Tax Treatment?*, 35 OKLA. CITY U. L. REV. (forthcoming Spring 2010); Nicole Occhuzzo, *Taxing Tenure: An Examination of How the Federal Insurance Contribution Act (FICA) Has Been Applied to Tenure Buyouts*, 62 TAX LAW. 189, 220 (2008).

These cases are useful because they illustrate common features of tenure. Generally, there is a probationary period in which a faculty member must demonstrate proficiency in teaching, research, and service before being considered for tenure. *Univ. of Pittsburgh*, 507 F.3d at 166, 173–74; *id.* at 177 (Scirica, J., dissenting); *N.D. State Univ.*, 255 F.3d at 605–06. The probationary period extends for a number of years, and if tenure is not granted, the faculty member may be terminated. *Univ. of Pittsburgh*, 507 F.3d at 166 (majority opinion); *N.D. State Univ.*, 255 F.3d at 601; see also *Mayberry v. Dees*, 663 F.2d 502, 518–19 (4th Cir. 1981) (explaining that a five-year probationary period applied). As previously discussed, courts tend to defer to institutional decisions concerning tenure and promotion. See *supra* notes 57–66 and accompanying text.

303. *Perry v. Sinderman*, 408 U.S. 593, 601–03 (1972); *Bd. of Regents v. Roth*, 408 U.S. 564, 576–78 (1972).

304. U.S. CONST. amend. XIV, § 1.

305. See *Daniels v. Williams*, 474 U.S. 327, 331 (1986). Courts are divided on whether a tenured faculty member has substantive due process protection in continued employment. Some

note that procedural due process does not guarantee any particular outcome, such as guaranteeing that a tenured faculty member will not be terminated; rather, its essence is the right to notice and an opportunity to be heard concerning the adverse action.³⁰⁶

A faculty member claiming a violation of due process in connection with an interest in continued employment must establish a protectable property interest under state law.³⁰⁷ Because the Constitution does not define what constitutes a property interest, one must establish a "legitimate claim of entitlement" rather than a unilateral expectation.³⁰⁸ Property is not limited to tangible personal or real property.³⁰⁹ It more broadly includes "interests that a person has already acquired in specific benefits."³¹⁰

A faculty member has a legitimate claim of entitlement to continued employment given a written contract with a tenure provision providing for termination only for cause.³¹¹ That said, rules and informal agreements can also demonstrate property interests, and other university employees may have property interests in their own continued employment.³¹² Thus, it is important to look not only to faculty contracts but also to faculty handbooks, academic regulations, past conduct, and other sources to determine whether the faculty member has a property interest in employment. The essence of tenure is a

courts have concluded that there is no substantive due process right, reasoning that such employment is not a fundamental right to which substantive due process would attach and that federal law already provides a claim for retaliatory discharge in contravention of the First Amendment. *See* *Nicholas v. Penn. State Univ.*, 227 F.3d 133, 143 n.3 (3d Cir. 2000); *Parate v. Isibor*, 868 F.2d 821, 832–33 (6th Cir. 1989). Other courts have found that substantive due process rights do attach to tenure. *N.D. State Univ.*, 255 F.3d at 605; *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 528 (10th Cir. 1998).

306. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). There may be other state procedural due process protections, but the due process afforded under the Fourteenth Amendment is judged on federal constitutional standards.

307. *Roth*, 408 U.S. at 577. A faculty member at a state university may also have a liberty interest in pursuing other employment opportunities upon termination or non-renewal. *Id.* at 573. This interest may be infringed where a state university publicly discloses false and stigmatizing reasons for the termination or non-renewal, without providing the faculty member advance notice and an opportunity to be heard. *Id.* at 573; *Vega v. Miller*, 273 F.3d 460, 470 (2d Cir. 2001). To prevail on such a claim, the faculty member would have to show that other employment opportunities were foreclosed and that the statements went beyond defamation and involved false charges of dishonesty, moral turpitude, or other similar claims. *Hedrich v. Bd. of Regents*, 274 F.3d 1174, 1183–84 (7th Cir. 2001); *Townsend v. Vallas*, 256 F.3d 661, 669–72 (7th Cir. 2001). A property interest in continued employment is not a prerequisite for a liberty interest claim. *See* *Sciolino v. City of Newport News*, 480 F.3d 642, 645–46 (4th Cir. 2007).

308. *Roth*, 408 U.S. at 576–77.

309. *Id.* at 571–72.

310. *Id.* at 576.

311. *Perry v. Sindermann*, 408 U.S. 593, 601 (1972).

312. *See id.* at 601–02.

restriction on the discretion of the university employer in matters of reappointment.³¹³

As a result, courts are reluctant to find a property interest based on the criteria and procedures leading to tenure or reappointment of probationary faculty; the procedures in place should not be confused with an actual restriction on the university's power to appoint a particular candidate.³¹⁴ However, for those faculty members awarded tenure, the university stands on different ground, and a faculty member could certainly be entitled to due process procedures when alleging that termination was based on protected speech.³¹⁵ Tenure protects academic freedom because "[i]t provides a secure forum for the germination, cultivation, and exchange of ideas without fear that expression of viewpoints will result in retribution."³¹⁶ At the core of that protection are contract-based restrictions on the discretion regarding reappointment, and constitutional due process protections on how that reappointment power is exercised.³¹⁷ The procedural protections incident to tenure often will require the institution to come up with legitimate reasons for its actions; such reasons will be made public, making it more difficult to terminate a faculty member for advocating unpopular views.³¹⁸ While it might be theoretically possible to protect academic freedom solely through contract-based restrictions (requiring that employment decisions be made based upon professional and educational concerns) involving peer review, at a minimum some protection in the nature of tenure would be necessary to insulate the decision-makers from political and institutional pressure.³¹⁹

A contractual restriction on the power to reappoint, and therefore a constitutional right to procedural due process, is generally lacking for the majority of the academic workforce. From 1975 to 2007, the percentage of full-time tenured and tenure-track faculty declined from 56.8% to 31.2% of university academic employees.³²⁰ Along with the decline of appointments leading to tenure has been the rise of contingent faculty—faculty who teach

313. See *Omoegbon v. Wells*, 335 F.3d 668, 674–75 (7th Cir. 2003).

314. *Colburn v. Trs. of Ind. Univ.*, 973 F.2d 581, 589–90 (7th Cir. 1992); *Lovlace v. Se. Mass. Univ.*, 793 F.2d 419, 422–24 (1st Cir. 1986) (per curiam).

315. By itself, the First Amendment does not require notice and an opportunity to be heard merely to ensure that the free speech rights of university faculty are protected. *Roth*, 408 U.S. at 575 n.14.

316. *N.D. State Univ. v. United States*, 255 F.3d 599, 606 (8th Cir. 2001).

317. *Id.* at 605–06. Many courts and universities have endorsed the purpose of tenure as set forth by the AAUP. *Otero-Burgos v. Inter Am. Univ.*, 558 F.3d 1, 10 n.24 (1st Cir. 2009).

318. *Byrne, Special Concern*, *supra* note 14, at 266.

319. *Byrne, Academic Freedom Without Tenure*, *supra* note 13, at 13.

320. Am. Ass'n of Univ. Professors, *Trends in Faculty Status, 1975–2007*, <http://www.aaup.org/NR/rdonlyres/7D01E0C7-C255-41F1-9F11-E27D0028CB2A/0/TrendsinFacultyStatus2007.pdf> (last visited Oct. 16, 2009) [hereinafter *AAUP Trends*].

part-time or full-time but without tenure.³²¹ In 2007, these contingent faculty members comprised almost sixty-nine percent of faculty employees.³²² Of course, this trend portends consequences for the academic environment; although contingent faculty add a practical dimension to the academy and work for less than the tenured or tenure-track faculty, the arrangement rarely allows for participation in research or faculty development, let alone faculty governance.³²³ Appointments from semester-to-semester or year-to-year counsel against free expression, particularly expression concerning the appointing authority, by this sub-group of the academic workforce.³²⁴ Yet such free expression is essential to academic freedom. Courts and academics are keenly aware of the difference between tenure-track and non-tenure-track appointments,³²⁵ although this may be ameliorated somewhat through limited contractual protections short of tenure, such as notice and an opportunity to be heard prior to dismissal or non-reappointment.³²⁶

B. Academic Regulations

In addition to relying upon procedural due process protections, faculty faced with retaliatory dismissal may also be able to rely upon certain substantive provisions adopted by the university. A public university's operational guidelines often incorporate parts of the AAUP's recommended academic regulations, which are designed "to protect academic freedom and tenure and to ensure academic due process."³²⁷ For those who enjoy tenure and may only

321. John W. Curtis & Monica F. Jacobe, *Consequences: An Increasingly Contingent Faculty*, in AAUP CONTINGENT FACULTY INDEX 2006 5 (2006), available at <http://www.aaup.org/NR/rdonlyres/F05FF88E-B2A8-4052-8373-AF0FDAE060AC/0/ConsequencesAnIncreasinglyContingentFaculty.pdf>.

322. AAUP Trends, *supra* note 320, at 312.

323. Curtis & Jacobe, *supra* note 321, at 6–7.

324. Joe Berry & Elizabeth Hoffman, *Including Contingent Faculty in Governance*, ACADEME ONLINE, Nov.–Dec. 2008, <http://www.aaup.org/AAUP/pubsres/academe/2008/ND/Feat/berr.htm> (last visited Oct. 16, 2009) (noting that most contingent faculty are at-will or virtually at-will employees who run a great risk of publicly disagreeing with tenure and tenure-track colleagues and concluding that job security is essential to inclusion).

325. See *Keri v. Bd. of Trs.*, 458 F.3d 620, 644–45 (7th Cir. 2006) (noting that tenured and non-tenured faculty are not similarly situated and are subject to different standards); *Weinstein v. Univ. of Ill.*, 811 F.2d 1091, 1097 (7th Cir. 1987) (finding no property interest in reappointment); *McElearney v. Univ. of Ill. at Chi.*, 612 F.2d 285, 290–92 (7th Cir. 1979) (*per curiam*) (holding that probationary employee had no property interest); see also *Otero-Burgos v. Inter Am. Univ.*, 558 F.3d 1, 10–11 (1st Cir. 2009) (noting the difference between at-will employees and tenured professors who are not subject to temporal limitations but who presumptively may serve until retirement).

326. Ernest Benjamin, *Contingent Faculty Organizing and Representation*, in ACADEMIC COLLECTIVE BARGAINING 112, 129–30 (Ernest Benjamin & Michael Mauer eds., 2006).

327. Am. Ass'n of Univ. Professors, *Foreword* to RECOMMENDED INSTITUTIONAL REGULATIONS ON ACADEMIC FREEDOM & TENURE I (2007), <http://www.aaup.org/NR/rdonlyres/43B77A60-BA80-4155-B61B-FF76743B5048/0/RecommendedInstitutionalRegulationsonAcade>

be dismissed for cause, the regulations provide that “[a]dequate cause for a dismissal will be related, directly and substantially, to the fitness of faculty members in their professional capacities as teachers or researchers. Dismissal will not be used to restrain faculty members in their exercise of academic freedom or other rights of American citizens.”³²⁸ The regulations further declare that “[a]ll members of the faculty, whether tenured or not, are entitled to academic freedom as set forth in the 1940 *Statement*” and provide a hearing procedure when a faculty member alleges that the decision not to reappoint was based upon considerations that violate academic freedom.³²⁹ The AAUP also provides information and advice on apparent violations of academic freedom; in certain cases, a formal investigation and report may occur.³³⁰

Additionally, a school’s accrediting body may also insist upon some protection of academic freedom. For example, the American Bar Association, which accredits nearly 200 law schools, requires that a “law school shall have an established and announced policy with respect to academic freedom and tenure” and provides an example based upon the AAUP’s 1940 *Statement*.³³¹ Likewise, a regional accrediting body may require some evidence of a policy of academic freedom.³³²

C. Other Measures

Provisions protecting academic freedom may be incorporated not only in faculty contracts and academic regulations,³³³ but also in collective-bargaining

micFreedomandTenure.pdf (last visited Oct. 16, 2009) [hereinafter AAUP Recommended Institutional Regulations].

328. *Id.* at 4.

329. *Id.* at 6–7.

330. See Am. Ass’n of Univ. Professors, *Investigative Reports*, <http://www.aaup.org/AAUP/protect/academicfreedom/investrep/> (last visited Oct. 16, 2009).

331. See AM. BAR ASS’N 2009–2010 STANDARDS FOR APPROVAL OF LAW SCHOOLS std. 405(b), <http://www.abanet.org/legaled/standards/20082009StandardsWebContent/Chapter%204.pdf> (last visited Oct. 16, 2009); see also AM. BAR ASS’N 2009–2010 STANDARDS FOR APPROVAL OF LAW SCHOOLS app. 1, <http://www.abanet.org/legaled/standards/20082009StandardsWebContent/Appendix1AcademicFreedomandTenure.pdf> (last visited Oct. 16, 2009). Additionally, the membership requirements of the Association of American Law Schools provide that a “faculty member shall have academic freedom and tenure in accordance with the principles of the [AAUP].” BYLAWS OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS, INC. art. 6, § 6-6(d), http://www.aals.org/about_handbook_bylaws.php (last visited Oct. 16, 2009).

332. See, e.g., HIGHER LEARNING COMM’N, HANDBOOK OF ACCREDITATION §§ 3.1-5, 3.2-13 (3d ed. 2003), available at <http://www.ncahlc.org/download/Handbook03.pdf> (discussing Criterion 4 and Core Component 4a and indicating that an organization must demonstrate that it values a life of learning, evidenced by the fact that the board has, among other things, “approved and disseminated statements supporting freedom of inquiry”).

333. Finkin, *Intramural Speech*, *supra* note 175, at 1348–49 (noting that most institutions commit to a guarantee of academic freedom and that professional academic freedom is not restricted by certain constitutional requirements, such as the requirements that the speech be on a matter of public concern or that it not be pursuant to employment responsibilities). Recognizing that constitutional academic freedom may be insufficient to protect faculty, an AAUP

agreements,³³⁴ state-law retaliatory discharge provisions,³³⁵ and other state-law constitutional protections. In *Garcetti*, the Court implied that even if First Amendment protection was unavailable, government employers should be mindful of employee complaints given a “powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing.”³³⁶ Many states recognize that penalizing whistleblowers who report violations of federal, state, or local law contravenes public policy.³³⁷ The problem, however, is that there is a wide variation in who and what is covered because a uniform law is lacking.³³⁸ For example, some schemes condition protection on notifying a supervisor before engaging in the protected activity, while others prohibit supervisors from imposing such conditions.³³⁹ This lack of uniformity probably contributes to difficulties in making the academic community generally aware, but the important point here is that such laws do exist and may affect conduct. In any event, should the speech involve opposition to discrimination, federal law prohibits an employer from retaliating against an employee who has spoken out against that discrimination.³⁴⁰

It is important to sound one note of caution in this area: exhaustion of any administrative remedy may be required. Several cases have held that a faculty member cannot assert certain rights when administrative mechanisms exist to

Subcommittee has proposed alternative policies for incorporation into academic regulations and agreements. AAUP Subcommittee Report, *supra* note 251, at 87–88. The policies are “designed to clarify that academic freedom protects faculty speech about institutional academic matters and governance, as well as teaching, research and extramural statements.” *Id.* at 87. They differ in specificity as to defining faculty responsibility for such speech. *Id.*

334. *See, e.g.*, *Nalichowski v. Capshaw*, No. 95-5577, 1996 WL 548143, at *2–3 (E.D. Pa. Sept. 20, 1996) (holding that violations of a collective-bargaining agreement containing an academic freedom provision were grievable); *see also* *Gorum v. Sessoms*, No. 06-565, 2008 WL 399641, at *2 (D. Del. Feb. 12, 2008) (discussing the procedure required to terminate a tenured faculty member under a collective bargaining agreement), *aff'd*, 561 F.3d 179, 182 (3d Cir. 2009). Frequently, the collective bargaining agreement will incorporate academic freedom norms and protect academic freedom through detailed appointment, retention and termination provisions. Ernest Benjamin, *The Collective Agreement: Negotiating Redbook Principles*, in *ACADEMIC COLLECTIVE BARGAINING* 242, 261–62 (Ernest Benjamin & Michael Mauer eds., 2006).

335. *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).

336. *Id.*

337. *Id.* at 425–26.

338. *Id.* at 440–41 (Souter, J., dissenting).

339. *Id.* at 440.

340. *See, e.g.*, 29 U.S.C. § 623(d) (2006) (prohibiting discrimination against employees who oppose or testify to unlawful practices); 42 U.S.C. § 2000e-3(a) (2006) (prohibiting discrimination following employee speech regarding “unlawful employment practice[s]”). *See generally* *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) (construing § 2000e-3(a) as applying not only to employment-related acts or acts that occur in the workplace).

address such issues in the first instance.³⁴¹ Not having taken advantage of the procedure in place, it is difficult to argue later that the procedure and the result are inadequate.³⁴²

Other remedies might include state constitutional or statutory provisions; for example, a faculty member could file a claim under the state's equivalent of the First Amendment, and a state court might not be inclined to adopt the *Garcetti* limitation or may have a more expansive view of academic freedom than under the First Amendment to the United States Constitution.³⁴³ Likewise, a state may guarantee due process, both procedural and substantive. No matter the remedy, the key is to look for guarantees of free speech, procedural due process, and protection against arbitrary action.

D. Conclusion

The most well-known mechanism for the protection of academic freedom is the First Amendment. The *Garcetti* Court implicitly recognized that other mechanisms may protect employees who speak out, even if they do so pursuant to their job responsibilities. This is especially true in the academic area; most institutions have adopted some form of procedure for academic personnel. While a federal constitutional right to due process depends on a property interest in employment (tenure, for example, in the case of faculty members), state law constitutional or statutory provisions, collective bargaining, or university provisions may provide a guarantee of due process or academic freedom.

IV. CONCLUSION

Professional academic freedom and tenure are important aspects of a university environment that encourage both freedom of inquiry and learning. Academic freedom for public university faculty extends to research and publication, discipline-related speech, and speaking out as citizens. Tenure protects academic freedom because it restricts the discretion of university personnel and provides that tenured faculty will be terminated only for just cause or financial exigency, rather than for unpopular speech.

341. See, e.g., *Neiman v. Yale Univ.*, 851 A.2d 1165, 1172 (Conn. 2004) (arguing that lack of such requirements would “undermine the internal grievance procedure” that relies on the assumption that the institutions themselves are the best forums to handle such disputes and that “internal procedures do not preclude access to the courts”).

342. *Reilly v. City of Atl. City*, 532 F.3d 216, 235–36 (3d Cir. 2008); *Santana v. City of Tulsa*, 359 F.3d 1241, 1244 (10th Cir. 2004); *Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000).

343. Not surprisingly, state constitutional provisions concerning free speech often follow the First Amendment. See, e.g., *Rubin v. Ikenberry*, 933 F. Supp. 1425, 1437 n.4 (C.D. Ill. 1996) (holding that plaintiff's liberty interest was the same under both the state and federal constitutions); *Mills v. W. Wash. Univ.*, 208 P.3d 13, 20–21 (Wash. Ct. App. 2009) (analyzing academic freedom under both federal and state law).

Academic freedom is a relatively new constitutional doctrine and has important limitations. Academic freedom is a “special concern” of the First Amendment, not a rule of decision. The First Amendment generally must be the source of rights used to vindicate speech. In addition, though initially concerned with individual faculty rights, academic freedom has taken on a decidedly institutional character: it protects the freedom of the institution to decide internal matters including selection of personnel, curriculum, and teaching methods. As such, academic freedom is often a default principle—courts tend not to interfere in academic matters and to defer to the institution where possible.

The First Amendment protects against retaliation for engaging in protected speech. Academic personnel may speak out on matters involving teaching, research, and service, but it would be a mistake to think that all such speech is protected under the rubric of academic freedom, let alone under the First Amendment. First, the state has far more power to regulate the speech of its employees than its citizens, given that it is hiring those engaging in the speech and is necessarily concerned with operational efficiency and effectiveness. Second, the Supreme Court has repeatedly been challenged as to how to achieve a balance between the rights of the state employer to run its operation successfully and the First Amendment rights of employees to speak out. It has determined that when employees act more like citizens than like employees, the First Amendment may protect speech on matters of *public* concern. Speech on matters of purely personal interest, such as internal complaints, is not protected. Moreover, even for speech on a matter of public concern, the right is qualified. The state may prove that its interest in avoiding actual disruption of the workplace outweighs the employee’s right to speak out, or the state may prove that even absent the employee’s protected speech, it still would have terminated the employee. This framework has been applied in a variety of employment contexts, and courts have been reluctant to alter it in the academic setting for fear of elevating the rights of state academic personnel above other personnel.

In 2006, the Court decided *Garcetti v. Ceballos*, in which it held that speech pursuant to one’s official duties is not protected from employer discipline.³⁴⁴ This test precedes other inquiries in the framework, and in creating it, the Court reserved comment on whether this rule applies to speech related to scholarship or teaching. Because suppression of speech involving research and scholarship has the greatest potential to involve content-based limitations and is central to the university’s mission, there is good reason not to apply it in these contexts. Even if the *Garcetti* limitation does apply, a faculty member may be able to avoid it by demonstrating that he or she was acting as a citizen—for example, by complaining outside the chain of command. The *Garcetti* limitation is grounded in the idea that public employees should not be

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

better off than those in the private sector with regard to employer discretion over job performance.

The *Garcetti* limitation, however, creates some odd results: those most knowledgeable about an issue because of job responsibilities frequently do not enjoy protection for statements that are job-related. Additionally, the limitation as applied may mean that statements pursuant to faculty governance responsibilities are unprotected. Such a possibility could deter participation.

Even if the limitation applies, tenure, with its customary guarantee of academic freedom and dismissal only for just cause, provides some protection against arbitrary action for those relatively few faculty members with such status. That said, all academic employees may want to consider remedies apart from federal constitutional protection—such as state constitutional and statutory protection, collective bargaining agreements, contracts, and university policy reflected in academic regulations—when it comes to employer discipline based on speech.

