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Pickering, Garcetti, & Academic Freedom

Mark Strasser[†]

INTRODUCTION

While the U. S. Supreme Court long ago recognized that individuals do not lose their free speech rights simply by virtue of being state employees,¹ the contours of those protections have been evolving over the past several decades. The proper way to apply these protections in the academic context is confusing, especially after *Garcetti v. Ceballos* in which the Court suggested that First Amendment protections do not attach insofar as individuals are speaking as employees rather than as citizens.² The circuit courts have adopted a dizzying set of rules to determine when First Amendment protections are triggered in the academic context, some distinguishing between the protections afforded to college professors and the protections afforded to primary and secondary school teachers³ and others distinguishing based on whether the expression is appropriately characterized as teaching, scholarship, or instead, something else.⁴ Still others offer a different approach.⁵ Even when the *Garcetti* exception is not triggered, the circuits offer very different interpretations of how to apply the prevailing jurisprudence. Until the Court offers greater guidance, we can only expect the circuits to continue to

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¹ *Lane v. Franks*, 134 S. Ct. 2369, 2374 (2014) (“Almost 50 years ago, this Court declared that citizens do not surrender their First Amendment rights by accepting public employment.”).

² *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

³ See *infra* notes 202–207 and accompanying text (distinguishing between First Amendment rights of college professors and those of individuals teaching in primary and secondary schools).

⁴ See *infra* notes 249–250 and accompanying text (distinguishing between speech related to professional work and speech offered as an ordinary citizen on matters of public concern).

⁵ See *infra* notes 238–267 and accompanying text (discussing whether legitimate goals like fundraising and maintaining workplace efficiency will immunize university actions under *Pickering*).

treat relevantly similar cases differently and to diverge with respect to what academic freedom includes.

Part I of this article discusses the *Pickering-Garcetti* line of cases, noting that even if the *Garcetti* exception does not apply when teaching and research are at issue, the *Pickering v. Board of Education* decision is so open-ended with respect to the proper analysis that it almost guarantees confusion in the circuits when academic freedom is at issue. Part II discusses the application of the prevailing jurisprudence in the context of public education, highlighting some of the ways in which the circuit analyses are at odds. The article concludes that the Court not only must make clear that *Garcetti* does not apply in the context of teaching and research, but also must make clear that the *Pickering* analysis must be understood differently in the academic context to preserve the constitutional values embodied in academic freedom.

I. *PICKERING* AND ITS PROGENY

The Supreme Court provided the seminal test for determining when state employees' First Amendment rights can be overridden in *Pickering v. Board of Education*.⁶ There, the Court discussed various considerations that must be balanced, and a series of subsequent cases attempted to address some of the questions that *Pickering* did not resolve. For example, the Court did not discuss whether the holding might have been different had the state employee's comments affected his working relationship with his colleagues. Nor did the Court discuss the degree to which workplace efficiency must be sacrificed as a cost of protecting First Amendment values. Regrettably, the clarifications offered in the later cases have made the jurisprudence more confusing rather than less, leaving the circuits with an increasingly muddled jurisprudence to apply.

A. *Pickering v. Board of Education of Township High School District 205*

Marvin Pickering, a high school teacher,⁷ wrote a letter to the editor appearing in the local newspaper after a school levy was defeated at the polls.⁸ Prior to the vote, a few articles had

⁶ *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, Will Cty. Ill.*, 391 U.S. 563 (1968).

⁷ *Id.* at 564.

⁸ *Id.* at 566 ("[O]n September 19, 1964, a second proposal to increase the tax rate was submitted by the Board and was likewise defeated. It was in connection with this last proposal of the School Board that appellant wrote the letter to the editor . . . that resulted in his dismissal.").

appeared in the newspaper asserting that the failure to pass the requested tax increase would result in a decline in the quality of education provided to the students.⁹ Pickering wanted to respond to those articles.¹⁰

Pickering made a few controversial allegations in that published piece. Not only did he suggest that the Board of Education had wrongly prioritized athletics over academics,¹¹ but he further claimed that the superintendent had tried to prevent teachers from expressing their lack of support for the tax increase.¹² Pickering's letter did not go unnoticed and he was fired for having expressed those views.¹³ The Supreme Court of Illinois upheld the dismissal.¹⁴ Pickering appealed to the U.S. Supreme Court.¹⁵

The Court began its analysis by noting that it has "unequivocally rejected"¹⁶ the view that "teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work."¹⁷ The Constitution strikes a balance, the Court noted, "between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."¹⁸ Needless to say, promoting efficiency in an academic context might be thought to cover a variety of institutional interests ranging from "maintaining control over the academic processes"¹⁹ to "promot[ing] the efficiency of its

⁹ *Id.* ("These articles urged passage of the tax increase and stated that failure to pass the increase would result in a decline in the quality of education afforded children in the district's schools.").

¹⁰ *Id.* ("It was in response to the foregoing material, together with the failure of the tax increase to pass, that appellant submitted the letter in question to the editor of the local paper.").

¹¹ *Id.* ("The letter constituted, basically, an attack on the School Board's handling of the 1961 bond issue proposals and its subsequent allocation of financial resources between the schools' educational and athletic programs.").

¹² *Id.* at 566 ("It also charged the superintendent of schools with attempting to prevent teachers in the district from opposing or criticizing the proposed bond issue.").

¹³ *Id.* ("The Board dismissed Pickering for writing and publishing the letter.").

¹⁴ See *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, Will Cty., Ill.*, 225 N.E.2d 1 (Ill. 1967), *rev'd*, 391 U.S. 563 (1968).

¹⁵ *Pickering*, 391 U.S. at 565 (noting "appellant's claim that the Illinois statute permitting his dismissal on the facts of this case was unconstitutional as applied under the First and Fourteenth Amendments").

¹⁶ *Id.* at 568.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ David M. Dumas, Caroline McIntyre & Katheryne L. Zelenock, Comment, *Parate v. Isibor: Resolving the Conflict Between the Academic Freedom of the University and the Academic Freedom of University Professors*, 16 J.C. & U.L. 713, 719 (1990).

services”²⁰ to requiring employees to have the ability to be collegial with coworkers.²¹

When assessing whether Pickering’s comments might impair school efficiency, the Court noted that the “statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher.”²² The Court did not discuss what would have happened if Pickering’s comments were viewed as reflecting an unwillingness to be a “team player,”²³ which might have contributed to less-than-collegial relations among employees or between Pickering and his immediate supervisor.²⁴ In *Pickering*, there was no evidence that the comments led to a deterioration of relations, if only because most coworkers seemed not to care about the comments.²⁵ But precisely because the comments seemed to do no harm, upholding First Amendment rights in this case might have little import in a different case where the expression undermined workplace efficiency.

The Court clearly wanted to prevent public employees from being coerced into silence, noting that “the threat of dismissal from public employment is . . . a potent means of inhibiting speech.”²⁶ *Pickering* can be read to provide robust protection to the right of public employees to contribute to debates about matters of public concern.²⁷ But it can also be read to afford much less protection than first appears because First Amendment rights can be overridden upon a showing that public comments have impaired working relationships. Several

²⁰ E. Edmund Reutter Jr., *Naragon v. Wharton: Tip of an Iceberg?*, 21 EDUC. L. REP. 1103, 1106 (1985).

²¹ Cf. Mary Ann Connell, Kerry Brian Melear & Frederick G. Savage, *Collegiality in Higher Education Employment Decisions: The Evolving Law*, 37 J.C. & U.L. 529, 538–39 (2011) (discussing “the federal appellate courts confirming the legitimacy of considering collegiality in a tenure denial situation”).

²² *Pickering*, 391 U.S. at 569–70.

²³ Cf. Carol A. Parker, *Tenure Advice for Law Librarians and Their Directors*, 103 LAW LIBR. J. 199, 206–09 (2011) (discussing the importance of being a team player for those seeking tenure).

²⁴ *Pickering*, 391 U.S. at 570 (“Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here.”).

²⁵ *Id.* (“Pickering’s letter was greeted by everyone but its main target, the Board, with massive apathy and total disbelief.”).

²⁶ *Id.* at 574.

²⁷ Mark Strasser, *Whistleblowing, Public Employees, and the First Amendment*, 60 CLEV. ST. L. REV. 975, 980 (2013) (“*Pickering* . . . offer[s] robust protection for state employees exercising their First Amendment rights.”); Tyler Wiese, *Seeing Through the Smoke: “Official Duties” in the Wake of Garcetti v. Ceballos*, 25 A.B.A. J. LAB. & EMP. L. 509, 529 (2010) (“The Court’s emphasis on protection of speech for public employees perhaps reached its zenith in *Pickering*, in which the Court articulated a robust test to ensure protection.”).

subsequent cases explored the degree to which First Amendment rights outweigh the interest in workplace efficiency.

B. Givhan v. Western Line Consolidated School District

Pickering made very public statements by publishing a letter to the editor in the local newspaper. Suppose, however, that he had addressed matters of public concern in private conversations. *Givhan v. Western Line Consolidated School District* addressed whether conversations made in private may nonetheless implicate First Amendment protections.²⁸

Bessie Givhan's teaching contract was not renewed²⁹ after she had a series of one-on-one conversations with her principal about whether the school's hiring practices involved racial discrimination.³⁰ The principal objected to the manner in which Givhan's comments were delivered, describing them as "insulting," "hostile," "loud," and "arrogant."³¹ At issue before the Supreme Court was whether such private conversations might trigger First Amendment protections.³² After holding that statements need not be public to trigger applicable guarantees, the Court remanded the case for a determination of whether Givhan would have been rehired but for her criticism.³³

Givhan is protective of public employees' speech in that First Amendment guarantees may be triggered even when the statements at issue are not made publicly. Here, too, however, the standard may be less protective than first appears. The principal claimed that there had been numerous occasions on which Givhan had been less than pleasant when speaking to him.³⁴ Had there been less emphasis on Givhan allegedly having offered unreasonable suggestions that the Court found were not unreasonable³⁵ and more emphasis on how Givhan had allegedly made it difficult if not impossible "for a reasonable working

²⁸ *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979).

²⁹ *Id.* at 411.

³⁰ *See id.* at 413.

³¹ *Id.* at 412.

³² *Id.* at 415–16 ("The First Amendment forbids abridgment of the 'freedom of speech.' Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public.").

³³ *See id.* at 417.

³⁴ *See Ayers v. W. Line Consol. Sch. Dist.*, 555 F.2d 1309, 1312 (5th Cir. 1977), *vacated in part sub nom., Givhan* 439 U.S. 410 ("[O]n many occasions she has taken an insulting and hostile attitude towards me and other administrators. She hampers my job greatly by making petty and unreasonable demands. She is overly critical for a reasonable working relationship to exist between us.").

³⁵ *See Givhan*, 439 U.S. at 412–13 ("[T]hose demands 'were neither "petty" nor "unreasonable"").

relationship to exist,”³⁶ the trier of fact might have been induced to believe that Givhan was not rehired for reasons of efficiency.³⁷ This suggests that the applicable jurisprudence might be much less protective depending upon the framing of the reasons for dismissal,³⁸ same underlying facts notwithstanding.

C. Connick v. Myers

An important aspect of both *Pickering* and *Givhan* was that the expressions at issue involved matters of public concern. *Connick v. Myers*³⁹ illustrates the importance of the requirement that the challenged expression be a matter of public concern rather than of mere private interest.⁴⁰

Myers, an assistant district attorney in New Orleans, distributed a questionnaire to her coworkers “soliciting the views of her fellow staff members 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.”⁴¹ She did this after being informed that she was going to be transferred to another office.⁴² The Court characterized the contents of the questionnaire as predominantly involving matters of mere private interest rather than issues of public concern.⁴³ Discussions of private matters do not trigger First Amendment protections. “When employee expression 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

³⁶ See *Ayers*, 555 F.2d at 1312.

³⁷ Cf. Strasser, *supra* note 27, at 984 (“It would not have been difficult for a district court to have found that the relationship had been too impaired to warrant reinstatement.”).

³⁸ Cf. Janelle L. Davis, *Sticks and Stones May Break My Bones, But Names Could Get Me a Mistrial: An Examination of Name-Calling in Closing Argument in Civil Cases*, 42 GONZ. L. REV. 133, 136 (2007) (quoting Rosemary Nidiry, *Restraining Adversarial Excess in Closing Argument*, 96 COLUM. L. REV. 1299, 1306 (1996)) (“The closing argument is the advocate’s primary opportunity to ‘frame[] the evidence to support her ‘theory’ of the case, presenting the explanation for the facts that most strongly helps [her side] or hurts [the other side].”); Patricia M. Wald, *Judge Arnold and Individual Rights*, 78 MINN. L. REV. 35, 37 (1993) (“Without astute counsel, plaintiffs cannot possibly know how to frame their claims.”).

³⁹ *Connick v. Myers*, 461 U.S. 138 (1983).

⁴⁰ Sarah L. Fabian, *Garcetti v. Ceballos: Whether an Employee Speaks as a Citizen or as a Public Employee—Who Decides?*, 43 U.C. DAVIS L. REV. 1675, 1684 (2010) (“*Connick* underscored the need to distinguish between speech on matters of public concern and speech on matters of private concern.”).

⁴¹ *Connick*, 461 U.S. at 141.

⁴² *Id.* at 140–41 (“Myers was notified that she was being transferred.”).

⁴³ *Id.* at 148 (“[W]ith but one exception, the questions posed by Myers to her co-workers do not fall under the rubric of matters of ‘public concern.’”).

their offices, without intrusive oversight by the judiciary in the name of the First Amendment.”⁴⁴

Regrettably, the Court offered contradictory messages with respect to the proper categorization of the relevant speech. In one part of the opinion, the Court implied that the contents of the questionnaire were purely of private interest. “We do not suggest, however, that Myers’ speech, *even if not touching upon a matter of public concern*, is totally beyond the protection of the First Amendment.”⁴⁵ But the Court later suggested in its decision that most *but not all* of the questionnaire’s contents were merely of private concern. “In this case, with but one exception, the questions posed by Myers to her coworkers do not fall under the rubric of matters of ‘public concern.’”⁴⁶ Most of the questions involved personnel issues⁴⁷ and “internal office policy,”⁴⁸ the one exception being a question asking “whether assistant district attorneys are pressured to work in political campaigns.”⁴⁹

If one of the survey questions implicated a matter of public concern, then it should be of interest whether that question played an important role in the firing. The Court noted that “Connick particularly objected . . . to a question concerning pressure to work in political campaigns which he felt would be damaging if discovered by the press.”⁵⁰ But if the expression involving a matter of public concern was thought particularly objectionable, it seems reasonable to believe that this expression in particular played a role in the firing. Would Myers have been fired anyway? That might have been the question on remand.⁵¹

The *Connick* Court noted the lack of evidence that the distribution of the questionnaire had made it difficult for Myers to perform her job.⁵² One might have thought that this lack of evidence would have been all that Myers needed to vindicate her

⁴⁴ *Id.* at 146.

⁴⁵ *Id.* at 147 (emphasis added).

⁴⁶ *Id.* at 148.

⁴⁷ *Id.* (“We view the questions pertaining to the confidence and trust that Myers’ co-workers possess in various supervisors, the level of office morale, and the need for a grievance committee as mere extensions of Myers’ dispute over her transfer to another section of the criminal court.”).

⁴⁸ *Id.* at 154.

⁴⁹ *Id.* at 149.

⁵⁰ *Id.* at 141.

⁵¹ *Cf. Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 417 (1979) (remanding case to determine whether Givhan would in fact have been rehired but for her comments); see also Mark Strasser, *What’s It to You: The First Amendment and Matters of Public Concern*, 77 MO. L. REV. 1083, 1107 (2012) (“One might then expect at least a remand to discern whether that question in particular had played a substantial role in the firing.”).

⁵² *Connick*, 461 U.S. at 151 (“We agree with the District Court that there is no demonstration here that the questionnaire impeded Myers’ ability to perform her responsibilities.”).

position. After all, the *Pickering* Court had rejected the claim that “the publication of the letter . . . would foment controversy and conflict among the Board, teachers, administrators, and the residents of the district,”⁵³ because “no evidence to support these allegations was introduced at the hearing.”⁵⁴ But the *Connick* Court took a different tack, reasoning that “[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer’s judgment is appropriate.”⁵⁵

The Court justified this deference to the employer’s judgment by explaining that it would make little sense to require “an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.”⁵⁶ The point of deferring to the employer’s judgment is to allow the employer to prevent the probable harm rather than force the public to endure interrupted or lower quality service.⁵⁷ Yet, the question before the Court was whether the distribution of the questionnaire was likely to undermine the efficiency of the district attorney’s office. If the distribution did not undermine efficiency in the office, then a court deferring to the employer’s judgment might not only fail to prevent harm but might actually cause it. For example, Myers might have been fired for reasons having nothing to do with efficiency.

The Court made its reasoning even more opaque when it “caution[ed] that a stronger showing [of disruption] may be necessary if the employee’s speech more substantially involved matters of public concern.”⁵⁸ Presumably, the Court was not suggesting that the likelihood of harm was somehow correlated with the degree to which the speech involved matters of public concern but merely that the person wrongly punished for her speech on private matters would not thereby have had her First Amendment rights infringed.

Regrettably, the Court left open what speech would have more substantially involved matters of public concern. For

⁵³ *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, Will Cty., Ill.*, 391 U.S. 563, 570 (1968).

⁵⁴ *Id.*

⁵⁵ *Connick*, 461 U.S. at 151–52; see also Stephen Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43, 49 (1988) (“[T]he Court made the *Pickering* balancing test more difficult to resolve in the employee’s favor by ruling that the mere apprehension by a supervisor that disruption of the work place might occur is a sufficient reason to tip the balance in favor of the state, even though the employee spoke on a matter of public concern.”).

⁵⁶ *Connick*, 461 U.S. at 152.

⁵⁷ See *id.* at 151–52 (“When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer’s judgment is appropriate.”).

⁵⁸ *Id.* at 152 (“Myers’ questionnaire touched upon matters of public concern in only a most limited sense.”).

example, the Court's decision did not illuminate if it would have reached a different result if the public were more interested in whether assistant district attorneys were pressured to work in campaigns or whether, instead, a greater percentage of the questions had to involve matters of public interest.⁵⁹ The Court explained "that the issue of whether assistant district attorneys are pressured to work in political campaigns is a matter of interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory dismissal."⁶⁰ Despite acknowledging this, the Court was then rather deferential to the employer when assessing whether this essential interest had been adequately protected. Such deference casts doubt on the Court's commitment to protecting the right of public employees to speak freely.

D. Rankin v. McPherson

The *Connick* Court was rather deferential to the employer with respect to whether workplace efficiency had been impaired and thus the Court did not need to offer an assessment of the kinds of considerations that might be a part of such an analysis. But an important part of the *Pickering* analysis involves the effect that challenged speech will have in the workplace so it is necessary to discuss the kinds of factors that would be relevant in any such analysis. *Rankin v. McPherson*⁶¹ offered some clues about the kinds of factors that would be appropriate to consider.

At issue in *Rankin* were the comments of Ardith McPherson, who had clerical duties in the Office of the Constable in Harris County.⁶² After hearing about the attempted assassination of President Reagan, she said, "[I]f they go for him again, I hope they get him."⁶³ Unbeknownst to her, someone overheard her comment and reported it to Constable Rankin.⁶⁴ Rankin asked McPherson if she had made the remark and then

⁵⁹ See *id.* at 148 (noting that only one of the questions involved a matter of public interest).

⁶⁰ *Id.* at 149.

⁶¹ *Rankin v. McPherson*, 483 U.S. 378 (1987).

⁶² *Id.* at 380 ("Ardith McPherson was appointed a deputy in the office of the Constable of Harris County, Texas. . . . McPherson's duties were purely clerical. Her work station was a desk at which there was no telephone, in a room to which the public did not have ready access.").

⁶³ *Id.* at 381.

⁶⁴ *Id.*

fired her when she admitted that she had.⁶⁵ McPherson challenged her firing as a violation of her First Amendment rights.⁶⁶

The Court noted that the comments involved a matter of public concern,⁶⁷ both because it was made in the context of discussing presidential policies⁶⁸ and because it was a reaction to an attempt on the President's life.⁶⁹ The Court then discussed how to evaluate the workplace efficiency element. "Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest."⁷⁰ Here, although the comment was made while at work, "there [was] no evidence that it interfered with the efficient functioning of the office."⁷¹ Indeed, her comments would not undermine her relationship with Rankin if only because they had no contact with each other.⁷² The Court held that McPherson could not be fired for her comments.⁷³

The Court pointed out some other factors, not applicable in this case, that might be applicable in a different case. For example, there was no evidence here that "McPherson had discredited the office by making her statement in public."⁷⁴ Nor had any member of the public heard her statement.⁷⁵ Because there had been no ill effects from her comments, her firing violated her First Amendment rights.⁷⁶ The Court implied, however, that a different result might have been reached if, for example, members of the public had overheard the comments.⁷⁷

⁶⁵ *Id.* at 382 ("McPherson readily admitted that she had made the statement, but testified that she told Rankin, upon being asked if she made the statement, 'Yes, but I didn't mean anything by it.' . . . After their discussion, Rankin fired McPherson.").

⁶⁶ *Id.* at 382.

⁶⁷ *Id.* at 386 ("Considering the statement in context, as *Connick* requires, discloses that it plainly dealt with a matter of public concern.").

⁶⁸ *Id.* ("The statement was made in the course of a conversation addressing the policies of the President's administration.").

⁶⁹ *Id.* ("It came on the heels of a news bulletin regarding what is certainly a matter of heightened public attention: an attempt on the life of the President.").

⁷⁰ *Id.* at 388.

⁷¹ *Id.* at 389.

⁷² *Id.* at 392 ("McPherson's employment-related interaction with the Constable was apparently negligible.").

⁷³ *Id.*

⁷⁴ *Id.* at 389.

⁷⁵ *Id.*

⁷⁶ *Id.* at 392 ("Given the function of the agency, McPherson's position in the office, and the nature of her statement, we are not persuaded that Rankin's interest in discharging her outweighed her rights under the First Amendment.").

⁷⁷ The Court seemed worried about the negative effects that might have resulted had those comments been heard by members of the public. *See id.* at 389 ("Nor was there any danger that McPherson had discredited the office by making her statement in public.").

E. Waters v. Churchill

Both *Connick* and *Rankin* suggest that the determination of whether expression concerns a matter of public, rather than mere private interest, is relatively straightforward.⁷⁸ There may be instances, however, in which that determination is somewhat difficult, and *Waters v. Churchill* discusses how the difficulties associated with making such a determination might have constitutional import.⁷⁹ At issue in *Waters* was whether Churchill could be fired for her comments to another nurse during a dinner break.⁸⁰ Churchill was an obstetrics nurse and Perkins-Graham was a nurse considering transferring to the obstetrics department.⁸¹

The contents of their conversation were in dispute.⁸² Churchill claimed to have expressed reservations about “the hospital’s ‘cross-training’ policy, under which nurses from one department could work in another when their usual location was overstaffed.”⁸³ Churchill worried that such a policy might compromise patient care.⁸⁴ Another nurse who overheard the conversation described it as a negative assessment of the department and of the supervisor.⁸⁵ In any event, the conversation led Perkins-Graham not to transfer to the department,⁸⁶ and Churchill was later fired for having made those comments.⁸⁷

If Churchill’s speech was simply about personnel matters, such as her relationship with her supervisor, then it would merely have been a matter of private interest.⁸⁸ However, if she was discussing patient safety or whether the hospital policies were in accord with state regulations, then her speech would have been a matter of public concern.⁸⁹

⁷⁸ See *supra* Section I.C (discussing *Connick*) & *supra* Section I.D (discussing *Rankin*).

⁷⁹ *Waters v. Churchill*, 511 U.S. 661 (1994).

⁸⁰ *Id.* at 664.

⁸¹ *Id.*

⁸² See *infra* notes 83 and 89 and accompanying text.

⁸³ *Waters*, 511 U.S. at 666.

⁸⁴ *Id.* (“Churchill believed this policy threatened patient care because it was designed not to train nurses but to cover staff shortages.”).

⁸⁵ *Id.* at 665.

⁸⁶ *Id.*

⁸⁷ *Id.* at 664.

⁸⁸ *Id.* at 667 (noting the district court’s finding that the speech was not on a matter of public concern); see also Edward J. Velazquez, *Waters v. Churchill: Government-Employer Efficiency, Judicial Deference, and the Abandonment of Public-Employee Free Speech by the Supreme Court*, 61 BROOK. L. REV. 1055, 1097 (1995) (“[B]ecause the Court does not want to involve itself in what it perceives to be primarily intra-office disputes, it is willing to construe ‘public concern’ quite narrowly.”).

⁸⁹ *Waters*, 511 U.S. at 667 (discussing the Seventh Circuit’s analysis of why this might be a matter of public concern).

The *Waters* Court explained that for government employee speech to be protected, “the speech must be on a matter of public concern, and the employee’s interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to ‘the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.’”⁹⁰ In this case, there was disagreement about whether the conversation involved a matter of public concern. One person overhearing it understood it as a critical assessment of personnel practices,⁹¹ whereas others overhearing the conversation believed that Churchill was correct when describing it as involving a concern for patient safety.⁹²

Even if the conversation did involve a matter of public concern, a separate question before the Court was whether the employer reasonably believed that it did not. The plurality explained that “Government action based on protected speech may under some circumstances violate the First Amendment even if the government actor honestly believes the speech is unprotected.”⁹³ A mistaken view that the speech is unprotected, however, will not alone establish that the First Amendment has been violated as long as the employer reasonably believed that the speech was unprotected.⁹⁴ In contrast, an adverse employment action would not be immunized from review if it was based on very weak evidence or no evidence at all that the speech was unprotected.⁹⁵

Suppose that the punished expression is a matter of public concern. The Court cautioned: “If an employment action is based on what an employee supposedly said, and a reasonable supervisor would recognize that there is a substantial likelihood that what was actually said was protected, the manager must tread with a certain amount of care.”⁹⁶ Even if the speech is on a matter of public concern, it may nonetheless be the basis for an

⁹⁰ *Id.* at 668 (citing *Connick v. Myers*, 461 U.S. 138, 142 (1983)).

⁹¹ *Id.* at 665 (“Ballew said that Churchill ‘was knocking the department’ and that ‘in general [Churchill] was saying what a bad place [obstetrics] is to work.’ Ballew said she heard Churchill say Waters ‘was trying to find reasons to fire her.’ Ballew also said Churchill described a patient complaint for which Waters had supposedly wrongly blamed Churchill.”).

⁹² *Id.* at 666.

⁹³ *Id.* at 669.

⁹⁴ *Id.* at 677 (“[E]mployer decisionmaking will not be unduly burdened by having courts look to the facts as the employer *reasonably* found them to be.” (emphasis in original)).

⁹⁵ *Id.* (“It may be unreasonable, for example, for the employer to come to a conclusion based on no evidence at all. Likewise, it may be unreasonable for an employer to act based on extremely weak evidence when strong evidence is clearly available . . .”).

⁹⁶ *Id.*

adverse action if sufficiently disruptive. In this case, “the potential disruptiveness of the speech as reported was enough to outweigh whatever First Amendment value it might have had.”⁹⁷ After all, “[d]iscouraging people from coming to work for a department certainly qualifies as disruption.”⁹⁸

Waters makes the jurisprudence more confusing rather than less. Part of the decision was written to support the government employer’s reasonable judgment that the speech was only a matter of private interest.⁹⁹ A different part of the decision was about why the contested speech was too disruptive—it dissuaded someone from transferring to the department¹⁰⁰ and the comments themselves were perceived as “unkind and inappropriate.”¹⁰¹ In addition, Churchill’s comments “threatened to undermine management’s authority”¹⁰² and there was reason for “management [to] doubt Churchill’s future effectiveness.”¹⁰³ But including all of these very different elements gives lower courts too little guidance about which factors to consider, how they should be considered, or how heavily they should be weighed. For example, accurate criticism about compromised patient care might cause an individual not to transfer to the department and thus might be viewed as disruptive. In addition, such comments might be viewed as undermining management. The post-*Waters* jurisprudence may not protect such comments.

It is not clear what to make of *Waters*,¹⁰⁴ given the facts and the likely mistaken assessment of the character of the contested conversation.¹⁰⁵ The Court characterized the employer’s mistake as reasonable,¹⁰⁶ although there were indications that the witness who recounted the conversation to the supervisor did not like Churchill.¹⁰⁷ Further, there may have been bad blood between Churchill and the supervisor, which

⁹⁷ *Id.* at 680.

⁹⁸ *Id.*

⁹⁹ *Id.* at 679–80 (“[I]f petitioners really did believe Perkins–Graham’s and Ballew’s story, and fired Churchill because of it, they must win. Their belief, based on the investigation they conducted, would have been entirely reasonable.”).

¹⁰⁰ *Id.* at 680.

¹⁰¹ *Id.*

¹⁰² *Id.* at 680–81.

¹⁰³ *Id.* at 681.

¹⁰⁴ *See id.* at 692 (Scalia, J., concurring) (“The approach to this case adopted by Justice O’Connor’s opinion provides more questions than answers, subjecting public employers to intolerable legal uncertainty.”).

¹⁰⁵ *See id.* at 666 (“Koch’s and Welty’s recollections of the conversation match Churchill’s.”).

¹⁰⁶ *Id.* at 680 (“Their belief, based on the investigation they conducted, would have been entirely reasonable.”).

¹⁰⁷ *Id.* at 666 (“Churchill claims[] Ballew was biased against Churchill because of an incident in which Ballew apparently made an error and Churchill had to cover for her.”).

might have induced the supervisor to think the worst of Churchill.¹⁰⁸ Finally, if the bad relationship between Churchill and the supervisor was the supervisor's fault, then the employer's interpretation of Churchill's comments may not have been reasonable after all.

One element to be spelled out involves the ways in which speech on a matter of public concern might be found sufficiently disruptive to justify a termination. In *Waters*, it may well be that the supervisory relationship had deteriorated, but the Court seemed not to care about *why* that was so. Such an approach might undermine the effectiveness of First Amendment guarantees. Consider *Givhan*, where the principal said that Givhan's attitude made it impossible for him to work with her. Certainly, the trier of fact might not have believed his testimony, but his judgment about his poor relationship with her might have been reasonable, even if a separate question involved who was to blame for that poor relationship.

If the Court believes the abridgment of First Amendment rights is justified as long as there is some workplace efficiency impairment, then an employer can virtually immunize her employee-punishing expression by sincerely testifying about how the employer-employee working relationship has broken down. Churchill had implied that the supervisor was responsible for their poor working relationship,¹⁰⁹ but Churchill was nonetheless characterized as undermining her supervisor's authority, and thus permissibly fired.¹¹⁰

F. *Garcetti v. Ceballos*

When Churchill was talking to Perkins-Graham, there was no question that Churchill was not speaking as an employee.¹¹¹ The importance of the difference between an individual speaking as a citizen or speaking as an employee was emphasized in *Garcetti v. Ceballos*.¹¹²

Ceballos was a deputy district attorney in Los Angeles who had certain supervisory responsibilities over other attorneys.¹¹³ He was informed by a defense attorney that there were certain irregularities in an affidavit used to justify the issuance of a

¹⁰⁸ Cf. *id.* at 665 ("Ballew also said Churchill described a patient complaint for which Waters had supposedly wrongly blamed Churchill.").

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 680–81.

¹¹¹ See *id.* at 664. (implying that the encounter was an informal discussion between two nurses during a dinner break).

¹¹² *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

¹¹³ *Id.* at 413.

warrant.¹¹⁴ Ceballos determined that the affidavit contained some “serious misrepresentations,”¹¹⁵ and he communicated his concerns to his supervisors orally and in a memo.¹¹⁶ Ceballos, his supervisors, and other interested parties attended a meeting to discuss these matters, where the discussion became contentious.¹¹⁷

The defense attorney who had alerted Ceballos to the affidavit’s deficiencies challenged the warrant in court.¹¹⁸ The court rejected the challenge, Ceballos’s testimony on behalf of the defense notwithstanding.¹¹⁹ Ceballos claimed that subsequent to that hearing he was subjected to “retaliatory employment actions.”¹²⁰ Ceballos’s supervisors denied that there had been retaliatory action and, in any event, claimed that Ceballos’s speech was not protected.¹²¹ The district court held that the memo was not protected speech because Ceballos wrote it pursuant to his employment duties.¹²² The United States Court of Appeals for the Ninth Circuit reversed, holding that Ceballos’s expression was a matter of public concern, although not reaching whether he had made the speech as a private citizen.¹²³

The *Garcetti* Court began its analysis by quoting *Pickering* and then proceeded to analyze the elements required to trigger First Amendment guarantees.¹²⁴ The first issue to be determined is “whether the employee spoke as a citizen on a matter of public concern.”¹²⁵ If not, the analysis stops in that “the employee has no First Amendment cause of action based on his or her employer’s reaction to the speech.”¹²⁶ If the employee was speaking as a citizen on a matter of public concern, then the issue is “whether the relevant government entity had an adequate justification for treating the employee differently from .any other member of the general public.”¹²⁷ The Court explained

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 414.

¹¹⁶ *Id.*

¹¹⁷ *Id.* (“The meeting allegedly became heated, with one lieutenant sharply criticizing Ceballos for his handling of the case.”).

¹¹⁸ *Id.* at 413–14.

¹¹⁹ *Id.* at 414–15.

¹²⁰ *Id.* at 415.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 415–16.

¹²⁴ *Id.* at 417 (“[T]he First Amendment protects a public employee’s right, in certain circumstances, to speak as a citizen addressing matters of public concern.” (citing *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, Will Cty. Ill.*, 391 U.S. 563, 568 (1968))).

¹²⁵ *Id.* at 418 (citing *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, Will Cty., Ill.*, 391 U.S. 563, 568 (1995)).

¹²⁶ *Id.* (citing *Connick v. Meyers*, 461 U.S. 138, 147 (1983)).

¹²⁷ *Id.*

that a “government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity’s operations.”¹²⁸

Unlike Pickering’s speech, Ceballos’s speech occurred within the office. But that did not end the Court’s analysis. “That Ceballos expressed his views inside his office, rather than publicly, is not dispositive.”¹²⁹ Further, merely because the “memo concerned the subject matter of Ceballos’ employment”¹³⁰ also did not end the analysis. Instead, the dispositive factor was that “his expressions were made pursuant to his duties as a calendar deputy.”¹³¹ The Court reasoned that “[r]estricting 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.”¹³² The Court summed up its holding by saying: “[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”¹³³

The *Garcetti* Court understood that its comments about public employee speech might have important implications in the academic context, acknowledging that “[t]here 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.”¹³⁴ Yet the Court expressly refused to address whether the *Garcetti* analysis “would apply in the same manner to a case involving speech related to scholarship or teaching.”¹³⁵

In his dissent, Justice Souter noted that the *Garcetti* rationale would seem “to include even the teaching of a public university professor.”¹³⁶ He expressed the “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

¹²⁸ *Id.*

¹²⁹ *Id.* at 420.

¹³⁰ *Id.* at 421.

¹³¹ *Id.*

¹³² *Id.* at 421–22.

¹³³ *Id.* at 421.

¹³⁴ *Id.* at 425.

¹³⁵ *Id.*

¹³⁶ *Id.* at 438 (Souter, J., dissenting).

duties.”¹³⁷ Undermining academic freedom would adversely impact teachers, students, and society as whole. In *Keyishian v. Board of Regents*, the Court noted that “[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.”¹³⁸ The *Keyishian* Court feared that imposing burdens on a teacher for her teaching or scholarship would have readily foreseeable effects— “[i]t would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living. . . .”¹³⁹ So, too, in *Sweezy v. New Hampshire*, the Court recognized the importance of not “imping[ing] upon such highly sensitive areas as . . . freedom of communication of ideas, particularly in the academic community.”¹⁴⁰

Yet, the Court’s suggestion that teaching and research *may* be more protected is not particularly helpful, because that leaves open *whether* more protection is afforded to those areas and, if so, *how much* more protection is accorded. Those issues have been left to the circuits to determine.

II. ACADEMIC FREEDOM IN THE CIRCUITS

Analyses of when teachers can be punished for their speech are quite complicated, especially post-*Garcetti*. A court must determine whether the teacher’s speech was made as a citizen or as an employee. If the teacher made the speech as an employee rather than as a citizen, then First Amendment protections will not be triggered, although they *might* be triggered if the comments were made in the context of teaching or research. Even if First Amendment protections are thereby triggered, how much protection is added has not been specified and the First Amendment protection may be overridden if the speech causes workplace disruption. Such a jurisprudential approach has led to similar cases being decided differently in the circuits.

¹³⁷ *Id.*; see also Bridget R. Nugent & Julie T. Flood, *Rescuing Academic Freedom from Garcetti v. Ceballos: An Evaluation of Current Case Law and A Proposal for the Protection of Core Academic, Administrative, and Advisory Speech*, 40 J.C. & U.L. 115, 131 (2014) (“Construing speech related to scholarship or research as pursuant to ‘official duties’ under the *Garcetti* standard runs the risk of inhibiting the free pursuit of unpopular or socially charged ideas—precisely what the First Amendment was designed to protect.”).

¹³⁸ *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

¹³⁹ *Id.* at 601.

¹⁴⁰ *Sweezy v. State of New Hampshire*, 354 U.S. 234, 245 (1957).

A. Teaching

Garcetti suggests that the First Amendment protections under the *Pickering* line of cases are not triggered insofar as an individual speaks as an employee.¹⁴¹ The *Garcetti* exception, however, may be inapplicable insofar as the employee's speech is made in the course of teaching or research.¹⁴² But even if the *Garcetti* exception is not triggered, First Amendment interests may still be outweighed if the speech causes workplace disruption,¹⁴³ which makes the determination of what constitutes workplace disruption very important.

Consider *Silva v. University of New Hampshire*, a case involving a tenured instructor at the University of New Hampshire¹⁴⁴ who taught a course in technical writing.¹⁴⁵ Students complained that some of Silva's comparisons in class¹⁴⁶ and some of his comments in the library were "personally and/or sexually offensive."¹⁴⁷ The students "all expressed a fear of going to speak to him directly because they would never wish to be alone with him."¹⁴⁸ One of the students suggested that Silva's sexual comments were pervasive.¹⁴⁹ The university created shadow classes so that students who did not feel comfortable in Silva's class could take the course with someone else.¹⁵⁰ Many students took advantage of that opportunity.¹⁵¹

Despite the evidence of workplace difficulties, as evidenced by all of the students who took the shadow class and by the student complaints, the court found that Silva's First

¹⁴¹ Jayne Chen, *When Public Employees Speak Out on Issues of Public Concern: The Applicability of Pickering in Garcetti v. Ceballos*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 642, 659 (2007) ("Justice Kennedy holds that the Pickering balancing test does not apply in *Garcetti*, and that statements made by public employees pursuant to their official duties are not subject to First Amendment protection.").

¹⁴² *Garcetti*, 547 U.S. at 425.

¹⁴³ Cf. Robert J. Tepper & Craig G. White, *Speak No Evil: Academic Freedom and the Application of Garcetti v. Ceballos to Public University Faculty*, 59 CATH. U.L. REV. 125, 180 (2009) ("The state may prove that its interest in avoiding actual disruption of the workplace outweighs the employee's right to speak out . . .").

¹⁴⁴ *Silva v. Univ. of New Hampshire*, 888 F. Supp. 293, 297 (D.N.H. 1994).

¹⁴⁵ *Id.* at 298.

¹⁴⁶ *Id.* at 300.

¹⁴⁷ *Id.*; See, e.g., *id.* at 305 ("I was on the floor in the card indexes looking up books. Don Silva stopped, saw me on my hands & knees pulling out a floor level card index. Kate & Nikki heard him say to me 'You look like you've had alot [sic] of experience on your knees.' I didn't hear him. Kate & Nikki looked at each other in disbelief and then told me.").

¹⁴⁸ *Id.* at 300.

¹⁴⁹ *Id.* at 301 ("He has yet to hold a class in which he did not make a sexually suggestive, or bluntly sexual statement.").

¹⁵⁰ *Id.* at 303.

¹⁵¹ *Id.* at 307 ("Twenty-six students, including the complainants, changed sections when presented with the opportunity.").

Amendment rights had been violated when he had been disciplined for his speech.¹⁵² The speech at issue included Silva having “described a ‘belly dancer’ as being like a bowl of jello being stimulated by a vibrator”¹⁵³ or his having described focus in technical writing as “like going in and out, side to side, and loosening up so you could find the best target area.”¹⁵⁴ Notwithstanding the obvious discomfort of some of the students, the *Silva* court concluded that the university sexual harassment policy “as applied to Silva’s classroom speech is not *reasonably* related to the legitimate pedagogical purpose of providing a congenial academic environment because it employs an impermissibly subjective standard that fails to take into account the nation’s interest in academic freedom.”¹⁵⁵ The court believed that Silva’s classroom comments had the “the legitimate pedagogical, *public* purpose of conveying certain principles related to the subject matter of his course.”¹⁵⁶

Silva might helpfully be contrasted with a United States Court of Appeals for the Sixth Circuit case, *Bonnell v. Lorenzo*.¹⁵⁷ Jon Bonnell was a teacher at MacComb Community College¹⁵⁸ who frequently used the words “fuck,” “pussy,” and “cunt” in the classroom.¹⁵⁹ Bonnell claimed that “none of the terms at issue were directed to a particular student and were only used for demonstrating an academic point,”¹⁶⁰ namely, to discuss “the chauvinistic degrading attitudes in society that depict women as sexual objects, as compared to certain words to describe male genitalia, which are not taboo or considered to be deliberately intended to degrade.”¹⁶¹

One semester, a student complained that Bonnell used lewd, obscene and sexually explicit comments in connection with stories that the class was reading.¹⁶² The student claimed to have been adversely affected mentally and emotionally, and was prepared “to take this sexual harassment complaint to the highest level of authority it can go.”¹⁶³ The school provided Bonnell with a copy of the complaint.¹⁶⁴ He made copies of it after

¹⁵² See *id.* at 313.

¹⁵³ *Id.* at 300.

¹⁵⁴ *Id.* at 301.

¹⁵⁵ *Id.* at 314 (emphasis in original).

¹⁵⁶ *Id.* at 316 (emphasis in original).

¹⁵⁷ *Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir. 2001).

¹⁵⁸ See *id.* at 802.

¹⁵⁹ See *id.* at 803.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² See *id.* at 804.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 805.

redacting the student's name, and passed out the copies to the students in his six classes¹⁶⁵ and to over two hundred faculty members.¹⁶⁶ He also gave a copy of the complaint to the local newspaper and some local TV stations.¹⁶⁷

Eventually, he was suspended for a semester.¹⁶⁸ The Sixth Circuit upheld the sanction imposed, finding that Bonnell's interest in academic freedom did not outweigh the interests of the college, which included "maintaining a disruption-free environment, and maintaining its federal funding."¹⁶⁹ Bonnell and Silva both pervasively used sexually suggestive language,¹⁷⁰ allegedly for legitimate pedagogical purposes. One was protected by the First Amendment and the other was not.

The Sixth Circuit contrasted *Bonnell* with another case it decided that same year: *Hardy v. Jefferson Community College*.¹⁷¹ *Hardy* involved a community college's decision not to renew an instructor's contract for fear that student enrollment would otherwise decline.¹⁷² Kenneth Hardy taught an Introduction to Interpersonal Communication class, "where the students examined how language is used to marginalize minorities and other oppressed groups in society."¹⁷³ He solicited examples of such language from the students and included in "their suggestions were the words 'girl,' 'lady,' 'faggot,' 'nigger,' and 'bitch.'"¹⁷⁴ One student complained¹⁷⁵ because she felt that the introduction of these words into the class was "in direct contravention of Hardy's stated policy prohibiting the use of offensive language in class."¹⁷⁶

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 806.

¹⁶⁸ *Id.* at 808.

¹⁶⁹ *Id.* at 811; *see also id.* at 823 ("[W]e believe that Defendants' purported interests, including maintaining the confidentiality of student sexual harassment complaints, disciplining teachers who retaliate against students who file sexual harassment claims, and creating an atmosphere free of faculty disruption, outweigh Plaintiff's purported interests.").

¹⁷⁰ *See Silva*, 888 F. Supp. at 299 ("In his affidavit, Silva states, 'I had used both examples in my classes on numerous prior occasions'"); *Bonnell*, 241 F.3d at 805 (including a memo written by the Dean which found that Bonnell "made it a practice (as announced to the class at the start of the term) to swear in the classroom, using such words as 'shit,' 'damn,' 'fuck,' and 'ass.'").

¹⁷¹ *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671 (6th Cir. 2001).

¹⁷² *Id.* at 674 ("When the minister threatened that African-American enrollment would decline unless the dispute was resolved to the satisfaction of the complaining student, Hardy's teaching contract was not renewed.").

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 675.

¹⁷⁵ *Id.* ("One African-American student, however, objected to the in-class use of the words 'nigger' and 'bitch,' and complained to Hardy and his superiors.").

¹⁷⁶ *Id.*

When the acting dean asked Hardy why he used offensive words in class, Hardy “attempted to explain that this and other words were analyzed as illustrations of highly offensive, powerful language, and that it was not used in an ‘abusive’ manner”¹⁷⁷ The dean mentioned that “a ‘prominent citizen’ representing the interests of the African American community had become involved and had threatened to affect the school’s already-declining enrollment if corrective action was not taken.”¹⁷⁸ Hardy was never again hired to teach after that semester.¹⁷⁹

When examining whether Hardy’s First Amendment rights had been violated, the Sixth Circuit considered whether his words involved matters of public concern. “Speech that relates ‘to any matter of political, social, or other concern to the community’ touches upon matters of public concern.”¹⁸⁰ But the court stressed that it was also important to “determine ‘the *point* of the speech in question . . . [because] [c]ontroversial parts of speech advancing only private interests do not necessarily invoke First Amendment protection.”¹⁸¹ The court noted that “Hardy’s in-class use of the objectionable word[s] [were] germane to the subject matter of his lecture on the power and effect of language.”¹⁸²

The Sixth Circuit admitted that this incident “did have the effect of creating disharmony between Hardy and the College administrators. . . .”¹⁸³ Further, the administration seemed to take quite seriously “the potential disruption in school operations and enrollment that might have occurred had Reverend Coleman become more involved in the matter.”¹⁸⁴ But the court dismissed the enrollment concern, describing it as “present[ing] a classic illustration of ‘undifferentiated fear’ of disturbance on the part of the College’s academic administrators.”¹⁸⁵ After noting that the administrators became interested “[o]nly after Reverend Coleman voiced his opposition to the classroom discussion,”¹⁸⁶ the court nowhere discussed whether the

¹⁷⁷ *Id.* at 675.

¹⁷⁸ *Id.*

¹⁷⁹ *See id.* at 674.

¹⁸⁰ *Id.* at 678 (quoting *Connick v. Meyers*, 461 U.S. 138, 146 (1983)).

¹⁸¹ *Id.* (quoting *Dambrot v. Cent. Mich. Univ.*, 55 F.3d, 1177–87 (6th Cir. 1995)).

¹⁸² *Id.* at 679.

¹⁸³ *Id.* at 681.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 682; *see also* Joseph J. Martins, *Tipping the Pickering Balance: A Proposal for Heightened First Amendment Protection for the Teaching and Scholarship of Public University Professors*, 25 CORNELL J.L. & PUB. POL’Y 649, 679 (2016) (“[T]he Sixth Circuit found the College’s prediction to be nothing more than the ‘undifferentiated fear’ of disturbance, which is never sufficient to overcome the freedom of expression.”).

¹⁸⁶ *Hardy*, 260 F.3d at 682.

Reverend could make good on the “threat[] to affect the school’s already-declining enrollment if corrective action was not taken.”¹⁸⁷ It is simply unclear whether the Sixth Circuit found that having Hardy return would not result in lower student enrollment or whether, instead, Hardy’s academic freedom rights outweighed the college’s interests, notwithstanding the legitimate fear that student enrollment might suffer and notwithstanding the strained relationship between Hardy and the administration.¹⁸⁸ The court ultimately held Hardy’s First Amendment rights had been violated.¹⁸⁹

One reason that the Sixth Circuit held Hardy’s rights to academic freedom were violated was that there had only been one instance in which the offensive words had been used¹⁹⁰ and there had been an academic purpose behind their use.¹⁹¹ Yet, the fact that there was a single incident and that the teacher had a good purpose will not always be immunizing, as a case decided in the United States Court of Appeals for the Seventh Circuit illustrates.

*Brown v. Chicago Board of Education*¹⁹² involved Lincoln Brown, a sixth grade public school teacher,¹⁹³ who had “caught his students passing a note in class [with] . . . among other things, music lyrics with the offensive word ‘nigger.’”¹⁹⁴ The Board of Education had a policy prohibiting teacher use of racial epithets in front of students regardless of motivation.¹⁹⁵ Policy notwithstanding, Brown used the opportunity to try to show why racial epithets are hurtful and should not be used.¹⁹⁶ The principal happened to witness the incident and Brown was suspended soon thereafter.¹⁹⁷

Brown challenged the suspension.¹⁹⁸ The Seventh Circuit reasoned that “[w]hether a public employee’s speech is constitutionally protected depends on ‘whether the employee

¹⁸⁷ *Id.* at 675.

¹⁸⁸ *See id.* at 682.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 681.

¹⁹¹ *Id.* at 679.

¹⁹² *Brown v. Chi. Bd. of Educ.*, 824 F.3d 713 (7th Cir. 2016).

¹⁹³ *Id.* at 714.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* Brown was accused of violating Section 3.3 of the Employee Discipline and Due Process Policy which “prohibits ‘[u]sing verbally abusive language to or in front of students.’” *See id.* at 716. Brown articulated the offensive word; *see also id.* at 718 (“Brown is indignant that he was suspended for using a racial slur while attempting to teach his students why such language is inappropriate.”).

¹⁹⁷ *Id.* at 714–15.

¹⁹⁸ *Brown*, 824 F.3d at 715.

spoke as a citizen on a matter of public concern.”¹⁹⁹ Because “Brown himself [] emphasized that he was speaking as a teacher—that is to say, as an employee—not as a citizen,”²⁰⁰ the court held that his speech was not protected.²⁰¹

The *Brown* court noted that there was some question “whether the *Garcetti* rule applies in the same way to ‘a case involving speech related to scholarship or teaching,’”²⁰² because that issue had not been before the *Garcetti* Court.²⁰³ However, the Seventh Circuit had previously “concluded that a teacher’s in-classroom speech is not the speech of a ‘citizen’ for First Amendment purposes,”²⁰⁴ at least if the teacher is in a primary or secondary school rather than in a university setting.²⁰⁵ Such a distinction was thought appropriate in light of “the long-standing recognition that academic freedom in a university is ‘a special concern of the First Amendment’ because of the university’s unique role in participating in and fostering a marketplace of ideas.”²⁰⁶ Because Brown had made the speech as a primary school teacher rather than as a citizen, his being punished did not abridge First Amendment guarantees.²⁰⁷

The Sixth Circuit has also expressed reluctance to offer First Amendment protections to primary and secondary school teachers when their in-classroom speech is at issue. *Evans-Marshall v. Board of Education*²⁰⁸ involved an English teacher, Shelley Evans-Marshall, who had gotten parent complaints when she had assigned the books *Heather Has Two Mommies*

¹⁹⁹ *Id.* (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006)) (citing *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, Will Cty., Ill.*, 391 U.S. 563 (1968)).

²⁰⁰ *Id.*

²⁰¹ *Id.* at 718 (“The Board may have acted in a short-sighted way when it suspended him for his effort to educate the students about a sensitive and socially important issue, but it did not trample on his First Amendment rights.”).

²⁰² *Id.* at 715 (quoting *Garcetti*, 547 U.S. at 425).

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ The Second Circuit has also applied *Garcetti* in the primary/secondary school context, although that case involved a union grievance filed as a result of the administration’s failure to punish a child for misbehaving in school. *See Weintraub v. Bd. of Educ. of City of N.Y.*, 593 F.3d 196, 201 (2d Cir. 2010) (“Weintraub, by filing a grievance with his union to complain about his supervisor’s failure to discipline a child in his classroom, was speaking pursuant to his official duties and thus not as a citizen.”); *see also id.* at 203 (“[U]nder the First Amendment, speech can be ‘pursuant to’ a public employee’s official job duties even though it is not required by, or included in, the employee’s job description, or in response to a request by the employer.”).

²⁰⁶ *Brown*, 824 F.3d at 716 (quoting *Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2014)).

²⁰⁷ *See id.* at 715 (“Brown’s First Amendment claim fails right out of the gate. Public-employee speech is subject to a special set of rules for First Amendment purposes.”).

²⁰⁸ *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332, 335 (6th Cir. 2010).

and *Siddhartha* to her students.²⁰⁹ When her contract was not renewed, Evans-Marshall argued that she had been subjected to retaliation for her “curricular and pedagogical choices.”²¹⁰ The Sixth Circuit explained that “when Evans-Marshall taught 9th grade English, she did something she was hired (and paid) to do, something she could not have done but for the Board’s decision to hire her as a public school teacher.”²¹¹ Noting that it might be very difficult to organize a coherent curriculum through all of high school if each teacher had the right to choose whatever texts she desired,²¹² the court held that “the First Amendment does not protect primary and secondary school teachers’ in-class curricular speech”²¹³

Yet, it should not be thought that the Sixth and Seventh Circuits are therefore viewing academic freedom at the university level as immunizing professor’s in-class comments. *Piggee v. Carl Sandburg College* involved “a part-time instructor of cosmetology at Carl Sandburg College who gave a gay student two religious pamphlets on the sinfulness of homosexuality.”²¹⁴ The student complained and the college found that the instructor had engaged in sexual harassment.²¹⁵ While this student was the only one to complain formally,²¹⁶ Piggee admitted that she had given other students those same pamphlets.²¹⁷

The Seventh Circuit did not find *Garcetti* directly relevant.²¹⁸ However, the court noted that Piggee’s speech was not only *not* directly relevant to her job but in fact might have impeded her ability to work with students.²¹⁹ In course evaluations, over half of the students in her class commented

²⁰⁹ *Id.*

²¹⁰ *Id.* at 336.

²¹¹ *Id.* at 340.

²¹² *See id.* at 341.

²¹³ *Id.* at 342. It is not clear that the Sixth Circuit is emphasizing the difference between primary and secondary education on the one hand and university education on the other. *See Savage v. Gee*, 665 F.3d 732, 738 (6th Cir. 2012) (“Savage’s speech was not protected by the First Amendment because the speech was made pursuant to his duties as Head of Reference and Library Instruction [at the University].” (citing *Evans-Marshall*, 624 F.3d at 339–40)).

²¹⁴ *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 668 (7th Cir. 2006).

²¹⁵ *Id.* (“After the college looked into the matter, it found that Piggee had sexually harassed the student.”).

²¹⁶ *Id.* at 672.

²¹⁷ *Id.*

²¹⁸ *Id.* (“The Supreme Court’s decision in *Ceballos* is not directly relevant to our problem”).

²¹⁹ *Id.* (“Piggee’s ‘speech,’ both verbal and through the pamphlets she put in Ruel’s pocket, was not related to her job of instructing students in cosmetology. Indeed, if it did anything, it inhibited her ability to perform that job by undermining her relationship with Ruel and other students who disagreed with or were offended by her expressions of her beliefs.”).

about her bringing religion into the classroom,²²⁰ which one student found especially rankling because the students had been instructed not to bring up religion in the salon.²²¹ The *Piggee* court suggested that while the contents at issue were matters of public concern²²² that alone did not establish that the discussion was appropriate in the classroom.²²³ While instructors must have some latitude in the discussion of course content as a matter of academic freedom,²²⁴ that does not give instructors license to offer extensive discussions of matters unrelated to the course's subject matter.²²⁵ By the same token, *Bonnell* suggests that instructors on the college level are not given carte blanche to make whatever comments they want in the course of their instruction.²²⁶

While the Sixth and Seventh Circuits are persuasive when suggesting that academic freedom does not immunize all actions in the teaching context,²²⁷ the courts could have been more helpful in clarifying how particular factors should be weighed. For example, the *Bonnell* court suggested that a fear of a loss of federal funding was a legitimate consideration when deciding to override an instructor's First Amendment interests,²²⁸ but the *Hardy* court dismissed concerns about whether retention of an instructor would have had a negative effect on enrollment.²²⁹ The Sixth Circuit would have been more

²²⁰ *Piggee*, 464 F.3d at 672 ("Out of eight student evaluations of Piggee's performance from the fall semester of 2001, five spoke about Piggee's emphasis on religion.").

²²¹ *Id.* ("One student wrote 'Mrs. Piggee usually inquires [sic] her religion into everyday. Some people don't always agree w/ what she feel. I think that if we are taught that we are not to speak of our religions in the salon, neither should she.'").

²²² *Id.* at 671 ("[S]peech about religion, or speech about the pros and cons of homosexual behavior, plainly deals with a topic that richly deserves full public discussion.").

²²³ *Id.* ("The real question, however, is whether the college had the right to insist that Piggee refrain from engaging in that particular speech while serving as an instructor of cosmetology.").

²²⁴ *Id.* ("[T]he instructor's freedom to express her views on the assigned course is protected.").

²²⁵ *Id.* ("No college or university is required to allow a chemistry professor to devote extensive classroom time to the teaching of James Joyce's demanding novel *Ulysses*, nor must it permit a professor of mathematics to fill her class hours with instruction on the law of torts.").

²²⁶ See *Bonnell v. Lorenzo*, 241 F.3d 800, 820 (6th Cir. 2001) ("Plaintiff may have a constitutional right to use words such as 'pussy,' 'cunt,' and 'fuck,' but he does not have a constitutional right to use them in a classroom setting where they are not germane to the subject matter, in contravention of the College's sexual harassment policy.").

²²⁷ Amy H. Candido, *A Right to Talk Dirty?: Academic Freedom Values and Sexual Harassment in the University Classroom*, 4 U. CHI. L. SCH. ROUNDTABLE 85, 85 (1997) ("We should neither allow professors to invoke academic freedom to avoid the consequences of discrimination against women in the classroom, nor allow highly constrictive regulation of classroom speech in the name of nondiscrimination to destroy the important goals of academic freedom.").

²²⁸ See *Bonnell*, 241 F.3d at 811.

²²⁹ See *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 681–82 (6th Cir. 2001).

helpful had it made clear whether the difference between *Bonnell* and *Hardy* involved the likelihood of the loss of monies or, instead, other factors.

In contrast, the United States Court of Appeals for the Second Circuit made its position relatively clear on whether academic freedom could be overridden because of financial concerns. *Dube v. State University of New York* involved the tenure denial of a professor who taught that Nazism in Germany, apartheid in South Africa, and Zionism in Israel were all forms of racism.²³⁰ There were public protests²³¹ and a threat by a legislator that he would try to get school funding reduced if Dube were permitted to continue to teach.²³² Alumni said that they would no longer donate to the university and that they would urge students to matriculate elsewhere.²³³

Dube alleged that his tenure denial was due to the controversy surrounding his teaching,²³⁴ an issue that would be settled on remand.²³⁵ When offering guidance to the lower court, the Second Circuit did not undercut the accuracy of the contention that there would have been a loss of funding from the state or from private donors had Dube been granted tenure. Nor did the court say that the loss of funding would justify the tenure denial under *Pickering*. Instead, the court suggested that Dube's First Amendment rights were violated if the controversy was the basis for his tenure denial.²³⁶ The court thereby made clear that its analysis of the issue did not depend upon the relative likelihood that funding might be reduced if the controversial professor were accorded tenure. Instead, the Second Circuit's primary concern was whether Dube spoke on a matter of public concern.²³⁷

A separate issue is whether the Second Circuit's holding accurately reflects the Court's jurisprudence. If *Pickering* permits school administrations to make tenure and promotion decisions based in part on whether a faculty member's speech

²³⁰ *Dube v. State University of N.Y.*, 900 F.2d 587, 589 (2d Cir. 1990).

²³¹ *Id.* at 597.

²³² *Id.* at 590.

²³³ *Id.*

²³⁴ *See id.* at 597 ("This and other evidence, viewed in the light most favorable to Dube and in the context of the public protests and threats to defund Stony Brook programs, could lead a reasonable jury to find that Dube was denied tenure as a result of the controversy surrounding his teaching.").

²³⁵ *See id.* at 598.

²³⁶ *Id.* ("Dube's First Amendment claim will proceed to trial and, as Judge Mishler observed, defendants may defend against that claim on the merits by contending that they denied tenure and promotion to Dube for permissible academic reasons, without regard to community pressure triggered by Dube's teaching on Zionism and racism, and that the controversy resulting from that teaching did not affect the outcome of the decision regarding tenure and promotion.").

²³⁷ *See id.*

“undermine[s] a legitimate goal or mission of the employer,”²³⁸ then one would expect *Pickering* to allow tenure decisions to be based on wealthy donor preferences. If, as the Second Circuit suggests, academic freedom must mean at the very least that professors cannot be denied tenure merely because they displease wealthy donors, then the Supreme Court must clarify how *Pickering* should be applied in the academic context.

B. *Research and Expression*

At the university level, research is often an important component of a professor’s job responsibilities. One element of research may involve applying for and receiving funding. *Garcetti* raises questions about the protections afforded to academics who are seeking grants, especially if seeking grants is either expressly part of their job or is understood to be part of their research responsibilities.

Renken v. Gregory involved a dispute between a professor and his home institution regarding how funds from a grant would be used.²³⁹ Renken applied for, and received a grant from the National Science Foundation (NSF),²⁴⁰ which was contingent on the university also providing funding.²⁴¹ The university spelled out what it would do so that the monies would be awarded,²⁴² but Renken offered a number of criticisms of the university’s proposal²⁴³ including a charge that the university’s proposal violated NSF rules.²⁴⁴ Eventually, because Renken and the university could not agree about the conditions under which the grant would be accepted, the university simply returned the grant.²⁴⁵

Renken filed suit, claiming that the grant had been returned and that his salary had been reduced in retaliation for his having criticized the university’s planned use of the grant

²³⁸ *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 680 (6th Cir. 2001) (citing *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, Will Cty., Ill.*, 391 U.S. 563, 569–70 (1968)).

²³⁹ *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008).

²⁴⁰ *Id.* at 771.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* (“Renken and Reisel sent Gregory a letter cataloguing a list of criticisms regarding the project: a lack of lab space for the project, Gregory’s proposal for the use of certain funds for the labs, Gregory’s decision about course releases related to the project, and the delay in paying undergraduates working on the project, and the CEAS’s administration delay in processing purchase orders relating to the project and the resulting loss of certain vendors.”).

²⁴⁴ *Id.* (“Citing NSF instructions regarding program solicitations Renken and Reisel contended that Gregory’s fund proposal contravened NSF regulations regarding matching funds.”).

²⁴⁵ *Id.* at 773.

funds.²⁴⁶ One of the questions at hand was whether Renken's First Amendment rights had been violated, and that depended in part on whether he was speaking as a private citizen or an employee when criticizing the university.²⁴⁷

Renken argued that because he was not required to do all of this work in relation to the NSF grant, he was speaking as a citizen rather than as an employee.²⁴⁸ However, the Seventh Circuit rejected that analysis, reasoning instead that "Renken was speaking as a faculty employee, and not as a private citizen, because administering the grant as a [principal investigator] fell within the teaching and service duties that he was employed to perform."²⁴⁹ The court further explained that "whether Renken was explicitly required to apply for grants does not address whether his efforts related to the grant, including his complaints, were a means to fulfill his employment requirements, namely teaching and research."²⁵⁰ But that analysis at least suggests that First Amendment protections will not be triggered even if a professor is sanctioned because the school's administration disagrees with the views the professor expressed in teaching or research.

The United States Court of Appeals for the Fourth Circuit has offered a much different understanding of *Garcetti*'s application in the academic context. At issue in *Adams v. Trustees of the University of North Carolina-Wilmington*²⁵¹ was a claim by Michael Adams that he had been denied promotion to full professor in retaliation for his speech. Adams had been promoted to associate professor with tenure in the Department of Sociology and Criminal Justice at the University of North Carolina-Wilmington.²⁵² Subsequent to his promotion, he "became a Christian, a conversion that transformed not only his

²⁴⁶ *Id.* ("Renken alleged that the University had reduced his pay and terminated the NSF grant in retaliation for his exercise of his First Amendment rights when he criticized and complained about the University's proposed use of the grant funds.").

²⁴⁷ *Id.* ("The district court granted the University's motion for summary judgment, concluding that Renken's complaints about the grant funding were made as part of his official duties, rather than as citizen, and therefore were not protected by the First Amendment."). The district court had also suggested that Renken's complaints about the use of the grant involved a matter of private rather than public interest. *See id.* ("Alternatively, the district court concluded that if Renken spoke as a citizen and not as part of his official duties, his speech was still not protected because it related to a matter of private interest.").

²⁴⁸ *Id.* ("Renken argues that the tasks that he conducted in relation to the grant were implemented at his discretion 'while in the course of his job and not as a requirement of his job.'" (emphasis in original)).

²⁴⁹ *Id.* at 774 (citing *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006)).

²⁵⁰ *Id.* at 774; *cf. Garcetti*, 547 U.S. at 422 ("When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee.").

²⁵¹ *Adams v. Trs. of the Univ. of North Carolina-Wilmington*, 640 F.3d 550 (4th Cir. 2011).

²⁵² *Id.* at 553.

religious beliefs, but also his ideological views.”²⁵³ He became quite vocal about those views.²⁵⁴ Some members of the university community expressed discomfort about his views and how he expressed them,²⁵⁵ as did some members of the Board of Trustees and the public more generally.²⁵⁶ At one point, he was advised by the interim chair of the department to be more “cerebral” and less “caustic.”²⁵⁷

Adams argued that he had been denied promotion to full professor in retaliation for expressing Christian views.²⁵⁸ The district court granted summary judgment to the university, at least in part, because it read *Garcetti* to suggest that Adams’ expression was made as a university employee and not as a citizen; thus the speech was not protected.²⁵⁹ The district court’s analysis was complicated by its finding that Adams’ speech was initially protected but became unprotected when submitted as part of his application for promotion.²⁶⁰ While the Fourth Circuit rejected the district court’s alchemistic approach,²⁶¹ it also chided the district court for “appl[ying] *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.”²⁶²

²⁵³ *Id.*

²⁵⁴ *Id.* (“Adams became increasingly vocal about various political and social issues that arose within both the UNCW community and society at large.”).

²⁵⁵ *Id.* (“Some UNCW employees indicated discomfort with Adams’ views and his manner of expressing them.”); see also Matthew Jay Hertzog, *The Misapplication of Garcetti in Higher Education*, 2015 BYU EDUC. & L.J. 203, 215 (2015) (“Over the years, Adams became even more vocal in his views and tension developed between him and several of his colleagues. As these tensions mounted, complaints concerning his public beliefs and values from the Board of Trustees and the surrounding community began to find their way to the university administration.”).

²⁵⁶ *Adams*, 640 F.3d at 553 (“From time to time, UNCW officials fielded complaints from members of the Board of Trustees, the faculty and staff, and the general public about Adams’ public expressions of his views.”).

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 557 (“Adams asserted the Defendants violated Title VII’s protection against religious discrimination by ‘subjecting [him] to numerous, intrusive, and harassing investigations, asking him to terminate his First Amendment activities, and refusing to promote him to full professor because of his outspoken Christian and conservative beliefs.’”).

²⁵⁹ *Id.* at 561 (“Citing *Garcetti v. Ceballos*, 547 U.S. 410 (2006) . . . , for the proposition that ‘when a public employee makes a statement pursuant to his “official duties,” he does not “speak as a citizen,”’ the district court observed that it ‘must focus not on the content of the speech but on the role the speaker occupied when he said it.’”).

²⁶⁰ *Id.* at 561–62 (“[T]he court’s basis for determining the First Amendment did not protect Adams’ speech was Adams’ subsequent inclusion of past protected speech as part of his promotion application. In effect, the district court held that Adams’ speech in his columns, books, and commentaries, although undoubtedly protected speech when given, was somehow transformed into unprotected speech.”).

²⁶¹ *Id.* at 562 (“[W]e find the district court’s conclusion that Adams’ speech was converted from protected to unprotected speech to be error as a matter of law.”).

²⁶² *Id.* at 561.

The Fourth Circuit did not reject the assertion that *Garcetti* was ever applicable in the university setting, instead reasoning that “[t]here may be instances in which a public university faculty member’s assigned duties include a specific role in declaring or administering university policy, as opposed to scholarship or teaching.”²⁶³ The case was remanded for further consideration of whether Adams’ First Amendment rights had been violated.²⁶⁴ The Fourth Circuit, however, suggested that the university had presented a non-invidious reason for the promotion denial, namely, that Adams had too few peer-reviewed, single author publications since his last promotion.²⁶⁵ Nonetheless, a separate question before the court was whether the university in fact denied Adams the promotion in violation of his First Amendment rights.²⁶⁶

The facts of *Adams* illustrate one of the confusing points of the *Pickering* analysis in the academic setting. Suppose a different sanction had been at issue (e.g., a suspension or a tenure denial). Suppose further that the university had justified its adverse action by saying that while Adams had met the requirements for teaching and research, his manner of expressing his views had undermined workplace efficiency because many of his colleagues now found it too difficult to work with him. It is simply unclear whether *Pickering* would allow the university to impose sanctions in light of this workplace efficiency justification. It is further unclear whether it would matter whether the alleged difficulties in working together were based on the content of his speech rather than the manner in which those contents had been communicated.²⁶⁷

The Fourth Circuit is not the only circuit to question the applicability of *Garcetti* in the context of academia. The Ninth Circuit expressed a similar view in *Demers v. Austin*.²⁶⁸ At issue was whether David Demers had been subjected to retaliatory action because of a pamphlet he had written and because he had

²⁶³ *Id.* at 563.

²⁶⁴ *Id.* at 566.

²⁶⁵ *Id.* at 559 (“The Defendants offered numerous legitimate reasons for the decision not to promote Adams, including the small number of peer-reviewed single author publications since Adams’ last promotion.”); See also Mark P. Strasser, *The Onslaught on Academic Freedom*, 81 UMKC L. REV. 657, 680 (2013) (noting that Adams “will not be successful if the university can show independent reasons for Adams being denied the promotion and that he would not have received the promotion even if he had never made those comments”).

²⁶⁶ See *Adams*, 640 F.3d at 566 (“[W]e reverse the district court’s grant of summary judgment as to Adams’ First Amendment claims of viewpoint discrimination and retaliation.”).

²⁶⁷ Cf. *supra* Section I.B (discussing *Givhan*).

²⁶⁸ *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014).

distributed some chapters of a book that he was in the process of writing.²⁶⁹ The pamphlet, called “The 7-Step Plan” (the Plan), concerned a method by which the Murrow School, then a part of the College of Liberal Arts at Washington State University, could become a freestanding college.²⁷⁰ Demers wrote the pamphlet while serving on a Murrow School committee that was actively debating the issues Demers raised in the Plan.²⁷¹

The *Demers* court began its analysis by holding that “*Garcetti* does not apply to ‘speech related to scholarship or teaching.’”²⁷² Indeed, the court went even farther when concluding that *Garcetti*, “consistent with the First Amendment, cannot [] apply to teaching and academic writing that are performed ‘pursuant to the official duties’ of a teacher and professor.”²⁷³ Ironically, the Plan did not seem to fall into the teaching or research exception, because it instead was recommending a reorganization plan for the college.²⁷⁴ The sample book chapters were not considered because they had not been made part of the record.²⁷⁵

The point here is not that *Garcetti* applied after all. Arguably, the Plan was protected under the First Amendment if he was presenting it as a private citizen rather than an employee. Indeed, he and his company had offered a donation to

²⁶⁹ *Id.* at 406 (“He brought suit alleging that university administrators retaliated against him in violation of the First Amendment for distributing a short pamphlet and drafts from an in-progress book.”).

²⁷⁰ *Id.* at 406–07.

²⁷¹ *Id.* at 407.

²⁷² *Id.* at 406 (citing *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006)); see also Pat Fackrell, *Demers v. Austin: The Ninth Circuit Resolves the Public Employee Speech Doctrine’s Uncertain Application to Academic Speech*, 51 IDAHO L. REV. 513, 515 (2015) (“The Ninth Circuit’s holding in *Demers* further distinguishes the Ninth Circuit from three other circuits—the Third, Sixth, and Seventh Circuits. 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.” (footnotes omitted)); Martins, *supra* note 185, at 666 (“The Ninth Circuit thereby carved an explicit exception into *Garcetti* for academic scholarship and classroom instruction.”).

²⁷³ *Demers*, 746 F.3d at 412.

²⁷⁴ *Employment Law—Free Speech Rights—Ninth Circuit Finds Garcetti Official Duty Rule Inapplicable to Professional Speech in Public-University Context.*—*Demers v. Austin*, No. 11-35558, 2014 WL 306321 (9th Cir. Jan. 29, 2014), 127 HARV. L. REV. 1823, 1828 (2014) [hereinafter *Employment Law*] (“Court opinions championing the ‘transcendent value’ of academic freedom have emphasized in dicta the peculiar value of new ideas in the unique context of classrooms and intellectual scholarship. However, such a justification is lacking for *Demers*’s administrative pamphlet, which was speech typical of employees in a variety of employment relationships outside the university setting.” (footnotes omitted)).

²⁷⁵ See *Demers*, 746 F.3d at 413 (“For reasons best known to himself, *Demers* did not put the draft introduction or any of the draft chapters of *Ivory Tower* into the record.”).

the university to help implement the plan,²⁷⁶ which *might* be taken to support his offering the Plan as a citizen rather than as an employee.²⁷⁷ As was true in *Adams*, there were legitimate reasons in *Demers* for the university to take the actions that were allegedly retaliatory.²⁷⁸ A separate issue was whether there in fact had been retaliation against him, which would be determined on remand.²⁷⁹

Both the *Adams* and *Demers* courts recognized the importance of protecting both scholarship and teaching as a matter of academic freedom, which is unsurprising because both of those activities involve the “communication of ideas.”²⁸⁰ Further, it is of course true that one’s teaching might inform one’s scholarship²⁸¹ and one’s scholarship can inform one’s teaching.²⁸² *Levin v. Harleston*²⁸³ illustrates a different way in which teaching and scholarship might be related. Michael Levin had published “writings contain[ing] a number of denigrating comments concerning the intelligence and social characteristics of blacks”²⁸⁴ Students protested Levin’s views and disrupted his classes.²⁸⁵ Thus, Levin’s research might have been related to his teaching in that students knowing of his views might not have felt comfortable in this class.

There was no record of any student complaining of unfair treatment by Levin on the basis of race.²⁸⁶ Nonetheless, perhaps fearing that some students would not feel comfortable having Levin as a teacher, the Dean of Humanities created an alternate

²⁷⁶ See *id.* at 407.

²⁷⁷ But see *Employment Law*, *supra* note 274, at 1825 (“Despite *Demers*’s claim that the Plan was prepared through Marquette Books LLC and not the university, the panel determined that his actions fit sufficiently within the ‘pursuant to [his] official duties’ standard articulated in *Garcetti*.” (quoting *Demers*, 746 F.3d at 419)).

²⁷⁸ *Demers*, 746 F.3d. at 409 (“Defendants contend that the legitimate reasons for *Demers*’s critical annual reviews include his post-tenure failure to publish scholarship in refereed journals, his failure to perform his appropriate share of university service, and his failure to report properly his activities at Marquette Books.”).

²⁷⁹ See *id.* at 417–18 (“Should the district court determine that *Demers*’s First Amendment rights were violated, it may still grant injunctive relief to the degree it is appropriate.”).

²⁸⁰ *Sweezy v. State of New Hampshire*, 354 U.S. 234, 245 (1957).

²⁸¹ Peter A. Joy, *Clinical Scholarship: Improving the Practice of Law*, 2 CLINICAL L. REV. 385, 394 (1996) (“[T]he teaching informs the scholarship as when clinicians write about the insights gained through engaging in reflective practice with clinical law students.”).

²⁸² Gerald Torres, *Law and the Creation of Meaning: A Brief Reflection on the Work of Jane Larson*, Preface, 28 WIS. J.L. GENDER & SOC’Y 105, 109 (2013) (“[O]ne of the benefits of good scholarship is that it informs teaching by making insights deeper.”).

²⁸³ *Levin v. Harleston*, 966 F.2d 85 (2d Cir. 1992).

²⁸⁴ *Id.* at 87.

²⁸⁵ *Id.* at 90 (discussing the university’s “alleged failure to take steps to prevent what they themselves describe as ‘undisputed facts concerning disruptions’ of Levin’s classes”).

²⁸⁶ *Id.* at 88.

section so that Levin's students could transfer to it if they so desired.²⁸⁷ The district court found that the shadow classes had been created to stigmatize the professor's writings and ordered their discontinuation.²⁸⁸ The Second Circuit affirmed,²⁸⁹ noting, however, that the creation of shadow courses would have been permitted had there been a legitimate reason for them outweighing the implicated rights to academic freedom.²⁹⁰

It is precisely this kind of case (i.e., one in which a professor's scholarship involves very controversial views) that makes academic freedom precarious under a *Pickering* analysis. Suppose that the college feared a loss of funding.²⁹¹ Would *Pickering* have allowed Levin to be fired? Even were funding issues not presented, Levin's classes were picketed, which of course affected workplace efficiency. Under a *Pickering* balancing test, such a professor might well not be protected by the First Amendment if suspended or fired for his published writings. The Second Circuit did not use a balancing test, instead suggesting that punishing Levin for his speech outside the classroom would violate First Amendment guarantees.²⁹²

CONCLUSION

Commentators are correct to suggest that the *Garcetti* exception to *Pickering* might be read to endanger academic freedom as it is commonly understood.²⁹³ Yet, even if the *Garcetti*

²⁸⁷ *Id.* at 87–88 (“Dean Sherwin created an ‘alternative’ section of Philosophy 101 for those of Levin’s students who might want to transfer out of his class. He wrote to the students in Levin’s class on February 1, after the semester had commenced and without notice to Levin, informing them of the alternative section to which they could transfer.”).

²⁸⁸ *Id.* at 88 (“The district court found that the shadow classes ‘were established with the intent and consequence of stigmatizing Professor Levin solely because of his expression of ideas,’ . . . and enjoined their continuance.”).

²⁸⁹ *Id.*

²⁹⁰ *Id.* (“Formation of the alternative sections would not be unlawful if done to further a legitimate educational interest that outweighed the infringement on Professor Levin’s First Amendment rights.”).

²⁹¹ *Cf. supra* notes 230–237 and accompanying text (discussing *Dube*).

²⁹² *Levin*, 966 F.2d at 90 (“[T]he commencement, or threat thereof, of disciplinary proceedings against Professor Levin predicated solely upon his protected speech outside the classroom violates his First Amendment rights.”).

²⁹³ J. Peter Byrne, *Neo-Orthodoxy in Academic Freedom*, 88 TEX. L. REV. 143, 169 (2009) (reviewing MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM (2009)) (“The looming question posed by *Garcetti* of the relation between our tradition of academic freedom and the First Amendment makes the need to address these issues acute.”); Alan K. Chen, *Bureaucracy and Distrust: Germaneness and the Paradoxes of the Academic Freedom Doctrine*, 77 U. COLO. L. REV. 955, 959 n.16 (2006) (“In *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006), the Court held that when public employees speak in the course of fulfilling their official duties, they are not speaking as citizens within the meaning of the First Amendment. This statement would appear to undermine any future claim for individual academic freedom.”); Elizabeth M. Ellis, *Garcetti v. Ceballos: Public Employees Left to Decide*

exception does not apply to teachers in their teaching and research, the Court must still make clear the conditions under which rights to academic freedom may be overridden. If the *Pickering* analysis is used to make that determination, then academic freedom will be much weaker than is commonly thought.

The Court has offered insufficient guidance on whether *Garcetti* applies in the academic setting, much less on whether a distinction should be made between primary and secondary schools on the one hand and colleges and universities on the other. Even in those areas where *Garcetti* is inapplicable, it is unclear whether the right to academic freedom enjoyed by state employees should be analyzed under *Pickering* or some other test. Insofar as *Pickering* is applicable, the Court has been utterly unhelpful with respect to how the workplace efficiency factor should be applied in the academic setting. Unless properly cabined, such a factor could severely diminish academic freedom rights.

The Court's failure to explain how *Garcetti* and *Pickering* are to be applied in the academic context has led to very different analyses in the circuits, which means that an instructor punished for her speech might be protected by the First Amendment in one circuit but not in another. The Court must clarify this area at its first opportunity to protect academic freedom and the expansion of knowledge.

"*Your Conscience or Your Job*", 41 IND. L. REV. 187, 212 n.172 (2008) ("[A]ny suggestion that 'matters of public concern' may not encompass job-related expression of professors would undermine the special protections the Court has given academic freedom for the past 50 years."); Fackrell, *supra* note 272, at 544 ("*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. This categorical exclusion undermines the essence of academic freedom by granting unfettered power to the institution."); Oren R. Griffin, *Academic Freedom and Professorial Speech in the Post-Garcetti World*, 37 SEATTLE U. L. REV. 1, 7 (2013) ("[A] conflict may exist as to whether *Garcetti*'s application undermines academic freedom at colleges and universities."); Richard E. Levy, *The Tweet Hereafter: Social Media and the Free Speech Rights of Kansas Public University Employees*, 24 KAN. J.L. & PUB. POL'Y 78, 95 (2014) ("[T]he Court in *Garcetti* left open the possibility that *Pickering* may still apply to speech pursuant to official duties if that speech is within the scope of academic freedom. *Garcetti*'s ambiguous treatment of this issue highlights the uncertain relationship between academic freedom and the First Amendment."). 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, 951–52 (2012) ("The leading case on the First Amendment and free speech in the workplace is *Garcetti v. Ceballos*, in which the United States Supreme Court held that governmental employees who speak out pursuant to job responsibilities are not protected by the First Amendment from employer discipline for that speech. While the United States Supreme Court has stated in dicta that an academic freedom exception to this limit may exist, the Court has not yet provided any guidance for this hypothetical exception.").