A “GREAT” DAY FOR ACADEMIC FREEDOM: THE THREAT POSED TO ACADEMIC FREEDOM BY THE SUPREME COURT’S DECISION IN GARCETTI V. CEBALLOS

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I. INTRODUCTION

He claimed the terrorist attacks of September 11, 2001 were an “inside job,” planned by United States government officials and the Central Intelligence Agency. He cited reports from French daily newspaper Figaro and Radio France International that chronicled a meeting between an agent from the CIA and Osama Bin Laden two months prior to the attacks. He stated that “fires could not have caused the collapse of the World Trade Center towers at free-fall speed,” but rather the destruction was brought about in a controlled demolition. He believed that the Bush Administration had orchestrated the catastrophe “to justify military operations in Iraq.” And for his beliefs, they called for his job.

In early June 2006, Kevin Barrett, co-founder of the Muslim-
Jewish-Christian Alliance for 9/11 Truth\(^\text{6}\) and a University of Wisconsin-Madison professor, articulated his views to conservative radio talk show host Jessica McBride and told her that he planned to discuss these views, along with the mainstream account of the 9/11 terrorist attacks, during one week of his class titled “Islam: Religion and Culture.”\(^\text{7}\) “I always try to present all defensible sides of important issues. In this Islam course, I would present the dominant American interpretation of the so-called war on terror, as well as alternative interpretations, and let [the] students make up their own minds,’ [Barrett] said.”\(^\text{8}\) However, despite Barrett’s proclamation that he would not use his professorial pedestal to indoctrinate his students with anti-American propaganda, his remarks to McBride were met with calls for his termination.

In a letter to Governor James E. Doyle and university administrators, 61 of the 133 Wisconsin state legislators condemned Barrett’s “academically dishonest views” and demanded that the University remove him from its faculty for professing his “lies.”\(^\text{9}\)

One of the most vocal lawmakers calling for Barrett’s termination was Republican Representative Stephen L. Nass.\(^\text{10}\) “[The University] apparently ha[s] no limits to what can be taught in the classroom’ . . . . ‘Barrett has got to go,’ Mr. Nass . . . said. ‘It is an embarrassment for the State of Wisconsin. It is an embarrassment for the university.’”\(^\text{11}\)

“Taxpayers are spending $1 billion a year on the University of Wisconsin, and my office is being flooded with calls and e-mails by people who are furious that their dollars are going to be spent teaching such falsehoods,” Nass said. “If the university doesn’t do something to stop this, then lawmakers will step in and try to deal with it.”\(^\text{12}\)

Barrett’s remarks had so enraged the Wisconsin legislature that

\(^{6}\) See id. The Muslim-Jewish-Christian Alliance for 9/11 Truth is a group of scholars, activists, and religious leaders whose objective is to urge an investigation into the U.S. Government’s role in the September 11th terrorist attacks. Id. For additional information, see Welcome to the Muslim-Christian-Jewish Alliance for 9/11 Truth, http://mujca.com/ (last visited Nov. 2, 2007).

\(^{7}\) Corcoran supra note 4; see also Huffstutter, supra note 4; Megan Twohey, 9-11 Flap Won’t Stop UW Lecturer: Legislators Blast University Decision, MILWAUKEE J. SENTINEL, July 11, 2006, at A1.

\(^{8}\) Corcoran, supra note 4.

\(^{9}\) Huffstutter, supra note 4; see also Ruethling, supra note 1.

\(^{10}\) Huffstutter, supra note 4.

\(^{11}\) Ruethling, supra note 1.

\(^{12}\) Huffstutter, supra note 4.
Nass and other legislators even went so far as to threaten that inaction on the matter could result in a cut in the University’s public funding during the next budget cycle. In essence, the Wisconsin legislators were threatening to force the University to fire the controversial professor merely because he had espoused beliefs many found abhorrent. Such threatened action brought concerns over academic freedom to the forefront of Barrett’s situation, both on and off campus.

The legislature’s reaction left some of Barrett’s colleagues on the Madison campus fearing the potential impact on academic freedom. Donald Downs, a professor of political science, journalism, and law at the University and president of the Committee for Academic Freedom and Rights, addressed his concern stating that no teacher should be precluded from teaching because of his views, no matter how radical.

“You can’t tell someone that they can’t say these things because it’s not what a moral person would think,” said . . . Downs . . . . ‘I’m a supporter of the war on terror. I’m offended by him having these beliefs. But it’s censorship to say he can’t say these things.”

Dietram Scheufele, a professor of journalism and mass communication, echoed Downs’s views, stating that the freedom of speech protected by the First Amendment becomes even more important when the viewpoint presented is one contrary to mainstream thought and that that “freedom [must] extend to the classroom” to allow professors to present all competing views on controversial issues.

Like Barrett’s colleagues in Madison, many outside the Madison campus felt that the Wisconsin legislators’ threatened intervention would imperil the freedom traditionally afforded those in academia. Robert Kreiser, a senior program officer in the Department of

13 Id.
14 See Cullen, supra note 1.
15 The Committee for Academic Freedom and Rights is an ad hoc association comprised of tenured University of Wisconsin-Madison faculty members that was formed in 1996 to protect and advance “professorial, academic and individual freedom and rights of faculty members of the various campuses of the University of Wisconsin System.” Affidavit of Donald A. Downs in Support of Motion to Intervene ¶ 3, Marder v. Bd. of Regents, No. 1 CV 222, 2003 WL 25550707 (Wis. Cir. Ct. Sept. 12, 2003) available at http://www.uwm.edu/~renlex/downs2.htm. The Committee focuses on ensuring that adequate procedures exist to provide due process for all tenured faculty within the Wisconsin System who are threatened with termination in a disciplinary proceeding. Id. ¶ 4.
16 Cullen, supra note 1; see also Huffstutter, supra note 4.
17 Huffstutter, supra note 4.
18 Cullen, supra note 1.
Academic Freedom and Tenure of the American Association of University Professors,19 expressed concerned sentiments.20 “The more legislators introduce themselves,” Kreiser said, “the more academic freedom is threatened.”21 Jonathan Knight, a colleague of Kreiser’s at the AAUP, mirrored Kreiser’s fears.22 “The thing we do not need is legislative bodies deciding to fund, or not fund, education depending on whether they like what a faculty member says. To do so would create a chilling effect across education,” he said.23

However, despite the legislature’s threat to intervene, the University of Wisconsin-Madison administration remained committed to academic freedom and after a ten-day review of Barrett’s proposed syllabus and readings for the class, Provost Patrick Farrell decided to allow Barrett to teach the one week segment devoted to the war on terror during his fifteen-week class on Islam.24 Provost Farrell reiterated that it was academic freedom that commanded the decision rendered.25 “We cannot allow political pressure from critics of unpopular ideas to inhibit the free exchange of ideas,’ Farrell said in a written statement.”26 Professor Barrett echoed that sentiment, saying, “It’s a great day for academic freedom and freedom of speech . . . .”27

Yet, Barrett might not have been so cheery on that day had he known that the same views he espoused to Jessica McBride may not be protected had he articulated them in a lecture or in his research.

19 The American Association of University Professors is considered by those in academia to be the authority on academic freedom. See Thomas L. Haskell, Justifying the Rights of Academic Freedom in the Era of “Power/Knowledge”, in THE FUTURE OF ACADEMIC FREEDOM 43, 47 (Louis Menand ed., 1996); see also Robert Post, The Structure of Academic Freedom, in ACADEMIC FREEDOM AFTER SEPTEMBER 11, at 61, 64 (Beshara Doumani ed., 2006) (arguing that the AAUP’s 1915 Declaration of Principles on Academic Freedom and Academic Tenure was “the greatest articulation of the logic and structure of academic freedom in America”). The AAUP’s 1940 Statement of Principles on Academic Freedom and Tenure (hereinafter “1940 Statement”) has been endorsed by over “200 scholarly and education groups.” AM. ASS’N OF UNIV. PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE, http://www.aaup.org/NR/rdonlyres/EBB1B330-33D3-4A51-B534-CEE0C7A90DAB/0/1940StatementofPrinciplesonAcademicFreedomandTenure.pdf. The AAUP’s definition of academic freedom and its 1940 Statement will be discussed further infra at Part II.B. See infra Part II.B.
20 Cullen, supra note 1.
21 Id.
22 Huffstutter, supra note 4.
23 Id.
24 Id.; see also Ruethling, supra note 1; Twohey, supra note 7.
25 Twohey, supra note 7.
26 Id.
27 Id.
Had he known that his status as a public employee could potentially leave his previously-protected speech unprotected under the United States Supreme Court’s newest doctrine regarding public employee speech, his outlook might have been quite bleak. Could he have foreseen the potentially chilling implications for academic freedom that the Supreme Court’s newest public employee free speech precedent presents, Professor Kevin Barrett likely would not have hailed the University’s decision as “a great day for academic freedom.”

This Note will discuss the Supreme Court’s May 2006 decision in *Garcetti v. Ceballos* and its potential implications for academic freedom. Part II will discuss the definition of academic freedom from the American Association of University Professors, which, in academia, is considered the authoritative source on the subject, and will also discuss the Supreme Court’s recognition of academic freedom as an unwritten liberty protected by the United States Constitution. Part III will chronicle the Supreme Court’s development of the public employee free speech doctrine, beginning with the seminal case of *Pickering v. Board of Education*. Part IV will be dedicated to discussing both the Supreme Court’s majority and dissenting opinions in *Garcetti* and the precedent set in that case. Finally, Part V will discuss the potential implications of the *Garcetti* decision on academic freedom and will offer a few solutions to the issues that need to be resolved.

II. ACADEMIC FREEDOM

I would be remiss to begin a discussion of the potential implications of *Garcetti* upon academic freedom without first defining the phrase. So, what exactly is academic freedom? Many tend to align the concept with the rights afforded citizens under the First Amendment, such as freedom of expression, association, and publication. While this comparison may be helpful as a point from which to start, there are many differences between the concept of academic freedom and those rights articulated in the Bill of Rights.

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29 I will hereinafter refer to the American Association of University Professors as the "AAUP."
31 Haskell, *supra* note 19, at 54; see also Post, *supra* note 19, at 62.
32 Haskell, *supra* note 19, at 54. Compare *AM. ASS’N OF UNIV. PROFESSORS, 1940*
First, academic freedom applies only to faculty in academia, indicating that the concept derives from a faculty member’s professional role as a scholar, whereas all citizens are afforded First Amendment rights. Second, the First Amendment protects individuals only against intrusions by the states. Academic

STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE WITH 1970 INTERPRETIVE COMMENTS 3–4 (2006) [hereinafter AAUP, 1940 STATEMENT], http://www.aaup.org/AAUP/comm/rep/A/abor.htm (“When carefully analyzed, therefore, the Academic Bill of Rights undermines the very academic freedom it claims to support. It threatens to impose administrative and legislative oversight on the professional judgment of faculty, to deprive professors of the authority necessary for teaching, and to prohibit academic institutions from making the decisions that are necessary for the advancement of knowledge.”).

33 Post, supra note 19, at 63. While the tenets of academic freedom with which I am concerned exclusively apply to faculty, the concept of academic freedom has application for students in academia as well. For example, since 2004, David Horowitz, founder of the Students For Academic Freedom, has championed his Academic Bill of Rights to ensure the protections of academic freedom for both faculty and students. See DAVID HOROWITZ, THE CAMPAIGN FOR ACADEMIC FREEDOM 5 (2005), available at http://www.studentsforacademicfreedom.org/documents/2004/the-campaign-for-academic-freedom; J. Peter Byrne, Constitutional Academic Freedom After Grutter: Getting Real About the “Four Freedoms” of a University, 77 U. COLO. L. REV. 929, 941 (2006). Horowitz’s Academic Bill of Rights attempts to eliminate perceived political biases in university employment decisions, student grading, and classroom lecturing. See STUDENTS FOR ACADEMIC FREEDOM, ACADEMIC BILL OF RIGHTS, http://www.studentsforacademicfreedom.org/documents/1925/abor.html (last visited May 31, 2008). The Academic Bill of Rights includes two clauses in its section on academic freedom that specifically protect the rights of students. See id. These clauses are quoted in full below:

3. Students will be graded solely on the basis of their reasoned answers and appropriate knowledge of the subjects and disciplines they study, not on the basis of their political or religious beliefs.

5. Exposing students to the spectrum of significant scholarly viewpoints on the subjects examined in their courses is a major responsibility of faculty. Faculty will not use their courses for the purpose of political, ideological, religious or anti-religious indoctrination.

34 See Post, supra note 19, at 63; see also U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”). While the First Amendment only specifically proscribes the federal government from intrusions into individuals’ freedoms of expression, the protections contained in the First Amendment were incorporated to also apply against the states after the adoption of the Fourteenth
freedom, on the other hand, protects faculty from intrusions by their institutions of higher education, whether public or private. Finally, while the freedoms of expression are regarded as individual liberties, which equally protect individuals from abridgements of their rights, academic freedom does not function in this regard. It does not protect individual professors from all regulation of their work and does not always protect all faculty members equally.

The function of academic freedom is not to liberate individual professors from all forms of institutional regulation, but to ensure that faculty within the university are free to engage in the professionally competent forms of inquiry and teaching that are necessary for the realization of the social purposes of the university.

Viewed in this context, academic freedom is a right of the profession, a right afforded scholars to search for the truth, communicate their findings without substantive filters, and encourage others to do the same. However, this right is certainly not absolute; it comes attached with corresponding obligations.

A. The AAUP’s 1915 Report on Academic Freedom and Tenure

This delicate balance was first codified by the American Association of University Professors, an organization formed by Arthur O. Lovejoy and John Dewey to ensure the protections of academic freedom for faculty members, in its charter document, the 1915 Report on Academic Freedom and Tenure. In the 1915 Report, the AAUP began with the premise that “academic freedom
was a necessary condition for a university’s existence.”43 The AAUP saw academic freedom—more specifically the freedom to research and publish—as a necessary condition because one of the purposes of a university, the inquiry and advancement of human knowledge, could not be accomplished without it.44

In order to preserve this freedom, the 1915 Report proposed definite rules of tenure.45 These rules provided due process to faculty members threatened with dismissal: up to one year’s notice of termination, a judicial hearing to allow the at-risk professor an opportunity to respond to the charges, and tenure with promotion to any rank above instructor after a specified length of service.46 “Academic freedom was the end: due process, tenure, and establishment of professional competence were regarded as necessary means.”47

Besides the goal of ensuring academic freedom to all faculty members, the 1915 Report set out to carve out a special place in the university for faculty members, insulated from arbitrary actions of university trustees.48 While trustees often viewed professors as merely employees of the university subject to as extensive regulation as any other, the 1915 Report sought to have faculty viewed as appointees of the university subject to some institutional regulation through academic standards set by the university, but free to pursue the advancement of human knowledge through research, lecturing, and expression.49 Illustrating its hands-off ideal, the 1915 Report likened the relationship between university trustees and professors to that between the president and federal court judges.50

[O]nce appointed, the scholar has professional functions to perform in which the appointing authorities have neither competency nor moral right to intervene. . . . So far as the university teacher’s independence of thought and utterance is concerned—though not in other regards—the relationship of professor to trustees may be compared to that between

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43 Hofstadter & Metzger, supra note 40, at 480.
44 Post, supra note 19, at 67–68.
45 Hofstadter & Metzger, supra note 40, at 481–82.
46 Id. at 481–82.
47 Id. at 481.
48 Id. at 480; Post, supra note 19, at 66–67.
49 See Post, supra note 19, at 66, 68–70.
50 Id. at 67 (quoting Am. Ass’n of Univ. Professors, 1915 Declaration of Principles of Academic Freedom and Academic Tenure [hereinafter AAUP, 1915 Declaration]).
judges of the federal courts and the executive who appoints them. University teachers should be understood to be, with respect to the conclusions reached and expressed by them, no more subject to the control of the trustees, than are the judges subject to the control of the president, with respect to their decisions; while of course, for the same reason, trustees are no more to be held responsible for, or to be presumed to agree with, the opinions or utterances of professors, than the president can be assumed to approve of the legal reasonings of the courts.51

This illustration emphasized the AAUP’s ideal academic environment where professors would be free to pursue “truth” without the threat of sanction based on the content of their teachings.

B. The AAUP’s 1940 Statement of Principles on Academic Freedom and Tenure

After twenty-five years of experience defending academic freedom under the 1915 Report, the AAUP during the late 1930s sought to update the principles it had first codified in 1915.52 Seeking to “promote public understanding and support of academic freedom and tenure,” the AAUP published the 1940 Statement of Principles on Academic Freedom and Tenure.53 Like the 1915 Report, the 1940 Statement began with the purposes of the university and academic freedom’s essential role in furthering these goals. “Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.”54

Beginning with this premise, the 1940 Statement discerned two main areas in which university professors must remain largely free from institutional regulation: teaching and research.55 In order to most accurately convey the 1940 Statement’s three tenets on academic freedom, they are quoted in full below.56

1. Teachers are entitled to full freedom in research and in

51 Id. (quoting AAUP, 1915 DECLARATION).
52 HOFSTADTER & METZGER, supra note 40, at 487.
53 AAUP, 1940 STATEMENT, supra note 32, at 3.
54 Id.
55 Id.
56 Id.
the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

2. Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

3. College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

As can be seen, the 1940 Statement again emphasized that the rights of academic freedom come attached with corresponding obligations. With research for pecuniary gain, professors must ensure that their work is satisfactory to the institution providing the funding. While professors may teach controversial matters, they must also ensure that their teachings relate to their subject and are not intended to indoctrinate the students in a particular viewpoint. Finally, while speaking as a citizen, professors are free to articulate their views, but must also ensure that those views are not attributed to the institution they represent. Therefore, in defining academic freedom, the AAUP not only listed what the freedom would protect, but also included a list of corresponding obligations to impress upon professors that academic freedom is not an individual right, but a privilege of the profession.

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57 Id. at 3–4 (footnotes omitted).
58 Id.
59 See id. at 3.
60 See id.; see also supra note 33 (discussion of David Horowitz’s Academic Bill of Rights).
61 AAUP, 1940 STATEMENT, supra note 32, at 4.
C. Academic Freedom’s “Special Niche in Our Constitutional Tradition”

While academic freedom is not explicitly mentioned in the Constitution or the Bill of Rights, the Supreme Court has many times recognized that academic freedom occupies a “special niche in our constitutional tradition.” First recognized in Adler v. Board of Education, where the Supreme Court upheld New York’s Feinberg Law which authorized the state to remove any teacher or other employee in the public schools who had advocated the overthrow of the government, Justice Douglas, dissenting, propounded the virtues of academic freedom.

The Constitution guarantees freedom of thought and expression to everyone in our society. All are entitled to it; and none needs it more than the teacher.

... The very threat of . . . a procedure [to remove teachers for mere association with a group labeled “subversive”] is certain to raise havoc with academic freedom. Youthful indiscretions, mistaken causes, misguided enthusiasms—all long forgotten—become the ghosts of a harrowing present.

While Justice Douglas’s recognition of the importance of academic freedom in Adler was in dissent, a majority of the Supreme Court justices adopted his position just five years later. In Sweezy v. New Hampshire, the Supreme Court held that the New Hampshire attorney general’s attempt to summon Sweezy, a professor who had given a guest lecture at the University of New Hampshire, and force him to answer questions about the content of his lecture “unquestionably was an invasion of [Sweezy’s] liberties in the areas of academic freedom and political expression.”

The essentiality of freedom in the community of American universities is almost self-evident. No one should

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62 Grutter v. Bollinger, 539 U.S. 306, 329 (2003) (“We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”).
64 Id. at 490, 494–96.
65 Id. at 508 (Douglas, J., dissenting).
66 Id. at 508–09.
68 Id. at 250.
underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.69

Finally, in 1967, the Supreme Court majority read protection of academic freedom into the mandates of the First Amendment.70 In Keyishian v. Board of Regents, the Supreme Court addressed the question of whether it was constitutional for the State University of New York at Buffalo to require incoming professors to sign certificates stating that they were not Communists.71 While the Court recognized that the state had a legitimate interest in protecting its educational system from subversion, the Court ultimately held that conditioning employment upon assent to signing a statement declaring oneself not to be a “subversive” was a violation of the plaintiff professors’ First Amendment rights.72

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.73

The Supreme Court’s decision in Keyishian, recognizing the critical role academic freedom has to play in our nation, was the first time that a Supreme Court majority explicitly read the right to academic freedom into the protections of the First Amendment.74 This was a major milestone for those in academia, as they could then be assured that the freedoms forwarded by the AAUP would occupy a “special niche in our constitutional tradition.”75 It is from this backdrop that the Supreme Court’s decision in Garcetti v. Ceballos must be evaluated.

69 Id.
71 Id. at 591–92.
72 Id. at 602–04.
73 Id. at 603.
74 See id.
III. **PICKERING AND ITS PROGENY**

For most of the first half of the twentieth century, public employees, such as public school teachers and public university professors, saw their rights limited merely by virtue of their public employment.\(^{76}\) "[T]he unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights."\(^{77}\) However, in 1968, this unchallenged dogma began to shift.

The evolution of the public employee free speech doctrine began with the Supreme Court’s seminal opinion in *Pickering v. Board of Education*.\(^{78}\) In *Pickering*, Marvin L. Pickering, a teacher in a public high school, was dismissed from his position after he wrote a letter to the editor of a local newspaper that criticized the district and the board’s allocation of financial resources between academics and athletics, speech traditionally protected by the First Amendment.\(^{79}\) The Court began its analysis with the premise that public employees do not relinquish their First Amendment rights to comment on matters of public concern merely by virtue of government employment.\(^{80}\) However, the Court also recognized that while public employees certainly have a right, “as a citizen, in commenting upon matters of public concern,” their interest must also be balanced against the “interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”\(^{81}\) In evaluating the state’s interest in the balance, the court must examine a number of factors, including whether the speech impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes

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\(^{76}\) See, e.g., Adler v. Bd. of Educ., 342 U.S. 485, 492 (1952) (holding that the State of New York could deny employment in the public schools “because, first, of their advocacy of the overthrow of the government by force or violence, or, secondly, by unexplained membership in an organization found by the school authorities . . . to teach and advocate the overthrow of the government by force or violence”).

\(^{77}\) Connick v. Myers, 461 U.S. 138, 143 (1983) (discussing the early history of the public employee free speech doctrine); see also McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892) (“[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”).

\(^{78}\) 391 U.S. 563 (1968).

\(^{79}\) Id. at 566.

\(^{80}\) See id. at 568.

\(^{81}\) Id.
the performance of the speaker's duties or interferes with the regular operation of the enterprise.82

Applying this test, subsequently referred to as the Pickering balancing test, the Court held that Pickering's interest in commenting upon the district's allocation of funds outweighed the district's interest in limiting Pickering's ability to contribute to the public debate.83 Pickering's interest in speaking on the allocation of funds was especially strong because, as a teacher in the district, he was in a special position to be well informed and able to form a definite opinion on how the funds should be spent.84 Therefore, the Court concluded that "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."85

Four years later, the Supreme Court reiterated this stance in Perry v. Sindermann.86 The Court explained that a state may not discharge a public employee on a basis that infringes on that employee's constitutionally protected rights, including the right to free speech; for if it could do so, such threatened action would likely chill the employee's speech.87 While the Court ultimately decided the case on other grounds,88 this decision formally entrenched protection for public employees' speech on matters of public concern under the First Amendment.

The next development of the public employee free speech doctrine came in 1979 in Givhan v. Western Line Consolidated School District.89 Unlike the teachers in Pickering and Perry who expressed their criticisms publicly, Bessie Givhan, a junior high English teacher, went to her principal privately with complaints about the school's perceived racially discriminatory employment policies.90 When the school district subsequently terminated her employment, Ms. Givhan brought suit claiming that the nonrenewal

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82 Id. at 570–73.
83 See id. at 573.
84 See id. at 572 ("Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent.").
85 Id. at 574.
86 408 U.S. 593, 598 (1972).
87 See id. at 597.
88 See id. at 598 (holding that the grant of summary judgment against the teacher was improper because an issue still remained as to whether the teacher was dismissed from employment in retaliation for his public statements critical of the Board of Regents' policies).
90 Id. at 411–13.
of her contract was based on her private criticisms and violated her First and Fourteenth Amendment rights. 91 In Givhan, the Court was faced with the question whether private communications to one’s employer exempt a public employee’s speech from Pickering’s protection of public employees speaking on a matter of public concern. 92 In deciding the case, the Supreme Court extended Pickering’s protection to public employees who communicate their views on matters of public concern privately to their employer rather than to spread the views publicly, intimating that the mere difference in forum should not serve as a barrier to protection. 93

After extending the breadth of protection under Pickering in Givhan, the Supreme Court further refined the Pickering balancing test four years later in Connick v. Myers. 94 While employed as an assistant district attorney in New Orleans, Shelia Myers opposed her proposed transfer to a different section of the criminal court and expressed this view to her supervisors, including District Attorney Harry Connick. 95 Myers then prepared a questionnaire asking for co-workers’ views on “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.” 96 After Myers’s distribution of the questionnaires, Connick told Dennis Waldron, a first assistant district attorney, that Myers was creating a “mini-insurrection” in the office and that he considered her acts to be insubordination. 97 Thereafter, Connick terminated Myers’s employment, citing her refusal to accept the transfer. 98

Alleging that she had been wrongfully terminated because of her exercise of her First Amendment rights, Myers brought suit against Connick. 99 This presented the Supreme Court with a new twist on the facts that had previously underlain a traditional public employee free speech claim. 100 Unlike most claims which alleged

91 Id. at 411–12. Technically, Ms. Givhan did not bring a separate action in her own right but instead filed a complaint to intervene in a desegregation action already pending against the school district. Id. at 411.
92 See id. at 415–16.
93 Id.
95 Id. at 140.
96 Id. at 141.
97 Id.
98 Id.
99 Id.
100 See id. at 145–46.
retaliation based solely on speech on matters of public concern. The Supreme Court was faced with the task of defining exactly what public employee speech would be protected under the *Pickering* balancing test.

Resolving this issue, the Supreme Court concluded that in order to receive protection under the *Pickering* balancing test, the public employee’s speech must be on a matter of public concern. “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 their offices, without intrusive oversight by the judiciary in the name of the First Amendment.” The Court further stated that “the content, form, and context of a given statement, as revealed by the whole record” would determine whether the statement at issue could be deemed to address a matter of public concern.

Unfortunately for Myers, the Court determined that her speech, the questions posed to her coworkers, with one exception, was not on a matter of public concern, but was instead a “mere extension[] of Myers'[s] dispute over her transfer to another section of the criminal court.” Myers’s questionnaire did not seek to alert the public to misfeasance in the District Attorney’s Office; instead, the questionnaire only conveyed Myers’s consternation with the status quo in the office, which, the Court held, was not a matter of “political, social, or other concern to the community.”

The exception, the Court noted, was Myers’s question whether any assistant district attorneys “ever fe[lt] pressured to work in political campaigns on behalf of office supported candidates”
because it addressed the possible use of political power to coerce public employees to work for political candidates not of their own choice—a matter with which the public would be quite concerned. However, this lone question on a matter of public concern was not enough to save Myers's job, as the Court held that the Pickering balance weighed in favor of the district attorney because Myers's questionnaire had interfered with the close working relationships that were essential to the district attorney's provision of public services. The Court determined that “[t]he limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships” and, therefore, Myers's dismissal did not violate the First Amendment.

The Supreme Court next turned to the tension between the government's role, first, as a provider of valuable public services and, second, as an employer subject to the constraints of the First Amendment. In Rankin v. McPherson, Ardith McPherson, a clerical employee in the office of the Constable of Harris County, Texas, made a remark after the attempted assassination of President Ronald Reagan. Perhaps in bad taste, but in the context of a political discussion concerning welfare, Medicaid, and food stamps, McPherson was overheard by another Deputy Constable to say, “[I]f they go for him again, I hope they get him.” McPherson's remark was relayed to the Constable, who then fired her.

Emphasizing the government's dual role, the Supreme Court noted that review of every employment decision by a public agency could hamper the effective and efficient provision of the public services the agency offered. However, this deference had to be tempered by the fact that “the threat of dismissal from public employment is...a potent means of inhibiting speech.” Therefore, the Court concluded that “[v]igilance is necessary to

107 Id. at 149.
108 Id. at 151–52.
109 Id. at 154.
111 Id. at 381.
112 Id.
113 Id. at 381–82.
114 Id. at 384.
115 Id. (alteration in original) (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968)).
ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees’ speech.”

Performing the Pickering balance using its newly articulated vigilance, the Supreme Court held that because McPherson’s remark was made in the context of a discussion of the policies of the President’s administration and immediately following a news bulletin announcing the attempted assassination, “it plainly dealt with a matter of public concern.” Turning to the State’s interest in the balance, the Court reiterated that the State’s interest focuses on the effective and efficient operation of the employer’s business, including considerations of “whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker’s duties or interferes with the regular operation of the enterprise.” Examining these factors, the Court held that the State’s interest could not outweigh McPherson’s interest in making her political statement because the remark did not interfere with the efficient operation of the workplace, undermine any close working relationships, or discredit the office to the public. Therefore, the Court held that McPherson’s termination was based on the content of her speech and violated the First Amendment.

Finally, in 1994, the Supreme Court made its last revision to the public employee free speech doctrine, that is, until the Court announced its decision in Garcetti. In Waters v. Churchill, Cheryl Churchill, a nurse at a public hospital, was fired due to comments she made regarding the department in which she worked during a conversation with a co-worker. While there was a dispute as to exactly what was said, the Court determined that it must apply the Pickering balancing test to “the facts as the employer reasonably

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116 Id.
117 Id. at 386.
118 See id. at 388.
119 Id. (citing Pickering, 391 U.S. at 570–73).
120 Id. at 389.
121 Id. at 392.
123 Id. at 664–66.
According to the employer’s reasonable beliefs, in speaking with her co-worker, Churchill had disparaged the obstetrics department, saying that it was a “bad place . . . to work.” After an investigation that included interviews with Churchill, the co-worker, and a nurse who had overheard the conversation, the employer could have reasonably concluded that Churchill’s comments had “substantially dampened [the co-worker’s] interest in working in obstetrics.”

Evaluating the government’s dual role, the Court emphasized that the government’s power as an employer to regulate speech is far broader than is its power when regulating as sovereign. This is largely because “[t]he government’s interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.” Therefore, while the government as sovereign cannot limit the right to free speech of the public merely to promote efficiency, the same restriction may be justified when the state is acting as an employer. Applying the Pickering balance to what the employer reasonably believed Churchill said, the Supreme Court held that after a reasonable investigation into what was said, employer was justified in believing that Churchill’s speech would disrupt the workplace and, thus, was justified in terminating her.

Therefore, prior to Garcetti, the Supreme Court had articulated a quite cogent process of analysis to determine whether speech by a public employee is protected by the First Amendment. First, the Court would ask whether the employee was speaking as a citizen on a matter of public concern. If it determined that the speech was on a matter of public concern, the Court would apply the Pickering balancing test, balancing “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.” When the Court determined that the interests of the public employee outweighed those of the State, the public employee’s speech would be protected.

124 Id. at 677.
125 Id. at 665.
126 Id. at 680.
127 Id. at 672.
128 Id. at 675.
129 Id.
130 Id. at 680.
by the First Amendment. However, if the interests of the State outweighed the public employee’s interest in speaking, the Court would accord the employer’s employment decision deference and refuse to disturb the employer’s decision. Yet, with the Supreme Court’s decision in *Garcetti*, the Court added a new threshold question to the analysis.

IV. *GARCETTI V. CEBALLOS*

A. The Facts

Richard Ceballos was a deputy district attorney for the Los Angeles County District Attorney’s Office. In February 2000, he was contacted by a defense attorney who claimed that there were inaccuracies in an affidavit used to obtain a search warrant critical to a pending criminal case. Conducting his own investigation into the allegation, Ceballos examined the affidavit, visited the location it described, and determined that the affidavit contained serious misrepresentations. After questioning the warrant affiant, a deputy sheriff from the L.A. County Sheriff’s Department, Ceballos relayed his findings to his supervisors. Following up, he prepared an office memorandum explaining his concerns and recommending dismissal of the case. A meeting was held between members of the District Attorney’s Office, including Ceballos and his supervisors, and the Sheriff’s Office, including the warrant affiant, to discuss the allegedly misrepresented affidavit. The meeting became heated, with a lieutenant from the Sheriff’s Office sharply criticizing Ceballos’s handling of the case. In the aftermath of these events, Ceballos claimed that he was subjected to a series of retaliatory employment actions, including “reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion.”

Seeking a remedy for these actions, Ceballos filed suit under 42 U.S.C. § 1983 in the United States District Court for the Central

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133 *Id.*
134 *Id.* at 414.
135 *Id.*
136 *Id.*
137 *Id.*
138 *Id.*
139 *Id.* at 415.
District of California, alleging a violation of the First and Fourteenth Amendments.\textsuperscript{140} However, the district court was unresponsive to Ceballos’s claims of retaliation.\textsuperscript{141} Noting that Ceballos wrote his memo pursuant to his official duties with the District Attorney’s Office,\textsuperscript{142} the court granted District Attorney Garcetti’s motion for summary judgment and held that the contents of the memo were not protected under the First Amendment.\textsuperscript{143}

Unsatisfied with this result, Ceballos appealed the ruling and the Ninth Circuit Court of Appeals reversed, holding that the content of Ceballos’s memo alleging serious misrepresentations in an affidavit used to support a search warrant was protected speech under the First Amendment.\textsuperscript{144} Beginning the analysis, the Ninth Circuit held that the subject matter of the memo was “inherently a matter of public concern” because it touched on matters of alleged governmental misconduct.\textsuperscript{145} Balancing the competing interests as required under \textit{Pickering}, “[t]he court struck the balance in Ceballos’[s] favor, noting that [Garcetti] ‘failed even to suggest disruption or inefficiency in the workings of the District Attorney’s Office’ as a result of the memo.”\textsuperscript{146} Therefore, the Ninth Circuit held that Ceballos’s speech was protected by the First Amendment.\textsuperscript{147}

The Supreme Court granted certiorari\textsuperscript{148} to determine “whether the \textit{First Amendment} protects a government employee from discipline based on speech made pursuant to the employee’s official duties.”\textsuperscript{149}

\textbf{B. The Majority Opinion}

Beginning with the premise that “public employees do not surrender all their First Amendment rights by reason of their employment,” the Supreme Court majority in \textit{Garcetti} laid out the \textit{Pickering} balancing test and identified the two inquiries that it

\begin{itemize}
\item \textsuperscript{141} \textit{Id.}
\item \textsuperscript{142} \textit{Id.} at *6.
\item \textsuperscript{143} \textit{Id.} at *6–7.
\item \textsuperscript{144} Ceballos v. Garcetti, 361 F.3d 1168, 1180 (9th Cir. 2004).
\item \textsuperscript{145} \textit{Id.} at 1174.
\item \textsuperscript{146} Garcetti, 547 U.S. at 416 (quoting Ceballos, 361 F.3d at 1180).
\item \textsuperscript{147} Ceballos, 361 F.3d at 1180.
\item \textsuperscript{148} Ceballos v. Garcetti, 361 F.3d 1168 (9th Cir. 2004), \textit{cert. granted}, 543 U.S. 1186 (Feb. 28, 2005) (No. 04-473).
\item \textsuperscript{149} Garcetti, 547 U.S. at 413 (emphasis added).
\end{itemize}
would consider in determining whether Ceballos’s speech was protected by the First Amendment. First, the Court would inquire into whether Ceballos was speaking “as a citizen on a matter of public concern.” If not, “the employee has no First Amendment cause of action based on his or her employer’s reaction to the speech.” However, if the Court found that the employee was speaking as a citizen on a matter of public concern, then the employee may have a valid First Amendment retaliation claim and the Court would proceed to the second inquiry, asking whether the public employer can adequately justify its perceived negative employment decision to tip the *Pickering* balance in its favor.

Proceeding with this analysis, the majority first recognized that even though Ceballos made his expressions within his office and not to the public and his speech concerned office matters, his speech may still be protected under the First Amendment. However, despite the majority’s encouraging first words, it ultimately held that the controlling factor in this case and what left Ceballos’s speech unprotected was that he made the speech pursuant to his official duties as a calendar deputy district attorney. He wrote the memo because that was what he was employed to do; it was a requirement of his position to advise his supervisors on how best to proceed with pending cases and his memo was written pursuant to this duty. Therefore, the majority held “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”

The majority rested this conclusion largely on its past precedents that had afforded public employers great deference in making employment decisions. “Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors

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150 *Id.* at 417–18.
151 *Id.* at 418.
152 *Id.*
153 *See id.*
154 *Id.* at 420 (citing *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414 (1979)).
155 *Id.* at 421.
156 *See id.*
157 *Id.* (emphasis added).
158 *Id.* at 422.
must ensure that their employees’ official communications are accurate, demonstrate sound judgment, and promote the employer’s mission.” That a public employee is required to speak or write pursuant to his official duties should not forbid his employer from evaluating the employee’s job performance and disciplining the employee if he deviates from the agency mission, the court reasoned. Therefore, in the case at bar, the majority held that “the First Amendment does not prohibit managerial discipline based on an employee’s expressions made pursuant to official responsibilities. Because Ceballos’s memo [fell] into this category, his allegation of unconstitutional retaliation must fail.”

This is the Supreme Court’s newest addition to the public employee free speech doctrine. If a public employee speaks pursuant to his official duties, he is not speaking as a citizen and, therefore, his speech does not meet the first prong of the Pickering analysis. Under this approach, if the employee is held to be speaking pursuant to his official duties, he is not accorded the right to have his interest balanced against that of the State to determine whether his speech may be the basis for a negative employment action. With this decision, the majority essentially placed public employee speech at the will of the employer, stating that if the employer wants to “institut[e] internal policies [or] procedures that [would be] receptive to employee criticism,” it is free to do so, but may not be required to do so under the First Amendment.

However, what is most significant in the majority opinion, besides the Supreme Court’s new rule, is found in a three-sentence, throw-away paragraph at the end of Justice Kennedy’s opinion. In this paragraph, Justice Kennedy specifically noted and dismissed the potential great impact that the new rule excluding speech pursuant to official duties may have on academic freedom.

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

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159 Id.
160 Id.
161 Id. at 424.
162 Id. at 421.
163 Id. at 424.
164 See id. at 425.
to a case involving speech related to scholarship or teaching.\footnote{Id.}

Justice Kennedy and the Supreme Court majority refused, even in dicta, to address \textit{Garcetti}'s implications upon academic freedom, leaving those in academia to hypothesize what the Court will do when it is faced with the question of how to apply \textit{Garcetti} in an academic context. Until then, the majority has left a great void in academic freedom that can only be filled with thoughts of the possible ramifications.

\section*{C. The Dissenting Opinion}

Dissenting in \textit{Garcetti}, Justice Souter forwarded two criticisms of the majority’s conclusion that an employee who speaks pursuant to his official duties is not speaking as a citizen and, thus, is unprotected by the First Amendment from employer retaliation.\footnote{See id. at 430, 431 n.2, 438 (Souter, J., dissenting).} First, Souter took issue with the incentives the majority’s rule created. Souter argued that in holding public employee speech pursuant to official duties not insulated from employer discipline under the First Amendment, the majority gave public employers an incentive to broaden job descriptions to include many previously-protected speech-related activities.\footnote{See id. at 431 n.2.} “I am pessimistic enough to expect that one response to the Court’s holding will be moves by government employers to expand stated job descriptions to include more official duties and so exclude even some currently protectable speech from First Amendment purview.”\footnote{Id.} For example, a public university could add an “obligation to ensure sound administration of the [department]” to the job duties of an English professor to relieve the university from liability based on First Amendment retaliation claims.\footnote{Id.} Second, Souter focused on the impact of the majority’s rule on academic freedom. Concerned that the new rule would threaten the academic protections that the Court had previously stated occupied “a special niche in our constitutional tradition,”\footnote{Id. at 438–39 (quoting Grutter v. Bollinger, 539 U.S. 306, 329 (2003)).} Souter wrote,

\begin{quote}
[t]his ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching
of a public university professor, and I have to hope that today’s majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write “pursuant to official duties.”

Ultimately, Justice Souter suggested that, instead of holding that public employees who speak pursuant to their official duties are unprotected by the First Amendment, the majority could have merely tweaked the *Pickering* balancing test to require a public employee who comments on matters germane to his official duties to show that he was speaking on a matter of “unusual importance and satisfies high standards of responsibility in the way he does it.” This leaves the question of what exactly constitutes a matter of “unusual importance.” According to Souter, speech revealing “official dishonesty, deliberate[] unconstitutional action, other serious wrongdoing, or threats to [public] health [or] safety” would satisfy this standard. Therefore, while less restrictive of public employee speech than the majority, even Justice Souter’s proposed standard presents significant limitations upon academic freedom.

V. *GARCETTI’S IMPLICATIONS FOR ACADEMIC FREEDOM*

A. Garcetti’s Potential Implications

After *Garcetti*, any speech by a public employee pursuant to his official duties is left unprotected by the First Amendment. Left unlimited, this new rule will have grave implications for academic freedom. Presumably, under the rule announced in *Garcetti*, a public university has the right to dismiss a professor solely because the administration disagreed with the content of his lectures, research, or publications because his speech would fall under the duties he was employed to perform. This would subject professors not only to institutional regulation through their Departments, but also to extensive regulation of the content of their scholarship.

Consider Kevin Barrett’s situation at the University of Wisconsin-Madison. Imagine, during the one week of his class dedicated to the war on terror, Barrett espouses his beliefs that the attacks of

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171 *Id.* at 438 (citing *Grutter*, 539 U.S. at 329; *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).
172 *Id.* at 434–35.
173 *Id.* at 435.
September 11th were merely a front led by U.S. government officials to justify military operations in Iraq. During the discussion in class, Barrett presents both sides of the story, including the “official account” of the attacks, and allows the students to evaluate the competing arguments and make their own decision on the issue. In the aftermath of the discussion in class, the public and Wisconsin legislators go up in arms, calling for Barrett’s immediate dismissal from the university. Bowing to political pressure, the University decides to terminate the controversial professor for the content of his remarks in the lecture.

Barrett would then file suit pursuant to 42 U.S.C. § 1983 alleging a claim of employment retaliation in violation of the First Amendment. While, prior to Garcetti, Barrett likely would have been successful, under the new rule, Barrett’s speech in his lecture was pursuant to his official duties as a professor at the University. Therefore, when he was speaking his controversial views, he was not speaking as a citizen, but instead as a public employee without the protection of the First Amendment. Even though Barrett’s speech took place in the context of a discussion evaluating the competing theories of the terrorist attacks and could be considered a political statement deserving of the utmost First Amendment protection, under Garcetti, he would not even be afforded the opportunity to have the court consider whether his speech was on a matter of public concern. Whether Barrett’s speech consisted of speaking his views in the classroom or publishing his research, so long as the university may construe the speech as part of one of his official duties, the speech remains unprotected under Garcetti.

Alternatively, Barrett could attempt to avoid such a result by commencing an action in state court under the free speech clause of the state constitution. Alleging that the University retaliated against him for the exercise of his free speech rights under the Wisconsin Constitution, Barrett could argue that the state constitution affords him more protection than the Supreme Court has provided under the First Amendment—that, as a member of the academic community, his right to teach and publish without the

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174 42 U.S.C. § 1983 creates a cause of action accruing to any citizen of the United States, or any other person within its jurisdiction, who is deprived of “any rights, privileges, or immunities secured by the Constitution and laws.”
175 See Wis. Const. art. 1, § 3 (“Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech . . . .”).
threat of reprisal should be afforded greater protection under the state constitution. However, unfortunately for him, Wisconsin has declined to interpret its state constitutional provision protecting speech more broadly than its federal counterpart. 176 Therefore, Barrett appears out of luck under both the federal and Wisconsin constitutions.

Besides the derogation of academic freedom that the rule from Garcetti presents, the decision may also afford a public employer the right to compel its employees to espouse a certain viewpoint, potentially a view contradicting the employee’s own opinion. For example, imagine that a public school district imposes a rule requiring all teachers to lead their classes in the recitation of the Pledge of Allegiance every morning. One morning, a teacher conscientiously objects and stands silent, instead asking one of the students to volunteer to lead the class in the Pledge. Because leading the class in the Pledge is one of the teacher’s official duties, the teacher could be punished for his refusal to speak. Essentially, the teacher would be faced with a choice of two alternatives, either speak the views the district required or face punishment for refusing to do so. Despite the Supreme Court’s decision in West Virginia State Board of Education v. Barnette, 177 where the Court proclaimed, “if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein,” the rule in Garcetti would allow the public school district to force its teachers to espouse views with which they may not agree.

While dismissal from employment is undoubtedly the most severe employment action a public university may threaten, the analysis

176 See County of Kenosha v. C & S Mgmt., Inc., 588 N.W.2d 236, 244 (Wis. 1999) (“Despite the differences in their language, we have heretofore found no differences in the freedom of speech guarantees provided by the First Amendment and Article I, § 3. Wisconsin courts consistently have held that Article I, § 3 of the Wisconsin Constitution guarantees the same freedom of speech rights as the First Amendment.”). Compare State v. Wicklund, 589 N.W.2d 793, 798–99 (Minn. 1999) (interpreting the free speech clause of the Minnesota Constitution no more broadly than the First Amendment), State v. Schad, 733 A.2d 1159, 1169 (N.J. 1999) (same), and Eastwood Mall, Inc. v. Slanco, 626 N.E.2d 59, 61 (Ohio 1994) (same), with State v. Stummer, 194 P.3d 1043, 1049 (Ariz. 2008), Wilson v. Superior Court, 532 P.2d 116, 120 (Cal. 1975) (holding that the free speech clause of the California Constitution provides more protection than the First Amendment), and O’Neill v. Oakgrove Constr., Inc., 523 N.E.2d 277, 280 n.3 (N.Y. 1988) (same).
177 319 U.S. 624 (1943).
178 Id. at 642.
remains the same for any adverse employment action, such as a denial of tenure or a refusal to promote. If the situation was different and a denial of a promotion was the adverse employment action at issue, the harm to the individual professor would be less; however, this would not lessen the impact upon academic freedom. As noted above, academic freedom is a right of the profession;\textsuperscript{179} when one professor is disciplined based on the content of his speech, the harm is felt by all in the profession. Professors all lose the certainty that academic freedom had previously provided, that they would be free from adverse actions based on the content of their lectures, research, and publications.

Further, facing unbridled university authority to terminate employment based on the content of speech pursuant to official duties, it is unlikely that many public university professors will make controversial statements criticizing the university, even though they are the ones in the best position to be well informed and able to form reasoned opinions on the issues in controversy. Thus, not only will the rule in \textit{Garcetti} likely inhibit the free expression of ideas in the classroom, it will also likely chill speech by public university professors on matters of particular concern to the public.

As the Supreme Court has previously said, “[t]he danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.”\textsuperscript{180} This is exactly what must happen under \textit{Garcetti}. Public university professors must be given assurances that they will not be disciplined due to the content of their lectures, research, or publications. While public universities may stand against the Supreme Court’s decision in \textit{Garcetti} and ensure that academic freedom is not limited on their campuses, as the University of Wisconsin-Madison did to protect Kevin Barrett from calls for his termination,\textsuperscript{181} some universities may not and may decide to take advantage of the opportunity presented by the rule in \textit{Garcetti} to increase pedagogical control over their faculties. It may be argued that such a decision is necessary to promote equal opportunities for students to hear opposing viewpoints and to avoid faculty indoctrination in the classroom.\textsuperscript{182} However, this argument

\textsuperscript{179} See supra notes 39–40 and accompanying text.
\textsuperscript{181} Huffstutter, supra note 4; see also Ruethling, supra note 1; Twohey, supra note 7.
\textsuperscript{182} David Horowitz has forwarded a similar argument while campaigning to have states
ignores the students’ ability to evaluate competing arguments, treating them as inherently vulnerable to coercive persuasion. Since applying *Garcetti* in the academic context would give public university administrators perverse incentives to interfere with their faculties’ scholarship, the ultimate duty to reinterpret the law must lay with the courts.

Justice Kennedy, writing for the majority, refused to answer the question of how the Court’s decision would impact academic freedom. Therefore, when the Court next hears a case where a public university professor or public school teacher has spoken upon a matter of public concern pursuant to his official duties and has been punished for doing so, it must hold the rule in *Garcetti* inapplicable to speech in the academic context. Public employee speech is at the heart of the official duties of any public educator. It is of the utmost importance that public employees in academia, public university professors and public school teachers alike, remain free to lecture, research, and publish without fear of reprisal. And the way to guarantee this freedom is to hold that speech pursuant to official duties in an academic context will still be protected under the First Amendment and state constitution and that the educator who spoke will still be afforded the right to have his interests weighed in the *Pickering* balance.

### B. Current Trends in Applying Garcetti

While the implications discussed remain, at the moment, potential implications, this is no reason for the courts to hesitate holding the rule in *Garcetti* inapplicable to those in academia, as the assault on protected public employee speech under *Garcetti* has already begun. For example, in January 2007, the Seventh Circuit Court of Appeals held that a public school teacher, who answered a
student question about whether she had participated in political demonstrations by saying that she honked her car horn when she passed a placard that read “Honk for Peace” at a demonstration against the military operations in Iraq, had spoken pursuant to her official duties when discussing this event in the context of a discussion of current events in the classroom and, thus, the First Amendment could not shield her from her employer’s decision to terminate her employment. While the teacher’s speech occurred in an elementary school classroom, which would presumably afford the school district more control over the content of its teachers’ speech due to the impressionable nature of elementary school children, the court did not base its decision solely on this fact. Instead, the Seventh Circuit’s decision was much broader, holding that “the school system does not ‘regulate’ teachers’ speech as much as it hires that speech. Expression is a teacher’s stock in trade, the commodity she sells to her employer in exchange for salary.” Ultimately, the court held that “the first amendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system.”

Treating an employee’s speech as a commodity to be traded and extending the court’s rule to secondary education, where presumably students are much less of a captive audience than in primary education, foreshadows exactly how little protection public employee speech will have in the coming years unless Garcetti is held inapplicable to the academic context.

Further erosions of public employee free speech in the academic context can be seen in the federal courts around the country, even though these cases have not pertained to public school teachers’ or public university professors’ academic freedom. For example, the Tenth Circuit held that a superintendent, who alerted the School Board that its Head Start program failed to comply with federal regulations, spoke pursuant to her official duties in administering the program and, thus, was unprotected when the Board decided to

185 See Mayer v. Monroe County Cmty. Sch. Corp., 474 F.3d 477, 479 (7th Cir. 2007).
186 Id. at 479.
187 Id.
188 Id. at 480. I find it interesting that the Seventh Circuit was willing to extend the scope of its decision to secondary education when the context of the case in front of the court solely concerned primary education. This seems inconsistent with the Supreme Court’s refusal in Garcetti to answer, even in dicta, the question of how its decision would impact academic freedom because the question was not in front of the court. See Garcetti, 547 U.S. at 425.
demote her and then terminate her employment.\textsuperscript{189} The court recognized that the superintendent’s speech related to a matter of public concern because “speech reporting the illicit or improper activities of a government entity or its agents is obviously a matter of great public import.”\textsuperscript{190} However, even though the speech was exactly that which \textit{Pickering} sought to protect—speech on a matter of great public concern by those in the best position to have informed opinions on the subject—under \textit{Garcetti}, the superintendent’s speech was unprotected from Board discipline.\textsuperscript{191}

The rule in \textit{Garcetti} has even left unprotected a teacher who, complying with a legal obligation, reported an incident where middle school students were shown a photograph of a nude man and two nude women to the Connecticut Department of Children and Families (DCF), against the wishes of his supervisor.\textsuperscript{192} After his report, the teacher was demoted to a permanent substitute and then to supervisor of in-school suspension students, which he alleged was in retaliation for having complied with his legal obligations and filed the complaint with DCF.\textsuperscript{193} The court disagreed, again holding, pursuant to \textit{Garcetti}, that “[the teacher] does not have protection against retaliation for his report to DCF.”\textsuperscript{194} Therefore, the rule in \textit{Garcetti} leaves the teacher with two choices, obey his legal obligation to report incidents of child abuse and be subject to employer discipline or disobey his legal obligation and face the legal consequences of that choice. This is unnecessary and can be easily remedied: hold the rule in \textit{Garcetti} inapplicable to the academic context.

\textbf{VI. CONCLUSION}

The Supreme Court’s decision in \textit{Garcetti v. Ceballos}\textsuperscript{195} seriously threatens academic freedom’s “special niche in our constitutional
tradition.”¹⁹⁶ By holding public employee speech pursuant to official duties unprotected under the First Amendment, *Garcetti* leaves unprotected those most in need of that protection, those who by their very job duties pursue truth and the advancement of human knowledge and are in the best position to have informed opinions on matters of public concern. Kevin Barrett and other public university professors who lecture, research, and publish pursuant to their official duties must be free to perform those duties without fear of reprisal based on the content of their scholarship. Therefore, in order to best safeguard academic freedom, the courts must hold the rule in *Garcetti* inapplicable in the context of public employee speech in academia. Then, Barrett’s excitement would be justified; it would indeed be a great day for academic freedom and freedom of speech.