An Academic Freedom Exception to Government Control of Employee Speech

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Other Views:

• Mark Strasser, Pickering, Garcetti, *& Academic Freedom*, 83 Brook. L. Rev. 579 (2018), *available at* https://brooklynworks.brooklaw.edu/blr/vol83/iss2/13/.

• Aaron Worthen, *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), *available at* https://digitalcommons.law.byu.edu/lawreview/vol2014/iss4/7/.

• 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 (2012), *available at* https://ideaexchange.uakron.edu/cgi/viewcontent.cgi?article=1056&context=akronlawreview.

Public employee speech cases often arise as Section 1983 actions in which a public employee claims to have suffered retaliatory employment consequences for speech that the First Amendment protects.[1] When the speech in question is not pursuant to the speaker's official duties as an employee of the government—say, a DMV employee alleges she was fired for placing a campaign poster at her desk—courts assess these actions under the Supreme Court's decision in *Pickering v. Board of Education*.[2] In that seminal public employee speech case, the Supreme Court instructs courts to apply a two-part test: First, they determine whether the speech was on a matter of public concern. If not, the First Amendment does not limit the government employer's right to regulate the speech. But if so, courts then balance the speaker's free speech interest against the government's administrative interest to determine which is more significant.

When the speech in question *is* pursuant to official duties, the government's interests receive an additional layer of protection. Perhaps fearing that public employee speech actions in such cases threaten "displacement of managerial discretion by judicial supervision,"[3] the Supreme Court, in its 2006 decision *Garcetti v. Ceballos*, extended government speech doctrine to public employee speech. According to government speech doctrine, the government "is entitled to say what it wishes" when it "appropriates public funds to promote a particular policy of its own."[4] *Garcetti* reasons that when public employees speak pursuant to their official duties, that speech is government speech because it results from an appropriation of public funds. Because it is government speech, it is not attributable to the person speaking at all. Thus, the speech implicates no First Amendment rights of the public employee to balance against the government's interests.[5]

Both the majority opinion and Justice David Souter's dissent recognized that applying this logic to public university professors would deny professors First Amendment protection for

1 42 U.S.C. § 1983 gives citizens the right to sue public officials for violations of their constitutional rights.

2 391 U.S. 563 (1968). *See also* Connick v. Myers, 461 U.S. 138 (1983) (further refining *Pickering*'s test).

3 Garcetti v. Ceballos, 547 U.S. 410, 423 (2006).

4 Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995).

5 *Garcetti*, 547 U.S. 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."); *Id.* at 421–22 ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.").

“expression related to scholarship or teaching.”[6] Public universities would be free to undermine academic freedom by retaliating against professors who express ideas their university disagrees with. To avoid that uncomfortable result, the Court expressly stipulated that it did not “decide whether the analysis . . . would apply in the same manner to a case involving speech related to scholarship or teaching.”[7]

Thus, the Court implied that there may be an academic freedom exception to *Garcetti*’s rule that public employee speech pursuant to official duties receives no First Amendment protection because it is government speech. Currently, three circuits (or four, depending on how one reads the cases) have recognized some form of an academic freedom exception to *Garcetti* for speech by public university professors.[8] These circuits agree that, because *Garcetti* itself creates an exception to standard public employee speech analysis under *Pickering*,[9] that standard analysis applies to speech that qualifies for the academic freedom exception to *Garcetti*.[10] So where, for example, a public university professor alleges that she was denied tenure because she published a controversial paper, a court that would normally apply *Garcetti* to a speech retaliation claim by a public employee would instead find *Garcetti* inapplicable due to the academic freedom exception. The court would then proceed to *Pickering*’s two-part inquiry requiring courts to ask whether the speech in question involves a matter of public concern,[11] and if so whether the employee’s interest in expression outweighs the government’s interest in regulating its employees’ speech to maintain an effective workplace.[12]

Are these circuits correct to recognize an academic freedom exception to *Garcetti*? If so, how does the exception operate, and how broadly does it apply? This article posits that a fully defined academic freedom exception to *Garcetti* emerges from careful inspection of *Garcetti*, public employee speech doctrine, and government speech doctrine. That exception, when properly understood, applies to all public university professor speech on matters of public concern. Moreover, while the exception does not exempt all public university professor speech pursuant to official duties from *Garcetti*’s holding, it does render *Garcetti* wholly inconsequential in every First Amendment retaliation claim by a public university professor. Therefore, courts hearing such claims may safely ignore *Garcetti* altogether.

I. *Garcetti* and the Academic Freedom Exception

A. *Garcetti v. Ceballos*

On March 2, 2000, a deputy district attorney for the Los Angeles County District Attorney’s Office named Richard Ceballos submitted to his supervisor a memo he had written to explain his concerns about the veracity of a sheriff’s deputy’s affidavit on which a prosecution was based.[13] The memo led to a heated meeting and, according to Ceballos, retaliatory employment actions including reassignment, transfer, and denial of a promotion.[14] Ceballos brought a Section 1983 claim alleging a violation of his right to free speech guaranteed by the First Amendment and applied to the states through the Fourteenth.[15] Following disagreement between the district court and the Ninth Circuit, the Supreme Court granted certiorari.[16]

The Court, in an opinion by Justice Anthony Kennedy, explained that “[t]he controlling factor in Ceballos’ case is that his expressions were made pursuant to his duties as a calendar deputy,” and it 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

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6 *Id.* at 428 (Souter, J., dissenting).

7 *Id.* at 425.

8 *See* Adams v. Trustees of the Univ. of N.C.-Wilmington, 640 F.3d 550 (4th Cir. 2011); Demers v. Austin, 746 F.3d 402 (9th Cir. 2014); Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021). The arguable case is *Buchanan v. Alexander*, 919 F.3d 847 (5th Cir. 2019). *See infra* Section I.B.4.

9 *See* Mark Strasser, Pickering, Garcetti, *& Academic Freedom*, 83 Brook. L. Rev. 579, 596 (2018) (“*Garcetti* suggests that the First Amendment protections under the *Pickering* line of cases are not triggered insofar as an individual speaks as an employee. The *Garcetti* exception, however, may be inapplicable insofar as the employee’s speech is made in the course of teaching or research.”). Some readers may prefer to think of *Garcetti* as adding a new preliminary step to the *Pickering* analysis (asking whether the speaker was acting “as a citizen” or pursuant to “official duties”), instead of denying *Pickering* analysis to speech pursuant to official duties. That is, some might see *Garcetti* as a modification of *Pickering*, not an exception to it. These readers may prefer to read “pre-*Garcetti*” where the author has written “standard” or “ordinary.” On this reading, the academic freedom exception operates by using the pre-*Garcetti* two-step *Pickering* analysis instead of the post-*Garcetti* three-step *Pickering* analysis. The author reads *Garcetti* as an exception to *Pickering* because he understands the very application of *Pickering* analysis to be a form of First Amendment protection, even when it leads to the speech regulation being upheld. Therefore, *Garcetti*’s denial of First Amendment protection to speech pursuant to official duties does not modify *Pickering* (though the *Garcetti* Court rooted its holding in *Pickering*’s language), but instead renders *Pickering* (that is, First Amendment protection) wholly inapplicable to public employee speech that is pursuant to official duties. Post-*Garcetti* circuit cases applying a two-step *Pickering* analysis (instead of performing a third “as a citizen” step as part of the *Pickering* analysis) support the author’s reading. *See infra* note 11.

10 *See infra* Section I.B.

11 Barker v. City of Del City, 215 F.3d 1134, 1138 (10th Cir. 2000) (citing *Pickering* and *Connick*); Nord v. Walsh Cty., 757 F.3d 734, 740 (8th Cir. 2014) (“This analysis requires a two-step inquiry. First, we determine whether the employee’s speech can be ‘fairly characterized as constituting speech on a matter of public concern. Second, if the speech addresses a matter of public concern, we balance 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.”) (internal citations and quotation marks omitted); *Demers*, 746 F.3d at 412 (“We hold that academic employee speech not covered by *Garcetti* is protected under the First Amendment, using the analysis established in *Pickering*. The *Pickering* test has two parts. First, the employee must show that his or her speech addressed matters of public concern. Second, the employee’s interest in commenting upon matters of public concern must outweigh the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”) (internal citations and quotation marks omitted).

12 *Connick*, 461 U.S. at 146.

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

14 *Id.* at 414–15.

15 *Id.* at 415.

16 *Id.*

not insulate their communications from employer discipline."[17] The Court then reasoned that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created."[18] To draw a sharp distinction between government speech and citizen speech, the Court added a step to *Connick*'s two-part formulation of the test that *Pickering* initially laid out. The Court held that the first inquiry—"whether the employee spoke as a citizen on a matter of public concern"—presupposes that the employee spoke "as a citizen," not merely as a government mouthpiece, and that courts must confirm that this supposition is true before asking whether the speech was on a matter of public concern.[19] The Court reasoned that speech on a matter of public concern does not necessarily implicate the speaker's interest "as a citizen" unless he was in fact speaking in his capacity as a citizen. In the case at hand,

> Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.[20]

Because official communications must "promote the employer's mission . . . [i]f Ceballos' supervisors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action."[21]

Justice Souter, joined by Justices John Paul Stevens and Ruth Bader Ginsburg, took issue with the Court's apparent holding "that any statement made within the scope of public employment is (or should be treated as) the government's own speech, and should thus be differentiated as a matter of law from the personal statements the First Amendment protects."[22] Justice Souter warned that this conception of government speech is so broad as "to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties.'"[23]

The Court responded to Justice Souter's dissent by explicitly not deciding whether its analysis "would apply in the same manner to a case involving speech related to scholarship or teaching" because such expression might "implicate[] additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence."[24] Seizing on the majority's suggestion that its sharp distinction between government and citizen speech by public employees may not apply to public university professors, courts soon began recognizing an academic freedom exception to *Garcetti*.

B. The Academic Freedom Exception in the Courts of Appeals

1. The Fourth Circuit

In 2011, the Fourth Circuit became the first federal court of appeals to hold that an academic freedom exception to *Garcetti* preserves First Amendment protection for some public university professor speech. The occasion arose when the senior faculty at the University of North Carolina-Wilmington ("UNCW") voted 7-to-2 against promoting associate professor Michael Adams to full professor.[25] Adams sued, asserting claims under Section 1983 for First Amendment retaliation, among other things.[26] He alleged that UNCW refused to promote him because of the faculty's disagreement with ideas he'd expressed in several "external writings and [media] appearances" that he had mentioned in his application for full professor.[27] These writings included articles in "non-refereed publications," columns published on TownHall.com, and a book that republished several of these columns.[28]

The district court awarded UNCW summary judgment on Adams' First Amendment claims.[29] The court ruled that Adams' columns, other publications, and public appearances were all speech pursuant to his "official duties," and that his listing them on his promotion application was an implicit admission that this was the case.[30] Having characterized Adams' speech as government speech, the court ended its analysis by relying on *Garcetti* to deny First Amendment protection to the speech.[31]

In reversing the district court's decision, the Fourth Circuit declared that it was "persuaded that *Garcetti* would not apply in the academic context of a public university as represented by the facts of this case."[32] The Fourth Circuit explained that *Garcetti* was inapplicable because Adams' speech at issue was not speech "'pursuant to [his] official duties' as intended by *Garcetti*."[33]

17 *Id.* at 421.

18 *Id.* (citing *Rosenberger*, 515 U.S. at 833) ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.").

19 *Id.*

20 *Id.* at 422.

21 *Id.* at 423.

22 *Id.* at 436 (Souter, J., dissenting).

23 *Id.* at 449 (internal citation omitted).

24 *Id.* at 425.

25 *Adams*, 640 F.3d at 555.

26 *Id.* at 556.

27 *See id.* at 555–57.

28 *Id.* at 553–54.

29 *Id.* at 561.

30 *Id.*

31 *Id.*

32 *Id.* at 562.

33 *Id.* at 564.

But as UNCW had argued, "because Adams was employed as an associate professor, and his position required him to engage in scholarship, research, and service to the community,"[34] even his external speech was pursuant to these broad official duties. Rather than reject this logic, the Fourth Circuit read a directness requirement into *Garcetti*. As the court explained, "Adams' speech was not tied to any more specific or direct employee duty than the general concept that professors will engage in writing [and] public appearances."[35] This "thin thread" connecting Adams' speech to his official duties was, for the court, "insufficient to render Adams' speech 'pursuant to [his] official duties' as intended by *Garcetti*."[36]

Thus, the Fourth Circuit's academic freedom exception operates by narrowing the definition of speech "pursuant to official duties" to encompass only speech *directly* pursuant to official duties. This direct/indirect distinction provides little guidance in close cases. Speech mandated by administrative duties, such as an emergency evacuation plan announcement on the first day of class, clearly falls on the direct side of the line. But how should courts apply the Fourth Circuit's approach in teaching and scholarship cases? Can public universities remove First Amendment protection for such speech by defining professors' teaching and writing responsibilities in great detail? Would not classroom speech dictated by university curriculum committees be directly pursuant to official duties and therefore unprotected, despite also directly implicating cherished First Amendment values? The Fourth Circuit's academic freedom exception fails to wholly resolve "the problem recognized by both the majority and the dissent in *Garcetti*."[37]

2. The Ninth Circuit

The Ninth Circuit recognized an academic freedom exception when Washington State University ("WSU") associate professor David Demers alleged that WSU administrators violated his First Amendment rights by retaliating against him for distributing a pamphlet called "The 7-Step Plan."[38] Demers wrote this two-page pamphlet while a member of a "Structure Committee" created to consider revisions to WSU's communications department, some of which the pamphlet recommended.[39] Demers did not submit the pamphlet to the Structure Committee, but instead distributed it to various media sources, WSU administrators and faculty, and others.[40] The district court found that the pamphlet was speech pursuant to official duties, applied *Garcetti*, and granted WSU summary judgment.[41]

Reversing the district court, the Ninth Circuit agreed that the pamphlet was speech pursuant to Demers' official duties as a member of the WSU Mass Communications faculty and Structure Committee.[42] But it went on to

> conclude that *Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed "pursuant to the official duties" of a teacher and professor. We hold that academic employee speech not covered by *Garcetti* is protected under the First Amendment, using the analysis established in *Pickering*.[43]

It also noted that "*Connick* refined the *Pickering* analysis" when it "did not insist on characterizing [the employee's speech on matters of public concern] as speech 'as a citizen.'"[44]

Turning to Demers' claim, the Ninth Circuit found that his 7-Step Plan was speech "related to scholarship or teaching" within the meaning of *Garcetti*, and therefore qualified for the newly recognized academic freedom exception. The court found a sufficient connection between Demers' out-of-classroom, administration-focused speech and "teaching" in Demers' belief that "[h]is Plan, if implemented, would . . . greatly improve the education of mass communications students at [WSU]."[45] After making this threshold finding, the court moved to the first step of *Pickering* analysis, the "matters of public concern" inquiry, and it offered that "protected academic writing is not confined to scholarship."[46] Other writing pursuant to official duties, including "memoranda, reports, and other documents addressed to such things as a budget, curriculum, departmental structure, and faculty hiring . . . may well address matters of public concern under *Pickering*."[47] Demers' 7-Step Plan addressed matters of public concern because it "contained serious suggestions about the future course of an important department of WSU, at a time when [WSU] itself was debating some of those very suggestions."[48]

For the Ninth Circuit, unlike the Fourth, speech "related to teaching and academic writing" is also speech "pursuant to official duties" under *Garcetti*, but it nonetheless receives First Amendment protection because *Garcetti* left open the possibility of an exception for such speech.[49] The Ninth Circuit explicitly includes professors' non-scholarly writing in its academic freedom exception. Still, its formulation offers little concrete guidance on how closely related to scholarship or teaching professor speech must be to qualify for the academic freedom exception.[50]

34 *Id.* (quoting *Garcetti*, 547 U.S. at 421).

35 *Id.*

36 *Id.*

37 *Id.*

38 *Demers*, 746 F.3d at 406–07.

39 *Id.* at 407.

40 *Id.* at 408.

41 *Id.* at 409.

42 *Id.* at 410.

43 *Id.* at 412.

44 *Id.* at 413.

45 *Id.* at 416.

46 *Id.*

47 *Id.*

48 *Id.* at 417.

49 *Id.* at 418.

50 *See id.* at 416 (offering only that applicability of the academic freedom exception depends on the speech's "scope and character").

3. The Sixth Circuit

The Sixth Circuit joined the ranks of courts of appeals recognizing an academic freedom exception when it ruled that Shawnee State University violated associate professor Nicholas Meriwether's free speech rights by taking disciplinary actions against him for declining to refer to a student using the student's preferred gender pronouns.[51] Meriwether contravened a university policy that requires professors to refer to students by pronouns that reflect the student's self-asserted gender identity when—in accordance with his religious beliefs—he referred to a transgender student by last name only.[52] Meriwether also expressed his belief that referring to students formally as "Mr." or "Ms." during his political philosophy class serves the important pedagogical interest of "foster[ing] an atmosphere of seriousness and mutual respect" in a class where "students discuss many of the most controversial issues of public concern."[53]

The district court rejected Meriwether's argument that Shawnee State University's application of its gender-identity policy violated his free speech rights and held that, under *Garcetti*, professors' in-classroom speech never receives First Amendment protection.[54] Reversing the district court, the Sixth Circuit cited sweeping language from the Supreme Court's decisions in *Grutter v. Bollinger*,[55] *Sweezy v. New Hampshire*,[56] and *Keyishian v. Board of Regents*[57] to "establish that the First Amendment protects the free-speech rights of professors when they are teaching"[58] by protecting broad notions of "academic freedom."[59]

The court then relied on this tradition of First Amendment concern for academic freedom to recognize an academic freedom exception to *Garcetti* that "covers all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not."[60] The exception applies to all speech on matters of public concern because "the need for the free exchange of ideas in the college classroom is unlike that in other public workplace settings."[61] In university classrooms, "there are three critical interests at stake (all supporting robust speech protection): (1) the students' interest in receiving informed opinion, (2) the professor's right to disseminate his own opinion, and (3) the public's interest in exposing our future leaders to different viewpoints."[62]

The Sixth Circuit placed limits on its version of the academic freedom exception even as applied to classroom speech. The court observed that, "[o]f course, some classroom speech falls outside the exception: A university might, for example, require teachers to call roll at the start of class, and that type of non-ideological ministerial task would not be protected by the First Amendment."[63] Pronoun usage, the court found, was not such a "ministerial task" because "titles and pronouns carry a message [on a matter of public concern]."[64]

The Sixth Circuit's academic freedom exception, then, is rooted in its conception of the university classroom's unique implication of three First Amendment interests simultaneously. Although the court does not say so, its version of the academic freedom exception appears not to apply to non-scholarly professor speech occurring outside the classroom (such as David Demers' 7-Step Plan) because the first and third "critical interests" (the students' interest in receiving informed opinion and the public's interest in exposing students to different viewpoints) on which the court rested its exception would be absent in such cases (or at least greatly diminished). Further, the court's reliance on the uniqueness of the classroom would not support the exception's application to professors' writing despite *Garcetti*'s willingness to exempt from its holding speech "related to scholarship or teaching."[65] These considerations indicate that the Sixth Circuit's current formulation of the academic freedom exception may be incomplete.

4. A Fifth Circuit Academic Freedom Exception?

The Fifth Circuit disposed of Teresa Buchanan's First Amendment retaliation suit by applying *Pickering* analysis without assessing whether Buchanan's speech was pursuant to her official duties, nor so much as mentioning *Garcetti*. Louisiana State University ("LSU") fired Buchanan for making in-class comments on her own and students' personal lives that bore no relevance to the early childhood education classes she taught, and for regularly using equally irrelevant profanity.[66] LSU argued that *Garcetti* bars any First Amendment protection for Buchanan's speech because Buchanan spoke "while performing her official duties of teaching and supervising students."[67] The court ignored this argument, cited pre-*Garcetti* circuit precedent for the proposition that "classroom discussion is protected activity,"[68] and proceeded directly to *Pickering* analysis.

51 *Meriwether*, 992 F.3d 492.

52 *Id.* at 498.

53 *Id.* at 499.

54 *Id.* at 503.

55 539 U.S. 306, 329 (2003) (". . . 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").

56 354 U.S. 234, 250 (1957) (referring to "[t]he essentiality of freedom in the community of American universities").

57 385 U.S. 589, 603 (1967) (affirming that the Constitution protects "academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned").

58 *Meriwether*, 992 F.3d at 504–05.

59 *See id.* at 507 (marshalling precedent to hold that "academic freedom" belongs to individual professors as well as universities).

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.*

64 *Id.*

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

66 *Buchanan*, 919 F.3d at 850–51.

67 Appellee Br. at 36.

68 *Buchanan*, 919 F.3d at 852 (quoting Kingsville Indep. Sch. Dist. v. Cooper, 611 F.2d 1109, 1113 (5th Cir. 1980)).

There are at least four possible ways to read *Buchanan*'s omission of any discussion of *Garcetti*. First, it could have been a glaring oversight by the court. Second, it could imply a holding that Buchanan's classroom speech, though pursuant to official duties, nonetheless receives First Amendment protection because an academic freedom exception exists and applies to it. Third, *Buchanan* might be a repeat of the Fourth Circuit's *Adams* decision,[69] recognizing that, although Buchanan's speech was pursuant to her official duties within the common meaning of that term, an academic freedom exception narrows "official duties" to a term of art that excludes the speech at issue here.[70] The problem with the second and third possible readings is that they involve very consequential implicit holdings that a court would not likely leave unstated. The fourth, and probably correct, possible reading is an implicit holding that Buchanan's speech, though it occurred while she was at work, was so far removed from her employer's purposes that it was not pursuant to her official duties even within the ordinary meaning of that term. So the speech never triggers *Garcetti*'s exception to *Pickering* in the first place. This reading requires a less complicated and far less consequential implicit holding than the second and third possibilities, while avoiding the first possibility's assumption of gross negligence by the court.

II. Toward a Uniform Academic Freedom Exception

The cases recognizing an academic freedom exception to *Garcetti* rest on somewhat discordant assumptions and offer only partial explanations of its theoretical underpinnings. The next part of this article aims to solidify the exception by offering a definitive statement of its function, scope, and theoretical foundation.

A. How Does the Academic Freedom Exception Operate?

Although the courts that recognize an academic freedom exception agree that it restores *Pickering* analysis where it applies, none has offered a theoretical account of how the exception achieves this effect. There are at least three ways in which an academic freedom exception could operate to exempt certain speech pursuant to official duties from *Garcetti*'s denial of First Amendment protection. (For convenience, assume that all speech discussed in this section addresses a matter of public concern.)

First, the academic freedom exception might operate by preventing speech that would otherwise be government speech from being such. The exception would do this by rendering *Garcetti*'s phrase "speech pursuant to official duties" a term of art meaning "government speech." Speech within the exception, though "pursuant to official duties" in a literal sense, is not government speech. It is therefore exempt from *Garcetti*'s rule. On this understanding, standard public employee *Pickering* analysis would apply because no other speech doctrine competes for simultaneous application. Government speech doctrine is simply not applicable.

The Fourth Circuit appears to have embraced this approach in *Adams*.[71] There, the court held that Adams' out-of-classroom speech, though pursuant to his broad employment duties in a literal sense, was not speech "'pursuant to [his] official duties' as intended by *Garcetti*" because the message was not directly attributable to the government.[72] Thus, the Fourth Circuit implicitly held that *Garcetti* used that phrase as a synonym for government speech and that Adams' speech was not that.

Second, the academic freedom exception might make academic speech hybrid government-citizen speech. If so, then unlike other public employee speech created pursuant to official duties, the speech of public university professors pursuant to their official duties retains some attributes of speech "as citizen." Thus, the government is not categorically "entitled to say what it wishes"[73] through its professor employees because, unlike in the ordinary government speech case, the speaker has some ownership of the contested speech, even though it was expressed pursuant to official duties. That partial citizen ownership creates a competing First Amendment interest not present in other government speech cases. On this understanding, courts would have to apply some sort of balancing test (but not necessarily *Pickering*'s) to weigh the competing interests. A test different than *Pickering*'s final step of balancing the citizen and government interests is necessary if *Pickering*'s formulation of the government interest—"promoting the efficiency of the public services it performs through its employees"—does not fully include the government's broader interest in conveying any permissible message as speaker.[74] If so, the likely result would be a new balancing test that weakens standard government speech doctrine and is more deferential to government than *Pickering* balancing because it adds an extra interest to the government side of the balance.[75]

Third, the academic freedom exception might cause both government speech and citizen speech labels to attach to the contested expression as in the second possibility, but with a different result. Instead of requiring courts to merge government and public employee speech doctrines into a more government-friendly *Pickering* balancing test, the partial citizen character of academic speech might exempt it entirely from government speech analysis. Because the cases that establish the absolute rule of government speech doctrine presuppose that the speech is wholly attributable to government, this approach would consider the doctrine wholly inapplicable to speech that is not wholly attributable to government.[76] On this theory, speech that fits within the academic freedom exception is, by virtue of its dual speakers, entirely exempt from *Garcetti*'s extension of government speech doctrine. No obstruction to ordinary *Pickering* analysis would remain for this subset of government speech.

69 *Adams*, 640 F.3d 550.

70 *See supra* Section I.B.1.

71 *Id.*

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

73 *Rosenberger*, 515 U.S. at 833.

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

75 *But see* Joseph J. Martins, *Tipping the* Pickering *Balance: A Proposal for Heightened First Amendment Protection for the Teaching and Scholarship of Public University Professors*, 25 Cornell J.L. & Pub. Pol'y 649, 651 (2016) (arguing for a modified *Pickering* analysis that is more favorable to public university professors than other public employees).

76 *Cf. Garcetti*, 547 U.S. at 411 ("[T]he controlling factor is that Ceballos' expressions were made pursuant to his official duties. . . . He did not act as a citizen by writing it.").

The government's interest in conveying its message undistorted becomes relevant only to the extent that distortion interferes with the speaker's performance of daily duties or with the operation of the university. Thus, the government speech aspects of the challenged expression are not necessarily wholly ignored, but subsumed into the ordinary *Pickering* analysis, where they can be analyzed with nuance.

The Sixth Circuit in *Meriwether* and the Ninth Circuit in *Demers* have implicitly endorsed possibility three by finding the challenged speech to be "pursuant to official duties" (and therefore government speech per *Garcetti*), but holding that the academic freedom exception nonetheless requires courts to proceed with unmodified *Pickering* analysis.[77]

The third theoretical framework for the academic freedom exception also conforms closest with *Garcetti*'s logic and fits neatly with the relevant language in *Pickering*. First, *Garcetti* itself casts doubt on the first possibility by suggesting that speech within an academic freedom exception would still be government speech. Justice Souter's dissent, which led directly to the majority's allusion to an academic freedom exception to its decision, objected not to the characterization of Ceballos's speech as government speech, but to the conclusion that all such speech is "the government's own speech and should thus be differentiated as a matter of law from the personal statements the First Amendments protects."[78] Justice Souter's argument is not, as possibility one would have it, that the speech is not government speech, but that it is both government and citizen speech.

Assuming that the first approach gets it wrong and academic speech by public university professors is at least partially government speech, the question is what to do with hybrid speech. Courts could create a new test (as described in formulation two), or they could apply the existing *Pickering* balancing test after confirming that the speech was on a matter of public concern (as described in formulation three). Because *Garcetti* creates an exception to the ordinary rule that courts should apply *Pickering* to public employee free speech challenges,[79] the effect of the academic freedom exception to *Garcetti*'s exception should be to restore that ordinary rule by negating the first exception. Moreover, as a practical matter, if the government interest prong of *Pickering*'s balancing test fully considers the government's legitimate interests in controlling hybrid expression, then there is no reason to create another test. Using an existing test would promote clarity by applying well-established concepts rather than contribute to doctrinal clutter with yet another balancing test.

In the context of speech by public university professors, *Pickering* fully accounts for all government interests in challenged speech. Recall that the relevant government interest under *Pickering* is in "promoting the efficiency of the public services it performs through its employees,"[80] and that the government's interest in government speech is to convey its message undistorted.[81] In public university settings, *Pickering*'s efficient public services rationale requires courts to consider the effect that distortion of a government message would have on teaching, research, and general university operations (all public services that government provides through state-funded universities). In some contexts where the government has great need to speak clearly, such as disciplinary hearings and administrative meetings, government speech interests would often be decisive. But in other contexts, such as most in-classroom speech, where the government's interest in absolutely controlling the message is less pressing, citizen speech interests are more likely to prevail. Thus, standard *Pickering* balancing weighs the government speech interests that the *Garcetti* Court identified in academic speech. That weighing obviates any need for a new hybrid government-citizen speech test. So the Sixth and Ninth Circuits found the best way to construe the academic freedom exception's effect. Where it applies, the academic freedom exception requires courts to apply unmodified *Pickering* analysis to speech that is "pursuant to official duties" under *Garcetti*. The Fourth Circuit should consider revising its reasoning to conform to this logic in an appropriate case.

B. How Broad Is the Academic Freedom Exception?

No Supreme Court or circuit-level case defines the academic freedom exception's full scope of application. The question remains open: how closely "related to scholarship or teaching" must be speech pursuant to a public university professor's "official duties" to retain First Amendment protection? In *Meriwether*, the Sixth Circuit offers some guidance with its holding that "the academic-freedom exception to *Garcetti* covers all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not," whereas speech pursuant to a "non-ideological ministerial task," such as a roll call, "falls outside the exception."[82] The Sixth Circuit correctly points to the "matter of public concern" factor as the decisive issue, but its holding is limited to classroom speech. This section demonstrates that the academic freedom exception applies to all public university professors' speech on matters of public concern, regardless of the setting in which the speech occurs.

77 *See Meriwether*, 992 F.3d at 505 ("Simply put, professors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship."). If such speech were not pursuant to official duties (and therefore not government speech), there would be no need to hold that speakers "retain" First Amendment rights. *Demers*, 746 F.3d at 411 ("Demers presents the kind of case that worried Justice Souter. Under *Garcetti*, statements made by public employees 'pursuant to their official duties' are not protected by the First Amendment. But teaching and academic writing are at the core of the official duties of teachers and professors.") (internal citation omitted).

78 *Garcetti*, 547 U.S. at 436 (Souter, J., dissenting).

79 *See* Strasser, *supra* note 9, at 596.

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

81 *Rosenberger*, 515 U.S. at 833 (citing Rust v. Sullivan, 500 U.S. 173, 194, 196–200 (1991)) ("We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.").

82 *Meriwether*, 992 F.3d at 507.

1. *Garcetti*'s Phrase "Related to Scholarship or Teaching" Means the Same as *Pickering*'s "On a Matter of Public Concern"

Garcetti's allusion to an exception for public university professors' speech "related to scholarship or teaching" has led to at least one academic attempt to define the exception's scope by first defining the words "scholarship" and "teaching" and then construing the exception's scope as covering speech that fits the definition of one of those terms.[83] But that approach gives no effect to the words "related to" and thus threatens to unduly restrict the exception's scope. The Ninth Circuit came closer to the mark when it explained that "protected academic writing is not confined to scholarship" and extended First Amendment protection to a professor's plan for revamping his department, which the court found to address a matter of public concern.[84]

To understand the academic freedom exception's scope, one must understand the purpose of protecting speech "related to scholarship or teaching" from retaliation. That purpose is to promote the free exchange of ideas.[85] The critical role that public universities play in the market of ideas explains the Supreme Court's longstanding recognition of "expansive freedoms of speech and thought associated with the university environment," and it explains why "universities occupy a special niche in our constitutional tradition."[86] Teaching and scholarship are protected because they promote the free exchange of ideas.[87] Therefore, other forms of professor speech that support the free exchange of ideas are "related to scholarship or teaching" in the sense necessary to warrant First Amendment protection.[88]

In *Meriwether*, the Sixth Circuit marked the trail to recognizing that all public university professors' speech on matters of public concern promotes the free exchange of ideas, and is therefore closely enough "related to scholarship or teaching" to qualify for the academic freedom exception. Recall the holding that "the academic-freedom exception to *Garcetti* covers all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not."[89] Although the court limited its holding to classroom speech (the only category of speech at issue in the case), it made clear that lack of germaneness to what is being taught cannot disqualify speech on matters of public concern from First Amendment protection under the academic freedom exception. That suggests that the setting in which professors' speech occurs is irrelevant to determining whether the academic freedom exception applies; if the speaker is a professor and the subject is a matter of public concern, the venue does not render the speech unrelated to scholarship or teaching.

The setting in which speech occurs cannot affect the determination of whether a protectable First Amendment interest exists, that is, whether the speech furthers the free exchange of ideas. When the speech is on a matter of public concern, it furthers the free exchange of ideas, regardless of where it is spoken. All speech on matters of public concern furthers the free exchange of ideas to some degree because such speech expresses ideas that society has an interest in receiving. Consider the example of professor speech in a student disciplinary hearing. The hearing may be closed to the public and attended only by people who already have access to the ideas conveyed. Nonetheless, a professor's raising an idea of public concern causes those present to confront the idea and increases the likelihood that they will discuss the idea with others. Thus, even in this most restricted environment, the speech marginally advances society's interest in freely receiving important ideas.[90] The venue may affect *how much* the speech serves society's interest in the free exchange of ideas, but it cannot eliminate the interest.

Thus, all professor speech on matters of public concern is "related to scholarship or teaching" in the sense necessary to qualify for the academic freedom exception. In contrast, speech on matters of private concern, by definition, never serve society's interest in the free exchange of ideas.[91] Therefore, the academic freedom exception does not prevent *Garcetti* from denying First Amendment protection to professor speech on matters of private concern spoken pursuant to official duties.

2. An Academic Freedom Exception Defined and Operated In This Way Would Not Invite Meritless Litigation

Defining the academic freedom exception this way—that is, without reference to where the professor speaks—would not place significantly greater limits on university control of professor speech than would an exception that only protects speech in certain venues. A court that applies the exception simply analyzes the professor's free speech claim under *Pickering*—which balances free speech interests against government interests—rather than discounting the free speech interest under *Garcetti*. In the *Pickering* analysis, venue is relevant to the government's interest in ensuring efficient performance of professors' day-to-day duties and university functioning. If a professor loudly presents a new scientific theory in a student disciplinary hearing thereby disrupting scheduled proceedings, the government's interest in regulating that speech would almost certainly outweigh the professor's interest in speaking. Applying the academic freedom

83 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, 973–82 (2012).

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

85 *See Meriwether*, 992 F.3d at 507 (extending the academic freedom exception to non-teaching classroom speech because of "[t]he need for the free exchange of ideas in the college classroom"). *See* Lane v. Franks, 573 U.S. 228, 235–36 (2014) ("Speech by citizens on matters of public concern lies at the heart of the First Amendment, which 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people,'") (citing Roth v. United States, 354 U.S. 476, 484 (1957)).

86 *Grutter*, 539 U.S. at 329.

87 *See Meriwether*, 992 F.3d at 507.

88 *See id.*

89 *Id.*

90 Bradley v. W. Chester Univ. of Penn. State Sys. of Higher Educ., 880 F.3d 643, 653 (3d Cir. 2018) (indicating that speech at a public university committee meeting that was closed to the public could receive First Amendment protection).

91 *Connick*, 461 U.S. at 146 (explaining that speech is on a matter of private concern only when the "expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community").

exception to that professor's speech would mean only that the professor has some First Amendment interest, if only a shred, that the court must weigh against the government's regulatory interest before upholding the regulation. Likely losers remain likely losers.

Among circuits that have not yet addressed the academic freedom exception, adopting a broad understanding of it would have little effect on the number and outcome of public university professors' First Amendment retaliation claims. In no-exception jurisdictions,[92] professors can bring these claims and simply argue that their speech was not "pursuant to official duties" as intended by *Garcetti*. Those courts would likely engage in *Pickering* balancing dressed in different terms.[93] Thus, if no-exception jurisdictions adopt a broad exception, the likely outcome of most cases remains the same. The main practical difference is that courts would reach results through more candid, clearer analyses. Because cases that would be likely losers under *Garcetti* in a narrow-exception or no-exception jurisdiction would remain losers under *Pickering* in a broad-exception jurisdiction, recognizing a broad exception would not significantly encourage First Amendment retaliation suits.

C. A Theoretical Foundation for the Academic Freedom Exception

Thus far, this article has argued that an academic freedom exception that preserves *Pickering*'s application to all public university professor speech on matters of public concern is workable and coherent, in that it serves the societal interests that the First Amendment seeks to protect. This section argues further that a broadly defined academic freedom exception survives the layering-on of government speech doctrine that *Garcetti* requires. Applying government speech doctrine to public university professors indicates that there is an academic freedom exception to *Garcetti*'s rule. It does not, however, define the exception's proportions.

1. Public University Professors' Speech on Matters of Public Concern is Different from Other Forms of Government Speech

To understand the concept of an exception to *Garcetti*, one must begin by reexamining the logic of *Garcetti*'s holding. At bottom, it is a government speech case. It reasons that speech pursuant to official duties is attributable to the government exclusively, not at all to the citizen-employee, because the speech "owes its existence to a public employee's professional responsibilities."[94] The employee transmits the speech as a government mouthpiece, not a citizen speaker. This conceptualization has three major consequences. First, because the citizen has not spoken, the citizen has no interest in the speech for the First Amendment to protect. Thus, restricting the speech "does not infringe any liberties the employee might have enjoyed as a private citizen."[95] Second, because the speech is government speech, the doctrine that the government-as-speaker "is entitled to say what it wishes" applies.[96] Third, because official communications must be accurate and "promote the employer's mission," the employer has "authority to take proper corrective action"[97] when the employee-speaker does not promote the employer's mission. Each of these principles alone provides a sufficient reason for courts to inquire no further before upholding regulation of speech pursuant to public employees' official duties because the regulation "simply reflects the exercise of employer control over what the employer itself has commissioned or created."[98]

This reasoning applies to all public employee speech pursuant to official duties except that of public university professors on matters of public concern. In all other contexts, when the government creates a job that requires the employee to speak, the government employer reserves an absolute right to determine whether speech, once spoken, "promote[d] the employer's mission."[99] That right includes power to control the message the public employee conveys by punishing the employee who contradicts that mission.[100] In *Garcetti*, for example, Ceballos's supervisors in the Los Angeles County District Attorney's Office had not surrendered the right to determine whether Ceballos's memo advanced the office's mission. Thus, the Court found no reason "to prohibit his supervisors from evaluating his performance."[101]

But only when the government creates a university and hires professors to offer ideas is the government's mission to speak some ideas it knows it may later regret having spoken. Put differently, when the government creates a university, its mission is to create a marketplace of ideas that includes ideas the government disapproves of.[102] By creating a marketplace anyway,

92 At the time of writing, no circuit court has held that no academic freedom exception to *Garcetti* exists.

93 *See Adams*, 640 F.3d 550 (openly considering speaker's academic freedom interests to decide that challenged speech was not pursuant to official duties). *See also Garcetti*, 547 U.S. at 424–25 (practically admitting that the "official duties" determination is a free-form inquiry by stating, "The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.").

94 *Garcetti*, 547 U.S. at 411, 421–22 (citing *Rosenberger,* 515 U.S. at 833) ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.").

95 *Id.*

96 *Rosenberger*, 515 U.S. at 833.

97 *Garcetti*, 547 U.S. at 423.

98 *Id.* at 422.

99 *Id.* at 423.

100 *See id.* ("If Ceballos' superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action.").

101 *Id.*

102 *Cf.* Land-Grant College Act of 1862, 7 U.S.C. § 304 (granting land to states for "the endowment, support, and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life"). All speech by professors at land-grant colleges that promotes education of "the industrial classes" therefore achieves the government's mission.

the government transfers to its professors (the proprietors in that marketplace) some of the government's right to determine the content of the government speech on offer. The government's act of commissioning the professor to transmit, in its name, messages of which it expects to disapprove retrospectively, is a delegation to the professor of some role in determining what the government wishes to say.

This delegation of control does not result merely from leaving the individual to choose the specific content of the speech. A government employer might have said, as it did to Ceballos, "you shall speak words of your choice that shall please us." Instead, in the delegation to professors, the government pre-commits itself to speaking ideas through these specific employees regardless of whether the government approves of the ideas. Thus, in the public university professor context only, the government exercises its absolute right "to say what it wishes"[103] by alienating its power to control its message.

When the government regrets the speech it commissions public university professors to transmit, and then responds by retaliating against the professor, the government cannot truthfully allege that the speaker distorted the message that the government commissioned the professor to transmit. So long as the professor offered an idea to the marketplace, the professor said what the government wished to say. The government pre-committed itself to speaking whatever the professor said. The government's choice to delegate some control to professors likely stems from its belief, first, that society has a long-term interest in the free exchange of ideas, and second, that the government is likely to act contrary to this long-term societal interest every time the government feels a less important, but more acute, contrary interest (such as the desire to suppress criticism).

Whatever the reasons for delegating control, the act of delegation has two consequences that cause public university professor speech to fall outside the logic of *Garcetti* and into an academic freedom exception. First, delegation prevents the resulting speech from being attributable exclusively to government. Second, delegation divides the government's interest in "say[ing] what it wishes" against itself.

a. Public University Professors' Speech is Attributable to Both the Government and the Government Employee-Speaker

The government delegates some of its right to control its message to public university professors when it commissions professors as idea-proprietors. That delegated control gives professors a role in determining not only what the government *does* say (as Ceballos did), but also what the government *wishes* to say. That role, however small, is enough to make speech pursuant to the professor's official duties partially attributable to the professor who voiced or wrote it, not attributable only to the government as in the typical public employee speech case. When the government shares its right to control its message, it also shares its ownership of the message.

This distinction makes *Garcetti*'s logic inapplicable to public university professors' speech on matters of public concern. *Garcetti* relies (at least in part) on the premise that such speech, if pursuant to the professor's official duties, is exclusively attributable to the government. Because the government is the only speaker and the government has an undivided interest in controlling its message, the complainant has no competing right of control to weigh against it. Thus, *Garcetti*'s categorical "government may control" rule is appropriate. But public university professors' speech on matters of public concern is partially attributable to the government, and partially attributable to professors themselves. So, contrary to *Garcetti*'s analysis of a prosecutor's speech, the public university professor speaks "as a citizen" distinct from the government, not just "as a government employee."[104] The speech that the government seeks to control therefore implicates a First Amendment interest, belonging to the professor as citizen-speaker, in controlling the speech that the professor has some ownership stake in. The presence of two legitimate claims to a right to control means that courts cannot apply *Garcetti*'s categorical "government may control" rule without ignoring a citizen's cognizable First Amendment interest. The academic freedom exception that *Garcetti* hinted at offers a way to protect this interest without depriving the government of its interest in controlling employee speech. That virtue alone may be a sufficient theoretical justification for recognizing an academic freedom exception that provides some First Amendment protection to public university professors' speech.

b. Public University Professors' Speech Divides the Government's Interest in "Say[ing] What it Wishes"

Nevertheless, *Rosenberger v. Rector* makes clear that government, when it speaks, "is entitled to say what it wishes."[105] If this dictum applies even when a citizen is a co-speaker with the government, then a public university professor's part-ownership of speech pursuant to official duties does not exempt the speech from *Garcetti*'s logic. Although the professor has an interest in controlling the speech, so does the government, and the government may say what it wishes whenever it acts as speaker—no First Amendment inquiry necessary. But even if this logic is sound, another aspect of public university professors' speech on matters of public concern preserves its First Amendment protection: the speech splits the government's "wishes" for its message into two opposing parts.

When it establishes public universities as idea-marketplaces and hires professors as proprietors in those marketplaces, government sets out to produce speech it cannot control. When a professor speaks pursuant to official duties, the government also speaks. When the government regrets having commissioned this speech and retaliates against a professor, it engages in a second speech act (expressing displeasure) that opposes its earlier speech (the professor's speech commissioned by the government).

In other public employee speech cases, by contrast, both the employee's initial expression and the government employer's later expression of displeasure comprise a single speech act. The expressions are a single act because the second expression completes the first by making the whole conform to the message the government wished to convey from the outset. Consider how

103 *Rosenberger*, 515 U.S. at 833.

104 *Garcetti*, 547 U.S. at 422.

105 *Rosenberger*, 515 U.S. at 833.

this worked in Ceballos's situation. Ceballos's memo conveyed to his superiors and the defense attorney that the government doubted the veracity of the affidavit on which prosecution was based.[106] But the government had not commissioned Ceballos to convey this message. The expression was not the speech that the government commissioned until the government corrected and completed it by the expressive acts of reassigning, transferring, and not promoting Ceballos.[107] Once completed, it was clear to onlookers that the government never commissioned Ceballos's uncorrected speech in the first place, and therefore the uncorrected speech never was an act of government speech at all.

In public university professor speech cases though, the initial expression is a complete government speech act in itself. Recall that in such cases, the government affirms in advance that it wishes to convey the message its professor-employee speaks. Thus, the speech, when it occurs, is necessarily an accurate expression of the government's wish. A subsequent expression of displeasure is therefore a separate expression of regret for having spoken earlier. Thus, even if the government "is entitled to say what it wishes" when the speech has a citizen co-owner, that entitlement would not settle public university professor retaliation claims because these claims (and only these claims) present two conflicting exercises of the government's entitlement to control its speech.

The question for courts in such cases is thus whether the First Amendment allows the government to punish a faithful transmitter of its own message. Government speech doctrine's response that the government "is entitled to say what it wishes" does not settle that question. Thus, *Garcetti*'s extension of government speech doctrine to public employee speech pursuant to official duties should not deny First Amendment protection to speech by public university professors on matters of public concern. This second unique result of the governmental pre-commitment to speaking through its professors completes the theoretical foundation for recognizing an academic freedom exception to *Garcetti* applicable to all public university professor speech on matters of public concern.

2. The Relevance of Third-Party Interests

The *Garcetti* opinion does not reveal what constitutional significance, if any, third-party interests have for regulating speech pursuant to official duties. The majority discusses the importance of "the public's interest in receiving informed opinion" as a "First Amendment interest[],"[108] but seemingly limits the relevance of such "societal interests" to cases "when employees *speak as citizens* on matters of public concern."[109] Do societal interests play any role when employees speak pursuant to official duties on matters of public concern? *Garcetti* gives no explicit answer, but its failure to account for such interests when analyzing Ceballos' claim suggests the answer is "no."[110] The *Garcetti* Court asked whether the contested speech was government speech or citizen speech before asking whether it was on a matter public concern, and it held that a "government speech" answer ends the inquiry.[111] The Court thus never reached the "public concern" question, which would have determined whether third-party interests were present and relevant.[112] This section argues that, under the best reading of *Garcetti* and other government speech cases, third-party interests are irrelevant to determining whether particular speech "pursuant to official duties" is entitled to First Amendment protection.

In *Meriwether*, the Sixth Circuit's holding implied that third-party interests are of critical significance for determining when the First Amendment protects government employee speech pursuant to official duties.[113] The court held that "the academic-freedom exception to *Garcetti* covers all classroom speech related to matters of public concern" because "in the college classroom there are three critical interests at stake (all supporting robust speech protection): (1) the students' interest in receiving informed opinion, (2) the professor's right to disseminate his own opinion, and (3) the public's interest in exposing our future leaders to different viewpoints."[114] On further examination though, this observation cannot exempt such speech from the *Garcetti* rule without swallowing *Garcetti* entirely.

Garcetti held that a public employee speaking pursuant to official duties is not really speaking at all.[115] Instead, the government is speaking, and the employee is a mere transmitting device like a bullhorn or ventriloquist dummy. Because the employee is not the speaker, the employee has no protected interest in determining the content of the speech. Thus, according to the strict logic of *Garcetti*—and without the theoretical distinction of professors from other government employees detailed above—the second of the "critical interests" that the Sixth Circuit identified does not exist.

Even so, the "critical interests" of students and the public in university classroom speech remain valid.[116] These third-party interests are significant because they remain to oppose the government's interest in regulating the speech even after *Garcetti*'s rule invalidates the professor's interest as speaker. Arguably, when the government is not the only party with an interest in challenged speech, the First Amendment requires courts to balance the competing interests, even if those interests are not the speaker's. If so, then *Garcetti*'s per se approach of upholding regulations of speech pursuant to official duties would be unconstitutional as applied to all speech that creates third-party interests; challenges

106 *See Garcetti*, 547 U.S. at 414.

107 *Id.* at 414-15.

108 *Id.* at 419.

109 *Id.* at 420 (emphasis added) (internal citation omitted).

110 *See id.* at 420–25.

111 *Id.*

112 *Id.*

113 *See Meriwether*, 992 F.3d at 507 (discussing third party interests).

114 *Id.* (citing *Lane*, 573 U.S. at 236 and *Sweezy*, 354 U.S. at 250 (plurality opinion)).

115 *Garcetti*, 547 U.S. at 421 (citing *Rosenberger*, 515 U.S. at 833 ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes")).

116 *See Lane*, 573 U.S. at 236 ("There is considerable value, moreover, in encouraging, rather than inhibiting, speech by public employees. . . . 'The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it.'") (quoting San Diego v. Roe, 543 U.S. 77, 82 (2004) (per curiam)).

to such regulations would instead require courts to balance government and third-party interests—an exception to the categorical *Garcetti* rule.

But if that assessment were correct, then *Garcetti* could not constitutionally apply to any public employee speech on a matter of public concern, because all speech on matters of public concern creates a third-party interest—that of the public in receiving the information or opinion expressed.[117] The court would therefore have to balance that interest against the government's regulatory interest rather than deny the speech First Amendment protection under *Garcetti*. That result would swallow the *Garcetti* rule by causing it to do nothing but, in some instances, add a superfluous reason (in addition to *Pickering*'s public versus private concern inquiry) to allow the government to regulate its employees' speech on matters of private concern. That consequence does not mean that the preceding paragraph's analysis is certainly wrong. It might be that the First Amendment requires that the exception *Garcetti* alluded to be a "public concern" exception much broader than the "academic freedom" exception that the Court anticipated.[118]

Moreover, the distinction that classroom speech on matters of public concern necessarily implicates two third-party interests (of students and the public at large) while other speech on matters of public concern may implicate only one (of the public) probably does not make a constitutional difference. The Constitution might allow *Garcetti*'s rule to deny protection to speech that gives rise to only one, but not two, third-party interests on the premise that one third-party interest in receiving speech can never, by itself, outweigh the government's interest in controlling its speech, but adding a second third-party interest might overcome the government's interest in a *Pickering* analysis.[119] But it would be strange for the Constitution to allow courts to treat weak constitutional interests as if they were not constitutional interests at all.

The more likely constitutional underpinning of *Garcetti* is that when the government speaks, "it is entitled to say what it wishes,"[120] even when other parties have protectable interests in the speech.[121] If so, then the existence of two third-party interests in all classroom speech on matters of public concern does not meaningfully distinguish that speech from all other speech on matters of public concern, which always creates one, but not necessarily two, third-party interests. Thus, the Sixth Circuit's assertion that the presence of "three critical interests at stake" is what makes professor classroom speech constitutionally "anything but speech by an ordinary government employee"[122] is almost certainly incorrect. Instead, public university professor speech on matters of public concern is constitutionally different from all other types of public employee speech because the professor retains a citizen's interest in the speech and the government's wish for the content of that speech is divided against itself.[123] These unique aspects of professor-employee speech on matters of public concern make the *Garcetti* rule inapplicable to that speech.[124] Neither the classroom setting nor third-party interests affect *whether* the First Amendment protects speech (a *Garcetti* question), but both may greatly affect *how* the First Amendment protects speech to which it applies (a *Pickering* question).

III. Conclusion: Applying the Academic Freedom Exception

How should a court proceed when a professor brings a First Amendment retaliation claim? Because the *Garcetti* rule denying First Amendment protection to public employee speech pursuant to official duties is itself an exception to ordinary public employee speech analysis under *Pickering*, the first analytical step is to determine whether the professor spoke pursuant to official duties. However, the academic freedom exception to the *Garcetti* rule makes this first step unnecessary because it causes the "official duties" question to have no bearing on the ultimate outcome of the case. To understand why, consider the table at the top of the next page.

The table makes plain that a court will always arrive at the right answer if it skips the "official duties" question altogether and instead begins with the "matter of public concern" question that it would have begun with under *Pickering* had *Garcetti* never been decided. This is the consequence of the *Garcetti* rule's being a mere barrier to standard *Pickering* analysis. Recall that if a professor has a First Amendment claim (either because *Garcetti* doesn't apply or because both *Garcetti* and the academic freedom exception to *Garcetti* apply), the court applies *Pickering* analysis, asking first whether the speech is on a matter of public concern. When the answer is "no," the speech regulation is upheld. It is inconsequential why the regulation is valid, that is, whether *Garcetti* deprived the speech of all First Amendment protection, or the speech can be regulated even after receiving the First Amendment protection it is due under *Pickering*. Accordingly, whether the speech on a matter of private concern was pursuant to official duties so as to trigger *Garcetti* makes no practical difference.

When the speech is on a matter of public concern, the question of whether that speech was pursuant to official duties so as to trigger *Garcetti* remains inconsequential. If the speech on a matter of public concern was pursuant to official duties, then the academic freedom exception cancels the *Garcetti* rule, leaving the court to apply *Pickering* analysis. If the speech was not pursuant to official duties, then *Garcetti* does not stand in the way, leaving the court to apply *Pickering* analysis.

117 *Supra* text accompanying note 114.

118 But if the Constitution does require a "public concern" exception to *Garcetti*, then it was probably unconstitutional for the *Garcetti* Court to apply its categorical rule in that case, because the government misconduct Ceballos spoke about was almost certainly a matter of public concern that society had a First Amendment interest in receiving. *See Garcetti*, 547 U.S. at 425 ("Exposing governmental inefficiency and misconduct is a matter of considerable significance.").

119 This rationale would be an extension of *Garcetti*, which did not directly address the importance of third-party interests to the case at hand, even though a third-party interest belonging to the public was almost certainly present in the *Garcetti* case. *See supra* Section I.A.

120 *Rosenberger,* 515 U.S. at 833.

121 This rationale would be an extension of *Rosenberger*.

122 *Meriwether*, 992 F.3d at 507.

123 *Supra* Section II.C.1.b.

124 *Id.*

Characteristics of the Challenged Speech		Intermediate Analysis	Outcome-Determinative Analysis
Pursuant to official duties	matter of public concern	*Garcetti* is triggered, "academic freedom exception" applies	Apply *Pickering* balancing
Not pursuant to official duties	matter of public concern	*Garcetti* does not apply	Apply *Pickering* balancing
Pursuant to official duties	matter of private concern	*Garcetti* applies	No First Amendment protection for professor, speech regulation upheld*
Not pursuant to official duties	matter of private concern	*Garcetti* does not apply	Apply *Pickering*, speech regulation upheld at step one
* Note that if *Garcetti* did not apply, *Pickering* would, and the outcome would not change because *Pickering* step one would allow the speech regulation to stand.			

Garcetti, properly understood, has no effect on public university professor free speech claims. In this sui generis area, the law stands as if *Garcetti* were never decided, except that *Garcetti* creates a superfluous analytical reason for upholding restrictions of speech pursuant to official duties on matters of private concern. In the end, the Fifth Circuit appears to have gotten it right by giving *Garcetti* the silent treatment in *Buchanan*:[125] the best way to apply *Garcetti* to public university professor speech cases is to ignore *Garcetti* completely when analyzing them.

125 *Buchanan*, 919 F.3d 847.