

# EXECUTIVE SUMMARY

## PROTECTING AN INDEPENDENT FACULTY VOICE: ACADEMIC FREEDOM AFTER *GARCETTI V. CEBALLOS*

(NOVEMBER–DECEMBER 2009)

Most faculty may be unaware that a recent Supreme Court decision, *Garcetti v. Ceballos* (2006), and several subsequent lower-court rulings applying that decision to higher education pose a serious threat to academic freedom and the ability of faculty in public institutions to participate freely in academic governance. The seriousness of this threat led the AAUP's Committee A on Academic Freedom and Tenure to form a subcommittee to examine the potential impact of the *Garcetti* decision and to suggest actions to be taken in both public and private colleges and universities to preserve academic freedom even in the face of judicial hostility or indifference. Because of the length and detailed legal analysis of its report, the subcommittee has also prepared this executive summary to make its general findings more readily accessible and to highlight its call for action outside the limited confines of the courts. The full report begins with an overview of the historical development of the principle of academic freedom in the United States. It then provides a substantial analysis of the legal precedents concerning both academic freedom, in particular, and the more general limits on the free speech rights of public employees, the issue addressed in the *Garcetti* case, before concluding with a series of recommended steps that faculty and administrators should take to safeguard academic freedom.

In *Garcetti v. Ceballos*, the Supreme Court allowed a Los Angeles district attorney's office to discipline a deputy district attorney for having criticized his supervisors' actions; the Court ruled that when public employees speak "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." Although the majority expressly left open whether its ruling should apply to "speech related to scholarship and teaching" in public colleges and universities, subsequent decisions in the lower federal courts concerning faculty speech have disregarded this reservation and now threaten to diminish severely the constitutional protection of the academic freedom of professors whose engagement in governance, as well as their teaching and research, is considered part of their "official duties."

The drafters of the AAUP's 1915 *Declaration of Principles on Academic Freedom and Academic Tenure*, which has provided a basis for the American understanding of academic freedom, did not rely upon the Constitution or statutes to make their case. At the time, faculty members at both private and public institutions were largely governed by the common law of master and servant—that is, the institution had authority and control over the faculty. Hence, most governing boards and presidents had the legal power to dismiss faculty members, who were at-will employees, for their economic, political, social, or religious views and for their criticisms of the institution. The authors of the *Declaration* argued that, for universities to advance knowledge and train students to think for themselves, faculty not only had to possess disciplinary expertise but also needed to be free from the control of their governing board and administration. The *Declaration's* authors explained that "[u]niversity teachers should be understood to be, with respect to the conclusions reached and expressed by them, no more subject to the control of the trustees than are judges subject to the control of the president." The assertion and exercise of these liberties confronted the master-servant model head on. As the 1915 *Declaration* put it, faculty members are "appointees" of the governing boards "but not in any proper sense the employees."

By the late 1930s, the principles of academic freedom in teaching, research, and publication had become generally accepted in most of public and nondenominational private higher education, and they were codified in the 1940 *Statement of Principles on Academic Freedom and Tenure*, the joint formulation of the AAUP and the Association of American Colleges (now the Association of American Colleges and Universities). This development occurred outside the context of the law and the constitutional right to free speech.

One aspect of academic freedom asserted in the 1940 *Statement* is the role of the faculty member in institutional life as a citizen or an "officer" of the institution. The academic freedom of a faculty member pertains to both (1) speech or action taken as part of the institution's governing and decision-making processes (for

example, within a faculty committee or as part of a grievance filing) and (2) speech or action that is critical of institutional policies and of those in authority and takes place outside an institution's formal governance mechanisms (such as e-mail messages sent to other faculty members). In its 1994 statement *On the Relationship of Faculty Governance to Academic Freedom*, the AAUP affirmed the inextricable connection between academic freedom in teaching and research and the free and effective participation of faculty in institutional governance.

Although the principle of academic freedom developed outside the law, beginning in the 1950s the Supreme Court began to interpret the First Amendment to include some protections for academic freedom for faculty at public institutions. In *Keyishian v. Board of Regents* (1967), a majority of the Court recognized academic freedom as a First Amendment interest. The subcommittee report emphasizes, however, that such protection did not extend to private institutions, since First Amendment protections apply only to restrictions on speech by arms of government. Moreover, the First Amendment protections provided to faculty at public institutions, while often quite helpful, never fully incorporated the AAUP's understanding of the scope of academic freedom.

Soon after the *Keyishian* ruling, the Supreme Court began to hand down a series of decisions addressing public employee speech more broadly. In *Pickering v. Board of Education* (1968), the Court strengthened the free speech rights of public employees by qualifying the long-standing legal doctrine that the First Amendment did not restrain the government when it functioned as an employer. That doctrine had been encapsulated by Oliver Wendell Holmes in 1892, when he stated that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." In *Pickering*, a case decided in favor of a public employee's free speech rights, the Supreme Court balanced the interests of a public employee "as a citizen, in commenting upon matters of public concern," against "the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." In subsequent decisions regarding public employee speech prior to *Garcetti*, the Court began to limit employee speech protection to a more restricted definition of matters of "public concern," so *Garcetti* ought not to have been a total surprise.

The threat to academic freedom implicit in *Garcetti*'s pinched reading of public employees' free speech rights became explicit in three subsequent lower-court deci-

sions. In *Hong v. Grant* (2007), a district judge, citing *Garcetti* and ignoring the Supreme Court's reservation for speech related to teaching and research, ruled that the University of California "is entitled to unfettered discretion when it restricts statements an employee makes on the job and according to his professional responsibilities." Such responsibilities included participation in institutional governance. Appeals courts in both *Renken v. Gregory* (2008) and *Gorum v. Sessoms* (2009) adopted similarly restrictive interpretations of faculty free speech rights. As of this writing, the *Hong* decision is on appeal, and the AAUP has filed an amicus brief.

The subcommittee report notes the irony that, based on the broad definition of "official duties" employed in these post-*Garcetti* rulings, only faculty speech on topics beyond the speaker's expertise may be constitutionally protected and that there now may exist a "negative or inverse correlation between the scope of a professor's (or a faculty's) role in shared governance and the breadth of potential protection for expressive activity. . . . In brief, as the cases stand now, one could argue that the less of a stake you have in your institution's shared governance, the freer you are (as a First Amendment matter) to criticize how it is governed, and vice versa."

Based on its review of relevant cases, the subcommittee report reiterates the imperative of making the case for academic freedom at both public and private institutions, not as a matter of law, but as a principle vital to the effective functioning of institutions of higher learning. While supporting efforts to shape the law through amicus curiae briefs, the report focuses on how the academic community can best preserve and protect academic freedom in light of the threat posed by the post-*Garcetti* legal context. The report urges faculty groups to minimize the dangers of recent court rulings and avert their recurrence, including through efforts to make administrators and governing boards aware of the risks to institutional health and to higher education generally if they use the *Hong-Renken-Gorum* doctrine to curtail intramural faculty speech.

The subcommittee also calls upon AAUP chapters and faculty senates at both public and private colleges and universities to develop policy statements at the institutional level that will explicitly incorporate protections for faculty speech on institutional academic matters and governance, such as the amendments recently adopted by the Board of Regents of the University of Minnesota. At the moment, most institutions have policy statements that recognize academic freedom as it pertains to teaching, research, and publication, but typically, such statements do not refer to speech relating to

governance. The report concludes by providing the Minnesota language and two other draft policy statements as examples of language that might be incorporated into faculty handbooks or other institutional regulations to clarify that academic freedom protects faculty speech about institutional academic matters and governance as well as teaching, research, and extramural statements:

1. Academic Freedom and Academic Responsibility sections of the Academic Freedom and Responsibility policy of the University of Minnesota, as amended by the board of regents on June 12, 2009:

Academic freedom is the freedom to discuss all relevant matters in the classroom, to explore all avenues of scholarship, research, and creative expression, and to speak or write without institutional discipline or restraint on matters of public concern as well as on matters related to professional duties and the functioning of the University.

Academic responsibility implies the faithful performance of professional duties and obligations, the recognition of the demands of the scholarly enterprise, and the candor to make it clear that when one is speaking on matters of public interest, one is not speaking for the institution.

2. Subcommittee proposal option 1:

Academic freedom is the freedom to teach, both in and outside the classroom, to conduct research and to publish the results of those investigations, and to address any matter of institutional policy or action whether or not as a member of an agency of institutional governance. Professors should also have the freedom to address the larger community with regard to any matter of social, political, economic, or other interest, without institutional discipline or restraint, save in response to fundamental violations of professional ethics or statements that suggest disciplinary incompetence.

3. Subcommittee proposal option 2:

Academic freedom is the freedom to teach, both in and outside the classroom, to research and to publish the results of those investigations, and to address any matter of institutional policy or action whether or not as a member of an agency of institutional governance. Professors should also have the freedom to speak to any matter of social, political, economic, or other interest to the larger community, subject to the academic standard of conduct applicable to each. ■

# PROTECTING AN INDEPENDENT FACULTY VOICE: ACADEMIC FREEDOM AFTER *GARCETTI V. CEBALLOS*

This subcommittee was formed by the AAUP's Committee A on Academic Freedom and Tenure in November 2008 for the purpose of surveying the landscape of legal and professional protections for academic freedom at public colleges and universities in the wake of the Supreme Court's 2006 decision in *Garcetti v. Ceballos* and to propose institutional policy language aimed at protecting academic freedom where courts cannot or should not be relied upon.<sup>1</sup> In *Garcetti*, the Supreme Court majority ruled that when public employees speak "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," regardless of whether the speech implicates matters of public concern. Anticipating this outcome, the AAUP and the Thomas Jefferson Center for the Protection of Free Expression had submitted an amicus brief to the Court, urging not only that the speech of all public employees on matters of public concern must be protected under the First Amendment but also particularly that applying a job-related standard of protection to speech could threaten academic freedom, noting that "much potentially controversial expression by university professors relates to the subject matter of the speaker's academic expertise, and could thus be deemed unprotected under a diminished and distorted concept of 'public concern.'" Perhaps in response to that caution, the majority in *Garcetti* observed that "there is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for" by its decision. The majority therefore reserved the question of speech in the academic context: "We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship and teaching."

In subsequent cases touching on teaching or higher education, however, and then in several cases squarely

addressing faculty speech, the lower federal courts have so far largely ignored the *Garcetti* majority's reservation, posing the danger that, as First Amendment rights for public employees are narrowed, so too may be the constitutional protection for academic freedom at public institutions, perhaps fatally. This report reaffirms the professional notion of academic freedom as existing apart from, and regardless of, any given mechanism for recognition of a legal right to academic freedom and situates a range of faculty speech firmly within the reservation articulated by the *Garcetti* majority.<sup>2</sup>

This report therefore begins with an exploration of academic freedom as articulated by the AAUP (and as put to the test by institutions of higher education), moves to an explanation of the judicial treatment of academic freedom prior to *Garcetti*, sets out the current post-*Garcetti* landscape, and concludes by urging that national faculty organizations, local and regional faculty groups, and institutional administrators and governing boards take action to preserve all elements of academic freedom even in the face of judicial hostility or indifference.

## I. What Is Academic Freedom?

Academic freedom in the United States took form in 1915 when the American Association of University Professors issued its *Declaration of Principles on Academic Freedom and Academic Tenure*. John Dewey, the first president of the Association, had appointed a committee of respected scholars to draft the *Declaration*. Chaired by Columbia University economist Edwin Seligman, the committee included Arthur Lovejoy of Johns Hopkins

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2. The debate over precisely how far academic freedom protects both intramural speech (speech, broadly defined, about various institutional matters) and extramural speech (speech about, for example, political and social matters) persists and will continue to do so. That debate underpins this report, but the report does not reach a conclusion regarding the precise contours of that protection; such a consensus is not a prerequisite to any of the steps that are suggested at the end of this report.

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

University and Roscoe Pound, then dean of the Harvard Law School.

When the *Declaration* was issued, faculty members in both private and public institutions were largely governed by the common law of master and servant, under which the administration supervised and was responsible for the actions of the faculty, with a few exceptions. Most institutions at the time were private, under lay or denominational control, in which those with legal power to govern were privileged to brook no expression at odds with their economic, political, social, or religious views or with speech critical of their institutions' policies: Scott Nearing's appointment at the University of Pennsylvania's Wharton School was not renewed in 1915—effectively constituting a dismissal—in the face of a favorable faculty recommendation, in large part because of his social activism; A. A. Knowlton was dismissed at the University of Utah in 1915 for uttering, in private, remarks “disrespectful” of the chairman of the university's governing board. Both actions were perfectly lawful at the time.

Nor, as Knowlton's case demonstrated, were the faculties of public institutions generally regarded in any different light by virtue of public control of the university. In 1892, Justice Oliver Wendell Holmes Jr., then of the Supreme Judicial Court of Massachusetts, rejected a policeman's claim that his discharge for participation in a political committee infringed his constitutional right of free speech with an aphorism that captured the law for decades to come: “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”<sup>3</sup> The fact of public sponsorship or control was irrelevant: the First Amendment simply did not restrain the government when it functioned as an employer any more than it restrained private employers.

The point was punctuated when, a decade after the 1915 *Declaration*, the Tennessee legislature enacted a law prohibiting all public universities and schools supported by public funds from teaching “any theory that denies the story of the divine creation of man as taught in the Bible and to teach instead that man has descended from a lower order of animals.” So emphatic was the state's stricture that teaching contrary to the dictate was made a crime. In upholding the law in the face of high school teacher John Scopes's conviction for violating it, the Supreme Court of Tennessee observed that the teacher—and, by extension, any professor in a public university—“had no right or privilege to serve the state except upon such terms as the state prescribed.” The law

was an order by an employer, a master, “as to the character of the work the master's servant shall, or rather shall not, perform. In dealing with its own employees engaged upon its own work, the state is not hampered”—not limited, not constrained—by the constitution.

As this was the legal landscape on which the 1915 *Declaration* was mapped, it is not surprising that the drafters drew no support from the law and made no claim on it. Instead, the 1915 *Declaration* addressed the function of the university and so of the role of the faculty within it. The focus was conceptual; the practical consequences were anticipated to play out in institutional policies and practices and in the public's sympathetic understanding—not necessarily in the courts.

The 1915 *Declaration* challenged the conception of the professor as the servant of an institutional master, both in carrying out the institution's teaching and research missions and in relation to the faculty's status—and, eventually, its role—in the institution vis-à-vis the institution's legal governors. The *Declaration* observed that the functions of the university were to advance the sum of knowledge, to promote inquiry, to provide instruction to students—not to give them “ready-made conclusions” but to “train them to think for themselves”—and to develop experts fit for public service. This required not only disciplinary expertise, gained by years of study and academic apprenticeship, but also independence from regental or administrative control in teaching, research, and publication, save for assurance of adherence to professional standards of care. Where that assurance was questioned, the determination of professional neglect or incompetence, of any departure from professional standards of care, should be placed in the hands of the faculty as the body competent to decide such questions. In these specific regards, the relationship of professors to the institution's legal governing authorities “may be compared to that between judges of the federal courts and the executive who appoints them. University teachers should be understood to be, with respect to the conclusions reached and expressed by them, no more subject to the control of the trustees, than are judges subject to the control of the president, with respect to their decisions.”

The *Declaration* took note of the sources that work to limit the freedom of teaching, research, and publication: the political, economic, or social biases of donors and parents that “sometimes deliberately and sometimes unconsciously, sometimes openly and sometimes subtly” are brought to bear on academic authorities; and, more threatening still, the dangers of “an overwhelming and concentrated public opinion.” Subsequent

3. *McAuliffe v. Mayor and Board of Aldermen of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892).

AAUP investigations were to document the role of public offense in causing the removal of faculty members whose speech had triggered the public's ire, even outrage, but who had stayed within professional bounds of disciplinary utterance or who had merely expressed opinions on contested matters of public policy. To the architects of the 1915 *Declaration*, an exercise of academic freedom could not be held subject to the threats and even the consequences of regental or administrative disapprobation. Outside the academy, an employee, being the agent of the employer, could be held to account for speech or action inimical to the employer's economic interests—speech that disaffected clients, that engendered disharmony among co-workers, or was disrespectful of authority—but none of this applied to speech protected by academic freedom.

Two aspects of academic freedom should be elaborated here: first, the freedom of teaching, research, and publication; second, the role of the faculty member in the college or university's institutional life—as an “officer” of the institution, to use the terms of the 1940 *Statement of Principles on Academic Freedom and Tenure*, or, in a possibly more evocative metaphor, as a citizen of his or her institution.

#### A. FREEDOM OF TEACHING, RESEARCH, AND PUBLICATION

This is the most readily understood aspect of academic freedom: so long as the teacher or researcher has acted in accordance with the applicable standard of professional care, what is taught or endorsed cannot be held to institutional account no matter the resulting disharmony or contentiousness arising from within the institution or instigated by external groups. Such freedom is a defining condition of higher learning; without it, our institutions would become mere appendages to economic interests, party politics, and dramatic if evanescent shifts in public opinion. The universities' usefulness as “intellectual experiment stations,” as the 1915 *Declaration* puts it, where new ideas may germinate no matter how distasteful at the time, where prevailing pieties are tested, possibly to be confirmed, possibly to be found wanting, where the young are made to engage critically with their most cherished beliefs, would be at an end.

It is important to stress that the assertion and exercise of these liberties takes the master-servant model head on. As the 1915 *Declaration* puts it, university faculties are “appointees” of the legal governing authority “*but not in any proper sense*” its “employees.” (Emphasis added.) “[O]nce appointed, the scholar has professional functions to perform in which the appointing authorities have neither competency nor moral right to intervene. The responsibility of the university teacher is primarily

to the public itself, and to the judgment of his own profession.” The conclusion inexorably to be drawn contradicted the assumptions of managerial control and accountability imported under the common law master-servant relationship:

A university is a great and indispensable organ of the higher life of a civilized community, in the work of which the trustees hold an essential and highly honorable place, but in which the faculties hold an independent place, with quite equal responsibilities—and in relation to purely scientific and educational questions, the primary responsibility.<sup>4</sup>

#### B. SPEECH AS AN INSTITUTIONAL CITIZEN

By the late 1930s, the principles of academic freedom in teaching, research, and publication had become generally

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4. The inapplicability of the master-servant model was echoed by Judge Benjamin Cardozo, then of the New York Court of Appeals, in the rather surprising setting of the charitable immunity doctrine (now widely abandoned) that insulated charities from liability for the negligence of their employees. *Hamburger v. Cornell University*, 148 N.E. 539 (N.Y. 1925). The precise question presented was whether a student injured in a chemistry laboratory could sue the university for her professor's negligence. The court held that she could not. There might be a duty to select the professor with care, Cardozo reasoned,

but that duty being fulfilled, there was no duty to supervise day by day the details of their [the faculty's] teaching. The governing body of a university makes no attempt to control its professors and instructors as if they were its servants. By practice and tradition, the members of the faculty are masters, and not servants, in the conduct of the classroom. They have the independence appropriate to a company of scholars.

*Id.* at 541. Three decades later Judge Charles E. Wyzanski Jr., then president of the Board of Overseers of Harvard University, echoed Cardozo, albeit in speaking to a very different situation:

A university is the historical consequence of the mediaeval *stadium generale*—a self-generated guild of students or of masters accepting as grounds for entrance and dismissal only criteria relevant to the performance of scholarly duties. The men who become full members of the faculty are not in substance our employees. They are not our agents. They are not our representatives. They are a fellowship of independent scholars answerable to us only for academic integrity.

Charles Wyzanski, “Sentinels and Stewards,” *Harvard Alumni Bulletin*, January 23, 1954, 316.

accepted in most of public and nondenominational private higher education. These were codified in the 1940 *Statement of Principles on Academic Freedom and Tenure*, drafted by the AAUP and the Association of American Colleges (now the Association of American Colleges and Universities). Today, the 1940 *Statement* has been endorsed by more than two hundred learned societies and higher education associations. It has also been adopted by a great many, perhaps most, colleges and universities in the United States, where it is typically incorporated or referenced in faculty handbooks or contracts. It has been relied upon as persuasive authority by courts to shed light on, and to resolve, a wide range of cases related to academic tenure.<sup>5</sup> Though the 1915 *Declaration* discussed the faculty member's freedom to speak as a citizen on questions outside the professor's disciplinary domain, in part quoting from a Wisconsin report to the effect that "it is neither possible nor desirable to deprive a college professor of the political rights vouchsafed to every citizen," the 1915 *Declaration* drew no special attention to faculty speech regarding the institution's own internal affairs.

Yet many of the Association's early investigations, including its very first at the University of Utah, concerned speech of just that character, speech critical of the institution's governing board or president or speech contesting institutional policies or actions. Thus the question whether speech of that nature was encompassed by the profession's understanding of academic freedom pressed to the fore and called for address. The Association took it up both in individual case reports and then in the 1940 *Statement*.

The academic freedom aspects of the faculty's role in the institution are manifested in one of two ways: speech or action taken as part of the institution's governing process; and speech or action taken outside the formal structure of governance that is critical of institutional policies, actions, or inactions, including criticism of those in authority who have acted or have refused to act.

### 1. Participation in Established Governance

Two years after creating its Committee A on Academic Freedom and Tenure, the Association established its Committee T on the Place and Function of Faculties in University Government and Administration (now the

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5. See, for example, *Vega v. Miller*, 273 F.3d 460, 476 (2d Cir. 2001) (Cabranes, J., dissenting); *Browzin v. Catholic Univ. of Am.*, 527 F.2d 843, 848 & n.8 (D.C. Cir. 1975) ("The 1940 *Statement* represent[s] widely shared norms within the academic community, having achieved acceptance by organizations which represent teachers as well as organizations which represent administrators and governing boards").

Committee on College and University Governance). Committee T issued its first report in 1920, surveying the extent of faculty responsibility exercised by regulation or custom in several dozen institutions and recommending best practices. The committee's report noted the then "prevailing" type of university organization in which faculties

have little or no legally recognized voice in the determination of the conditions, in the matters of fundamental university policies, academic status and salary. . . . It is argued that this situation is responsible, in part, for the timidity and lack of enterprise and spirit of so many university teachers; that they tend to become either creatures of trivial pedagogical routine, deficient in the spirit of personal independence and intellectual creativeness, or discontented rebels, because they are parts of a system in the guidance and reform of which they do not effectively participate.<sup>6</sup>

Over the course of the following decades faculties sought and increasingly gained institutional recognition for a role in policy and decision making. As a normative matter, the faculty's role in institutional government was codified in the 1966 *Statement on Government of Colleges and Universities*, which was jointly formulated by the AAUP, the American Council on Education, and the Association of Governing Boards of Universities and Colleges. It recognized the faculty's right to information and consultation in most areas of institutional operation but accorded the faculty primary responsibility in certain fundamental academic matters such as curriculum, subject matter and methods of instruction, and faculty status. Just as the 1915 *Declaration* conceived of the faculty as an equal to the governing board and administration, the 1966 *Statement* conceives of professors as citizens of their institutions whose active engagement in the institution's teaching and research mission, whose intimate knowledge of their own and cognate disciplinary trends and needs, whose deep engagement with students, and whose day-to-day knowledge of the details of the institution's workings entitle them to participate, to be heard, and, if need be, to criticize free of institutional sanction.

The close connection between academic freedom as teacher and researcher and academic freedom as institutional citizen was explained in the AAUP's 1994 *statement On the Relationship of Faculty Governance to Academic Freedom*. The rich texture of that explanation

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6. "Report of Committee T on the Place and Function of Faculties in University Government and Administration," *AAUP Bulletin* 6 (March 1920): 21–22.

need not be rehearsed here; it is enough to note that it would be antithetical to the very purpose of seeking a faculty's considered judgment on a question of institutional policy or action to retaliate against those whose views are being sought because they are contrary to those of the administration. A corporate manager who persistently advances policies contrary to the plans of the company's chief executive may be removed for failing to be in harmony with those objectives or for dissenting from them. A professor may not be made subject to retribution because the position he or she has advanced on matters relating to governance displeases those in power.<sup>7</sup>

## 2. Criticism and Dissent

Although the 1915 *Declaration* did not address the relationship of academic freedom to intramural speech, cases of institutional sanction in just that situation were fast in presenting themselves for Committee A investigation—dismissal for criticism of the credentials or competence of a president or dean, for appeals for salary improvements, and, importantly, for demands for faculty participation in institutional governance. The Association came to the position that speech on these questions was encompassed by the concept of academic freedom. That

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7. Whence the difficulty five justices of the U.S. Supreme Court had with the status of the faculty of a private university under the law of collective bargaining. *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). In industry the range of effective recommendatory authority faculty possessed would render them agents of management ineligible to engage in collective bargaining: they decide teaching methods, grading policies, admissions standards, and degree requirements, that is, in industrial terms what the product will be, how it will be made, and with what raw materials. "To the extent the industrial analogy applies," the majority opined, the faculty are managers. *Id.* at 686. As the dissenters pointed out, however, academic freedom insulated the faculty from accountability in the industrial sense, to which the majority replied that "the analogy of the university to industry need not, and indeed, cannot be complete." *Id.* at 689. As demonstrated by the tension in the *Yeshiva* decision, if the exemption of managers from collective bargaining in industry is premised on the need to maintain their undivided loyalty, necessarily requiring that managers be solely accountable to the corporation's officers, and if faculty in exercising their collective professional judgment are not—indeed cannot—be held accountable in that industrial sense, then faculty cannot be managers precisely because of the want of hierarchical control, because they are not held to observe a duty of loyalty in the industrial sense.

position was codified in the 1940 *Statement* when it spoke of the academic freedom of faculty as "officers" of their institution, echoing the 1915 *Declaration's* demand that faculty be treated as fully the equal of trustees and administrators. Consequently, as *On the Relationship of Faculty Governance to Academic Freedom* puts it,

Protecting academic freedom on campus requires ensuring that a particular instance of faculty speech will be subject to discipline only where that speech violates some central principle of academic morality, as, for example, where it is found to be fraudulent (academic freedom does not protect plagiarism and deceit). Protecting academic freedom also requires ensuring that faculty status turns on a faculty member's views only where the holding of those views clearly supports a judgment of competence or incompetence.

Although the business interests of a corporation may empower it to punish employee speech that disparages its product or the competence of those in command, universities serve the common good, and how the common good is best served cannot be resolved by managerial dictate.<sup>8</sup> The very same expertise and institutional commitment that legitimizes the faculty's role in institutional government legitimizes its right to criticize institutional policies and actions even when that speech is not uttered in a governing forum. A letter to the campus or public press expressing a lack of confidence in the institution's trustees or president—indeed, a call for the president's resignation or for a vote of no confidence by the faculty—is insulated from institutional retaliation as a matter of academic freedom. In this example, the critical distinction between a faculty member and an employee of a corporation with traditional business interests comes to the fore: the faculty member is acting not as a spokesperson for the institution—and so subject to control *for* the views expressed—but as a citizen *of* the institution.

## II. How Far Does the First Amendment Protect Academic Freedom?

While the AAUP spent the first several decades of the twentieth century articulating the professional

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8. A United States Court of Appeals has even held that an employee's public remarks that management's layoff decision had "left a void" in the company's knowledge base and that those who made the decision had "no good ability" to run the company were so disloyal as to justify discharge despite the decision of the National Labor Relations Board that the speech was fair comment during a union organizational drive. *Endicott Interconnect Technologies, Inc. v. NLRB*, 453 F.3d 532 (D.C. Cir. 2006).



understanding of academic freedom—a principle that has force independent from, and regardless of, judicial recognition, which must necessarily find a legal “hook” for its dictates—courts were slow to catch up. Nevertheless, by the middle of the twentieth century, courts were beginning to recognize the importance of academic freedom and to sketch out the contours of a protected legal right to it. That judicial recognition would, of course, prove to be detrimental in some ways, as the courts’ crabbed reading of public employees’ First Amendment rights would ultimately allow (though not require) courts to restrict the First Amendment academic freedom rights of faculty members as well. If we are to gauge the impact of the *Garcetti* decision and its subsequent application by lower courts, however, we must start by analyzing the extent to which courts understood the First Amendment to protect academic freedom before the *Garcetti* majority’s ruling. Specifically, we should determine the extent to which constitutional doctrines of free speech encompassed faculty expression of the type that has now been placed at greater risk. That assessment is the focus of this section of the subcommittee report.

#### A. PRIVATE HIGHER EDUCATION

First, we should set aside private or independent higher education, to which First Amendment constraints do not apply. Even in California, which has uniquely imposed such limits on private campuses, only the speech of students at secular institutions is protected by special state legislation, which makes no mention of professors. Elsewhere, courts may occasionally impose legal obligations on independent institutions in regulating the speech of their faculties, but for quite different reasons. New York courts, for example, have provided remedies for outspoken professors on private campuses but only because of a unique state law that empowers judges to probe the fairness of all chartered private entities.

There have also been a few cases in which federal courts have found a private university receiving massive government subvention to be engaged in “state action” and thus potentially subject to quasi-constitutional standards, but those cases seem to have dealt only with race, gender, and other unlawful forms of bias. Thus the initial premise remains sound; because our task concerns the constitutional protections for academic freedom writ large, we are concerned here only with publicly supported institutions.

This division between public and private also underscores the clear implication that faculty members at private institutions (and at public institutions, as we shall see later) must seek nonconstitutional protections for the full spectrum of faculty speech—teaching- and

research-related, intramural, and extramural. Indeed, any reputable private institution must pride itself on imposing at least equivalent standards upon itself as those that the Constitution imposes upon public institutions. Faculty members at private as well as at public institutions will find specific recommendations at the end of this report: recommended policy language and avenues by which to encourage institutions to commit to protecting faculty expression for the good of the institution as well as the good of the faculty and the public as a whole.

#### B. PUBLIC HIGHER EDUCATION: ACADEMIC FREEDOM IN THE COURTS

When it comes to the public sector, the answer to the seemingly simple question of the extent of constitutional protection of academic freedom turns out to be dauntingly complex. The first hint that professorial speech might be different from that of other public employees came in two 1952 dissents by Justice William O. Douglas and a concurrence by Justice Felix Frankfurter that same year.<sup>9</sup> These early stirrings were followed five years later by Justice Frankfurter’s signal concurrence in the first clear victory for academic expression in *Sweezy v. New Hampshire*.<sup>10</sup> Although the majority in *Sweezy* ruled in favor of a visiting lecturer whose class notes had been demanded by state officials probing suspected subversive activity, the rationale for that ruling was due process rather than free expression. Chief Justice Earl Warren, writing for the majority, did explicitly recognize the importance of free inquiry in the academic setting, adding the majority’s view that “there unquestionably was an invasion of petitioner’s liberties in the area of academic freedom,” though such statements were simply helpful dicta. The chief justice also observed,

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

9. *Adler v. Board of Education*, 342 U.S. 485 (1952); *L’Hommedieu v. Board of Regents*, 342 U.S. 951 (1952); *Wieman v. Updegraff*, 344 U.S. 183 (1952).

10. 354 U.S. 234 (1957).

For Justice Frankfurter, who as a Harvard Law School professor in the 1920s and 1930s had been involved in his share of academic freedom challenges, the speech of professors was simply different and deserved a higher level of solicitude. He opined in concurrence that “the dependence of a free society on free universities” requires “the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor.”

Professors would continue during the next decade to prevail in court challenges to state laws that severely abridged free expression, though usually without explicit mention of academic freedom. Highly significant Supreme Court rulings invalidated, for example, loyalty oaths in Florida and Washington State at the behest of state university professors, though on grounds that were equally available to the range of public employees in those states.<sup>11</sup> Clearly the plaintiff professors were sympathetic challengers, whose pleas may have made the justices more comfortable both in reviewing such cases and in imposing First Amendment constraints, though such a view of the interim cases remains wholly conjectural.

The first unambiguous recognition of academic freedom as a First Amendment interest came in Justice William Brennan’s opinion for the Court in *Keyishian v. Board of Regents*, revisiting a disclaimer oath that the Court had sustained a decade earlier but now decisively invalidated on First Amendment grounds.<sup>12</sup> The plaintiffs in *Keyishian*, faculty members (and one non-faculty employee) at the State University of New York, objected to a required oath certifying that they were not members of “subversive organizations” and challenged a New York State law prohibiting the distribution of materials “containing or advocating, advising or teaching” the forceful overthrow of the government as violations of their First Amendment rights. The Supreme Court agreed, observing that the breadth and vagueness of the state law would effectively compel teachers to stay far away “from utterances or acts,” or even the “writing of articles,” which might “jeopardize [their] living.” As Justice Brennan said for the Court: “Our Nation is deeply committed to safeguarding academic freedom,

which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.” This was, however, no ordinary case of government workers’ free speech; indeed, even basic constitutional protection for public employee expression would not be recognized until the ensuing term. Moreover, Justice Brennan’s opinion was liberally enhanced by explicit declarations of the Court’s special solicitude for the speech and other expressive activities of state college and university professors. Those references also strongly implied a broader scope for such protection, extending beyond the classroom, the laboratory, and the published scholarship to which academic freedom most clearly and logically applied.

Yet the conundrum persisted: had the same challenge to New York’s loyalty test been mounted instead by a group of nonacademic employees, would the outcome have been different? Given Justice Brennan’s abiding commitment to the doctrine that a government benefit—here, public employment—could only rarely be accompanied by restrictions on the employee’s freedom of speech, it seems unlikely that if the issue had first reached the high court in a nonfaculty case the result would have been different. The prevailing opinion would, however, have been vastly different; lacking the unique capacity to illustrate the vitality of unfettered expression and free inquiry in the academic setting, the majority ruling would have lacked most of its memorable eloquence and enduring force. Thus it was a fortunate coincidence—and perhaps even more than that, if not a constitutional imperative—that the case in which to reverse a long course of deference to states in restricting speech of government workers involved state university professors.

One who doubted the potential value of such rulings for faculty speech—or academic freedom—might remind us, however, that around this time, the Supreme Court was ready to hold public higher education accountable to First Amendment standards in non-faculty matters. The classic example was *Healy v. James*, a 1972 ruling that recognized the right of a radical student group not to be denied state college recognition on one campus because of disruptive activities elsewhere or administrative disapproval of its mission or agenda.<sup>13</sup> Though the *Healy* opinion invoked both *Sweezy* and *Keyishian* as evidence of the justices’ commitment to “safeguarding academic freedom,” the

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11. *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961); *Baggett v. Bullitt*, 377 U.S. 360 (1964).

12. 385 U.S. 589 (1967) (reversing *Adler v. Board of Education*, 342 U.S. 485 [1952]).

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13. 408 U.S. 169 (1972).

outcome suggested that nonfaculty speech—and specifically student extracurricular political activity for which no familiar academic freedom claim could be made—was equally entitled to constitutional protection. And around the same time (in fact even a bit earlier) the Court uniquely rebuked a public school district, in the *Tinker* case, for suppressing nonverbal student speech—black armbands worn to protest the Vietnam War—on the basis of claimed “disruption” without proof of a compelling regulatory interest.<sup>14</sup> Thus judicial skepticism about administrative authority in the academic setting went well beyond cases involving university professors.

The same skeptic might cite two pivotal rulings the same year as *Healy* in which the claims of state college professors prevailed against summary dismissal in reprisal for their controversial extramural statements.<sup>15</sup> When a substantial claim had been made in support of a federally cognizable interest such as continued academic employment, the justices now insisted that due process must be afforded. Thus the contentious tenured professor must receive an adequate hearing before major sanctions could be imposed. (For faculty members without tenure, for whom an interest in continued academic employment does not have the same constitutional dimensions, the level of procedural protection that must be observed before dismissal is much lower as a legal matter.) Here again one might be tempted to find solicitude for academic freedom, but we should note that comparable procedural protection had been afforded to welfare recipients facing summary termination of their benefits and to a householder whose refrigerator was about to be repossessed for credit default. The outspoken professors again offered a most appealing vehicle for recognition of due process, and the Court’s discussion of their expectation of continued employment was quite sympathetic and undeniably helpful. But the bottom line in such cases seems to have been drawn well short of special protection for academic freedom.

Lower-court rulings also fail to provide definitive answers to this persistent question of how far the First Amendment protects academic freedom. Of those distressingly few cases in which outspoken faculty or professors with unwelcome affiliations have prevailed on free speech grounds, even fewer offer clear evidence of the importance of academic freedom beyond helpful references. Perhaps the case that comes closest to a positive

correlation was *Cooper v. Ross*, a 1979 district court ruling that reversed the nonreappointment of a political scientist at the University of Arkansas at Little Rock for having revealed his Marxist convictions to his undergraduate classes.<sup>16</sup> The judge concluded that such adverse action violated the professor’s First Amendment rights, noting that “at least in the context of a university classroom, he had a constitutionally protected right simply to inform his students of his personal and political and philosophical views.” Even this ruling, however helpful, was limited to core faculty speech in the classroom and entailed a single rather mild statement about an unwelcome ideology.

Before leaving this part of the equation, we should make some mention of other Supreme Court cases recognizing and protecting faculty academic freedom. Especially relevant are the two major race-sensitive admissions rulings, *Bakke* in 1978 and *Grutter* a quarter century later, and a 1985 case on academic standards, *Ewing*, that was bookended by the two.<sup>17</sup> Justice Lewis Powell in *Bakke* and Justice Sandra Day O’Connor in *Grutter* cited academic freedom considerations to support their deference to certain uses of race in the state university admissions process. Such rulings are undeniably most helpful in the larger context of judicial recognition of academic freedom. They do not, however, offer much insight into the specific question that occupies us here—the extent to which academic freedom claims a right to, and benefits from, First Amendment protection. What was involved in the race-based admissions rulings was not individual faculty speech or political activity but the very different (if equally important) concept of collective faculty endorsement of certain admissions policies through the exercise of shared university governance. And since in both cases faculty bodies, administrators, and governing boards were all on the same page, there was no occasion to consider which interests or views would prevail in the inevitable case of disagreement or divergence between faculty and board or administration. For the moment, it is enough to take note of the admissions decisions, while seeking elsewhere for answers to our central inquiry.

In *Ewing*, the Supreme Court spoke forcefully in favor of deference to faculty decisions on academic matters. *Ewing* involved a decision by a committee at the

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14. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

15. *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).

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16. 472 F. Supp. 802 (E.D. Ark. 1979).

17. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985).

University of Michigan to drop a student from a special medical school program without allowing him to retake a national board test on which he had achieved the lowest recorded score of any student in the history of the program. In answer to the student's challenge that the committee's decision (as well as the committee's reaffirmation of its decision on appeal and its ratification by the executive committee of the medical school) had deprived the student of his property interest in continued enrollment in the program, the Court observed that "[i]f 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." As Justice John Paul Stevens noted for a unanimous Court, "When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment." The Court also quoted approvingly an earlier concurrence by Justice Powell urging that "university faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation."<sup>18</sup> The unanimous Court thereby recognized the importance of awarding faculty primary authority over academic matters—which encompassed, in *Ewing*, issues relating to an institution's academic standards vis-à-vis its students and presumably would also encompass questions of academic standards vis-à-vis hiring, faculty promotions, research agendas, and more.

What can be said with confidence, therefore, is that a host of cases involving faculty speech have recognized a vital First Amendment interest in academic freedom as a basis for protecting such expression from institutional or governmental sanctions. Such decisions have proved immensely helpful to faculty interests in a host of ways over the past half century. Whether any or all of these rulings would have occurred in the absence of professorial plaintiffs and academic freedom claims remains a subject of conjecture and creates inescapable uncertainty for the present inquiry.

### C. PUBLIC EMPLOYEE SPEECH

Barely had the Supreme Court's *Keyishian* ruling expressly recognized academic freedom as a First

Amendment interest than the justices addressed public employee speech more broadly.<sup>19</sup> The case was that of Marvin Pickering, an Illinois public high school teacher who was dismissed after the local newspaper published his letter that was highly critical of the school board's budget policies and priorities. The Illinois Supreme Court affirmed the dismissal, using language little different from Justice Holmes's 1892 approval of the discharge of the politically active patrolman.<sup>20</sup>

The U.S. Supreme Court was now ready to alter substantially the law of public employee speech. Even though Pickering's letter contained several factual errors, he could not be dismissed for his extramural speech without proof that he wrote either knowing that those statements were false or in "reckless disregard" of their accuracy—the very standard the Court had applied several years earlier in the *New York Times* libel case to news media comments about public officials and public figures.<sup>21</sup> The Court articulated a balancing test weighing "the interests of the teacher, as a citizen, in commenting upon matters of public concern" against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Under this test, public employee speech would likely not be protected if it took excessive time away from assigned duties, disrupted morale or efficiency within the agency, undermined confidence among the agency's clients, or simply demonstrated a clear lack of competence or fitness to continue on the job.

There was another possible limitation. In emphasizing the importance of allowing Pickering to publish his letter, the Court stressed that "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." The Court added, however, that the budgetary data about which Pickering inaccurately wrote

were matters of public record on which his position as a teacher in the district did not qualify him to speak with any greater authority than any other taxpayer. . . . We are thus not presented with a situation in which a teacher has carelessly made false statements about matters so closely related to the day-to-day operations of the schools that any harmful

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18. 474 U.S. at 225 n. 11 (quoting *Board of Curators, University of Missouri v. Horowitz*, 435 U.S. 78, 96 n.6 [Powell, J., concurring]).

19. *Pickering v. Board of Education*, 391 U.S. 563 (1968).

20. *Pickering v. Board of Education*, 36 Ill. 2d 568, 225 N.E.2d 1 (Ill. 1967).

21. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

impact on the public would be difficult to counter because of the teacher's presumed greater access to the real facts.

This comment suggested that the same criticism published by someone known to be familiar with the fiscal realities of the school district might in fact not have been comparably protected if it were false—even if it could not have been shown that such a person spoke with “actual knowledge of falsehood” or “reckless disregard” of accuracy.

Two quite different theories might explain this facet of the *Pickering* decision. On the one hand, the Court's thrust may have been to protect a public employee's speech as a citizen rather than as a government worker; not only would later cases reinforce that view, but the *Pickering* majority itself concluded that, given the circumstances, “the 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.”

There was, however, a more ominous theory wholly overlooked at the time but clearly portentous in the post-*Garcetti* context: that the justices were from the outset committed only to protecting public employees when they spoke (at least inaccurately) on matters remote from their field of expertise or assigned responsibility. That theory certainly fit the facts of *Pickering*. It would, however, have created the implication that a letter writer who knew the facts—or even who was perceived in the community as knowing the facts, whether such knowledge actually existed—would have been subject to dismissal under the *Pickering* balancing test, as a result of the disruption or the undermining of client confidences that such a letter might have caused.

The evolution of the *Pickering* doctrine in the ensuing four decades may be summarized briefly here, since few of the refinements directly affect our current inquiry. One early development is, however, highly significant. Justice Thurgood Marshall made clear that public employee speech would be protected only if it addressed a “matter of public concern,” though without defining that term, since the Illinois school boards could hardly have claimed *Pickering*'s letter to be otherwise. But fifteen years later, in *Connick v. Myers*, the high court drew a less than perfectly clear line

between protected “public concern” on one side and unprotected “personal grievances” on the other.<sup>22</sup> Thereafter agency heads would enjoy at least a presumption that internal criticism did not target “matters of public concern” and therefore was not protected by the First Amendment.

Such deference would be strongly buttressed a decade later by the Court's recognition in *Waters v. Churchill* of a broader latitude for public employers in speech cases.<sup>23</sup> That deference, while not overruling or even expressly undermining *Pickering*, seemed to enhance the presumption in such cases; for example, “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.” This ruling also “elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer . . . the government's interest in achieving its goals as effectively and efficiently as possible.”

Along the way, there have been a few bright spots and a few procedurally helpful rulings, mainly *Mt. Healthy School Board v. Doyle*, which shifted the burden to the employer (in that case a public school district) when a dismissed or even nonrenewed employee establishes that the catalytic conduct was constitutionally protected.<sup>24</sup> In response to such a burden, the employer must demonstrate that adverse action would have occurred notwithstanding the protected expression or activity.

In addition, a decade after *Pickering*, the Court held that speech addressed privately to one's supervisor may still be protected, as long as a matter of public concern is implicated. Anticipating the Catch-22 that the *Garcetti* decision would produce, the Court held in *Givhan v. Western Line Consolidated School District* that “[t]his Court's decisions in *Pickering*, *Perry*, and *Mt. Healthy* 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.”<sup>25</sup>

For the most part, however, the judicial development and refinement of the *Pickering* doctrine has had remarkably limited import for faculty speech or for academic freedom.

Such limitation does not, however, mark the most recent development, which is the focus of this report and the work of the subcommittee. From the earliest judicial

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22. 461 U.S. 138 (1983) (upholding termination of an assistant district attorney for circulating a job satisfaction questionnaire among her colleagues on the grounds that the questions were not matters of public concern but were raised for the purpose of criticizing her supervisor and that any First Amendment right was outweighed by the supervisor's interest in maintaining a functioning office).

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23. 511 U.S. 661 (1994).

24. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).

25. 439 U.S. 410 (1979).

recognition of the distinction between potentially protected speech “on matters of public concern” and speech of citizens that is unprotected because it does not address such matters (including but not limited to “personal grievances”), courts have struggled to understand and apply that distinction in myriad workplace disputes.

Especially troubling has been the status of speech in or concerning the public workplace, not clearly raising “personal grievances” but addressing issues of agency policy or procedure in which the speaker had no disabling or disqualifying personal stake. Though the Supreme Court had declined to address that question, it came before most of the federal courts of appeals during the 1990s and into the new century. Without apparent exception, the federal circuit courts ruled that merely job-related speech did not forfeit *Pickering* protection if it did touch matters of public concern and did not implicate potential personal grievances. Although courts have had difficulty grappling with the precise application of the *Pickering* and *Connick* analyses to speech on academic matters, the U.S. Courts of Appeals for the Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits ruled with striking consistency during this period that job relatedness did not disentitle a government worker from presumptive *Pickering* protection.<sup>26</sup> Such

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26. See, for example, *Johnson v. Lincoln University of Commonwealth System of Higher Education*, 776 F.2d 443 (3d Cir. 1985) (holding that faculty member’s campaign against the university president, critical letters to university’s accrediting body, involvement as plaintiff in successful lawsuit challenging previous unconstitutional activity by the university, and criticisms of academic department all implicated faculty member’s First Amendment interests, and noting that “the academic context and the fact that these controversies took place apart from any close working relationships with immediate supervisors” distinguished this case from *Connick*, among others); *Landrum v. Eastern Kentucky University*, 578 F. Supp. 241, 246–47 (E.D. Ky. 1984) (citations omitted) (concluding that faculty member’s speech on various matters of academic governance, as a result of which he alleged he was denied tenure, was unprotected by the First Amendment because it dealt “‘with individual disputes and grievances’ which ‘would be of no relevance to the public’s evaluation of the performance of governmental agencies,’” while acknowledging that “there must be more room for divergent views in a university situation than in a prosecutor’s office, and . . . frequently the working relationship between a university and members of the faculty is not as close as that which existed in *Connick*”).

speech could, in short, be both job related and directed at a matter of public concern.<sup>27</sup>

The only possible exception was the Fourth Circuit. In sustaining a Virginia statute that barred the use of state-owned or state-leased computer equipment to access sexually explicit material (without a supervisor’s approval for a “bona fide research project”), an *en banc* (or full court) majority in *Urofsky v. Gilmore* seemed to imply that job-related speech was not presumptively protected; in the relevant Supreme Court rulings, said the appeals court, the justices had “emphasized the *unrelatedness* of the speech at issue to the speaker’s employment duties.”<sup>28</sup> (Emphasis added.) That observation was not vital to the judgment, which deferred broadly to the state in the operation and regulation of its computer equipment and systems and also declared, over the strong opposition of one judge, that academic freedom (to the extent it claimed any protection) was an institutional and not an individual

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27. There is also, of course, troubling language from those appeals courts regarding First Amendment protection for faculty speech. For example, in 1991, the Eleventh Circuit relied inaptly on high school speech cases, in particular *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), to hold that the University of Alabama was entitled to control the classroom speech of a faculty member in exercise physiology who asked his students to filter his classroom instruction through the lens of his Christian beliefs. *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991). The court stated: “[W]e consider the University’s position as a public employer which may reasonably restrict the speech rights of employees more readily than the [*sic*] those of other persons. As a place of schooling with a teaching mission, we consider the University’s authority to reasonably control the content of its curriculum, particularly that content imparted during class time. Tangential to the authority over its curriculum, there lies some authority over the conduct of teachers in and out of the classroom that significantly bears on the curriculum or that gives the appearance of endorsement by the university.” *Id.* at 1074. The court concluded, “Though Dr. Bishop’s sincerity cannot be doubted, his educational judgment can be questioned and redirected by the University when he is acting under its auspices as a course instructor, but not when he acts as an independent educator or researcher. . . . We have simply concluded that the University as an employer and educator can direct Dr. Bishop to refrain from expression of religious viewpoints in the classroom and like settings.” *Id.* at 1077.

28. 216 F.3d 401, 407 (4th Cir. 2000) (*en banc*), cert. denied, 531 U.S. 1070 (2001).

interest. But before listing the Fourth Circuit in a different column, we must note two post-*Urofsky* cases, both involving clearly job-related speech (of a Virginia police officer and a Maryland university professor), in both of which the court of appeals conferred the same degree of presumptive protection as had all the sister circuits.<sup>29</sup>

That leaves the Ninth Circuit, where the controversy under examination here began. Richard Ceballos was an assistant district attorney in Los Angeles County, who was disciplined for critical comments about the way in which the agency handled certain pretrial evidence. He was transferred to the most remote of the branch DA's offices and, because of the lengthy commute to and from his new workplace, was expected to engage in what the staff euphemistically called "freeway therapy." Instead, Mr. Ceballos filed suit in federal court against the district attorney, claiming a violation of his First Amendment right to criticize operations of his agency. There was no suggestion that under applicable standards, such as those applied by other circuits, these admittedly job-related concerns fell outside *Pickering* protection as "personal grievances" or for other reasons. Thus, a majority of the Ninth Circuit panel joined the prevailing chorus. But Judge Diarmuid O'Scannlain filed a dissent, arguing that, consistent with *Pickering* and later Supreme Court rulings, job-related speech should not be deemed to address a "matter of public concern" and thus would be disqualified at the threshold.

When the Supreme Court agreed to review the case, despite the absence of any conflict among circuits on the central issue, a potential elevation of the O'Scannlain view seemed highly probable. Sensing that hazard, the AAUP and the Thomas Jefferson Center for the Protection of Free Expression collaborated on an amicus brief addressing specifically and at length the potential import for faculty expression and academic freedom of adopting the O'Scannlain view and denying *Pickering* protection to job-related speech. In essence, the brief stressed the potentially perverse result of applying the O'Scannlain view to faculty speech and cautioned that

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29. *Mansoor v. Trank*, 319 F.3d 133 (4th Cir. 2003); *Kariotis v. Glendening*, 2000 U.S. App. LEXIS 22506 (4th Cir. Sept. 6, 2000) (*unpub.*) (in vacating the district court's opinion dismissing a faculty member's complaint, the appeals court observed that the faculty member's "vocal and public opposition to the college's announced plan to eliminate all full-time faculty and to employ only adjunct faculty members" might have involved a matter of public concern and his termination therefore might have violated his First Amendment rights).

such a distortion of First Amendment values would leave potentially unprotected most faculty speech in or near areas of the speaker's expertise—on which society most clearly depended for law and policy making and which cases such as *Sweezy* and *Keyishian* indicated was protected by First Amendment academic freedom—while limiting protection to statements so clearly beyond the speaker's competence as to have minimal societal or governmental value. Other amici also sensed a potential reversal of what by now was a well-established and widely prevalent view on this very issue.

The worst fears of these amici were realized when the Supreme Court majority declared that speech within a public employee's "official duties" would no longer trigger First Amendment analysis because it was not the type of citizen speech that *Pickering* sought to protect. Justice Anthony Kennedy's majority opinion did caution 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." The majority opinion therefore carved out a welcome, though incompletely theorized, reservation: "We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship and teaching." In dissent, Justice David Souter (joined by Justices Stevens and Ruth Bader Ginsburg) amplified this concern, warning that the majority's view could "imperil First Amendment academic freedom in public colleges and universities, whose teachers necessarily speak and write pursuant to 'official duties.'"

### III. The Progeny of *Garcetti v. Ceballos*

Even close observers had some reason to be startled by the curious turn of events in the *Garcetti* case. Every federal court of appeals that had recently considered the issue had ruled that speech within a public employee's official duties could claim *Pickering* protection as a "matter of public concern." Such was the unanimous view of the Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits. Even the Fourth Circuit, which seemingly implied a contrary view in *Urofsky*, rejoined the chorus in its two later public employee speech cases. Thus, until the moment Judge O'Scannlain filed his separate opinion in the *Garcetti* case itself, there was no evidence of any fraying of this crucial consensus.

In a very different sense, however, *Garcetti* could be viewed as a disaster waiting to happen. From the initially euphoric response to *Pickering* through the nearly four decades that followed, the assumption that job-related speech deserved First Amendment protection was in fact

frailer than most commentators (and litigators) dared to admit. Pickering's own speech claimed protection in part because it had been "greeted . . . with massive apathy" in his community; Justice Marshall implied that the Court might have been less sympathetic had such a critique come from someone who had "expertise on the subject at hand" and whose views thus might have claimed credence. Moreover, the *Pickering* Court observed that it was not ruling on the question whether a "narrowly drawn grievance procedure" could obligate teachers to submit complaints about the operation of the schools to their superiors before taking their complaints public. Thus a cautious champion of public employees' job-related speech should have been better prepared than most were in fact.

In this context, the *Garcetti* Court's declaration that statements made within the scope of a public employee's official duties could no longer claim First Amendment protection seems far less surprising, even if far from inevitable. From the moment the case was granted review, academic freedom advocates sensed potential trouble, recognizing that the consequences for academic freedom could be dire if the O'Scannlain dissent applied equally to outspoken or incautious professors as to the general run of government workers.

Whether in response to such advocates' pleas or on its own initiative, the *Garcetti* Court did recognize potential risks for faculty speech. The majority's reservation seemed at first to afford substantial protection for academic expression, or at least an assurance that faculty speech cases would be handled differently in the post-*Garcetti* era. Such hopes would soon be thwarted, however, by actual experience in three federal district courts and two courts of appeals. The worst fears of those who anticipated a new standard for public employee speech would soon be realized.

#### A. POST-GARCETTI CASES

Three cases may be briefly summarized as a prelude to general observations and suggestions for further analysis and activity.

##### 1. *Hong v. Grant*

Professor Juan Hong, a long-tenured teacher of civil engineering at the University of California, Irvine, criticized several administrative practices and decisions within his professional school, specifically with regard to faculty hiring and promotion in certain cases and in general with regard to what he viewed as excessive reliance on adjuncts to staff lower-division courses. In one such case he specifically protested the extension of an appointment offer before full faculty approval, a violation of what he

deemed to be applicable governance standards. When a routine merit-based salary increase was later denied him, he sued the university and the individual senior administrators in federal court, alleging that the denial was in retaliation for his critical statements and was thus an abridgment of his freedom of speech.<sup>30</sup>

The district judge rejected Hong's claims on authority of *Garcetti*, asserting that all the contested activities or statements fell within his "official duties" since under University of California policies, in the judge's words, "a faculty member's official duties are not limited to classroom instruction and professional research. . . . Mr. Hong's professional responsibilities . . . include a wide range of academic, administrative, and personnel functions in accordance with UCI's self governance principle." To allay any possible uncertainty about the scope of this ruling, the judge concluded that the university "is entitled to unfettered discretion when it restricts statements an employee makes on the job and according to his professional responsibilities." Professor Hong's case was appealed to, but has not yet been argued before, the federal court of appeals for the Ninth Circuit.

##### 2. *Renken v. Gregory*

The second case involved a University of Wisconsin—Milwaukee engineering professor named Kevin Renken, who obtained a National Science Foundation (NSF) grant for a team research project. Renken refused, however, to sign the confirmation letter from the university because of differences with his dean over management of the grant; among other issues, Renken claimed that the campus administration had breached NSF rules with regard to the use of certain funds. The dean then informed Renken that the university had initiated a process to return the grant funds. Renken sought the intervention of the board of regents; when a compromise drafted by the graduate dean proved unavailing, the engineering dean declared his intent to relinquish the grant.

Renken then sued the dean in federal court, claiming that the university had reduced his salary and returned the NSF grant in retaliation for his criticism of the handling of the grant funds. An unreported district court ruling rejected these claims in general reliance on *Garcetti*, and Renken appealed to the Seventh Circuit. The court of appeals proved no more sympathetic to the professor's free speech claims than had been the *Hong* court; it was enough that "Renken was speaking as a faculty employee, and not as a private citizen, because administering the grant as a [principal investigator] fell within the teaching and service duties that he was

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30. 516 F. Supp. 2d 1158 (C.D. Cal. 2007).



employed to perform.” Once again a broad concept of “official duties” proved dispositive.<sup>31</sup>

### 3. *Gorum v. Sessoms*

The third and most recent case involved a tenured faculty member named Wendell Gorum at Delaware State University. As a participant in the faculty senate’s review of candidates for the institution’s presidency, he expressed public concerns about one Allen Sessoms, the ultimately successful applicant for the position. After Sessoms assumed office, he and Gorum tangled again, with Gorum rescinding an invitation to Sessoms as keynote speaker for the annual dinner of a fraternity for which Gorum was faculty adviser. There were other issues, including Gorum’s admitted use of his status as department chair to alter and enhance grades for several students without the course instructor’s permission, in conceded violation of university policy. Sessoms soon initiated Gorum’s dismissal from his tenured faculty position, and his dismissal was eventually sustained by the university’s governing board. Gorum then took his case to federal court.

As with the two preceding cases, federal judges in Delaware and in the Third Circuit categorically rejected Gorum’s claims of protected faculty speech.<sup>32</sup> In late March 2009, a unanimous court of appeals invoked *Garcetti* as the basis for a preclusive finding that in each instance Gorum “did not speak as a citizen” but rather acted within his “official duties” and thus could not claim to be speaking on a “matter of public concern” for *Pickering* purposes. The Third Circuit also ruled that any arguably protected speech was not, in Gorum’s case, “a substantial factor behind Sessoms’s allegedly retaliatory decision.”

The *Gorum* court was, however, the first to recognize and at least consider the Supreme Court’s express reservation of academic speech. Noting Justice Kennedy’s caution about blindly applying *Garcetti* to faculty statements and activities, the Third Circuit found no need to pursue the issue here, “because Gorum’s actions so clearly were not ‘speech related to scholarship and teaching’ and because we believe that such a determination here does not ‘imperil First Amendment protection of academic freedom in public colleges and universities’” (the latter citing Justice Souter’s dissent).

Following that sentence, a lengthy footnote addressed precisely this issue, citing Professor Judith Areen’s recent-

ly published *Georgetown Law Journal* article articulating the governance dimension of academic freedom and situating academic freedom within the First Amendment and D.C. Circuit judge Harry Edwards’s concurrence in a recent case upholding restrictions on academic travel to Cuba.<sup>33</sup> Without invoking any higher education ruling contrary to its own conclusion, the Third Circuit ventured that because “the full implications [of the *Garcetti* reservation] are not clear . . . federal circuit courts differ over whether (and, if so, when) to apply *Garcetti*’s official-duty test to academic instructors.”

There the legal landscape remains for the moment, awaiting Ninth Circuit oral argument and decision in Professor Hong’s case and anticipating a host of similar cases that are virtually certain to follow. (Two recent news stories confirm that prospect: “U. of Iowa Staff Member Sues Law School for Discrimination,” concerning the employee’s allegations that she was turned down for teaching positions because of her conservative political views, and “Professor Sues University of Tennessee at Chattanooga,” in which the professor claims he was demoted because he voiced concerns about a female professor who he said lied about her academic record.<sup>34</sup>) Hardly a week passes without such reminders of the potential for continuing litigation over these issues. In addition, of course, a significant amount of important scholarship on these issues is being produced, which informs this report and the surrounding discussion.<sup>35</sup>

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33. Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L. J. 945 (2009); *Emergency Coalition to Defend Educ. Travel v. United States Dep’t of the Treasury*, 545 F.3d 4 (D.C. Cir. 2008).

34. Katherine Mangan, “U. of Iowa Staff Member Sues Law School for Discrimination,” *Chronicle of Higher Education*, January 22, 2009 (available at <http://chronicle.com/news/article/5852/university-of-iowa-staff-member-sues-law-school-for-discrimination> [accessed May 12, 2009]); Joan Garrett, “Professor Sues University of Tennessee at Chattanooga,” *Chattanooga Times Free Press*, January 22, 2009 (available at <http://www.timesfreepress.com/news/2009/jan/22/professor-sues-university-tennessee-chattanooga/> [accessed May 19, 2009]).

35. See, for example, *Symposium on Public Citizens, Public Servants: Free Speech in the Post-Garcetti Workplace*, hosted by the *First Amendment Law Review* at the University of North Carolina School of Law (7 FIRST AMEND. L. REV. 1-144 [Fall 2008]); Paul Horwitz, *Universities as First Amendment Institutions: Some Easy*

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31. 541 F.3d 769 (7th Cir. 2008).

32. 2008 U.S. Dist. LEXIS 10366 (D. Del. Feb. 12, 2008); 561 F.3d 179 (3d Cir. 2009).

## B. OBSERVATIONS AND IMPLICATIONS

Several potentially helpful observations emerge from this review of the early post-*Garcetti* cases. First, the neglect for or disregard of Justice Kennedy's clear reservation of (and Justice Souter's more urgent warning about) the academic-expression issue is alarming. Of the five courts (in three cases) that have thus far addressed this issue, only the Third Circuit in *Gorum* evinced any recognition that the highest court had stressed obvious differences between academic and nonacademic speech cases for *Pickering* and "official duties" purposes.

Second, in a closely related vein, such oversight might be attributed in some measure to the regrettable failure of the academic community to press the issue; groups that did raise the flag in *Garcetti* at the Supreme Court level and in Hong's appeal were apparently blindsided by both levels of adjudication in *Renken* and in *Gorum* and by the first level of review in *Hong*. Usually an early warning system affords clearer signals and, especially on a matter of such obvious import, the affected academic community is able to press its interests in timely fashion.

Third, the post-*Garcetti* faculty rulings reveal a singular pair of ironies. On one hand, so broad a definition of "official duties" (resulting in denial of constitutional solicitude for related speech) poses a significant threat that only professorial statements of minimal benefit to society will now be able to claim protection because only those statements fall far enough beyond the speaker's expertise to avoid the "official duties" stigma. The other irony may be even more acute, if equally unanticipated: what has emerged from these rulings is a negative or inverse correlation between the scope of a professor's (or a faculty's) role in shared governance and the breadth of potential protection for expressive activity. Those institutions (like the University of California) that accord their professors the deepest stake in shaping the mission and guiding the course of the university are now most clearly empowered to sanction unwelcome faculty speech, quite simply because its professors enjoy the widest range of participatory roles. Indeed, the dis-

trict judge in the *Hong* case seized upon that perverse correlation in citing the scope of shared governance across the UC system as prelude for proclaiming the administration's "unfettered discretion [in restricting] statements an employee makes on the job and according to his professional responsibilities." In brief, as the cases stand now, one could argue that the less of a stake faculty members have in their institution's shared governance, the freer they are (as a First Amendment matter) to criticize how it is governed, and vice versa.

Fourth, a narrow reading of the Kennedy and Souter reservations, even by sympathetic courts, is both possible and potentially troubling. The specific concern of the *Garcetti* majority was for "speech related to scholarship and teaching"—a phrase that may not seem as readily applicable to extramural faculty expression and activity as to core professorial pursuits. While certain of both Hong's and Renken's statements undeniably related to "scholarship and teaching," the failure of either court even to recognize the reservation—much less apply close analysis—leaves the matter indeterminate. In *Gorum*, the one case that did acknowledge and address the issue, that nexus may have been least clear. Yet in all such cases, a proper recognition of the import of a professor's special role in university governance should trigger a substantially broader and more protective view of such expressive activity.

Moreover, even apart from the integral connection between academic freedom and faculty involvement in institutional governance (as explicated in the Association's 1994 statement *On the Relationship of Faculty Governance to Academic Freedom*), criticisms made in a faculty member's capacity as a member of an academic community can themselves be "related to scholarship and teaching," though the post-*Garcetti* decisions have not yet recognized this relationship. Witness, for example, Professor Hong's criticism of the university's excessive reliance on adjuncts, which can easily be understood as expressing a concern that his department's scholarship and teaching might suffer if the number of faculty on the tenure track were to decline drastically in favor of contingent faculty, who might be unable to immerse themselves in scholarly work due to fear of job loss, lack of grant support, or the simple logistics of commuting from one campus to another. Similarly, Professor Renken's criticisms of the handling of his grant funds are indubitably "related" to his "scholarship," even if they do not precisely constitute the type of speech that the Supreme Court may have envisioned in crafting that formulation.

Fifth, the failure of the early cases to recognize a potentially serious academic freedom problem is deeply

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*Answers and Hard Questions* (54 UCLA L. REV. 1497 [2007]); Leonard Niehoff, *Peculiar Marketplace: Applying Garcetti v. Ceballos in the Public Higher Education Context* (35 J.C.U.L. 75 [2008]); Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative* (Chapman University Legal Studies Research Paper Series, Paper No. 08-303 [2008]); and Matthew Finkin and Robert Post, *For the Common Good: Principles of American Academic Freedom* (New Haven, Conn.: Yale University Press, 2009).

troubling. Even the *Gorum* appeals court, which cited not only Justice Kennedy's reservation but Justice Souter's warning, failed to recognize that some of the alleged transgressions might well have invoked broader academic freedom protections even though they arguably fell beyond matters of "scholarship or teaching." Such recognition would not likely have shaped the outcome, since the court was convinced that dismissal was warranted by nonexpressive activity, but even in dictum an academic freedom concern would have been welcome.

Sixth, and in some ways most alarming, the early cases reflect a distressingly inadequate judicial appreciation of faculty governance, even beyond the irony noted earlier. To oversimplify only slightly, the logic of the *Hong* and *Renken* rulings goes thus: since senior university faculty have a governance role in virtually all major campus issues, any statements not clearly unrelated to such issues—that is, any that are not entirely beyond the scope of recognized faculty interest—are deemed "job related" or "within official duties" and for that reason are denied First Amendment protection. There is, in fact, much valuable precedent that could be (but has not yet been) brought to bear—most notably, the Supreme Court's recognition in the 1981 *Yeshiva* case of the inexact fit between the realities of a university professor's role and responsibilities and the traditional labor-management concept of an "employee" vis-à-vis a "manager."<sup>36</sup> In another context, the Supreme Court recognized that a state employee may be an "officer" who acts in an essentially private capacity: in *Polk County v. Dodson*, the Court held that public defenders, while paid by the state, do not act—and cannot be seen as acting—for the state.<sup>37</sup> As the Court observed about a public defender, "an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government."<sup>38</sup> While neither the attorney-client relationship nor the managerial designation is clearly a perfect analogy—not least because the Supreme Court's difficulty with conceptualizing higher education in the traditional manager-employee framework led it, in *Yeshiva*, to categorize faculty members improperly as managers rather than as a separate category of "professionals"—the Supreme Court's willingness in these cases to recognize employment models different from the strict master-servant framework that characterized *Garcetti* high-

lights the inadequacy of the analysis both in *Garcetti* itself and in the early post-*Garcetti* cases.

The thread that runs through the logic of the *Pickering-Connick-Garcetti* line is that a public employer qua employer has interests in controlling the speech and actions of its subordinates that it does not have when regulating the speech of the citizenry at large: its concern for disharmony, disruption, and, especially in *Garcetti*, insubordination—that is, its critical need to maintain managerial control—place the subordinate's speech in conducting his or her duties outside the sphere of "free" speech. This, the fundamental assumption upon which this body of law rests, has scant purchase when it comes to faculty speech in or concerning institutional government. Institutional rules or policies providing for faculty participation do not delegate authority to subordinates in a hierarchy; they recognize the faculty as a body of cognate authority whose individual and collective counsel should be sought, even whose approval must be secured in some matters before institutional policies may be adopted or actions taken. The U.S. Supreme Court's inability to understand how that is, how a faculty cannot be considered to be a subordinate body in a managerial hierarchy even as it exercises effective authority, is evidenced in the *Yeshiva* decision: a manager may be dismissed for publicly criticizing her superior; a faculty member may not be dismissed for publicly criticizing her dean. It would be inconceivable for a corporate subordinate to challenge a superior's authority to override the subordinate's decision without facing the prospect of sanction. It is not inconceivable for a faculty to challenge the right of the administration or of a governing board to disregard the faculty's judgment.<sup>39</sup>

District Attorney Connick could sanction Assistant District Attorney Meyers for having surveyed her co-workers about their dissatisfaction with his administration, for fomenting a "mini-insurrection."<sup>40</sup> As the U.S. Supreme Court saw it, Connick's need to maintain discipline trumped Meyers's effort to criticize his management. When President Parley Paul Womer dismissed Professor J. E. Kirkpatrick from Washburn College in

36. *NLRB v. Yeshiva University*, 444 U.S. 672 (1980).

37. 454 U.S. 312 (1981).

38. *Id.* at 319 n.8 (quoting *Ferri v. Ackerman*, 444 U.S. 193, 204 [1979]).

39. See, for example, *Searle v. Regents of the University of California*, 23 Cal. App. 3d 455, 100 Cal. Rptr. 194 (1972). What is notable about the lawsuit, which was brought to protect the faculty's prerogative in deciding whether credit may be granted for a certain course of instruction, is that it was brought at all.

40. *Connick v. Myers*, 461 U.S. 138 (1983) (discussed briefly in Section II.C).

1919 for “agitation”—specifically, for “disturbing the peace of the college” by his efforts to secure for the faculty an advisory role in the college’s governance—Womer’s decision was condemned by the Association as no less serious than an “unwarranted restriction on freedom of teaching.”<sup>41</sup> As another ad hoc committee of investigation put it in just such a case eight years later,

It is impossible, and rightly so, to suppress critical discussion by members of a faculty, of general or special educational policies, unless that end is accomplished by the simple and drastic means of dismissing that faculty. The attempt to abolish such discussion . . . is not only a deplorable anachronism, but tends to destroy the values which can be created only by patient and tolerant effort, by free and open discussion, and by the gradual increase of a common stock of wisdom, which is incapable of monopolization by any administrative officer.<sup>42</sup>

The judiciary’s future engagement with the Court’s reservation in *Garcetti*, withholding judgment on the application of the “official duty” exemption to the professoriate, has need for a deep understanding of these differences.

Finally, the post-*Garcetti* experience recalls an earlier and strikingly comparable experience in which academic interests fared far better. In 1991, the Supreme Court’s ruling in *Rust v. Sullivan* sustained federal regulations that forbade a federally funded health clinic from counseling abortion and indeed required clinic staff to advocate alternatives.<sup>43</sup> Basically the Court concluded that if Congress did not wish its appropriations to be spent in a contrary fashion, it could so stipulate. Yet Chief Justice William Rehnquist recognized the potential import of such a ruling for academic health centers and added this protective caution: “[W]e have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government’s ability to control speech within that sphere by means of conditions attached to the expenditure of government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.”

The potential reach both of *Rust* and its reservation would soon be tested. The National Institutes of Health

(NIH) notified Stanford University of plans for a major grant to study an artificial heart device. The notice cautioned, however, that the grant might contain a confidentiality clause, requiring researchers to obtain NIH approval before publishing or otherwise publicly discussing or disseminating preliminary results of their research. On behalf of its faculty who were the intended principal investigators, Stanford formally objected to such a stipulation. When the NIH refused to modify the prospective constraint, and eventually withdrew the grant altogether, Stanford filed suit in federal district court. Predictably, federal lawyers insisted such a condition was squarely in line with *Rust*.

Judge Harold Greene sharply disagreed and struck down the proposed clearance procedure as a prior restraint violative of the First Amendment.<sup>44</sup> His ruling took specific note of *Rust*’s reservation as well as its basic ruling; the type of expression that the NIH sought to limit was, in his view, “the very free expression that the *Rust* Court held to be so important to the functioning of American society.” Noting that the restrictive standards in the proposed grant language were “impermissibly vague,” Judge Greene declared that any such constraint would have a “chilling effect” upon scholars at a “premier academic institution, engaged in significant scientific and medical research for the benefit of the American people . . . [and which may not be] compelled under the law to surrender its free speech rights and those of its scientific researchers.” Lest anyone fail to get the message, Judge Greene stressed in a concluding paragraph his deep distaste for official edicts that “subject to government censorship the publications of institutions of higher learning and others engaged in legitimate research.”

The nearly two decades since *Rust* have seen remarkably little litigation directly addressing the same issue. The “follow the money” view of federal appropriations has occasionally been sustained elsewhere, at least once (in a case involving content restrictions on grants by the National Endowment for the Arts to individual artists) with implications for the academic world.<sup>45</sup> Yet on the whole Judge Greene’s view seems to have prevailed more by default than by design. The entire saga, especially the felicitous resolution of the *Stanford* case in the early 1990s, suggests that academic interests fared better in an earlier and closely analogous encounter than has been the post-*Garcetti* experience.

41. “Report of the Committee of Inquiry on Conditions in Washburn College,” *AAUP Bulletin* 7 (January–February 1921): 66.

42. “Report on the University of Louisville,” *AAUP Bulletin* 13 (October 1927): 451–52.

43. 500 U.S. 173 (1991).

44. *Stanford v. Sullivan*, 773 F. Supp. 472 (D.D.C. 1991).

45. *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

The striking success of substantive academic freedom claims in the *Stanford* case invites brief consideration of an analogously happier experience on the procedural side. In the general run of public employee speech cases, a prima facie *Pickering* claim that involves several possible grounds for adverse action imposes on the government employer a burden of proving that sanctions would have occurred even absent the expressive activity—or, alternatively, that one of *Pickering*'s exceptions (for example, taking excessive time away from the job, bypassing a grievance channel, disrupting the morale or efficiency of the agency, or undermining the confidence of its clientele) independently supported the sanction. The utility of this doctrine, shaped by the Supreme Court's *Mt. Healthy* case and consistently applied for a quarter century, should be apparent here.

If a university professor takes to court a plausible claim that adverse action occurred in retaliation for protected expression, the institution should bear the burden of establishing that clearly unprotected activity triggered the sanction. In *Gorum*'s case, the admitted unauthorized changing of students' grades might serve that purpose. Yet in *Hong*'s and *Renken*'s cases, absent any seemingly unprotected expression, meeting that burden would have been far more difficult. Merely noting that such expression arguably relates to a professor's "official duties" as a participant in university governance should not suffice.

#### C. A CLOSING NOTE ABOUT ACADEMIC FREEDOM

We conclude this section by returning to a matter raised in Section I but worth reiterating more fully here. We have focused almost exclusively on faculty members at public institutions, because, as explained early in the report, it is only at public institutions that the Constitution affords protection to academic freedom (or potentially causes that protection to recede). At no time have faculty members at private colleges and universities been beneficiaries of the development in First Amendment protection of academic freedom. It has always been the case at those institutions that faculty have had to turn to the persuasive merits of the 1915 *Declaration* and subsequent policies, rather than to the U.S. Constitution, when seeking means of securing conditions of academic freedom within their institutions.

Indeed, when professional notions of academic freedom began to be advanced in the beginning of the last century, not only were those notions not within the law, they were explicitly outside and even against the law. The 1915 *Declaration* was effectively a statement of reasons for philanthropists, trustees, alumni, legislators, and ordinary citizens and taxpayers to forego exercising

their legal (and fiscal) power to control faculty speech and, instead, by enacting self-denying ordinances, to enable their schools to become genuine universities. There is thus a historical understanding that institutional distinction arises in part from a university's forswearing the power that it might be legally permitted to exercise over its faculty. In light of *Garcetti* and its progeny, it is more urgent than ever that it be clear that the case for academic freedom is not now written, nor was it ever written, merely on legal litmus paper but in the history of the profession that recognizes universities that deserve to bear the name.

As Robert Carr said half a century ago, "[W]hat the courts give, they may take away, and that having thus given and taken away, academic freedom may be left in a weaker position than it was before it became a concern of the law."<sup>46</sup> Whether academic freedom is in a weaker position in the legal firmament, universities that are worthy of the name, and the faculties by which they are constituted, may—indeed, must—recognize that the unstinting protection of academic freedom is not a faculty perquisite but a prerequisite for the university's continued status among the great institutions.

#### IV. The Response: What's Next?

In the complex legal framework described above, we now ask how the academic community might best preserve and protect academic freedom, particularly in regard to faculty speech about institutional matters. We explore that question by offering suggestions for national faculty organizations, for local or regional faculty groups such as campus senates or AAUP chapters and conferences, and for institutional administrators and governing boards. In outlining next steps, we take as foundational two points: first, that several statements by the AAUP, including the classic statement in collaboration with the American Council on Education and the Association of Governing Boards, have stressed the vital importance of meaningful faculty participation in all areas of institutional governance, to the benefit of colleges and universities and of society; and second, that the best definition of and protection for academic freedom lie in the principles and language set forth by the AAUP and in the best policies and practices of institutions of higher education. As the University of Wisconsin observed in 1994, drawing upon a report of the university issued one hundred years earlier in a

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46. Robert Carr, "Academic Freedom, the American Association of University Professors, and the United States Supreme Court," *AAUP Bulletin* 45 (Spring 1959): 20. Carr was general secretary of the AAUP from 1957 to 1958.

seminal board of regents decision on faculty academic freedom, “We call upon all members of our several academic communities—administrators, faculty, staff, and students alike—to guard this precious legacy, to consider differing points of view, and always to engage in ‘that continual and fearless sifting and winnowing by which alone the truth can be found.’”<sup>47</sup>

#### **A. THE AAUP AND OTHER NATIONAL FACULTY AND HIGHER EDUCATION ORGANIZATIONS**

National faculty groups and other academic freedom advocates should seriously consider framing a more aggressive response to the *Garcetti-Hong* doctrine and its implications for full faculty participation in institutional governance and for faculty speech in other contexts. To protect and support faculty members’ open expression of ideas and fulfillment of governance responsibilities, national organizations could pursue the following steps:

1. Develop and widely disseminate examples of policy statements that could be adopted at the institutional level explicitly to protect faculty members’ speech in regard to institutional matters. (Examples of such statements, including a policy recently adopted at the University of Minnesota, appear at the end of this report.) As the AAUP disseminates such language, it should work with other national faculty organizations to issue a joint statement on the value of faculty members’ academic freedom and academic responsibilities in governance and in institutional matters, highlighting exemplary handbook language.
2. Consider preparing and filing amicus curiae briefs in addition to assisting faculty members in academic freedom cases relating to speech about institutional matters; where resources allow, this could even include intervention at the trial court level, especially in federal courts, wherever such participation is permissible and might avert a harmful first-level ruling.
3. Monitor more rigorously the emergence of future cases involving similar issues, in hopes of avoiding the blindsiding that may have allowed the *Hong-Renken-Gorum* doctrine to emerge so largely unchallenged. Contact with local campus chapters and state conferences of the AAUP and other organizations,

and alerts to other groups like the American Civil Liberties Union that maintain a “watchdog” presence in state capitals, could be helpful in this regard.

4. Undertake an empirical national analysis of handbook language on academic freedom in governance and institutional matters at various types of institutions and disseminate the results widely to faculty organizations. Disseminate examples of language to be emulated as well as examples that fail sufficiently to protect academic freedom in institutional matters.
5. Collaborate with organizations of institutions and trustees such as the American Council on Education and the Association of Governing Boards on issuance of a joint statement on the value of faculty members’ academic freedom and academic responsibilities in governance and in institutional matters, highlighting examples of handbook language that all parties can endorse.
6. Undertake to persuade public university governing boards, senior administrators, and attorneys of the potential risks of invoking the *Hong-Renken-Gorum* doctrine while reminding those groups that pre-*Garcetti* public employee speech concepts have adequately protected the institution’s vital interests while also safeguarding academic freedom and free expression.
7. Consider providing governance workshops and other sorts of activities at the national and regional level to educate faculty leaders and members about the issues that confront faculty in institutional governance and in speech about institutional matters.

#### **B. FACULTY SENATES AND OTHER CAMPUS-BASED FACULTY GROUPS**

At the individual campus, institution, or system level, the options and imperatives may be quite different, depending on whether faculty are represented by a bargaining agent, in which case the bargaining agent might take primary responsibility for negotiating protective language. In addition, since state law recognizes and enforces handbook language to varying degrees, faculty groups should be aware of the applicable legal provisions and should seek language that would be maximally enforceable under those provisions. (The AAUP offers a state-by-state guide to the enforceability of handbooks as contracts that may be of assistance in this regard.) Nevertheless, the following steps should be seriously considered in any context:

1. Carefully assess the adequacy and coverage of existing institutional policies that affect faculty speech or expressive activity. Local faculty groups should work with the national office of the AAUP and may solicit assistance in making those assessments. Such

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47. “University of Wisconsin Board of Regents Resolution 6787,” quoted in *Academic Freedom on Trial: 100 Years of Sifting and Winnowing at the University of Wisconsin—Madison*, ed. W. Lee Hansen (Chicago: University of Chicago Press, 1998).

institutional policies may exist in faculty handbooks, in policies or regulations adopted by the governing board, in collective bargaining agreements, and occasionally in state laws or regulations defining faculty rights and responsibilities. In an era where constitutional protection for academic freedom and free speech is in flux, and given the lack of such constitutional protection for faculty at private colleges and universities (as well as in for-profit institutions of higher education), enshrining protection for academic freedom in an institution's own documents may be the single most important task for faculty members to undertake. To be suitable for this purpose, such a policy should (a) expressly protect faculty participation in institutional governance as a dimension of academic freedom, and (b) clarify that faculty speech including but not limited to classroom teaching and research and extramural utterances merits both constitutional and institutional protection, but (c) need not and probably should not expressly use the language of "matters of public concern" lest general First Amendment standards that apply to public employee speech inappropriately be applied to speech that should be protected by academic freedom.

2. If such policies seem inadequate, or simply do not address the issue at all, faculty groups, whether senates or unions, should create special committees to examine available alternatives, adapt such policies to institutional needs and values, and seek approval from as broad a range of faculty and faculty groups as possible within individual institutions or, if applicable, across multicampus systems. When appropriate language has been developed, every effort should be made by faculty groups to negotiate with and persuade the administration and the governing board of the wisdom of adopting such language. (Indeed, where appropriate and productive, early involvement of senior academic administrators and university attorneys in a shared task may be both logical and desirable.) Such local faculty bodies should draw on the experience and expertise of colleagues in their states and regions, as well as the national office of the AAUP, which may be able to share additional examples of desirable policy language.
3. In the case of faculties represented by a collective bargaining agent, such policies should be developed with an eye toward their incorporation in the next negotiated agreement between faculty and governing boards.
4. Where existing institutional policy either meets the recognized needs or could be so adapted with minor revision, efforts should be made to enhance aware-

ness of that policy across the faculty as well as within the administration and the governing board.

Enforceability of such existing safeguards should also be explored and verified, however protective the policy provisions may appear. Every effort should be made to ensure that such protective language has the force of contractual law.

5. Whatever action results from such inquiry at the campus or system level should be brought to the attention of the AAUP and other relevant national faculty groups. Several members of the Big Ten, for example, have begun developing potential policy language and have contacted the AAUP about their experiences. From institutions within regional conferences or consortia (for example, the Midwest's Committee on Institutional Cooperation), such experience should be promptly shared with faculties at peer institutions—especially within federal judicial circuits (for example, the Third and Seventh) where the issue has already been litigated with adverse results.
6. Efforts should be made to disseminate to the news media—from faculty representatives directly or, where appropriate or useful, through the university's communications office—accounts of such faculty initiative and self-regulatory activity, especially where governing board approval eventually validates the process and increases the protections accorded by institutional policy.
7. In the event of litigation of such issues that may substantially affect academic freedom and free expression, faculties should be prepared to provide support to affected colleagues in at least moral if not material form. Specifically, faculty at other institutions may consider offering their own policies for the potential guidance of courts, as well as seeking broader public understanding and urging acceptance of such policies in legislative and other forums. The academy as a whole benefits when specific faculty members' academic freedom to participate in institutional matters is legally recognized and affirmed.

### C. SENIOR ACADEMIC ADMINISTRATORS AND GOVERNING BOARDS

In parallel with the two foregoing tasks, faculty groups at every level should seek to work with and educate senior administrators and governing boards about shared governance.

1. The national office of the AAUP and other national faculty organizations should develop materials on shared governance that can be distributed to senior academic administrators and board members. At the local level, faculty groups should consider providing

these materials to new administrators and to candidates for senior administrative positions, and they should follow up with meetings and discussions about the materials with senior administrators and, where possible, board members.

2. At the national and regional levels, the AAUP and other faculty organizations should consider providing governance workshops and other sorts of educational and orientation activities to educate senior administrators and board members about the value(s) and mechanisms of shared governance and of faculty members' independent voice in institutional matters. Such training could be conducted in concert with orientation and training experiences that are provided by associations such as the American Council on Education and the Association of Governing Boards.
3. In addition, faculty groups should seek to educate senior administrators and governing boards about the problems and risks embedded in the *Hong-Renken-Gorum* doctrine—problems and risks that may substantially outweigh the apparent or assumed short-term benefits in a particular case. Several explanations could be advanced:
  - a. Faculty involvement in institutional decision making helps ensure campuswide “buy-in,” with respect to both the decision-making process and the decision itself. Decisions reached without faculty input may be insufficiently attentive to core academic values, may not reflect the realities on campus, or may simply be difficult to execute. Moreover, once a decision is made and its implementation begun, ongoing faculty involvement and cooperation are essential. Without the freedom to engage deeply in that decision-making and implementation process—including the freedom to voice disagreement over the direction of a policy or the method of execution—the entire academic community will be ill-served. The explicit protection of academic freedom, including freedom of involvement in institutional governance, is therefore critical to ensuring the success of institutional initiatives.
  - b. Legal and policy considerations may caution against institutional reliance on or invocation of the *Hong-Renken-Gorum* doctrine. For example, a university that insists in litigation that it has the “unfettered discretion” to regulate or control all faculty speech within the scope of broadly defined “official duties” inescapably implies its obligation to exercise that authority and would thus be potentially liable for faculty

transgressions (verbal or physical) otherwise likely to be dismissed (and potential liability thus avoided) as outside the scope of the faculty member's appointment by the university. Such risks could extend to compliance with conditions on government and other research grants, to cite but one of many collateral contexts.

#### **D. PROPOSED POLICY LANGUAGE FOR INCORPORATION IN FACULTY HANDBOOKS AND AGREEMENTS**

In our opinion, the policy adopted by the Board of Regents of the University of Minnesota in June 2009, as well as the two policy drafts we offer here, is designed to clarify that academic freedom protects faculty speech about institutional academic matters and governance as well as teaching, research, and extramural statements. This policy and those we propose differ in approach to a different question, no less important but not within the committee's immediate purview, of how the obligations that attach to the exercise of academic freedom are dealt with. The profession has long understood that academic freedom is not to be equated with freedom of speech. Speech in the classroom, speech as a citizen of the institution, and speech as a concerned member of the larger community are subject to limits, the specific nature of which may differ according to the capacity in which one is speaking; classroom utterance, for example, is held to a standard of professional care, while political speech is not similarly cabined.

The University of Minnesota's policy affirms academic freedom with some reference to limits but would leave the bulk of that question open for treatment elsewhere, perhaps by institutional regulation or case determination—whence the committee's two alternatives, offered to acknowledge permissible limits as part of the policy. These differ on the degree of direction a general statement of policy might give; that is, whether it is enough to advert broadly to professional ethics or whether the focus of attention should be sharpened. In any event, none of these is meant to preclude local drafting efforts but only to demonstrate how the solution to the *Garcetti* problem lies in the hands of faculty and institutional governing bodies.

1. Academic Freedom and Academic Responsibility sections of the Academic Freedom and Responsibility policy of the University of Minnesota, as amended by the board of regents on June 12, 2009:

Academic freedom is the freedom to discuss all relevant matters in the classroom, to explore all avenues of scholarship, research, and creative expression, and to speak or write without institutional discipline or



restraint on matters of public concern as well as on matters related to professional duties and the functioning of the University.

Academic responsibility implies the faithful performance of professional duties and obligations, the recognition of the demands of the scholarly enterprise, and the candor to make it clear that when one is speaking on matters of public interest, one is not speaking for the institution.

2. Subcommittee proposal option 1:

Academic freedom is the freedom to teach, both in and outside the classroom, to conduct research and to publish the results of those investigations, and to address any matter of institutional policy or action whether or not as a member of an agency of institutional governance. Professors should also have the freedom to address the larger community with regard to any matter of social, political, economic, or other interest, without institutional discipline or restraint, save in response to fundamental violations of professional ethics or statements that suggest disciplinary incompetence.

3. Subcommittee proposal option 2:

Academic freedom is the freedom to teach, both in and outside the classroom, to conduct research and to publish the results of those investigations, and to address any matter of institutional policy or action whether or not as a member of an agency of institutional governance. Professors should also have the freedom to speak to any matter of social, political, economic, or other interest to the larger community, subject to the academic standard of conduct applicable to each.

## V. Conclusion

Although the catalyst for this report was a brace of unexpected and potentially ominous court rulings, the scope of the subcommittee's response has been far broader. Our immediate concern about judicial threats to the academic freedom of outspoken professors invited consideration of the foundations of such freedom, both in policy and in constitutional law. We have expressed deep concern about the recent disregard by lower federal courts of the Supreme Court's insistence upon special deference to speech within the academic setting. Thus our report revisits in some detail the complex relationship between principles of academic freedom and legal safeguards for the exercise of that freedom by university

professors. We have also reviewed the evolution of legal protection for the speech of public employees, with special attention to those who teach at publicly supported colleges and universities.

The analysis of these issues has led us to offer a series of specific recommendations by which we hope the academic community may reduce the legal threats that energized this subcommittee and prevent or at least reduce the risk of their recurrence. We have directed our recommendations to several levels of the academic community—not surprisingly, starting with national faculty organizations such as the AAUP, as well as faculty senates and other campus-based professorial bodies. Less obvious, but in our view no less important, is an appeal to senior university administrators and governing boards to adopt similar cautions—not only in the interests of their faculty colleagues, but quite as much for even broader institutional welfare. We have offered several specific options to guide those who share our concern and seek to respond by adopting a responsive policy. The AAUP is willing to work with institutions and their faculties in implementing the subcommittee's recommendations; we encourage faculties and administrations to seek such assistance and to collaborate in instituting policies and practices that will ultimately benefit the entire academic enterprise. ■

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