Harvard Law Review Commentary Fails to Justify Its Anti-Free-Speech Stance

Ninth Circuit Ruling in *Demers v. Austin* Implicitly Protects Shared Governance

By David Demers

The author taught at Washington State University for 16 years and was the plaintiff in a federal free-speech lawsuit (Demers v. Austin, 2014) *that is the subject of this article. He is executive director of the American Center for Civil Liberties* (www.acfcl.org) *and author of more than a dozen books, including* The Lonely Activist*, a three-volume series that examines the adverse impact of conservatism and bureaucracy on commitment to civil liberties in American institutions.* HLR *refused to publish an earlier version of this commentary.*

A commentary published in the April 2014 issue of *Harvard Law Review*[1] accused the Ninth U.S. Circuit Court of Appeals of "overzealously" extending First Amendment protection to faculties at public universities when it ruled in *Demers v. Austin*[2] that speech uttered when professors are serving on university committees deserves just as much protection as speech in the classroom and in scholarship.

The commentary's conservative, anti-free-speech position surprised some civil libertarians, who are accustomed to seeing more Enlightenment-friendly sentiments flowing from the pens of Harvard Law students. In fact, until recent years, Harvard Law School was known as a "bastion" of liberalism,[3] and it was difficult to find law students embracing a conservative viewpoint.[4]

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[1]Unsigned commentary, "Ninth Circuit Finds *Garcetti* Official Duty Rule Inapplicable to Professional Speech in Public-University Context," *Harvard Law Review*, Vol. 127, No. 6, pp. 1823-1830 (April 18, 2014), p. 1823. *Harvard Law Review* is a student-controlled publication.

[2]*Demers v. Austin*, et al., 746 F.3d 402 (2014), Case No. 11-35558, 2014 WL 306321; 9th Cir. Jan. 29, 2014.

[3]Jonas Blan, "All the Right's Moves," *Harvard Law Bulletin* (Spring 2013), p. 18.

[4]Richard Wolf, "Harvard Asks: Are Law School Faculties too Liberal?" *USA Today* (April 4, 2013), retrieved from <www.usatoday.com/story/news/nation/2013/04/04/supreme-court-law-school-harvard-federalist-society- faculty/2054423>.

But conservative orthodoxy is not the main flaw in the unsigned HLR commentary.[5] The real problem is the commentary's failure to provide a substantive rationale for its anti-free-speech stance. It failed to answer the question: *What harm, if any, is produced when faculty members are allowed to criticize administrative decisions and plans?*

A separate but related problem also plagues the 2006 U.S. Supreme Court 5-4 ruling in *Garcetti v. Ceballos*,[6] upon which the HLR commentary draws its inspiration. The five-member conservative majority asserted that governments are unable to function efficiently if their employees are accorded free-speech rights, but the majority offered no evidence to back this assertion. The history of decision-making in American universities, this analysis will show, debunks the inefficiency assumption.

The social impact of *Demers v. Austin* extends far beyond the Ninth Circuit ruling that one faculty member had a right to criticize administrative policies and offer an alternative plan for restructuring an academic unit. The ruling implicitly provides constitutional protection for the principle of shared governance — a three-century-old tradition in the American academy that has granted faculties an active role in the management of their universities.

However, as of this writing, the Ninth Circuit ruling only applies to nine states in the west.[7] If faculties in the other 41 states are denied the constitutional right to criticize administrators on issues of public concern, then, it is argued here, their universities will lack the resources necessary for solving social, political and economic problems.

Background: The Demers v. Austin Lawsuit

The Ninth Circuit Court of Appeals summed up the facts in *Demers v. Austin* as follows:[8]

> David Demers is a member of the faculty in the Edward R. Murrow College of Communication at Washington State University. ... He was granted tenure as an associate professor in 1999. Demers also owns and operates Marquette Books, an independent publishing company.
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> Demers brought suit alleging First Amendment violations by WSU Interim Director of the Murrow School (and three other administrative defendants). Demers contends that defendants retaliated against him, in violation of his First Amendment rights, for distributing a pamphlet called "The 7-Step Plan" ("the Plan") ... [9]
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> The Plan is a two-page pamphlet Demers wrote in the late 2006 and distributed in early 2007. Demers distributed the Plan while he was serving on the Murrow School's "Structure Committee," which was actively debating some of the issues addressed by the Plan. ... The Murrow School had two faculties. One

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[5]The commentaries are unsigned because, according to the HLR website, "many members of the *Review* besides the author make a contribution to each published piece."

[6]*Garcetti v. Ceballos,* 547 U.S. 410 (2006).

[7]The Ninth Circuit is composed of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington state, Guam and Northern Mariana Islands.

[8]I have deleted portions of the summary that are not germane to this commentary.

[9]My lawsuit also claimed that the university retaliated against me for distributing a draft introduction and draft chapters of my in-progress book *The Ivory Tower of Babel*, but my attorney never submitted the book as evidence so the courts dismissed that part of the lawsuit.

> faculty was Mass Communications, which had a professional and practical orientation. The other was Communication Studies, which had a more traditional academic orientation. ... The Structure Committee was considering whether to recommend, as part of the restructuring of the Murrow School, that the two faculties of School be separated. There was serious disagreement at the Murrow School on that question.[10]
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> Demers is a member of the Mass Communications faculty. Demers's Plan proposed separating the two faculties. ...
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> On January 16, 2007, Demers sent the Plan to the Provost of WSU. In his cover letter, he stated that the purpose of the Plan is to show how WSU "can turn the Edward R. Murrow School of Communication into a revenue-generating center for the university and, at the same time, improve the quality of the program itself." Demers's letter also stated, "To initiate a fund-raising campaign to achieve this goal, my company and I would like to donate $50,000 in unrestricted funds to the university." Demers signed the letter "Dr. David Demers, Publisher/Marquette Books LLC." ... The Provost did not respond ... . On March 29, 2007, Demers sent the Plan to the President of WSU. The cover letter was identical to the letter he had sent to the Provost, except that he increased the offered donation to $100,000.
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> In his declaration, Demers states that he sent the plan "to members of the print and broadcast media in Washington state, to administrators at WSU, to some of my colleagues, to the Murrow Professional Advisory Board, and others." Demers also posted the Plan on the Marquette Books website. ...
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> Demers contends that defendants retaliated against him for circulating the Plan ...
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> Defendants respond that changes in Demers's evaluations and the investigations by the university were warranted, and were not retaliation for the Plan ... .

Background: The Court Decisions

In 2011, a U.S. District Court judge in Spokane, Washington, dismissed my lawsuit, saying the 7-Step Plan was written and distributed in the performance of my official duties as a faculty member of WSU and was, therefore, not protected by the First Amendment. The district court also ruled that the Plan did not address a matter of public concern.

The district court's decision was based largely on the 2006 U.S. Supreme Court decision in *Garcetti v. Ceballos*, which held that public employees do not have free-speech rights when acting in their official duties.

Prior to *Garcetti*, public employees' free-speech claims were governed by a public concern analysis and balancing test established in *Pickering v. Board of Education* (1968) and *Connick v. Myers* (1983).[11] This involved determining whether the speech in question

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[10]The Plan also called for WSU to seek national accreditation for the Murrow mass communication programs from the Accrediting Council on Education in Journalism and Mass Communication.

[11]*Pickering v. Board of Education,* 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983).

addressed "matters of public concern" and whether the interests of the state as an employer outweighed the interests of the employee in commenting on public matters.

Before *Garcetti*, aggrieved faculty members usually won cases that involved speech in the classroom or in their scholarship, and sometimes they won cases that involved service-related or professional speech.[12]

Legal cases identified by the American Association of University Professors shows that faculty are still winning cases when the dispute involves speech in the classroom or in scholarship.[13] But victories for service-related speech ended completely with Garcetti.[14]

A conservative majority of five justices — led by Justice Anthony M. Kennedy — ruled that deputy district attorney Richard Ceballos could be punished by his superiors even after reporting that police apparently had fabricated evidence to obtain a search warrant. Government employees, the majority opinion stated, only have free-speech rights when they speak as citizens, not employees.

The majority justified its decision with this statement: "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services."[15]

Civil libertarians lambasted the *Garcetti* decision, saying it would end protection for whistleblowers who report on abuse of authority and criminal activity in government.[16]

In dissent, Justice David H. Souter wrote that he hoped the *Garcetti* ruling did not apply to public universities, "whose teachers necessarily speak and write 'pursuant to official duties.'"[17] Kennedy's majority opinion seemed to agree: "We need not ... decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."[18]

Free-speech-for-faculty advocates were relieved.

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[12]Rachel B. Levinson, "Academic Freedom, Shared Governance, and the First Amendment after *Garcetti v. Ceballos*," paper presented at the 31st Annual Conference on Law and Higher Education (February 2011) and Subcommittee Report, "Protecting an Independent Faculty Voice: Academic Freedom after *Garcetti v. Ceballos*," American Association of University Professors (November/December 2009).

[13]For details, see <http://www.aaup.org/get-involved/issue-campaigns/speak-speak-out-protect-faculty-voice/legal-cases-affecting-academic

[14]David Demers, "Courts Rule 7-1 that Professors Have No Free-Speech Rights When Performing Their Service-Related Roles, Analysis Shows," American Center for Civil Liberties, retrieved from <www.acfcl.org/latestonwsulawsuit.html>.

[15]*Garcetti v. Ceballos,* 547 U.S. 410 (2006), p. 2

[16]Social scientific studies and legal analyses support the civil libertarians' claims and show that statutory protection for whistleblowers has never worked well. See, e.g., Ruben J. Garcia, "Against Legislation: *Garcetti v. Ceballos* and the Paradox of Statutory Protection for Public Employees," *Scholarly Works Paper*, No. 650, pp. 22-53 (2008); Priscilla Winslow, "*Garcetti* Four Years Later: Can Public Employee Whistleblowers be Protected?" *California Public Employees Relation Journal*, No. 201, pp. 9-17 (March 2011); Nancy Modesitt, "The *Garcetti* Virus," *Cincinnati Law Review*, Vol. 80, No. 1, pp. 161-208 (2012); and Ashley M. Cross, "The Right to Remain Silent? *Garcetti v. Ceballos* and a Public Employee's Refusal to Speak Falsely," *Missouri Law Review*, Vol. 77, pp. 805-827 (2012).

[17]*Garcetti v. Ceballos*, 547 U.S. 410 (Souter, D., dissenting, p. 12).

[18]*Garcetti v. Ceballos*, 547 U.S. 410, p. 13.

"I am very pleased that even the majority has recognized that distinctive constitutional considerations apply in the academic context," David M. Rabban, general counsel for the American Association of University Professors and a professor at the University of Texas at Austin School of Law, told the *Chronicle of Higher Education*.[19]

But the nation's federal judges were not listening.

Over the next six years, federal courts ignored the academic exception language and uniformly denied — seven times in a row — free-speech protection to faculty plaintiffs who had criticized administrators and their policies.[20] These courts denied free-speech rights to professors who had (1) criticized administrators for hiring too many adjunct faculty, (2) supported a student during a disciplinary hearing, and (3) challenged administrators on the use of grant monies.[21]

Demers v. Austin was the eighth case.

At the time I drafted the 7-Step Plan in late 2006,[22] it never crossed my mind that the plan might not be protected speech, as the WSU Faculty Manual specifically guaranteed First Amendment protection to faculty.[23]

But I overestimated the commitment WSU administrators had to the principle of academic freedom. Their legal strategy proved me right.

Instead of fighting the case out at trial, the four defendant-administrators and their state-appointed attorney decided argue that I did not deserve free-speech rights because my speech was not uttered in the classroom or in scholarship.[24]

They asked the federal district court judge to reject my lawsuit vis-a-vis *Garcetti*. They argued that my speech was employment-related and not citizen speech.

The judge granted their motion.[25]

I appealed.

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[19]Kelly Field, "Supreme Court Limits Public Employees' Free-Speech Protections, but Ruling May Not Apply to Colleges," *The Chronicle of Higher Education* (May 31, 2006), retrieved from <http://chronicle.com/article/Supreme-Court-Limits-Public/118268>.

[20]Demers, "Courts Rule 7-1 that Professors Have No Free-Speech Rights When Performing Their Service-Related Roles, Analysis Shows." During the six-year period, the federal courts always ruled in favor of professors when the speech occurred in the classroom or in scholarship (two cases total).

[21]By early 2011, the American Association of University Professors was urging faculty 'to defend their academic freedom ... not through the courts but through clear university policies." Source: Joan DelFattore, "Defending Academic Freedom in the Age of *Garcetti*," American Association of University Professors website, retrieved from <http://www.aaup.org/article/defending-academic-freedom-age-garcetti#.VL_dHHl0y70>.

[22]I was unaware of the *Garcetti* decision, which came down in May 2006.

[23]"It is the policy of Washington State University to support and promote the rights of all individuals to express their view and opinions for or against actions or ideas in which they have an interest, to associate freely with others, and to assemble peacefully. The faculty has the right to dissent and protest." Source: *2010-2011 Washington State University Faculty Manual,* p. 16.

[24]In hindsight, this proved to be a fatal legal decision for the university. Administrators tried to frame me as an incompetent professor, but the anti-free-speech legal position they employed ensured that the case would be framed as a free-speech dispute. WSU has a history of free-speech disputes. See the Washington State University posting (subhead "First Amendment Controversies") at Wikipedia.org.

[25]*Demers v. Austin,* et al., United States District Court, Eastern District of Washington, Case 2:09-cv-00334-RHW, Document 135, Filed 06/02/11.

Before a three-judge panel of the Ninth Circuit in November 2012, the attorney for the defendants argued that my 7-Step Plan was not deserving of free-speech protection because it was employment-related speech, did not involve an issue of public concern, and was unrelated to teaching or scholarship. The attorney also tried to argue that the Plan did not constitute a criticism of the WSU administration, because it did not specifically criticize anyone.

Lead judge William A. Fletcher agreed that the plan was not citizen speech. But he said the quality of an academic unit was an issue of public concern. He also said the plan implicitly criticized the WSU administration, because it was saying the current Murrow structure was ineffective. He and the other judges did not offer any comments in terms of whether they thought the plan was related to teaching or scholarship, to the best of my recall.

"I have trouble ... treating that 7-Step Plan as cleanly private speech," Fletcher said during the hearing. "It originates when he (Demers) is a member of a committee. It's clearly undertaken in tight relationship to his job and the things that he cares about in his job. He is suggesting an important restructuring of two departments."[26]

After the hearing, I believed I was going to lose the case, because my attorney had argued that I had submitted the 7-Step Plan as a citizen, not a professor-employee.

But I underestimated Judge Fletcher.

He had spent many years teaching law at the University of California at Berkeley and other universities. These experiences no doubt gave him some insight into the way universities operate. I'm sure he knew that what goes on in the classroom depends heavily on how a program is structured and funded. In other words, efficacy in the classroom cannot exist if those who do the teaching have no power to modify the content and structure of courses and the academic units in which they teach.

But Fletcher ignored these pragmatic issues when he wrote the panel's opinion, which was released September 4, 2013. Instead, he simply borrowed the language of the majority opinion in *Garcetti*. If the speech is "related to scholarship or teaching" and addresses a matter of public concern, then it is protected. He said my 7-Step Plan met both criteria, and the state's interests as an employer did not outweigh my interests in commenting on a public matter.

WSU filed an *en banc* appeal with the Ninth Circuit, arguing that I had engaged in "professional speech" unrelated to teaching or scholarship.

In January 2014, the full court refused to hear the appeal, and Fletcher issued a revised opinion that reiterated why my 7-Step Plan was related to teaching.

"It may in some cases be difficult to distinguish between what qualifies as speech 'related to scholarship or teaching' within the meaning of *Garcetti*. But this is not such a case. The 7-Step Plan was ... a proposal to implement a change at the Murrow School that, if implemented, would have substantially altered the nature of what was taught at the school, as well as the composition of the faculty that would teach it."[27]

Faculty-rights advocates heralded the decision. The *Chronicle* even published a commentary several weeks later from two top-level non-WSU university administrators

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[26]The oral arguments in the case can be heard at <http://www.ca9.uscourts.gov/media/view.php?pk_id=0000009827>.

[27]*Demers v. Austin* et al., Case No. 11-35558, 2014 WL 306321; 9th Cir. Jan. 29, 2014, p. 23.

(the kind of administrators faculty like because they embrace shared governance) under the headline: "For Faculty Free Speech, the Tide Is Turning."[28]

WSU decided not to appeal the case to the U.S. Supreme Court. In October 2014, the university paid $120,000 to my attorneys. I dropped the lawsuit.[29]

Impact of the Appeals Court Ruling in *Demers v. Austin*

Although I have stated here that the Ninth Circuit decision protects service-related speech, the decision actually strikes down the notion that the role one plays in a governmental organization is important when deciding whether speech deserves protection. It's not whether the speech was uttered in the classroom, in a research paper, in a meeting, or in the hallway. Rather, it's the content of the speech, and if that content is *related to teaching or scholarship* and addresses an issue of public concern, then it's protected.

Some legal analysts have underestimated the impact of the decision. But let there be no mistake: It implicitly preserves a role — via the Constitution — for faculty in shared governance in nine western states. No university board or administration can eliminate that right.[30]

Had the decision gone the other way, it could have led to a major redistribution of power at those universities. University governing boards and administrators are under no legal obligation to provide shared governance to their faculty. They can, barring statutory or university rule restrictions, withdraw that authority at any time.

As it stands now, faculties in forty-one other states have no federal constitutional protection for comments they make in their service-related roles.[31] Their protection depends upon how state courts interpret university rules and regulations and/or faculty union contracts.[32]

The *Harvard Law Review* commentary did not see the connection between the Ninth Circuit ruling and shared governance. Instead, it justified its criticism of the Ninth Circuit ruling by appealing to the principles of traditionalism and judicial interference.

The HLR commentary asserted that the appeals court decision was misguided because it (1) conflicts "with the trend toward greater deference to government employers in controlling workplace speech" (p. 1829) and (2) "infringes upon institutional autonomy

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[28]Thomas Sullivan and Lawrence White, "For Faculty Free Speech, the Tide Is Turning," *The Chronicle of Higher Education* (September 30, 2013), retrieved from <http://chronicle.com/article/For-Faculty-Free-Speech- the/141951>.

[29]The Ninth Circuit also ruled that I was not entitled to damages because the court had not previously articulated its views on the legal issue in the case (i.e., it gave the defendants qualified immunity). I voluntarily left my position in December 2012 in part to spend more time writing about civil liberties issues.

[30]University administrations could disband faculty governing bodies and the committees on which they serve, barring statutory or university rule restrictions, but faculty would still have First Amendment protection when speaking on issues of public concern.

[31]State constitutions and/or university rules and regulations may protect faculty speech, but neither carries the weight of the First Amendment.

[32]Faculty unions exist in only about 70 universities nationwide, but the number has been growing since the decision in *Garcetti*. AAUP encourages faculty to unionize as a way to preserve shared governance, academic freedom, and professional standards. See <http://www.aaupcbc.org>.

and introduces the excessive judicial interference expressly disfavored in Supreme Court tradition" (p. 1830).[33]

Neither of these arguments explains why giving more speech freedom to professors would lead to adverse effects. Instead, the HLR position grounds itself in the principle of unbridled traditionalism. This is the notion that courts should always do as they have done before because that's the way things have always been done and social change leads to harmful conditions.

Tradition is not always a bad thing. Tradition provides a basis for shared understanding and social action.

But traditionalism for traditionalism sake is the bane of societies predicated upon alleviating injustice through truth and knowledge. No modern legal system can sustain itself through unbridled traditionalism.

The HLR commentary also implies that the Ninth Circuit ruling interferes with "institutional autonomy," because the ruling is extending a constitutional protection to faculty that did not exist before. Actually, the opposite argument can be made. For more than three centuries, academia in America has given faculty a proactive role in university governance. Eliminating that role would actually interfere with a tradition.

In *Garcetti*, the five conservative justices who denied free-speech protection to government employees did offer a logic, of sorts. The majority argued that government employers need a significant degree of control over their employees' words and actions, otherwise there would be "little chance for the efficient provision of public services."

This proposition holds weight if one assume that corruption in government is itself not efficient. But couldn't Ceballos reasonably argue that failure to punish police for falsifying affidavits likely would generate lawsuits from innocent victims, thereby creating even more inefficiencies in government services and big lawsuit judgments?

More importantly, the inefficiency proposition is simply not supported by the history of shared governance in American universities.

A Brief History of Authority in American Universities[34]

Since the founding of Harvard University in the 17th century, most public and private universities in the United States have organized themselves pyramidically, with ultimate authority vested in a small number of directors, regents or trustees, often appointed by governors or state officials. These boards have had final say on budgets, promotion and tenure, curriculum, staffing and long-term planning.

But power and decision-making at public universities has never been as highly centralized as it has been in most other bureaucratically organizations, especially the military, and big business and most branches of government. In fact, university governing

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[33]Unsigned commentary, "Ninth Circuit Finds *Garcetti* Official Duty Rule Inapplicable to Professional Speech in Public-University Context," *Harvard Law Review,* p. 1829 and p. 1830, respectively. The HLR commentary, by the way, referred to the workplace speech as "internal administrative" speech. Other attorneys and courts have called it "professional speech" or "extramural speech." I prefer the term "service-related speech," since the speech arises as a result of participation on university committees and faculty senates.

[34]See Levinson, "Academic Freedom, Shared Governance, and the First Amendment after *Garcetti v. Ceballos*," for a more detailed history of shared governance in American universities.

boards, then as now, have relied heavily on faculty for advice and guidance. At some universities, it is even fair to say that the boards function more as "rubber stamps" for administrative and faculty proposals than as sources of original ideas and thought. Most board members are not full-time university employees and spend little time involving themselves in the day-to-day operations of the university.

Administrators, who are usually led by a president or chancellor, oversee operations of the university. Until recent decades, most administrators were drawn from the ranks of faculty. They have been responsible for preparing budgets and managing the non-academic operations of the institution. Administrators also have played a role in curriculum development, but primary responsibility for that job has gone to the faculty, who do the teaching. At most universities, faculty members also help prepare administrative budgets; hire administrators; train and promote teachers and some staff; and provide, often through faculty senates or committees, feedback on major issues facing the university, especially with respect to the development of new programs and construction projects.

The role of faculty in helping administrators make decisions and manage operations at the university has been so crucial that the principle of shared governance has come to be one of the defining features of university life, more so than virtually any other bureaucratically organized institution in society.

In 1920, the American Association of University Professors issued its first formal statement on shared governance, emphasizing the importance of faculty involvement in personnel decisions, selection of administrators, preparation of the budget, and determination of educational policies.[35]

In 1966, the AAUP Statement on Government of Colleges and Universities called for "shared responsibility among the different components of institutional government and its specification of areas of primary responsibility for governing boards, administrations, and faculties." AAUP points out that over the years a "series of derivative policy statements" included other areas of concern: academic freedom; budgetary and salary matters; financial exigency; the selection, evaluation, and retention of administrators; college athletics; governance and collective bargaining; and the faculty status of college and university librarians.

During the 20th century, universities grew rapidly and became more structurally complex, partly in response to an ever-increasing number of federal and state laws and regulations (e.g., Title 9, privacy statutes, occupational safety, risk management). Universities hired more administrators and support staff, but teaching staffs grew much more slowly, and the number of tenure-track hires slowed substantially at many institutions. As time passed, fewer administrators were drawn from the ranks of faculty, creating what retired professor Benjamin Ginsberg called a "professional class" of administrators, many of whom have never taught a class.[36]

"When I was a graduate student in the 1960s and a young professor in the 1970s, ... top administrators were generally drawn from faculty and even midlevel managerial tasks

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[35]For more details, see AAUP's website at <www.aaup.org>.

[36]In fact, Elson Floyd, who has been president of Washington State University since 2007, has no refereed journal publications, according to his curriculum vitae. He earned Ph.D. in education and worked as an administrator throughout most of his career. See <http://president.wsu.edu/about/pdf/CV.pdf>.

were directed by faculty members," writes Ginsberg, author of the book *The Fall of the Faculty: The Rise of the All-Administrative University and Why It Matters.*[37] "Because so much of the management of the university was in the hands of professors, presidents and provosts could do little without faculty support and could seldom afford to ignore faculty views."

However, Ginsberg adds that "today's full-time professional administrators tend to view management as an end in and of itself. ... For many of these career managers, promoting teaching and research is less important than expanding their own administrative domains."[38]

Obtaining faculty input or permission is much less important to these administrators than it is to faculty-administrators, Ginsberg points out. As such, tensions between administrators and faculty have increased on many campuses. At some institutions, the faculty have organized unions, partly in response to administrations that have tried to lessen the role of shared governance.

The power of the faculty has, without question, declined since the 1960s. But almost every public university in the United States today still acknowledges, at least publicly, that faculty have a right to shared governance.

In 1994, AAUP issued a "Statement on the Relationship of Faculty Governance to Academic Freedom," which argued in part that the faculty's voice on matters related to teaching and research "should be given the greatest weight." The Statement also asserted that "the *protection of the academic freedom of faculty members in addressing issues of institutional governance is a prerequisite for the practice of governance unhampered by fear of retribution*." (emphasis added)

This ideal is achieved on most campuses, at most times and on most issues. Faculty criticism of administrative actions and programs is commonplace, and most administrators are secure enough to tolerate some criticism. Most faculty also cherish their service-related roles, which, along with teaching and scholarship, is the "third leg" of an academic's professional life.

But on some campuses and at some times, administrators do not always practice what their handbooks preach.

That's why the Ninth Circuit Court of Appeals decision in *Demers v. Austin* is so crucial.

The Future of Shared Governance and Academic Freedom

As of this writing in early 2015, it's too early to tell whether other federal circuits and the U.S. Supreme Court will follow the Ninth Circuit's lead.

The weakest part of the *Garcetti* decision is the assumption that government cannot run efficiently if its employees are allowed to challenge supervisors' decisions. The history of universities shows that they are able to function effectively when lower-level employees (faculty) are allowed to speak freely on issues of public concern. And most academics

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[37]Benjamin Ginsberg, *The Fall of the Faculty: The Rise of the All-Administrative University and Why It Matters* (New York: Oxford University Press, 2011), p. 1.

[38]*Ibid.*, p. 2.

and administrators will tell you that a robust debate actually enhances the mission of the university.

There are, of course, exceptions to the rule.

But the *Garcetti* decision eliminates a balancing test for determining whether speech addresses issues of public concern and interferes with the effective administration of an academic unit.

The conservative majority of the Supreme Court presumably would have us embrace the idea that a law clerk deserves to be fired if he or she discovered a Supreme Court justice taking bribes from litigants in exchange for favorable opinions.

A balancing test is not a perfect solution. Reasonable parties will quibble about what standard to use for "efficient provision of services."[39]

But without constitutional protection for shared governance and service-related speech, faculty at many universities in America may have only one alternative left to them: unionization.[40]

A forum for commenting on this article or other topics is available at www.acfcl.org.

[39] Administrators at Washington State University rejected my 7-Step Plan. To this day, the Murrow programs still is not nationally accredited by Accrediting Council on Education in Journalism and Mass Communication.

[40] After *Garcetti*, AAUP began actively encouraging faculty at many universities to unionize. The mission of AAUP-CBC (Collective Bargaining Congress) "supports unionization as the most effective means for academic employees to protect shared governance and academic freedom, to uphold professional standards and values, and to promote higher education as an investment in our common future." Source: <http://www.aaupcbc.org/about/mission-0>.