

DEMERS V. AUSTIN: THE NINTH CIRCUIT RESOLVES THE PUBLIC EMPLOYEE SPEECH DOCTRINE’S UNCERTAIN APPLICATION TO ACADEMIC SPEECH

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I. INTRODUCTION

The notion that the First Amendment protects academic freedom has been described as mere “conventional wisdom.”¹ The Supreme Court has similarly stressed

1. Matthew W. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323, 1324 (1988).

that academic freedom presents a First Amendment right of “special concern”² and that “[t]he essentiality of freedom in the community of American universities is almost self-evident.”³

Despite these pronouncements, the Supreme Court’s cases provide only vague protections, if any, to academic speech and expression in higher education. Likewise, many lower courts are “remarkably consistent in their *unwillingness* to give analytical shape to the rhetoric of academic freedom.”⁴ This uncertainty unravels a context in which “attempts to understand the scope and foundation of academic freedom . . . generally result in paradox or confusion.”⁵ For these reasons, academic freedom has been accurately described as a problem, of which the cases are a pathology.⁶

Academic freedom’s problematic nature arises from at least three sources of tension, all of which run prominently through case law. First are university professors’ and faculty members’ interests in a First Amendment right to free speech and expression when performing research, scholarship, and teaching. Second is the government’s interest in smoothly functioning higher education institutions.⁷ Third is the judiciary’s efforts to determine whose interests should prevail.⁸

These three tensions collided in *Demers v. Austin*,⁹ where the Ninth Circuit recognized and applied an academic speech exception to the public employee speech doctrine as set forth in *Garcetti v. Ceballos*,¹⁰ which holds that speech made pursuant to an employee’s “official duties” is categorically unprotected under the First Amendment.¹¹ Given that *Garcetti*’s official duties inquiry excludes a significant amount of speech from First Amendment protection, it is no surprise that *Garcetti*’s categorical rule has been criticized as excessively constraining public employees’ free speech rights.¹² However, Justice Kennedy, writing for the Supreme Court in *Garcetti*, left open whether an exception to the official duties inquiry may exist for speech “related to academic scholarship or classroom instruction.”¹³

The Ninth Circuit in *Demers* properly resolved that uncertainty, reasoning that *Garcetti*’s official duties inquiry presents a limitation on academic freedom in

2. Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967).

3. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

4. Stuart W. Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 NEB. L. REV. 301, 302 (1998) (emphasis added).

5. J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251, 252 (1989) [hereinafter *Special Concern*] (“There has been no adequate analysis of what academic freedom the Constitution protects or of why it protects it . . .”).

6. RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES*, at x (1955).

7. See *Special Concern*, *supra* note 5, at 288 (“When the Supreme Court came to constitutionalize academic freedom, it encountered a tradition of values and personnel procedures protecting the individual scholar from non-academic judgments by college administrators.”).

8. See HOFSTADTER & METZGER, *supra* note 6, at 413–67 (discussing the additional tension that exists between academic freedom and big business).

9. 746 F.3d 402 (9th Cir. 2014).

10. 547 U.S. 410 (2006).

11. *Id.* at 417.

12. Lauren K. Ross, *Pursuing Academic Freedom After Garcetti v. Ceballos*, 91 TEX. L. REV. 1253, 1278 n.202 (2013) (noting that *Garcetti* “itself shows the danger of strict rules. The Court imposed a threshold question, whether the speech is pursuant to official duties, and provided no leeway for courts to protect speech if the answer to that question is yes.”).

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

higher education that runs contrary to the First Amendment's core values.¹⁴ The Ninth Circuit's holding serves as a welcome pronouncement for university professors and faculty members by providing First Amendment protection for the research, scholarship, and teaching that they were hired to perform.

In addition to the Ninth Circuit, the Fourth Circuit has also recognized the existence of an academic speech exception to *Garcetti*.¹⁵ But the Fourth Circuit did not, in fact, *apply* the exception as the Ninth Circuit did.¹⁶ And, though the Fourth and Ninth Circuits have aligned in recognizing the existence of an academic speech exception, the Ninth Circuit has gone further than the Fourth Circuit to protect academic speech by defining "academic speech" to encompass matters beyond traditional research, scholarship, and teaching.¹⁷

The Ninth Circuit's holding in *Demers* further distinguishes the Ninth Circuit from three other circuits—the Third, Sixth, and Seventh Circuits.¹⁸ Because these circuits have declined to resolve whether an academic speech exception may exist, these circuits apply *Garcetti*'s official duties inquiry and have typically held that a university professor or faculty member who speaks pursuant to his official duties is not entitled to First Amendment protection on grounds that he is speaking pursuant to his official duties, not as a private citizen.¹⁹

This Article suggests that the Ninth Circuit in *Demers v. Austin*²⁰ properly recognized and applied an academic speech exception to *Garcetti*'s official duties inquiry, providing an analytical framework that safeguards a First Amendment right to academic freedom in public universities. As essential background, Part II sets forth the public employee speech doctrine with the Supreme Court's key cases. Part III addresses the Supreme Court's uncertainty as to whether *Garcetti*'s official duties inquiry was intended to apply to academic speech. Part IV considers how the Third, Sixth, and Seventh Circuits have applied *Garcetti* to academic speech to hold that university professors and faculty are not entitled to First Amendment protection in their work. Part V discusses how the Fourth Circuit advocated for an academic speech exception but resolved the case with *Garcetti*'s official duties inquiry. Part VI analyzes the Ninth Circuit's resolution of *Garcetti*'s uncertainty in *Demers* by recognizing and applying an academic speech exception to *Garcetti* that

14. This Article addresses academic freedom in public universities. But it must be noted that *Demers*'s holding, although addressing a university professor's speech, was not expressly limited to higher education. See Amanda Harmon Cooley, *Controlling Students and Teachers: the Increasing Constriction of Constitutional Rights in Public Education*, 66 BAYLOR L. REV. 235, 273 n.260 (2014) (acknowledging that because *Demers* stated that "teaching and academic writing are at the core of the official duties of teachers and professors," the Ninth Circuit's decision "did not appear to foreclose its application to K-12 school teachers."). Nonetheless, most courts consider it resolved that K-12 teachers do not enjoy a First Amendment right to academic freedom. See, e.g., *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 368–71 (4th Cir. 1998) (en banc) (holding that a K-12 teacher's academic speech was government speech and therefore not protected under the First Amendment).

15. Compare *Demers*, 746 F.3d 402 (9th Cir. 2014), with *Adams v. Trustees of the Univ. of N.C. Wilmington*, 640 F.3d 550 (4th Cir. 2011).

16. See *Adams*, 640 F.3d at 564.

17. See *Demers*, 746 F.3d at 411–16.

18. Compare *Demers*, 746 F.3d 402 (9th Cir. 2014), with *Savage v. Gee*, 665 F.3d 732 (6th Cir. 2012), and *Gorum v. Sessoms*, 561 F.3d 179 (3d Cir. 2009), and *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008).

19. See *Savage*, 665 F.3d at 739; *Gorum*, 561 F.3d at 186; *Renken*, 541 F.3d at 775.

20. 746 F.3d 402 (9th Cir. 2014).

protects academic freedom. Part VII seeks to define academic freedom, concluding that academic freedom should function to properly balance the autonomy of the individual professor and academic institution. Part VIII revisits the cases discussed in Parts IV and V and applies *Demers*'s framework to determine whether *Demers* would have led to a different result. Part IX explains why an academic speech exception is necessary to protect disinterested research, scholarship, and teaching. Lastly, Part X concludes, suggesting that *Demers* provides the proper analytical framework to protect academic freedom in universities.

II. DEVELOPMENT OF THE PUBLIC EMPLOYEE SPEECH DOCTRINE

The US Constitution's First Amendment states, in its absolute terms, that "Congress shall make no law . . . abridging the freedom of speech."²¹ Despite the First Amendment's plain language, which appears to provide an absolute right to free speech, history and case law show otherwise. Public employees have long faced significant constraints on their freedom of speech. For most of the twentieth century, "the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights."²² But in the mid-1950s and the 1960s, in response to efforts requiring public employees, especially teachers, to "swear oaths of loyalty to the state and reveal the groups with which they associated," the Supreme Court adopted a new approach.²³ An analysis of the three key Supreme Court cases that form the modern public employee speech doctrine is set forth below.²⁴

A. *Pickering v. Board of Education of Township High School District*

In 1968, in *Pickering v. Board of Education of Township High School District*, 205,²⁵ the Supreme Court established that public employees enjoy a First Amendment right to free speech.²⁶ There, Plaintiff Marvin Pickering, a high school teacher, drafted a letter in which he criticized how the Illinois Board of Education handled proposals to raise funding.²⁷ Pickering voiced his criticisms by submitting his letter to a local newspaper, after which he was fired.²⁸ The Court described the letter as follows:

The letter constituted, basically, an attack on the School Board's handling of the 1961 bond issue proposals and its subsequent allocation of financial

21. U.S. CONST. amend. I.

22. *Connick v. Myers*, 461 U.S. 138, 143 (1983) (acknowledging Justice Holmes's quote that "[a] policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."); see also Carol N. Tran, *Recognizing an Academic Freedom Exception to the Garcetti Limitation on the First Amendment Right to Free Speech*, 45 AKRON L. REV. 949, 953–55 (2012).

23. *Connick*, 461 U.S. at 144.

24. Though more Supreme Court cases are certainly relevant to the development of the public employee speech doctrine, this Article discusses only those cases that are most relevant to the academic speech exception.

25. 391 U.S. 563 (1968).

26. *Id.*

27. *Id.* at 564.

28. *Id.*

resources between the schools' educational and athletic programs. It also charged the superintendent of schools with attempting to prevent teachers in the district from opposing or criticizing the proposed bond issue.²⁹

The Court then clarified that the misguided theory that public employees relinquish their First Amendment rights by nature of their employee status has been unequivocally rejected.³⁰ However, the Court conceded that the "State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses . . . with regulation of the speech of the citizenry in general."³¹

Thus, given that Pickering's right to free speech was not absolute, despite the First Amendment's plain terms, the Court fashioned what has come to be known as the "*Pickering*-balancing test." This test requires a balancing of "the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."³² The Court identified five factors for consideration, asking whether:

1. A close working relationship existed between the educator and the people whom he criticized;
2. The speech addressed a matter of public concern;
3. The speech had a detrimental impact on the administration of the educational system;
4. The educator's performance of his daily duties was impeded;
5. The educator spoke as a public employee or as a private citizen.³³

Applying those factors to Pickering, his letter, and his termination, the Court found that: (1) Pickering had no working relationship with the Board; (2) Pickering's letter dealt with a matter of public concern, e.g., school funding; (3) Pickering's letter had no detrimental effect on the school's administration; (4) Pickering's letter did not compromise the performance of his daily duties as educator; and (5) Pickering wrote his letter as a private citizen, not as a public employee.³⁴ The Court further emphasized that Pickering's letter was neither shown nor could be presumed to have impeded the proper performance of his daily duties or interfered with the District's regular operations.³⁵ Based on the weight of those factors, the Court held that the District's interest in preventing Pickering from speaking on the school funding issue did not tip the balance in the District's favor to deprive Pick-

29. *Id.* at 566.

30. *Id.* at 568.

31. *Pickering*, 391 U.S. at 568.

32. *Id.*

33. *Id.* at 568–75; see also 1 WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 693 (5th ed. 2013).

34. *Pickering*, 391 U.S. at 568–75.

35. *Id.* at 571–74.

ering of his First Amendment right to free speech so as to fire him for writing his letter.³⁶

The Court employed this flexible balancing test for approximately a decade after *Pickering*, having tremendous discretion to weigh the interests on a case-by-case basis.³⁷

B. Connick v. Myers

Because *Pickering's* flexible balancing approach did not highlight the importance that the employee's speech be on a matter of public concern,³⁸ the Supreme Court refined *Pickering's* flexible balancing test into a structured, if not rigid, two-step inquiry in *Connick v. Myers*.³⁹ There, plaintiff Sheila Myers, an assistant district attorney in New Orleans, brought suit for First Amendment retaliation when she was fired after having protested about being transferred to prosecute criminal cases in a separate division of criminal court.⁴⁰ Specifically, shortly after Ms. Myers was transferred,

she prepared a questionnaire that she distributed to the other Assistant District Attorneys in the office concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns. Petitioner then informed respondent that she was being terminated for refusal to accept the transfer, and also told her that her distribution of the questionnaire was considered an act of insubordination.⁴¹

Faced with Myers's First Amendment retaliation claim, the Court raised two pointed issues for analysis: first, whether Myers spoke on a matter of public concern, and second, whether Myers's speech interfered with the employer's abilities to discharge its official duties and maintain proper discipline.⁴²

36. *Id.* It should be further emphasized that although the Court recognized that *Pickering* had a legitimate interest in a right to free speech, the Court did not hold that *Pickering's* right was absolute and explained several ways in which the District's interest in efficiency could have hypothetically prevailed. *See id.* at 571–72 (“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 impact on the public would be difficult to counter because of the teacher's presumed greater access to the real facts.”).

37. *See generally* Elizabeth Dale, *Employee Speech & Management Rights: A Counterintuitive Reading of Garcetti v. Ceballos*, 29 BERKELEY J. EMP. & LAB. L. 175, 182–83 (2008) (explaining that *Pickering's* test “treated th[e] balancing of interests as something less than a formal test”).

38. *See, e.g.*, *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979) (applying *Pickering's* balancing test to a primary schoolteacher's speech made in private and finding in the teacher's favor); KAPLIN & LEE, *supra* note 33, at 695 (stating that *Givhan* emphasized “the need to distinguish between communications on matters of public concern and communications on matters of private or personal concern”).

39. 461 U.S. 138 (1983); *see also* Matthew W. Finkin, *Symposium on Academic Freedom: Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323, 1331 (1988) (“Despite its claim of faithfulness to precedent, *Connick* work[ed] a major change in *Pickering*.”).

40. *Connick*, 461 U.S. at 140.

41. *Id.* at 138.

42. *Id.* at 143–45, 150–51.

The Court clarified that the first inquiry, that of public concern, was now to be treated as a threshold legal question.⁴³ The Court stressed that whether speech addresses a matter of public concern requires looking at the “content, form, and context of a given statement, as revealed by the whole record.”⁴⁴ The Court further noted that speech falling into this category includes informing the public that a governmental entity failed to discharge its responsibilities, or otherwise “bring[ing] to light actual or potential wrongdoing or breach of public trust on the part of [the governmental entity or its officials].”⁴⁵ But if the content, form, and context of the speech cannot be “fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.”⁴⁶ As to Myers’s questionnaire, the Court reasoned that only one question—that which concerned pressure to work on political campaigns—addressed a matter of public concern, reasoning that government service should depend on merit, not political service.⁴⁷

In addition to fashioning a threshold “public concern” step, the second step of *Connick*’s inquiry, whether the employee’s speech interfered with the employer, further refined the Court’s flexible approach taken in *Pickering*.⁴⁸ The Court in *Connick* noted that essential to this step is “full consideration of the government’s interest in the effective and efficient fulfillment of its responsibilities.”⁴⁹ This “full consideration” shifted the balance in the employer’s favor by requiring that “[w]hen close working relationships are essential to fulfilling public responsibilities, a *wide degree* of deference to the employer’s judgment is appropriate.”⁵⁰ Under this deferential inquiry, the Court found in favor of Myers’s employer, concluding that Myers’s employer was not required to tolerate conduct that he reasonably believed would disrupt the office, undermine authority, and impede working relationships.⁵¹

As Professor Dale noted, “[i]n *Pickering*, the Court emphasized that public employee rights to speak trumped the interests of public employers.”⁵² But in *Connick*, “the Court had reweighed that balance, deferring to the interests of public employers at the expense of protecting the rights of public employees.”⁵³ The Court adhered to *Pickering-Connick*, i.e., *Connick*’s public concern requirement and *Pickering*’s refined balancing test, without significant development until 2006.⁵⁴

43. *Id.* at 148 n.7.

44. *Id.* at 147–48.

45. *Connick*, 461 U.S. at 148.

46. *Id.* at 146.

47. *Id.* at 148.

48. *Id.* at 151; *see also* Dale, *supra* note 37, at 182–83.

49. *Connick*, 461 U.S. at 151.

50. *Id.* at 151–52 (emphasis added).

51. *Id.* at 151.

52. Dale, *supra* note 37, at 184.

53. *Id.*

54. *See, e.g.*, *San Diego v. Roe*, 543 U.S. 77 (2004); *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (“[T]he government as employer indeed has far broader powers than . . . as sovereign.”); *Bd. of Cnty. Comm’rs v. Umbehr*, 518 U.S. 668 (1996); *Rankin v. McPherson*, 483 U.S. 378 (1987);

C. Garcetti v. Ceballos

In 2006, in *Garcetti v. Ceballos*,⁵⁵ the Supreme Court narrowed the public employee speech doctrine to categorically exclude speech made pursuant to an employee's "official duties" from First Amendment protection.⁵⁶ Before the Court in *Garcetti* was a First Amendment retaliation claim made by Richard Ceballos, a Los Angeles County deputy district attorney.⁵⁷ Ceballos argued that his employer, the Los Angeles County District Attorney's Office, had retaliated against him by reassigning him and denying him a promotion after Ceballos distributed an internal memorandum in which Ceballos criticized inaccuracies in his subordinates' work.⁵⁸ The district court granted summary judgment in favor of Los Angeles County.⁵⁹ The district court found that Ceballos was not entitled to First Amendment protection because he had written the memo pursuant to his duties as a district attorney, not as a private citizen.⁶⁰

When Ceballos appealed, the Ninth Circuit reversed.⁶¹ The Ninth Circuit applied the *Pickering-Connick* test.⁶² The Ninth Circuit held that Ceballos was entitled to First Amendment protection for writing and distributing his memo, thereby rejecting the district court's notion that a public employee's speech is not protected under the First Amendment merely because it has been made pursuant to an employment responsibility.⁶³

The Supreme Court, however, reversed the Ninth Circuit's holding. The Court began its analysis by acknowledging that government employees, by necessity, must accept certain limitations on their freedom.⁶⁴ The Court further expressed that "public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a *citizen addressing matters of public concern*."⁶⁵ However, the Court clarified that these "certain circumstances" do not include speech made pursuant to an employee's official duties, holding that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."⁶⁶

Reasoning that Ceballos had written and distributed his memo pursuant to his official duties, the Court concluded that Ceballos was not entitled to First Amend-

55. 547 U.S. 410 (2006).

56. *Id.* at 421; see also Paul M. Secunda, *Garcetti's Impact on the First Amendment Speech Rights of Federal Employees*, 7 FIRST AMENDMENT L. REV. 117, 123 (2008) (criticizing the "overly-formalistic view of a public employee as either being a citizen or a worker, but never simultaneously both").

57. *Garcetti*, 547 U.S. at 414.

58. *Id.* at 412–13. The inaccuracies related to information set forth in an affidavit that was used to obtain a "critical" search warrant. For example, "the affidavit called a 'long driveway' what Ceballos thought should have been referred to as a 'separate roadway.'" *Id.* at 414 (internal single quotes added).

59. *Id.* at 415.

60. *Id.*

61. *Ceballos v. Garcetti*, 361 F.3d 1168, 1173–78 (9th Cir. 2004).

62. *Id.*

63. *Id.* at 415–16 (quoting *Ceballos*, 361 F.3d at 1175).

64. *Id.* at 418.

65. *Garcetti*, 547 U.S. at 417 (emphasis added).

66. *Id.* at 421.

ment protection.⁶⁷ The Court explained that restricting speech “that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself had commissioned or created.”⁶⁸ Because Ceballos was found to have spoken pursuant to his official duties, there was no need to consider whether Ceballos’s speech addressed a matter of public concern, nor whether Ceballos’s interest outweighed Los Angeles County’s interests.

With the addition of *Garcetti*’s threshold official duties inquiry, a public employee is entitled to First Amendment protection only if three requirements are met. First, the public employee must speak as a private citizen, not pursuant to his official duties.⁶⁹ Second, the speech must address a matter of public concern.⁷⁰ Third, the speech must not cause significant disruption to the employer so that the public employee’s interests outweigh the employer’s interests.⁷¹

III. DID *GARCETTI* CARVE OUT A CAVEAT FOR ACADEMIC SPEECH?

Garcetti’s threshold official duties inquiry has been criticized as excessively limiting public employees’ First Amendment right to free speech and expression.⁷² Indeed, as discussed, *Garcetti*’s official duties inquiry categorically excludes speech made pursuant to public employees’ official duties from the First Amendment. However, *Garcetti* left unanswered a significant question of major concern for public university professors and faculty members. Near the very end of the Court’s majority opinion, Justice Kennedy broached the issue of academic speech:

There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the

67. *Id.*

68. *Id.* at 421–22.

69. *Id.* at 421; *see also* KAPLIN & LEE, *supra* note 33, at 697 (stating that “[i]f the employee is speaking as an employee . . . one need never reach the question of whether the employee was speaking on a matter of public concern.”).

70. *Garcetti*, 547 U.S. at 415–17.

71. *See Connick*, 461 U.S. at 147–48; *Pickering*, 391 U.S. at 568–69. However, even if the employee’s interests outweigh the university’s, the employee must also show that the employee’s protected conduct was a substantial or motivating factor in causing an adverse employment action. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285–87 (1977). If the employee carries this burden, the burden then shifts to the university to show that the university would have taken the same action against the employee even absent any protected conduct. *Id.*

72. *See, e.g.,* Erwin Chemerinsky, *Civil Rights*, 34 PEPP. L. REV. 535, 539 (2007) (“[*Garcetti*] is not only a loss of free speech rights for millions of government employees, but it is really a loss for the general public, who are much less likely to learn of government misconduct.”); Martin Schwartz, *Section 1983 Civil Rights Litigation in the October 2005 Term*, 22 Touro L. REV. 1033, 1036 (2007). (“The Court could have held that this is potentially protected speech but has to be balanced against the government interest and weighed on a case-by-case basis. Instead, the Court said if the speech is pursuant to the employee’s official duties, it is categorically unprotected. I see that as being very significant. I think it is going to remove a fairly sizable chunk of public employee free speech retaliation claims.”).

analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.⁷³

Justice Kennedy's hesitation was undoubtedly borne by the importance that the Court has traditionally placed on academic freedom.⁷⁴ Nonetheless, Justice Kennedy left the application of *Garcetti's* official duties inquiry to academic speech uncertain.

A. Justice Souter's Concern

Justice Souter, joined by Justices Stevens and Ginsburg, dissented from the majority, expressing concern about *Garcetti's* negative implications for academic freedom.⁷⁵ On the one hand, Justice Souter conceded that "a government employer has substantial interests in effectuating its chosen policy and objectives, and in demanding competence, honesty, and judgment."⁷⁶ But on the other hand, Justice Souter argued that *Garcetti's* official duties inquiry was arbitrary, suggesting that the majority chose "an odd place to draw a distinction, and while necessary judicial line-drawing sometimes looks arbitrary, any distinction obliges a court to justify its choice. Here, there is no adequate justification"⁷⁷

Justice Souter expressed further caution about subjecting academic speech to the official duties inquiry, writing as follows:

This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write "pursuant to . . . official duties."⁷⁸

Justice Souter's concern was well-founded. *Garcetti*, read in its own, plain terms, necessarily excludes the research, scholarship, and teaching that university professors and faculty were hired to perform from First Amendment protection. This categorical exclusion would reduce academic speech to other classes of unprotected speech, such as fighting words, obscenity, incitement of illegal activities, and child pornography, which, in contrast to academic speech, are categorically unprotected due to their *low value*.⁷⁹

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

74. *See, e.g.*, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."); *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) ("Our nation is deeply committed to safeguarding academic freedom").

75. *Garcetti*, 547 U.S. at 428–43 (Souter, J., dissenting).

76. *Id.* at 428.

77. *Id.* at 430.

78. *Id.* at 438.

79. J. Peter Byrne, Book Review, 88 TEX. L. REV. 143, 163–65 (2009) (reviewing MATTHEW W. FINKIN & ROBERT C. POST, *NEO-ORTHODOXY IN ACADEMIC FREEDOM FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM*, and STANLEY FISH, *SAVE THE WORLD ON YOUR OWN TIME*) [hereinafter Book Review] ("The *Garcetti* formulation turns the principle of academic freedom on its head . . . [and] perversely eviscerates academic freedom by depriving it of any constitutional protection.").

Understandably, educator litigants have asked courts to consider Justices Kennedy's and Souter's comments.⁸⁰ But in *Garcetti*'s wake, with the Court's minimal guidance, the weight that lower courts should give Justice Kennedy's statements is uncertain. And, if a court indeed chooses to recognize and apply an academic speech exception, the court then faces another challenge in determining when speech is sufficiently "related to scholarship or teaching" in the words of *Garcetti*.⁸¹

IV. ONE SIDE OF THE DIVIDE: *GARCETTI*'S OFFICIAL DUTIES INQUIRY CONTROLS

Despite Justice Kennedy's uncertainty and Justice Souter's express caution in *Garcetti*, the Third, Sixth, and Seventh Circuits have aligned in choosing either to decline resolving whether an academic speech exception may exist or to reject recognizing its existence altogether.⁸²

A. The Third Circuit

In *Gorum v. Sessoms*,⁸³ the Third Circuit declined to resolve whether an academic speech exception may exist and instead held that *Garcetti*'s official duties inquiry applied to professorial speech. In *Gorum*, Delaware State University (DSU) conducted a grade audit after learning of irregularities in a student athlete's transcript.⁸⁴ During the audit, DSU found that Plaintiff Wendell Gorum, a tenured professor who served on several committees, had changed withdrawals, altered incompletes, and forged grades for 48 students in DSU's Mass Communications Department.⁸⁵ Gorum admitted his misconduct.⁸⁶ When DSU suspended Gorum and began proceedings to dismiss him, Gorum requested a hearing before DSU's disciplinary committee.⁸⁷

The disciplinary committee determined that Gorum's actions undermined the tenets of DSU's educational profession and thus deserved condemnation from DSU's academic community.⁸⁸ The disciplinary committee recommended that Gorum be disciplined with a lengthy suspension and no pay, but not terminated.⁸⁹ Despite those recommendations, DSU President Allen Sessoms concluded that Gorum's misconduct warranted termination.⁹⁰

80. KAPLIN & LEE, *supra* note 33, at 698 ("Since *Garcetti* was decided, faculty litigants in numerous cases have asked lower courts to consider the comments of Justice Kennedy and Justice Souter.")

81. *Id.* at 698 (acknowledging the need to consider when faculty speech is "sufficiently 'related to scholarship or teaching' . . . to receive the protection of the exception").

82. These circuits "apply various combinations of Pickering, Connick, and *Garcetti* . . . [and] employ the incredibly restrictive general governmental employee speech analysis test onto teachers without acknowledging the unique nature of the educational profession." Cooley, *supra* note 14, at 269–70.

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

84. *Id.* at 182.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Gorum*, 561 F.3d at 182.

90. *Id.*

Nearly two years after he was fired, Gorum brought suit for First Amendment retaliation.⁹¹ Gorum pointed to his speech and expression on three occasions: (1) objecting to the selection of Sessoms as DSU President; (2) advising a student athlete who had violated DSU's weapon policy; and (3) rescinding an invitation for Sessoms to speak at a Prayer Breakfast.⁹² The district court granted summary judgment in DSU's favor, finding first that Gorum had failed to raise a genuine issue of material fact as to whether Sessoms even knew that Gorum had objected to Sessoms's status as DSU President.⁹³ As to the remaining two occasions, each arose within Gorum's official duties as professor.⁹⁴ The district court further found that Sessoms would have terminated Gorum even if Gorum had not engaged in any protected activity under the First Amendment.⁹⁵

The Third Circuit affirmed when Gorum appealed.⁹⁶ Gorum argued that assisting and advising the student athlete who had violated DSU's weapon policy was protected because that speech was not made pursuant to Gorum's official duties.⁹⁷ However, reasoning that the proper inquiry into official duties is a "practical one," the court found that assisting the student athlete fell within the scope of Gorum's official duties.⁹⁸ This was because Gorum had extensive knowledge and experience with DSU's disciplinary code, making him the "*de facto* advisor to all [DSU] students with disciplinary problems."⁹⁹ The court likewise held that rescinding Sessoms's invitation fell squarely within Gorum's official duties.¹⁰⁰

In holding that Gorum spoke as a public employee and not as a private citizen, thus failing *Garcetti's* threshold official duties inquiry, the court acknowledged that *Garcetti* did not answer whether the "official duty" analysis would apply to speech related to scholarship or teaching.¹⁰¹ Nonetheless, the court did not resolve whether an academic speech exception may exist. But even assuming the existence of an academic speech exception, the *Gorum* court concluded that *Garcetti's* official duties inquiry was proper because Gorum's speech at the disciplinary hearing and in rescinding Sessoms's invitation was "so clearly not 'speech related to scholarship or teaching,' and because [the court] believe[d] that such a determination here [would] not 'imperil First Amendment protection of academic freedom in public colleges and universities.'"¹⁰² Like *Garcetti*, the *Gorum* court did

91. *Id.*

92. *Id.* at 183–84.

93. *Id.* at 184.

94. *Id.*

95. *Gorum*, 561 F.3d at 184. The University argued, and the court found, that this misconduct presented a sufficient alternative basis upon which the University could terminate Gorum, regardless of whether Gorum's expression was protected under the First Amendment. *Id.* at 188; *see also* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285–87 (1977) (holding that adverse employment actions may be deemed permissible if the employer can demonstrate that it would have taken the same employment action even in the absence of protected conduct).

96. *Gorum*, 561 F.3d at 185–86.

97. *Id.* at 185.

98. *Id.* at 185–86.

99. *Id.* at 186.

100. *Id.*

101. *Id.*

102. *Gorum*, 561 F.3d at 186. It should be noted that if Gorum had challenged his termination based on forging grades for 48 students and not on his allegedly protected speech at the disciplinary hearing and in rescinding Sessoms's invitation, Gorum's forging of grades would have been expression related to

not specify what sort of speech would be sufficiently “related to scholarship or teaching” to warrant possible application of an academic speech exception.

B. The Sixth Circuit

In *Savage v. Gee*,¹⁰³ the Sixth Circuit declined to resolve whether an academic speech exception may exist to *Garcetti*. In *Savage*, Plaintiff Scott Savage brought suit against Ohio State University (OSU), asserting that he was constructively discharged in retaliation for exercising his First Amendment rights.¹⁰⁴ Savage worked as Head of Reference and Library Instruction at OSU’s library.¹⁰⁵ In his position, Savage regularly assisted faculty members and students with library research and designing course bibliographies.¹⁰⁶ In addition, in 2006, Savage served on a faculty committee that was deciding which book would be assigned to all incoming freshman students.¹⁰⁷

In a series of email exchanges with the committee, Savage provided four book recommendations and a short description of each book.¹⁰⁸ One of Savage’s recommended books, *The Marketing of Evil*, by David Kupelian, features a chapter “describing homosexuality as aberrant human behavior.”¹⁰⁹ Savage’s email containing his recommendations did not specify that *The Marketing of Evil* contained this chapter.¹¹⁰

The following day, committee member Norman Jones, who was fully familiar with *The Marketing of Evil*, described Savage’s recommendation as “anti-gay” and questioned Savage’s competency as OSU’s Head of Reference and Library Instruction.¹¹¹ Jones also sent an email to a fellow committee member, stating that Savage’s recommendation had severely compromised Jones’s confidence in OSU’s library.¹¹² Word of Savage’s book recommendation quickly circulated around OSU’s campus and created chaos, which was further exacerbated when faculty members began filing claims of harassment based on sexual orientation against Savage.¹¹³

After taking a leave of absence for extreme emotional distress due to the chaos that his book recommendation had caused, Savage resigned from OSU and filed constructive discharge and First Amendment retaliation claims shortly thereafter.¹¹⁴ The district court granted OSU’s motion for summary judgment, expressly declining to recognize Savage’s book recommendation as academic speech and therefore finding that Savage’s speech was not protected because Savage spoke pursuant to

research, scholarship, or teaching and should have qualified as academic speech. *See infra* Part VII.B. However, as discussed, DSU’s legitimate interest in ensuring honesty and integrity in grading would have likely outweighed Gorum’s interest in having a right to forge grades. *See id.*

103. 665 F.3d 732 (6th Cir. 2012).

104. *Id.* at 734.

105. *Id.* at 735.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Savage*, 665 F.3d at 735.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 736.

114. *Id.*

his official duties.¹¹⁵ The court further concluded that Savage had not been constructively discharged but had voluntarily resigned.¹¹⁶

On appeal, the Sixth Circuit affirmed.¹¹⁷ Savage argued that his book recommendation should qualify as protected academic speech, invoking Justice Kennedy's statements from *Garcetti*.¹¹⁸ But the court rejected Savage's argument and did not resolve whether an academic speech exception may exist.¹¹⁹ Instead, the court reasoned that Savage spoke as a committee member, and thus, Savage spoke pursuant to his official duties.¹²⁰ But even assuming that "*Garcetti* may apply differently, or not at all, in some academic settings," the court concluded that Savage's recommendation was only "loosely, if at all, related to academic scholarship."¹²¹ Like *Garcetti*, the *Savage* court did not indicate exactly what speech would suffice as "academic scholarship" to warrant further consideration of an academic speech exception, but the court found that Savage's book recommendation was not sufficient, despite that Savage recommended the book for assignment to *all* incoming freshman.

C. The Seventh Circuit

In *Renken v. Gregory*,¹²² the Seventh Circuit, without considering the existence of an academic speech exception to *Garcetti*, held that *Garcetti*'s official duties inquiry applies to professors' speech concerning teaching. In *Renken*, plaintiff Kevin Renken, a tenured professor at the University of Wisconsin-Milwaukee (UWM), protested funding conditions that UWM and Dean William Gregory had attached to Renken's fund for a National Science Foundation (NSF) project.¹²³ Believing that some of UWM's conditions violated NSF regulations, Renken sought to negotiate the conditions.¹²⁴ After Renken's negotiation efforts failed, Renken emailed the Secretary of UWM's Board of Regents, writing as follows:

115. *Savage*, 665 F.3d at 736–37.

116. *Id.* at 737, 740.

117. *Id.* at 738–39.

118. *Id.* at 739.

119. *Id.*

120. *Id.*

121. *Savage*, 665 F.3d at 739. The court also concluded that "Savage [could not] prevail on his First Amendment retaliation claim because he has failed to present evidence of any adverse employment action." *Id.* Despite the *Savage* court's uncertainty as to whether an academic speech exception may exist, other courts in the Sixth Circuit suggest that it does. Compare *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Village Sch. Dist.*, 624 F.3d 332, 343 (6th Cir. 2010) (reversing district court's conclusion that a K-12 schoolteacher's speech was exempt from *Garcetti*'s public employee speech doctrine. While the court recognized the possibility of an academic speech exception to *Garcetti*, the court did not resolve the matter and emphasized that even if the academic speech exception existed, a primary schoolteacher fell "outside the group the dissent wished to protect."), with *Kerr v. Hudd*, 694 F. Supp. 2d 817, 843–844 (S.D. Ohio 2010) ("Even without the binding precedent, this Court would find an academic exception to *Garcetti*. Recognizing an academic freedom exception to the *Garcetti* analysis is important to protecting First Amendment values. Universities should be the active trading floors in the marketplace of ideas."). However, though *Kerr* recognized and applied the academic speech exception, *Kerr* pre-dated *Savage*, and the Sixth Circuit did not acknowledge *Kerr* in *Savage*.

122. 541 F.3d 769 (7th Cir. 2008).

123. *Id.* at 771.

124. *Id.* at 772.

[T]he Dean's office has harassed, discriminated against, and frustrated our educational and research activities. . . . I find the Dean's actions unprofessional and vindictive in nature. The [UWM] System has no place for an individual, especially an administrator, who has little concern for the students and frustrates productive faculty members.¹²⁵

Renken shared his complaints with others in UWM's community, including the Chair of UWM's University Committee.¹²⁶ During this time, UWM reduced Renken's pay rate.¹²⁷ In addition to reducing his pay rate, because Renken was repeatedly instructed that he must agree to the funding conditions or the fund would not be granted and continuously refused to do so, UWM rescinded the NSF fund in its entirety.¹²⁸ Thus, Renken filed suit against UWM for First Amendment retaliation.¹²⁹

The district court applied *Garcetti's* official duties inquiry and granted UWM's motion for summary judgment on grounds that Renken spoke pursuant to his official duties, not as a private citizen; alternatively, even if Renken had spoken as a private citizen, the district court held that Renken's speech on the NSF fund did not address a matter of public concern.¹³⁰

On appeal, the Seventh Circuit, without analyzing whether an academic speech exception may exist, affirmed and concluded that *Garcetti's* official duties inquiry applied.¹³¹ Significantly, the court treated Renken's speech as concerning teaching, stating that "in fulfillment of his acknowledged teaching and service responsibilities . . . Renken appl[ied] for the NSF grant."¹³² Nonetheless, administering the grant fell within Renken's teaching and services duties that he was employed to perform.¹³³ Because Renken spoke as a professor, not a private citizen, the court held that Renken's speech was not constitutionally protected.¹³⁴

V. THE FOURTH CIRCUIT'S SUPERFICIAL DIVERGENCE

In *Adams v. Trustees of the University of North Carolina-Wilmington*,¹³⁵ the Fourth Circuit recognized and advocated for the existence of an academic speech exception to *Garcetti*.¹³⁶ But despite those pronouncements, the court ultimately resolved the case under *Garcetti's* official duties inquiry.¹³⁷

125. *Id.* at 772.

126. *Id.*

127. *Id.* at 773.

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

129. *Id.*

130. *Id.*

131. It should be noted that while Renken's counsel acknowledged Justice Souter's hope that *Garcetti's* majority did not "mean to imperil First Amendment protection of academic freedom in public colleges and universities," Renken's counsel's acknowledgement came only at the very end of Renken's appellate brief. Brief for Plaintiff-Appellant Kevin J. Renken at 23, *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008) (No. 07-3126). This may suggest that the argument was not properly raised.

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

133. *Id.*

134. *Id.* at 774-75.

135. 640 F.3d 550 (4th Cir. 2011).

136. *Id.* at 560-61.

137. *Id.* at 561.

Plaintiff Michael Adams, a tenured associate professor of criminology in the University of North Carolina-Wilmington's (UNCW) Department of Sociology and Criminal Justice (Department), brought First Amendment claims when UNCW denied him a promotion.¹³⁸ The events giving rise to his claim began in 2000, when, two years after receiving tenure, Adams became a Christian; with his religious conversion, Adams began vocalizing his beliefs in the local community, UNCW's campus community included.¹³⁹ Adams expressed his Christian beliefs in classes, on campus, on religious radio and television shows, by publishing articles, and by writing a book that he planned to publish.¹⁴⁰ Adams's expression did not go unnoticed but instead gave rise to numerous complaints in UNCW's community, including among UNCW's Board of Trustees, faculty, staff, and the public.¹⁴¹

In 2004, four years after his Christian conversion, Adams applied for promotion to full professor.¹⁴² UNCW evaluated full professor applicants on four bases: (1) teaching; (2) research or artistic achievement; (3) service; and (4) scholarship and professional development.¹⁴³ These bases required the Department to evaluate Adams's works' scholarly attributes, if any; therefore, when addressing Adams's application, the Department evaluated Adams's articles, book, and other columns, all of which expressed Adams's Christian beliefs.¹⁴⁴ Because Adams's works were beyond the scope of his academic discipline as criminology professor and were not peer-reviewed, the Department found that Adams was lacking as a candidate and voted 7-2 to deny his promotion.¹⁴⁵

When Adams brought suit for First Amendment discrimination and retaliation, the district court granted summary judgment in UNCW's favor, applying *Garcetti's* official duties inquiry and finding that Adams had "implicitly acknowledged" that his religious columns, publications, and appearances set forth in his promotion application had been performed pursuant to his official duties.¹⁴⁶

The Fourth Circuit reversed on appeal.¹⁴⁷ In doing so, the court recognized the existence of an academic speech exception to *Garcetti*.¹⁴⁸ The court emphasized that the district court's decision rested on several fundamental errors because "the district court applied *Garcetti* without acknowledging, let alone addressing, the clear language in that opinion that casts doubt on whether the *Garcetti* analysis applies in the academic context of a public university."¹⁴⁹ Moreover, citing circuit

138. *Id.* at 553.

139. *Id.*

140. *Id.* at 554-55.

141. *Adams*, 640 F.3d at 554-55.

142. *Id.* at 553.

143. *Id.*

144. *Id.* at 554-56.

145. *Id.*

146. *Id.* at 556, 561.

147. *Adams*, 640 F.3d at 566.

148. Though the court reversed on *Garcetti's* official duties inquiry, the court remanded the case for a determination of whether: (1) Adams spoke on a matter of public concern; (2) Adams's or UNCW's interests prevailed; and (3) Adams's religious expression was a substantial factor in UNCW's decision not to promote him. *Id.* at 565-66. However, it must be noted that UNCW may have had a sufficient alternative basis upon which to deny Adams his promotion, e.g., his lack of quality scholarship. See *supra* note 95 (discussing *Mt. Healthy's* sufficient alternative basis for discipline standard).

149. *Adams*, 640 F.3d at 561.

precedent from *Lee v. York County School Division*,¹⁵⁰ which applied the *Pickering-Connick* balancing test when faced with a public high school teacher's bulletin board posting, the *Adams* court noted that the basis for applying *Pickering-Connick* as opposed to *Garcetti* "is equally—if not more—valid in the public university setting, which is the specific arena that concerned both the majority and the dissent in *Garcetti*."¹⁵¹ The court further emphasized that:

Applying *Garcetti* to the academic work of a public university faculty member under the facts of this case could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment. That would not appear to be what *Garcetti* intended, nor is it consistent with our long-standing recognition that no individual loses his ability to speak as a private citizen by virtue of his employment. In light of the above factors, *we will not apply Garcetti to the circumstances of this case*.¹⁵²

Nonetheless, the court, in fact, relied on *Garcetti's* official duties inquiry to find that the First Amendment protected Adams's speech.¹⁵³ Instead of doing as the court advocated and applying an academic speech exception to *Garcetti*, the court reasoned that Adams spoke as a private citizen because Adams's speech was unrelated to any of his official duties.¹⁵⁴ As the court explained:

Put simply, Adams' speech was not tied to any more specific or direct employee duty than the general concept that professors will engage in writing, public appearances, and service. . . . [T]hat thin thread is insufficient to render Adams' speech "pursuant to [his] official duties" as intended by *Garcetti*.¹⁵⁵

The conclusion that the First Amendment protected Adams's speech was therefore grounded in a narrow application of *Garcetti's* official duties inquiry, not an academic speech exception.¹⁵⁶ Indeed, because Adams's speech was private speech, *Garcetti's* official duties inquiry did not bar Adams's speech from First Amendment protection.¹⁵⁷ As Professor Bauries clarified, despite the court's apparent recognition of an academic speech exception to *Garcetti*, the court's reasoning shows that if Adams "had written provocatively . . . on the subject of criminology,

150. 484 F.3d 687, 694 n.11 (4th Cir. 2007) (holding that *Garcetti's* public employee speech doctrine should not apply to cases involving speech related to teaching in K-12 settings).

151. *Adams*, 640 F.3d at 563.

152. *Id.* at 564 (emphasis added).

153. *Id.*

154. *Id.*

155. *Id.*

156. As Professor Bauries explained:

[R]ather than carving out an exception to the *Garcetti* rule, as some have understandably, but incorrectly, read the decision to do, the Fourth Circuit, after discussing at length the "reservation" of the academic speech issue in *Garcetti* itself, simply applied the *Garcetti* rule and found Adams's speech to fall outside of the exemption due to an insufficient relationship between Adams's political speech about academia and other topics and his normal job duties as a criminology professor.

Scott R. Bauries, *Individual Academic Freedom: An Ordinary Concern of the First Amendment*, 83 MISS. L.J. 677, 725–26 (2014).

157. *Adams*, 640 F.3d at 564.

and his colleagues had retaliated against him for that, then his speech would have been directly applied to his official duties, and the *Garcetti* exemption would have applied.”¹⁵⁸

VI. THE OTHER SIDE OF THE DIVIDE: THE NINTH CIRCUIT’S SOLUTION TO *GARCETTI*’S UNCERTAINTY

In January 2014, the Ninth Circuit recognized and applied an academic speech exception to *Garcetti*, extending further than any other federal court of appeals to provide First Amendment protections for the work of university professors and faculty. The case’s relevant background facts, the district court’s analysis, and the Ninth Circuit’s analysis are set forth below.

A. Background Facts

Plaintiff David Demers worked as a tenured associate professor at Washington State University (WSU) in the Edward R. Murrow College of Communication (Murrow School).¹⁵⁹ Demers was involved in the Murrow School’s Structure Committee (Committee), which, in late 2006, was considering restructuring the College of Communication.¹⁶⁰ At that time, the Murrow School faculty was divided between Communications Studies and Mass Communications; through his Committee role, Demers advocated to re-structure the Murrow School by separating the two faculties.¹⁶¹ By separating the two faculties, Demers believed that the Mass Communications faculty would be strengthened by being able to appoint a director with a strong professional background and provide prominent roles to faculty with professional backgrounds.¹⁶² When he proposed this idea to the other Committee members, Demers roused considerable disagreement.¹⁶³

In January 2007, after proposing his idea to the Committee and causing discord, Demers drafted a two-page pamphlet, called the *7-Step Plan for Improving the Quality of the Edward R. Murrow School of Communication (7-Step Plan)*.¹⁶⁴ The cover of Demers’s 7-Step Plan indicated that Demers’s personal publishing company, Marquette Books, LLC, was responsible for preparing and circulating the pamphlet, and that Demers’s company had no ties with WSU.¹⁶⁵

In Demers’s 7-Step Plan, he detailed the idea that he had previously proposed to the Committee about separating the two faculties.¹⁶⁶ These seven steps were:

1. Separate the mass communication program from the communication studies program at WSU—i.e., create two separate units;

158. Bauries, *supra* note 156, at 726.

159. Demers v. Austin, 746 F.3d 402, 406 (9th Cir. 2014).

160. *Id.* at 407.

161. *Id.*

162. *Id.*

163. *Id.*

164. Demers v. Austin, No. CV-09-334-RHW, 2011 WL 2182100, at *10 (E.D. Wash. June 2, 2011).

165. *Id.*

166. Demers, 746 F.3d at 407.

2. Hire a director of the Edward R. Murrow School of Communication who has a strong professional background;
3. Create an Edward R. Murrow Center for Media Research that conducts joint research projects with the professional community;
4. Give professionals an active (rather than the current passive) role in the development of the curriculum in the School;
5. Give professional faculty a more active role in the development of the undergraduate curriculum for mass communication students;
6. Seek national accreditation for the “new” mass communication program;
7. Hire more professional faculty with substantial work experience.¹⁶⁷

Demers submitted his 7-Step Plan to WSU’s Provost.¹⁶⁸ Demers also circulated his 7-Step Plan to other WSU faculty and local broadcast media in Washington State.¹⁶⁹ Demers believed that by implementing his 7-Step Plan, the discipline of mass communications would be connected to the “real world of professional communicators” and thus restored.¹⁷⁰

At that time, in addition to his 7-Step Plan, Demers was also writing a book, called *The Ivory Tower of Babel (Ivory Tower)*, which he indicated criticized WSU’s “bureaucratic niche” and the social sciences as a whole.¹⁷¹ Demers described *Ivory Tower* by expressing that it “examine[d] the role and function of social science research in society. . . . Social scientific research generally has little impact on public policy decisions and almost never has a direct impact on solving social problems. Instead, social movements play a much more important role”¹⁷² When preparing his faculty report in 2006, 2007, and 2008, Demers submitted select excerpts from *Ivory Tower* to WSU’s management.¹⁷³ Though Demers primarily drafted *Ivory Tower* while on sabbatical, he did so to fulfill WSU’s scholarly publication requirement for professors and faculty.¹⁷⁴

After distributing his 7-Step Plan and *Ivory Tower* excerpts, Demers claimed that WSU retaliated against him by having: (1) knowingly used incorrect information to lower his performance review scores; (2) falsely stated that Demers had cancelled classes; (3) falsely asserted that Demers had conducted an improper process when forming Marquette Books, LLC; (4) prevented Demers from serving on certain committees; (5) prevented Demers from teaching basic Communications courses; (6) instigated two internal audits against Demers; (7) sent Demers a disciplinary warning; and (8) excluded Demers from heading the Murrow School’s journalism sequence.¹⁷⁵ Demers argued that these actions had caused him a loss in

167. *Id.* at 414–15.

168. *Id.*

169. *Id.*

170. *Id.* at 415.

171. *Id.* at 406–07.

172. *Demers*, 746 F.3d at 408.

173. *Id.*

174. *Demers*, No. CV-09-334-RHW, 2011 WL 2182100, at *11, *14.

175. *Demers*, 746 F.3d at 408.

compensation and compromised his academic reputation.¹⁷⁶ Thus, Demers brought suit against WSU for First Amendment retaliation.

B. The District Court

The district court granted WSU's motion for summary judgment.¹⁷⁷ Applying *Garcetti's* official duties inquiry, the court began its analysis by focusing on whether Demers spoke pursuant to his official duties as a professor or as a private citizen.¹⁷⁸ Because Demers distributed his 7-Step Plan while serving on the Committee, the district court reasoned that Demers had distributed the 7-Step Plan pursuant to his official job duties, not as a private citizen.¹⁷⁹ Likewise, because Demers wrote *Ivory Tower* to fulfill WSU's scholarly publication requirements, it too represented speech made pursuant to Demers's employment as professor.¹⁸⁰ Thus, *Garcetti's* threshold official duties inquiry barred Demers's First Amendment claim with no need to consider whether Demers's speech addressed matters of public concern or whether Demers's interest in free speech outweighed WSU's interests in a smoothly functioning institution.

But the court went further, speculating that even if Demers had spoken as a private citizen, neither his 7-Step Plan nor *Ivory Tower* addressed matters of public concern.¹⁸¹ The court found that because both works dealt with issues that were relevant only to the Murrow School and WSU's journalism education, neither work had any relevance to the public's evaluation of the governmental agencies.¹⁸² The court described both works as "personnel-related grievances and a workplace struggle for power," which, by their nature, are not matters of public concern.¹⁸³

C. Demers's Appeal

When Demers appealed, the Ninth Circuit reversed on grounds that Demers's speech should have been analyzed under an academic speech exception to *Garcetti*.¹⁸⁴ The court began its analysis by emphasizing that the "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."¹⁸⁵ The court then recognized an academic speech exception to *Garcetti's* official duties inquiry.¹⁸⁶ Because *Garcetti's* threshold official duties inquiry bars First Amendment claims from all but public employees who are not speaking pursuant to their official duties to therefore qualify as private citizens, the *Demers* court recognized that "*Garcetti* does not—indeed, consistent with the First

176. *Id.*

177. *Demers*, No. CV-09-334-RHW, 2011 WL 2182100, at *4.

178. *Id.* at *3.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Demers*, No. CV-09-334-RHW, 2011 WL 2182100, at *3.

184. *Demers*, 746 F.3d at 413–14.

185. *Id.* at 411 (quoting *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967)).

186. *Demers*, 746 F.3d at 412.

Amendment, cannot—apply to teaching and academic writing that are performed ‘pursuant to the official duties’ of a teacher and professor.”¹⁸⁷

With this analysis, *Demers* became the first federal court of appeals case to apply the academic speech exception. And, because the Supreme Court has not provided a relevant analytical framework to which academic speech should be applied, the *Demers* court was left to create its own framework. Thus, the court’s threshold inquiry was whether Demers’s speech was sufficiently related to academic research, scholarship, or teaching to qualify as academic speech or expression.¹⁸⁸ The remaining two steps were subject to *Pickering-Connick*’s balancing test, which requires that the employee show his speech addressed matters of public concern and that the employee’s interest in a right to free speech outweighs the employer’s interest in efficiency.¹⁸⁹

Reaching Demers’s materials, the court first “put to one side” *Ivory Tower*.¹⁹⁰ Demers did not put a draft or any of its chapters into the record; instead, Demers indicated that *Ivory Tower* contained “information that [was] critical of the academy, including some events at Washington State University.”¹⁹¹ The court’s concern, however, was that Demers had described no specific events at WSU to which *Ivory Tower* ostensibly referred.¹⁹² Given that the court was unable to evaluate the specific content of *Ivory Tower*, the court had no way to determine whether *Ivory Tower* was sufficiently related to research, scholarship, or teaching to qualify as academic expression, much less expression addressing a matter of public concern.¹⁹³

The court next turned to Demers’s 7-Step Plan, considering first whether his 7-Step Plan constituted academic speech or expression.¹⁹⁴ Conceding that it may be difficult to determine when speech is sufficiently “related to scholarship or teaching” in the words of *Garcetti*, the court reasoned that Demers’s 7-Step Plan was academic speech.¹⁹⁵ Though not traditional research, scholarship, or teaching, Demers’s 7-Step Plan was not merely “a proposal to allocate one additional teaching credit for teaching a large class instead of a seminar, to adopt a dress code that would require male teachers to wear neckties, or to provide a wider range of choices in the student cafeteria.”¹⁹⁶ By contrast, if Demers’s 7-Step Plan had been implemented, it 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.”¹⁹⁷ Thus,

187. *Id.*

188. *Id.* at 413–14.

189. *Id.* at 412.

190. *Id.* at 413.

191. *Id.* at 414.

192. *Demers*, 746 F.3d at 414.

193. *Id.* The court’s inability to evaluate *Ivory Tower* highlights a distinction between the academic speech exception and *Garcetti*’s official duties inquiry, indicating that the academic speech exception requires an inquiry into the content of the particular speech or expression. Whereas the district court, applying *Garcetti*’s official duties inquiry, was able to determine that *Ivory Tower* was not protected simply because Demers wrote it to fulfill WSU’s scholarly publication requirement, the court of appeals, applying the academic speech exception, could not determine whether *Ivory Tower* was academic speech without evaluating its specific content.

194. *Demers*, 746 F.3d at 414.

195. *Id.* at 415.

196. *Id.*

197. *Id.*

Demers's 7-Step Plan had a nexus to teaching—because of that nexus to teaching, the court concluded that Demers's 7-Step Plan qualified as academic speech.¹⁹⁸

With the threshold question of academic speech met, the court turned to *Pickering-Connick*, asking whether: (1) Demers's 7-Step Plan addressed a matter of public concern and (2) Demers's interests outweighed WSU's interests.¹⁹⁹ As to the public concern element, the court first sought to clarify two obvious ends of the public concern spectrum with respect to academic speech—first, not all professorial speech addresses matters of public concern, and second, protected academic writing is not confined to scholarship.²⁰⁰

The second consideration was key to finding that Demers's 7-Step Plan constituted academic expression on a matter of public concern. Indeed, the court acknowledged that “academics, in the course of their academic duties, also write memoranda, reports, and other documents addressed to such things as a budget, departmental structure, and faculty hiring. . . . [S]uch writing may well address matters of public concern.”²⁰¹ To illustrate this point, the court found a poignant example from *Pickering*, where a letter to the local newspaper criticizing the school district's funding methods was determined to have addressed a matter of public concern.²⁰²

Turning to Demers's 7-Step Plan, the court found that its contents addressed matters of public concern because the 7-Step Plan could “fairly be considered to relate to ‘any matter of political, social, or other concern to the community,’”²⁰³ noting that:

The first page of the Plan gave an abbreviated history of “mass communications programs . . . and the academy in general,” and placed the communications program at WSU in the broader context of similar programs at other universities. The second page recommended seven steps for improving the communications program at WSU. Demers's Plan did not focus on a personnel issue or internal dispute of no interest to anyone outside a narrow “bureaucratic niche.”

* * *

Nor did the Plan address the role of particular individuals in the Murrow School, or voice personal complaints. Rather, the Plan made broad proposals to change the direction and focus of the School. . . . The importance of the proposed steps in Demers's Plan is suggested by the fact that the Murrow School had appointed a “Structure Committee,” of which Demers was a member, to address some of the very issues addressed in Demers's Plan.²⁰⁴

198. *Id.*

199. *Id.*

200. *Demers*, 746 F.3d at 415–16.

201. *Id.* at 416.

202. *Id.*

203. *Id.* at 415 (quoting *Johnson v. Multnomah Cnty.*, 48 F.3d 420, 422 (9th Cir. 1995)).

204. *Demers*, 746 F.3d at 416.

Moreover, the manner in which Demers distributed his 7-Step Plan further showed that it addressed matters of public concern. This was because Demers distributed his 7-Step Plan to the President and Provost of WSU, to members of the Murrow School's Professional Advisory Board, to other WSU faculty, and to local broadcast media, in addition to posting his 7-Step Plan on his personal website.²⁰⁵ Demers's efforts to make his 7-Step Plan publicly available distinguished his 7-Step Plan from an employee grievance expressed to a limited audience, which, as the court indicated, would suggest a matter not of public concern.²⁰⁶

As noted above, Demers's 7-Step Plan largely criticized the Murrow School's current governance and structure issues, and proposed new procedures.²⁰⁷ Recognizing that Demers's speech closely resembled governance speech, the court acknowledged that "there may be some instances in which speech about academic organization and governance does not address matters of public concern."²⁰⁸ But in Demers's case, the court found otherwise, concluding that Demers's 7-Step Plan concerned serious suggestions about the future of an important WSU department, at a time when the Murrow School was debating some of those suggestions.²⁰⁹ Thus, Demers's 7-Step Plan addressed matters of public concern to pass muster under *Pickering-Connick's* first step.²¹⁰

Respecting *Pickering-Connick's* second step, that is, whether Demers's interests outweighed those of WSU, the court remanded the case to district court for consideration of whether: (1) WSU had a sufficient interest in controlling or sanctioning Demers's circulation of the 7-Step Plan to limit Demers's First Amendment protection; (2) the 7-Step Plan's circulation was a substantial or motivating factor in the adverse employment actions that Demers suffered; and (3) WSU had a sufficient alternative basis upon which to take adverse action against Demers, regardless of his protected speech.²¹¹ The court further instructed that "[t]he nature and strength of the interest of an employing academic institution will also be difficult to assess," causing the court to "hesitate before concluding that we know better than the institution itself the nature and strength of its legitimate interests."²¹²

The *Demers* framework, substituting an academic speech inquiry for *Garcetti's* official duties inquiry, protects academic speech and consists of a three-step analysis. First, the educator has the burden to show that his speech has a nexus to research, scholarship, or teaching to qualify as academic speech or expression.²¹³ Second, the educator must show that his speech addressed a matter of public concern.²¹⁴ Third, the educator's speech must not cause significant disruption to the employer so that the employer will be unable to meet its burden to show that its

205. *Id.*

206. *Id.*

207. *See supra* Part VI.A.

208. *Demers*, 746 F.3d at 416 (citing *Brooks v. Univ. of Wis. Bd. of Regents*, 406 F.3d 476, 480 (7th Cir. 2005) (holding that professors objecting to laboratory closings and study programs was a "classic personnel struggle—infighting for control of a department—which is not a matter of public concern.")).

209. *Demers*, 746 F.3d at 417.

210. *Id.* at 417.

211. *Id.*; *see also supra* note 95.

212. *Id.* at 413.

213. *See id.* at 414–15.

214. *Connick v. Myers*, 461 U.S. 138, 147–48 (1983); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist.*, No. 205, 391 U.S. 563, 558–69 (1968).

interest in a smoothly functioning institution of higher education outweighs the educator's interest in free speech.²¹⁵

VII. DEFINING ACADEMIC FREEDOM

The legitimacy of the Ninth Circuit's holding in *Demers*, which defines academic speech as that which has a nexus to research, scholarship, or teaching and properly provides First Amendment protection to university professors and faculty for speech and expression made pursuant to their official duties, turns on clarifying what is meant by "academic freedom." Academic freedom, although not enumerated in the Constitution, has long been viewed a "special concern" of the First Amendment.²¹⁶ However, a precise legal definition of academic freedom has yet to be provided. As Professor Byrne explained, "Lacking definition, the doctrine floats in law, picking up decisions as a hull does barnacles."²¹⁷

As set forth below, searching for a definition of academic freedom shows that academic freedom should function to strike a proper balance between the autonomy of the individual and institution. *Demers*'s three-step analytical framework achieves this balance.

A. Academic Freedom Seeks to Properly Balance the Autonomy of the Individual and Institution

Courts and commentators alike indicate that "academic freedom" is susceptible to at least two possible definitions, each with a corresponding application. The first possibility is that academic freedom applies to protect the individual's research, scholarship, and teaching from the institution's restraint or direction.²¹⁸ The

215. See *Demers*, 746 F.3d at 417.

216. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978).

217. *Special Concern*, *supra* note 5, at 252–53. Though such an inquiry is beyond this Article's scope, many commentators have questioned whether academic freedom can be accurately classified as a constitutional right. *Garcetti* itself raised this concern, with Justice Kennedy noting that there "is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests . . ." *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006). In contrast, Justice Souter seemed to consider it resolved that academic freedom is a First Amendment right, emphasizing that he hoped that the majority did "not mean to imperil *First Amendment* protection of academic freedom . . ." *Id.* at 438 (Souter, J., dissenting) (emphasis added). See generally William Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, in *THE CONCEPT OF ACADEMIC FREEDOM* 59, 77 (E. Pincoffs ed., 1972) (explaining that academic freedom is a First Amendment right that should be distinguished from the general protection of free speech because university professors and faculty comprise a vocation that serves to critically examine learning and social values while generating new knowledge). But see MATTHEW W. FINKIN & ROBERT C. POST, *FOR THE COMMON GOOD: PRINCIPLES OF ACADEMIC FREEDOM* 7 (2009) (Professors Finkin and Post argue that academic freedom is a professional standard, not a constitutional standard, advocating that "academic freedom consists of the freedom to pursue the scholarly profession according to the standards of that profession."). In this regard, "[t]he academic freedom decisions of the Supreme Court reveal that there has been some convergence of the professional and constitutional standards over time, at least with respect to expanding academic freedom to protect academic governance matters, as well as research and teaching." Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 *GEO. L.J.* 945, 985 (2009). *Adams v. Trustees of the Univ. of N.C. Wilmington*, 640 F.3d 550 (4th Cir. 2011), discussed above, where a criminology professor spoke on religious issues unrelated to his professorial duties, highlights this convergence of professional and constitutional standards. See *supra* Part V.

218. See, e.g., William W. Pendleton, *The Freedom to Teach*, in *ACADEMIC FREEDOM: AN EVERYDAY CONCERN* 11–12 (Benjamin et al. eds., 1994).

second possibility is that academic freedom applies to protect the institution's ability to organize and offer a curriculum without interference from the government, big business, and the individuals whom it employs.²¹⁹

At face value, these two possible definitions of academic freedom seem paradoxical. Indeed, if a university could simply fire professors or faculty members for anything that they say, teach, or write, the professor or faculty member would argue that his right to academic freedom was undermined by the institution. Likewise, if the institution had no means by which to set standards, limit, or otherwise direct professors and faculty in their research, scholarship, and teaching, the institution would necessarily argue that its right to academic freedom was undermined by the individual.

Reconciling this paradox requires concluding that academic freedom cannot be mutually exclusive. Thus, both the individual's and institution's interests deserve proper weight. Despite many courts applying mutually exclusive definitions of academic freedom,²²⁰ academic freedom should function to establish a balance between the autonomy of the individual and institution. Specifically, academic freedom should provide a right "to engage in professional speech within a discipline without *extraneous* restraint."²²¹ Therefore, academic freedom is best understood as "encompass[ing] *both* the ongoing health of universities as institutions that promote the growth of disciplinary knowledge *and* the capacity of individual scholars to promote and disseminate the results of disciplinary inquiry."²²²

Perhaps the most influential explication of academic freedom is found in the *1940 Statement of Principles on Academic Freedom* (1940 Statement) set forth by the American Association of University Professors (AAUP).²²³ Though the 1940 Statement is not legal authority, it "has been endorsed by over 180 educational organizations and . . . has become 'the general norm of academic practice in the United States.'"²²⁴ In the 1940 Statement, the AAUP articulated three illuminating principles, all of which seek to properly balance the autonomy of the individual and institution:

219. *Id.* at 12; *see also* HOFSTADTER & METZGER, *supra* note 6, at 413–67 (discussing the additional tension that exists between academic freedom and big business).

220. *See, e.g.*, *Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153, 172 n.14 (3d Cir. 2008) ("[O]ur precedent has consistently demonstrated that it is the educational institution that has a right to academic freedom, not the individual teacher."); *Urofsky v. Gilmore*, 216 F.3d 401, 415 (4th Cir. 2000) ("Significantly, the [Supreme] Court has never recognized that professors possess a First Amendment right to determine for themselves the content of their courses and scholarship, despite opportunities to do so."). *But see* *Hopwood v. Texas*, 78 F.3d 932, 943 n.25 (5th Cir. 1996) ("Saying that a university has a First Amendment interest in this context is somewhat troubling . . . [t]he First Amendment generally protects citizens from the actions of government, not government from its citizens."); Richard H. Hiers, *Institutional Academic Freedom or Autonomy Grounded upon the First Amendment: a Jurisprudential Mirage*, 30 *HAMLIN L. REV.* 1, 4 (2007) (clarifying that the Supreme Court has "never actually held that academic institutions are entitled to either academic freedom or autonomy under the First Amendment. Language cited in support of the proposition that the Court has so held can be found only in concurring opinions and dicta.").

221. Book Review, *supra* note 79, at 165 (emphasis added).

222. ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM* 77 (2012) [hereinafter *DEMOCRACY*]; *see also* Pendleton, *supra* note 218, at 12.

223. AM. ASS'N OF UNIV. PROFESSORS & ASS'N OF AM. COLLS., *1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE WITH 1970 COMMENTS* 14 [hereinafter *1940 STATEMENT ON ACADEMIC FREEDOM*], available at <http://www.aaup.org/file/1940%20Statement.pdf>.

224. *DEMOCRACY*, *supra* note 222, at 65.

1. Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.
2. Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.
3. College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.²²⁵

These three key principles enshrine values that were previously set forth in the AAUP's *1915 Declaration of Principles on Academic Freedom and Tenure* (1915 Declaration).²²⁶ The 1915 Declaration provided that the "liberty of the scholar within the university to set forth his conclusions, be they what they may, is conditioned by their being conclusions gained by a scholar's method and held in a scholar's spirit"²²⁷ Emphasizing the individual, the 1915 Declaration was drafted when employment at-will stood at its zenith, allowing employers, including universities, to fire employees "for good cause, for no cause, or even for cause morally wrong, without thereby being guilty of a legal wrong."²²⁸ Indeed, two chief drafters of the 1915 Declaration, Edwin R.A. Seligman and Arthur O. Lovejoy, were "intimately acquainted with and appalled by application to the professoriat of the American doctrine of employment-at-will."²²⁹ But seeking to balance the individual's and the institution's interests, the 1915 declaration stressed that the individual's work must be "the fruits of *competent* and *patient* and *sincere* inquiry."²³⁰

The 1940 Statement's three principles illustrate that academic freedom carries with it rights and duties for both the individual and institution. Regarding the individual, the 1940 Statement acknowledges that professors and faculty, having re-

225. 1940 STATEMENT ON ACADEMIC FREEDOM, *supra* note 223, at 14.

226. DEMOCRACY, *supra* note 222, at 65; *see also* AM. ASS'N OF UNIV. PROFESSORS & ASS'N OF AM. COLLS., 1915 DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE [hereinafter 1915 DECLARATION OF ACADEMIC FREEDOM], available at <http://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf>.

227. DEMOCRACY, *supra* note 222, at 66 (quoting 1915 DECLARATION OF ACADEMIC FREEDOM, *supra* note 228, at 298).

228. *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. 507, 519–20 (1884).

229. Robert C. Post, *The Structure of Academic Freedom*, in ACADEMIC FREEDOM AFTER SEPTEMBER 11, at 65 (Beshara Doumani ed., 1996).

230. DEMOCRACY, *supra* note 222, at 66 (quoting 1915 DECLARATION OF ACADEMIC FREEDOM, *supra* note 228, at 298) (emphases added).

ceived specialized training,²³¹ are subject to self-regulation and should be permitted to exercise professional competence in their work. Regarding the institution, the 1940 Statement expressly anticipates that institutions will establish standards and limitations, requiring that “[l]imitations of academic freedom . . . should be clearly stated in writing at the time of the appointment.”²³² This allows the institution to set, for example, standards to ensure quality scholarship. So long as the institution establishes standards that comport with legitimate norms of the respective academic discipline, academic freedom must function to allow the institution to set appropriate standards for and limitations on its professors and faculty.²³³ Like First Amendment protection in other contexts, a First Amendment right to academic freedom should not be understood as an absolute right.²³⁴

B. *Demers* Serves as the Proper Analytical Framework

Consistent with the 1940 Statement’s three principles, the *Demers* framework serves to protect academic freedom for both the individual and institution by seeking to arrive at a proper balance between the autonomy of the individual and institution by means of each of its three analytical steps.

First, to protect the individual’s autonomy, the *Demers* framework substitutes *Garcetti*’s threshold official duties inquiry with an academic speech inquiry tailored to encompass speech or expression having a nexus to research, scholarship, or teaching.²³⁵ As *Demers* itself suggests, governance and service speech may well qualify as protected academic speech, so long as the speech shares a nexus to research, scholarship, or teaching.²³⁶ Second, by adhering to *Pickering-Connick*’s public concern requirement, *Demers* clarifies that not *all* speech qualifying as academic speech will receive First Amendment protection; instead, the speech must address a matter of public concern.²³⁷ Third, again adhering to *Pickering-Connick*, to fully consider the institution’s autonomy, allowing the institution to set standards ensuring quality scholarship and professional conduct as the 1940 Statement intended, *Demers* requires that the individual’s interest outweigh the institution’s.²³⁸ In fact, *Demers* specifically instructs that the “nature and strength of the interest of an employing academic institution will be difficult to assess,” and that courts should “hesitate before concluding that [courts] kn[o]w better than the institution itself the nature and strength of its legitimate interests.”²³⁹ The *Demers* framework, then, is the proper means by which to protect academic freedom, giving full consideration to both the individual and institution.

231. DEMOCRACY, *supra* note 222, at 64–68.

232. 1940 STATEMENT ON ACADEMIC FREEDOM, *supra* note 223, at 14.

233. See Van Alstyne, *supra* note 217, at 71–77; DEMOCRACY, *supra* note 222, at 67.

234. See Van Alstyne, *supra* note 217, at 71–81.

235. *Demers v. Austin*, 746 F.3d 402, 413 (9th Cir. 2014). The court further noted that “the degree of freedom an instructor should have in choosing what and how to teach will vary depending on whether the instructor is a high school teacher or a university professor.” *Id.*

236. See *id.* at 413–17.

237. See *Connick v. Myers*, 461 U.S. 138, 147–48 (1983); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 558–69 (1968); *Demers*, 746 F.3d at 414–16.

238. *Demers*, 746 F.3d at 415–16.

239. *Id.* at 413.

VIII. DEMERS APPLIED

Having shown that *Demers* presents the proper framework under which academic speech and expression should be analyzed, the discussion set forth below revisits the cases discussed in Parts IV and V and applies the *Demers* framework, seeking to determine whether *Demers* would have led to a different outcome. Because *Gorum*, *Savage*, and *Gee* are similar in that these courts did not resolve whether an academic speech exception may exist, these cases are discussed collectively. Because *Adams* diverged in recognizing the existence of an academic speech exception, *Adams* is discussed separately.

A. A Second Look at *Gorum*, *Savage*, and *Renken*

Gorum represents one end of the spectrum, where applying *Demers* would produce the same result. *Savage* represents a middle ground, where *Demers* likely would produce the opposite result. *Renken* represents another end of the spectrum, where *Demers* would produce a different outcome.

Gorum, where the court held that *Gorum*'s speech at the student disciplinary hearing and in rescinding Sessoms's invitation to speak at a breakfast was not protected academic speech, establishes one end of the spectrum.²⁴⁰ *Gorum* shows that if the Third Circuit were to recognize and apply an academic speech exception, the Third Circuit's definition of academic speech would be narrow, providing university professors and faculty with little First Amendment protection unless their expression was traditional research, scholarship, or teaching.²⁴¹ Any other speech could arguably be characterized as governance speech, even if it had a nexus to academic matters, found that it was not sufficiently related to academic speech or expression, linked to official duties, and therefore deemed unprotected.²⁴²

However, applying *Demers*'s framework to the facts of *Gorum* would likely not change *Gorum*'s outcome. Though *Demers*'s definition of academic speech encompasses speech with a nexus to research, scholarship, or teaching, governance and service speech included, neither *Gorum*'s speech at the disciplinary hearing nor rescinding Sessoms's invitation had any effect on research, teaching, or scholarship.²⁴³ Perhaps the *Gorum* court was correct when it stated that *Gorum*'s speech was "so clearly" not speech related to scholarship or teaching.²⁴⁴ But if *Demers* had protected *Gorum*'s speech as academic speech, *Gorum*'s speech may have addressed a matter of public concern because it dealt with matters beyond *Gorum*'s private interests, implicating a student's consequences for disciplinary violations.²⁴⁵ Moreover, because *Gorum* would have had a significant interest in a right to free speech so as to adequately represent the student at the disciplinary hearing, *Gorum*'s interests may have outweighed DSU's interests in suppressing *Gorum*'s

240. See *supra* Part IV.A.

241. See *Gorum v. Sessoms*, 561 F.3d 179, 185–86 (3d Cir. 2009).

242. KAPLIN & LEE, *supra* note 33, at 787.

243. Compare *supra* Part IV.A with *supra* Part VII.B.

244. *Gorum*, 561 F.3d at 186 (emphasis added).

245. See *Connick v. Myers*, 461 U.S. 138, 146 (1983) (stressing the speech's community importance).

speech.²⁴⁶ But even so, because Gorum admitted to having forged grades for 48 students, Gorum's misconduct presented DSU with a sufficient alternative basis upon which to discharge Gorum, regardless of whether Gorum engaged in any protected academic expression.²⁴⁷

Savage, where the court held that Savage's book recommendation was not protected academic speech, represents the middle ground.²⁴⁸ The *Savage* court's analysis shows that if the Sixth Circuit were to recognize and apply an academic speech exception, its application would be limited by a very narrow definition of academic speech.²⁴⁹ Indeed, Savage's book recommendation containing the anti-homosexual chapter was certainly related to teaching on grounds that the book was proposed for assignment to *all* incoming freshman.²⁵⁰ But despite that close nexus to teaching, the *Savage* court held that Savage's book recommendation was only "loosely related," if at all, to academic speech or expression.²⁵¹ Thus, the *Savage* court's conclusion that Savage's speech was not protected academic speech indicates that the Sixth Circuit's definition of academic speech would be more restrictive than the Third Circuit's definition, encompassing only research, scholarship, and teaching if it is part of an official course curriculum.²⁵²

Applying the *Demers* framework to the facts of *Savage* suggests that Savage's speech would likely be protected academic speech. Savage's speech was very similar to Demers's speech because, like Demers's 7-Step Plan, Savage's book recommendation had a nexus to material that would be taught on the basis that all incoming freshman would have been assigned to read Savage's recommended book.²⁵³ Though it could be argued that Savage's book recommendation was not academic speech because it was not associated with an official course, *Demers* does not impose this requirement.²⁵⁴ Moreover, Savage's book recommendation may have addressed matters of public concern because the book would have been widely distributed to all incoming freshman.²⁵⁵ But even if Savage's book recommendation had addressed matters of public concern, OSU would have had a legitimate interest in regulating the books with which incoming freshman would be welcomed to OSU, and this legitimate interest would have likely outweighed Savage's interest in a right to freely propose his recommended book.²⁵⁶

At the opposite end of the spectrum is *Renken*, where the court held that Renken's speech on the NSF grant was not protected academic speech.²⁵⁷ The fact that the *Renken* court did not inquire into the possible existence of an academic speech exception may have been central to its holding. The *Renken* court did, however, treat Renken's speech on the NSF grant as concerning teaching, specifically

246. See *supra* Part VII.B.

247. See *supra* text accompanying note 95.

248. See *supra* Part IV.B.

249. *Savage v. Gee*, 665 F.3d 732, 736–37 (6th Cir. 2012).

250. *Id.* at 735.

251. *Id.* at 739.

252. Compare *supra* Part IV.A, with *supra* Part IV.B.

253. Compare *supra* Part IV.B, with *supra* Part VII.B.

254. See *supra* Part VII.B.

255. See *Connick v. Myers*, 461 U.S. 138, 146 (1983) (stressing the speech's community importance and context).

256. See *supra* Part VII.B.

257. See *supra* Part IV.C.

noting that in “fulfillment of his acknowledged teaching and service responsibilities,” Renken applied for the NSF grant.²⁵⁸ But because the *Renken* court did not address whether an academic speech exception may exist, there is no indication as to what the Seventh Circuit’s relevant definition of academic speech would be if the Seventh Circuit were to recognize and apply an academic speech exception. Nonetheless, based on the conclusion that Renken’s speech was related to teaching under *Garcetti*’s official duties inquiry, *Renken* may be very similar to *Demers* on grounds that the Seventh Circuit’s definition of academic speech would likely encompass speech with a nexus to be research, scholarship, or teaching, perhaps even governance speech.²⁵⁹

Under the *Demers* framework, Renken’s speech likely would have been protected academic speech. Because Renken’s speech regarding the NSF grant shared a necessary nexus to material that Renken would teach, *Demers*’s definition of academic speech would have encompassed Renken’s speech.²⁶⁰ Likewise, because the NSF grant touched on Renken’s course curriculum, in addition to expressing concerns that UWM’s conditions violated NSF regulations, Renken’s speech very likely addressed matters of public concern.²⁶¹ And, Renken’s legitimate interest in tailoring his course curriculum and ensuring that UWM complied with NSF regulations would have outweighed UWM’s interest in suppressing Renken’s speech.²⁶²

In sum, applying the *Demers* framework to the cases set forth above shows that *Demers* balances the interests of both the individual and institution, ensuring that each is given proper consideration.

B. Revisiting *Adams*

In *Demers*, the Ninth Circuit cited to *Adams*, stating that *Adams* supported recognizing and applying an academic speech exception to *Garcetti*.²⁶³ Though *Adams* indeed recognized the existence of an academic speech exception, *Adams* and *Demers* are different in two key ways, thereby causing *Adams*’s rationale to largely undermine *Demers*.

First, the facts in *Adams* stand inapposite to the facts in *Demers*. In *Adams*, Adams spoke and wrote on religious issues, and because Adams was a criminology professor, Adams’s religious speech was therefore private speech on the basis that it was related to none of his official duties.²⁶⁴ But in *Demers*, Demers wrote his 7-Step Plan as part of his Committee role.²⁶⁵ Thus, in *Adams*, the speech had no connection with Adams’s employment, whereas in *Demers*, the speech and Demers’s official duties were one and the same. In the first instance, Adams’s speech did not

258. *Renken v. Gregory*, 541 F.3d 769, 773 (7th Cir. 2008).

259. *See supra* Part VII.B.

260. *See supra* Part VII.B.

261. *See Pickering v. Bd. of Educ. of Twp. High Sch. Dist., No. 205*, 391 U.S. 563, 571 (1968) (“[W]hether a school system requires additional funds is a matter of legitimate public concern . . .”).

262. *See supra* Part VII.B.

263. *Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2014) (referring to *Adams* and stating that “[o]ne of our sister circuits agrees.”).

264. *Adams v. Trustees of the Univ. of N.C. Wilmington*, 640 F.3d 550, 563–64 (4th Cir. 2011).

265. *Demers*, 746 F.3d at 414.

become unprotected under *Garcetti's* official duties inquiry; in the latter, Demers's speech would have been categorically unprotected.²⁶⁶

Second, the Fourth Circuit's recognition of an academic speech exception and the Ninth Circuit's application of the academic speech exception suggest differing reaches of the exception altogether. In *Adams*, the court acknowledged that the academic speech exception would not apply in certain instances.²⁶⁷ Specifically, if a "public university faculty member's assigned duties include a specific role in declaring or administering university policy, as opposed to scholarship or teaching . . . *Garcetti* may apply."²⁶⁸ In *Demers*, however, Demers held a committee role in declaring and administering new university policy.²⁶⁹ And, indeed, Demers's 7-Step Plan itself advocated for declaring new university policy.²⁷⁰ Though the *Demers* court found that Demers's 7-Step Plan was sufficiently related to research, scholarship, or teaching to qualify as academic speech because of its nexus to what would be taught at the Murrow School, that conclusion sits inapposite to *Adams*, where the court's "declaring or administering university policy" limitation would likely have excluded Demers's 7-Step Plan from the definition of academic speech.²⁷¹ This limitation would therefore have caused *Garcetti's* official duties inquiry to apply, indicating that the Ninth Circuit's definition of academic speech is broader than the Fourth Circuit's.²⁷²

Nonetheless, applying *Demers* to the facts of *Adams* would not have produced a different result, due to the fact that the *Adams* court concluded that Adams's speech was protected under *Garcetti's* official duties inquiry.²⁷³ *Demers* would have applied to hold that Adams's speech was protected academic speech because of its nexus to Adams's research, scholarship, and teaching, but the outcome would be no different. And, though Adams's speech is protected under both *Garcetti* and *Demers*, Adams's speech very likely did not address a matter of public concern because Adams spoke about personal religious beliefs.²⁷⁴ Likewise, even if Adams's speech had been on a matter of public concern, UNCW's interest in setting legitimate scholarship standards for professors and faculty would have outweighed Adams's interest to speak freely on religious beliefs unrelated to his work as criminology professor.²⁷⁵

IX. AN ACADEMIC SPEECH EXCEPTION IS NECESSARY

Universities perform many essential functions, undoubtedly occupying a special role in American society. In addition to educating students and preparing them for modern professions, the university serves the common good and "epitomizes a liberal faith that a free people can, like the college itself, cast off authoritarianism

266. See *Garcetti v. Ceballos*, 547 U.S. 410, 421–22 (2006).

267. *Adams*, 640 F.3d at 563–64.

268. *Id.* at 563.

269. *Demers*, 746 F.3d at 414.

270. *Id.* at 415.

271. Compare *Demers*, 746 F.3d at 414, with *Adams*, 640 F.3d at 563.

272. Compare *supra* Part V, with *supra* Part VII.B.

273. See *supra* Part V.

274. See *Connick v. Myers*, 461 U.S. 138, 146 (1983) (stressing the speech's community importance).

275. See *supra* Part VIII.B.

without lapsing into total relativism or incoherence.²⁷⁶ The future of disinterested scholarship and teaching—the tenets of the modern university—requires that university professors and faculty enjoy a First Amendment right to free speech and expression in performing their official duties.

As set forth in Part I, academic freedom faces three primary sources of tension: the individual, the institution, and the judiciary.²⁷⁷ Indeed, “the institutional setting, the educational objective, and the meaning and status of academic freedom are, as we have seen, intimately connected.”²⁷⁸ *Demers* properly safeguards academic freedom by seeking to arrive at a proper balance between the autonomy of the individual and institution.²⁷⁹ In contrast, *Garcetti*’s threshold official duties inquiry suppresses academic freedom by categorically barring research, scholarship, and teaching from First Amendment protection because these duties stand at the core of university professors and faculty.²⁸⁰ This categorical exclusion undermines the essence of academic freedom by granting unfettered power to the institution.²⁸¹

Nonetheless, arguments against an individual First Amendment right to academic freedom indeed exist. In the context of recognizing an academic speech exception to *Garcetti*’s official duties inquiry, the argument against individual academic freedom centers on the fact that the Court left the question open.²⁸² But beyond *Garcetti*’s context, arguments against individual academic freedom primarily hinge on a lack of clear constitutional support from the Framers and the majority of courts’ persistent unwillingness to give a protective analytical structure to the doctrine.²⁸³ Professor Pendleton, who advocated on behalf of a right to individual academic freedom, identified examples of common additional concerns that run contrary to recognizing an individual First Amendment right to academic freedom:

[T]he temptation remains to make things “better” by imposing controls on the classroom. Should not students be free from error in instruction? Should not students be free from fear, confusion, intimidation, and belittlement? Should not universities protect students from improper views, outdated theories, and distorted data? If faculty remain to teach as they wish, will they not release evils of the worst sort on the impressionable young?²⁸⁴

These concerns are valid and should not be overlooked. But the routine answers to these concerns, which are to add additional administrative powers and increased classroom intrusion, oversight, and regulation,²⁸⁵ disregard that university professors and faculty possess professional competence and integrity. These answers “are supplied because they are easy and they appeal to those who little under-

276. *Special Concern*, *supra* note 5, at 288.

277. *See supra* Part I.

278. *See* HOFSTADTER & METZGER, *supra* note 6, at 277.

279. 1940 STATEMENT ON ACADEMIC FREEDOM, *supra* note 223, at 14.

280. *See Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2014).

281. *See Special Concern*, *supra* note 5, at 255.

282. *See Garcetti*, 547 U.S. at 421.

283. *Special Concern*, *supra* note 5, at 331–32; Stuller, *supra* note 4, at 302.

284. Pendleton, *supra* note 218, at 12.

285. *Id.*

stand education,²⁸⁶ and thus, these answers “suffer from a lack of academic purpose, scholarly direction, and educational integrity.”²⁸⁷ Therefore, these answers have the effect of undermining academic freedom by taking autonomy away from professors and faculty, who are most qualified to make decisions on many academic matters, and entrusting the institution with unfettered power to make decisions that may well be illegitimate without considering academic freedom’s proper balance.

In contrast, *Demers* allows courts to consider these valid concerns, ensuring that neither the individual nor institution will have unfettered control. *Demers* properly acknowledges that freedom in research, scholarship, and teaching, subject to legitimate limitations imposed by the institution, is fundamental to academic freedom and the advancement and creation of both truth and knowledge.²⁸⁸ Applying *Demers* provides professors and faculty with greater job security and allows them to exercise professional competence in pursuing the “pedagogy and content of their classes as they judge best,”²⁸⁹ without fear of retaliation or adverse employment action. This necessarily fosters meaningful and disinterested research, scholarship, and teaching. Academic freedom was never designed to place unfettered power in the hands of any source, and doing so spells certain disaster.²⁹⁰ As the Supreme Court emphasized in *Sweezy v. New Hampshire*, “[t]eachers 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.”²⁹¹

A. The Academic Speech Exception’s Scope

The academic speech exception should apply in universities, where the need for academic freedom is not only greatest, but essential.²⁹² As the Supreme Court acknowledged in *Garcetti*, a constitutional right to academic freedom should protect speech related to academic scholarship or classroom instruction.²⁹³ But constraining the academic speech exception to protect only traditional academic research, scholarship, and teaching in universities ignores many important, additional roles that professors and faculty routinely perform.

To engage in essential and critical collaboration, discourse, and inquiry, professors and faculty must enjoy freedom of speech and expression in more than just traditional research, scholarship, and teaching. Fostering universities that serve the common good requires that professors and faculty be able to freely conduct research, collaborate and engage with diverse colleagues and students, and contribute

286. *Id.*; see also *Demers*, 746 F.3d at 413 (“The nature and strength of the public interest in academic speech will often be difficult to assess. . . . The nature and strength of the interest of an employing academic institution will also be difficult to assess. . . . [R]ecognizing our limitations, we should hesitate before concluding that we know better than the institution itself the nature and strength of its legitimate interests.”).

287. Pendleton, *supra* note 218, at 11–12.

288. 1940 STATEMENT ON ACADEMIC FREEDOM, *supra* note 223, at 14.

289. Pendleton, *supra* note 218, at 11.

290. See 1940 STATEMENT ON ACADEMIC FREEDOM, *supra* note 223, at 14.

291. 354 U.S. 234, 250 (1957).

292. See *Gutter v. Bollinger*, 539 U.S. 306, 329 (2003) (“We have long recognized that . . . universities occupy a special niche in our constitutional tradition.”).

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

to discussions about the university's curriculum.²⁹⁴ *Demers* allows professors and faculty to do that.

X. CONCLUSION

Courts have long recognized the importance of academic freedom. But until *Demers*, academic freedom has received few protections, if any. Academic freedom should function to provide individual university professors and faculty members with First Amendment protection when conducting the research, scholarship, and teaching that they were hired to perform. At the same time, academic freedom requires that the institution be able to impose legitimate limitations and direct the professors and faculty whom it hires. The future of public universities and their valuable role requires balancing the autonomy of the individual and institution because “[p]aradoxical as it may seem, a public university would violate, not fulfill, its public duty if it interfered with the free production of the teaching and scholarship that are not merely the means of achieving its goal but the goal itself.”²⁹⁵ Though *Garcetti* left uncertain whether its threshold official duties inquiry was intended to apply to academic speech in universities, the Ninth Circuit in *Demers* properly resolved that uncertainty and provided a welcome analytical framework for academic speech that protects the future of academic freedom and disinterested research, scholarship, and teaching.

*Pat Fackrell**

294. Ross, *supra* note 12, at 1278.

295. JOAN DELFATTORE, KNOWLEDGE IN THE MAKING: ACADEMIC FREEDOM AND FREE SPEECH IN AMERICA'S SCHOOLS AND UNIVERSITIES 264 (2010).

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