

# DOES THE FIRST AMENDMENT PROTECT ACADEMIC FREEDOM?

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## *Abstract*

*Whatever the strength of the case for academic freedom, it remains the case that academic freedom can be granted or withheld at the discretion of the leadership of universities and colleges, and the elected officials entitled to dictate policy at those institutions, unless academic freedom enjoys constitutional protection. The constitutional status of academic freedom, in turn, is a matter of some dispute. This article offers an account of the relationship of the First Amendment to academic freedom. Part I explores the precedents and concludes that none support a doctrinal conception of academic freedom as a constitutional right of an individual scholar. Part II considers the normative case for a conception of academic freedom as a constitutional right of individual academics and finds it wanting. A First Amendment jurisprudence that would permit courts to override bona fide academic judgments made by universities to protect the "academic freedom" of individual teachers and scholars would be deeply problematic. Debates over the merits of pedagogy and scholarship, as long as they are fought on academic and pedagogical grounds, should occur within the university, not in the courts.*

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## INTRODUCTION

Perhaps unsurprisingly, among academics, there is wide agreement on the importance of academic freedom, though they often disagree about its application.<sup>1</sup> In one leading formulation, that of the American Association of University Professors (AAUP), “academic freedom” means

1. Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties . . . .
2. Teachers 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. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.
3. College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline . . . .<sup>2</sup>

Notably, while the final sentence of paragraph 2 hedges on the status of academic freedom at private colleges and universities, the AAUP offers no such qualification when it comes to public institutions.

Whatever the strength of the case for the AAUP’s or any other conception of academic freedom, it remains the case that academic freedom at public institutions can be granted or withheld at the discretion of their leadership, and the elected officials entitled to dictate policy at those institutions, unless academic freedom enjoys constitutional protection.

The constitutional status of academic freedom, in turn, is a matter of some dispute. Academic freedom has many times been invoked in constitutional litigation in the U.S. Supreme Court, as in cases involving efforts to root out academics thought to be disloyal or subversive from public employment,<sup>3</sup> state laws governing what may be taught in public schools,<sup>4</sup> and investigations of tenure decisions alleged to have been discriminatory.<sup>5</sup> In the lower courts, an

1 See, e.g., Jonathan R. Cole et al., *Academic Freedom: A Pilot Study of Faculty Views*, in WHO’S AFRAID OF ACADEMIC FREEDOM? 343, 343–46, 348–64 (Akeel Bilgrami & Jonathan R. Cole eds., 2015) (discussing empirical evidence regarding academics’ high commitment to academic freedom in the abstract but high levels of disagreement about how it applies in particular contexts).

2 Am. Ass’n of Univ. Professors, *1940 Statement on Academic Freedom and Tenure (With 1970 Interpretive Comments)*, in AAUP POLICY DOCUMENTS AND REPORTS 13, 14 (11th ed. 2015) (footnotes omitted) [hereinafter AAUP POLICY DOCUMENTS AND REPORTS].

3 See, e.g., *Keyishian v. Bd. of Reg. of St. Univ. of N.Y.*, 385 U.S. 589 (1967) (statutes and implementing regulations barring individuals who make “treasonous” statements or who advocate the overthrow of the government by force from public employment).

4 See, e.g., *Epperson v. Arkansas*, 393 U.S. 97 (1968) (state statutes barring teaching of evolution).

5 See, e.g., *Univ. of Pa. v. EEOC*, 493 U.S. 182 (1990) (subpoena seeking confidential peer review

even wider variety of cases have been treated with the constitutional status of academic freedom, from litigation over state statutes governing what material may be accessed over computers provided by the state,<sup>6</sup> to cases involving statements by academics alleged to constitute sexual harassment or retaliation against students who have complained about such harassment.<sup>7</sup> Nevertheless, the Supreme Court has never issued a square holding on the question whether academic freedom is constitutionally protected. The Court has, however, referred to academic freedom as “a special concern to the First Amendment.”<sup>8</sup> On the basis of this and similar statements, some commentators have argued that academic freedom is constitutionally protected under the First Amendment’s prohibition on abridgements of free speech.<sup>9</sup>

Then came *Garcetti v. Ceballos*.<sup>10</sup> In that case, the Court held that a prosecutor’s expressions of doubts about the merits of a pending case were unprotected by the First Amendment because “his expressions were made pursuant to his duties . . . .”<sup>11</sup> This holding has considerable import for academic freedom as a constitutional matter; if public employees lack First Amendment protection when they speak pursuant to their duties, it could well follow that academics at public institutions, to the extent they teach, research, publish, and speak as part of their duties, lack constitutional protection as well. Acknowledging this possibility, in *Garcetti*, the Court wrote that “today’s decision may have important ramifications for academic freedom, at least as a constitutional value,” but added, “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.”<sup>12</sup> The Court ultimately reserved decision on the point: “We need not . . . decide whether the analysis we conduct today would apply in the same manner . . . to a case involving speech related to scholarship or teaching.”<sup>13</sup>

Most legal scholars to address the implications of *Garcetti* for academic speech

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materials in connection with tenure denial alleged to have been discriminatory).

6 See, e.g., *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000) (state statute barring use of computers owned or leased by the state to access sexually explicit material as applied to college and university professors who access such materials for academic purposes).

7 See, e.g., *Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir. 2001) (professor’s use in class of vulgar language and subsequent circulation of harassment complaint filed against the professor).

8 *Keyishian*, 385 U.S. at 603.

9 See, e.g., David M. Rabban, *Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment*, LAW & CONTEMP. PROBS., Summer 1990, at 227, 246–47 (“The distinctive functions of professors and universities provide a convincing justification for the Court’s ambiguous incorporation of academic freedom as ‘a special concern’ of the first amendment . . . . The argument for a constitutional right of academic freedom can be substantially strengthened by viewing it not primarily as a special right unique to professors, but as a specific application of the broader principle that the institutional context of speech often has first amendment significance.”).

10 547 U.S. 410 (2006).

11 *Id.* at 421.

12 *Id.* at 425.

13 *Id.*

have opined that *Garcetti* should not be understood to limit the First Amendment rights of university faculty engaged in core academic functions such as teaching and scholarship.<sup>14</sup> The federal appellate courts to consider the question have, for the most part, agreed.<sup>15</sup>

A good example is provided by *Meriwether v. Hartop*. In that case, a philosophy professor at a state university, “a devout Christian” who “believes that God created human beings as either male or female, that this sex is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual’s feelings or desires,”<sup>16</sup> was informed that professors would be disciplined if they “refused to use a pronoun that reflects a student’s self-asserted gender identity,” and when subsequently asked by a student Professor Meriwether believed to be male to refer to her with feminine pronouns, instead referred to the student only by last name, ultimately provoking the university to place a formal warning in the professor’s file.<sup>17</sup> The district court dismissed the professor’s free-speech claim on

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14 See, e.g., ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 84 (2012) (“First Amendment coverage should be triggered whenever the freedom of the scholarly profession to engage in research and publication is potentially compromised.”); Judith C. Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 994 (2009) (“First Amendment protection for the speech of individual faculty members [should be afforded] as long as the speech concerned research, teaching, or faculty governance matters.”); Bridget R. Nugent & Julee T. Flood, *Rescuing Academic Freedom from Garcetti v. Ceballos, An Evaluation of Current Case Law and a Proposal for the Protection of Core Academic, Administrative, and Advisory Speech*, 40 J.C. & U.L. 115, 152 (2014) (“Without the assurance of an exception for core academic speech, many faculty members will be discouraged from taking novel or unpopular positions. Important ideas will never be advanced; intellectual debate and advancement will suffer. Scholarship cannot flourish in an atmosphere of chilled speech.” (footnote omitted)); Sheldon Nahmod, *Academic Freedom and the Post-Garcetti Blues*, 7 FIRST AMEND. L. REV. 54, 68 (2008) (“[A] lack of First Amendment protection would be inconsistent with the democracy-promoting purposes of higher education: the ability to engage in moral reasoning or, more broadly, the development of critical intellectual faculties and the advancement of knowledge. Classroom speech in the university and professorial scholarship are high-value speech deserving maximum First Amendment protection.” (footnote omitted)); Larry D. Spurgeon, *The Endangered Citizen Servant: Garcetti versus the Public Interest and Academic Freedom*, 39 J.C. & U.L. 405, 460 (2013) (“The starting point for reform is for the Supreme Court to hold that academic speech is exempted from *Garcetti* and the public employee speech analysis.”); Robert J. Tepper & Craig G. White, *Speak No Evil: Academic Freedom and the Application of Garcetti v. Ceballos To Public University Faculty*, 59 CATH. U.L. REV. 125, 156–67 (2009) (arguing that academic freedom should protect professors when engaged in faculty governance, teaching, or scholarship).

15 See, e.g., *Meriwether v. Hartop*, 992 F.3d 492, 504–07 (6th Cir. 2021) (“[P]rofessors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship.” (citation omitted)); *Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014) (“We conclude that *Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed “pursuant to the official duties” of a teacher and professor.”). *But cf.* *Evans-Marshall v. Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332, 344 (6th Cir. 2010) (“[T]o the extent academic freedom, as a constitutional rule, could somehow apply to primary and secondary schools, that does not insulate a teacher’s curricular and pedagogical choices from the school board’s oversight .... In the context of in-class curricular speech, this court has already said in the university arena that a teacher’s invocation of academic freedom does not warrant judicial intrusion upon an educational institution’s decisions.” (citing *Parate v. Isabore*, 868 F.2d 821, 827 (6th Cir. 1989)).

16 *Meriwether*, 992 F.3d at 498 (internal quotations omitted).

17 *Id.* at 498–502. Specifically, Professor Meriwether’s practice was to “address[] students as

the strength of *Garcetti*, but the court of appeals reversed, holding that “professors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship.”<sup>18</sup>

*Meriwether* illustrates the dual character of academic freedom. Vindicating the professor’s claim to academic freedom would necessarily constrain the academic freedom of responsible university officials to make and enforce their best pedagogical judgments about how teachers should interact with students. To be sure, in the AAUP’s conception, academic freedom is held by individual professors, who are “entitled to freedom in the classroom in discussing their subject.”<sup>19</sup> This conception, however, is contested. Academic freedom can also be framed as the prerogative of a university to make and enforce academic judgments free from external interference; in the words of Justice Frankfurter, academic freedom consists of “the four essential freedoms of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”<sup>20</sup> On this view, a judicial decision that prevents a university from enforcing its view about how its faculty best interacts with students could be regarded as a form of external interference that infringes on academic freedom in this institutional sense.

Cases like *Meriwether* illustrate the Janus-faced character of academic freedom, which is plausibly framed as both an individual and an institutional right.<sup>21</sup> This

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Mr. or Ms. He believes this formal manner of addressing students helps them view the academic enterprise as a serious, weighty endeavor and foster[s] an atmosphere of seriousness and mutual respect.” *Id.* at 499 (internal quotations and citations omitted and second brackets in original). After a dean “‘advised’ that he ‘eliminate all sex-based references from his expression,’” Professor Meriwether “proposed a compromise: He would keep using pronouns to address most students in class but would refer to Doe [the student] using only Doe’s last name. Dean Milliken accepted this compromise, apparently believing it followed the university’s gender-identity policy.” *Id.* (citations omitted). After the student again complained, the dean instructed Professor Meriwether that if he did not address the student as a woman, “he would be violating the university’s policy.” *Id.* at 500. Professor Meriwether subsequently inquired whether he could “use students’ preferred pronouns but place a disclaimer in his syllabus noting that he was doing so under compulsion and setting forth his personal and religious beliefs about gender identity.” *Id.* (internal quotations and citation omitted). After this proposal was rejected, Professor Meriwether continued to refer to the student by last name only. *Id.*

18 *Id.* at 505. Meriwether also advanced a claim under the First Amendment’s Free Exercise Clause, and on this claim, the court observed that government action that burdens the exercise of religious beliefs are valid if they are “neutral and generally applicable,” *id.* at 512 (citing *Employment Div., Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 877–78 (1990)), the court held that Meriwether had plausibly alleged that the university’s policy was not neutral and generally applicable based on his allegations that university officials had exhibited hostility to his religious beliefs as well as a variety of procedural irregularities in the University’s administration of policy that raised an inference of nonneutrality. *Id.* at 512–17.

19 See *supra* text accompanying note 2.

20 *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring in the result) (emphasis supplied) (internal quotations omitted).

21 *Cf. Reg. of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 ((1985) (“Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself.” (citations omitted)).

duality is at the heart of the difficulty in fashioning a First Amendment right of academic freedom.

This article breaks with the scholarship to date and offers a different account of the relationship of the First Amendment to academic freedom. Part I explores the precedents and concludes that none support a doctrinal conception of academic freedom as a constitutional right of an individual scholar. Part II considers the normative case for a conception of academic freedom as a constitutional right of individual academics and finds it wanting. Debates over the merits of pedagogy and scholarship, as long as they are fought on academic and pedagogical grounds, should occur within the university, not in the courts.

## I. The Doctrinal Case for Academic Freedom as a First Amendment Right

An exploration of the doctrinal basis for a First Amendment right of academic freedom requires consideration of both the First Amendment rights of public employees and the place that academic freedom occupies in First Amendment jurisprudence.

### A. *First Amendment Rights of Public Employees*

The doctrinal landscape that contours the constitutional status of academic freedom starts with the First Amendment rights of public employees.

#### 1. *The Pickering Balancing Test*

Prior to *Garcetti*, a public employee's speech was eligible for First Amendment protection when it "addresses a matter of public concern," an inquiry "determined by the content, form, and context of a given statement."<sup>22</sup> This "public concern" test endeavors to distinguish workplace grievances from speech of broader concern, asking whether a public employee's statements are "fairly considered as relating to any matter of political, social, or other concern to the community," or, instead, "employee complaints over internal office affairs."<sup>23</sup> The fact that a statement is disseminated solely within the workplace is not determinative; statements of public employees implicating matters of public concern are eligible for constitutional protection even when conveyed privately to colleagues at the workplace.<sup>24</sup> For example, the Court has held that a clerical employee of a

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22 *Connick v. Myers*, 461 U.S. 138, 147–48 (1983). *Accord, e.g., Rankin v. McPherson*, 483 U.S. 378, 384–85 (1987).

23 *Connick*, 461 U.S. at 146, 149. For a useful illustration, see *United States v. Nat'l Treas. Emp. Union*, 513 U.S. 454, 466 (1995) ("Respondents' expressive activities in this case fall within the protected category of citizen comment on matters of public concern rather than employee comment on matters related to personal status in the workplace. The speeches and articles for which they received compensation in the past were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their government employment.")

24 *See, e.g., Givhan v. Western Line Cons. Sch. Dist.*, 439 U.S. 410, 414 (1979) ("This Court's decisions ... do not support the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly.")

county constable's office spoke on a matter of public concern when she remarked to a coworker, after hearing of the attempted assassination of President Reagan, "[I]f they go for him again, I hope they get him."<sup>25</sup> Similarly, the Court held that matters of public concern were implicated by a questionnaire circulated by a local prosecutor to colleagues asking whether they feel pressure to work on political campaigns,<sup>26</sup> and a teacher's private comments to a school principal criticizing the school's desegregation policies.<sup>27</sup>

In light of the breadth of the concept of speech on a matter of public concern, academic speech will frequently implicate matters of public concern.<sup>28</sup> Thus, in *Meriwether*, the court held that the professor's expressions of his views on gender preferences and pronouns raised a matter of public concern.<sup>29</sup> Under the approach taken in the Supreme Court's decisions on the public-concern test, it is difficult to quarrel with that conclusion.

When the speech of a public employee implicates a matter of public concern, it is assessed under a test, first announced in *Pickering v. Board of Education of Township High School District 205*,<sup>30</sup> that requires a court to "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."<sup>31</sup> In striking the balance, the Court has "recognized as pertinent considerations whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise."<sup>32</sup> In undertaking this inquiry, "the government bears the burden of justifying its adverse employment action."<sup>33</sup> Accordingly, the court wrote in *Meriwether*: "The mere 'fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.'"<sup>34</sup>

25 *Rankin*, 483 U.S. at 381, 385–87.

26 *Connick*, 461 U.S. at 149.

27 *Givhan*, 439 U.S. at 415–16.

28 *See, e.g.*, *Hardy v. Jefferson Comm. Coll.*, 260 F.3d 671, 679 (6th Cir. 2001) ("Because the essence of a teacher's role is to prepare students for their place in society as responsible citizens, classroom instruction will often fall within the Supreme Court's broad conception of 'public concern.' Hardy's lecture on social deconstructivism and language, which explored the social and political impact of certain words, clearly meets this criterion. Although Hardy's in-class speech does not itself constitute pure public debate, it does relate to matters of overwhelming public concern—race, gender, and power conflicts in our society." (citation omitted)).

29 992 F.3d 492, 508–09 (6th Cir. 2021).

30 391 U.S. 563 (1969).

31 *Id.* at 568. *Accord, e.g.*, *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam); *United States v. Nat'l Treas. Emp. Union*, 513 U.S. 454, 465–66 (1995); *Rankin v. McPherson*, 483 U.S. 378, 384 (1987); *Connick v. Myers*, 461 U.S. 138, 142 (1983).

32 *Rankin*, 483 U.S. at 388 (citation omitted).

33 *Nat'l Treasury Emp. Union*, 513 U.S. at 466. *Accord, e.g.*, *Rankin*, 483 U.S. at 388.

34 *Meriwether*, 992 F.3d at 511 (citation omitted) (quoting *Tinker v. Des Moines Indep. Sch.*

To be sure, the balancing test does not require “an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.”<sup>35</sup> Moreover, “[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer’s judgment is appropriate,” though “a stronger showing may be necessary if the employee’s speech more substantially involve[s] matters of public concern.”<sup>36</sup> Thus, in *Meriwether*, there were plausible arguments on both sides of the *Pickering* balance. On his side of the scale, Professor Meriwether’s expressions of his views on gender identity likely implicated a matter of considerable public concern.<sup>37</sup> On the other, although the university need not have waited until a student’s education has been compromised to enforce its gender-identity policy, as the court of appeals observed, that “[a]t this stage of the litigation, there is no suggestion that Meriwether’s speech inhibited his duties in the classroom, hampered the operation of the school, or denied [the student] any educational benefits.”<sup>38</sup> Thus, Meriwether’s plausible allegation was sufficient to obligate the university to mount what was likely to be an expensive defense of the litigation. Moreover, proving that a professor’s refusal to use gender-neutral pronouns—or indeed a professor’s failure to adhere to most pedagogical or curricular policies—subsequently impeded students’ educational attainment would likely be a tall order.

In this fashion, the *Pickering* test grants courts considerable leeway to discount a public employer’s concerns about its employee’s duty-related speech and likely obligates universities to incur substantial litigation expenses if it decides to defend a contested pedagogical or scholarly decision. But the question remains, what of *Garcetti v. Ceballos*?

## 2. *The Impact of Garcetti*

Richard Ceballos, a “calendar deputy” or supervisory prosecutor in the Los Angeles County District Attorney’s Pomona office, was alerted by a defense attorney to a motion in a pending case attacking a search warrant on the ground that it had been obtained by deputy sheriffs through misrepresentation of material facts.<sup>39</sup> After examining the affidavit in support of the warrant application and visiting the location that it described, Ceballos wrote a memorandum recommending

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Dist., 393 U.S. 503, 508 (1969)).

35 Connick, 461 U.S. at 152 (footnote omitted).

36 *Id.* at 151–52.

37 In this connection, the court wrote: “Taken in context, his speech concerns a struggle over the social control of language in a crucial debate about the nature and foundation, or indeed real existence, of the sexes. That is, his mode of address *was* the message. It reflected his conviction that one’s sex cannot be changed, a topic which has been in the news on many occasions and has become an issue of contentious political . . . debate.” *Meriwether*, 992 F.3d at 508 (citations and internal quotations omitted). The court added, “[T]he First Amendment interests are especially strong here because Meriwether’s speech also relates to his core religious and philosophical beliefs.” *Id.* at 509.

38 *Id.* at 511.

39 *Garcetti v. Ceballos*, 547 U.S. 410, 413–14 (2006).

dismissal of the case.<sup>40</sup> After a “heated” meeting with sheriff’s personnel, higher-ranking supervisors in the district attorney’s office decided to proceed with the case, and a judge subsequently rejected the challenge to the warrant.<sup>41</sup> Ceballos then brought suit alleging that he had been subjected to a series of retaliatory actions based on his memorandum, in violation of his First Amendment rights.<sup>42</sup>

Rejecting Ceballos’s claim, the Supreme Court concluded that “[t]he controlling factor in Ceballos’ case is that his expressions were made pursuant to his duties as a calendar deputy.”<sup>43</sup> The Court explained that Ceballos’s employer was entitled to act on the basis of its assessment of Ceballos’s duty-related speech: “When he went to work and performed the tasks that he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.”<sup>44</sup> Thus, the Court held, “[W]hen 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.”<sup>45</sup>

Much of *Garcetti*’s reasoning seems inarguable. It is difficult to believe, for example, that prosecutors’ closing arguments—or their prosecutive recommendations—are protected by the First Amendment against criticism by their superiors. Surely prosecutors can be reassigned, demoted, or even fired when their superiors conclude that the arguments that they present to courts or juries, or the prosecutive recommendations they make to superiors, are wanting. Public employers doubtless have ample authority with respect to their employees’ duty-related speech; to use an example once employed by Justice O’Connor, “surely a public employer may, consistently with the First Amendment, prohibit its employees from being ‘rude to customers,’ a standard almost certainly too vague when applied to the public at large.”<sup>46</sup> Bad employees can be demoted or terminated by public employers based on what they write or say in the execution of their speech-related duties—even if those utterances would, outside of the employment context, be protected by the First Amendment.<sup>47</sup>

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40 *Id.* at 414.

41 *Id.* at 414–15.

42 *Id.* at 415.

43 *Id.* at 421.

44 *Id.* at 422. To similar effect, see *id.* at 422–23 (“Supervisors must ensure that their employees’ communications are accurate, demonstrate sound judgment, and promote the employer’s mission . . . If Ceballos’ superiors thought his memo was inflammatory or misguided, they had the authority to take corrective action.”).

45 *Id.* at 421.

46 *Waters v. Churchill*, 511 U.S. 661, 673 (1994) (plurality opinion) (citation omitted).

47 For arguments along these lines, see Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 *FORDHAM L. REV.* 33, 44–52 (2008); and Kermit Roosevelt III, *Not as Bad as You Think: Why Garcetti v. Ceballos Makes Sense*, 14 *U. PA. J. CONST. L.* 631, 645–54 (2012).

To be sure, one might argue that *Garcetti* is unnecessary to protect legitimate managerial prerogatives because the ordinary *Pickering* balancing test accommodates employer assessments of employee's duty-related speech. But, because the *Pickering* test places the burden of justification on the employer, it could give courts enormous leeway to micromanage the public workforce and thereby undermine the public's ability to hold those employers accountable for their performance. If, on the other hand, the *Pickering* balance were understood to require great deference to the judgments of public employers with respect to duty-related speech, then in practice that test would offer not much in the way of meaningful First Amendment protection, while potentially generating a great deal of likely meritless but costly and burdensome litigation.

Other aspects of *Garcetti* are more controversial. The decision has drawn considerable fire from commentators concerned with the potential its holding creates for the government to punish "whistleblowers"—those who bring official misconduct to light.<sup>48</sup> That seems a rather odd attack on *Garcetti*, however, since the Court denied protection only for Ceballos's prosecutive recommendations made entirely within the district attorney's office, rather than any effort to alert the public, or even anyone outside the district attorney's office, to his concerns. Even for employees whose duties include ferreting out misconduct, when they disclose evidence of misconduct not to their superiors, but outside the workplace, in an effort to alert the public or others, their speech is not denied constitutional protection under *Garcetti*.<sup>49</sup>

In any event, *Garcetti*'s implications for academic freedom as a constitutional right remain; because the duties of academics ordinarily include teaching and scholarly writing, *Garcetti* could deny academics constitutional protection from employer discipline for what they say and write pursuant to those duties.<sup>50</sup> Thus, as we have seen, in *Garcetti*, the Court acknowledged that its holding "may have important ramifications for academic freedom ... ." <sup>51</sup> Still, *Garcetti*'s reach is not unlimited; when academics address nonscholarly audiences in what is sometimes

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48 For critiques of *Garcetti* along these lines, see, for example, Cynthia Estlund, *Harmonizing Work and Citizenship: A Due Process Solution to a First Amendment Problem*, 2006 SUP. CT. REV. 115, 144–53; Cynthia Estlund, *Free Speech Rights that Work at Work: From the First Amendment to Due Process*, 54 U.C.L.A. L. REV. 1463, 1470–74 (2007); Scott A. Moss, *Students and Workers and Prisoners—Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 U.C.L.A. L. REV. 1635, 1649–52 (2007); Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing, and § 1983: A Critique of Garcetti v. Ceballos*, 42 U. RICH. L. REV. 561, 569–81 (2008); Charles W. "Rocky" Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RIGHTS J. 1173, 1192–1202 (2007); Paul M. Secunda, *The Solomon Amendment, Expressive Associations, and Public Employment*, 54 U.C.L.A. L. REV. 1767, 1809–13 (2007); Terry Smith, *Speaking Against Norms: Public Discourse and the Economy of Racialization in the Workplace*, 57 AM. U. L. REV. 523, 572–75 (2008); Jeffrey W. Stempel, *Tending to Potted Plants: The Professional Identity Vacuum in Garcetti v. Ceballos*, 12 NEV. L.J. 703, 713–20 (2012).

49 See *Lane v. Franks*, 573 U.S. 228, 238–42 (2014) (public employee's testimony at criminal trials discussing financial misconduct the employee had discovered in the course of his auditing duties protected by the First Amendment).

50 See, e.g., *Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2014) ("[T]eaching and academic writing are at the core of the official duties of teachers and professors.").

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

referred to as their “extramural utterances,”<sup>52</sup> it is likely the case, even after *Garcetti*, they will be treated as citizens speaking on a matter of public concern and therefore eligible for First Amendment protection.<sup>53</sup> Classroom speech and scholarly writing, however, may be a different matter.

### 3. *The Constitutional Status of Academic Freedom*

The courts that have rejected *Garcetti*'s application to claims of academic freedom have reasoned that the Supreme Court's First Amendment jurisprudence affords specific protections for academic freedom beyond those afforded to other public employees.<sup>54</sup> This view of precedent, however, is based almost entirely on two cases—the only instances in which the Supreme Court has treated substantively with the constitutional status of academic freedom.<sup>55</sup>

52 Am. Ass'n Univ. Professors, *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, in AAUP POLICY DOCUMENTS AND REPORTS, *supra* note 2, at 3, 11 (“In their extramural utterances, it is obvious that academic teachers are under a peculiar obligation to avoid hasty or unverified or exaggerated statements, and to refrain from intemperate or sensational modes of expression. But subject to these restraints, it is not, in this committee's opinion, desirable that scholars should be debarred from giving expression to their judgments upon controversial questions, or that their freedom of speech, outside the university, should be limited to questions falling within their own specialties.”).

53 See, e.g., *Adams v. Trs. of Univ. of N.C.-Wilmington*, 640 F.3d 550, 563–64 (4th Cir. 2011) (“[T]he scholarship and teaching in this case, Adams' speech, was intended for and directed at a national or international audience on issues of public importance unrelated to any of Adams' assigned teaching duties at UNCW or any other terms of his employment found in the record. Defendants concede none of Adams' speech was undertaken at the direction of UNCW, paid for by UNCW, or had any direct application to his UNCW duties.”). Cf. *Lane*, 573 U.S. at 240 (“The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties.”).

54 See, e.g., *Meriwether v. Hartop*, 992 F.3d 492, 506 (6th Cir. 2021) (“[O]ur job as lower court judges is to apply existing Supreme Court precedent unless it is expressly overruled. And here, the Supreme Court has not overruled its academic-freedom cases.”); *Demers*, 746 F.3d at 411 (“We conclude that if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court.”).

55 The Supreme Court's other references to academic freedom in its free-speech jurisprudence have been brief and unilluminating. See, e.g., *Univ. of Pa. v. EEOC*, 493 U.S. 182, 198, 200–01 (1990) (Rejecting a university's First Amendment defense to subpoenas seeking peer review materials considered in connection with an allegedly on discriminatory tenure denial because “the infringement the University complains of is extremely attenuated,” and “also speculative . . . . Although it is possible that some evaluators may become less candid as the possibility of disclosure increases, others may simply ground their evaluations in specific examples and illustrations in order to deflect potential claims of bias or unfairness.”); *Healy v. James*, 408 U.S. 169, 180–81 (1972) (“The college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas,’ and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.” (citation omitted)); *Whitehill v. Elkins*, 389 U.S. 54, 61–62 (1967) (“[A]s we read §§ 1 and 13 of the Ober Act [requiring a loyalty oath], the alteration clause and membership clause are still befogged . . . . [W]e find an overbreadth that makes possible oppressive or capricious application as regimes change. That very threat, as we said in another context, may deter the flowering of academic freedom as much as successive suits for perjury.” (citation and footnote omitted)); *Barenblatt v. United States*, 360 U.S. 109, 112 (1959) (“When academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain. But this does not mean that the Congress is precluded from interrogating a witness merely because he is a teacher.”).

The first case is *Keyishian v. Board of Regents*, which contains the Court's most expansive discussion of academic freedom as a concept of constitutional dimension, although it occupies not even a paragraph of the opinion: "[A]cademic freedom . . . 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."<sup>56</sup>

It is far from clear, however, that this observation was necessary to the Court's holding; in *Keyishian*, the Court held invalid state regulations authorizing the removal of university faculty from public employment for "treasonable" or "seditious" utterances or acts on the ground that they were impermissibly vague; these words, the Court reasoned, "were wholly lacking in 'terms susceptible of objective measurement.'"<sup>57</sup> This prohibition on unduly vague regulation of speech, however, does not rest on a distinctive First Amendment right of academic freedom; the case on which the Court primarily relied in *Keyishian* to condemn the regulations at issue, *Cramp v. Board of Public Instruction of Orange County*, placed no reliance on academic freedom as it invalidated as impermissibly vague a requirement that public employees take a loyalty oath.<sup>58</sup>

Since *Keyishian*, the Court has continued to condemn vague regulations of speech, even outside the context of public employment or academic speech, because of their tendency to inhibit the exercise of First Amendment rights.<sup>59</sup> Thus, it is difficult to conclude that the Court's holding in *Keyishian* rested on academic freedom, as opposed to a general rule condemning vague regulation of speech.<sup>60</sup>

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56 *Keyishian v. Bd. of Reg. of St. Univ. of N.Y.*, 385 U.S. 589, 603 (1967).

57 *Id.* 604 (quoting *Cramp v. Bd. of Pub. Instruction of Orange Cnty*, 368 U.S. 278, 286 (1961)).

58 *See Cramp*, 368 U.S. at 386–88 (discussing impermissible vagueness when regulating the speech of public employees).

59 *See, e.g., Reno v. Am. Civ. Liberties Union*, 521 U.S. 844, 871–72 (1997) (noting that the Communications Decency Act is "a content-based regulation of speech" and adding that "[t]he vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech").

60 In *Keyishian*, the Court also invalidated a statute making membership in the Communist Party prima facie evidence supporting disqualification from employment, explaining that "legislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization or which is not active membership violates constitutional limitations." *Keyishian*, 385 U.S. at 608. A long line of cases laws invalidates laws that prohibit public employees from membership in advocacy organizations without proving that the employees shared the unlawful objectives of the organization without placing reliance on academic freedom. *See, e.g., United States v. Robel*, 389 U.S. 258, 262–68 (1967) (invalidating statute making members of communist organizations ineligible for employment in defense facilities); *Elfbrandt v. Russell*, 384 U.S. 11, 15–19 (1966) (invalidating statute prohibiting teachers from joining organizations that have as one of their purposes overthrow of the government). Even outside the context of teaching or public employment, the Court has concluded that the government may not impose sanctions or deny rights or privileges solely because of an individual's association with a group absent proof that the individual intended to advance the group's unlawful objectives. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 919–20 (1982) ("[T]he Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization . . . . The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims" (internal quotations and citations omitted)). Thus, this aspect of *Keyishian* likewise rests on principles that do not rest on a right of academic freedom.

The second case is *Sweezy v. New Hampshire*.<sup>61</sup> There, a professor at a state university was held in contempt for his refusal to answer questions propounded in a statutorily authorized investigation by the state's attorney general regarding Sweezy's knowledge of various political organizations and their members, the contents of a lecture that Sweezy had given to his students at the University of New Hampshire, and whether he believed in communism.<sup>62</sup> In a plurality opinion joined by four justices, Chief Justice Warren, opined that there had been "an invasion of [Sweezy]'s liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread," and adverted to "[t]he essentiality of freedom in the community of American universities . . . ."<sup>63</sup> Yet, this conclusion rested on the lack of an indication that the legislature had any interest in the information being sought:

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. It follows that the use of the contempt power, notwithstanding the interference with constitutional rights, was not in accordance with the due process requirements of the Fourteenth Amendment.<sup>64</sup>

Thus, for these justices, *Sweezy* turned on the absence of an actual delegation of legislative power to the attorney general to seek the information at issue from Sweezy. It is difficult to divine a general First Amendment right of academic freedom flowing from this conclusion.

Academic freedom plays more of a role in the separate opinion of Justice Frankfurter; he adverted to "the dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a university."<sup>65</sup> This passage suggests that universities enjoy First Amendment protection against external interference. Yet, it is unclear whether Justice Frankfurter was recognizing a distinctive right of academic freedom or a more general right of public employees to freedom of political belief and action, since his opinion conflates the two: "In the political realm, as in the academic, thought and action are presumptively immune from inquisition by political authority."<sup>66</sup> Perhaps Justice Frankfurter was recognizing a First Amendment right unique to academics in *Sweezy*; but the matter is not free from doubt. Moreover, as we have

61 354 U.S. 234 (1957).

62 *Id.* at 236–45 (plurality opinion).

63 *Id.* at 250 (plurality opinion).

64 *Id.* at 254–55 (plurality opinion).

65 *Id.* at 262 (Frankfurter, J., concurring in the result). To similar effect, see *Wieman v. Updegraff*, 344 U.S. 183, 196–97 (1952) (Frankfurter, J., concurring) ("It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion . . . . They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or State government.").

66 *Sweezy*, 354 U.S. at 266 (Frankfurter, J., concurring in the result).

seen, his reference to “the four essential freedoms of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study,”<sup>67</sup> suggests that he was referring to a right held by the university to be free from external interference rather than a First Amendment right of individual scholars.<sup>68</sup>

In any event, whatever the import of the intimations in *Sweezy*, within a few years, the Court came to hold that the right of teachers to be free from official scrutiny into the political beliefs was rooted in general First Amendment doctrine, not a specific right of academic freedom. In *Shelton v. Tucker*,<sup>69</sup> for example, the Court wrote, “[T]o compel a teacher to disclose his every associational tie is to impair that teacher’s right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.”<sup>70</sup>

Beyond that, the Supreme Court has subsequently described *Keyishian* and *Sweezy* as cases in which “government was attempting to control or direct the content of the speech engaged in by the university or those affiliated with it,” adding that they have no application absent governmental efforts to “direct the content of university discourse toward or away from particular subjects or points of view.”<sup>71</sup> This suggests that *Keyishian* and *Sweezy* are best understood as forbidding the government from regulating the content of speech at a university, rather than as recognizing a right of individual academics to be free from regulation of their duty-related speech by the university that employs them. Moreover, the rule prohibiting the government from discriminating on the basis of the content of speech is hardly unique to higher education; First Amendment doctrine generally resists governmental efforts to draw distinctions between speech on the basis of its content or viewpoint.<sup>72</sup> Thus, it is far from clear that *Keyishian* and *Sweezy* can

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67 *Id.* at 262.

68 *See supra* text accompanying note 20. Notably, Justice Frankfurter subsequently wrote an opinion suggesting that individual academics enjoy no First Amendment protection against being compelled to disclose their political beliefs and associations. *See Shelton v. Tucker*, 364 U.S. 479, 495–96 (1960) (Frankfurter, J., dissenting) (“[I]t is not that I put a low value on academic freedom. It is because that very freedom, in its most creative reaches, is dependent in no small part upon the careful and discriminating selection of teachers . . . . Because I do not find that the disclosure of teachers’ associations to their school boards is, without more, such a restriction upon their liberty, or upon that of the community, as to overbalance the State’s interest in asking the question, I would affirm the judgments below.”).

69 364 U.S. 479 (1960).

70 *Id.* at 485–86. The Court subsequently expanded this holding to reach the right of students and student organizations to free association, despite the absence of any claim involving the academic freedom of teachers. *See Healy v. James*, 408 U.S. 169, 181 (1972) (“Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition. There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right.” (citations omitted)).

71 *University of Pa. v. EEOC*, 493 U.S. 182, 197, 198 (1990).

72 *See, e.g., Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (“[A] government, including a municipal government vested with state authority, ‘has no power to restrict expression because of its message, its ideas, its subject matter, or its content.’”).

be understood as recognizing special First Amendment protection for academic freedom or speech.

Perhaps most important, since *Keyishian* and *Sweezy*, the Court has articulated a general First Amendment rule that ideological conformity may not be demanded from public employees—a rule broad enough to encompass the holdings in *Keyishian* and *Sweezy* without need to rely on a distinctive right of academic freedom. In *Branti v. Finkel*,<sup>73</sup> for example, the Court concluded that “the First Amendment prohibits the dismissal of a public employee solely because of his private political beliefs”<sup>74</sup> and for that reason held that public employees, such as the deputy public defenders facing discharge in that case, may not be terminated “solely for the reason that they were not affiliated with or sponsored by the Democratic Party,” unless “party membership was essential to the discharge of the employee’s governmental responsibilities.”<sup>75</sup> The Court later extended that holding to hiring: “[C]onditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so. We find no such government interest here, for the same reasons that we found that the government lacks justification for patronage promotions, transfers, or recalls.”<sup>76</sup>

Thus, although *Keyishian* characterized academic freedom as of constitutional concern because “the First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom,”<sup>77</sup> since then, the Court has made clear that all public employees—not just academics—have a First Amendment right to speak on matters of public concern and resist governmental demands for political or ideological conformity, as long as they hold positions for which such loyalty is not an appropriate criterion for employment, as is true of most (if not all) scholars.<sup>78</sup>

It is, therefore, far from clear that there is a doctrinal basis for recognizing a First Amendment right of academic freedom beyond the more general First

73 445 U.S. 507 (1980).

74 *Id.* at 516–17 (citation and internal quotations omitted). The Court also held that “the continued employment of an assistant public defender cannot properly be conditioned upon his allegiance to the political party in control of the county government.” *Id.* at 519.

75 *Id.* at 517, 518.

76 *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 78 (1990) (citations omitted). The Court subsequently extended this rule to forbid denying public contracts on the basis of the contractor’s political affiliations or beliefs. *See O’Hare Trucking Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996) (company impermissibly removed from list of those eligible to perform city towing services when owner refused to contribute to mayor’s reelection campaign); *Bd. of Cnty Comm’rs of Wabaunsee Cnty. v. Umbehr*, 518 U.S. 668 (1996) (contract to haul trash impermissibly terminated based on contractor’s criticism of county board).

77 *Keyishian v. Bd. of Regents of St. Univ. of N.Y.*, 385 U.S. 589, 603 (1967).

78 *See, e.g., Perry v. Sindermann*, 408 U.S. 593, 598 (1972) (holding that a professor’s claim that his contract had not been renewed because of his criticism of the college administration could go forward, citing *Pickering* and without reliance on a right of academic freedom, reasoning that “a teacher’s public criticism of his superiors on matters of public concern may be constitutionally protected, and may, therefore, be an impermissible basis for termination of his employment.”).

Amendment rights of all public employees to be free from official demands for ideological or partisan loyalty.<sup>79</sup>

### ***B. The Doctrinal Obstacles to Constitutionalizing a First Amendment Right of Academic Freedom***

The difficulties with the doctrinal case for a First Amendment right of academic freedom go beyond the lack of precedent to support it. Extant First Amendment doctrine erects serious obstacles to a First Amendment right of academic freedom.

At the outset, First Amendment doctrine has long been hostile to granting special protections based on the identity of the speaker.<sup>80</sup> This suggests that an effort to grant academics special First Amendment rights unavailable to other public employees under *Garcetti* would be problematic.<sup>81</sup> A claim that academic freedom deserves special constitutional protection because of its asserted social import is equally problematic; First Amendment doctrine has never embraced a balancing test in which the perceived value of speech determines how much constitutional protection it will receive.<sup>82</sup>

The problems with a First Amendment right of academic freedom that could limit the sweep of *Garcetti*, however, run deeper than these. At least when the effort to regulate teaching and scholarship is undertaken by the university itself, First Amendment doctrine teaches that deference to the university's pedagogical and scholarly judgments is appropriate.

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79 For a judicial opinion concluding that the First Amendment offers no special protection for academic freedom, see *Urofsky v. Gilmore*, 216 F.3d 401, 409–15 (4th Cir. 2000). For a scholarly analysis along these lines, see Larry D. Spurgeon, *A Transcendent Value: The Quest to Safeguard Academic Freedom*, 34 J.C. & U.L. 111, 150–64 (2007).

80 See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 340–41 (2010) (“[T]he Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker’s voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.”); *Simon & Schuster, Inc. v. N.Y. St. Crime Victims Bd.*, 515 U.S. 105, 117 (1995) (“The government’s power to impose content-based financial disincentives on speech surely does not vary with the identity of the speaker.”); *First Nat’l Bank of Boston v. Belotti*, 435 U.S. 756, 784–85 (1978) (“In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.” (citation omitted)).

81 See, e.g., Scott R. Bauries, *Individual Academic Freedom: An Ordinary Concern of the First Amendment*, 83 MISS. L. REV. 677, 740 (2014) (“If the underlying structure of First Amendment doctrine is one of neutrality toward speakers, content, and viewpoints, then it seems that structure has no room for academic freedom, which requires that the First Amendment recognize that some speakers are entitled to more protection than other speakers similarly situated in their relationship with the government . . .”).

82 See, e.g., *United States v. Stevens*, 559 U.S. 460, 470 (2010) (“The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.”). Cf. Nugent & Flood, *supra* note 14, at 151 (“Academic freedom is worth protecting not because it is exceptionally important to our national well-being; that standard alone would create enhanced First Amendment protection every time speech furthers an important national interest.”).

Recall that in *Sweezy*, Justice Frankfurter characterized academic freedom in terms of “the four essential freedoms of a university—to determine *for itself* on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”<sup>83</sup> In this fashion, Justice Frankfurter characterized academic freedom as an institutional right of the university itself, implicated in that case because the state’s attorney general attempted to intervene in the university’s relationship with one of its academic employees.<sup>84</sup> This characterization of academic freedom in institutional and not individual terms has taken root in constitutional doctrine.

For example, since *Sweezy* and *Keyishian*, the Supreme Court has “stressed the importance of avoiding second-guessing of legitimate academic judgments.”<sup>85</sup> Similarly, in a case involving a student’s claim that he was unconstitutionally dismissed from an academic program, the Court cautioned that courts “should show great respect for the faculty’s professional judgment . . . . [T]hey may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.”<sup>86</sup> The Court elaborated:

Added to our concern for lack of standards is a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, a special concern of the First Amendment. If a federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies, far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.<sup>87</sup>

83 *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the result) (internal quotations omitted and emphasis supplied).

84 *See supra* text accompanying notes 66–68. For a helpful discussion of the manner in which the constitutional conception of academic freedom is properly characterized in terms of deference to universities’ pedagogical and educational judgments, see PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* 112–40 (2003).

85 *University of Pa. v. EEOC*, 493 U.S. 182, 199 (1990). *Cf. Bd. of Regents of Univ. Wis. Sys. v. Southworth*, 529 U.S. 217, 237 (2000) (Souter, J., concurring in the judgment) (“Our understanding of academic freedom has included not merely liberty from restraints on thought, expression, and association in the academy, but also the idea that universities and schools should have the freedom to make decisions about how and what to teach.”); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.) (“Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.”).

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

87 *Id.* at 226 (citations and internal quotations omitted) (brackets in original). *Cf. Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (“The Law School’s educational judgment that such diversity [in the composition of its student body] is essential to its educational mission is one to which we defer . . . . Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.” (citations omitted)). For a scholarly defense of highly deferential judicial review of academic decision-making as an aspect of academic freedom, see Rabban, *supra* note 9, at 287–94.

Although these cases do not involve a university's effort to discipline a faculty member, they suggest that academic freedom is rooted in a right of an academic institution to be free from external interference with a university's administration of scholarly norms, rather than a right of individual teachers.<sup>88</sup> Indeed, even those who argue that *Garcetti's* sweep is limited by an individual right of academic freedom acknowledge that a university's scholarly and pedagogical judgments are entitled to great deference.<sup>89</sup> And, when it comes to a university's authority to supervise faculty members, it is notable that in *Central State University v. American Association of University Professors, Central State University Chapter*,<sup>90</sup> the Court summarily reversed a decision invalidating, on equal protection grounds, a statute requiring state universities to develop standards for faculty workloads without use of collective bargaining, concluding that the statute infringed neither "fundamental rights nor proceeding along suspect lines" and therefore should be upheld as having "a rational relationship between disparity of treatment and some legitimate governmental purpose" because it "increase[d] the time spent by faculty in the classroom."<sup>91</sup>

To be sure, it is unclear from these cases whether they recognize a First Amendment right of institutional academic freedom, or instead counsel judicial deference to the academic judgments of universities in light of their expertise in pedagogical and scholarly norms. But whether the institutional prerogatives of universities are based on their own First Amendment rights or judicial prudence, an academic who wished to challenge a university's assessment of the quality of that academic's duty-related teaching or scholarship as an interference with a constitutional right of academic freedom would face serious doctrinal hurdles.

There may be cases in which a university's claimed pedagogical or academic judgments about teaching or scholarship can be proven to be pretextual.<sup>92</sup> For example, consider a state university's rule that forbids academics to teach or study

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88 For scholarship taking the view that the constitutional conception of academic freedom is rooted in the right of a university to be free from external interference with its scholarly mission, see, for example, Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 877–83 (2008); William G. Buss, *Academic Freedom and Freedom of Speech: Communicating the Curriculum*, 2 J. GENDER, RACE & JUST. 213, 230–62 (1999); J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 97 YALE L.J. 251, 304–11, 323–27 (1989); Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. REV. 461, 472–501 (2005); Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1310–22 (1988); Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 919–26 (2006); 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., Summer 1990, at 79, 135–43.

89 See, e.g., Areen, *supra* note 14, at 995–99 (advocating the deferential *Ewing* standard for decisions made on academic grounds); Spurgeon, *supra* note 14, at 456–64 (same).

90 526 U.S. 124 (1999) (per curiam).

91 *Id.* at 127–28 (citations, ellipsis in original and internal quotations omitted). Only Justice Stevens, in dissent, perceived any potential infringement on academic freedom, and he dissented only to the extent of disagreeing with the Court's decision to decide the case summarily. *Id.* at 130–33 (Stevens, J., dissenting).

92 Compare Rabban, *supra* note 9, at 283–94 (arguing that a university's academic judgments should be set aside if pretext can be proven); with Byrne, *supra* note 88, at 301–11 (arguing that good-faith academic judgments of a university should not be set aside).

critical race theory, promulgated in the face of threatened state legislation to forbid the same.<sup>93</sup> Without need to rely on a First Amendment right of academic freedom, it might be easy for an individual professor to prove that the prohibition on teaching critical race theory is a pretext for ideological suppression rather than a bona fide pedagogical judgment.<sup>94</sup> After all, it is a general principle of First Amendment law that “[t]he government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves.”<sup>95</sup> Moreover, to the extent that such a rule was produced as a result of threatened or enacted legislation, this type of prohibition could well constitute external interference with a university’s academic mission that is forbidden by the institutional conception of academic speech reflected in Justice Frankfurter’s opinion in *Sweezy*, although as we have seen, it is far from clear that the First Amendment protects academic freedom in this institutional sense.<sup>96</sup> None of this, however, suggests that academics hold a First Amendment right of academic freedom that permits them to contest the bona fide pedagogical or academic judgments of the universities that employ them.

Accordingly, there is little support in current doctrine for limiting *Garcetti*’s application to the academy. Of course, there may be reason to construct new doctrine limiting the reach of *Garcetti*. It is to that question that we next turn.

93 For a helpful and brief overview of critical race theory as a field of scholarship and study, see Adrien K. Wing, *Is There a Future for Critical Race Theory?*, 66 J. LEG. EDUC. 44 (2016).

94 Cf. *Edwards v. Aguillard*, 482 U.S. 578, 588–89 (1987) (“If the Louisiana Legislature’s purpose was solely to maximize the comprehensiveness and effectiveness of science instruction, it would have encouraged the teaching of all scientific theories about the origins of humankind. But under the Act’s requirements, teachers who were once free to teach any and all facets of this subject are now unable to do so. Moreover, the Act fails even to ensure that creation science will be taught, but instead requires the teaching of this theory only when the theory of evolution is taught. Thus we agree with the Court of Appeals’ conclusion that the Act does not serve to protect academic freedom, but has the distinctly different purpose of discrediting ‘evolution by counterbalancing its teaching at every turn with the teaching of creationism ... .’” (footnote and citation omitted and ellipsis in original)).

95 *Knox v. Serv. Emps. Int’l Union, Local 1000*, 567 U.S. 298, 309 (2012) (citations omitted).

96 See *supra* text accompanying notes 65–68. The scope of institutional academic freedom is, to be sure, in some tension with the broad discretion that state and local governments likely enjoy under the First Amendment to make pedagogical judgments about appropriate curriculum in the public schools they fund. Cf. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 870–71 (1982) (plurality opinion) (“Petitioners rightly possess significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner ... . Our Constitution does not permit the official suppression of *ideas*. Thus whether petitioners’ removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners’ actions.”). If a state legislature, under budgetary pressure, decided to stop funding what it regarded as unnecessary liberal arts programs in a public university, it is doubtful that the university could claim constitutional protection against the legislature’s prerogative over the allocation of scarce public resource; while a legislative prohibition on teaching critical race theory may be more plausibly characterized as external interference with a university’s pedagogical judgment about the content of its curriculum. Cf. *Edwards v. Aguillard*, 482 U.S. 578, 586 (1982) (“The goal of providing a more comprehensive science curriculum is not furthered either by outlawing the teaching of evolution or by requiring the teaching of creation science.”). Yet, it may unnecessary to recognize any special right of institutional academic freedom when general First Amendment principles suggest that a prohibition on teaching critical race theory, even if framed as a pedagogical judgment, is actually a pretext for ideological suppression. A full consideration of the scope of institutional academic freedom, however, is well beyond the scope of the present discussion.

## II. The Problematic Case for Academic Freedom as a First Amendment Right

Some commentators argue that *Garcetti's* discussion of duty-related speech has little application to university teaching, research, and scholarship, which is not undertaken to serve a public employer's purposes, but instead represents an academic's own effort to participate in a scholarly marketplace of ideas.<sup>97</sup> The point can also be made by treating the university as what has come to be known as a public forum.<sup>98</sup> A public university, the argument goes, is best characterized not as a collection of scholar-employees executing speech-related duties on behalf of a public employer, but rather as a metaphorical forum created by the government to facilitate professorial speech, undertaken for scholarly and not governmental purposes.<sup>99</sup>

This account, however, must come to grips with the role that the university-as-employer plays in overseeing the speech-related duties of the professorate. Or, to frame the problem in terms of the public forum doctrine, even in a forum created to facilitate individual and not governmental speech, speech may be restricted to ensure that it is consistent with the purpose of the forum: "In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."<sup>100</sup>

Even the advocates of academic freedom acknowledge that universities necessarily assess scholarly speech to ensure that it is consistent with the objective

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97 See, e.g., Post, *supra* note 14, at 92 ("[F]aculty serve the 'public' insofar as they serve the public function of identifying and discovering knowledge. It is this function that triggers the function of democratic competence. Were faculty to be merely employees of the university, as *Garcetti* conceptualizes employees, their job would be to transmit the views of university administrators."); R. George Wright, *The Emergence of Academic Freedom*, 85 NEB. L. REV. 793, 824–25 (2007) ("[T]he *Garcetti* model of university faculty as proxies, instruments, or agents expressing views approved of, if not specified by, the state paying for their performance undermines the mission and purposes of the worthy state university. Adding broadly to the treasury of scholarly knowledge simply cannot be reduced to carrying out anyone's wishes or preferences, whether of any sitting government or of trustees or of university faculty themselves." (footnotes omitted)).

98 Cf. *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981) ("This Court has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum." (citations omitted)).

99 See Nahmod, *supra* note 14, at 69 ("The university classroom is an intentionally created educational forum for the enabling of professorial (and student) speech . . . . Similarly, professorial scholarship is an intentionally created metaphorical educational forum for the dissemination of knowledge by academics." (footnotes omitted) (citing *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995)).

100 *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (citation and internal quotation omitted). For a similar observation in a case involving a state university's student activity fund, see *Rosenberger*, 515 U.S. at 829–30 ("[W]e have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations." (citing *Perry Educ. Ass'n*, 460 U.S. at 46)).

of providing high-quality teaching and scholarship; thus, as one of the leading advocates of a constitutional right of academic freedom has acknowledged:

[U]niversities are free to evaluate scholarly speech based on its content—to reward or regulate scholarly speech based on its professional quality. Universities make these judgments when they hire professors, promote them, tenure them, or award them grants.<sup>101</sup>

Another advocate of academic freedom acknowledged, even as he argued that universities are properly characterized as fora for professorial speech, that universities necessarily impose constraints on that speech, such as, in the classroom, a requirement that there be “some relation between professorial speech and the subject matter that is being taught, as well as a prohibition against disruptive tactics that interfere with the educational process,” as well as “legitimate educational constraints on professorial scholarship . . . . Perhaps the main constraint is scholarly standards.”<sup>102</sup>

It is difficult to quarrel with these commonplace observations; a university concerned about the quality of teaching and scholarship will endeavor to maintain high standards when it comes to both. Yet, even if public universities are properly characterized as fora for the speech of scholars, it follows that universities—to the extent that they endeavor to facilitate high-quality teaching and scholarship—cannot be indifferent to the nature and quality of teaching and scholarship. Instead, a central function of the university is to assess—through whatever organs the university creates to exercise this function—the quality of the work done by faculty members, as well as those who aspire to join their faculties. To be sure, university faculty frequently plays a role in these assessments, though even the AAUP acknowledges that ultimate authority lies with the university’s administration,<sup>103</sup> and, as a matter of First Amendment law, university faculty has no right to participate in university governance.<sup>104</sup>

Thus, ultimately the university itself, through its designees, assesses the quality of professorial speech. Universities engage in these assessments to ensure

101 *Post*, *supra* note 14, at 67 (footnotes and internal quotations omitted).

102 *Nahmod*, *supra* note 14, at 72, 73 (footnotes omitted). *Cf. Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (“[W]e hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” (footnote omitted)).

103 *See Am. Ass’n Univ. Professors, Statement on Government of Colleges and Universities*, in *AAUP POLICY DOCUMENTS AND REPORTS*, *supra* note 2, at 117, 120 (“The faculty has primary responsibility for such matters as curriculum, subject matter and methods of instruction, research, faculty status, and those matters of student life which relate to the educational process. On these matters, the power of review or final decision lodged in the governing board or delegated by it to the president should be exercised adversely only in exceptional cases, and for reasons communicated to the faculty.” (footnote omitted)).

104 *See Minn. St. Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 288 (1984) (“Even assuming that speech rights guaranteed by the First Amendment take on a special meaning in an academic setting, they do not require government to allow teachers employed by it to participate in institutional policymaking. Faculty involvement in academic governance has much to recommend it as a matter of academic policy, but it finds no basis in the Constitution.”).

that those to whom they assign academic duties will exercise those responsibilities consistent with the mission of the university to provide high-quality teaching and scholarship. This uncontroversial point has important implications.

### A. *Classroom Speech and the First Amendment*

Consider a professor's speech in the classroom. Professors are not hired to teach whatever piques their interest; they are expected to cover the courses and material to which they are assigned. Even the AAUP acknowledges that professors "should be careful not to introduce into their teaching controversial matter which has no relation to their subject."<sup>105</sup> Yet, this understates matters. There is no conception of academic freedom in which a professor hired to teach biology may instead convert the course to one about the Civil War, at least as long as the professor says nothing controversial. Brief digressions may be unremarkable, but a biology course surely can be expected to focus on biology.<sup>106</sup> Permitting universities to regulate classroom speech in this manner is uncontroversial as a matter of First Amendment law; the lower courts have consistently held First Amendment permits a university, as employer, to insist that a professor teach the subject the professor has been hired to teach.<sup>107</sup>

A university's pedagogical prerogatives go beyond insisting that professors teach their assigned subject. Universities are also entitled to hold teachers accountable for bad teaching, just as they may reward good teaching. To pick what is perhaps the most obvious example, nothing in the concept of academic freedom permits teachers to harass or bully students.<sup>108</sup> The authority of universities to sanction teachers on this basis is routinely upheld by the courts over First Amendment objection.<sup>109</sup>

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105 Am. Ass'n of Univ. Professors, *supra* note 2, at 14.

106 See, e.g., HORWITZ, *supra* note 84, at 124 ("[I]ndividual professors cannot have the same liberty to make these decisions that an individual speaker has within public discourse. A philosophy professor who teaches the dialogues of Plato must have some leeway to decide which dialogues to teach and how to teach them. But she cannot decide to spend all her time in that class talking about astrology or the war in Iraq. A philosophy department, as a department, may not dictate the thoughts its members think, but it can insist that they teach philosophy.").

107 See, e.g., Bishop v. Aronov, 926 F.2d 1066, 1076 (11th Cir. 1991) ("The University's conclusions about course content must be allowed to hold sway over an individual professor's judgments.").

108 See, e.g., Am. Ass'n of Univ. Professors, *Freedom in the Classroom*, in AAUP POLICY DOCUMENTS AND REPORTS, *supra* note 2, at 20, 23 ("An instructor may not harass a student nor act on an invidiously discriminatory ground toward a student, in class or elsewhere. It is a breach of professional ethics for an instructor to hold a student up to obloquy or ridicule in class for advancing an idea grounded in religion, whether it is creationism or the geocentric theory of the solar system. It would be equally improper for an instructor to hold a student up to obloquy or ridicule for an idea grounded in politics, or anything else." (footnote omitted)).

109 See, e.g., Wozniak v. Adesida, 932 F.3d 1008, 1010 (7th Cir. 2019) ("[H]ow faculty members relate to students is part of their jobs, which makes *Ceballos* applicable. Professors who harass and humiliate students cannot successfully teach them, and a shell-shocked student may have difficulty learning in other professors' classes. A university that permits professors to degrade students and commit torts against them cannot fulfill its educational functions." (citation omitted)); *Bonnell v. Lorenzo*, 241 F.3d 800, 823–24 (6th Cir. 2001) ("While a professor's rights to academic freedom and freedom of expression are paramount in the academic setting, they are not absolute to the point of

Bullying and harassment are the most extreme forms of bad teaching; they do not exhaust the category. There is no serious claim that universities are obligated to hire, assign, and promote teachers without regard to their ability to teach; nor is there any serious claim that universities are unable to discipline, terminate, or deny promotion or tenure to those who prove to be poor teachers.<sup>110</sup> Even the AAUP agrees; it makes no claim that universities must be indifferent to the quality of teaching; its policy on tenure instead states, “After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause . . . .”<sup>111</sup> “Adequate cause,” in turn, can include poor teaching; it need only be “related, directly and substantially, to the fitness of faculty members in their professional capacities as teachers or researchers.”<sup>112</sup> Courts routinely uphold disciplinary action against those who prove to be inadequate teachers against First Amendment attack.<sup>113</sup>

Then there is the question of pedagogical policy. Consider an example pertinent to legal education—the use of formative assessment, which is now required by the accreditation standards for law schools.<sup>114</sup> Formative assessment involves “measurements at different points during a particular course or at different points over the span of a student’s education that provide meaningful feedback to improve student learning,” while “[s]ummative assessment methods are measurements at the culmination of a particular course or at the culmination of any part of a student’s legal education that measure the degree of student learning.”<sup>115</sup> There is both a theoretical case for and empirical evidence of the efficacy of formative assessment

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compromising a student’s right to learn in a hostile-free environment. To hold otherwise under these circumstances would send a message that the First Amendment may be used as a shield by teachers who choose to use their unique and superior position to sexually harass students secure in the knowledge that *whatever* they say or do will be protected. Such a result is one that a state college or university is legally obligated to prevent, and such a result would fail to consider the countervailing interests.” (citation omitted)).

110 See, e.g., Rabban, *supra* note 9, at 286 (“[A] constitutional right of individual academic freedom would force courts to overturn administrative sanctions against professors who deviate from prescribed curricular coverage or who receive poor teaching evaluations from students. But no accepted theory of individual academic freedom, and certainly not the one developed by the AAUP, would identify these professors as engaging in speech to which academic freedom should attach. Academic freedom is not the freedom to be a poor teacher . . . .” (footnote omitted)).

111 Am. Ass’n of Univ. Professors, *supra* note 2, at 14.

112 Am. Ass’n Univ. Professors, *Recommended Institutional Regulations on Academic Freedom and Tenure*, in AAUP POLICY DOCUMENTS AND REPORTS, *supra* note 2, at 79, 83.

113 See, e.g., *Martin v. Parrish*, 805 F.2d 583, 585–86 (5th Cir. 1986) (“Repeated failure by a member of the educational staff of Midland College to exhibit professionalism degrades his important mission and detracts from the subjects he is trying to teach . . . . To the extent that Martin’s profanity was considered by the college administration to inhibit his effectiveness as a teacher, it need not be tolerated by the college . . . .”).

114 See ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, 2020–2021, Stnd. 314 (2020) (“A law school shall utilize both formative and summative assessment methods in its curriculum to measure and improve student learning and provide meaningful feedback to students.”).

115 *Id.* Interp. 314–1.

in legal education.<sup>116</sup> If a law school required those who teach required courses to utilize formative assessment, perhaps a teacher might resist—doubting the efficacy of formative assessment and wishing to devote more time to scholarship and less to teaching.<sup>117</sup> Yet, if all teachers at law schools enjoyed a First Amendment right of academic freedom to resist formative assessment, law schools would find it impossible to comply with applicable accreditation standards. It would be quite a task to develop a First Amendment right of academic freedom that entitles professors to refrain from using an assessment mechanism that the applicable accrediting body has found essential for a minimally adequate education.

In short, it is hard to explain why, under the First Amendment, academics can never be held accountable for incompetence or misconduct as long as it is reflected in what they say or write to students. Even the AAUP has not taken this position; instead, it acknowledges that academics should be expected to defend allegations of misconduct, though such allegations should be resolved under procedures designed to offer academic a fair opportunity to defend themselves.<sup>118</sup>

This survey of the pedagogical prerogatives of universities over the classroom speech of professors suggests that *Garcetti's* rationale about the prerogatives of public employers over duty-related speech has considerable applicability to higher education; when a university hires a scholar to teach, it has the corresponding prerogative to assess the quality of that teaching—to reward good teachers and discipline bad ones.

One might argue that the ordinary *Pickering* balancing test is sufficient to permit universities to discipline poor teachers without need of the blanket exception from First Amendment review for duty-related speech announced in *Garcetti*. Recall, however, that the concept of speech on a matter of “public concern” is quite broad,<sup>119</sup> and the burden of justifying an adverse employment action under the balancing test falls on the employer.<sup>120</sup> The *Pickering* balancing test, accordingly, would give courts ample room to displace the pedagogical judgments of universities were it to be applied to classroom speech. It could therefore produce so robust a judicial supervisory role over pedagogy in higher education that that judicial review might itself threaten the independence of universities. If, conversely, courts were

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116 For some of the leading discussions, see Andrea A. Curcio et al., *Does Practice Make Perfect? An Empirical Examination of the Impact of Practice Essays on Essay Exam Performance*, 35 FLA. ST. U. L. REV. 271 (2008); Daniel Schwarcz & Dion Farganis, *The Impact of Individualized Feedback on Law School Student Performance*, 67 J. LEG. EDUC. 139 (2017); and Carol Springer Sargent & Andrea A. Curcio, *Empirical Evidence that Formative Assessments Improve Final Exams*, 61 J. LEG. EDUC. 379 (2012).

117 Indeed, a frequently voiced objection to formative assessment is along these lines. E.g., Olympia Duhart, *The ‘F’ Word: The Top Five Complaints (and Solutions) About Formative Assessment*, 67 J. LEG. EDUC. 531, 537 (2018).

118 See Am. Ass’n Univ. Professors, *supra* note 112, at 83–88 (describing recommended procedures for identifying and resolving allegations of misconduct). For a helpful discussion of the procedural protections generally available to academics accused of misconduct, see Nancy Chi Cantalupo & William C. Kidder, *Systemic Prevention of a Serial Problem: Sexual Harassment and Bridging Core Concepts of Bakke in the #MeToo Era*, 52 U.C. DAVIS L. REV. 2349, 2398–403 (2019)

119 See *supra* text accompanying notes 22–29.

120 See *supra* text accompanying notes 30–33.

obligated to defer to the pedagogical judgments of universities, the *Pickering* test would have little bite.

*Pickering* accordingly seems either too strong or too weak to provide a satisfactory test for a constitutional right of academic freedom enforceable by academics against the universities that employ them.

### B. Scholarly Speech and the First Amendment

Even if the problems with a First Amendment right of academic freedom can be overcome when it comes to classroom speech, the problems of recognizing such a right when it comes to scholarly speech are even greater.

Even the advocates of academic freedom acknowledge that universities, when deciding who to hire or promote, properly consider the quality of their scholarship. As Robert Post and Matthew Finkin put it,

[N]o university currently deals with its faculty as if academic freedom of research and publication were an individual right to be fully free from all institutional restraint. Universities instead hire, promote, grant tenure to, and support faculty on the basis of criteria of academic merit that purport to apply professional standards. Individual faculty have no right of immunity from such judgments.<sup>121</sup>

The review of scholarship undertaken by universities frequently extends to both its content and even the viewpoint advanced therein. For example, an aspiring law professor who advanced racist legal views in the materials supporting an application for employment surely could be refused for that reason,<sup>122</sup> even though the government, when promulgating generally applicable regulations, is forbidden under the First Amendment from discriminating against racist viewpoints, even in categories of unprotected speech such as so-called “fighting words.”<sup>123</sup> Or, a university’s history department could surely refuse to hire an applicant who advanced in the “great man” theory of history on the ground that this view had fallen into disrepute as a matter of prevailing professional norms.<sup>124</sup> Similarly, a

121 MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 58–59 (2009).

122 See, e.g., Schauer, *supra* note 88, at 918 (“Consider the case in which, whether in class or in an academic book or article, a professor argues that the decision in *Brown v. Board of Education* was the product of a conspiracy among the Communist Party, the NAACP, and the Jews. There should be little doubt that espousing such a viewpoint would be permissible grounds for non-hiring, and permissible grounds for non-tenuring.”).

123 See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391–92 (1992) (“[T]he ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination. Displays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views. But ‘fighting words’ that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person’s mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers’ opponents . . . St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.”).

124 For a helpful discussion of the manner in which historians have come to view the various

biology department could refuse to hire an applicant who rejected evolution in favor of a biblical theory of creation,<sup>125</sup> even though discrimination on the basis of religious belief is ordinarily considered a form of impermissible viewpoint discrimination forbidden by the First Amendment.<sup>126</sup>

Accordingly, while, under First Amendment doctrine, content and viewpoint discrimination is ordinarily forbidden, it is commonplace in the academy. When it comes to society at large, the First Amendment may well represent, as Justice Brennan famously wrote, “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,”<sup>127</sup> but the academy is not a forum in which all voices must be heard. Only those who survive the rigorous process of vetting scholarship to assess its merit are granted entry, and their continued employment through tenure (at least) depends on similar assessments.<sup>128</sup> The expression of views that have come into academic disrepute for one reason or another frequently are the basis on which aspiring academics fail to gain employment, promotion, or tenure. In this fashion, the prerogative to assess an employee’s duty-related speech that is at the heart of *Garcetti* has clear application to higher education. Even the advocates of constitutional protection for academic freedom acknowledge that this right is necessarily subject to compliance with professional norms for scholarship.<sup>129</sup>

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viewpoints reflected in competing views of history, see Peter Burke, *Overture: The New History, Its Past and Future*, in *NEW PERSPECTIVES ON HISTORICAL WRITING* 1, 1–23 (Peter Burke ed., 1991).

125 See, e.g., Horwitz, *supra* note 88, at 506 (“A university may reasonably determine that the kind of speech covered by a discrimination policy or other code affecting campus speech is simply not of the intellectual quality demanded in an environment of scholarly inquiry—just as it would not hesitate to conclude that a professor teaching creationism in a biology class may be subject to discipline or dismissal, or that a student pursuing an argument in favor of Holocaust revisionism may receive a failing grade in a history class.”).

126 See *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995) (“[V]iewpoint discrimination is the proper way to interpret the University’s objections to *Wide Awake*. By the very terms of the SAF prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.”).

127 *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

128 See, e.g., STANLEY FISH, *THE FIRST: HOW TO THINK ABOUT HATE SPEECH, FAKE NEWS, POST-TRUTH, AND DONALD TRUMP* 64 (2019) (“Freedom of speech is a democratic value. It says that in a democracy government should neither anoint nor stigmatize particular forms of speech . . . . In the academy, on the other hand, free inquiry, not free speech, is the reigning ethic, and academic inquiry is engaged in only by those who have been certified as competent; not every voice gets to be heard . . . . Determining who will *not* be allowed to speak is the regular business of departments, search committees, promotion committees, deans, provosts, presidents, and editors of learned journals.”); *Post*, *supra* note 14, at 67 (“In contrast to the marketplace of ideas . . . academic freedom protects scholarly speech only when it complies with professional norms.” (footnote and internal quotations omitted)); JOAN WALLACH SCOTT, *KNOWLEDGE, POWER, AND ACADEMIC FREEDOM* 118 (2019) (“Free speech makes no distinction about quality; academic freedom does. Are all opinions equally valid in a university classroom? Does creationism trump science in the biology curriculum if half of the students believe in it? Do both sides carry equal weight in the training of future scientists? Are professors being ‘ideological’ if they refuse to accept biblical accounts as scientific evidence?”).

129 See, e.g., *Post*, *supra* note 14, at 67 (“Although the First Amendment would prohibit government from regulating the *New York Times* if the newspaper were inclined to editorialize that the moon is

As with classroom speech, one might argue that a university's prerogative to assess the quality of the scholarly speech can be accommodated by the *Pickering* balancing test, rather applying *Garcetti*. But the same objections to *Pickering* when it comes to an assessment of classroom speech apply with even greater force to scholarship. If the *Pickering* balancing test applies, the burden would be on the employer justify its judgments about an applicant or incumbent professor's scholarship, thereby give the judiciary ample room to displace scholarly judgments. Conversely, to the extent that great deference to a university's scholarly judgment is required, it becomes doubtful whether an individual professor's right of academic freedom would, in actual effect, have meaningful bite.

Beyond that, an effort to pigeonhole scholarly judgments about the quality of scholarship into the workplace-efficiency metric of the *Pickering* balancing test misconceives the nature of scholarly inquiry. *Pickering* weighs "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."<sup>130</sup> A university seeks to hire, promote, and encourage outstanding scholarship, however, not in a quest for efficiency on any conventional metric; rather, as we have seen, scholarship is properly assessed in terms of professional norms.<sup>131</sup> One struggles to fit a university's judgments about the quality of scholarship into this workplace-efficiency metric of the *Pickering* balancing test.

Perhaps even more important, universities are most likely to face political pressure to deviate from scholarly norms when academics take unpopular positions.<sup>132</sup> The *Pickering* balancing test, however, is concerned with workplace

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made of green cheese, no astronomy department could survive if it were prevented from denying tenure to a young scholar who was similarly convinced. Academic freedom thus depends upon a double recognition: that knowledge cannot be advanced in the absence of free inquiry, and that the right question to ask about a teacher is whether he is competent."); Byrne, *supra* note 88, at 283 ("[A]cademic freedom does not insulate speakers from being penalized for the content of their speech. Academic freedom only requires that speakers be evaluated by their peers for relative professional competence and within the procedural restraints of the tenure system."); David M. Rabban, *Does Academic Freedom Limit Faculty Autonomy?*, 66 TEX. L. REV. 1405, 1409 (1988) ("[A]cademic freedom limits the autonomy of professors by requiring adherence to professional norms . . . . An individual professor who departs from the scholarly standards that justify academic freedom can be disciplined or even dismissed."); William Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, in THE CONCEPT OF ACADEMIC FREEDOM 59, 75–76 (Edmund L. Pincoffs ed., 1975). ("[I]n respect to his academic freedom, the teacher or scholar is simultaneously under more constraint as well as under less constraint than would ordinarily obtain."). Even with respect to speech outside of academic contexts, the concept of academic freedom frequently is conjoined with the correlative obligation of academics to exercise appropriate restraint. See, e.g., Am. Ass'n of Univ. Professors, *supra* note 2, at 14 ("College and university teachers are citizens, members of a learned profession, and officers of an educational institution . . . . [T]heir special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.").

130 *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563, 568 (1969).

131 See *supra* text accompanying notes 121–29.

132 See, e.g., Am. Ass'n of Univ. Professors, *Ensuring Academic Freedom in Politically Controversial Academic Personnel Decisions*, in AAUP POLICY DOCUMENTS AND REPORTS, *supra* note 2, at 32, 32–33

efficiency, not protecting unpopular speakers or viewpoints. Using the *Pickering* balancing test to protect the academic freedom to articulate unpopular views is rather an exercise in fitting square pegs into round holes.

In this regard, consider the question whether the academy itself is tainted by ideological bias. There is ample evidence that American college and university faculty are predominantly liberal.<sup>133</sup> There is less evidence that this ideological skew affects hiring decisions, but the cupboard is far from bare. One study, for example, found that conservative scholars have less prestigious academic appointments than liberal scholars with equivalent publication records.<sup>134</sup> There are also a series of studies that survey academics and strikingly find they acknowledge that they are willing to discriminate in hiring and other respects against conservative academics.<sup>135</sup> If *Garcetti* were held inapplicable to duty-related scholarship, perhaps an unsuccessful academic candidate for hiring, promotion, or tenure could advance a plausible claim the candidate's conservative ideology was the reason for the candidate's lack of success.

Yet, disentangling ideology in academic hiring and promotion from scholarly norms is an enormously tricky business; as we have seen, academics frequently reject scholarship reflecting a viewpoint that has come into academic disrepute for one reason or another.<sup>136</sup> A right of academic freedom that permitted courts to police hiring decisions for evidence of ideological discrimination would be fiendishly difficult to apply.<sup>137</sup> Separating permissible from impermissible viewpoint discrimination in

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("Political intrusion . . . usually arises out of controversies over political ideology, religious doctrine, social or moral perspectives, corporate practices, or public policy—not more narrowly professional disagreements and disputes among academics.").

133 See, e.g., Emily Burmila, *Liberal Bias in the College Classroom: A Review of the Evidence (or Lack Thereof)*, 54 PS: POLITICAL SCI. & POLITICS 598, 599 (2021) ("Higher Education Research Institute data show that 60% of California university faculty across all institutions self-identified as liberal or left in 2014. Carnegie Foundation survey data reached an identical figure (60%) in similar nationwide studies." (citations omitted)).

134 See Stanley Rothman & S. Robert Lichter, *The Vanishing Conservative—Is There a Glass Ceiling?*, in *THE POLITICALLY CORRECT UNIVERSITY: PROBLEMS, SCOPE AND REFORMS* 60, 71–72 (Robert Maronto et al. eds., 2009). Cf. James C. Phillips, *Why Are There So Few Conservatives and Libertarians in Legal Academia? An Empirical Exploration of Three Hypotheses*, 39 HARV. J.L. & PUB. POL'Y 153, 193–204 (2016) (finding conservative and libertarian law professors have higher publication and citation rates).

135 For leading surveys, see ERIC KAUFMAN, CTR. FOR STUDY OF PARTISANSHIP AND IDEOLOGY, *ACADEMIC FREEDOM IN CRISIS: PUNISHMENT, POLITICAL DISCRIMINATION, AND SELF-CENSORSHIP* 136–68 (Rpt. No. 2, Mar. 1, 2021) (survey of academics across disciplines in the United States and Britain); GEORGE YANCEY, *COMPROMISING SCHOLARSHIP: RELIGIOUS AND POLITICAL BIAS IN AMERICAN HIGHER EDUCATION* 39–76 (2011) (survey of academic sociologists); Nathan Honeycutt & Laura Freberg, *The Liberal and Conservative Experience Across Academic Disciplines: An Extension of Inbar and Lammers*, 8 PERSP. PSCHOL. SCI. 115, 118–19 (2017) (academics from a variety of disciplines at four California State University campuses); Yoel Inbar & Joris Lammers, *Political Diversity in Social and Personality Psychology*, 7 PERSP. PSYCHOL. SCI. 496, 500 (2012) (survey of social and personality psychologists); Uwe Peters et al., *Ideological Diversity, Hostility, and Discrimination in Philosophy* 33 PHIL. PSYCHOL. 511, 523–29 (2020) (international survey of philosophers).

136 See *supra* text accompanying notes 122–26.

137 Cf. Byrne, *supra* note 88, at 307 ("[I]t would be most difficult for a court to separate legitimate from illegitimate academic decision-making. The court would have no guiding principles enabling it to determine which academic grounds are consistent with the First Amendment and which are

higher education would be no easy task, yet *Pickering* seemingly demands an effort to balance a scholar's liberty interest against the university's interest in enforcing maintaining high standards of scholarship.

*Pickering* would likely prove unworkable if courts were required to evaluate the quality of scholarship to determine if a candidate was not hired, promoted, or tenured as a consequence of professional norms, or as retaliation for scholarship expressing conservative views on matters of public concern. Judicial surveillance of the role of ideology in academic hiring and promotion, moreover, would threaten the academic freedom of universities themselves. There is, in short, no easy way to apply *Pickering* to judgments about the quality of scholarship.

### C. Academic Freedom and Scholarly Accountability

There are accordingly serious problems with applying *Pickering's* balancing test to higher education. A robust judicial role would threaten the independence of public universities, while a highly deferential approach to the test would render academic freedom largely illusory.

Nor is a purely procedural approach to *Pickering* more satisfactory. If *Pickering* were understood to require no more than a university to announce clear pedagogical and scholarly policies, academic freedom would be reduced to a principle of fair notice offering little in the way of substantive protection. As we have seen, academic freedom is generally characterized as a substantive rather than a procedural protection, whether on the AAUP's view that academics are entitled to "freedom" in teaching and scholarship, or the institutional conception of academic freedom as freedom from external interference advanced by Justice Frankfurter.<sup>138</sup> It is unclear at best why First Amendment right academic freedom should be converted into a procedural doctrine.<sup>139</sup> Moreover, if conceived in procedural terms, *Pickering* would function in a manner quite different from the fashion in which it has been applied to other public employees.<sup>140</sup>

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not. This is so because ... the only intelligible purpose for constitutional academic freedom is to protect academic values and practices from conformity to general social demands."); Rabban, *supra* note 9, at 291 ("It is often impossible, moreover, to separate ideological from disciplinary objections to academic work. Does a liberal law professor oppose critical legal studies or the Chicago school of economics because he has political objections to radical and conservative positions, or because he finds little merit in their intellectual approaches to legal issues? Does a radical law professor favor critical and feminist legal theory over traditional doctrinal analysis for intellectual or political reasons?").

138 See *supra* text accompanying notes 65–68.

139 Procedural protections are generally offered not by the First Amendment but the Due Process Clause. On that score, academics with a contractual right to tenure or some other type of legitimate claim of entitlement to continued employment enjoy a property interest within the meaning of the Due Process Clause, and are therefore entitled to notice and opportunity for hearing when their employment is threatened by allegations of misconduct. See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 602–03 (1972) ("[T]he respondent has alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment absent 'sufficient cause.' ... Proof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency.").

140 See, e.g., *Connick v. Myers*, 461 U.S. 138, 150–54 (1983) (upholding termination of prosecutor

To be sure, as we have seen, the First Amendment forbids impermissibly vague regulation of speech, including the speech of public employees.<sup>141</sup> That said, it is doubtful that ordinary vagueness doctrine applies when the government acts as an employer overseeing the performance of public employees' speech-related duties. *Garcetti*, of course, denies any protection to a public employee's duty-related speech.<sup>142</sup> Even putting *Garcetti* aside, as Justice O'Connor once observed, surely "a public employer may, consistently with the First Amendment, prohibit its employees from being 'rude to customers,' a standard almost certainly too vague when applied to the public at large,"<sup>143</sup> and it is unclear why it is not equally apparent that a university may refuse to hire or promote an applicant because it found that scholar's work deficient in terms of professional norms under broadly framed standards demanding something like "high-quality scholarship" of those seeking academic positions or promotions, even if those standards were impermissibly vague if applied to regulate speech outside of public employment. Thus, it is unclear why academics should be entitled, under the First Amendment, to some sort of special procedural protection unavailable for any other public employee's duty-related speech, even if it would be practicable to formulate precise rules governing university's assessments of classroom and scholarly speech.

Once the *Pickering* balancing test is put aside, the difficulties only multiply for a First Amendment right that would not insulate the incompetent or the venal from accountability—at least as long as their incompetence or venality is manifested in what they say or write.

Those who have attempted to erect a First Amendment theory of academic freedom that stands apart from *Pickering* have encountered just this difficulty. The advocates of a First Amendment right of academic freedom distinct from *Pickering*, while varying in the particulars, contend that the First Amendment should protect academics when they speak or write in their professional capacity as teachers and scholars.<sup>144</sup> This view, however, must still address the extent to which academics

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who had circulated a questionnaire asking whether colleagues felt pressure to work on campaigns of office-supported candidates under the *Pickering* balancing test, although "Myers did not violate announced office policy" because the questionnaire "carries the clear potential for undermining office relations," "the fact that Myers, unlike *Pickering*, exercised her rights to speech at the office supports Connick's fears that the functioning of his office was endangered," and "[w]hen employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office.").

141 See *supra* text accompanying notes 56–60.

142 See *supra* text accompanying notes 39–45.

143 *Waters v. Churchill*, 511 U.S. 661, 673 (1994) (plurality opinion) (citation omitted).

144 See, e.g., Post, *supra* note 14, at 84 ("First Amendment coverage should be triggered whenever the freedom of the scholarly profession to engage in research and publication is potentially compromised."); Areen, *supra* note 14, at 994 ("First Amendment protection for the speech of individual faculty members [should be afforded] as long as the speech concerned research, teaching, or faculty governance matters."); Matthew W. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323, 1333 (1988) ("The core claim of academic freedom concerns not speech as a citizen—the liberty of a professional utterance the academic enjoys in common with his fellow citizens—but freedom of professional utterance not shared with the citizenry at large."); Rabban, *supra* note 9, at 300 ("Individual academic freedom should cover expression within a professor's scholarly expertise

can be held accountable for poor teaching or scholarship. After all, no one thinks that academic freedom amounts to a license to teach, speak, or write ineptly, irresponsibly, or free from meaningful accountability.<sup>145</sup>

On this point, as we have seen, the advocates of a constitutional right of academic freedom universally acknowledge that academics can be disciplined—or denied employment or promotion—based on what they say and write, at least when these employment decisions are justified in terms of professional norms, and they agree that deference is owed to the academic judgments of the university.<sup>146</sup> These concessions, of course, greatly circumscribe the scope of any asserted First Amendment right of academic freedom. On this view, a constitutional right of academic freedom would, at best, be doomed to the status of a grossly underenforced constitutional norm.<sup>147</sup>

Moreover, the acknowledgment that academic freedom cannot be secured without deference to the academic judgments of universities itself reflects the type of managerial prerogative embraced in *Garcetti*. As we have seen, that decision is rooted in the prerogative of an employer to assess the quality of its employees' duty-related speech.<sup>148</sup> The view that universities' assessments of the quality of teaching and scholarship are entitled to deference is based in the same conception of managerial prerogative. Accordingly, it is not so easy to dismiss the applicability of *Garcetti*, and its conception of a managerial prerogative, to higher education.

Even if *Garcetti* applied to the professorate at public universities, it would not render the First Amendment nugatory at those institutions. As we have seen, public employers cannot demand ideological or partisan loyalty from those who hold positions for which such loyalty is not an appropriate criterion such as most (if not all) academics.<sup>149</sup> Accordingly, neither the government nor the public university that employs a scholar can demand ideological or partisan loyalty as a criterion for employment.

It follows that, even if applied to higher education, *Garcetti* would not eliminate all constitutional protection for classroom or scholarly speech. As a matter of general First Amendment doctrine, allegations of scholarly incompetence or professional misconduct that are mere pretexts to retaliate against an academic for protected speech unrelated to the performance of academic duties or a breach of professional norms run afoul of the First Amendment; after all, all public employees enjoy a First Amendment right to be free from retaliation motivated by their protected

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and intramural speech on matters of educational policy.”).

145 See, e.g., David M. Rabban, *The Regrettable Underenforcement of Incompetence as a Cause to Dismiss Tenured Faculty*, 91 IND. L.J. 39, 56 (2015) (“While the job functions of a professor justify the special protection of academic freedom, they do not justify special protection for incompetence.”).

146 See *supra* text accompanying notes 89, 101–02, 121–29.

147 For helpful discussions of the concept of underenforced constitutional norm, see LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES, A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* 86–128 (2004).

148 See *supra* text accompanying notes 39–49.

149 See *supra* text accompanying notes 73–79.

speech or conduct.<sup>150</sup> Thus, to the extent that allegations of teaching or scholarly misconduct are actually motivated not by concerns about the quality of teaching or scholarship, but instead are intended as retaliation against an academic for what is regarded as partisan or ideological nonconformity, the academic retains First Amendment rights.

Nothing in *Garcetti* is to the contrary. Recall that Ceballos was allegedly disciplined because of his duty-related speech—his assessment of the prosecutive merit of a pending case.<sup>151</sup> Nothing in the Court's decision entitled the district attorney's office to discipline Ceballos for any reason other than its assessment of the quality of his duty-related speech. Had the discipline been pretextual—for example, had the prosecutor's office actually disciplined Ceballos based on some sort of non-duty-related speech critical of the district attorney's actions on a matter of public concern—Ceballos would have been free to challenge the discipline.<sup>152</sup>

*Garcetti*, in other words, permits an employer to evaluate duty-related speech consistent with pertinent professional norms, not to use it as pretext. Notably, it is far from clear that there is any meaningful difference between that conclusion and the concession of the advocates of a constitutional right of academic freedom that universities may assess academic speech consistent with pertinent professional norms.

Accordingly, even if applied to higher education, *Garcetti* does not leave a professor without constitutional recourse in the face of retaliation for the expression of unpopular views that are nevertheless consistent with prevailing scholarly norms. If a university seeks to discipline a teacher or scholar—whether tenured or not—not because that individual's work is inconsistent with professional norms, but because it is politically unpopular, the teacher would be able to challenge the assertedly scholarly judgment as pretextual, either as an aspect of institutional academic freedom or under generally applicable principles of First Amendment

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150 See, e.g., *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1419 (2016) (“The constitutional harm at issue in the ordinary case consists in large part of discouraging employees—both the employee discharged (or demoted) and his or her colleagues—from engaging in protected activities . . . . The upshot is that a discharge or demotion based upon an employer's belief that the employee has engaged in protected activity can cause the same kind, and degree, of constitutional harm whether that belief does or does not rest upon a factual mistake.”)

151 See *supra* text accompanying notes 39–45.

152 See, e.g., *Lane v. Franks*, 573 U.S. 228, 238–42 (2014) (First Amendment prohibited retaliation against public employee for testimony at criminal trials discussing financial misconduct the employee had unearthed in the course of his duties on the ground that the testimony was non-duty-related speech on a matter of public concern). Cf. *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563, 572–73 (1969) (“What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally . . . . [T]he interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.” (footnote omitted)).

law.<sup>153</sup> To be sure, it will often be difficult to prove pretext; and in the academic context in particular, it will be difficult to separate impermissible discrimination against disfavored viewpoints with the appropriate administration of professional and scholarly norms. There is no proposal to erect a constitutional right of academic freedom, however, that avoids this difficulty.

Beyond the realm of pretext, however, it is unclear why the First Amendment immunizes academics against the need to face allegations of teaching-related misconduct. After all, if teachers were never accountable for poor teaching or scholarship, the academy would become a safe harbor for the incompetent and the venal. Nor could universities decide to hire, promote, or tenure based on its assessment of the quality of their teaching and scholarship. Perhaps most important, an individual right of academic freedom that would render scholars immune from bona fide professional judgments of the universities that employ them threatens to leave universities helpless in the face of writing or speech that raises legitimate questions about a scholar's professional competence.

### III. Conclusion

There is little more reason to believe that an academic's duty-related speech is protected by the First Amendment is immune from scrutiny by a public employer than it is to believe that a prosecutor's duty-related speech enjoys the same protection—the position rejected in *Garcetti*. Indeed, some might conclude that prosecutors exercise far more critical responsibilities than academics; after all, they have the power to seek to deprive others of life, liberty, or property. Yet, the soundness of prosecutive recommendations may surely be evaluated by supervisors, and prosecutors whose recommendations are found wanting—because they seek to prosecute the innocent or fail to prosecute the guilty—surely have no immunity from discipline under the First Amendment. Similarly, academic speech is necessarily assessed by universities in terms of prevailing professional norms, as even the advocates of a constitutional right of academic freedom acknowledge.<sup>154</sup>

There is undoubted appeal to the notion that academics ought to be free to teach or write without risk to their jobs if they offend prevailing political sentiment. Yet, academics enjoy a protection available to no other public employee—they work not for a public official who must take heed of public opinion to remain in office, but for universities, which ordinarily operate outside of the political fray, applying scholarly and not political norms. To be sure, universities are sometimes subject to political pressure when professors express unpopular views, but general First Amendment doctrine forbids government from demanding ideological conformity. That should offer academics protection enough from prevailing political winds.

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153 Cf. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) (“[T]his is not a case in which the procedures used by the University were unfair in any respect; quite the contrary is true. Nor can the Regents be accused of concealing nonacademic or constitutionally impermissible reasons for expelling Ewing; the District Court found that the Regents acted in good faith.”).

154 See *supra* text accompanying notes 121–29.

When individual academics are granted a constitutional right of academic freedom to resist the university's conception and application of professional norms, however, academic freedom wages war with itself. A university that cannot hold its teachers to appropriately demanding pedagogical and scholarly standards is doomed to mediocrity or worse. A First Amendment right of academic freedom, in short, paves the road to a destination that the no university—or the academics in its employ—should want to reach.