DEVELOPING A SPEECH STANDARD FOR PUBLIC UNIVERSITY FACULTY IN THE ACADEMIC ENVIRONMENT

ABSTRACT

Discussing unpopular ideas has become a problem at some universities and colleges. This places faculty members in a predicament since they are responsible for advancing discussions and teaching college students about different topics, ideas, and theories in order to contribute to the marketplace of ideas. Thus, the Supreme Court should adopt a clear standard for public university and college faculty members regarding academic freedom that balances the First Amendment right of faculty members with the interests of the public university or college.

The standard should defer to university policies concerning academic freedom only when there is insufficient evidence of flagrant interference with academic freedom. The faculty member must prove with sufficient evidence that the policy or action taken by the university flagrantly interfered with his or her ability to freely research and instruct. If the faculty member meets this burden, the burden would shift to the school to provide a compelling interest as to the reason the interference was warranted.

TABLE OF CONTENTS

I. INTRODUCTION.................................................................1
II. BACKGROUND...............................................................6
   A. Trigger Words, Safe Spaces, and Speaker Cancellations at Universities and Colleges.....6
   B. Academic Speech and Professors Being Punished.........................................................7
   C. Overview of Freedom of Speech.........................9
II. SPEECH IN THE PUBLIC EMPLOYMENT CONTEXT AND SPEECH IN THE PUBLIC UNIVERSITY CONTEXT.........11
   A. Public Employment.................................................11
   B. Public Universities and Academic Freedom....14
INTRODUCTION

Ivor van Heerden was hired by Louisiana State University (LSU) in 1992 “to work at the Louisiana Geological Survey, and later at the College of Engineering, as an Associate Professor of Research.” 1 After Hurricane Katrina, the Louisiana Department of Transportation chose van Heerden “to head Team Louisiana, a group of scientists tasked with researching what caused the extensive flooding in New Orleans.” 2 Ivor van Heerden criticized the U.S. Army Corps of Engineers by “making public statements suggesting that the Corps failed to properly engineer and maintain New Orleans levees and was to blame for the city's flooding.” 3 In addition, “van Heerden published ‘The Storm,’ in which he again hypothesized at length about the Corps' role in the levee failures and exposed LSU's attempt to silence his opinion.” 4 As a result, “LSU responded by further urging van Heerden not to make public statements and stripping him of his limited teaching duties.” 5 Ivor van Heerden’s contract with LSU was not renewed in 2009. 6

2 Id.
3 Id. (“Unfortunately for van Heerden, the LSU administration and many of its faculty did not approve of his statements for fear that they might cause the University to lose federal funding. On a number of occasions, LSU administrators ordered van Heerden not to make public statements or testify regarding the cause of New Orleans' levee failures.”).
4 Id.
5 Id.
6 Id. at 2.
Following these events, van Heerden filed several claims against the university including “retaliation based on conduct protected by the First Amendment.” The district court did not dismiss van Heerden’s First Amendment claim upon a summary judgment by the defendant and allowed this claim to proceed. Regarding academic freedom and the expression of unpopular ideas, the Louisiana district court explained that it “share[d] Justice Souter’s concern that wholesale application of the Garcetti analysis to the type of facts presented here could lead to a whittling-away of academics’ ability to delve into issues or express opinions that are unpopular, uncomfortable or unorthodox. Allowing an institution devoted to teaching and research to discipline the whole of the academy for their failure to adhere to the tenets established by university administrators will in time do much more harm than good.” Ultimately, the case settled but had it gone to court, the case might have offered an opportunity for the court to set the standard for academic freedom.

As seen in the lawsuit that was filed by Ivor van Heerden, the issue concerning the discussion of unpopular ideas is sweeping the nation and it has become especially a problem at universities and colleges. One reason this is a predicament is because in order to advance discussions and teach college students about various topics, ideas, and theories, professors are supposed to contribute to the marketplace of ideas. The Court has recognized the unique significance of higher education for the expression of ideas and theories. Despite this recognition of the importance of academic freedom, not all courts agree as to the scope and nature of academic freedom. At some universities, such as Haverford College, speakers have been cancelled because of a potential

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7 Id.
8 Id. at 13.
9 Id. at 6.
12 Id. at 180-81.
13 See Regents of Univ. of California v. Bakke, 438 U.S. 265, 312 (1978) ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.").
protest. On the other hand, the University of Chicago recently took a stance concerning speech in the context of the university explaining that speakers at the University of Chicago will not be cancelled, and there will be no place for trigger words at the university.

Recently, the University of Chicago took one of the more controversial approaches that might lead to other schools following suit. The University of Chicago explained that “[o]ur commitment to academic freedom means that we do not support so-called ‘trigger warnings,’ we do not cancel invited speakers because their topics might prove controversial, and we do not condone the creation of intellectual ‘safe spaces’ where individuals can retreat from ideas and perspectives at odds with their own.”

The University of Chicago’s statement appears to be an example of one private university informing students that ideas, even ideas that may offend students, will be discussed, which seems to promote the marketplace of ideas at the university. This particular approach, while pertaining to a private university, is also relevant to public universities. In addition, a public university restricting the speech of faculty members is especially important because of the litigation risks that a faculty member who believes that their first amendment right to exercise free speech has been violated by the university’s actions or the university’s policies.

Considering these recent events, it is important to determine ways in which public universities and colleges can implement policies that reduce the risk of litigation, while also making sure students and professors feel safe to discuss controversial topics in the university environment. However, in order for public colleges and universities to be able to clearly set forth policies about how much speech protection professors have,

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16 Id.

17 See, e.g., Demers v. Austin, 746 F.3d 402, 406 (9th Cir. 2014) (“[A] tenured associate professor at Washington State University...brought suit alleging that university administrators retaliated against him in violation of the First Amendment for distributing a short pamphlet and drafts from an in-progress book.”).
it would be particularly useful to have a clear legal standard for speech protection in the academic environment.

Thus, the Supreme Court should adopt a standard that defers to university policies concerning academic freedom only when there is insufficient evidence of flagrant interference with academic freedom. Courts are struggling as to when specific policies apply or when Garcetti v. Ceballos applies. This paper contends that deference to the university’s policy or decision should apply, but not at the expense of a first amendment right. If the faculty member does not present a convincing case that the university interfered with his or her ability to freely research and instruct, then the deference standard would remain. This test seeks to balance the interests of the faculty members and the interests of the public university or college.

This paper consists of five parts. The first section of this paper offers a brief overview of the importance of free speech in the American society, and introduces cases where academics have been punished for their speech as well as recent efforts of students and administrators to try to limit the free speech of faculty at public universities. Part two discusses the Supreme Court’s standard for regulating the speech of public employees and seeks to distinguish between the ways that the Court has treated speech in the context of public employment versus the way the Court has dealt with speech in the context of faculty at public universities and colleges. Part three of this paper analyzes how several circuit courts and district courts have treated academic freedom concerning speech of public university and college faculty members highlighting the special need for the Supreme Court to articulate a clear standard for academic freedom. Finally, section four of this article sets forth a test for academic speech that balances the interest of the faculty member, the public university’s interest, and protects academic freedom. The role and significance of academic freedom in society has been addressed in several of the Supreme Court’s opinions, and it would be useful to have a clear standard that expresses what academic freedom means for professors on a practical level at public colleges and universities so that policies could incorporate the standard. This article seeks to revisit a balancing approach for academic freedom following the Garcetti decision in 2006.
I. BACKGROUND

This section presents an overview explaining the way speech has been treated at colleges, in particular professors punished for their speech. Additionally, this section introduces how the Court has interpreted the First Amendment right to speech in the past.

A. Trigger Words, Safe Spaces, and Speaker Cancellations at Universities and Colleges

Recently there have been efforts to limit faculty speech which could also restrict the discussion in the academic environment. The University of Chicago statement provides an example of how one university is dealing with the issue of safe spaces and speakers being cancelled by promoting free discussion of ideas, but this is not an approach taken by every school. For example, there have been recent efforts to encourage trigger words and safe spaces at college and university campuses. Trigger warnings are defined as “statement[s] cautioning that content (as in a text, video, or class) may be disturbing or upsetting.” A president of a community college, Dr. Dustin Swanger, explained the recent efforts by noting that “[c]ollege campuses all across the country are wrestling with the balance between ‘safe spaces’ and open discussions that may challenge students, and others, to move out of their comfort zone. The viewpoints that have been expressed on both sides of the argument have ranged from a collegial discussion, to a hostile exchange, to calling for the resignation of administrators.” Thus, Dr. Swanger explained the difficulties in balancing free discussion while also considering how students feel about controversial issues.

Dr. Swanger also contended that while it is not the goal for faculty to offend students, “colleges should foster a culture that allows discussions of topics that make us uncomfortable. We

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should hear viewpoints from those who don’t share our history, our values, our religion, our race, etc. We must foster an environment where we can confront issues that trouble us in an intellectual and respectful fashion. Additionally, speakers have been cancelled at universities because students are offended by the speakers.

B. Academic Speech and Professors Being Punished

Due to the efforts to avoid speech that might offend students at universities, and the potential litigation that could arise from these efforts, there needs to be a clear standard for academic freedom so that faculty members know the level of speech protection they have in the academic environment. Even though the Supreme Court has dealt with universities as limited public forums, the Supreme Court has also acknowledged the special importance of academic freedom in the United States of America. However, the Supreme Court has not explicitly provided a standard for public university faculty speech regarding academic freedom. The lack of a definite standard has resulted in some confusion among the circuits, district courts, and university policies about the amount of speech protection faculty members are entitled to legally. While district courts and circuit courts have addressed cases involving public university faculty and academic freedom, the Supreme Court has not directly confronted the issue. Even so, in Garcetti v. Ceballos the Supreme Court noted that academic freedom is different from the typical speech of public employees.

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21 Id.
26 See, e.g., Demers v. Austin, 746 F.3d 402, 417 (9th Cir. 2014).
27 See Garcetti, 547 U.S. at 425.
Regarding the speech standard for public employees, the Supreme Court has developed rules that apply to public employees in order to determine if a public employee's first amendment rights have been violated. In *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cty., Illinois*, the Supreme Court articulated the standard that public employees are held to regarding speech about matters of public concern. Then, in *Connick v. Myers*, the Supreme Court elaborated on the standard for public employee speech. Additionally, in *Garcetti v. Ceballos*, the Supreme Court set forth a standard that applies to public employees in the context of an employee's duties at their jobs. However, while the Supreme Court explained that *Garcetti v. Ceballos* did not apply to public universities in the context of academic freedom, the Court did not explain exactly how or what the standard is for academic freedom. Thus, the Supreme Court seemingly left open the question of how much speech protection professors have for academic freedom.

Professors have brought claims against public colleges and universities for first amendment speech violations. While the Supreme Court has not distinguished the standard for faculty and professors' speech in the classroom context of public universities, several cases at the district court and circuit court levels have tried to analogize prior cases to determine if a faculty member's first amendment speech rights have been violated. Thus, there is a need for the Supreme Court to clarify the role that a public college or university can play in restricting in class speech and research for faculty.

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29 See *Pickering*, 391 U.S. at 563.
30 See *Connick*, 461 U.S. at 138.
31 See *Garcetti*, 547 U.S. at 426.
32 Id. at 425.
C. Overview of Freedom of Speech

Academic freedom and the ability to advance classroom discussion are especially important in higher education, and the First Amendment is a necessary starting place to understand the amount of freedom professors have. The First Amendment of the United States Constitution provides for the protection of the freedom of speech.34 There are several rationales for the protection of speech that is provided in the first amendment.35 One example of a theory is the concept of the “marketplace of ideas.” 36 Another example of a rationale for the speech protection in the first amendment is the need for self-governance in a democracy.37

Throughout the years, the courts have analyzed ordinances, regulations, and statutes to determine if the government has abridged a person’s first amendment right, and the United States Supreme Court has identified specific areas of speech that are can be regulated based on the speech’s content such as incitement, defamation, threats, fighting words, obscenity, and commercial advertising.38 In addition, symbolic conduct can be restricted in certain circumstances.39 Other types of speech are deemed to be

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34 U.S. Const. amend. I (“Congress shall make no law…abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).


36 Id. at 1032 (“The search for truth rationale for the protection of free expression rests on the premise ‘when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.’”) (citing Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).


39 See, e.g., United States v. O’Brien, 391 U.S. 367, 377 (1968) (Explaining “that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”); see also Texas v. Johnson, 491 U.S. 397 (1989).
protected and any law that appears to abridge a person’s protected speech based on its content must be analyzed under strict scrutiny. Even speech that is offensive to others has been deemed to be protected speech in certain instances. However, while the First Amendment provides protection for speech, the government has been able to restrict speech in content neutral manners if the regulation can pass the time, place, or manner test as seen in the Ward v. Rock Against Racism case.

Additionally, in certain circumstances, the government has the ability to regulate speech based on the location where the speech takes place. One example of this is at universities. The Court has treated universities as limited public forums in the past. In order to analyze the validity of a law that seems to conflict with first amendment speech protection within limited public forums, the court has reviewed the laws or regulations to determine if they meet the standard of a reasonable regulation that is viewpoint neutral. Thus, the courts have dealt with various types of speech regulations and have determined ways that speech can be regulated provided that it does not infringe on someone's First Amendment right.

See United States v. Alvarez, 132 S. Ct. 2537, 2543 (2012) (“When content-based speech regulation is in question, however, exacting scrutiny is required.”).

See, e.g., Cohen v. California, 403 U.S. 15, 24-5 (1971) (“To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve.”).

See Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989) (“[A] regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government’s legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so.”).


II. SPEECH IN THE PUBLIC EMPLOYMENT CONTEXT AND SPEECH IN THE PUBLIC UNIVERSITY CONTEXT

The Supreme Court has addressed the importance of academic freedom in several opinions. This section seeks to demonstrate the different ways the Court has treated academic freedom from speech of public employees.

A. Public Employment

In the context of public employment, the Supreme Court has articulated a standard for speech protection. In the case of Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cty., Illinois, the Supreme Court set forth a balancing test explaining that in each case the Court “balance[s] between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”

This balancing test helps to protect public employees when they speak as citizens.

While the Pickering case dealt with the speech of a public employee, it also relates to teachers and their speech protection for topics of public concern since the case concerned a public high school teacher. The case involved a high school teacher, Pickering, who was dismissed after sending a letter to a newspaper that concerned a potential tax increase. The letter that Pickering wrote was criticizing the manner in which the school had dealt with prior revenue proposals in the past. The Supreme Court ultimately held in Pickering that without “proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.” The Court decided that “[s]ince no such showing has been made in this case regarding appellant’s letter... his dismissal for writing it

47 Id. at 564.
48 Id.
49 Id.
50 Id.
cannot be upheld.”

Thus, *Pickering* provides an example of a case that protected the speech of a public school teacher.

The Supreme Court also addressed public employee speech in the *Connick v. Myers* case. In this case, the Supreme Court explained that if a public employee’s expression does not relate “to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.” The Court explained that “the government employer’s dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable.” In *Connick v. Myers*, an assistant district attorney, Myers, who was being transferred to another office, distributed a questionnaire to other assistant district attorneys discussing the transfer policy and office morale. The Supreme Court decided that “Myers' questionnaire...is most accurately characterized as an employee grievance concerning internal office policy. The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships.” Accordingly, the Court decided that “Myers' discharge therefore did not offend the First Amendment.” Even so, the *Connick v. Myers* court declined to articulate a general rule for public employee dismissals writing that “We reiterate...the caveat we expressed in *Pickering*...‘Because of the enormous variety of fact situations in which critical statements by ... public employees may be thought by their superiors ... to furnish grounds for dismissal, we do not deem it either appropriate or feasible to lay down a general standard against which all such statements may be judged.” The Supreme Court also noted that “it has been settled that a state cannot condition public employment on a basis that infringes the

51 Id. at 574–75.
52 Id.
54 Id. at 146.
55 Id.
56 Id. at 140-41.
57 Id. at 154.
58 Id.
59 Id.
60 Id. at 574–75.
61 Id.
63 Id. at 146.
64 Id.
65 Id. at 140-41.
66 Id. at 154.
67 Id.
68 Id.
employee's constitutionally protected interest in freedom of expression." Thus, the Court analyzed whether the employee’s First Amendment rights were violated, ultimately deciding they were not.

Finally, in the case of *Garcetti v. Ceballos*, the Supreme Court rejected “the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties.” The Supreme Court explained that “[o]ur precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job.” The facts of *Garcetti v. Ceballos* involved a deputy district attorney, Ceballos, who brought a claim against his employer for employment retaliation concerning what Ceballos wrote in a memo. Ultimately, the Court held that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” The Supreme Court determined that Ceballos wrote the memo in accordance with the duties of his employment.

However, the majority in *Garcetti v. Ceballos* alluded to Justice Souter’s dissent and wrote that “today’s decision may have important ramifications for academic freedom, at least as a constitutional value.” In addition, the Supreme Court noted that “[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence. 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.” Thus, the Court did not decide if the *Garcetti* standard would apply to teaching.

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60 Id. at 142.
61 Id. at 426.
62 Id. at 413-15.
63 Id. at 421.
64 Id. at 421 (“The controlling factor in Ceballos’ case is that his expressions were made pursuant to his duties as a calendar deputy...That consideration—the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case—distinguishes Ceballos’ case from those in which the First Amendment provides protection against discipline.”)
65 Id. at 425.
66 Id.
In Justice Souter’s dissent in the *Garcetti* case, joined by Justices Stevens and Ginsburg, Justice Souter argued that “[t]his ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today’s majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write ‘pursuant to ... official duties.’” Thus, in *Garcetti v. Ceballos*, the Supreme Court did not resolve the question of what standard applies to professors at public universities for speech within their employment duties.

**B. Public Universities and Academic Freedom**

While the Supreme Court is clear about the standard for first amendment protection afforded to public employees, the Court has not explained how much protection public school professors have regarding academic freedom. The Supreme Court has expressed the importance of academic freedom in several opinions and Justice Souter used these opinions to demonstrate the significance of academic freedom in his dissent.69

For example in the case of *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, the Supreme Court explained that the United States “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.”70 The Supreme Court also provided that “[t]he classroom is peculiarly the ‘marketplace of ideas.’”71 Furthermore, “[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.’”72 The Court also wrote in *Shelton v. Tucker* that “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the

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67 Id. at 438.
68 Id. at 425.
69 Id.
71 Id.
72 Id. (citing United States v. Associated Press, D.C., 52 F.Supp. 362, 372 (1943)).
community of American schools." In addition, the Supreme Court noted in *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, citing *Sweezy v. State of N.H. by Wyman*, that “[t]he 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.”

Thus, the Court in *Keyishian v. Bd. of Regents of Univ. of State of N. Y.* and several others cases has explained that teachers at universities need to be able to test and question ideas, theories, and viewpoints.

III. RESULT OF THE COURT NOT BEING CLEAR ON THE SPEECH STANDARD FOR PUBLIC UNIVERSITY FACULTY

This section explains the different standards that circuit and district courts have used for academic freedom. In addition, this section highlights the need for the Supreme Court to adopt a clear standard for academic freedom.

A. Circuit and District Court Confusion

Even though the Supreme Court did not explain how much protection public university faculty members have for academic freedom, district courts and circuit courts have addressed the issue of first amendment speech protection for professors and faculty members within public colleges and universities. Regarding the meaning of the scope of academic freedom, the tenth circuit noted in *Urofsky v. Gilmore* that “[o]ur review of the law, however, leads us to conclude that to the extent the Constitution recognizes any right of ‘academic freedom’ above and

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beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors.\textsuperscript{75} Thus, the Fourth Circuit contended in \textit{Urofsky} that academic freedom belongs to the university.

The ninth circuit addressed public faculty’s speech in \textit{Cohen v. San Bernardino Valley Coll.}, which involved a tenured English professor at a community college.\textsuperscript{76} One student claimed that she was “offended by Cohen’s repeated focus on topics of a sexual nature, his use of profanity and vulgarities, and by his comments which she believed were directed intentionally at her and other female students in a humiliating and harassing manner.”\textsuperscript{77} Cohen introduced controversial topics in his class discussions such as pornography expressing different viewpoints; Cohen also had students write papers about pornography.\textsuperscript{78} The community college had implemented a new policy regarding sexual harassment and Cohen was the first professor to face a complaint under the policy.\textsuperscript{79} The college’s Grievance Committee decided, after a hearing, that Cohen had violated the sexual harassment policy since he “creat[ed] a hostile learning environment.”\textsuperscript{80} Cohen appealed the decision and the college’s Board, after hearing other students testify, decided that “Cohen engaged in sexual harassment which unreasonably interfered with an individual’s academic performance and created an intimidating, hostile, or offensive learning environment.”\textsuperscript{81} As a result, the Board demanded that Cohen “[p]rovide a syllabus concerning his teaching style, purpose, content, and method to his students at the beginning of class and to the department chair by certain

\textsuperscript{75} See \textit{Urofsky v. Gilmore}, 216 F.3d 401, 410 (4th Cir. 2000).

\textsuperscript{76} \textit{Cohen v. San Bernardino Valley Coll.}, 92 F.3d 968, 969–70 (9th Cir. 1996).

\textsuperscript{77} \textit{Id.} at 970.

\textsuperscript{78} \textit{Id.}

\textsuperscript{79} \textit{Id.} at 970-71 (The policy at the college provided: “Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal, written, or physical conduct of a sexual nature, it includes, but is not limited to, circumstances in which: 1. Submission to such conduct is made explicitly or implicitly a term or condition of a student's academic standing or status. 2. Such conduct has the purpose or effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile, or offensive learning environment. 3. Submission to or rejection of such conduct is used as the basis for academic success or failure.”)

\textsuperscript{80} \textit{Id.} at 971.
deadlines” and any additional violations might result in termination.82

In the Cohen case, the ninth circuit held “that the Policy is simply too vague as applied to Cohen” and that Cohen did not have proper notice that the Policy would apply to his teaching.83 However, the court declined to “decide whether the College could punish speech of this nature if the Policy were more precisely construed by authoritative interpretive guidelines or if the College were to adopt a clearer and more precise policy.”84 This case is an example of the need to have clear policies in place that are not too vague.

In addition, the ninth circuit was again confronted with the issue of academic freedom in Demers v. Austin.85 This case involved a Washington State University professor, Demers, who claimed “that defendants retaliated against him, in violation of his First Amendment rights, for distributing a pamphlet called “The 7–Step Plan” (“the Plan”) and for distributing a draft introduction and draft chapters of an in-progress book titled “The Ivory Tower of Babel ” (“Ivory Tower ”).”86 The court finally determined “that academic employee speech not covered by Garcetti is protected under the First Amendment, using the analysis established in Pickering.”87 The ninth circuit ultimately decided to “affirm the district court’s determination that Demers prepared and circulated his Plan pursuant to official duties, but we reverse its determination that the Plan does not address matters of public concern.”88 The court elaborated and further clarified that “Garcetti does not apply to ‘speech related to scholarship or teaching’...Rather, such speech is governed by Pickering.”89 Thus, this court would apply the Pickering standard to scholarship.

In 2010, a district court in Ohio noted that there was a lack of clarity concerning how to deal with academic freedom and the Garcetti v. Ceballos exception in a case, Kerr v. Hurd, that involved a state medical school professor named Kerr who

81 Id.
82 Id.
83 Id. at 972.
84 Id.
85 Demers v. Austin, 746 F.3d 402, 411 (9th Cir. 2014).
86 Id. at 406–07.
87 Id. at 412.
88 Id. at 418.
89 Id. at 406.
believed that his First Amendment right had been violated by the medical school. The district court explained in the opinion that “[r]ecognizing an academic freedom exception to the Garcetti analysis is important to protecting First Amendment values. Universities should be the active trading floors in the marketplace of ideas.” The court wrote that “[p]ublic universities should be no different from private universities...At least where, as here, the expressed views are well within the range of accepted medical opinion, they should certainly receive First Amendment protection, particularly at the university level.” The defense in Kerr v. Hurd contended “that because Dr. Kerr's speech about forceps and vaginal delivery was within his role as an employee of Wright State School of Medicine, it is not protected because the school had the right to regulate that speech.” Additionally, the defense argued “that any academic freedom exception to Garcetti must be construed narrowly and limited to classroom teaching.” However, the district court found “no suggestion in the motion papers that Dr. Kerr's advocacy for forceps deliveries was outside either the classroom or the clinical context in which medical professors are expected to teach.” Ultimately, this case illustrates the difficulty that results from the lack of clarity for academic freedom by the Supreme Court following Garcetti.

In the case, Bonnell v. Lorenzo, the sixth circuit wrote that “[w]hile a professor's rights to academic freedom and freedom of expression are paramount in the academic setting, they are not absolute to the point of compromising a student's right to learn in a hostile-free environment.” The facts of Bonnell v. Lorenzo involved a teacher, Bonnell, who was disciplined by a community college. The court noted that “[t]he line drawn as to whether a professor's speech rises to this level is to be decided on a case by case basis, and in the instant case Plaintiff is not challenging the constitutionality of the College's sexual harassment policy.” In Bonnell v. Lorenzo, the court had to try and determine how to

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91 Id. at 844.
92 Id.
93 Id. at 843.
94 Id. at 844.
95 Id.
96 See Bonnell v. Lorenzo, 241 F.3d 800, 823–24 (6th Cir. 2001).
97 Id. at 805.
98 Id. at 824.
“balanc[e] the precious First Amendment rights of a professor in the academic setting, against the legal obligation of a college to guarantee the rights of students to learn in an environment free of sexual harassment and hostility.”\textsuperscript{99} The sixth circuit ultimately decided “that the balance tips in favor of the College such that the district court erred in granting the extraordinary relief of a preliminary injunction under the specific facts of this case.”\textsuperscript{100} This case demonstrates the need to balance the First Amendment with the college's obligations to students.

The tenth circuit explained in \textit{Schrier v. Univ. Of Co.} that in order “[t]o determine whether a public employer's actions impermissibly infringe on free speech rights, we apply the four-prong test articulated in \textit{Pickering}.”\textsuperscript{101} For the court’s analysis of this issue, the tenth circuit wrote that “First, we must determine whether the employee's speech involves a matter of public concern. If so, we then balance the employee's interest in commenting upon matters of public concern against the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. Third, if the balance tips in favor of the employee, the employee then must show that the speech was a substantial factor or a motivating factor in the detrimental employment decision. Fourth, if the plaintiff establishes that speech was such a factor, the employer may demonstrate that it would have taken the same action against the employee even in the absence of the protected speech.”\textsuperscript{102} In this case, the tenth circuit applied \textit{Pickering} to a case where a professor was claiming his academic freedom was violated.\textsuperscript{103}

In \textit{Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.}, a public high school English teacher’s contract was not renewed and the teacher brought a first amendment claim against the school district.\textsuperscript{104} The teacher claimed "that the school board and other defendants had retaliated against her 'curricular and pedagogical choices,' infringing her First Amendment

\textsuperscript{99} Id. at 802.

\textsuperscript{100} Id.

\textsuperscript{101} See Schrier v. Univ. Of Co., 427 F.3d 1253, 1262 (10th Cir. 2005).

\textsuperscript{102} Id.

\textsuperscript{103} Id. at 1265.

\textsuperscript{104} Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist., 624 F.3d 332, 336 (6th Cir. 2010).
While the Evans-Marshall case involved a high school teacher, the sixth circuit clarified that “[i]n the context of in-class curricular speech, this court has already said in the university arena that a teacher's invocation of academic freedom does not warrant judicial intrusion upon an educational institution's decisions.” Thus, this case reiterates the importance of academic freedom in universities.

**B. Public University Policies**

Policies that concern a professor's speech regarding academic freedom at public universities differ at various universities, however, the policies help to explain the amount of speech protection that a faculty member has at a public college or university. In addition, a college or university must make sure that a policy is not too vague to clearly apply to a faculty member in class room instruction. The faculty senate at one university sought to address the concerns about faculty speech protection regarding academic freedom following the way that courts had interpreted the *Garcetti v. Ceballos* decision.

If the Supreme Court clarified the standard that is provided to professors and faculty members for academic freedom protection, this could be helpful for creating university policies that notify the type of speech that is protected for faculty members in the public college and university context. This could help professors and faculty members know the protection they have so that they will be able to freely discuss ideas without being punished.

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105 *Id.*

106 *Id.* at 344.


108 Cohen v. San Bernardino Valley Coll., 92 F.3d 968, 972 (9th Cir. 1996).

IV. CLARIFYING THE SPEECH STANDARD FOR PUBLIC UNIVERSITY AND COLLEGE FACULTY MEMBERS USING A BALANCING APPROACH

Concerning the concept of academic freedom, professors need the ability to explore topics and have an open discussion about ideas and viewpoints. Previous cases that involve professors being punished for their speech highlight the need for the Supreme Court to set forth a standard for speech of public faculty at colleges and universities. While arguably district courts and circuit courts could try, as some already have, to apply a standard for speech protection for academic freedom by setting aside the Garcetti v. Ceballos rule for a professor’s academic freedom, it would be helpful for faculty members and professors to understand the amount of speech protection that they have in the classroom environment regarding academic freedom. The fourth circuit argued in Urofsky, that while the university retains the academic freedom right, professors still need the freedom and ability to openly discuss and inform students about ideas in the classroom in order to advance the conversations and contribute to the marketplace of ideas. Thus, the Supreme Court should adopt a clear standard that explains how academic freedom relates to Garcetti v. Ceballos and also provides the speech protection for professors and faculty members at public colleges and public universities throughout the United States.

Given the importance of academic freedom, the Supreme Court should adopt a standard that balances the interests of the school with the interests of the faculty members. The standard should first defer to university and college policies and actions regarding academic freedom for faculty members only when there is insufficient evidence of flagrant interference with academic freedom. While the public universities and colleges are supposed to foster an educational environment conducive to learning, public universities are also employers and have an interest in preventing litigation. The burden should be on the faculty member to prove that a restriction or employment action by the university has

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112 Urofsky v. Gilmore, 216 F.3d 401, 410 (4th Cir. 2000).
113 Id. at 428 (Wilkinson, J., concurring) (“A faculty is employed professionally to test ideas and to propose solutions, to deepen knowledge and refresh perspectives.”).
restricted his or her academic freedom. The faculty member must show sufficient evidence that the policy or action taken by the university flagrantly interfered with his or her ability to freely research and instruct. If the faculty member meets this burden, then the burden would shift to the school to provide a compelling interest as to why the interference was warranted. In addition, the compelling interest must be tailored to fit the institution’s needs. If the faculty member does not present a convincing case that the university interfered with his or her ability to freely research and instruct, then the deference standard should remain. This standard seeks to balance the faculty member’s interest with the public university’s interest.

Academic freedom also should be defined for the Court to consider academic freedom. The American Association of University Professors define academic freedom by explaining that “Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties... Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject... College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations....Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.”114 Thus, academic freedom encompasses freedom in research, in class teaching, and the university faculty members speaking as citizens. Academic freedom has a special role in American society and several Supreme Court opinions have expressed the significance of it in schools.115

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115 See, e.g., Regents of Univ. of California v. Bakke, 438 U.S. 265, 312 (1978) ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.").
A. Comparing Approaches

It has been argued that the court should adopt a standard that focuses on deference to a school’s policy.\textsuperscript{116} While deference to a university’s policy is a great and necessary starting point, the legal standard should also provide a way for faculty members to prove if a policy or employment action is interfering with their freedom to research and instruct. Furthermore, if a school decides to adopt a policy that limits or narrows faculty members’ academic freedom, deferring to a policy would not help protect the faculty members’ freedom to research and instruct. On the other hand, there is another argument that academic freedom restrictions should have to pass strict scrutiny.\textsuperscript{117} While the strict scrutiny argument supports and protects the faculty members, it is important to also protect the university’s interests as an employer. Thus, a balancing approach, more of an intermediate standard, would be more appropriate and allow the court to defer to the university or college absent a faculty member proving a restriction of academic freedom by the institution. A similar argument concerning a burden shifting approach was discussed in 1988.\textsuperscript{118} Given recent developments, especially following the Garcetti decision in 2006, it would helpful to revisit the idea of introducing a balancing approach for academic freedom.

B. Implications of a Balancing Approach

While the Garcetti standard would not apply to academic freedom, other aspects of public employment such as a professor expressing grievances about their duties, being repeatedly late to their job, or acting hostile to other employees would fall under the


\textsuperscript{117} R. George Wright, *The Emergence of First Amendment Academic Freedom*, 85 Neb. L. Rev. 793, 826 (2007) (“One alternative, familiar from other free speech contexts, would be to apply a strict scrutiny test in the case of any significant potential regulatory threat to academic freedom.”).

Garcetti standard. These areas of employment which are not unique to public university and college faculty members could be held to the Garcetti standard. However, an employee discussing ideas and expressing viewpoints such as criticizing the inequities of the justice system in class or through research would be governed by the standard for academic freedom.

In addition, the standard for academic freedom should afford professors some discretion to have the ability to use materials that help advance the academic discussion. One concern could be that professors might create a toxic environment within the classroom and argue that they have the protection for their speech claiming they have academic freedom. However, while the court has noted the special importance of academic freedom, the university or college is still the faculty member’s employer. If the university discovers that a professor is selecting offensive material to intentionally and unnecessarily upset students, then their speech in the academic environment would likely not be protected since the university would have a justification for limiting the use of intentionally offensive material in the classroom.

Also, other policies like sexual harassment policies would still apply, but the policies must not be vague so that professors know that the policies apply in the classroom as noted in the Cohen v. San Bernardino Valley Coll. case. Furthermore, in order to avoid a hostile learning environment, schools could implement policies that explain that speech that harms groups and is not advancing the academic discussion could be punished within the Garcetti v. Ceballos standard. The school policy would be given deference in a situation like a hostile environment since it would be difficult for the faculty member to provide sufficient evidence of flagrant interference in his or her academic freedom.

After considering the various interests of faculty members to express ideas and the public university’s role as an employer, it is important to strike the appropriate balance between the interests of protecting the professor’s First Amendment right and also making sure students are not subjected to a toxic environment. In addition, given that the university has been treated by the Supreme Court as a limited public forum, the public university or college could possibly be able to regulate the speech of faculty members with reasonable regulations that are

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viewpoint neutral. Hopefully, applying a standard that first defers to the university or college and provides faculty members the opportunity to show that their ability to research or instruct has been limited can help to strike the difficult balance between the types of speech that are protected for academic freedom.

C. Application

Discussing unpopular ideas can have a negative impact on a faculty member’s job as seen in the lawsuit that was filed by Ivor van Heerden.\textsuperscript{121} When applying the proposed standard to van Heerden’s situation, van Heerden would have a strong case that the school interfered with his academic freedom. Then the burden would shift to the school to provide a compelling reason for the interference. If the school could provide a justification that is narrowly tailored then there would be no violation of academic freedom. However, if they could not, the court would likely find that van Heerden’s academic freedom was violated. On the other hand, when applying the proposed standard to Cohen’s situation\textsuperscript{122} in the case of Cohen v. San Bernardino Valley Coll., Cohen would not likely be able to prove with sufficient evidence that the school interfered with Cohen’s academic freedom regarding Cohen using vulgarity and profanity in class. Thus, the court would likely give deference to the school’s policy.

Given the importance of academic freedom in the American society, and the need to promote the marketplace of ideas which can involve unpopular ideas, there should be a standard that balances the interests of faculty members and public colleges and universities. Accordingly, the Supreme Court should adopt a clear standard that first defers to the institution, but also provides a way for a faculty member to be able to prove that their academic freedom was limited by the institution. The university would still have the opportunity to provide a compelling reason for the policy or action. Thus, this standard seeks to balance and protect the interests of the faculty members and the public university.


\textsuperscript{122} Cohen, 92 F.3d at 969–70.
CONCLUSION

Public colleges and universities have played an important and unique role in history and in society by being a place where ideas are explored.\textsuperscript{123} Faculty members at universities help contribute to the marketplace of ideas by advancing the discussions and informing students of different ideas, concepts, theories, viewpoints, and perspectives. In addition, public universities and colleges have a special role in society since they are funded by the government. One of the challenges that public higher education institutions face includes providing education to students while not restricting the first amendment rights of professors in the academic setting.

Public university and college faculty members filing a lawsuit and claiming that their first amendment free speech rights were violated by the actions of their employers has been the subject of litigation in the past.\textsuperscript{124} While the United States Supreme Court has acknowledged that public universities and academic freedom are different from typical public employers and employees as seen in Garcia\textsuperscript{t}\textsuperscript{i} v. Ceballos, there is still a question of how much protection the Supreme Court provides for faculty members within the academic freedom context. As a result of the United States Supreme Court not clarifying the standard, the circuit and district courts have tried analogize to cases to determine if academic freedom has been violated by a college. Thus, the Court’s standard should apply a balancing test on a case by case basis, but still outline the way that the Court views the Garcia\textsuperscript{t}\textsuperscript{i} v. Ceballos for professors and faculty members.

Recently, there has been more discussion about the types of speech that are tolerated on college and university campuses in

\textsuperscript{123} See Grutter v. Bollinger, 539 U.S. 306, 329, 123 S. Ct. 2325, 2339, 156 L. Ed. 2d 304 (2003) ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.").

the United States. Speakers that are cancelled at universities highlight the attention given to speech at colleges and universities and the special need for a clear standard for academic freedom in today's context. The standard should provide that the court will defer to school policies for academic freedom absent a faculty member showing a restriction of academic freedom. If a faculty can prove with sufficient evidence that his or her academic freedom was violated, then the burden shifts to the school to provide a compelling reason for the restriction. However, the standard for public employees set forth in Garcetti v. Ceballos would apply for typical public employment decisions that do not deal with academic freedom restrictions.

Once the Supreme Court clearly sets forth a rule to evaluate the protection for speech of faculty members in the academic freedom context, there would be more clarity about the amount of protected speech for professors and faculty. If there is a clear standard, public universities and public colleges can implement the standard into their policies to help promote free speech for faculty even if the speech is unpopular. The policies could also help to avoid the risk of potential litigation from faculty members who feel that their free speech was violated by the universities' actions, and also try to foster an environment that makes students feel respected in the academic environment.

Academic freedom is important for society, is especially crucial at universities and the Supreme Court has recognized this importance in several opinions. Following the Garcetti v. Ceballos decision and the recent efforts to avoid controversial and unpopular ideas on campuses, there needs to be a standard that clarifies the amount of speech protection for faculty members and professors.

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