

INDIVIDUAL ACADEMIC FREEDOM: AN ORDINARY CONCERN OF THE FIRST AMENDMENT

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Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us, and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.¹

There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.²

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¹ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

² *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).

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INTRODUCTION

The idea that individual academics possess a First Amendment right to academic freedom is canonical.³ Since the 1950s, the Supreme Court has again and again referenced the importance of academic freedom and even stated several times that it is a “special concern of the First Amendment.”⁴ However, examining the cases reveals that the Court has never used the concept of individual academic freedom⁵ in the First Amendment

³ See, e.g., Matthew W. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323, 1324 (1988) (describing the notion as “conventional wisdom”). Academic freedom has both a “professional” conception and a “constitutional” conception. The professional conception of academic freedom has roots in the nineteenth century policies of colleges and universities, and found its first formal expression in Association of American University Professors, 1915 Declaration of Principles on Academic Freedom and Academic Tenure (1915), available at <http://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf>. See generally Larry G. Gerber, *Professionalization as the Basis for Academic Freedom and Faculty Governance*, 1 AAUP J. ACAD. FREEDOM 1 (2010). This Article does not address the professional conception, focusing instead on the purported individual constitutional right under the First Amendment. The seminal treatment of the professional conception of academic freedom, along with its historical development, is RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* (1955).

⁴ Chief Justice Warren coined this much-quoted language in *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

⁵ A lively debate exists as to whether an “institutional” First Amendment right to academic freedom exists. This debate lies beyond the scope of this Article’s inquiry, which focuses on the purported right to academic freedom held by the individual scholar. For a comprehensive recent defense of the institutional view, see PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* 107-43 (2013). See also, e.g., J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J.

context as more than rhetorical makeweight—and that much of the most lofty, and most quoted, rhetoric on academic freedom does not even appear in the Court’s majority opinions.⁶

This Article makes two claims—one descriptive, and the other prescriptive. The descriptive claim is that the Supreme Court has never recognized academic freedom as a unique or “special” individual right under the First Amendment that inheres only in academics. Despite the Court’s many pronouncements hinting at such an individual right, no decision of the Court has depended for its resolution on the existence of such a right. In a word, academic freedom is merely incidental to the basic First Amendment jurisprudence of the Court as it has developed over the last century.

The prescriptive claim is that this state of affairs is the constitutionally correct one under the doctrinal structure that supports First Amendment jurisprudence. First Amendment jurisprudence and theory have generally coalesced around the idea of viewpoint and content neutrality—an outgrowth of what Kenneth Karst famously termed the “equality principle,”⁷ and which I refer to here as the *neutrality principle*, to account for the ways in which it is reflected in current doctrine. First Amendment speech rights are primarily about government neutrality toward speakers and messages.⁸

Because of this orientation toward neutrality, the First Amendment possesses strong tools suited to the protection of academic expression against *extramural* political suppression. Academic expression is, in the first instance, expression, so the

251, 253-55 (1989) (developing the institutional conception of the First Amendment right).

⁶ See Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 910 (2006). Given the state of conventional wisdom on the topic, Schauer understandably takes as a baseline assumption that, if an individual right to academic freedom exists, it exists “under, or near” the First Amendment. *Id.* at 907. As Schauer’s article does, this Article calls into question that assumption, but approaches the question from the vantage point of the post-*Garcetti* landscape. *Id.* at 908.

⁷ Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 22 (1975); see also Geoffrey R. Stone, *Kenneth Karst’s Equality as a Central Principle in the First Amendment*, 75 U. CHI. L. REV. 37, 43-45 (2008) (extolling the virtues of Karst’s theory and tracing the significant impact that it has had on First Amendment scholarship and jurisprudence).

⁸ See *infra* Part III.A. (discussing the neutrality principle).

expression of academics qualifies for the same strong protections the expression of non-academics can claim when the government acts in its sovereign capacity to abridge such expression. Nevertheless, the expression of an academic is often also that academic's work product.

If the academic in question works for a private university, then that university, under the First Amendment, may choose to suppress or punish the speech for any reason not prohibited by the academic's employment contract or statutory law. If that academic works for a public university, then the academic enjoys the presumptive protection of the First Amendment; however, the government, operating in its capacity as an employer, might have reasons to suppress or punish such expression that the government acting as a sovereign could not claim. For this reason, academic expression may be imperiled through *intramural* government suppression—the use of employment terms and conditions to punish or threaten punishment of the speech of academics in the public academic workplace. Because it is organized around a principle of neutrality, the First Amendment lacks sufficient tools suited to protect academic speech uniquely against this intramural government suppression.

Thus, this Article will establish both that we *have not* recognized a unique constitutional speech right that inheres in individual academics, and that we *cannot* do so without changing the doctrinal structure of the First Amendment.⁹ The argument proceeds in five parts. Part I illustrates a proposition often hinted at, but rarely acknowledged directly¹⁰—despite the lofty judicial

⁹ Robert Post's most recent book also recognizes this dilemma, and it proposes a restructuring of the First Amendment around the ideas of "democratic competence" and "democratic legitimacy." See generally ROBERT C. POST, *DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* (2012). My aim here is more modest: where Post focuses on jurisprudence, interrogating the competing theories of the purpose of the First Amendment and offering his own, my contribution focuses on the existing doctrine, and the doctrinal structure on which future doctrinal advancements might rest absent a change in the First Amendment's organizing principles.

¹⁰ Articles and books in which the tenuous nature of the purported individual right is acknowledged include, among others, POST, *supra* note 9; Schauer, *supra* note 6, at 907; William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS. 79, 153-54 (1990). Professor Van Alstyne's article is a seminal work

rhetoric that exists in many First Amendment cases, the Supreme Court has never held that academic freedom is an enforceable individual First Amendment right.¹¹ Part I then considers what J. Peter Byrne has termed “the paradox of *Garcetti*”—the fact that academic expression is of significant value to society, yet it is uniquely disabled under the First Amendment, as most recently interpreted in *Garcetti v. Ceballos*.¹² Part II examines several potential resolutions to the *Garcetti* paradox and concludes that none of them resolve it without altering the doctrinal structure of First Amendment jurisprudence.

Part III explains just why this is so. Principally, the argument in Part III is that the First Amendment does not protect individual academic freedom distinctly from other First Amendment rights because the doctrine of the First Amendment cannot do so—it lacks the tools. The neutrality principle that pervades First Amendment doctrine prevents the recognition of special rights for special speakers or special speech.¹³ The Article concludes by proposing that scholars direct attention to private law for protecting academic freedom.

I. INDIVIDUAL ACADEMIC FREEDOM AND THE FIRST AMENDMENT

Higher education has been a feature of American intellectual life since before the Founding, and its import cannot seriously be questioned today.¹⁴ Often, this importance has been reflected in the opinions of Supreme Court justices, some of whom served in

on the subject of the development of academic freedom case law in the Supreme Court. Part I of this Article covers a good deal of the same descriptive ground, as it must, and owes a debt to Van Alstyne’s work for identifying most of the vital cases that define the academic freedom canon.

¹¹ This Article leaves for future work the current debates over a purported “institutional right” to academic freedom. In addition to those cited *supra* note 5, for comprehensive and thoughtful accounts of the institutional view, see, for example, Schauer, *supra* note 6, at 907; Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497 (2007).

¹² *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).

¹³ In contrast, it can be argued that the First Amendment does recognize special *disabilities* for certain speakers—for example, public employees, children, prisoners—but these recognitions are better conceived as preemptive recognitions of compelling government interests rather than categorical distinctions between speakers, as I explain. See *infra* Part I.

¹⁴ See generally MATTHEW FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM (2009).

academia prior to joining the Court.¹⁵ The passages lauding the academic enterprise, its vitality to American society, and its need for constitutional protection are typically stirring, lofty, and always supportive of the academic enterprise.¹⁶

Despite the Court's decades-long dialogue pronouncing the value of academic freedom and the "special concern" that the First Amendment has for such freedom,¹⁷ the Court has never carved out this special status as an individual right in its actual binding precedent.¹⁸ To be sure, the Court has decided numerous First Amendment cases brought by academic employees—mostly at the university level—and has generally been protective of these employees' speech and associational rights.¹⁹ However, at no time has the Court treated such employees any differently from the public at large in the case of claims of extramural interference,²⁰ or any differently from other public employees in the case of

¹⁵ See ROBERT O'NEIL, *ACADEMIC FREEDOM IN THE WIRED WORLD: POLITICAL EXTREMISM, CORPORATE POWER, AND THE UNIVERSITY* 47 (2008) (relating that both Justice Douglas and Justice Frankfurter, each of whom prominently featured in the academic freedom precedent of the Court, were university professors before joining the Court).

¹⁶ See, e.g., *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."); *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring in result) (speaking of academic scholarship, "For society's good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling."); see also *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) ("Today [education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.").

¹⁷ See, e.g., *Keyishian*, 385 U.S. at 603.

¹⁸ Although the concept is hundreds of years old the term "academic freedom" was not used by the Supreme Court until the McCarthy Era. See *Adler v. Bd. of Educ.*, 342 U.S. 485, 509 (1952) (Douglas, J., dissenting) (criticizing the majority's upholding of the now-defunct Feinberg Law, which mandated the removal of subversive teachers from the classroom and coining the judicial usage of the term: "The very threat of [the] procedure [of removal under the law] is certain to raise havoc with academic freedom.").

¹⁹ See *infra* Part I.A. for detailed discussion of these cases; see also Van Alstyne, *supra* note 10.

²⁰ See *infra* Part I.A. for a discussion of the extramural interference cases.

claims of intramural interference.²¹ Casting aside the lofty rhetoric often laced throughout these opinions about the value of academic speech, then, one finds no unique, speech-protective principle of binding precedential law that applies to academics and not to non-academics.²²

Nevertheless, the presence of so many positive and supportive statements in Supreme Court opinions, often couched in the language of individual rights, has understandably created a common wisdom that an individual right to academic freedom exists under the First Amendment of the United States Constitution.²³ This Part debunks this understandable, but mistaken impression, showing that the First Amendment decisions of the Supreme Court have never established such a right in the holding of a decided case.²⁴

For the purposes of analysis, the ostensible “academic freedom” cases can be usefully grouped into two lines of authority: (1) cases in which academic speech was threatened by extramural forces, such as legislation and congressional investigations; and (2) cases in which academic speech was threatened by intramural forces, such as workplace investigations and retaliatory employee discipline.²⁵ As I will show below, the speech of academics has

²¹ See *infra* Part I.B. for a discussion of the intramural interference cases.

²² Several other commentators have essentially come to the same conclusion, but have stopped short of making the descriptive claim that I make here, preferring to give the Supreme Court’s dicta the benefit of the doubt and to address the normative dimension of the academic freedom question. See, e.g., Van Alstyne, *supra* note 10; Schauer, *supra* note 6.

²³ See Schauer, *supra* note 6, at 907-08 (challenging this conventional wisdom based on an institutional view of the First Amendment).

²⁴ Professor William Van Alstyne has done the most comprehensive work in tracing this constitutional development and has concluded similarly that the purported individual right lacks strong support. See Van Alstyne, *supra* note 10, at 88-93. Van Alstyne looks a bit further back in the history of academic freedom-related case law than I do here, incorporating such *Lochner*-era decisions as *Meyer v. Nebraska* into the analysis. *Id.* I applaud Van Alstyne for drawing attention to these important cases, as I believe they have been whitewashed and ignored as academic freedom precedents. But, since my aim here is to interrogate the basis for an individual First Amendment right to academic freedom post-*Garcetti*, and since those precedents are never cited as academic freedom precedents in the First Amendment academic freedom cases, I leave them aside.

²⁵ Institutional academic freedom, if it exists, is beyond the scope of this Article’s inquiry. Similarly, the academic speech of academics working in private institutions presents a different set of issues where that speech is subjected to intramural

traditionally been protected in the former context, but only to the extent that the speech of any similarly situated non-academic speaker would have been protected. Similarly, in the latter context, the speech of academics has only been protected to the extent that the speech of other public employees would have been protected. The upshot of these conclusions is that academic freedom is and always has been, if anything, an *ordinary* “concern of the First Amendment.”²⁶

A. *Extramural Interference Cases*

In the early days of the development of First Amendment law, the principal threats to academic work came from outside the school. Typically, threats to academic work came in the form of statutes that required employees of the state to submit to pre- or post-employment investigations of their associations (mostly directed at rooting out Communists from government employment), or legislative investigations of “subversives” that required public and private school and university educators to either disclose their own associations or beliefs, name their associates, or some combination of the two. It should not come as a surprise that these threats emerged mostly in the immediate post-World War II period dominated by the “Red Scare” and the numerous investigations prompted by Senator Joseph McCarthy and like-minded legislators both in the U.S. Congress and in the states. Eventually, cases challenging these extramural interferences with free academic inquiry found their way to the Supreme Court.

The first such case, *Adler v. New York*,²⁷ presented the last full-throated re-affirmance in the Supreme Court of the right-

retaliation. Because of the state action doctrine, such speech can only be protected through state constitutional, tort, or contract law, rather than federal constitutional law. Future work will address these sources, but for now, the focus is kept on the speech of public academic employees—perhaps the most vulnerable of all academic speech.

²⁶ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). Justice Brennan’s oft-quoted opinion in *Keyishian* coined the phrase that academic freedom is “a special concern of the First Amendment,” and these iconic words form most of the title of one of the more respected works in the academic literature on the constitutional status of academic freedom. *Id.* See Byrne, *supra* note 5, at 251.

²⁷ 342 U.S. 485 (1952).

privilege distinction associated most closely with Justice Oliver Wendell Holmes.²⁸ However, *Adler* also began the decades-long dialogue that has shaped the common conception of academic freedom as a matter of constitutional concern. In *McAuliffe v. Mayor of New Bedford*, in defending the government's prerogative to control the speech of its employees as a condition in the privilege of government employment, Holmes had stated that a police officer "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."²⁹ In *Adler*, the plaintiffs challenged New York's now-infamous Feinberg Law, which rendered ineligible for employment with the state any person advocating, or associating with a group that advocated, the overthrow of the United States government.³⁰

The Court upheld the statute based on the right-privilege distinction, explaining that the speech and assembly rights of the plaintiffs, who were teachers, had not been impaired through the law—only their available employment options. The teachers remained free to stay involved with the disfavored groups and advocate subversive acts or to become school teachers—just not both.³¹ Justice Frankfurter dissented primarily based on lack of standing and ripeness, though he also gave a brief nod to the then-nascent idea of academic freedom.³² Justice Black authored a general dissent,³³ but also joined the more pointed academic freedom-based dissent of Justice Douglas.

²⁸ *Id.* at 492. ("Has the State thus deprived them of any right to free speech or assembly? We think not. Such persons are or may be denied, under the statutes in question, the privilege of working for the school system of the State of New York because, first, of their advocacy of the overthrow of the government by force or violence, or, secondly, by unexplained membership in an organization found by the school authorities, after notice and hearing, to teach and advocate the overthrow of the government by force or violence, and known by such persons to have such purpose.")

²⁹ *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

³⁰ *Adler*, 342 U.S. at 488-90.

³¹ *Id.* at 493.

³² *Id.* at 497-508 (Frankfurter, J., dissenting);

The broad, generalized claims urged at the bar touch the deepest interests of a democratic society: its right to self-preservation and ample scope for the individual's freedom, especially the teacher's freedom of thought, inquiry and expression. No problem of a free society is probably more difficult than the reconciliation or accommodation of these too often conflicting interests.

Id. at 504 (Frankfurter, J., dissenting).

³³ *Id.* at 496-97 (Black, J., dissenting).

Justice Douglas's dissent did not squarely lay out what would become the idea that we now recognize as "academic freedom," but he did offer the first use of the term in any Supreme Court opinion, and his argument did set down the premises that underlie the current idea.³⁴ He began by pointing out the special need for teachers in the public schools to enjoy protection from speech control.³⁵ He pointed out the central role of the schools in shaping the American democracy, and the pernicious effects that censorship of those primarily responsible for filling that role would have.³⁶ Capping off this prediction, Justice Douglas painted a dystopian picture of the constant monitoring, second-guessing, and scrutinizing of the teacher that would become the daily life of administrators, parents, and even students due to the Feinberg Law:

What was the significance of the reference of the art teacher to socialism? Why was the history teacher so openly hostile to Franco Spain? Who heard overtones of revolution in the English teacher's discussion of the Grapes of Wrath? What was behind the praise of Soviet progress in metallurgy in the chemistry class? Was it not 'subversive' for the teacher to cast doubt on the wisdom of the venture in Korea?³⁷

The picture continued, calling up images of a totalitarian state, where teachers toe the "party-line," and where children are raised as "robots."³⁸ Justice Douglas concluded, "There can be no

³⁴ *Id.* at 509 (Douglas, J., dissenting) ("The very threat of [the] procedure [of removal under the law] is certain to raise havoc with academic freedom.")

³⁵ *Id.* at 508 (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.")

³⁶ *Id.* at 508 (Douglas, J., dissenting) ("The public school is in most respects the cradle of our democracy. The increasing role of the public school is seized upon by proponents of the type of legislation represented by New York's Feinberg law as proof of the importance and need for keeping the school free of 'subversive influences.' But that is to misconceive the effect of this type of legislation. Indeed the impact of this kind of censorship on the public school system illustrates the high purpose of the First Amendment in freeing speech and thought from censorship."); *id.* at 509 ("Fearing condemnation, she will tend to shrink from any association that stirs controversy. In that manner freedom of expression will be stifled.")

³⁷ *Id.* at 510 (Douglas, J., dissenting).

³⁸ *Id.* at 510-11 (Douglas, J., dissenting).

real academic freedom in that environment.”³⁹ Finally, in an effort to offer an alternative to the right-privilege distinction that would eventually take hold, Justice Douglas stated simply that, as long as a teacher meets the standards of her profession, her beliefs should not expose her to retaliation.⁴⁰ So began the dialogue over academic freedom.

The same year as it decided *Adler*, the Court decided *Wieman v. Updegraff*,⁴¹ a loyalty oath case with many similarities to *Adler* and the cases that preceded *Adler* in defining the states’ ability to identify and silence those it perceived to be subversives.⁴² Two of these prior cases, *Garner v. Board of Public Works*⁴³ and *Gerende v. Board of Supervisors*,⁴⁴ both decided in 1951, resulted in the Court upholding loyalty oaths when applied in limited circumstances to public employees and those seeking public employment.

In *Wieman*, the Court reversed the Oklahoma Supreme Court, which had upheld the application of Oklahoma’s loyalty oath statute to the faculty and staff of Oklahoma Agricultural and Mechanical College to deny some of them salary, and ultimately, their employment with the state.⁴⁵ Writing for the Court, Justice Clark distinguished the statute at issue in *Wieman*, which punished “innocent” associations as severely as knowingly associating with such subversive groups, from those at issue in *Adler*, *Garner*, and *Gerende*, each of which contained protections for “innocent” association.⁴⁶ The *Wieman* Court held that the indiscriminate grouping of innocents with knowing associates

³⁹ *Id.* 510 (Douglas, J., dissenting).

⁴⁰ *Id.* at 511 (Douglas, J., dissenting) (“So long as she is a law-abiding citizen, so long as her performance within the public school system meets professional standards, her private life, her political philosophy, her social creed should not be the cause of reprisals against her.”). As we shall see, this standard is remarkably close to the standard that the Supreme Court ultimately adopted in *Pickering v. Board of Education*. See *infra* notes 145-50 and accompanying text (discussing *Pickering*).

⁴¹ 344 U.S. 183 (1952).

⁴² See *Garner v. Bd. of Pub. Works*, 341 U.S. 716, 718-24 (1951) (upholding the application of Los Angeles’s loyalty oath ordinance); *Gerende v. Bd. of Supervisors*, 341 U.S. 56, 57 (1951) (upholding the application of a Maryland statute requiring loyalty oaths of all candidates for elective office).

⁴³ 341 U.S. 716 (1951).

⁴⁴ 341 U.S. 56 (1951).

⁴⁵ *Wieman*, 344 U.S. at 191.

⁴⁶ *Id.*

rendered the Oklahoma statute arbitrary and in violation of due process.⁴⁷ No mention was made in the majority opinion of academic freedom, or even of rights to free expression.

Justice Frankfurter focused a separate opinion on issues of academic freedom. Concurring with the Court's decision, Justice Frankfurter wrote separately to point out the importance of safeguarding the speech rights of teachers in particular as the "cultivators" and "practitioners" of "free play of the spirit."⁴⁸ He explained that teachers are exemplars of the habits of free inquiry that we want our citizens to learn, and that political limitations on their own free inquiry deprive them of the ability to act as such exemplars.⁴⁹ Then Justice Frankfurter appeared to state the view that the speech freedoms of academics are special in some way under the Constitution: "The functions of educational institutions in our national life and the conditions under which alone they can adequately perform them are at the basis of these limitations upon State and national power."⁵⁰

Justice Frankfurter concluded his concurrence with a long quote from Robert M. Hutchins, then Associate Director of the Ford Foundation, in which Hutchins had argued forcefully for the competitive advantage that free institutions of higher learning give to free societies over totalitarian societies.⁵¹ Thus, by 1952, two salvos to academic freedom had been offered in two separate

⁴⁷ *Id.*

⁴⁸ *Id.* at 195 (Frankfurter, J., concurring) ("Such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers.")

⁴⁹ *Id.* at 196-97 (Frankfurter, J., concurring) ("Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or State government.")

⁵⁰ *Id.* at 197 (Frankfurter, J., concurring).

⁵¹ *Id.* at 197-98 (Frankfurter, J., concurring).

opinions in two cases by two different justices. After 1952, the true dialogue began.

Five years later, academic freedom first made its way into a plurality opinion of the Court. In *Sweezy v. New Hampshire*, the Court invalidated the application of a state law that gave the state attorney general broad subpoena authority to root out “subversive persons” in the state.⁵² The law had been used to interrogate a self-described Marxist who had then-recently given a lecture at the University of New Hampshire.⁵³ The interrogation focused on his beliefs, his associations, and the content of his lecture.⁵⁴ After refusing to answer questions about his beliefs and his lectures at the university, he was subjected to a judicial hearing, where he similarly refused to answer the questions, and he was held in contempt.⁵⁵

In reversing the state court judgment upholding the contempt citation, Chief Justice Warren expressed a conception of academic freedom as an aspect of the speech rights in the First Amendment:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.⁵⁶

The opinion came close to holding that the professor’s academic freedom right was violated by the statute: “We do not

⁵² *Sweezy v. New Hampshire*, 354 U.S. 234, 254-55 (1957).

⁵³ *Id.* at 238, 248.

⁵⁴ *Id.* at 238.

⁵⁵ *Id.* at 238-45.

⁵⁶ *Id.* at 250.

now conceive of any circumstance wherein a state interest would justify infringement of rights in these fields.”⁵⁷ However, in the next breath, the plurality slotted this concern to the realm of dicta: “But we do not need to reach such fundamental questions of state power to decide this case.”⁵⁸

Ultimately, the Court decided that the attorney general did not have delegated legislative authority to seek responses to the questions he asked about Sweezy’s beliefs or his prior lectures because the state legislature had not asked for such information. Specifically, the Chief Justice explained:

The lack of any indications that the legislature wanted the information the Attorney General attempted to elicit from petitioner must be treated as the absence of authority. It follows that the use of the contempt power, *notwithstanding the interference with constitutional rights*, was not in accordance with the due process requirements of the Fourteenth Amendment.⁵⁹

Thus, the decision itself was of less import than the rhetoric preceding its operative provision. As the plurality declared, “notwithstanding the interference with constitutional rights,” an investigation conducted without proper authority violates procedural due process.⁶⁰

Perhaps it was this drawing back from the rhetoric of academic and political freedoms to the familiar territory of due process in the plurality opinion that caused Justice Frankfurter to author his famous concurrence.⁶¹ In this separate opinion, joined

⁵⁷ *Id.* at 251.

⁵⁸ *Id.*

⁵⁹ *Id.* at 254-55 (emphasis added).

⁶⁰ *Id.* at 254.

⁶¹ This was certainly Justice Clark’s reading of the two opinions, both of which prompted him to dissent, beginning by pointing out that “there is no opinion for the Court, for those who reverse are divided and they do so on entirely different grounds.” *Id.* at 267 (Clark, J., dissenting). Justice Clark thought, as this Article contends, that the celebrated discussions of academic freedom in *Sweezy* amounted to elaborate dicta:

Since the conclusion of a majority of those reversing is not predicated on the First Amendment questions presented, I see no necessity for discussing them. But since the principal opinion devotes itself largely to these issues I believe it fair to ask why they have been given such an elaborate treatment when the case is decided on an entirely different ground.

by Justice Harlan, Justice Frankfurter extolled the virtues of free universities and quoted at length from the “Four Essential Freedoms” address then-recently delivered in defense of free universities in South Africa by two chancellors of universities in that system: “It is an atmosphere in which there prevail ‘the four essential freedoms’ of a university—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.”⁶² This “four freedoms” conception of academic freedom has in recent decades provided the intellectual foundation for an “institutional” conception of academic freedom,⁶³ but it was used here to defend an individual rights-based conception.

Despite its lofty rhetoric, *Sweezy* did not immediately usher in an era of academic freedom jurisprudence. In *Barenblatt v. United States*, decided only two years later, the Court addressed a contempt-of-Congress conviction against a college professor who had refused to answer questions about his alleged prior membership in the Communist Party in front of the House Un-American Activities Committee.⁶⁴ This case, due to its similarities with *Sweezy* and the presence of a college professor defendant, presented the possibility that the Court members would expand their dialogue about academic freedom, begun in *Sweezy*. Nevertheless, aside from a passing dismissal of the relevance of the defendant’s status as a college teacher, the dialogue in the case almost conspicuously avoided any discussion of academic freedom or academic speech.⁶⁵

Id. at 270 (Clark, J., dissenting). Nevertheless, he later appeared to accede to the idea that both academic and political speech rights may be stronger than speech rights exercised outside those contexts, stating in his majority opinion two years later in *Uphaus v. Wyman*, 360 U.S. 72, 77 (1959) (“First, the academic and political freedoms discussed in *Sweezy v. State of New Hampshire*, *supra*, are not present here in the same degree, since World Fellowship is neither a university nor a political party.”).

⁶² *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring) (other citations omitted).

⁶³ See generally, e.g., Areen, *infra* note 257; Schauer, *supra* note 6, Horwitz, *supra* note 5. See *supra* notes 5, 11 and accompanying text (discussing the institutional conception and pointing out that, while it may be valid, it is beyond the scope of this Article, which focuses on a purported individual right).

⁶⁴ 360 U.S. 109, 113 (1959).

⁶⁵ *Id.* at 112 (“Of course, broadly viewed, inquires cannot be made into the teaching that is pursued in any of our educational institutions. When academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into

In *Shelton v. Tucker*, decided one year later in 1960, the Court addressed a state law requiring an applicant for a public school or university teaching or administrative position to submit an affidavit listing all of the applicant's prior and present organizational affiliations.⁶⁶ The Court struck down the statute on grounds similar to those in the cases discussed above. Interestingly, although the case drew a dissent from Justice Clark, who had dissented in prior cases where the Court had invalidated government investigations of associational ties,⁶⁷ the majority's opinion also drew an uneasy dissent from Justice Frankfurter, who had recently written eloquently about academic freedom in *Sweezy*.⁶⁸

All opinions in the case agreed on one thing—that a public school district has the power (the Justices called it the “right”) to inquire into the backgrounds of potential employees to evaluate their suitability for the classroom.⁶⁹ Further, all three opinions agreed that such an investigation could include associational ties not related to classroom teaching ability.⁷⁰ All of the opinions also agreed that the compelled disclosure of one's associations is an infringement on one's First Amendment right of association.⁷¹

this constitutionally protected domain. But this does not mean that the Congress is precluded from interrogating a witness merely because he is a teacher.”)

⁶⁶ *Shelton v. Tucker*, 364 U.S. 479, 480 (1960).

⁶⁷ *See, e.g., Sweezy*, 354 U.S. at 267 (Clark, J., dissenting).

⁶⁸ *Shelton*, 364 U.S. at 490 (Frankfurter, J., dissenting); *but see Sweezy*, 354 U.S. at 255 (Frankfurter, J., concurring in result).

⁶⁹ *See Shelton*, 364 U.S. at 485 (“There can be no doubt of the right of a State to investigate the competence and fitness of those whom it hires to teach in its schools, as this Court before now has had occasion to recognize. ‘A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern.’” (quoting *Adler v. Bd. of Educ.*, 342 U.S. 485, 493 (1952))); *id.* at 496 (Frankfurter, J., dissenting); *id.* at 498 (Harlan, J., dissenting).

⁷⁰ *Id.* at 485 (“There is no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness. Fitness for teaching depends on a broad range of factors.” (quoting *Beilan v. Bd. of Educ.*, 357 U.S. 399, 406 (1958))); *id.* at 496 (Frankfurter, J., dissenting); *id.* at 498 (Harlan, J., dissenting).

⁷¹ *Id.* at 485-86 (“It is not disputed that to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.”); *id.* at 494-96 (Frankfurter, J., dissenting) (recognizing the infringement of the teachers' associational liberties, but concluding that state interests outweigh the First Amendment interests of the teachers); *id.* at 497-98 (Harlan, J., dissenting) (same).

The Court's decision ultimately rested on principles of the freedom of association that would have been applicable in any context where the government might compel disclosure of associational ties.⁷² However, and perhaps because the plaintiffs were educational employees without the protection of tenure, the Court offered a salvo to academic freedom before resolving the right-to-association issue.⁷³ The Court quoted at length from Justice Frankfurter's concurring opinion in *Wieman v. Updegraff* and from Chief Justice Warren's opinion in *Sweezy v. New Hampshire* but did not rest its decision on any kind of right or interest that specially inheres in teachers or schools. Rather, the Court applied both its precedents on compelled disclosure of associations⁷⁴ and its precedents on governmental interests sufficient to overcome infringement of First Amendment rights⁷⁵ and concluded that the Arkansas legislation was not tailored narrowly enough to the proffered governmental interest in employing a qualified teaching force.⁷⁶

Justice Frankfurter's dissent acknowledged that the idea of "academic freedom" was implicated by the facts of the case, but he also approached the problem as one of general associational rights and governmental interests.⁷⁷ He viewed academic freedom as resting on the premise that the government has selected teachers who deserve the benefits of the freedom, and he viewed investigation of prospective teachers' associational ties as relevant

⁷² *Id.* at 490 (after discussing two handbilling cases, holding, "The unlimited and indiscriminate sweep of the statute now before us brings it within the ban of our prior cases. The statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers.").

⁷³ *Id.* at 487.

⁷⁴ *Id.* at 486 (citing *De Jonge v. Oregon*, 299 U.S. 353 (1937); *Bates v. Little Rock*, 361 U.S. 516 (1960) (assembly and association rights)).

⁷⁵ *Id.* at 488-89 (citing *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Talley v. California*, 362 US 60 (1960) (narrow tailoring)).

⁷⁶ *Id.* at 490 ("The unlimited and indiscriminate sweep of the statute now before us brings it within the ban of our prior cases. The statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers.").

⁷⁷ *Id.* at 495-96 (Frankfurter, J., dissenting) ("If I dissent from the Court's disposition in these cases, it is not that I put a low value on academic freedom. It is because that very freedom in its most creative reaches, is dependent in no small part upon the careful and discriminating selection of teachers.") (internal citations omitted).

to that selection, thus suggesting that teachers may have *less expansive*, rather than *more expansive*, speech and association rights than ordinary citizens.⁷⁸ Justice Frankfurter ultimately disagreed with the majority's determination that the set of inquiries exceeded the scope of the government's interest in investigating, but the two opinions were largely in concert as to the competing needs to protect the freedoms of educators and to select competent educators in the first place, a nod to the institutional form of academic freedom that Justice Frankfurter had highlighted in his *Sweezy* concurrence.⁷⁹ Justice Clark's dissenting opinion largely echoed these themes, except that Justice Clark avoided the term "academic freedom," referring instead to the more general right to freedom of association.⁸⁰

One year later, in *Cramp v. Board of Public Instruction*, the Court struck down, on the grounds of vagueness and overbreadth, a loyalty oath statute directed at public employees.⁸¹ In *Cramp*, the statute in question required every employee of the state to "swear that, among other things, he has never lent his 'aid, support, advice, counsel or influence to the Communist Party.'"⁸² Although the plaintiff in *Cramp* was a public school teacher who had refused to swear the required oath, Justice Stewart, writing for the Court, did not see fit to discuss the idea of academic freedom, or to reference anything special or distinct about academic employees as First Amendment actors. Instead, Stewart focused on the oath's overall vagueness, conspicuously avoiding the topic of academic speech and association by using exemplars entirely outside the academic context:

Could one who had ever cast his vote for [a Communist] candidate safely subscribe to this legislative oath? Could a lawyer who had ever represented the Communist Party or its

⁷⁸ *Id.* at 496 (Frankfurter, J., dissenting) (explaining that academic freedom depends on the "careful and discriminating selection of teachers").

⁷⁹ *Id.* at 496 (Frankfurter, J., dissenting); *see also id.* ("Of course, if the information gathered by the required affidavits is used to further a scheme of terminating the employment of teachers solely because of their membership in unpopular organizations, that use will run afoul of the Fourteenth Amendment.").

⁸⁰ *Id.* at 498-99 (Clark, J., dissenting).

⁸¹ *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 287 (1961).

⁸² *Id.* at 279 (quoting FLA. STAT. ANN. § 876.05 (West 1949), the law establishing the oath requirement).

members swear with either confidence or honesty that he had never knowingly lent his ‘counsel’ to the Party? Could a journalist who had ever defended the constitutional rights of the Communist Party conscientiously take an oath that he had never lent the Party his ‘support’? Indeed, could anyone honestly subscribe to this oath who had ever supported any cause with contemporaneous knowledge that the Communist Party also supported it?⁸³

Justices Black and Douglas specially concurred, joining the Court’s opinion in full, but also claiming continued adherence to their dissents in *Adler*, *Garner*, and *Barenblatt*, and to their concurrences in *Wieman*,⁸⁴ two of which had as their main focus a conception of academic freedom as a special individual right.⁸⁵ However, this oblique reference was the only nod to academic freedom in a case involving a teacher, decided within an era when the topic found its way into the judicial dialogue in several other opinions in cases involving the associations of academics.

Perhaps the best test of whether the Court was doing anything unique with academic speech versus other speech during the 1950s and 1960s came three years later, in the 1964 case of *Baggett v. Bullitt*.⁸⁶ The Court again struck down a public employee loyalty oath as “unduly vague, uncertain and broad” because it could be construed to ban many constitutionally permissible academic activities simply due to indirect benefits that might be realized by Communist organizations.⁸⁷ However, *Baggett* presented a unique loyalty oath case in two ways. First, the case involved two oaths, one which applied only to public

⁸³ *Id.* at 286.

⁸⁴ *Id.* at 288 (Douglas, Black, JJ., concurring specially).

⁸⁵ See *supra* notes 42-46 and accompanying text. *Garner v. Board of Public Works* did not involve teaching at all, but upheld a statute requiring disclosure of prior associations. 341 U.S. 716, 718-20 (1951). The dissents referenced viewed this requirement as an ex post facto law or a bill of attainder due to its punishment of past conduct without a trial. See *id.* at 736 (Douglas, Black, JJ., dissenting). *Barenblatt v. United States*, decided around the same time, did involve an academic defendant convicted of contempt of Congress, but as explained above, the Court conspicuously avoided any substantive discussion of academic freedom, aside from a quick refutation of its relevance not answered in Justice Douglas’s dissent. See *supra* notes 64-65 and accompanying text.

⁸⁶ 377 U.S. 360, 367 (1964).

⁸⁷ *Id.* at 366.

teaching personnel (including the public university professors who were plaintiffs in the case), and the other which applied to all public non-teaching employees.⁸⁸ This splitting off of academic employee oaths from other public employee oaths provided what might have been the very best opportunity in the history of academic freedom case law for the Court to recognize and articulate a special First Amendment status for academic employees. Second, some of the plaintiffs in the case were students at the University of Washington, who argued that they themselves had interests that were impaired due to the infringements on their professors' academic freedom.⁸⁹

Nevertheless, the Court did not take the opportunity to develop a unique jurisprudence of the associational or speech rights of academic employees or students. As to the universal oath statute, which required disclaimer of activity in furtherance or in aid of subversive purposes or organizations, the Court trod the same path it had in *Cramp*, even going so far as to directly quote the "parade of horrors" offered in *Cramp* (which, recall, included a list of non-academic activities that one could reasonably construe as being foreclosed by the statute at issue there), to justify its decision to strike the statute requiring the oath down as unconstitutionally vague.⁹⁰

Unlike the oath at issue in *Cramp*, however, the universal oath had been crafted specifically to comply with the "knowing association" element developed as a test of constitutionality in prior cases such as *Weiman*.⁹¹ In light of this feature, the Court augmented the parade of horrors from *Cramp* with a more academically focused one designed to specifically attack the "knowing" element:

⁸⁸ See *id.* at 364-66 (setting forth the two separate oaths and the statutory provisions authorizing the oaths).

⁸⁹ *Id.* at 366 n.5 (declining to pass on even the threshold question of the standing of the students because "the interests of the students at the University in academic freedom are fully protected by a judgment in favor of the teaching personnel").

⁹⁰ *Id.* at 368 ("The susceptibility of the statutory language to require forswearing of an undefined variety of 'guiltless knowing behavior' is what the Court condemned in *Cramp*. This statute, like the one at issue in *Cramp*, is unconstitutionally vague.").

⁹¹ *Id.* at 382 (Clark, J., dissenting) ("The defects noted by the Court when it passed on the *Cramp* oath have been cured in the Washington statute."); see also *supra* notes 41-51 and accompanying text (discussing the "innocent association" flaw in the Oklahoma statute at issue in *Wieman*).

But what is it that the Washington professor must ‘know’? Must he know that his aid or teaching will be used by another and that the person aided has the requisite guilty intent or is it sufficient that he knows that his aid or teaching would or might be useful to others in the commission of acts intended to overthrow the Government? Is it subversive activity, for example, to attend and participate in international conventions of mathematicians and exchange views with scholars from Communist countries? What about the editor of a scholarly journal who analyzes and criticizes the manuscripts of Communist scholars submitted for publication? Is selecting outstanding scholars from Communist countries as visiting professors and advising, teaching, or consulting with them at the University of Washington a subversive activity if such scholars are known to be Communists, or regardless of their affiliations, regularly teach students who are members of the Communist Party, which by statutory definition is subversive and dedicated to the overthrow of the Government?⁹²

Ultimately, based on the two lists, the Court concluded that the universal portion of the oath was unconstitutionally vague and overbroad.⁹³

The Court then went on to strike down the portion of the oath that applied only to teachers. This portion of the statute required an oath to “promote respect for the flag and the institutions of the United States and the State of Washington.”⁹⁴ Here again, though, the Court offered both academic and non-academic activities that could be viewed as violating the statute: “The oath may prevent a professor from criticizing his state judicial system or the Supreme Court or the institution of judicial review. Or it might be deemed to proscribe advocating the abolition, for example, of the Civil Rights Commission, the House Committee on Un-American

⁹² *Id.* at 369-70.

⁹³ *Id.* at 370 (“The Washington oath goes beyond overthrow or alteration by force or violence. It extends to alteration by ‘revolution’ which, unless wholly redundant and its ordinary meaning distorted, includes any rapid or fundamental change. Would, therefore, any organization or any person supporting, advocating or teaching peaceful but far-reaching constitutional amendments be engaged in subversive activity? Could one support the repeal of the Twenty-second Amendment or participation by this country in a world government?”).

⁹⁴ *See id.* at 371 (summarizing the teacher-specific oath).

Activities, or foreign aid.”⁹⁵ The Court ultimately struck this provision down as vague, as well, failing to draw any distinction between it and the more universal provision discussed above, other than the difference in the scope of their intended application.⁹⁶

One would think that, if the academic nature of the teachers’ employment had any bearing on the vagueness question, then based on the knowledge element in the universal oath that marked the sole infirmity of the Oklahoma statute struck down in *Wieman*, the Court could have upheld the universal oath and struck down the teacher-specific oath as a violation of academic freedom. But the Court allowed the opportunity to distinguish academic First Amendment rights from other First Amendment rights to pass by.⁹⁷ Thus, while the *Baggett* case presented a tantalizing opportunity for the Court to draw speech and association-related distinctions between academic restrictions and non-academic restrictions, neither the majority nor the dissent seized the opportunity.

Two years later, in *Elfbrandt v. Russell*, the Court struck down another public employee loyalty oath as overbroad because it purported to sweep within its provisions membership in a subversive group without intentional support of treason or sedition together with innocent membership lacking “specific intent.”⁹⁸ The Court held, “[a] law which applies to membership without the ‘specific intent’ to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of ‘guilt by association’ which has no place

⁹⁵ *Id.*; see also *id.* at 371-72 (“It would not be unreasonable for the serious-minded oath-taker to conclude that he should dispense with lectures voicing far-reaching criticism of any old or new policy followed by the Government of the United States. He could find it questionable under this language to ally himself with any interest group dedicated to opposing any current public policy or law of the Federal Government, for if he did, he might well be accused of placing loyalty to the group above allegiance to the United States.”).

⁹⁶ *Id.* at 380-81.

⁹⁷ The Court acted similarly at roughly the same time in two cases presenting challenges to intramural suppression of academic expression. See *supra* notes 137-44 and accompanying text (discussing *Beilan* and *Lerner*).

⁹⁸ *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966).

here.”⁹⁹ As the foregoing quote illustrates, the Court grounded its decision on the general right of association, not on a special right of academics to associate more freely than non-academics.¹⁰⁰ In reaching its overbreadth decision, the Court offered as examples of constitutionally protected association membership in academic organizations, participation in academic conferences, and participation in seminars, but, as it had before, the Court offered these as examples of activities in which the actual plaintiff before the Court could plausibly engage, which would violate the statute, not as First Amendment activities unique from other First Amendment activities.¹⁰¹

One year later, in *Whitehill v. Elkins*, the Court invalidated another loyalty oath required for all prospective employees at the University of Maryland.¹⁰² The majority opinion, authored by Justice Douglas, mentioned the words “academic freedom” several times.¹⁰³ However, the Court mentioned academic freedom only as an abstract principle, failing to separate or distinguish it from other First Amendment freedoms held by non-academic public employees. After engaging (and quoting at length) the “self-evident” language from *Sweezy*, the Court relied, as it had in prior loyalty oath cases, on generally accepted principles of vagueness and overbreadth under the First Amendment.¹⁰⁴

⁹⁹ *Id.* at 19; *see also id.* at 17 (“Laws such as this which are not restricted in scope to those who join with the ‘specific intent’ to further illegal action impose, in effect, a conclusive presumption that the member shares the unlawful aims of the organization.”).

¹⁰⁰ *Id.* at 18 (“This Act threatens the cherished freedom of association protected by the First Amendment, made applicable to the States through the Fourteenth Amendment.”).

¹⁰¹ *Id.* at 16-17 (“Would a teacher be safe and secure in going to a Pugwash Conference? Would it be legal to join a seminar group predominantly Communist and therefore subject to control by those who are said to believe in the overthrow of the Government by force and violence?”).

¹⁰² *Whitehill v. Elkins*, 389 U.S. 54, 62 (1966).

¹⁰³ *Id.* at 60, 62.

¹⁰⁴ *Id.* at 61-62 (“The lines between permissible and impermissible conduct are quite indistinct. Precision and clarity are not present. Rather we find an overbreadth that makes possible oppressive or capricious application as regimes change. That very threat, as we said in another context, may deter the flowering of academic freedom as much as successive suits for perjury.” (citing *NAACP v. Button*, 371 U.S. 415, 432-33 (1963) (a case striking down as overbroad a Virginia statute limiting the ability of legal associations to solicit business, which contained both permissible and impermissible restrictions)); *see also id.* at 62 (“Like the other oath cases mentioned, we have another

As it had in *Baggett* and *Elfbrandt*, the Court illustrated the possibility of the chilling of speech by the overbroad oath through examples of the forms of association in which academics such as the plaintiff typically engage. For example, the Court explained that, under the statute, a professor attending an international conference might “innocently” violate his or her oath if Communist interests are also present and benefit from the academic’s participation.¹⁰⁵ But the holding of the case was based solely on the specific intent rule applied in the other loyalty oath cases,¹⁰⁶ not on any separate and distinct concept of the rights of academics to associate in ways that other citizens may not.

Justice Harlan’s dissent in *Whitehill*, joined by three other Justices, mostly avoided discussion of academic freedom, focusing instead on the claim that the majority’s decision to read the oath in question, which had been drafted to comply with the rulings in the cases above by requiring disclaimer only of present seditious associations, *in pari materia* with the statute authorizing the oath’s imposition, which had a broader sweep, was erroneous.¹⁰⁷ Harlan’s single mention of academic freedom was directed at explaining how it was *not* at issue in the case: “References to international conferences, controversial discussions, support of minority candidates, academic freedom and the like cannot disguise the fact that *Whitehill* was asked simply to disclaim actual, present activity amounting in effect to treasonable conduct.”¹⁰⁸ Harlan argued simply that the oath should be judged on its own terms, and that, judged fairly, it fit directly within the permissible scope of the Court’s prior loyalty oath cases and should be upheld.¹⁰⁹

classic example of the need for ‘narrowly drawn’ legislation in this sensitive and important First Amendment area.” (citing *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940) (which applied the overbreadth doctrine to restrictions on the passing out of religious literature))).

¹⁰⁵ *Id.* at 60 (“The restraints on conscientious teachers are obvious. As we noted in the *Elfbrandt* case, even attendance at an international conference might be a trap for the innocent if that conference were predominantly composed of those who would overthrow the Government by force or violence.”) (citing *Elfbrandt*, 384 U.S. at 16-17).

¹⁰⁶ *Id.* at 60-61; *see also supra* notes 98-105 and accompanying text (discussing the specific intent cases).

¹⁰⁷ *Id.* at 62-63 (Harlan, J., dissenting).

¹⁰⁸ *Id.* (Harlan, J., dissenting).

¹⁰⁹ *Id.* at 63 (Harlan, J., dissenting).

In the 1967 case of *Keyishian v. Board of Regents*, one of the few truly seminal opinions in the academic freedom canon, the Court again addressed New York's Feinberg Law, which it had upheld fifteen years earlier in *Adler*, the first case discussed in this section.¹¹⁰ This time, the Court, in a majority opinion authored by Justice Brennan, struck the statute down as unconstitutionally vague and overbroad.¹¹¹ In examining the vagueness of the law, the Court first uttered the now-famous and oft-quoted words that have made the case canonical in discussions of academic freedom:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.¹¹²

The Court also famously stated, “the classroom is peculiarly the ‘marketplace of ideas,’”¹¹³ calling up the Holmesian conception of freedom of speech as a competition of viewpoints.¹¹⁴ Finally, the Court offered a lengthy quote from *Sweezy*, set forth in the section above, proclaiming the “self-evident” nature of the importance of academic freedom.¹¹⁵

Nevertheless, the Court's actual holdings on vagueness and overbreadth were straight applications of the then-emerging jurisprudence under the First Amendment in general.¹¹⁶ The Court did not derive any particular or “special” rule for academic

¹¹⁰ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 593 (1967).

¹¹¹ *Id.* at 604 (vagueness holding), 609 (overbreadth holding).

¹¹² *Id.* at 603.

¹¹³ *Id.*

¹¹⁴ See generally, Steven J. Heyman, *The Dark Side of the Force: The Legacy of Justice Holmes for First Amendment Jurisprudence*, 19 WM. & MARY BILL RTS. J. 661, 673, 711 (2011) (outlining and critiquing the influence of Holmes's view).

¹¹⁵ *Keyishian*, 385 U.S. at 603 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)); see also *supra* note 56 and accompanying text (setting forth the *Sweezy* quote).

¹¹⁶ See Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75 n.39-40 (1960) (setting forth the early First Amendment vagueness cases, which were contemporaries of *Keyishian*); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 844-45 (1970) (reviewing the history and current applications of the doctrine).

contexts, nor did it purport to do so.¹¹⁷ Rather, the lofty language regarding the importance of safeguarding academic freedom was used as rhetorical support for a vagueness and overbreadth decision that could have been applicable either inside or outside the academic context.¹¹⁸

Justice Clark's dissent took issue with the majority's explicit rejection of the right-privilege distinction that had formed the basis of the *Adler* Court's decision to uphold the very same law struck down in *Keyishian*.¹¹⁹ In support of his argument, Justice Clark offered his own strong endorsement of the importance of educational institutions to the preservation of American democracy: "Our public educational system is the genius of our democracy. The minds of our youth are developed there and the character of that development will determine the future of our land. Indeed, our very existence depends upon it."¹²⁰ However, Justice Clark's purpose in offering this paean to education was not to defend the academic freedom of the university professors, but to defend the power of the state university system employer to rigorously examine the backgrounds of its professorial employees, on the theory that, because of education's importance, the government is justified in rooting out subversive influences that might sway young minds.¹²¹ Justice Clark specifically spoke of the government interest at stake as one of "self-preservation."¹²² Thus, Justice Clark saw the goal of public education not as one of knowledge advancement, as the majority saw it, but as one of preservation of the Republic.

Examined as a group, then, the extramural interference cases do not present any binding judicial holdings recognizing speech rights that inhere in academics and not in non-academics. Looking past the lofty rhetoric of these cases, they appear to establish the

¹¹⁷ See, e.g., Martin H. Redish, *The Warren Court, the Burger Court and the First Amendment Overbreadth Doctrine*, 78 NW. U. L. REV. 1031, 1036-37 (1983) (discussing *Keyishian* and *Shelton* as paradigmatic Warren Court overbreadth cases).

¹¹⁸ See *Keyishian*, 385 U.S. at 604 (vagueness); 609 (overbreadth).

¹¹⁹ *Id.* at 625-27 (Clark, J., dissenting). Justice Clark also alternatively took issue with the majority's attempts to distinguish *Adler* by claiming that the *Adler* Court did not consider the questions presented in *Keyishian*. See *id.* (disputing the majority's characterization of what the *Adler* Court failed to consider).

¹²⁰ *Id.* at 628 (Clark, J., dissenting).

¹²¹ *Id.* at 628-29 (Clark, J., dissenting).

¹²² *Id.* at 628 (Clark, J., dissenting).

contrary—that speech rights are as protected from extramural government interference within educational institutions as they are outside such institutions, surely an encouraging proposition, but one that contradicts any conception of academic freedom as its own unique set of rights. So, during this period, the Court was doing nothing more than establishing a jurisprudence of the First Amendment mostly through cases brought by speakers uniquely vulnerable to extramural suppression, while refraining from holding that these uniquely *vulnerable* speakers were in any way uniquely *protected*. This conclusion is bolstered when one considers that, contemporaneously with the academic investigation cases, non-academics were winning similar cases based on similar extramural threats, and were winning on similar constitutional grounds.¹²³

For example, the Court invalidated, on First Amendment grounds, both external investigations and loyalty oaths in cases brought by private organization heads,¹²⁴ bar applicants,¹²⁵ and

¹²³ See, e.g., *United States v. Robel*, 389 U.S. 258, 262 (1967) (invalidating, as overbroad, a federal law excluding members of a Communist-action organization from being employed by the Defense Department). Sometimes, the First Amendment argument appeared only in dissent, as was true for most of the academic freedom cases. See, e.g., *Russell v. United States*, 369 U.S. 749, 776-79 (1962) (Douglas, J., concurring) (concurring in the Court's invalidation of the convictions of several current and former news workers for failure to disclose Communist affiliations, and explaining the First Amendment bases for these invalidations). Sometimes, these rights were protected not under the First Amendment, but as violations of the Bill of Attainder Clause; however, the effect was the same. See, e.g., *United States v. Brown*, 381 U.S. 437, 461-62 (1965) (invalidating, as a bill of attainder a law forbidding members of the Communist Party from being employed by labor unions); *United States v. Lovett*, 328 U.S. 303, 307 (1946) (invalidating, as a bill of attainder, a federal law canceling the employment of three specific federal officials on the grounds of prior connections with communist organizations, and stating, "According to the view we take we need not decide whether Section 304 is an unconstitutional encroachment on executive power or a denial of due process of law, and the section is not challenged on the ground that it violates the First Amendment. Our inquiry is thus confined to whether the actions in the light of a proper construction of the Act present justiciable controversies and if so whether Section 304 is a bill of attainder against these respondents involving a use of power which the Constitution unequivocally declares Congress can never exercise."); see also U.S. CONST. art. I § 9, cl. 3.

¹²⁴ See *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 542, 557-58 (1963) (invalidating an investigation requiring the head of the NAACP in Miami to disclose the membership roster of the organization pursuant to a Florida anti-subversives law).

labor union officials.¹²⁶ The loyalty oath case of *Cole v. Richardson*¹²⁷ is instructive here. In *Cole*, a Massachusetts public hospital employee challenged his dismissal for refusal to swear an oath that he would protect and uphold the Massachusetts and U.S. Constitution, and that he would oppose the violent overthrow of either.¹²⁸ In evaluating the oath, the Court began by reviewing several settled principles of general First Amendment law—that the government cannot condition employment “on taking oaths that impinge on rights guaranteed by the First and Fourteenth Amendments respectively, as for example those relating to political beliefs,”¹²⁹ or “on an oath that one has not engaged, or will not engage, in protected speech activities,”¹³⁰ or “on an oath denying past, or abjuring future, associational activities within constitutional protection . . . includ[ing] membership in organizations having illegal purposes unless one knows of the purpose and shares a specific intent to promote the illegal purpose,”¹³¹ or on an oath “so vague that ‘men of common intelligence must necessarily guess at its meaning and differ as to its application.’”¹³²

The Court ultimately upheld the Massachusetts law because it was merely a restatement of the oath of office required (and therefore sanctioned) by the United States Constitution.¹³³ Importantly, though, the Court defined the boundaries of the First Amendment associational and anti-compelled-speech rights of

¹²⁵ See *Baird v. State Bar of Ariz.*, 401 U.S. 1, 8 (1971) (invalidating an Arizona requirement that, to be admitted to the state bar, an applicant first disclose all associations with subversive organizations); *Application of Stolar*, 401 U.S. 23, 25 (1971) (invalidating a similar requirement for bar admission in Ohio).

¹²⁶ *Watkins v. United States*, 354 U.S. 178, 214-16 (1957) (reversing, on First Amendment and Fifth Amendment grounds, the conviction for contempt of Congress of a labor union official who refused to disclose to the House Un-American Activities Committee the identities of his associates and whether they were Communists).

¹²⁷ 405 U.S. 676 (1972).

¹²⁸ *Id.* at 677-79.

¹²⁹ *Id.* at 680.

¹³⁰ *Id.* (citing *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278 (1961)).

¹³¹ *Id.* (citing *Whitehill v. Elkins*, 389 U.S. 54 (1967); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Wieman v. Updegraff*, 344 U.S. 183 (1952)).

¹³² *Id.* at 680-81 (citing *Cramp*, 368 U.S. at 287).

¹³³ *Id.* at 682-83.

hospital employees by specific reference to the line of “academic freedom” cases decided in the two decades preceding the case before it.¹³⁴ If the academic freedom rights in those prior cases had truly been rights inhering only in academics, these cases would have been inapposite.

The decisions reviewed in this section, and the contemporaneous application of their principles outside the academic context,¹³⁵ establish that, rather than developing “special” academic speech or associational rights during the 1950s and 1960s, the Court instead was developing a set of general First Amendment doctrines in cases that largely presented claims by plaintiffs who happened to be academics. These cases accordingly and understandably yielded stirring rhetoric extolling the value of academic discourse and inquiry, but no special rights for academics. To the extent that the speech and associational rights of individual academics have ever been treated as “special” by the Supreme Court, it is in the cases where the alleged interference with academic rights came from an intramural source. I turn to those cases next.

B. Intramural Interference Cases

Beginning contemporaneously with the First Amendment cases addressing extramural interference with the speech of academics, the Court also addressed intramural, or employer-based, interference with such speech. These cases differ from the extramural interference cases discussed above in two important ways. First, they involve only publicly employed academics. As to privately employed academics, the state action doctrine prevents any First Amendment claims from arising against their employers, even though the First Amendment protects them against extramural interference just as much as it protects

¹³⁴ See *supra* notes 127-33 and accompanying text (reflecting the Court’s citation of the body of academic freedom precedent in analyzing the claim in *Cole*).

¹³⁵ See *supra* notes 86-89 and accompanying text (discussing *Baggett v. Bullitt*); see also *supra* notes 135-87 and accompanying text (providing several non-academic examples of cases decided on First Amendment and related principles identical to those animating the ostensible “academic freedom” cases).

publicly employed academics.¹³⁶ Second, as a direct result of the first difference, the intramural interference cases uniformly result in weaker protection for the First Amendment rights of academics than can be found in the extramural interference cases.

Indeed, in the earlier cases, the Court did not recognize *any* protection against intramural suppression. In *Beilan v. Board of Public Education*,¹³⁷ for example, decided one year after *Sweezy* in 1958, the Court held that the dismissal of a school teacher for refusing to answer questions from his Superintendent about prior Communist affiliations did not violate the Due Process Clause of the Fourteenth Amendment.¹³⁸ Recalling the language of *Adler* in upholding New York's Feinberg Law, Justice Burton stated for the majority:

By engaging in teaching in the public schools, petitioner did not give up his right to freedom of belief, speech or association. He did, however, undertake obligations of frankness, candor and cooperation in answering inquiries made of him by his employing Board examining into his fitness to serve it as a public school teacher.¹³⁹

Thus, Justice Burton construed the dismissal not as an affront to the associational rights of the plaintiff, but as an affirmation of a school district's ability, as an employer, to dismiss an employee for gross insubordination.¹⁴⁰ Once the case was

¹³⁶ See, e.g., Civil Rights Cases, 109 U.S. 3, 11, 13 (1883) (establishing the state action doctrine under the Fourteenth Amendment). A strong set of arguments can be made under some state constitutions for the protection of the speech of privately employed academics, see, e.g., Note, *Free Speech, the Private Employee, and State Constitutions*, 91 YALE L.J. 522, 525, 532, 541 (1982) (an early argument in favor of recognizing such protection), but the full development of such arguments is beyond the scope of this Article.

¹³⁷ 357 U.S. 399 (1958).

¹³⁸ *Id.* at 400.

¹³⁹ *Id.* at 405; see also *id.* (quoting *Adler v. Bd. of Educ.*, 342 U.S. 485, 493 (1952) (schools have the power to investigate the background of teachers, who "shape[] the attitude of young minds towards the society in which they live.")).

¹⁴⁰ *Id.* at 405-06 ("The Board based its dismissal upon petitioner's refusal to answer any inquiry about his relevant activities—not upon those activities themselves. It took care to charge petitioner with incompetency, and not with disloyalty. It found him insubordinate and lacking in frankness and candor—it made no finding as to his loyalty.").

framed in that way, it would have been difficult to arrive at an academic freedom-based inquiry.

The concurring and dissenting opinions to *Beilan* reveal much about the thinking of the Court during the 1950s and 1960s on the subject of special speech rights for academics. These opinions are found in the reported opinion of the companion case, *Lerner v. Casey*,¹⁴¹ to which the Court's holdings in *Beilan* were applied on the same date. Both dissenting opinions questioned the framing of the case as one of the propriety of dismissal for insubordination, rather than as a case of suppression of associational rights. Interestingly, however, the separate opinions did not take the opportunity to discuss any sort of special speech status that teachers may hold, and there was no mention of academic freedom, a particularly important omission in light of the then-recent decision in *Sweezy*.

Justice Brennan's opinion, in fact, conceded that the failure of a teacher to respond to job-related inquiries about the teacher's associations, if grounds for dismissal, would raise no constitutional issues.¹⁴² Justice Brennan's true concern appears to have been professional reputation in both cases, with no distinction being made between them.¹⁴³ Moreover, Justice Douglas's dissent, joined by Justice Black, took pains to draw parallels between the plaintiff in *Lerner*, who was a subway conductor, and the plaintiff in *Beilan*, who was a teacher.¹⁴⁴ This equivalence suggests that at least Justices Douglas and Black, two very strong proponents of speech rights who authored or joined

¹⁴¹ 357 U.S. 399 (1958).

¹⁴² *Id.* at 423 (Brennan, J., dissenting) ("I doubt that a meritorious question for our review would be presented if the issue was, as the Court says, the constitutional validity of a dismissal solely for refusal of the teacher to answer the relevant questions asked by the School Superintendent in private interviews. I might agree that the Due Process Clause imposes no restraint against dismissal of a teacher who refuses to answer his superior's questions asked in the privacy of his office and related to the teacher's fitness to continue in his position.")

¹⁴³ *See id.* at 425 (Brennan, J., dissenting) ("As in *Lerner* the inference of disloyalty is arbitrary in the extreme. Yet Pennsylvania, like New York in the *Lerner* case, publicly announces contrary to the fact that it possesses competent evidence justifying the conclusion that Beilan is in fact a disloyal American.")

¹⁴⁴ *See id.* at 416 (Douglas, J., dissenting) ("A teacher who is organizing a Communist cell in a schoolhouse or a subway conductor who is preparing the transportation system for sabotage would plainly be unfit for his job. But we have no such evidence in the records before us."); *see also id.* at 425 (Brennan, J., dissenting).

several academic freedom precedents during this time, saw no special speech rights in teachers against their employers, and the silence on the issue among the other opinions, coupled with the congruence in the results of the two cases, suggests that the rest of the Court collectively held the same view.

The Supreme Court had no occasion to consider under the First Amendment the constitutionality of direct restrictions on the volitional speech of publicly employed academics again until the late 1960s, when it decided the landmark case of *Pickering v. Board of Education*.¹⁴⁵ In *Pickering*, the plaintiff, a public school teacher, had penned a letter to the editor of a local newspaper charging that the school board—his employer—had dealt with public money irresponsibly by spending too much on athletics and not enough on academics, and that the superintendent had intimidated teachers into supporting previous bond issues.¹⁴⁶ In retaliation for this letter, the school board fired Mr. Pickering. He sued the school board, alleging a violation of his First Amendment rights.

In deciding the case, the Court finally and decisively jettisoned any remaining remnants of the Holmesian right-privilege distinction, holding that public school teachers do not relinquish their First Amendment rights simply by virtue of becoming public employees.¹⁴⁷ Rather, the Court held, a public school teacher retains the right to speak out as a citizen on a matter of public concern. However, due to the nature of the public employment relationship, this right to speak must be balanced against the interests of the school board in maintaining an effective public workplace.

In Mr. Pickering's case, the Court conducted this balance and concluded that, in part due to the unique knowledge of the educational system that a teacher possesses, a teacher's public speech on the appropriate uses of school funds is particularly valuable to the public.¹⁴⁸ A teacher's deliberately false statements

¹⁴⁵ 391 U.S. 563 (1968).

¹⁴⁶ *Id.* at 566.

¹⁴⁷ *Id.* at 568. Recall that this holding directly contradicts Holmes's famous quip while sitting on the Massachusetts Supreme Court that "[t]he Petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220 (Mass. 1892).

¹⁴⁸ *Pickering*, 391 U.S. at 571-72.

as part of such a debate might be cause for discipline, but only if such false statements are directed at matters peculiarly within this unique knowledge, rather than at matters that are part of the public record and subject to quick and easy verification and correction.¹⁴⁹ The school board could not state a governmental interest that might plausibly outweigh the value of this speech.¹⁵⁰ Thus, the *Pickering* doctrine was born.

The Court chipped away at the *Pickering* protection in *Mt. Healthy City School District Board of Education v. Doyle*.¹⁵¹ In *Mt. Healthy*, the Court addressed a claim against an employer which had both retaliated against an employee for engaging in speech addressing a matter of public concern and punished the same employee for non-speech-related misconduct.¹⁵² Addressing this unique factual situation, the Court allowed the employer to escape liability by proving, essentially, that the employee's speech was not a "but for" cause of the employer's action.¹⁵³ Colloquially, this defense has become known as the "same decision anyway" defense, and most employment law observers viewed it as an affront to the rights protected by *Pickering*.¹⁵⁴

The next development in this line of cases—this one a positive development from the perspective of public employees—also came out of the public school context. In *Givhan v. Western Line Consolidated School District*,¹⁵⁵ a public school counselor lodged a complaint with her principal alleging race discrimination in the school's personnel decisions. In retaliation for making this complaint, the counselor was terminated. She sued, alleging,

¹⁴⁹ *Id.* at 572.

¹⁵⁰ *Id.* at 572-73 ("What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.")

¹⁵¹ 429 U.S. 274 (1977).

¹⁵² *Id.* at 281-83.

¹⁵³ *Id.* at 285-87.

¹⁵⁴ See, e.g., Michael S. Wolly, *What Hath Mt. Healthy Wrought?*, 41 OHIO ST. L.J. 385, 390-93 (1980).

¹⁵⁵ 439 U.S. 410, 414 (1979).

among other things, violation of her First Amendment rights. The Court held that, despite the fact that she had complained internally and only to her supervisor, her complaints addressed a matter of public concern, and they remained protected under the First Amendment, subject to the *Pickering* balance of interests.¹⁵⁶

In *Connick v. Myers*,¹⁵⁷ the Court further clarified the *Pickering* test's requirement that the public employee's speech be made on "matters of public concern."¹⁵⁸ *Connick* did not involve an academic employee, but its modifications of the *Pickering* rule underscore the ultimate conclusion of this Section that *Pickering* and the cases following it did nothing to establish any kind of academic-specific set of rights. In *Connick*, an employee of the New Orleans District Attorney's Office circulated to co-workers a questionnaire containing items overwhelmingly reflecting the employee's personal grievances against the District Attorney, Harry Connick, Sr.¹⁵⁹ Among these more personal items was one item asking employees whether they had ever felt pressured to engage in political activities. While recognizing the public nature of the political activities item, the Court held both that (1) the main point of the questionnaire was to air a private grievance, not to comment on a matter of public concern; and (2) the managerial prerogatives of Mr. Connick's office outweighed any public interest in the items relating to political activity.¹⁶⁰

Most observers saw *Connick* as a tilting of the *Pickering* balance in favor of employers,¹⁶¹ but the basic protection for public employee speech remained.¹⁶² This was the state of public employee First Amendment law when Chief Justice Roberts took the gavel—a general protection of the speech of public employees on matters of public concern against retaliation, subject to

¹⁵⁶ *Id.* at 413.

¹⁵⁷ 461 U.S. 138, 140 (1983).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 141-42.

¹⁶⁰ *Id.* at 148, 151-52.

¹⁶¹ See, e.g., Stephen Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43, 47-50 (1988).

¹⁶² Indeed, the Court added one more significant precedent a few years after *Connick*, *Rankin v. McPherson*, recognizing an expansive definition of "matter of public concern." See *Rankin v. McPherson*, 483 U.S. 378, 381, 385 (1987) (holding that a public employee's expression of hope that the failed shooters of President Reagan in 1981 "get him" if they were to try again was speech on a matter of public concern).

override where employer interests outweigh the interests of the employee in speaking and the public in receiving the message.

One of the Roberts Court's earliest decisions, *Garcetti v. Ceballos*¹⁶³ was what many consider to be a radical departure from the *Pickering* regime, even as limited by *Connick* and *Mt. Healthy*. Like *Connick*, *Garcetti* did not involve an academic employee. Ceballos, the plaintiff, was a "calendar deputy" for the Los Angeles District Attorney's Office.¹⁶⁴ Consistent with his responsibilities in this role, at the urging of defense counsel in a pending case, Ceballos examined a search warrant that had been obtained against the defense counsel's client.¹⁶⁵

Concluding that the affidavit supporting the warrant was plagued by misrepresentations and serious factual inaccuracies, Ceballos authored a memorandum to that effect and submitted it to his superiors.¹⁶⁶ This submission led to a heated discussion, and ultimately, Ceballos's superiors rejected the memorandum's conclusions.¹⁶⁷ Subsequently, defense counsel called Ceballos as a witness in the suppression hearing, and Ceballos testified substantially in concert with his memorandum, but the judge denied the motion to suppress.¹⁶⁸ Finally, when all was said and done, Ceballos was transferred to a less desirable position.¹⁶⁹

Ceballos filed suit claiming, among other things, retaliation for the exercise of his First Amendment right to speak on matters of public concern.¹⁷⁰ When the case reached the Supreme Court, the only speech that was at issue was Ceballos's written memorandum to his superiors.¹⁷¹ The Court considered the memorandum in light of the *Pickering* line of cases and concluded that it was not the kind of speech that the *Pickering* line was designed to protect. Rather than "citizen speech," Ceballos's memorandum was speech made "pursuant to [Ceballos's] duties"

¹⁶³ 547 U.S. 410 (2006).

¹⁶⁴ *Id.* at 413.

¹⁶⁵ *Id.* at 413-15.

¹⁶⁶ *Id.* at 414.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 415.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *See id.* 420-26.

as a calendar deputy.¹⁷² The Court then stated as its holding a categorical rule of exclusion from the First Amendment's protection:

We hold 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.¹⁷³

The *Garcetti* Court's choice to adopt a categorical rule excluding certain speech from First Amendment protection has drawn fervent criticism. Multiple legal commentators have critiqued the decision on the grounds that it is unthinkingly formalistic.¹⁷⁴ These critiques center upon the Court's adoption of a threshold categorical rule to precede, and in some cases preclude, the interest balancing that would otherwise be conducted in cases alleging First Amendment retaliation.¹⁷⁵ Commentators generally contend that a categorical rule is inappropriate in the context of the First Amendment,¹⁷⁶ and that

¹⁷² *Id.* at 415.

¹⁷³ *Id.* at 421.

¹⁷⁴ See, e.g., Paul M. Secunda, *Neoformalism and the Reemergence of the Right-Privilege Distinction in Employment Law*, 48 SAN DIEGO L. REV. 907, 912 (2011) [hereinafter Secunda, *Neoformalism*]; Paul M. Secunda, *Garcetti's Impact on the First Amendment Speech Rights of Federal Employees*, 7 FIRST AMEND. L. REV. 117, 123 (2008) [hereinafter Secunda, *Speech Rights of Federal Employees*] ("Consistent with Justice Stevens' dissent in *Garcetti*, I reject the dichotomous, overly-formalistic view of a public employee as either being a citizen or worker, but never simultaneously both."); Charles W. "Rocky" Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173, 1174, 1192 (2007).

¹⁷⁵ Sources cited *supra* note 174.

¹⁷⁶ *Garcetti* was not the first case in which the Supreme Court set down a categorical rule creating an exemption from First Amendment scrutiny. Under the current understanding of the First Amendment, there are several such exemptions, each of which describes a category of speech that does not qualify for First Amendment protection. See, e.g., *Virginia v. Black*, 538 U.S. 343 (2003) (true threats); *Miller v. California*, 413 U.S. 15 (1973) (obscenity); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitement to imminent lawless activity); *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (defamation, including a modified, but still categorical, exception if the subject is a public figure); see also *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography). But see *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (striking down portions of the federal statute criminalizing child pornography, 18 U.S.C. § 2256, as overbroad). In addition to these categories, several speech-related acts have been criminalized or have formed the

any such rule is likely to render unprotected speech that ought to be protected, considering the purposes of the First Amendment.¹⁷⁷ This is a familiar critique of formalist rules, but one commentator has pointed out that the decision is likely to lead to results contrary even to the professed values of formalist judging—namely the fostering of predictability and the cabining of the influence of ideology in the judicial process.¹⁷⁸ Indeed, many courts applying *Garcetti* have over-read the case to deny First Amendment protection of any kind to speech simply made during the course of a public employee's employment, or speech related to a public employee's employment.¹⁷⁹ These rulings have caused many to conclude that *Garcetti* was wrongly decided,¹⁸⁰ and have been used as support for more general critiques of the formalism of the Roberts Court.¹⁸¹

Read on its own literal terms, the *Garcetti* rule would plainly bring within its ambit all of the pedagogical and scholarly academic speech of both publicly employed college professors and public school teachers, as Justice Souter pointed out in his dissent:

This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that

basis of tort liability in the states with little resulting First Amendment scrutiny. See, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1078-91 (4th ed. 2011) (discussing defamation together with privacy torts and intentional infliction of emotional distress). Professor Sheldon Nahmod has pointed out that each of these categories is based on the content of the speech and its intrinsic value, rather than the identity of the speaker, and that the *Garcetti* exemption presents a departure from traditional First Amendment principles. Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing, and § 1983: A Critique of Garcetti v. Ceballos*, 42 U. RICH. L. REV. 561, 570-71 (2008).

¹⁷⁷ See, e.g., Secunda, *Speech Rights of Federal Employees*, *supra* note 174, at 118 (federal employee speech); Rhodes, *supra* note 174, at 1201 n.204 (academic speech); Sheldon H. Nahmod, *Academic Freedom and the Post-Garcetti Blues*, 7 FIRST AMEND. L. REV. 54, 56 (2008) (same); Helen Norton, *Government Workers and Government Speech*, 7 FIRST AMEND. L. REV. 75, 90 (2008) (whistleblower/government auditor speech).

¹⁷⁸ Rhodes, *supra* note 174, at 1193.

¹⁷⁹ See Scott R. Bauries & Patrick Schach, *Coloring Outside the Lines: Garcetti v. Ceballos in the Federal Appellate Courts*, 246 EDUC. L. REP. 357 (2011) (documenting the broadening of the *Garcetti* categorical exemption in lower court decision making).

¹⁸⁰ Rhodes, *supra* note 174, at 1174; Secunda, *Speech Rights of Federal Employees*, *supra* note 174, at 117; Norton, *supra* note 177, at 83; Nahmod, *supra* note 176, at 54.

¹⁸¹ Secunda, *Neoformalism*, *supra* note 174, at 911.

today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write "pursuant to . . . official duties."¹⁸²

In response to Justice Souter's concerns about the teaching and scholarship of higher education academics, Justice Kennedy hedged:

There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.¹⁸³

This cryptic statement can be read in a number of ways. It can be read as one more reluctant acknowledgement that academic freedom has some kind of constitutional status, but one that is ill-defined. It can also, however, be read as an invitation to future litigants to discover the "additional constitutional interests" for which "employee-speech jurisprudence" fails to account.

Whatever Justice Kennedy intended by his response, Justice Souter was surely correct that the holding of *Garcetti* clearly sweeps within its ambit the teaching and scholarship of academic employees in public higher education institutions. Such employees, when they engage in teaching and scholarship, *always* speak "pursuant to their official duties." This state of affairs gives rise to what J. Peter Byrne has referred to as the "paradox of *Garcetti*."¹⁸⁴ The paradox to which Byrne refers arises from the mutually contradictory statements in the First Amendment jurisprudence of the Supreme Court purporting to recognize "special" protection for academic speech and association, and the

¹⁸² *Garcetti v. Ceballos*, 547 U.S. 410, 438 (2006) (Souter, J., dissenting).

¹⁸³ *Id.* at 425.

¹⁸⁴ J. Peter Byrne, *Neo-orthodoxy in Academic Freedom*, 88 TEX. L. REV. 143, 163 (2009) (reviewing FINKIN & POST, *supra* note 14; See also STANLEY FISH, *SAVE THE WORLD ON YOUR OWN TIME* (2008)).

Garcetti rule's complete exclusion of the academic speech of public academic employees from the First Amendment's protection.¹⁸⁵

Based on numerous Supreme Court pronouncements that the Court has neither disclaimed nor chosen to distance itself from, academic speech—including the academic speech of both private and public university professors—is uniquely important to the functioning of American democracy. Yet, under the Court's First Amendment jurisprudence, the academic speech of public university professors is among the *least protected forms of speech*. In fact, it stands on the same footing as obscenity, fighting words, incitement speech, and child pornography, which are all categorically unprotected under the First Amendment due to their "low-value."¹⁸⁶ So, academic speech is indisputably high-value speech, but in the public university workplace, it qualifies for the same protection as indisputably low-value speech—no protection. Byrne is certainly correct that this is a troubling paradox, and it is the resolution of this paradox that the next Part considers.¹⁸⁷

II. ATTEMPTS TO RESOLVE THE PARADOX

This Part considers how the academic community might seek to resolve the paradox that *Garcetti* imposes on academic work. First, I consider the prospect of simply urging the Court to overrule the case, which, after all, was a closely decided case that split the Court's justices 5-4. Concluding that overruling is not a workable option, I then review two recent efforts in the circuit

¹⁸⁵ See Byrne, *supra* note 184, at 165 ("The *Garcetti* formulation turns the principle of academic freedom on its head. The First Amendment, as expounded in *Garcetti*, protects only a public employee's speech as a citizen *outside* professional duties. Academic freedom essentially protects only academic speech *within* the sphere of a professor's professional responsibilities; any extension to the professor's speech as a citizen outside his or her professional duties is derivative and debatable.").

¹⁸⁶ See Bauries & Schach, *supra* note 179, at 357 n.1.

¹⁸⁷ A similar paradox appears to exist relating to the speech of publicly employed auditors, quality control specialists, and accountants, each of whom has an official duty to ferret out waste, fraud, and abuse in the use of public funds. This speech, like academic speech, is particularly likely to draw the ire of unscrupulous managers, and it is uniquely valuable to the public. Yet *Garcetti* leaves it completely unprotected. For a particularly worrisome version of this paradox, see Paul M. Secunda, *Whither the Speech Rights of Federal Employees*, FIRST AMEND. L. REV. (2007) (considering the statutory duty of *all* federal employees to report waste, fraud, and abuse, and *Garcetti*'s effects on such speech).

courts to construct a way around the paradox and provide individual academics with some protection for their work-required speech. Each of these ways around the paradox is also unworkable—the first because it does not resolve the paradox, and the second because, although it resolves the paradox, it does so in a way that conflicts with the underlying structure of First Amendment jurisprudence.

A. *Overrule Garcetti?*

Understanding that *Garcetti*'s rule imperils the academic work of publicly employed scholars and teachers, perhaps it is best to engage in a sustained program to see *Garcetti* itself overruled. While many academics (particularly those who work for public institutions) would undoubtedly support such a project, it is unlikely to succeed.

First, it is clear from the general tenor of the decisions of the lower courts that the *Garcetti* rule is quite popular with the federal judiciary. Although the Fourth and Ninth Circuits have recently deviated from this pattern in different ways, as discussed below,¹⁸⁸ the other circuits (and even the Fourth and Ninth in other cases) overwhelmingly have adopted a very broad reading of the *Garcetti* rule in the academic context, sometimes even ignoring its holding in favor of applying selected out-of-context quotations from its dicta that broaden the First Amendment exemption significantly.¹⁸⁹ Thus, rather than begrudgingly applying the rule and finding ways to narrow it to its facts, with few exceptions the circuits seem to have eagerly embraced it.

Second, from a predictive perspective, a vital and little noticed insight regarding the *Garcetti* opinions is that *every* dissenter to the *Garcetti* categorical rule *also* voted for a formal, categorical exemption from First Amendment protection—just not

¹⁸⁸ See *infra* Parts IV.B. & IV.C.

¹⁸⁹ For a detailed analysis of these decisions illustrating how each circuit that has addressed *Garcetti* in the context of the speech of public educational employees has applied the *Garcetti* rule in broader terms than those in which it was articulated, and in conflict with the limitations of the rule stated in the *Garcetti* majority opinion, see Bauries & Schach, *supra* note 179, at 357.

the precise one that the majority ultimately adopted.¹⁹⁰ That is, all nine justices of the Court were unified in seeking to exempt a large amount of public employee expression from the protection of the First Amendment without requiring a *Pickering* balance, but four justices disagreed with the other five as to the scope of the exemption. The majority thought that the scope should include all public employee speech made “pursuant to official duties”—speech that the employee’s job requires the employee to make.¹⁹¹ The dissenters favored different categorical exemptions, tempered by judicial determinations of the importance of the speech’s content, but each of the alternative rules offered by the dissents would be just as unprotective of academic speech as the majority’s rule.¹⁹²

Justice Souter’s lengthy dissent, joined in full by Justices Stevens and Ginsburg, contended that the majority’s categorical rule left much room for judicial mischief through its failure to articulate a test for whether speech is pursuant to one’s employment duties.¹⁹³ Souter also contended that the rule would imperil the interests of internal auditors, teachers, and academic scholars working in public institutions.¹⁹⁴ With these concerns in mind, Souter articulated his own preferred rule for the case, explaining first that an employer’s “substantial interests in effectuating its chosen policy and objectives” can be outweighed by “private and public interests in addressing official wrongdoing and threats to health and safety,” and when they are, “public

¹⁹⁰ See *Garcetti v. Ceballos*, 547 U.S. 410, 435 (Souter, J., dissenting); *id.* at 449-50 (Breyer, J., dissenting). Although neither Justice Souter nor Justice Breyer claims that his rule is categorical, their use of absolutist terms such as “unless” (Souter) and “only” (Breyer) compels this conclusion. Perhaps if either were in the majority, he would have proposed a less restrictive rule, but the willingness of each to base a substantial portion of his opinion, as well as his proposed alternative rule, on speech made “in the course” of job duties, rather than on the majority’s narrower category of speech made “pursuant to” job duties, suggests otherwise. See Bauries & Schach, *supra* note 179.

¹⁹¹ See *id.* (developing this reading of the *Garcetti* rule as the only one that can be correct, given the reasoning the Court offered).

¹⁹² The dissenters largely are the subject of sympathetic commentary in the scholarly studies of *Garcetti*. No such commentary, to my knowledge, has acknowledged either (1) that the dissenters themselves propose a categorical rule, or (2) that the rule they propose seems to sweep far expression within its scope (at least in cases where the narrow exception does not apply) than the rule adopted by the majority.

¹⁹³ *Garcetti*, 547 U.S. at 441 (Souter, J., dissenting).

¹⁹⁴ *Id.* at 438 (Souter, J., dissenting).

employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection.”¹⁹⁵

Justice Souter then articulated an alternative categorical rule (with a content-based exception) to replace the majority’s categorical rule. This rule would place all of a public employee’s expression made “in the course of duties” outside the protection of the First Amendment unless it addresses “a matter of unusual importance and satisfies high standards of responsibility.”¹⁹⁶ Recall that the majority would require that speech be made “pursuant to” an employee’s duties for it to be exempt from First Amendment scrutiny, thus leaving other matters of public concern (even “usual” ones) protected as long as they are not part of the speech that an employee was hired to make. By changing the words “pursuant to” to “in the course of,” Justice Souter’s proposed rule arguably would also expand the scope of speech presumptively exempt from First Amendment coverage from that *required by the job* to that merely made *while working*, subject to a very narrow, content-based exception-to-the-exemption.

It is inarguable that Justice Souter’s proposed categorical rule would significantly limit speech rights beyond the limits present in the *Pickering/Connick* test. Souter’s proposed rule would exempt all but the most important public employee speech from scrutiny, as long as it is uttered “in the course” of performing job duties, while the *Pickering/Connick* threshold test merely requires that the speech be directed at a matter of public concern, without regard to whether it is uttered while working.¹⁹⁷

But would Souter’s rule at least assist academic speakers in protecting their teaching and scholarship from intramural suppression? In a word, no. Justice Souter’s rule would exempt from protection all speech made “in the course” of job duties (a

¹⁹⁵ *Id.* at 428 (Souter, J., dissenting).

¹⁹⁶ *Id.* at 435 (Souter, J., dissenting).

¹⁹⁷ See *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 415-16 (1979) (“The First Amendment forbids abridgment of the ‘freedom of speech.’ Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public. We decline to adopt such a view of the First Amendment.”); see also *Connick v. Myers*, 461 U.S. 138, 150 (1983) (applying the balancing test where only a small portion of the challenged speech arguably addressed a matter of public concern, and did so obliquely).

category which certainly includes academic teaching and scholarship), and would only except from this exemption speech on matters of “unusual importance,” and then in those cases only if the speech satisfies “high standards of responsibility.”¹⁹⁸ Now, most academics undoubtedly believe that their work is “unusually important,” but it is unlikely that this is true in more than a small minority of cases. Thus, even if academic speakers in general are highly responsible in speaking, the personal importance of their academic speech to themselves and their fellow scholars will not likely cause the speech to rise to the level of “unusual importance” necessary to satisfy Justice Souter and his two co-dissenters.

If any doubt remains, Justice Souter’s illustrative explanation of his proposed rule should dispel it: “The examples I have already given indicate the eligible subject matter, and it is fair to say that only comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee’s favor.”¹⁹⁹

Some scholarship and teaching—particularly in law schools, will be able to meet this test, but not much, so if Justice Souter’s use of “in the course,” rather than “pursuant to” is meaningful, it is likely that his rule would be *more* restrictive of academic speech than the majority’s. And this alternative drew the votes of both Justices Ginsburg and Stevens.

Justice Breyer declined to join Justice Souter’s principal dissent, preferring to state his concerns solitarily.²⁰⁰ Breyer focused most of his dissent on the argument that, in Mr. Ceballos’s case, both the professional obligations placed on lawyers and the constitutional obligations placed on prosecutors under *Brady v. Maryland*²⁰¹ necessitated applying the *Pickering* balancing test.²⁰² Interestingly, though, Justice Breyer also ended up proposing a categorical rule of exemption from First Amendment protection for much of public employee speech, and one that reads even more

¹⁹⁸ *Garcetti*, 547 U.S. at 435 (Souter, J., dissenting).

¹⁹⁹ *Id.* (Souter, J., dissenting).

²⁰⁰ *See id.* at 444-50 (Breyer, J., dissenting).

²⁰¹ 373 U.S. 83, 87 (1963) (requiring criminal prosecutors to disclose to the defense the existence of exculpatory evidence in their possession).

²⁰² *See Garcetti*, 547 U.S. at 447 (Breyer, J., dissenting).

broadly than the one proposed by the other dissenters, which itself is arguably broader than the majority's rule.

Under Justice Breyer's proposed alternative rule, public employee speech that occurs "in the course of ordinary job-related duties" qualifies for First Amendment protection "only in the presence of an augmented need for constitutional protection and diminished risk of undue judicial interference with governmental management of the public's affairs."²⁰³ Like the rule proposed by the other three dissenters, Justice Breyer's proposed rule does not contain any requirement that the speech in question be mandated by the job in question—only that the speech in question "takes place" while a public employee is performing his or her "ordinary job-related duties."²⁰⁴ Under this formulation, an employee may have a job that does not require any speech at all, yet may still be denied the protection of the First Amendment if the employee simply speaks while working, and neither the Constitution nor state-created professional obligations places any special duty to speak in the public interest on that employee.²⁰⁵ In addition, Justice Breyer's discussion makes clear that the "augmented need for constitutional protection" will arise only in cases "[w]here professional and special constitutional obligations are *both* present."²⁰⁶

Although in "unusually important" cases, Justice Souter's rule would seem to protect some academic speech, applying Justice Breyer's rule to academic speech would result in *no* protection. As would be true under Justice Souter's rule, academic scholarship and teaching would fall easily within Breyer's category of presumptively unprotected speech—speech made "in the course of ordinary job-related duties."²⁰⁷ And although academic speech is *governed* by professional norms, it is not

²⁰³ *Id.* at 449-50 (Breyer, J., dissenting).

²⁰⁴ *Id.* at 444, 449-50 (Breyer, J., dissenting).

²⁰⁵ *See id.* at 449-50 (Breyer, J., dissenting). Although neither Justice Souter nor Justice Breyer claims that his rule is categorical, their use of absolutist terms such as "unless" (Souter) and "only" (Breyer) belies their silence. Perhaps if either were in the majority, he would have proposed a less restrictive rule, but the willingness of each to base a substantial portion of his opinion proposing and defending an alternative rule suggests otherwise.

²⁰⁶ *See id.* at 447 (Breyer, J., dissenting) (emphasis added).

²⁰⁷ *Id.* at 449-50 (Breyer, J., dissenting).

mandated either by those norms or by the Constitution, as the disclosure of exculpatory evidence is.

Thus, on balance, public employees in general should feel lucky that the Court at least split as it did. Under the *Garcetti* majority's rule, if faithfully applied, a public employee need not demonstrate "unusual public importance" to have his speech protected, nor need he show that his speech was "compelled" by constitutional or professional requirements. As long as he can show that his speech was not required by his job, he should receive the *Pickering* balance and have a reasonable chance to prevail. Nevertheless, this still leaves the principal forms of speech for which constitutional academic freedom is supposed to provide First Amendment protection completely unprotected from intramural suppression. And considering the alternative rules offered by the *Garcetti* dissenters, it is unlikely that *Garcetti* will be overruled anytime soon. In fact, given another opportunity, it is just as likely that the Court will expand the exemption. Those who seek to restore constitutional protection to academic speech must find another way.

B. Read Garcetti Narrowly?

One way to restore constitutional protection to academic speech may be to encourage a minimization of *Garcetti*'s impact by limiting it to its precise facts and holding.²⁰⁸ The Fourth Circuit recently did so by ruling in the academic plaintiff's favor in the case of Michael Adams. Adams was a tenured associate professor of criminology at the University of North Carolina-Wilmington, who also happened to be a Christian conservative and author of a column for the conservative blog Townhall.com.²⁰⁹ Adams also published several books and articles critical of academia and its place in society, including one provocative book titled, *Welcome to the Ivory Tower of Babel: Confessions of a Conservative College Professor*.²¹⁰ Although he won teaching awards and received positive reviews of his scholarship and teaching, Adams was

²⁰⁸ See generally Bauries & Schach, *supra* note 179 (advocating for this approach).

²⁰⁹ Adams v. Trustees of the U. of N.C.-Wilmington, 640 F.3d 550, 553 (4th Cir. 2011).

²¹⁰ MIKE S. ADAMS, WELCOME TO THE IVORY TOWER OF BABEL: CONFESSIONS OF A CONSERVATIVE COLLEGE PROFESSOR (2004).

nevertheless denied promotion to full professor after a faculty committee vote that went 7-2 against him. His tenure application packet included his peer-reviewed scholarship, his teaching evaluations, and references to his books, blog postings, and public appearances, mostly under the “Service” heading, but with some mention of these materials under the heading of “Research.”

Once the department chair and dean accepted the faculty committee vote to deny his promotion, he requested an explanation and received what he saw as shifting and evasive justifications, so he sued, alleging, in relevant part, a claim of retaliation for protected speech.²¹¹ The District Court granted summary judgment to the university on this claim, based solely on *Garcetti*, concluding that the materials constituted speech “pursuant to official duties” by virtue of Adams having included them in his application for promotion.²¹² The Fourth Circuit reversed, holding that, though the materials in question arguably constituted academic scholarship, they were not connected sufficiently with Adams’s official teaching and other duties to have been made “pursuant to” those duties.²¹³

After defining the shorthand term, “Adams’ ‘speech,’” which the court used throughout the opinion to refer to his blog posts at Townhall.com, his other political and religious articles, and his *Ivory Tower of Babel* book,²¹⁴ the court explained:

Defendants agree Adams’ speech involves scholarship and teaching; indeed, as we discuss below, that is one of the reasons they say *Garcetti* should apply—because UNCW paid Adams to be a scholar and a teacher regardless of the setting for his work. But the scholarship and teaching in this case, Adams’ speech, was intended for and directed at a national or international audience on issues of public importance unrelated to any of Adams’ assigned teaching duties at UNCW or any other terms of his employment found in the record. Defendants concede none of

²¹¹ Adams also claimed religious discrimination under Title VII and violation of his equal protection rights, claims which lie outside the scope of this Article. *See Adams*, 640 F.3d at 556.

²¹² *Id.* at 561.

²¹³ *Id.* at 564.

²¹⁴ *Id.* at 555 (“We will refer collectively to the foregoing materials listed in his application, which were not primarily devoted to purely academic subjects in his field, as Adams’ ‘speech.’ It is this speech which is a primary focus of Adams’ claims.”).

Adams' speech was undertaken at the direction of UNCW, paid for by UNCW, or had any direct application to his UNCW duties.²¹⁵

In characterizing what it termed "Adams' speech" in this way, the court drew a definitive line between academic speech made pursuant to Adams's official duties and political speech of an academic or scholarly character that Adams undertook for his own purposes, unrelated to his duties at UNC-Wilmington.

Indeed, the court sharply criticized the district court for improperly conflating Adams's political speech with his speech pursuant to his professorial duties.²¹⁶ In particular, the court focused on the University's stipulation that, when Adams published his political blogs, articles, and book, his speech was protected under the First Amendment, and the District Court's error in holding that this protected speech somehow became unprotected once Adams mentioned it in his promotion application: "In effect, the district court held that Adams' speech in his columns, books, and commentaries, although undoubtedly protected speech when given, was somehow transformed into unprotected speech because Dr. Cook and others read the same items from a different perspective long after Adams' speech was uttered."²¹⁷ So, the court focused very squarely on the real error in the case—improperly treating ordinary political speech as speech made "pursuant to official duties" simply because it was uttered by an academic and considered in the promotion process by his colleagues. The case therefore exemplifies one possible way around the *Garcetti* rule—reading the rule strictly, narrowly, and limited to speech substantially similar to that at issue in *Garcetti*—speech required by the plaintiff's job.²¹⁸

Like many opinions of collegial courts, the *Adams* opinion contains a good deal of extraneous matter—dicta—used to add rhetorical force to the court's ultimate conclusion. Unfortunately, the *dicta* of the *Adams* opinion creates the erroneous impression

²¹⁵ *Id.* at 563-64.

²¹⁶ *Id.* at 561.

²¹⁷ *Id.* at 561-62.

²¹⁸ A co-author and I advocated for just this reading, but noted that, at that time, the circuits had opted for a broader, and therefore less speech-protective, exemption. See Bauries & Schach, *supra* note 179. *Adams* was pending at the time our commentary was published, and it remains the only example of a true narrow, fact-bound reading in the education context among the federal circuit courts.

that the court carved out an “academic speech” exception to the *Garcetti* rule. The opinion refers specifically to the dispute between Justices Kennedy and Souter in *Garcetti* over the rule’s application to academic speech, including Justice Kennedy’s response that “We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”²¹⁹ It also contains such tantalizing gems as:

We are also persuaded that *Garcetti* would not apply in the academic context of a public university as represented by the facts of this case. Our conclusion is based on the clear reservation of the issue in *Garcetti*, Fourth Circuit precedent, and the aspect of scholarship and teaching reflected by Adams’ speech.²²⁰

Read quickly, this statement seems to carve out the “academic context” as exempt from *Garcetti*’s rule. But note the qualifier “as represented by the facts of this case.”²²¹ It is also important to unpack the remainder of this statement because it lists three reasons that *Garcetti* would not apply “as represented by the facts of this case.”

The first reason is the “clear reservation of the issue” in Justice Kennedy’s *Garcetti* opinion. It is not clear what the court saw as the import of this reservation, other than that it left the question of application to academic speech—which was not before the Court in *Garcetti*—open for future cases. The second reason is “Fourth Circuit precedent,” which makes it sound as though a prior Fourth Circuit case has already resolved the issue by creating an “academic speech” exception. In fact, in the case to which the court referred, *Lee v. York County School Division*,²²² the court had merely mentioned in a footnote that the Supreme Court had reserved the *Garcetti* issue as a justification for continuing to apply *Pickering* and *Connick* to a dispute over a high school teacher’s use of his bulletin board, absent more specific

²¹⁹ *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).

²²⁰ *Adams*, 640 F.3d at 562.

²²¹ *Id.*

²²² 484 F.3d 687 (4th Cir. 2007)

guidance.²²³ That the *Adams* court saw fit to give it such attention is puzzling, but the court's reference to the *Lee* decision added little that *Garcetti* itself did not already establish, other than signifying the confusion that a prior three-judge panel had about *Garcetti*'s scope.

Rather, the reason doing the real work in the decision was the court's third one—that “the aspect of scholarship and teaching reflected by Adams' speech”²²⁴ was not within the categorical exemption created by *Garcetti*. The proof of this claim is in the court's own decisional language. Later in the opinion, the court summarized its conclusion as to Adams's political speech:

Put simply, Adams' speech was not tied to any more specific or direct employee duty than the general concept that professors will engage in writing, public appearances, and service within their respective fields. For all the reasons discussed above, that thin thread is insufficient to render Adams' speech “pursuant to [his] official duties” as intended by *Garcetti*.²²⁵

Thus, rather than carving out an exception to the *Garcetti* rule, as some have understandably, but incorrectly, read the decision to do,²²⁶ the Fourth Circuit, after discussing at length the “reservation” of the academic speech issue in *Garcetti* itself, simply applied the *Garcetti* rule and found Adams's speech to fall

²²³ *Id.* at 694-95 n.11 (“The Supreme Court in *Garcetti* 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.’ 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 as articulated in *Boring* to this appeal.” (internal citations omitted)).

²²⁴ *Adams*, 640 F.3d at 562.

²²⁵ *Id.* at 564.

²²⁶ See, e.g., Thomas Sullivan & Lawrence White, *For Faculty Free Speech, the Tide Is Turning*, THE CHRONICLE OF HIGHER EDUCATION (Sept. 20, 2013), available at <http://chronicle.com/article/For-Faculty-Free-Speech-the/141951/> (speaking of *Adams* along with *Demers v. Austin*, discussed below, stating, “Two recent decisions by federal appellate courts explicitly hold that the *Garcetti* standard does not apply in faculty-free-speech cases.”); Kathi S. Westcott, *Annual Legal Update*, 0 J. COLLECTIVE BARGAINING ACAD. 1, 4 (2012) (“On appeal, the Fourth Circuit overturned the district court decision and held that *Garcetti* contains a clear reservation of the application of its analysis to academic speech at a public university.”).

outside of the exemption due to an insufficient relationship between Adams's political speech about academia and other topics and his normal job duties as a criminology professor.

In reading the *Garcetti* rule narrowly, or limiting it to its holding and its facts, the *Adams* decision broke from the existing precedent in every other circuit in the nation.²²⁷ However, it is important to note the negative implication of the court's narrow reading: If Adams had written provocatively in an academic publication on the subject of criminology, and his colleagues had retaliated against him for that, then his speech would have been directly tied to his official duties, and the *Garcetti* exemption would have applied.

In fact, long before *Adams*, the *en banc* Fourth Circuit, in *Urofsky v. Gilmore*,²²⁸ which predated *Garcetti* by six years, applied a view of public employee speech rights just as restrictive as that in *Garcetti*. The *Urofsky en banc* court even squarely held that academic freedom is not an individual right, but only an institutional right.²²⁹ No three-judge panel of the Fourth Circuit is empowered to overrule the *en banc* court—only the Supreme Court, or the *en banc* court in a later sitting, may do that,²³⁰ and *Garcetti*'s prudent reservation of the academic speech issue did nothing to overrule *Urofsky*.

²²⁷ See Bauries & Schach, *supra* note 179.

²²⁸ 216 F.3d 401, 408-09 (4th Cir. 2000) ("The speech at issue here—access to certain materials using computers owned or leased by the state for the purpose of carrying out employment duties—is clearly made in the employee's role as employee. Therefore, the challenged aspect of the Act does not regulate the speech of the citizenry in general, but rather the speech of state employees in their capacity as employees.")

²²⁹ *Id.* at 415 ("Taking all of the cases together, the best that can be said for Appellees' claim that the Constitution protects the academic freedom of an individual professor is that teachers were the first public employees to be afforded the now-universal protection against dismissal for the exercise of First Amendment rights. Nothing in Supreme Court jurisprudence suggests that the 'right' claimed by Appellees extends any further. Rather, since declaring that public employees, including teachers, do not forfeit First Amendment rights upon accepting public employment, the Court has focused its discussions of academic freedom solely on issues of institutional autonomy. We therefore conclude that because the Act does not infringe the constitutional rights of public employees in general, it also does not violate the rights of professors.")

²³⁰ *Cf. Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 271-72 n.2 (4th Cir. 2002) ("Of course, a panel of this court cannot overrule, explicitly or implicitly, the precedent set by a prior panel of this court. Only the Supreme Court or this court sitting *en banc* can do that.") (internal citations and quotation marks omitted).

So, the result of even this narrow reading is to place routine academic work—scholarship that one produces as a normal incident of being a public university professor—on a *less protected* footing than the same academic work done by the same public university professor, but paid for by an external entity other than the employer university, or produced for the professor’s own personal gratification. To be sure, the narrow reading approach of *Adams* at least protects the *political* speech of publicly employed academics from overly broad readings of *Garcetti*’s exemption, but it does nothing to insulate from intramural suppression the kind of *academic* speech that is the primary focus of individual academic freedom.

C. An “Academic Speech” Exception-to-the-Exemption?

Understanding that the rule of *Garcetti* applies by its own terms to the scholarly and teaching expression of professional, publicly employed academics, as scholarship and teaching is always done “pursuant to official duties,” one federal appellate court has opted to carve out an explicit “exception-to-the-exemption” for academic expression. In *Demers v. Austin*,²³¹ the Ninth Circuit considered the First Amendment retaliation claim of David Demers, a tenured associate professor of journalism and communications at Washington State University, who also owns a private publishing house called Marquette Books. Demers presented the faculty and administration of the University’s new College of Communications with a pamphlet titled *The Seven-Step Plan*, advocating the separation of two academic units within the College. He also distributed drafts of his then-forthcoming book (coincidentally, in light of the *Adams* case, titled *The Ivory Tower of Babel*)²³² to several colleagues. In response, Demers claimed, several university administrators retaliated against him by giving him unfair and inaccurate evaluations and impairing his career prospects.²³³

²³¹ 729 F.3d 1011 (9th Cir. 2013), *superseded* —F.3d—, 2014 WL 306321 (9th Cir. 2014).

²³² *Id.* at *1-*3; see also DAVID DEMERS, *THE IVORY TOWER OF BABEL: WHY THE SOCIAL SCIENCES ARE FAILING TO LIVE UP TO THEIR PROMISES* (2011).

²³³ *Demers*, 2014 WL 306321 at *3.

The District Court considered both the *Seven-Step Plan* and *The Ivory Tower of Babel* to be Demers's speech made "pursuant to [his] official duties."²³⁴ Accordingly, the Defendants prevailed on their motion for summary judgment on an argument founded explicitly on the *Garcetti* rule. On appeal, however, the Ninth Circuit disagreed in two ways—one minor, one major. The minor disagreement was as to whether to count *Ivory Tower of Babel* as part of the speech for which Demers was allegedly punished, given that Demers had failed to place any part of the book in the evidentiary record.²³⁵ The court rejected any consideration of the book, leaving only the less-scholarly, but still "academic" (in the collegial governance sense), *Seven-Step Plan*. As to this pamphlet, the court held that it constituted speech "pursuant to [Demers's] official duties" as part of the College's committee to consider restructure of its degree programs.²³⁶

As outlined above, under *Garcetti* and even *Adams*, this conclusion would likely have rendered Demers's speech unprotected under the First Amendment. But the Ninth Circuit, unlike the Fourth, explicitly recognized an exception to *Garcetti*'s exemption. In the simple and clear words of the court, "We hold that there is an exception to *Garcetti* for teaching and academic writing."²³⁷ According to the court, "if applied to academic teaching and writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court."²³⁸

Interestingly, the Ninth Circuit engaged the same misreading of *Adams* debunked above, proclaiming, "One of our

²³⁴ *Id.* at *4.

²³⁵ *Id.* at *1.

²³⁶ *Id.* at *5 ("But we conclude that in preparing the Plan, in sending the Plan to the Provost and President, in posting the Plan on the internet, and in distributing the Plan to news media, to selected faculty members and to alumni, Demers was acting sufficiently in his capacity as a professor at WSU that he was acting 'pursuant to [his] official duties' within the meaning of *Garcetti*."). Note that this, itself, is a dubiously broad reading of *Garcetti*'s "pursuant to official duties" exemption. See Bauries & Schach, *supra* note 179.

²³⁷ *Demers*, 2014 WL 306321 at *13.

²³⁸ *Id.* at *6.

sister circuits agrees.”²³⁹ As explained above, the *Adams* court may have agreed with this sentiment in principle, but its holding declined to apply *Garcetti* to Adams’s speech because the speech was not made “pursuant to official duties.”²⁴⁰ Unlike the Fourth Circuit in *Adams*, however, the Ninth Circuit in *Demers* unmistakably and clearly carved out an exception to *Garcetti*’s exemption, one that only applies to “teaching and academic writing.”²⁴¹

Although instrumentally satisfying from the perspective of those who prefer not to see academic speech excluded from the First Amendment’s protection, the Ninth Circuit’s approach in *Demers* is doctrinally flawed. That is, the carving out of a special exception to a rule otherwise generally applicable to all public employees works against the doctrinal structure of First Amendment jurisprudence. This structure finds its support in a durable and well-accepted First Amendment principle of neutrality toward speakers and speech, a topic I turn to next.

III. GOVERNMENT NEUTRALITY AND ACADEMIC SPEECH

A. The Neutrality Principle

First Amendment jurisprudence has for many years coalesced around a principle that places primary importance on the prevention of content and viewpoint discrimination, as well as discrimination against particular speakers. Adapting and updating Kenneth Karst’s famous label, we can call this principle the *neutrality principle*.²⁴² The Supreme Court’s most recent full

²³⁹ *Id.* (citing and quoting *Adams v. Trustees of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 562 (4th Cir. 2011)); see also *supra* notes 221-230 and accompanying text (debunking this mistaken reading of *Adams*).

²⁴⁰ See *supra* notes 209-227 and accompanying text (discussing the holding of *Adams*).

²⁴¹ *Demers*, 2014 WL 306321 at *7, *13. The court went on to hold that the *Seven-Step Plan* constituted speech on a matter of public concern, applying *Pickering*, but held that, due to the lack of clarity in the post-*Garcetti* precedent, the defendants were entitled to qualified immunity. *Id.* at *13.

²⁴² See generally Karst, *supra* note 7. In his seminal work, Karst primarily used the term “equality” to name his principle, but in elucidating this principle, he described what he termed “equal liberty of expression,” a right operationalized through the presumptive requirement of government neutrality toward speakers and speech

articulation of this principle came in the majority's opinion in *Citizens United v. Federal Election Commission*:²⁴³

Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.²⁴⁴ Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.²⁴⁵ As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.²⁴⁶

The neutrality principle is the bedrock of all First Amendment protection.²⁴⁷ Governmental discrimination against speakers with *particular viewpoints* on favored topics, or against all speakers on *disfavored topics*, or against *particular speakers* or classes of speakers regardless of topic, all presumptively violate the First Amendment.²⁴⁸ In theory, this principle is quite

content, which might be overridden only through strict scrutiny. *Id.* at 40; *see also id.* at 28-35 (outlining the equality principle and describing its primary effects).

²⁴³ 130 S. Ct. 876 (2010).

²⁴⁴ *Id.* at 898 (citing *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000)).

²⁴⁵ *Id.* at 898-99 (citing *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978)).

²⁴⁶ *Id.* at 899; *see also* Darrel C. Menthe, *The Marketplace Metaphor and Commercial Speech Doctrine: Or How I Learned to Stop Worrying About and Love Citizens United*, 38 HASTINGS CONST. L.Q. 131, 133 (2010) ("*Citizens United* radically affirmed the principle that the First Amendment must be neutral as between different speakers, holding that even corporate speech (at least on political matters) is fully protected by the First Amendment and cannot be subject to increased regulation merely because of its corporate authorship.")

²⁴⁷ *See, e.g.*, Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 706 (2011); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1304-05 (2006); Frederick Schauer, *Towards and Institutional First Amendment*, 89 MINN. L. REV. 1256, 1270 (2005); Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 50 (2000); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996); *see also* Karst, *supra* note 7, at 35.

²⁴⁸ *See* Karst, *supra* note 7, at 40 (criticizing Alexander Meiklejohn's value-based theory of the First Amendment and stating, "A vital public forum requires a principle of equal liberty of expression that is broad, protecting speakers as well as ideas."). This presumptive protection can be overcome, but the government must meet a very demanding burden to overcome it. *See, e.g.*, Eugene Volokh, *Freedom of Speech*,

attractive—who would be willing to argue that government should pick winners and losers in the marketplace of ideas, after all?

In practice, however, and in light of the doctrinal rules that have developed under it, the neutrality principle prevents the protection of academic speech. An individual First Amendment right to academic freedom violates the neutrality principle in two ways. First, it asks the courts to treat publicly employed academics differently from all other classes of public employees. Second, because of this difference in the treatment of speakers, individual academic freedom inherently also requires the courts to designate scholarly and classroom speech as uniquely valuable, as compared with the job-required speech of non-academic public employees, and even the non-academic speech of academic public employees. If the *Demers* court is correct, in other words, then academic speech occupies a more protected niche in the First Amendment's superstructure than all other public employee speech uttered pursuant to official duties, and public employees who happen to be academics therefore enjoy greater First Amendment protection than other public employees. This, of course, would be the opposite of government neutrality.

Nevertheless, perhaps the First Amendment can tolerate this brand of non-neutrality. Because strict government neutrality toward *all* speakers and *all* speech is impossible in practice,²⁴⁹ First Amendment doctrine has tolerated a few “neutrality work-arounds.” Government, at times, does have the practical need to treat some *speech* differently from most speech, due to the unique potential of some speech to damage the protectable interests of individuals other than the speaker. The paradigmatic example is the false shouting of “Fire” in a crowded theater.²⁵⁰ Government also, at times, has the practical need to treat some *speakers* differently from others depending on their unique relationship to the government on a particular occasion at which time speech is

Permissible Tailoring and Transcending Strict Scrutiny, 144 U. PA. L. REV. 2417, 2417 n.1 (1996) (introducing the general rule that content- or viewpoint-based restrictions imposed on speech by the government, acting in its sovereign capacity, must overcome strict scrutiny).

²⁴⁹ Even Professor Karst acknowledges this obvious fact. See Karst, *supra* note 7, at 28 (stating as a premise that “absolute equality is a practical impossibility”).

²⁵⁰ *Schenck v. United States*, 249 U.S. 47, 52 (1919) (coining this example as one for which the First Amendment should not provide protection).

suppressed or burdened. For example, the President must be able to decide who may and may not speak to ask questions during a press conference, or chaos will ensue. The result of these needs is the proliferation of two First Amendment staples—*content-based exemption* and *government role analysis*.

These two neutrality work-arounds allow courts addressing First Amendment claims to observe the neutrality principle in the *retail* sense—when they decide each particular case on its unique facts, by violating the principle in the *wholesale* sense—in setting up the non-neutral doctrinal structure that allows for this neutral case-by-case review.²⁵¹ But importantly, each of these neutrality work-arounds operates in every case in which it applies to *reduce*, rather than to *expand*, the baseline protection that the First Amendment provides for speech and speakers.²⁵² Accordingly, neither of these work-arounds is suited to the recognition of an individual right to academic freedom.

1. Content-based Exemptions

The simplest of the neutrality work-arounds are the various content-based categorical exemptions from First Amendment protection that the courts have constructed over time. Harry

²⁵¹ This latter process has been referred to as “categorical balancing”—that is, the balancing of individual and government interests generally, rather than specifically to one case, resulting in a categorical rule of speech doctrine, which might be a rule of exemption from protection, or might be a rule of burden alteration. *See, e.g.*, Mark Tushnet, *Heller and the Perils of Compromise*, 13 LEWIS & CLARK L. REV. 419, 424-25 (2009) (describing categorical balancing as a First Amendment concept); Nahmod, *supra* note 176, at 569-73 (describing in detail the way that the *Garcetti* Court used categorical balancing to arrive at its exemption).

²⁵² As Sheldon Nahmod points out, the technique of categorical balancing has been used by the Supreme Court in the past to both expand and contract First Amendment protection. *See* Nahmod, *supra* note 176, at 569-70. Nahmod offers as examples of expansion subversive speech and defamation. In the case of the former, this “expansion” took the form of restoring to a disfavored speech category the natural, baseline protection of government neutrality and strict scrutiny. In the case of the latter, the “expansion” also restored protections, but did so by imposing on the entire category of defamatory speech a “public official,” “public figure,” or “matter of public concern” test. Essentially, the Court removed the categorical lack of protection from defamatory speech and replaced it with a case-by-case examination of the public’s interest in such speech. So, in both cases, the categorical “expansion” of First Amendment protections really amounted to a reversal of a prior categorical exclusion from protection and the restoration (in whole or in part) of case-by-case analyses to the entire category.

Kalven referred to the theory underlying these exemptions as the “two-level theory,” owing to the fact that exemptions are typically created due to a determination by the Court that the exempted content constitutes “low-value” speech.²⁵³ These exemptions today include such speech categories as fighting words, incitement of imminent lawless conduct, child pornography, obscenity, and several others.²⁵⁴ These categories of speech content have been judicially deemed to be of such low value to the public discourse that they qualify for reduced, or even no, First Amendment protection.

At first glance, constructing or preserving these categories would appear to be in direct conflict with the neutrality principle;²⁵⁵ however, within each defined category, all speech is treated the same. For example, speech that incites a riot based on racism is treated equivalently to speech that incites a riot based on anger at Wall Street bankers. While the overall doctrinal structure of the First Amendment allows the government to be hostile (and therefore non-neutral) toward the *category* of speech labeled “incitement of imminent lawless conduct,” it nevertheless requires neutrality *within* that category. This neutrality within the category allows the government to honor the neutrality principle in the retail sense, while at the same time engaging itself in content-based discrimination in the wholesale sense.²⁵⁶ Although there is significant variance in the amount of hostility that government is permitted to exhibit from category to category,

²⁵³ Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 10 (1960).

²⁵⁴ See Bauries & Schach, *supra* note 179, at n.5 (collecting cases establishing the various low-value speech exceptions).

²⁵⁵ If, as I argue, the Court accepts the equality principle, but still sees the need to protect the government’s ability to sanction low-value speech without having to engage in individual justifications for each such sanction, a categorical approach preserves the Court’s ability to enforce equal treatment norms within categories while allowing it to craft the categories based on an *ex ante* “categorical balancing” that establishes the primacy of the government’s interest for all future cases. See *generally* Nahmod, *supra* note 176, at 569-73 (explaining the process of categorical balancing within the First Amendment).

²⁵⁶ In his most recent work advancing an institutional vision of the First Amendment, Paul Horwitz describes the two-level theory allowing for these categories aptly as a “pressure valve” that reduces tension on the courts in enforcing the neutrality principle. HORWITZ, *supra* note 5, at 34.

all currently recognized content-based exemptions from the First Amendment's protections work in this way.

2. Government Role Analysis

Government role analysis is a bit less defined and is in more of a state of flux than categorical exemption doctrine, but it also exists to allow the Court to honor the neutrality principle retail by violating it wholesale. Government role analysis asks what role the government occupies toward a speaker when it acts to suppress or punish that speaker's speech. Familiar roles that the Court has recognized include government-as-employer; government-as-patron; government-as-proprietor; and more recently, government-as-speaker.²⁵⁷ Each of these roles entitles the government's interests to greater initial weight in an *ex ante* categorical balancing of interests than these interests would receive in some cases if *ad hoc* balancing were used.

For example, when the government acts as a patron of the arts, which it does primarily through the funding of grants, it must have the power to discriminate between works of art or proposed works of art as to their quality.²⁵⁸ Arts funding is limited, and it does not serve the public interest to fund art projects that are of low quality. But in order to direct limited public funding to projects of high value, the government must make a determination—one based on content—as to which of two competing works or proposed works is of higher quality.

Public funding of the arts could not possibly happen in any other way that makes any sense, so the courts have recognized a government role—"government-as-patron" within which the government's non-neutrality is tolerated.²⁵⁹ Within this role,

²⁵⁷ See, e.g., Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 989 (2009) (proposing a new category for government role analysis, "government-as-educator," based on ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 199–267 (1995)); Blocher, *supra* note 247 (arguing that government speech secures a governmental right to discriminate based on viewpoint when it is the speaker).

²⁵⁸ See Horwitz, *supra* note 5, at 61 (describing arts funding as one of the "snares" inherent in an "acontextual" approach to the First Amendment).

²⁵⁹ See *Nat'l Endowment for Arts v. Finley*, 524 U.S. 569, 587–88 (1998) ("Finally, although the First Amendment certainly has application in the subsidy context, we

rather than owing complete neutrality toward speakers, the government owes them good faith consideration based on accepted artistic standards, and the government's interests in funding, and therefore incentivizing, good work that measures up to these standards categorically outweigh the individual artists' interests in having their work funded.

Such discrimination is inherently a government act of non-neutrality toward speakers based on the content of their expression. But because the speakers in question deal with the government as a patron, rather than as a sovereign, they must accept, *ex ante*, that the government will not treat their speech with the neutrality it must afford when it acts in its sovereign capacity. Nevertheless, all artists dealing with government in its role as patron are entitled to have the standards of artistic quality applied in a neutral way to their proposals. Therefore, although government has a lessened duty of neutrality toward the entire category of speech and speakers when it acts as patron, it must still apply its standards of decision making neutrally to individual speakers and speech within the category.

Some of these government roles are straightforward, while others have multiple levels of complexity beneath their surfaces. For example, the government may—and often does—act as a property owner, or “government-as-proprietor.” In this role, the government, like any property owner, must sometimes exercise control over who may access a certain piece of property and what such persons may do once on the property. This necessity has spawned a truly byzantine web of doctrinal rules, collectively placed under the label “forum analysis,” which determine the extent to which government may suppress or control speech on its own property, or on property within its control.

A full accounting of the rules relating to forum analysis is beyond the scope of this Article, but the basic distinctions break down into four categories of forums: the traditional public forum, the designated public forum, the limited public forum, and the closed or non-public forum. A traditional public forum is a government-owned space, such as a public park, a beach, or a

note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake.”).

sidewalk, which has traditionally been “held in trust for the public”²⁶⁰ and has been freely used by speakers to proclaim things to the public.²⁶¹ In such a forum, no content or viewpoint discrimination is allowed, but the government may adopt reasonable “time, place, and manner” restrictions, so long as such restrictions do not unreasonably impinge on the rights of speakers or listeners.²⁶²

For a piece of government property to be a traditional public forum, it must have been used by the public historically for the purpose of speech.²⁶³ For all other government property, the government has the baseline right of exclusion that all property owners have. But the government can also designate a piece of its property that has not traditionally been used for speech, and open that piece of property for that use. This latter type of forum is called a “designated” or “open” forum, and it places the same restrictions on government as the traditional public forum as to the regulation of speech by its content or viewpoint.²⁶⁴

The other two categories grant the government more power to restrict speech. Just as the government may designate a piece of its property to be open to speech, it may also designate that property to be open only for a particular category of speech or

²⁶⁰ See, e.g., *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515-16 (1939) (“Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.”).

²⁶¹ See Lyryssa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1981 (2011) (explaining the various forum categories that govern forum analysis, and the conceptual problems with each).

²⁶² *Id.* at 1982. Of course, as with many rights-based limitations on government power, the government can surmount the prohibition on its regulation of speech in a public forum even based on content by satisfying the demanding “strict scrutiny” test, which requires that the government establish a compelling government interest in regulating the speech and that the regulation in question is narrowly tailored to the government’s interest. *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.* at 1984.

class of speakers. If so, then it is termed a “limited public forum.”²⁶⁵ A school board meeting, for example, might be designated a limited public forum for discussion of property tax rates, or a publicly owned auditorium might be designated a limited public forum for the presentation of candidate debates for an upcoming election. Lyrissa Lidsky offers a succinct explanation of the general rules that apply in this type of forum:

When the State decides to open a public forum but limits it to certain speakers and topics, the State’s establishment of forum parameters is constitutional, so long as the parameters are reasonable and viewpoint neutral. When the State applies the forum criteria and excludes a speaker based on the subject matter of his speech, the exclusion need only be “reasonable in light of the purposes served by the forum” and viewpoint neutral, though there is some indication that the Court may be especially stringent in examining viewpoint neutrality if religious viewpoints are involved. Finally, when a State opens a public forum but excludes a speaker whose speech obviously falls within the subject matter constraints of the forum, the exclusion is subject to strict scrutiny.²⁶⁶

Finally, a closed or non-public forum is a similar piece of property that the government has *not* opened up to the public for debate on any topic. In such a forum, the government-as-property-owner’s right of exclusion is paramount, and the government may exclude most speakers and even most potential listeners, as long as it does not exclude them on the grounds that it disfavors their viewpoints.²⁶⁷ The leading case recognizing such a closed forum is *Perry Education Association v. Perry Local Educators’ Association*, in which the Court held the faculty mail system to be closed to a rival teacher’s union, even though it was opened to communications from the then-current bargaining representative.²⁶⁸

In the public school and university *classroom*, even the restriction on exclusion based on viewpoint is not so stringent, as both the institutions and the educators are permitted to suppress

²⁶⁵ *Id.* at 1984-85.

²⁶⁶ *Id.* at 1988-89 (internal citations omitted).

²⁶⁷ *Id.* at 1989.

²⁶⁸ *Perry Educ. Ass’n v. Perry Local Educ. Ass’n*, 460 U.S. 37, 46 (1983).

speech if they can show a “legitimate pedagogical justification” for doing so.²⁶⁹ Nevertheless, all speakers who deal with the government on government property are entitled to the same protections within a given forum that other speakers receive. One student’s classroom speech may not be suppressed on political grounds if the speech of other students demands a “legitimate pedagogical justification” for its suppression.

So, as a property owner, the government is entitled to more or less deference in its regulation of speech depending on how it chooses to use the property it holds for the public (or how that property has been used traditionally by the public). But once the Court determines that the property is being used in a certain way, the government is burdened by the modified neutrality requirement appropriate to each use.

One government role that has particular significance to the issues discussed in this Article is the role of “government-as-employer.”²⁷⁰ When the government acts as an employer, it must maintain a certain level of control over its workplace, both to protect the quality of the services it offers to the public and to ensure that its employees do not violate the rights of private individuals. When the government is an employer in certain of its workplaces, it inevitably employs people, such as attorneys, teachers, professors, and press secretaries, who “speak” for a living. The *Pickering-Garcetti* line of precedent recognizes that the government must be able to exercise some control over the speech of its employees hired to speak, and *Garcetti* held that the government may exercise *total* control where the speech is made “pursuant to official duties.”²⁷¹ As is true in the context of categorical exemption from the First Amendment’s protection, this line of precedent inherently lessens, and in some cases completely eliminates, the government’s duty of neutrality toward speech and speakers. Importantly, though, even this government role entitles all public employees to the same level of government neutrality—none are special within the category.²⁷²

²⁶⁹ See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 283 (1988).

²⁷⁰ See, e.g., Areen, *supra* note 257, at 990-91 (describing this role).

²⁷¹ *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

²⁷² Professor Areen distinguishes the role of “government-as-employer” from a new role conception that she advances and terms “government-as educator” in an attempt

Although government role analysis rarely deprives individuals of all First Amendment protection, within each role, the government enjoys a categorically higher level of judicial deference to its interests than it would in its traditional role as sovereign—in some cases, such as in *Garcetti*, this deference is total. But all speakers and their speech are equally burdened *within* each governmental role category, and each individual speaker's interests are weighed with equal dignity—or “equal liberty of expression”—when the speaker confronts the government in one of its non-sovereign roles. In short, artists are treated like other artists, guests on government property like other guests, and employees like other employees—the same rights and prerogatives apply to each speaker within each category. Although the government is permitted to be non-neutral toward different messages, it must justify its non-neutrality based on the rules that apply to whatever role it occupies at the time, regardless of the individual speaker's identity or message. Thus, here again, the Court's construction of a work-around allows the government to honor the neutrality principle retail, while at the same time violating it wholesale.

to define unique First Amendment principles that rescue academic freedom from *Garcetti*'s exemption. Areen, *supra* note 257, at 988-91. While this theory is attractive, and while it goes some way towards resolving the *Garcetti* paradox, it fails to resolve the paradox satisfactorily. Under Areen's theory, faculty speech on “research, teaching, or faculty governance matters” would be subject to university control, as long as the suppression or punishment of such speech is the result of collegial faculty decision making. *Id.* at 994. While it is true that a faculty member could challenge the judicial deference afforded based on such collegiality, as Areen states, the faculty member would have to clear a very high bar, *Id.* at 995 (quoting *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985)), presumably, higher than the bar set by *Pickering* and its progeny. In fact, applying Areen's theory to the speech of Professor Adams, who was denied promotion based on a collegial faculty vote, would have resulted in no protection, even though the Fourth Circuit's narrow reading of *Garcetti* left Adams's speech protected. See *supra* notes 208-211 and accompanying text (discussing the facts of *Adams v. Trustees of the U. of N.C.-Wilmington*, 640 F.3d 550, 553 (4th Cir. 2011)). So, the result would be less concerning, but essentially the same, as that of *Garcetti*—academic speech, while uniquely valuable to the public interest, would be less protected than most non-academic speech made by public employees on topics of concern to the public.

B. Individual Academic Freedom and the Neutrality Principle

Because the neutrality principle governs the world of the First Amendment, it is difficult to imagine how that world can have room for academic freedom as an individual right, especially as an exception from normal public employee speech doctrine.²⁷³ If academic freedom is a right unique to scholars and teachers in academic institutions, then it must provide one subset of public employees with a different set of rights and privileges under the First Amendment than other public employees—rights and privileges that extend only to academic speech and academic speakers.²⁷⁴ As developed above, this sort of treatment would be at odds with the neutrality toward speakers within the category that allows the government-as-employer category to be defended on traditional First Amendment neutrality grounds.²⁷⁵ If the underlying structure of First Amendment doctrine is one of neutrality toward speakers, content, and viewpoints, then it seems that structure has no room for academic freedom, which requires that the First Amendment recognize that some speakers are entitled to more protection than other speakers similarly situated in their relationship with the government—that, in effect, academics are “special.”²⁷⁶

The Court has consistently refused to recognize special speech rights that exist for some speakers, but not for others within the same content-based or role-based category. For example, in addressing the Press Clause, a section of the First Amendment that provides a textual foundation for a unique right that inheres only in certain speakers or certain speech, due to its uniquely high value, the Court has steadfastly refused to

²⁷³ Others have made this point, albeit in the context of different arguments. See, e.g., POST, *supra* note 9, at 43 (as part of an argument for restructuring the First Amendment around democratic competence and legitimacy, pointing out the incompatibility of academic freedom with an equality-based view of the First Amendment).

²⁷⁴ Finkin, *supra* note 3, at 1347-48 (explaining, in the context of a right to speak as to intramural affairs, that, under then-recently-decided *Connick*, in order for the Supreme Court to recognize an individual right to academic freedom for professors, it would also have to recognize similar rights for non-academic public employees, such as “groundskeepers, food service workers, or painters”).

²⁷⁵ See *supra* note 272 and accompanying text.

²⁷⁶ See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (calling academic freedom a “special concern of the First Amendment”).

recognize any speech rights in reporters or journalists that do not inhere in the general public.²⁷⁷ Some have questioned whether the word “Press” refers to the technology of the printing press or the industry of news reporting,²⁷⁸ and those commentaries have significant force, but the individuals comprising “the Press” at least have a *plausible* textual foundation for special protections. Nevertheless, the Court has rejected such special protections in every relevant case thus far.²⁷⁹ One familiar with this jurisprudence might therefore seriously question why academic speakers and speech deserve such protection without *any* plausible textual foundation for it in the First Amendment.

Such recognition would also flip the well-established “two-level theory” on its head. Where the Court has followed the “two-level theory,” it has always done so to *limit* the constitutional rights of speakers, and therefore to *expand* the powers of government. Doctrinally, all of the exceptions to the First Amendment’s protections justified by the “two-level theory” point in the direction of the *lower* value of the speech exempted. The *Demers* court’s exception, by contrast, would be the first that places one type of speech within a speech category on a *higher* pedestal than the general speech falling within that same category.

If recognized by the Court, an exception to prevailing doctrine for academic speakers would go against the general underlying doctrinal structure of the First Amendment and its central concern for government neutrality toward speakers and speech, including the Court’s steadfast refusal to recognize special rights for special speakers, even where the constitutional text seems to allow for such special rights. And as I have shown, it would also go against the last sixty-odd years of First Amendment precedent in the Supreme Court, which has never gone so far as to recognize a special right in academics, preferring to extol the virtues of

²⁷⁷ Horwitz, *supra* note 5, at 52; Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1028 (2011).

²⁷⁸ See Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459 (2012).

²⁷⁹ See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 680-92 (1972) (tracing the relevant case law up to that point, and declining to recognize a “confidential source” privilege in news reporters).

academic speech rhetorically without deciding any case based on the uniquely protected status of such speech.

CONCLUSION

This Article has had a modest aim—to elucidate how illusory the First Amendment foundations of a purported individual right to academic freedom are, and to defend this state of affairs as consistent with the doctrinal structure of the First Amendment. As we have seen, the Supreme Court has never held that such a right exists, and its most recent decision exempting work-required employee speech from the First Amendment's protections squarely sweeps academic speech within its ambit. The arguments of scholars and advocates that the *Garcetti* decision should be overruled or limited are likely to be unavailing, and the recent moves of two federal circuit courts to address the decision's application to academic speech were in the first instance, doctrinally inconsequential, and in the second instance, incompatible with the general underlying structure of First Amendment doctrine.

Academic freedom requires adherence to professional norms, and it also requires both content and viewpoint discrimination against academic expression that fails to meet these norms, yet the First Amendment cannot countenance such content or viewpoint discrimination. The First Amendment requires that speakers in the same basic relationship with government (employees, patrons, audience members, private citizens, students) be treated equally as to their speech in that relationship. Yet, academic freedom lays claim to special treatment for one special subset of government employees.

The *Pickering* balancing test made it possible to take account of all of these contradictions by weighing the speech of all public employees on matters of public concern, and then allowing content and even viewpoint discrimination against speech where the institution's interests outweighed the employee's speech interests as a citizen. For academic institutions, one of those government interests would certainly be ensuring its faculty were competent in their fields, so if an academic institution were to impose speech restrictions, or punish academic employees for their viewpoints, that action would be upheld if it were legitimately taken to police

scholarly quality. By imposing a categorical rule of exemption that brings the speech of publicly employed academics within its legitimate scope, *Garcetti* took this path away, leaving a paradox in its wake—one that First Amendment doctrine as it is currently structured cannot resolve.

So, where does this leave academic freedom as a constitutional matter? Institutional academic freedom—an ostensible expressive right of the institution against extramural suppression—has stronger recognition in federal and Supreme Court case law, but in the context of intramural suppression of academic speech, it suffers from a series of conceptual and practical problems, which I plan to address in future work. For now, the idea of individual academic freedom as a First Amendment speech right seems impossible—or at least highly improbable.

If I am correct, then renewed—and more vigorous—attention should be directed at the recent moves to alter or abolish tenure in the academy.²⁸⁰ If the Constitution does not protect academic work from intramural government suppression, and if academic work nevertheless is a uniquely valuable form of expression to a pluralistic republic (and one uniquely vulnerable to the politically motivated conduct of both professional and lay decision makers), then the contractual protection of academic freedom that tenure provides becomes all the more important.²⁸¹ Given the obvious benefit of academic work to the public discourse and the scant real protection for it under the First Amendment, attempts to abolish or limit contractual protections for academic freedom should be met with strong skepticism. Although academic freedom is an ordinary concern of the First Amendment, it should be of special concern to us all.

²⁸⁰ See, e.g., Charles Huckabee, *ABA Panel Favors Dropping Tenure as a Law-School Accreditation Standard*, THE CHRONICLE OF HIGHER EDUCATION (August 12, 2013), available at <http://chronicle.com/blogs/ticker/aba-panel-favors-dropping-tenure-as-law-school-accreditation-standard/64529> (last visited Feb. 5, 2014).

²⁸¹ See, e.g., Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, 53 LAW & CONTEMP. PROBS. 325, 328-31 (1990) (outlining the ways in which tenure protects academic freedom).

