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"A Kind of Continuing Dialogue": Reexamining the Audience's Role in Exempting Academic Freedom from Garcetti's Employee Speech Doctrine

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"A KIND OF CONTINUING DIALOGUE": REEXAMINING THE AUDIENCE'S ROLE IN EXEMPTING ACADEMIC FREEDOM FROM *GARCETTI*'S EMPLOYEE SPEECH DOCTRINE

Michael A. Sloman[*]

The U.S. Supreme Court's decision in Garcetti v. Ceballos *put further restraints on public employee speech by exempting from First Amendment protection speech made pursuant to the "official duties" of public employees. This limitation, if applied to the speech of college professors, would constrain their academic freedom of instruction and scholarship by permitting overbearing institutional oversight. This constraint would be detrimental not only to the employed professors, but also to their students and the post-secondary educational system as a whole. Courts should not apply* Garcetti *to academic freedom in the post-secondary education context, and they should avoid further limitations on professorial speech.*

This Note argues that Garcetti *should not be applied to higher education faculty by reconsidering the purpose of the university and the role that students and colleagues play in the expressive activities of professors. While many commentators have noted* Garcetti*'s potential detriment to the speaker, very few have considered the audience's participation in both instruction and research. This Note accounts for the rights of those receiving instruction from, or engaging in scholarship with, the professor to argue that restraints on professorial speech harm both the speaker and the audience.*

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TABLE OF CONTENTS

I. INTRODUCTION 937

II. LEGAL BACKGROUND 939
A. ACADEMIC FREEDOM 940
B. PUBLIC EMPLOYEE SPEECH DOCTRINE 944
C. *GARCETTI V. CEBALLOS* 945

III. ACADEMIC FREEDOM AFTER *GARCETTI* 947
A. CIRCUIT COURT CASES 947
B. POST-*GARCETTI* SCHOLARSHIP 949

IV. THE ROLE OF AN AUDIENCE 951
A. THE RIGHT TO RECEIVE COMMUNICATIONS 951
B. REAFFIRMING THE RIGHTS OF LISTENERS IN THE *GARCETTI* ANALYSIS 953

V. CONCLUSION 956

I. INTRODUCTION

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[1] The U.S. Supreme Court's sweeping assertion in *Tinker v. Des Moines* perfectly demonstrates how far the American judicial system is willing to go to preserve the classroom's peculiar role as "the 'marketplace of ideas.'"[2] These "constitutional freedoms" primarily refer to the First Amendment's protections for free expression.[3] Importantly, these protections are not merely rights afforded to American students; rather, teachers also enjoy (to some extent) free speech rights.[4] At the collegiate level, freedom of expression naturally implicates a professor's in-class instruction or professional scholarship.[5] A professor's freedom to teach, research, and publish without infringement is generally known as "academic freedom."[6] But does the First Amendment fully embrace academic freedom as a form of protected individual expression?

In *Bishop v. Aronov*, the Eleventh Circuit expressed doubt "that academic freedom is an independent First Amendment right."[7] Despite ardent protections for free speech, both teachers and scholars recognize the tenuous legal status of academic freedom as protected speech.[8] Without freedom to publish or instruct as they

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[1] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

[2] *Id.* (quoting *Keyishian*, 385 U.S. at 603).

[3] *Id.* at 505–06 (analyzing students' rights to freely engage in protest as a First Amendment right of expression); *see also* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

[4] *See Tinker*, 393 U.S. at 506 ("It can hardly be argued that either students *or teachers* shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." (emphasis added)).

[5] While some of the concerns outlined in this Note implicate other public educators, this Note's analysis focuses on university professors who produce scholarship and perform postsecondary instruction.

[6] Stacy E. Smith, *Who Owns Academic Freedom?: The Standard for Academic Free Speech at Public Universities*, 59 WASH. & LEE L. REV. 299, 307 (2002).

[7] Bishop v. Aronov, 926 F.2d 1066, 1075 (11th Cir. 1991).

[8] *See* Kim Fries, Vincent J. Connelly & Todd A. DeMitchell, *Academic Freedom in the Public K-12 Classroom: Professional Responsibility or Constitutional Right? A Conversation with Teachers*, 227 WEST'S EDUC. L. REP. 505, 522 (2008) ("Teachers . . . perceive that their academic freedom is rooted in their professional work with students and not necessarily

please, professors may be subject to discipline from their employing institutions, and the marketplace of ideas may be sullied. The immediate fear of government censorship is obvious—our society has long recognized that a college "may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent."[9] This legitimate fear of censorship was heightened by the U.S. Supreme Court's decision in *Garcetti v. Ceballos*.[10] There, the Court further narrowed the availability of free speech to public employees by holding that all speech made pursuant to the "official duties" of a public employee's job does not receive First Amendment protection.[11] This restriction on free expression naturally applies to instructors and researchers at public universities whose official duties likely include forms of speech.[12] Given that the classroom requires the most "vigilant protection" of our constitutional freedoms,[13] *Garcetti*'s potential limitation on collegiate instruction and scholarship, by placing these activities outside the scope of the First Amendment, presents a very real danger to American society as a whole.

This Note argues that *Garcetti* cannot be applied to the academic speech of professors pursuant to their teaching or scholarship, because controlling this speech contravenes the purposes of the First Amendment and infringes on the rights of the audience. Only one other scholar, Aaron Worthen, has addressed the role the

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grounded in constitutional law. To them, academic freedom is not a robust right that can be used to define practice."); *see also* John Inazu, *The Purpose (and Limits) of the University*, 2018 UTAH L. REV. 943, 960 (2018) ("[T]he realities of academic freedom are not as clear as these ideals.").

[9] Healy v. James, 408 U.S. 169, 187–88 (1972).

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

[11] *Id.* at 421 ("[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.").

[12] *See* Hilary Habib, Note, *Academic Freedom and the First Amendment in the* Garcetti *Era*, 22 S. CAL. INTERDISC. L.J. 509, 514 (2013) ("[*Garcetti*] creates a substantial problem for professors at public universities because their publications, research, scholarship, and criticisms of the university likely fall within their official duties and are, thus, left unprotected by the First Amendment.").

[13] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

audience plays in a *Garcetti*-based analysis of professorial speech.[14] Worthen, however, concludes that only professorial speech related to scholarship should be exempt from the *Garcetti* doctrine, arguing that in-class instruction should still be subject to *Garcetti*'s stringent standards.[15] This Note takes a similar approach as Worthen, examining the legal background of academic freedom, the effects of *Garcetti* and post-*Garcetti* decisions on academic freedom, and finally arguing for the abandonment of *Garcetti* in the narrow context of professorial speech. Unlike Worthen, however, this Note concludes that both instruction and scholarship should receive higher levels of constitutional protection under the First Amendment.

Part II of this Note explores the history of academic freedom in the United States and the development of the public employee speech doctrine, focusing specifically on *Garcetti*. Part III examines how the circuit courts have treated cases where parties have asserted academic freedom after *Garcetti* and how scholars have reacted to this developing doctrine. Part IV summarizes the audience's right to receive communication and its heightened importance in education and concludes that additional First Amendment protection precludes the application of *Garcetti* to collegiate academic freedom cases.

II. LEGAL BACKGROUND

Professorial speech jurisprudence draws upon two competing First Amendment doctrines: academic freedom's permissive free speech principles and the free speech limitations imposed on government employees.[16] Although these two doctrines rarely overlap, "the nature of the university setting is, in many respects, unique among other places of public employment" and requires

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[14] *See generally* Aaron Worthen, Comment, *Think of the Children: How the Role of Students in the Classroom Informs Future Applications of* Garcetti v. Ceballos *in Academic Contexts*, 2014 BYU L. REV. 983 (2014).

[15] *Id.* at 1014 ("[I]t becomes evident that the *Garcetti* rule should govern professional speech related to teaching but not professional speech related to scholarship.").

[16] *See* Smith, *supra* note 6, at 325 (noting the tension between the "severely restrictive standards" applied to public employee speech and the more lenient protections afforded to academic freedom).

courts to differentiate between academic speech and employee speech.[17] University professors must confront both these protections and limitations when assessing their rights. This Part details the evolution of both doctrines and analyzes the challenges to their reconciliation presented by *Garcetti*, which further limited the free speech rights of public employees.[18]

A. ACADEMIC FREEDOM

In 1940, the American Association of University Professors (the AAUP) promulgated a Statement of Principles on Academic Freedom and Tenure (the 1940 Statement).[19] The stated purpose of the document was "to promote public understanding and support of academic freedom" and to lay out three guiding principles for academic freedom: (1) professors are entitled to "full freedom" in their research and publications; (2) professors have freedom to discuss what they want in class, as long as the content is reasonably related to their subject matter; and (3) professors who "speak[] or write[] as . . . citizen[s]" should be free from censorship or discipline by their employing institution.[20] The 1940 Statement formalized the concept of academic freedom and the AAUP's formulation continues to guide the standards for many academic codes.[21]

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[17] Habib, *supra* note 12, at 530.

[18] *Id.* at 511 ("*Garcetti*'s holding has considerably decreased the number of public employment cases finding in favor of First Amendment protection.").

[19] Am. Ass'n of Univ. Professors, *Academic Freedom and Tenure: 1940 Statement of Principles and Interpretive Comments*, 56 AAUP BULL. 323 (1970). The 1940 Statement built on a previous 1915 Declaration by the AAUP, which first introduced the "[m]odern American understandings of academic freedom." Inazu, *supra* note 8, at 959. For a thorough review of the 1915 Declaration, see Smith, *supra* note 6, at 310–11.

[20] Am. Ass'n of Univ. Professors, *supra* note 19, at 324.

[21] *See* McAdams v. Marquette Univ., 914 N.W.2d 708, 746 n.10 (Wis. 2018) (Bradley, J., concurring) ("As the first organization to develop codes of academic freedom, AAUP's statements remain the model."). More than 250 academic groups and organizations have endorsed the 1940 Statement, and hundreds of American colleges and universities have adopted it in some form in their academic policies. Smith, *supra* note 6, at 312; *see also Endorsers of the 1940 Statement*, AM. ASS'N U. PROFESSORS, https://www.aaup.org/endorsers-1940-statement (last visited Jan. 31, 2021) (listing endorsers in alphabetical order).

The U.S. Supreme Court first began acknowledging academic freedom as a unique interest of education in the early 1950s.[22] Justice Douglas's dissent in *Adler v. Board of Education*[23] and Justice Frankfurter's concurrence in *Wieman v. Updegraff*[24] invoked the concept of academic freedom to caution against state actions aimed at employees during the Communist scares, arguing that teachers cannot effectively educate in an atmosphere that distrusts discussion of sensitive, and possibly subversive, topics.[25] Though the legal conception of academic freedom would grow to encompass more parties and greater rights, the foundation of the Court's jurisprudence "began primarily with an emphasis on the rights of individual teachers."[26]

Sweezy v. New Hampshire marked the first great triumph for academic freedom in the courts.[27] There, the U.S. Supreme Court reversed the conviction of a University of New Hampshire professor for a lecture he had given to his students during which he allegedly violated the state's subversive conduct act.[28] In the plurality opinion, Chief Justice Warren extolled the "essentiality of freedom in the community of American universities," declaring that

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[22] *See* Smith, *supra* note 6, at 313 (noting that "[t]he courts first paid attention to the concept of academic freedom as a response to government investigations of alleged communist conspiracies" during the 1950s and 1960s").

[23] 342 U.S. 485, 508 (1952) (Douglas, J., dissenting) ("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.").

[24] 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring) ("To regard teachers . . . as the priests of our democracy is . . . not to indulge in hyperbole. . . . They must have the freedom of responsible inquiry . . . .").

[25] *See* Smith, *supra* note 6, at 317 ("[T]he concept of academic freedom, although not the actual term, initially emerged into Supreme Court jurisprudence through dissenting and concurring opinions."). But the two cases themselves did not directly involve academic freedom. In *Adler*, public school teachers claimed that a New York law permitting dismissal of "subversive" public employees violated their First Amendment rights. 342 U.S. at 489–92. The Court found "no constitutional infirmity" with the law in *Adler*, see *id.* at 496, but it later held the law unconstitutional in a subsequent case. *See infra* note 30. In *Wieman*, state employees alleged that the state government could not require them to take an oath of loyalty, and Justice Frankfurter examined the effect such a law would have on educators. 344 U.S. at 196–97. The Court struck down the law in *Wieman* because "[t]he oath offend[ed] due process." *Id.* at 191.

[26] Smith, *supra* note 6, at 317.

[27] 354 U.S. 234, 235–55 (1957) (plurality opinion).

[28] *Id.* at 243–45, 255.

"[t]eachers and students must always remain free to inquire, to study and to evaluate, [and] to gain new maturity and understanding; otherwise[,] our civilization will stagnate and die."[29]

The Court reaffirmed these principles ten years later in *Keyishian v. Board of Regents*, finally applying a form of constitutional protection to academic freedom.[30] Justice Brennan, writing for the Court, declared that America "is deeply committed to safeguarding academic freedom, [and] . . . [t]hat freedom is . . . a special concern of the First Amendment."[31] Describing the classroom as a "marketplace of ideas," Justice Brennan stated that academic freedom is "of transcendent value to all of us and not merely to the teachers concerned."[32] By noting that teachers are not the only class in society with an interest in protecting academic freedom, *Keyishian* necessarily implies that students may also be protected by a constitutional right to academic freedom.[33]

But the Court has rarely enforced academic freedom as an individual-centric right; rather, "[e]ven judicial rhetoric more friendly to academic freedom has . . . focused on the institution of the university rather than the individual faculty member."[34] In his *Sweezy* concurrence, Justice Frankfurter provides an example of this institutional primacy by identifying "'the four essential

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[29] *Id.* at 250.

[30] 385 U.S. 589 (1967). *Keyishian* held unconstitutional the New York law previously upheld in *Adler* as applied to the plaintiffs in this case. *Id.* at 609–10; *see also supra* note 25.

[31] *Keyishian*, 385 U.S. at 603.

[32] *Id.*

[33] *Cf.* Barenblatt v. United States, 360 U.S. 109, 112 (1959) (recognizing "learning-freedom" as a "corollary" to "academic teaching-freedom"); Rory Thomas Gray, Note, *Academic Freedom on the Rack: Stretching Academic Freedom Beyond its Constitutional Limits in* FAIR v. Rumsfeld, 63 WASH. & LEE L. REV. 1131, 1149 (2006) (noting that the Court did not "elaborate upon the full extent of students' academic freedom" until the 1970s). Gray appears to rely on the 1970s as a turning point due to the Court's 1969 decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). *Id.* Although *Tinker* did not directly concern academic freedom, it is a foundational case, ensuring that students retain constitutional protections while in school, and it is a necessary component of First Amendment protections for students. *See* Inazu, *supra* note 8, at 955 n.55 (discussing how the Court primarily invokes *Tinker* in the university setting to support the First Amendment's applicability to public universities).

[34] Inazu, *supra* note 8, at 961; *see also* Gray, *supra* note 33, at 1152 ("Academic freedom, in its institutional guise, . . . grant[s] educational experts the corporate ability to govern the aspects of university life most intimately related to the educational process.").

freedoms' of a university."[35] These "four essential freedoms" are the freedoms for an institution "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[36] These freedoms have since expanded "to include a generalized principle of deference to a university's academic decisions."[37]

Paradoxically, a university's right to make unilateral decisions regarding academic policy can conflict with—and potentially override—a professor's right to teach as they deem most effective.[38] For example, the Third Circuit, in a decision by then-Judge Alito, has held that "a public university professor does not have a First Amendment right to decide what will be taught in the classroom" because the teacher cannot contravene the school's policy or curriculum.[39] Similarly, the Eleventh Circuit used academic freedom's tenuous legal footing—at least to the extent that it may

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[35] Sweezy v. New Hampshire, 354 U.S. 234, 263 (Frankfurter, J., concurring) (quoting THE OPEN UNIVERSITIES IN SOUTH AFRICA 10–12 (Elbert van de Sandt Centlivres et al. eds., Whitwatersrand Univ. Press 1957)).

[36] *Id.*

[37] Gray, *supra* note 33, at 1152. Gray also notes that the Court has gone to great lengths in cases where it rules against the universities to reaffirm its "respect for [the schools'] *legitimate* academic decisionmaking." *Id.* at 1153 (quoting Univ. of Pa. v. EEOC, 493 U.S. 182, 199 (1990)).

[38] *See, e.g.*, Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1985) ("Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself." (citations omitted)); *see also* Worthen, *supra* note 14, at 987–88 (noting the tension between these two "competing concepts" of academic freedom). *But see* Smith, *supra* note 6, at 323–24 ("More accurately, the Supreme Court's recognition of institutional academic freedom acts as a complementary layer of protection for academic speech."); Gray, *supra* note 33, at 1153–54 ("While this deference to academic judgment is substantial, it is not absolute. . . . The Supreme Court has resisted school officials' efforts to extend such deference to decisions that unnecessarily inhibit students' First Amendment freedoms.").

[39] Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 491 (3d Cir. 1998). After a student complained that Edwards was using class materials to advance a certain religious view, the university restricted the materials that Edwards, a tenured professor, could use in the class he taught and suspended him for an academic term. *Id.* at 489–90. Though the court held that Edwards could campaign for the use of the controversial material's inclusion in the class's syllabus outside of the classroom, it also held that Edwards had no right to use his teaching methods *inside* the classroom. *Id.* at 491 ("[A]lthough Edwards has a right to advocate outside of the classroom for the use of certain curriculum materials, he does not have a right to use those materials in the classroom.").

be recognized as an inherent constitutional right and not merely adjacent to First Amendment protections—to conclude that a university's interest in controlling its doctrinal mission outweighed any possible infringement on a professor's constitutional rights.[40] The U.S. Supreme Court's ruling in *Garcetti* only further highlighted the fragility of professors' academic freedom as opposed to their employing institutions' rights.[41]

B. PUBLIC EMPLOYEE SPEECH DOCTRINE

Beyond the academic context, every public employee faces substantial hurdles in asserting First Amendment rights in their professional workplace.[42] Although courts initially permitted public employers to restrict their employees' speech without cause,[43] the U.S. Supreme Court's 1968 decision in *Pickering v. Board of Education* established the current balancing test for determining when a public employer may constitutionally limit an employee's speech.[44] Under *Pickering*, courts must weigh the employee's First Amendment interests in "commenting upon matters of public concern" against the government's interests in acting as an employer and in providing public services.[45] Only if the government's interests outweigh the employee's is it permitted to control the form of expression.

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[40] *See* Bishop v. Aronov, 926 F.2d 1066, 1075 (11th Cir. 1991) ("Though we are mindful of the invaluable role academic freedom plays in our public schools . . . we do not find support to conclude that academic freedom is an independent First Amendment right.").

[41] *See* Worthen, *supra* note 14, at 988 ("This tension has come to the forefront of First Amendment jurisprudence in the wake of *Garcetti*."); *see also infra* Part III.

[42] *See* Smith, *supra* note 6, at 325 ("Public employees traditionally had no free speech rights. . . . The Supreme Court retreated from this broad position in 1968, but in subsequent cases, it has narrowly delimited government employees' free speech rights.").

[43] *See* Habib, *supra* note 12, at 514 ("Prior to the 1960s, as a constitutional matter, the speech of a public employee could be restricted without cause by the employer.").

[44] 391 U.S. 563, 568–73 (1968) (applying the balancing test to find that a school board violated a teacher's First Amendment rights when it fired him for writing a letter to the local newspaper criticizing the board's revenue-raising tax proposal).

[45] *Id.* at 568 ("The problem in any case is to arrive at a balance between the interests of the [employee], 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.").

Although *Pickering* requires lower courts to perform this balancing test, it fails to explain how to weigh these interests, what factors are determinative in this analysis, and what qualifies as a matter of public concern.[46] The Court provided further guidance on what is, and is not, a matter of public concern in *Connick v. Myers*, stating that a matter of public concern can "be fairly considered as relating to any matter of political, social, or other concern to the community."[47] The Court explained that "the content, form, and context of a given statement" are determinative in evaluating the speech at issue.[48] Courts are much more likely to find for the speaker when the speech "operates at the core of the First Amendment,"[49] but there is a noted bias in some circuits to side with the government in most cases.[50]

C. *GARCETTI V. CEBALLOS*

In 2006, the U.S. Supreme Court decided *Garcetti v. Ceballos* and created an additional hurdle for public employees pressing their free speech rights.[51] In this case, Ceballos, a district attorney in Los Angeles, wrote a memorandum denouncing the use of an affidavit which contained "serious misrepresentations" in order to secure an

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[46] S*ee* Habib, *supra* note 12, at 516 (explaining that lower courts had to develop their own standards to perform the *Pickering* analysis, leading to inconsistency and "considerable confusion").

[47] 461 U.S. 138, 146 (1983). The Court also indicated that an employer must demonstrate actual or potential disruption on account of the employee to prevail in the balancing test. *Id.* at 152–54. *But see* Smith, *supra* note 6, at 330 n.177 (arguing that the Court's decision in *Rankin v. McPherson*, 483 U.S. 378 (1987), heightened the requirement of "potential disruption" to "actual disruption").

[48] *Connick*, 461 U.S. at 147–48. This analysis seems to consider factors such as venue, articulation, audience, tone, and any other element of the disseminated speech.

[49] Boos v. Barry, 485 U.S. 312, 318 (1988) (discussing the core First Amendment right to display signs critical of foreign embassies).

[50] *See, e.g.*, Hansen v. Soldenwagner, 19 F.3d 573, 576 (11th Cir. 1994) (acknowledging the circuit's preference for deciding in favor of the state employer); *see also* Lewis M. Wasserman & John P. Connolly, *Unipolar Panel Effects and Ideological Commitment: An Analysis of U.S. Courts of Appeals Free Speech Decisions Involving K–12 Public Education Employees*, 31 A.B.A. J. LAB. & EMP. L. 537, 541 (2016) (finding that the U.S. Courts of Appeals found in favor of employers in K–12 free speech cases progressively more often throughout the years, up to approximately eighty percent of the time in the period from 2006–2014).

[51] 547 U.S. 410 (2006).

arrest warrant.[52] After tension arose between him and his supervisors, Ceballos alleged that he was reassigned to a different position, transferred to another courthouse, and denied a promotion.[53] The Ninth Circuit agreed with Ceballos, finding that the district had retaliated against his constitutionally protected speech.[54]

The U.S. Supreme Court, however, rejected Ceballos's claim and reversed the Ninth Circuit's decision.[55] Finding that Ceballos clearly wrote his memorandum pursuant to his official employment responsibilities, the Court held "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[56] Because Ceballos's speech was unprotected by the First Amendment, the Court refrained from applying the *Pickering* analysis, even though Ceballos's speech involved a matter of public concern.[57] The Court reasoned that speech created by employees within the scope of their official duties "owes its existence" to the government's employment, and the government has longstanding authority to regulate speech that it "itself has commissioned or created."[58] Therefore, any speech found to fall within the scope of *Garcetti* cannot even reach the balancing analysis under *Pickering*, precluding that speech from ever succeeding on a First Amendment claim.

Garcetti's holding, though "not directly involv[ing] academic speech," has reignited a debate about "how much First Amendment

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[52] *Id.* at 413–14. Ceballos also testified at a hearing for the defense that the affidavit contained errors. *Id.* at 414–15.

[53] *Id.* at 415.

[54] *Id.* at 415–16.

[55] *Id.* at 417.

[56] *Id.* at 421.

[57] *See* Habib, *supra* note 12, at 520 (explaining how *Garcetti*'s ruling is "consistent" with the *Pickering* doctrine because it merely added a "threshold inquiry").

[58] *Garcetti*, 547 U.S. at 421–22; *see also* Matal v. Tam, 137 S. Ct. 1744, 1757 (2017) ("[T]he First Amendment does not say that Congress and other government entities must abridge their own ability to speak freely. And our cases recognize that '[t]he Free Speech Clause . . . does not regulate government speech.'" (second alteration in original) (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009))).

protection academic speech deserves."[59] Justice Souter, in a dissenting opinion, urged that *Garcetti* would "imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties.'"[60] The majority acknowledged Souter's concern and stated that the Court "need not . . . decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."[61] Rather than solving the issue, this language has created a circuit split in the realm of academic freedom.

III. ACADEMIC FREEDOM AFTER *GARCETTI*

A. CIRCUIT COURT CASES

Because *Garcetti* did not address the issue, circuit courts have diverged in applying the public employee speech doctrine to educators who claim that their public institutions have infringed upon their academic freedom.[62] Some circuits have held that post-secondary scholarship and classroom instruction are outside the scope of *Garcetti*'s "official duties" test and therefore warrant First Amendment protection.[63] In *Demers*, the Ninth Circuit reasoned that applying *Garcetti* to instruction and scholarship "would directly conflict with the important First Amendment values previously articulated by the Supreme Court."[64] The Fourth Circuit was more timid, choosing only to apply the *Pickering* test instead of

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[59] Worthen, *supra* note 14, at 988.

[60] *Garcetti*, 547 U.S. at 438 (Souter, J., dissenting). Justice Souter cited *Keyishian* and *Sweezy* to argue that academic freedom must be exempt from the *Garcetti* holding. *Id.* at 439.

[61] *Id.* at 425 (majority opinion).

[62] *See* Worthen, *supra* note 14, at 988–91 (noting that "in the eight years since *Garcetti*, the circuit courts have split regarding whether the new public employee rule should extend to speech related to scholarship or teaching").

[63] *See, e.g.*, Demers v. Austin, 746 F.3d 402, 406 (9th Cir. 2014) ("We hold that *Garcetti* does not apply to 'speech related to scholarship or teaching.'" (quoting *Garcetti*, 547 U.S. at 425)); Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550, 562 (4th Cir. 2011) ("We are . . . persuaded that *Garcetti* would not apply in the academic context of a public university.").

[64] *Demers*, 746 F.3d at 411.

Garcetti because the Court had explicitly opted to leave the question of *Garcetti*'s applicability to academic speech unresolved.[65]

On the other hand, other circuits have seemingly followed the pre-*Garcetti* doctrine, which defers to an institution's academic freedom over the individual professor's.[66] The Sixth Circuit has relied on pre-*Garcetti* precedent to affirmatively state that educators do not have a right to contravene a school's "curricular and pedagogical choices."[67] The Seventh Circuit has also indicated that *Garcetti* may control in-class instruction,[68] although it has not yet addressed the issue in the post-secondary context.[69] Finally, some circuits have declined to reach the issue, but nevertheless have acknowledged the doctrinal uncertainty.[70]

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[65] *Adams*, 640 F.3d at 563 ("The Court explicitly did not decide whether this analysis would apply in the same manner to a case involving speech related to teaching. Thus, we continue to apply the *Pickering–Connick* standard . . . ." (quoting Lee v. York Cty. Sch. Div., 484 F.3d 687, 694 n.11 (4th Cir. 2007)). In *Adams*, a university allegedly denied a promotion to Adams based on his scholarly and instructive speech published in newspaper columns, radio shows, and a book outside the scope of his university employment. *Id.* at 552–54. The court acknowledged that the university hired Adams to be a scholar and educator, and *Garcetti* might implicate such teaching and research that occurs due to the terms of his employment. *Id.* at 563–64. Here, however, the speech was clearly not sponsored by the university and therefore did not implicate *Garcetti* "*under the facts of this case*." *Id.* at 564 (emphasis added). The court's reference to the specific "circumstances of this case" indicate *Adams*'s holding may only apply to that particular set of facts. *Id.*

[66] *See supra* Part II.A.

[67] Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 344 (6th Cir. 2010) ("In the context of in-class curricular speech, this court has already said in the university arena that a teacher's invocation of academic freedom does not warrant judicial intrusion upon an educational institution's decisions." (citing Parate v. Isibor, 868 F.2d 821, 827 (6th Cir. 1989))). Although *Evans-Marshall* deals with a high school teacher's academic freedom and the court explicitly recognized greater latitude for instructors in the collegiate context, the court still narrowed the constitutional rights of "nontenured" professors. *Id.*

[68] *See* Mayer v. Monroe Cty. Cmty. Sch. Corp., 474 F.3d 477, 479–80 (7th Cir. 2007) (holding that primary and secondary school teachers do not have a right to deviate from their school's adopted curriculum).

[69] *See* Brown v. Chi. Bd. of Educ., 824 F.3d 713, 716 (7th Cir. 2016) (declining to extend *Demers* into the primary and secondary education contexts by recognizing the uniqueness of post-secondary scholarship).

[70] *See, e.g.*, Gorum v. Sessoms, 561 F.3d 179, 186 (3d Cir. 2009) (acknowledging the issues concerning scholarship and instruction that Justice Souter raised in his *Garcetti* dissent but failing to reach the issue because the professor's statements "clearly were not 'speech related to scholarship or teaching'" (quoting Garcetti v. Ceballos, 547 U.S. 410, 425 (2006))); Emergency Coal. to Defend Educ. Travel v. U.S. Dep't of the Treasury, 545 F.3d 4, 18 (D.C.

B. POST-*GARCETTI* SCHOLARSHIP

The legal community immediately recognized the implications of *Garcetti*'s holding as it relates to academic freedom. Aaron Worthen identifies three categories into which legal scholars approaching the applicability of *Garcetti* to academic freedom fall: "those who conclude that *Garcetti* should apply to both scholarship and teaching, those who maintain that *Garcetti* should not apply to either scholarship or teaching, and those who contend that *Garcetti* should apply in some situations but not in others."[71] The first category encompasses those who support extending *Garcetti* to cases involving academic freedom, and its proponents generally argue that academic freedom only ever applied to institutions, not to individuals.[72]

Other commentators, however, argue that "[a]cademic speech must be distinguished from public-employee speech" and support at least some exception to *Garcetti*.[73] Compared to other government employees who "may be paid to disseminate a government message or provide a service," professors provide a service which requires the participation of others—the students.[74] However, there is near universal recognition that only those who work in the university setting enjoy this distinction.[75] The U.S. Supreme Court has "long

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Cir. 2008) (Edwards, J., concurring) (noting that the court should not decide whether academic freedom falls within the ambit of *Garcetti* because the Court declined to decide the same issue); Panse v. Eastwood, 303 F. App'x 933, 934–35 (2d Cir. 2008) (declining to answer whether *Garcetti* applies to classroom instruction because the appellant teacher failed to raise the issue on appeal); *cf.* Lee-Walker v. N.Y.C. Dep't of Educ., 712 F. App'x 43, 45 (2d Cir. 2017) (basing a school board's qualified immunity on *Panse*'s failure to create "clearly established law" regarding educators' free speech rights in classroom instruction).

[71] Worthen, *supra* note 14, at 991–92.

[72] *Id.* at 992 (citing Kermit Roosevelt III, *Not as Bad as You Think: Why* Garcetti v. Ceballos *Makes Sense*, 14 U. PA. J. CONST. L. 631, 645–49, 656 (2012)).

[73] Habib, *supra* note 12, at 530.

[74] *Id.* at 531.

[75] *See, e.g.*, *id.* (highlighting "internal critique" as an essential differentiating factor between universities and other places of public employment); Carol N. Tran, Comment, *Recognizing an Academic Freedom Exception to the* Garcetti *Limitation on the First Amendment Right to Free Speech*, 45 AKRON L. REV. 945, 980 (2012) ("[U]niversities are different and unique forms of institutions."). Most commentators who fall into Worthen's third category, those advocating for some hybrid application of *Garcetti*, typically argue that

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."[76] These scholars, who maintain that the university academic freedom context is unique, argue that an exception to *Garcetti* should be carved out in this specific instance.[77] Limiting the free speech rights of professors producing scholarship runs "contrary to the academic freedom's objective of critical inquiry."[78] Indeed, freedom from institutional oversight ensures academic integrity.[79]

Notably, Worthen is the main post-*Garcetti* commentator who has examined the importance of students in defining professors' academic freedom rights.[80] He ultimately argues that *Garcetti* should apply to a professor's speech related to teaching, but that *Garcetti* should not encompass speech made in relation to scholarship.[81] Worthen's reasoning that students are a captive audience and that a classroom is *not* a true marketplace of ideas lead him to conclude that the oversight offered to the government by *Garcetti* is warranted in university instruction.[82] Because these same concerns do not arise under scholarship, Worthen argues that

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university professors deserve greater leniency in instruction than primary and secondary school teachers. Worthen, *supra* note 14, at 993.

[76] Grutter v. Bollinger, 539 U.S. 306, 329 (2003).

[77] *See, e.g.*, Habib, *supra* note 12, at 542–43 (arguing that academic speech should only be analyzed under *Pickering* and not *Garcetti*); Tran, *supra* note 75, at 979 (suggesting that a "more thoughtful analysis" predicated on the 1940 Statement should be used to analyze scholarship and instruction).

[78] Tran, *supra* note 75, at 979. The criticism that *Garcetti* contravenes the mission of a university by inhibiting academic speech is a legitimate concern. *See* Habib, *supra* note 12, at 541–42 (denouncing governmental control of professors' academic activity through unfair school policies as "a type of fraud on the public"). This Note considers this proposition in a similar vein: how failure to account for the rights of an audience runs afoul of a university's academic mission. *See infra* Part IV.B.

[79] *See* Smith, *supra* note 6, at 354 ("Professors deserve more freedom from employer control than typical employees because scholarly independence is a prerequisite for the proper performance of academic work.").

[80] *See* Worthen, *supra* note 14, at 993–94. Rory Thomas Gray also addresses the role of students, but in a note that predates *Garcetti*. *See* Gray, *supra* note 33.

[81] Worthen, *supra* note 14, at 1014 ("[W]hen . . . attention is paid to the role students play in the classroom, it becomes evident that the *Garcetti* rule should govern professional speech related to teaching but not professional speech related to scholarship.").

[82] *Id.* at 1005.

"many of the academic freedom principles articulated by the Supreme Court can be preserved by solely protecting professors' scholarship."[83]

IV. THE ROLE OF AN AUDIENCE

The primary flaw in most analyses of *Garcetti*'s intersection with academic freedom is the hyper-focus on the speaker and the speaker's rights. Naturally, affirmative speech draws greater attention than silence.[84] But professors do not speak merely to express their own ideas or even to communicate specific messages dictated by the government; rather, professors engage in a dialogue with their students—or in the case of scholarship, with their peers—which stands apart in traditional First Amendment doctrine.[85] By applying *Garcetti* to these forms of expression, the courts have functionally ignored the listeners. Moving away from an analysis of academic speech as government speech will provide greater rights and protections to the audience of university professors, not just the professors themselves.

A. THE RIGHT TO RECEIVE COMMUNICATIONS

The U.S. Supreme Court has long upheld an individual's right to "receive information and ideas."[86] It is unclear exactly which provisions of the First Amendment provide these protections, as the Court has offered various clauses as the basis for this constitutional right.[87] Nevertheless, both the speaker and the listener are

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[83] *Id.* at 1008.

[84] *See* Matthew Baker, Comment, *A Teacher's Right to Remain Silent: Reasonable Accommodation of Negative Speech Rights in the Classroom*, 2009 BYU L. REV. 705, 705 (2009) ("Nearly every significant case analyzing public school teacher speech rights in the classroom involves affirmative expression.").

[85] *See* Smith, *supra* note 6, at 353 ("Scholarly speech is neither ordinary employee workplace speech nor common public debate.").

[86] *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 762–63 (1972) (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)).

[87] *See, e.g.*, Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982) (plurality opinion) (citing the speech and press clauses); Shelton v. Tucker, 364 U.S. 479, 485–87 (1960) (citing the association clause); Thomas v. Collins, 323 U.S. 516, 532 (1945) (citing the speech and assembly clauses). While it is normally immaterial which First Amendment provision provides a substantive right, it is possible that the right's origin affects the *Garcetti* analysis.

independently afforded protection under this doctrine.[88] The right to receive information supports the First Amendment's goal of "preserving an uninhibited marketplace of ideas" where the public may obtain "suitable access to social, political, esthetic, moral, and other ideas and experiences."[89] For this reason, the U.S. Constitution protects communications that "enhance the functioning of our republican form of government."[90] To effectuate the promotion of this marketplace, "[t]he 'rights' of the speaker are thus always tempered by a consideration of the rights of the audience and the public purpose served, or disserved, by his speech."[91]

The right to receive information is of particular concern in the academic setting: "The classroom is peculiarly the 'marketplace of ideas.'"[92] Education is defined by the interaction between the instructor and the instructed—"a kind of continuing dialogue."[93] This dialogue is essential to the improvement and development of our society:

> Students as well as faculty are entitled to credentials in their search for truth. If we are to become an integrated, adult society, rather than a stubborn status quo

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Because *Garcetti* only concerns itself with speech, the right to receive information as founded in association or assembly might prevent *Garcetti* from affecting expression protected by this right.

[88] *Pico*, 457 U.S. at 867 (plurality opinion) ("[T]he right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them . . . . More importantly, the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom.").

[89] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

[90] Martin v. Parrish, 805 F.2d 583, 584 (5th Cir. 1986).

[91] *Id.*

[92] Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967); *see also* Kleindienst v. Mandel, 408 U.S. 753, 763 (1972) ("This Court has recognized that [the right to receive information] is 'nowhere more vital' than in our schools and universities." (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960))).

[93] Wieman v. Updegraff, 344 U.S. 183, 197 (1952) (Frankfurter, J., concurring) (quoting *Tax-Exempt Foundations: Hearings on H. Res. 561 Before the H. Select Comm. to Investigate Tax-Exempt Founds. & Comparable Orgs.*, 82d Cong. 291 (1952) (statement of Robert M. Hutchins, Associate Director of the Ford Foundation)); *see also* Inazu, *supra* note 8, at 947–49 (identifying a dialogue that fosters "constrained disagreement" as a necessary characteristic of a university).

> opposed to change, students and faculties should have communal interests in which each age learns from the other. Without ferment of one kind or another, a college or university (like a federal agency or other human institution) becomes a useless appendage to a society which traditionally has reflected the spirit of rebellion.[94]

The school's role in developing citizens is seen as a crucial facet of the educational system—one that requires special attention when it comes to First Amendment protections.[95] Depriving students of the opportunity to hear contrasting opinions on important issues can infringe on these students' rights to participate in society and to realize their political freedom.[96]

The Court has even distinguished between the academic freedoms of teaching and learning, implying that learning has a unique status as a First Amendment right.[97] *Sweezy*'s declaration that "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding" stands just as true today as it did over sixty years ago.[98] The same principles are necessarily true in the realm of academic scholarship as well.[99]

B. REAFFIRMING THE RIGHTS OF LISTENERS IN THE *GARCETTI* ANALYSIS

Placing university instruction within the ambit of *Garcetti* fails to consider the role of the classroom generally, and students particularly, in professors' speech. *Garcetti* stands for the proposition that the government can regulate the expression of its

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[94] Healy v. James, 408 U.S. 169, 197 (1972) (Douglas, J., concurring).

[95] *See* Kristi L. Bowman, *The Government Speech Doctrine and Speech in Schools*, 48 WAKE FOREST L. REV. 211, 215–21 (2013) (discussing how positive civic externalities influenced the Court's decisions in cases such as *Brown v. Board of Education* and *Tinker v. Des Moines*).

[96] *Cf.* Gray, *supra* note 33, at 1180 (arguing that the government engages in indoctrination of its students when it does not allow them to decide important issues themselves).

[97] Barenblatt v. United States, 360 U.S. 109, 112 (1959) (asserting that "learning-freedom" is a "corollary" of "academic teaching-freedom" and deserves constitutional protection).

[98] Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion).

[99] *See* Worthen, *supra* note 14, at 1007–08 ("[S]cholarship, unlike teaching, *is* 'peculiarly a marketplace of ideas.'").

employees who speak as their employer.[100] But the service provided by the government in the academic context is the service of unfiltered speech.[101] Controlling the speech of a university professor—either in their classroom instruction or in their production of scholarship in the marketplace of ideas—inherently controls the expression of those who engage in a dialogue with that speaker. Students are particularly affected by this supervision.[102] Impeding a professor's ability to respond in the manner they think most appropriate is detrimental to the educational process. Analyzing their speech as though it were government speech is, therefore, unreasonable.

Importantly, most reasoning offered by case law that limits students' rights of expression only applies to elementary and secondary students, not the university setting.[103] University students, compared to elementary and secondary school students, are nearly always the age of majority and are voluntary participants, not "captive audience[s]."[104] They do not require the

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[100] Garcetti v. Ceballos, 547 U.S. 410, 424 (2006) ("Proper application of our precedents thus leads to the conclusion that the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities.").

[101] *Cf.* Habib, *supra* note 12, at 531 (explaining how valuable instruction arises out of "thoughtful and inquiring curricula or engaging in probative research").

[102] Norman B. Smith, *Constitutional Rights of Students, Their Families, and Teachers in the Public Schools*, 10 CAMPBELL L. REV. 353, 397 (1988) ("[C]ontents of student reports and other assignments, responses to questions, and volunteered comments in class, by their very nature, cannot be prescribed by higher authority.").

[103] *See, e.g.*, Kai Wahrmann-Harry, Note, *The Next Step in Student Speech Analysis? How the Eighth Circuit Further Complicates the First Amendment Rights of University Students in* Keefe v. Adams, 51 CREIGHTON L. REV. 425, 449 (2018) (explaining how the holding in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), relies heavily on schools acting *in loco parentis* and that this relationship is ill-suited for determining students' rights in the collegiate setting).

[104] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 515 (1969) (Stewart, J., concurring). Elementary and secondary school students, of course, are subject to truancy laws and usually do not have the freedom to choose the classes in which they enroll. *See* Rachel F. Moran, *Let Freedom Ring: Making* Grutter *Matter in School Desegregation Cases*, 63 U. MIAMI L. REV. 475, 503 (2009) ("Unlike college and university students, pupils are compelled to attend school until a specified age."). Conversely, postsecondary enrollment is optional for every individual, and these students have substantially more freedom to choose their course of studies. *Id.*; *see also* Paul Forster, *Teaching in a Democracy: Why the* Garcetti *Rule Should Apply to Teaching in Public Schools*, 46 GONZ. L. REV. 687, 714 (2010–2011) (discussing the differences between secondary and postsecondary curricula and teaching methods). Worthen

same level of oversight or coddling often afforded to students in lower levels of education.[105] While institutions may still have an interest in their curricula to ensure educational or reputational standards, any arguments that promote control as a method to protect students severely diminish the full legal liberty these adult students should otherwise enjoy. In fact, since 1923, the U.S. Supreme Court has condemned "'arbitrary' restrictions upon the freedom of teachers to teach and of students to learn."[106] The symbiotic relationship here is essential: a society that only permits teachers to teach but does not permit students to learn, or vice versa, is inherently implementing an arbitrary restriction.

Moreover, recognizing the rights of listeners in cases of professorial instruction also furthers the purposes of the university.[107] Open discussion is "essential to the credibility of universities and academic disciplines."[108] Professors are not hired to parrot the government's expression back to the public; rather, professors are hired to forge their own ideas and to promote their

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argues that college students are a captive audience, "at least in some scenarios," by focusing on the arbitrary definition of college students as adults and the financial incentives and graduation requirements that students must adhere to. Worthen, *supra* note 14, at 1002–05. While Worthen supplies neuroscientific and psychological reasoning for his maturity argument, *id.* at 1002, he ignores the legal reality that college students, even as young as eighteen, enjoy greater legal freedoms (such as the ability to vote) that their younger counterparts do not possess. *See* Sheldon Nahmod, *Academic Freedom and the Post*-Garcetti *Blues*, 7 FIRST AMEND. L. REV. 54, 68 (2008) ("[U]nlike elementary and secondary students, students at the university level are not a captive audience and, moreover, are legally adults."). Worthen also ignores that college students, unlike high school students, have a much greater ability to choose which classes they take, what subjects to major in, whether to drop out, whether to switch their course of study, or whether to transfer schools; in short, they can employ a whole host of other mechanisms through which they can control their course of study.

[105] *Cf.* Forster, *supra* note 104, at 714 ("College classes . . . involve a different sort of teaching than do public school classes. The ability of students to think for themselves increases with age, whereas younger students are more likely to accept whatever a teacher says as true.").

[106] Epperson v. Arkansas, 393 U.S. 97, 105 (1968) (citing Meyer v. Nebraska, 262 U.S. 390, 400 (1923)). Although *Epperson*, which upheld an Arkansas statute criminalizing the instruction of evolution, was decided on establishment clause grounds, the case reiterates the notion that there is a constitutional guarantee "to acquire useful knowledge." *Id.*

[107] *See* Tran, *supra* note 75, at 978 (arguing that academic freedom promotes expertise among professors and critical-thinking skills among students).

[108] *Id.*

students' ability to do the same.[109] Without greater recognition of academic freedom, students may be deprived of their professor's expertise in their subjects, as well as "cutting-edge information."[110] "[T]he academic freedom of teachers *and students* should create a zone of protection against encroachment by school authorities in matters of lectures, class questions, and discussions."[111]

Freedom of scholarship follows similar principles. Research builds on the open dialogue between professional academics; depriving the community of a single voice is inimical to the "search for truth."[112] Again, postsecondary institutions employ professors for unknown contributions they have yet to make, so it is inherent in their job description that they investigate without administrative limitation. If an institution does not want to be the mouthpiece for a professor's specific research, they have a simple solution: do not hire that individual in the first place. But by employing a professor, the institution implicitly authorizes the academic output produced by that professor.[113] Permitting professors to research as they like without institutional oversight preserves the principle of the marketplace of ideas and the purposes of the university.

V. CONCLUSION

Garcetti descends from a long line of cases that attempt to reconcile the government's interests as an employer with government employees' free speech rights.[114] *Garcetti* permits regulation of speech made by employees on behalf of the government

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[109] *See* Habib, *supra* note 12, at 542 (denouncing governmental control of professors' academic activity through unfair school policies as "a type of fraud on the public"); *see also* Worthen, *supra* note 14, at 1012–14 (arguing that universities hire professors to act as private speakers in their scholarship because outside agencies often fund research projects).

[110] Worthen, *supra* note 14, at 1010.

[111] Smith, *supra* note 102, at 409 (emphasis added).

[112] Worthen, *supra* note 14, at 1009. Worthen also discusses the important role that peers play in the research process to support academic freedom for speech "among professors." *Id.*

[113] This would not extend to research that is unethical, libelous, fraudulent, or otherwise illegal. In these instances, however, either the speech has already been deemed unprotected by the First Amendment or the *Pickering* balancing test can correctly determine that the speech subverted the proper administration of the university. *See supra* notes 44–50 and accompanying text.

[114] *But see* Habib, *supra* note 12, at 522 (arguing that *Garcetti* "incorrectly relied on" employee-speech cases to support its holding).

or pursuant to their governmental duties because this is essentially government speech.[115] While applying this doctrine is fairly straightforward in the vast majority of cases, academic freedom stands out as a notable exception.

If applied to either scholarship or teaching, *Garcetti* would conflict with one of the government's stated goals and a bedrock proposition of the First Amendment: supporting the free marketplace of ideas.[116] *Garcetti*'s potential impact on academic freedom is particularly egregious because this principle of American education "is of transcendent value to all of us and not merely to the teachers concerned."[117] By further analyzing academic speech as government employee speech, courts ignore the clear constitutional rights of students and the public at large. Recognizing the rights of the listeners in the academic context is necessary to support the "kind of continuing dialogue" inherent in education.[118]

Furthermore, simply refusing to apply *Garcetti* to academic speech does not greatly affect a university's ability to discipline a professor when required—absent *Garcetti*, the *Pickering* balancing test still applies.[119] Should a professor's speech involve sexual harassment or incite riotous behavior in their classroom instruction, for instance, the public interest in efficient operation may outweigh the professor's private interest in expression. Instead of immediately disregarding all professor speech as unprotected speech made "pursuant to their official duties,"[120] professors will at least have the opportunity to prove in court why their speech deserves protection. Requiring the state to demonstrate in open court how postsecondary instruction or research potentially harms the public interest would safeguard speech that is merely

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[115] *See* Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006) (distinguishing between private speech and speech within the scope of employment).

[116] *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.").

[117] Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

[118] Wieman v. Updegraff, 344 U.S. 183, 197 (1952) (Frankfurter, J., concurring) (quoting *Tax-Exempt Foundations: Hearings on H. Res. 561 Before the H. Select Comm. to Investigate Tax-Exempt Founds. & Comparable Orgs.*, 82d Cong. 291 (1952) (statement of Robert M. Hutchins, Associate Director of the Ford Foundation)).

[119] *See supra* notes 44–50 and accompanying text.

[120] *Garcetti*, 547 U.S. at 421.

disagreeable or unfavored. In our society's quest to ensure the "vigilant protection of constitutional freedoms . . . in the community of American schools,"[121] it should be more difficult, not easier, for the government to limit academic freedom.

[121] *Keyishian*, 385 U.S. at 603 (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).