TIPPING THE *PICKERING* BALANCE: A PROPOSAL FOR HEIGHTENED FIRST AMENDMENT PROTECTION FOR THE TEACHING AND SCHOLARSHIP OF PUBLIC UNIVERSITY PROFESSORS

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> *For here we are not afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left free to combat it.*
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> —Thomas Jefferson

The world has revered teachers from time immemorial. Nations still ponder the wisdom of Aristotle, Socrates, and Plato centuries after their passing. We in America have dubbed educators the "priests of our democracy."[1] *But while there is little debate over the value of teachers to our republic, there is much disagreement over how the Constitution should protect their core academic speech. In the 2006* Garcetti v. Ceballos[2] *decision, the Supreme Court implicitly questioned whether the First Amendment provides any protection for the teaching and scholarship of professors at public universities. The* Garcetti *majority concluded that when public employees speak "pursuant to their official duties," such speech is not shielded by the Free Speech Clause.*[3] *Rigidly applying this test to public university faculty would eliminate the possibility of any constitutional shelter for instruction and research. Mindful of this likelihood, the Court reserved for another day the specific application of its new test to public university faculty.*

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1 Wieman v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).

2 547 U.S. 410 (2006).

3 *Id.* at 421.

The Court's reservation has sparked fierce scholarly debate over the nature of constitutional protection for core academic speech. Many scholars have contended that there is no such protection; others have maintained that there is indeed constitutional shelter, but that it belongs primarily to the university rather than the professor. Few have argued for heightened protection for professors, and fewer still have provided an adequate justification for such stricter scrutiny. This Article fills that void by explaining how the policies underlying the public employee speech doctrine warrant heightened First Amendment protection for teaching and scholarship. This unique policy-based approach provides a framework for courts to properly weigh professor speech claims—a framework supported by the relevant academic freedom cases. This Article thus proposes that courts addressing speech retaliation claims involving teaching and scholarship should apply a modified public employee speech test that presumptively weighs the balance of interests in favor of the professors.

INTRODUCTION

In March 2014, a federal jury in Wilmington, North Carolina, issued an extraordinary verdict. The jury found that the University of North Carolina at Wilmington (UNCW) violated the First Amendment rights of Professor Mike Adams.[4] Specifically, the jury found that Dr. Adams's speech as expressed in his scholarship and teaching was a "substantial or motivating factor" in the University's decision not to promote him to full professor.[5] Such speech retaliation verdicts are rare for academics, but this favorable verdict was even more surprising because of an opinion issued by the Supreme Court the year before Dr. Adams filed suit. In 2006, in *Garcetti v. Ceballos*,[6] the Supreme Court held that the First Amendment does not shield public employees from discipline when they speak "pursuant to their official duties."[7] This new rule would seem to erase the speech rights of public university professors such as Dr. Adams who "necessarily speak and write 'pursuant to . . . official duties.'"[8] The *Garcetti* Court acknowledged this possibility, but decided simply to reserve the matter for future adjudication.

But by failing to expressly exempt professors' teaching and scholarship from its new "official duties" rule, the Court implicitly questioned the availability of *any* First Amendment protection for such core academic speech. The Court's injection of legal uncertainty over the rights of public university faculty to teach and research has been the subject of much scholarly debate.[9] Some scholars have maintained that core academic speech is entitled to no protection under *Garcetti*,[10] while others

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[4] Eugene Volokh, *Conservative Professor-Blogger Wins Political Retaliation Case at Trial*, WASH. POST (May 19, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/19/conservative-professor-blogger-wins-political-retaliation-case-at-trial/.

[5] Verdict Form, Adams v. Trs. of Univ. of N.C.–Wilmington, 640 F.3d 550, No. 7:07-CV-64-H (E.D.N.C. Mar. 20, 2014).

[6] 547 U.S. at 413.

[7] *Id.* at 421.

[8] *Id.* at 438 (Souter, J., dissenting).

[9] *See generally* Kermit Roosevelt III, *Not As Bad As You Think: Why* Garcetti v. Ceballos *Makes Sense*, 14 U. PA. J. CONST. L. 631 (2012) (arguing that Garcetti should be applied to academic speech); Judith Areen, *Government As Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 988–89 (2009) ("Carving out an exception for faculty to the *Garcetti* official-duty test is one possible response, but one that would be hard to defend."); Bridget R. Nugent & Julee T. Flood, *Rescuing Academic Freedom from* Garcetti v. Ceballos*: An Evaluation of Current Case Law and a Proposal for the Protection of Core Academic, Administrative, and Advisory Speech*, 40 J.C. & U.L. 115 (2014) (arguing that courts should exempt core academic speech from Garcetti's "official duties" test); Robert J. Tepper & Craig G. White, *Speak No Evil: Academic Freedom and the Application of* Garcetti v. Ceballos *to Public University Faculty*, 59 CATH. U. L. REV. 125 (2009) (arguing the same); Oren R. Griffin, *Academic Freedom and Professorial Speech in the Post-*Garcetti *World*, 37 SEATTLE U. L. REV. 1, 29 (2013) (arguing the same).

[10] *See* Roosevelt III, *supra* note 9, at 658–59 ("On the whole, I think the best way to conceive of scholarship from the First Amendment perspective is to think of it as akin to the

have argued that such speech, while shielded, is entitled to only minimal judicial scrutiny.[11] Neither of these positions, however, adequately represents the security available for professors in their teaching and scholarship, for the core academic speech of professors is not merely protected by the First Amendment—it is entitled to heightened protection.

Part I of this Article explores the development of the public employee speech doctrine and describes the balancing test used to evaluate claims that the government has violated the First Amendment rights of its employees. This Part also discusses how *Garcetti*'s "official duties" rule potentially threatens to undermine the constitutional protection available for public university faculty's teaching and scholarship. Part II explains how federal cases both before and after *Garcetti* recognize that the First Amendment shields such core academic speech from official reprisal by either the university or the state. Part III expands upon this foundation and explains how the law and policy surrounding the public employee speech doctrine warrants heightened First Amendment protection for professors when they teach and publish. According to this approach, which is novel among commentators but well-established in legal policy, the public employee speech framework should be presumptively balanced in favor of the public university professor. Part IV fully develops the modified public employee speech test that courts should apply to professors' speech retaliation claims. Under this framework, a public university generally may not discipline professors for what they say in their classrooms or their scholarship without a compelling or at least substantial justification. Finally, Part V examines and then rebuffs some objections to this proposal for heightened judicial scrutiny.

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fighting words in *R.A.V. v. City of St. Paul*. It is generally unprotected, which is to say that universities are free to assess its quality and reward or punish employees on that basis, consistent with their own tenure rules, but there are some criteria that cannot be used to evaluate it, such as avowedly partisan or religious ones.").

11 *See* Areen, *supra* note 9, at 995 ("Under the government-as-educator doctrine, if a university shows that its disciplinary decision was supported by the faculty (or by an authorized committee of the faculty), a court should presume that the decision was made on academic grounds and defer to it. This presumption would not only be logical, it would have the additional benefit of limiting judicial intrusion into the internal processes of most colleges and universities. Judges are public officials, of course, so they should avoid infringing the academic freedom of academic institutions unless their intervention is necessary to protect the academic freedom of faculty."); Larry D. Spurgeon, *The Endangered Citizen Servant:* Garcetti *Versus the Public Interest and Academic Freedom*, 39 J.C. & U.L. 405, 464 (2013) ("The Court should answer the question posed by the [*Garcetti*] Caveat and exempt academic speech from the public employee speech analysis. In its place, the Court should rely upon its existing policy of deference to both the institution and the community of scholars.").

I. THE *GARCETTI* PROBLEM

A. *The Public Employee Speech Doctrine*

Throughout much of the twentieth century, the First Amendment[12] protection afforded to public employees was quite simple to quantify because it was virtually nonexistent. While the government could not *directly* infringe upon constitutional rights, it could do so *indirectly* by conditioning receipt of its benefits—such as funding, licenses, or public employment—on the qualification or outright surrender of constitutional freedoms.[13] This doctrine gradually yielded over time as the Supreme Court recognized that citizens do not shed all their rights when they work for the government.[14] In 1963, the Court confidently declared that it was well-established that the state could not condition public employment on a basis that infringed upon the employee's First Amendment rights: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."[15] Yet the precise scope of this protection would require further development, particularly in the public employment context.

The Supreme Court began to define the modern contours of protection for public employee speech in *Pickering v. Board of Education of Township High School District 205*.[16] In that case, high school teacher

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12 U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

13 *See* Joseph J. Martins, *First Amendment Enclave: Is the Public University Curriculum Immune from the Sweep of the Compelled Speech Doctrine?*, 50 TULSA L. REV. 157, 171–80 (2014) (discussing the right-privilege doctrine); *see also* Adler v. Bd. of Educ., 342 U.S. 485, 492 (1952) ("It is clear that [persons employed or seeking employment in the public schools] have the right under our law to assemble, speak, think and believe as they will. It is equally clear that they have no right to work for the State in the school system on their own terms. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not."); McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892) (holding that the city did not violate the First Amendment when it fired a police officer for engaging in political activities because the officer did not have a right to public employment).

14 *See* Perry v. Sindermann, 408 U.S. 593, 597 (1972) ("[T]his Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' Such interference with constitutional rights is impermissible.").

15 Sherbert v. Verner, 374 U.S. 398, 404 (1963).

16 391 U.S. 563 (1968).

Marvin Pickering was fired for sending a letter to a local newspaper that criticized the school's mismanagement of public monies.[17] Pickering sued, alleging that his firing violated the First Amendment, but the Illinois courts found no constitutional objection to his termination.[18] The Supreme Court disagreed. The Court affirmed that teachers and other public employees do not relinquish their First Amendment rights to comment as citizens on matters of public interest.[19] Such opinions are, in fact, "vital to informed decision-making by the electorate."[20] However, the Court also maintained that the state has unique interests as an employer in regulating the speech of its employees.[21] Accordingly, federal courts must arrive at a "balance 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."[22] The Court concluded that this balance favored Pickering because he spoke on a legitimate matter of public concern and because his comments neither impeded the performance of his classroom duties nor interfered with the general operation of the schools.[23]

The Court added additional context to this analysis in *Givhan v. Western Line Consolidated School District*.[24] Bessie Givhan was fired from her job as a junior high English teacher after she told her principal that she believed the school district's employment policies discriminated against racial minorities.[25] The district court ruled in her favor, but the United States Court of Appeals for the Fifth Circuit reversed, holding that her expression was not protected by the First Amendment because she shared her opinions privately with the principal.[26] The Supreme Court rejected this view and held instead that a public employee does not lose the freedom of speech when he chooses to "communicate privately with his employer."[27] In essence, the Court ruled that the liberty of speech does not depend on the public employee's immediate audience.

The Court next refined the employee speech doctrine in *Connick v. Myers*.[28] In *Connick*, assistant district attorney Sheila Myers brought a First Amendment action against her employer after she was fired for cir-

17 *Id.* at 564.
18 *Id.* at 565.
19 *Id.* at 571–73.
20 *Id.* at 572.
21 *Id.* at 568.
22 *Id.*
23 *Id.* at 572–73.
24 439 U.S. 410 (1979).
25 *Id.* at 411–13.
26 *Id.* at 413.
27 *Id.* at 415.
28 461 U.S. 138 (1983).

culating a questionnaire regarding office morale."[29] The lower federal courts ruled in Myers's favor, but the Supreme Court reversed, holding that her discharge was not subject to judicial review because her questionnaire could not fairly be characterized "as constituting speech on a matter of public concern."[30] The Court examined the "content, form, and context"[31] of Myers's statements and concluded that her speech was largely unrelated "to any matter of political, social, or other concern to the community . . . ."[32] Consequently, unlike Pickering and Givhan, Myers spoke as an employee on matters of *personal* interest[33]:

> [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."[34]

Therefore, the Court rejected Myers's First Amendment claim in light of its opinion that her speech was a simple employee grievance.[35]

Pickering and its progeny thus identified two principal inquiries to use in determining whether a public employee's speech is protected by the First Amendment. The first is whether the employee spoke as a "citizen on a matter of public concern."[36] A negative answer to this threshold question ends the analysis, while a positive one opens the possibility of First Amendment protection.[37] The second inquiry asks whether the employee's interest in the speech *and* the public's interest in receiving it outweigh the government's interest in providing public services efficiently.[38] The *Pickering* test thus balances the competing interests of a public employee and the government when an employee speaks on issues

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29 *Id.* at 141.

30 *Id.* at 142, 146. The Court determined that one of the questions in Myers's survey did touch on a matter of public concern. However, the Court ultimately concluded that this question threatened the close working relationships necessary for efficient functioning of the District Attorney's office. Because the employer's interests thus outweighed Myers's interest in her speech, her termination did not violate the First Amendment. *Id.* at 149–54.

31 *Id.* at 147–48.

32 *Id.* at 146.

33 *Id.* at 147.

34 *Id.*

35 *Id.* at 154.

36 Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

37 *Id.*

38 *Id.* at 417 (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)); Ridpath v. Bd. of Governors, 447 F.3d 292, 317 (4th Cir. 2006).

of public concern.[39] This two-pronged analysis has remained the standard test for public employee speech claims for decades.

B. Garcetti v. Ceballos

In 2006, the Supreme Court added a significant threshold layer to the *Pickering* analysis by determining that a public employee is *not* insulated from retaliation by an employer when the employee speaks "pursuant to [his] professional duties."[40] In *Garcetti*, Richard Ceballos, a deputy district attorney, composed a memo discussing the inaccuracies of an affidavit used to obtain a search warrant.[41] Ceballos also testified in a hearing for the defense after his office initiated a prosecution.[42] Subsequently, Ceballos was reassigned, transferred, and ultimately denied a promotion.[43] Ceballos sued his employer, alleging that the employer violated his First Amendment rights by retaliating against him in response to his memo.[44]

The Court held that Ceballos was not entitled to protection from employer discipline because Ceballos was not speaking as a citizen, but pursuant to his duties as a deputy district attorney.[45] "[W]hen public employees make statements pursuant to their official duties, the employees are *not* speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[46] This principle, the Court explained, simply recognizes "the exercise of employer control over what the employer itself has commissioned or created."[47]

The Court, however, issued this "official duties" rule with an important reservation, in response to Justice Souter's dissent. Justice Souter feared that the Court's new rule would "imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties.'"[48] Justice Souter pointed out that the Court has "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."[49] The major-

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39 Adams v. Trs. of Univ. of N.C.–Wilmington, 640 F.3d 550, 560 (4th Cir. 2011).
40 *Garcetti*, 547 U.S. at 426.
41 *Id.* at 413–14.
42 *Id.* at 414–15.
43 *Id.* at 415.
44 *Id.*
45 *Id.* at 421.
46 *Id.* (emphasis added).
47 *Id.* at 422.
48 *Id.* at 438 (Souter, J., dissenting).
49 *Id.* (Souter, J., dissenting) (quoting Grutter v. Bollinger, 539 U.S. 306, 329 (2003)).

ity responded to these concerns by reserving the question of whether the "official duties" threshold would apply in the public university setting:

> 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.[50]

Consequently, the question as to whether the *Garcetti* doctrine applies to the scholarship and teaching of public university professors was left unanswered by the Court.

II. PUBLIC UNIVERSITY PROFESSORS' TEACHING AND SCHOLARSHIP IS PROTECTED BY THE FIRST AMENDMENT

By failing to expressly exempt speech related to teaching and scholarship from its "official duties" rule, the *Garcetti* Court left a cloud of uncertainty over the constitutional protection available for such core academic speech. Some might argue that this vagueness merely reflects the historical elusiveness of the Supreme Court's academic freedom jurisprudence.[51] Indeed, the Court's opinions in this area have led numerous scholars to debate whether a separate right to academic freedom inures to the university,[52] to the professor,[53] or to both,[54] or indeed whether such a

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[50] *Id.* at 425.

[51] Hillis v. Stephen F. Austin State Univ., 665 F.2d 547, 552–53 (5th Cir. 1982) ("While academic freedom is well recognized . . . its perimeters are ill-defined and the case law defining it is inconsistent.").

[52] J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 311 (1989) ("In the last decade, the Supreme Court's decisions concerning academic freedom have protected principally and expressly a First Amendment right of the university itself—understood in its corporate capacity—largely to be free from government interference in the performance of core educational functions.").

[53] David M. Rabban, *Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 230 (1990) ("Some commentators have maintained that the courts, especially the Supreme Court, seem to be defining constitutional academic freedom exclusively in institutional terms. Indeed, a major recent analysis comments approvingly on this perceived development. I disagree. Courts may have been presented with more institutional claims than individual claims of academic freedom, but they have also recognized that the [F]irst [A]mendment protects individual academic freedom.").

[54] Spurgeon, *supra* note 11, at 432 ("Scholars have long debated whether the Court has recognized a distinct constitutional right of academic freedom for the individual, for the institution, or both.").

right exists at all.[55] However, resorting to an independent theory of academic freedom is not necessary to address the question left unanswered by the *Garcetti* Court.[56] Relevant federal precedent—both before and after *Garcetti*—reveals a consistent and resounding theme: The Free Speech Clause provides a shield for the academic scholarship and classroom teaching of public university faculty. Accordingly, professors can speak as citizens on matters of public concern, even when teaching and writing pursuant to their official duties.

A. Supreme Court Precedent

Keyishian v. Board of Regents of the University of the State of New York[57] affirms that professors have First Amendment rights in expression related to their classroom instruction and academic scholarship.[58] In *Keyishian*, professors at a state university challenged a state statute and its related university regulations that "prevent[ed] the appointment or retention of 'subversive' persons in state employment."[59] Essentially, these regulations disqualified from employment any person who advocated or published material that advocated "the overthrow of government by . . . any unlawful means."[60] The University ensured compliance by requiring an "annual review of every teacher to determine whether any utterance or act of his, inside the classroom or out, came within the sanc-

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55 Roosevelt III, *supra* note 9, at 658 ("The ideal of independent and untrammeled scholarship is generally described as academic freedom. This sort of individual academic freedom has never been clearly recognized as a First Amendment right."); Spurgeon, *supra* note 11, at 432 ("The public policy for academic freedom as special concern of the First Amendment is strong and clear. The nature of the constitutional right, if any, is not."); Rabban, *supra* note 53, at 244 ("But as the Supreme Court has recognized, it is the free speech clause, not the special [F]irst [A]mendment right of academic freedom, that provides the constitutional basis for this protection.").

56 *See* DEREK BOK, HIGHER EDUCATION IN AMERICA 359 (2015) ("Today, professors are protected in their teaching and writing both by the doctrine of academic freedom and by the First Amendment of the Constitution.").

57 385 U.S. 589 (1967).

58 *Id.* at 603. Ten years prior, in *Sweezy v. New Hampshire*, the Supreme Court laid the groundwork for the *Keyishian* decision by recognizing that professors retain constitutional liberties in the area of academic freedom. 354 U.S. 235, 266 (1957). Sweezy was investigated by the New Hampshire attorney general for possible "subversive activities" after he delivered a guest lecture at the University of New Hampshire. *Id.* at 237–45. Sweezy was ultimately convicted of contempt for refusing to answer questions about his lecture and he appealed. *Id.* at 245. The Supreme Court overturned the conviction, but the Justices could not agree on a constitutional basis for the decision. *Id.* at 255. Chief Justice Warren's plurality opinion held that the State's use of the contempt power violated due process. *Id.* at 254–55. Justice Frankfurter concurred, but he appeared to rest his opinion on the Free Speech Clause. *Id.* at 260–64. Both opinions extolled the virtues of academic freedom and acknowledged that the State had invaded Sweezy's constitutionally protected "right to lecture." *Id.* at 249–50, 260–61.

59 *Keyishian*, 385 U.S. at 591–92.

60 *Id.* at 593.

tions of the laws."[61] The Court struck down the regulatory scheme, finding it to be unconstitutionally vague and overbroad:[62]

> We emphasize once again that '[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms,' '[f]or standards of permissible statutory vagueness are strict in the area of free expression. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.' New York's complicated and intricate scheme plainly violates that standard.[63]

The Court went on to explain that the regulatory scheme failed constitutional scrutiny precisely because of its suffocating effect upon teaching and scholarship.[64]

For example, one regulation prevented retention of anyone who "'advocates, advises or teaches the doctrine' of forceful overthrow of government."[65] According to the Court, this language was so vague that it could be applied improperly to a teacher who simply "advis[es] . . . the existence of the doctrine" or who "informs his class about the precepts of Marxism or the Declaration of Independence . . . ."[66] Thus, the Court voided this regulation specifically to avoid the inevitable "chilling effect upon the exercise of vital First Amendment rights" in the classroom.[67]

Similarly, the Court invalidated a companion provision that also blocked retention of anyone who distributes "written material 'containing or advocating, advising or teaching the doctrine' of forceful overthrow [of government] . . t. ."[68] The Court asked whether the prohibition banned publications containing the "histories of the evolution of Marxist doctrine or tracing the background of the French, American, or Russian revolutions?"[69] The Court answered its own rhetorical question by concluding that the regulation reached beyond these topics to even forbid the "mere expression of belief."[70] The regulation thus violated the First

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61 *Id.* at 601–02.

62 *Id.* at 604. Although the Court does not specifically use the term "overbroad," its reference to "sweeping and improper application" speaks in terms of overbreadth. *See id.* at 599. Indeed, the Court has confirmed that *Keyishian* involved facial overbreadth in subsequent cases. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 564 n.1 (1968); Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

63 *Keyishian*, 385 U.S. at 603–04 (citations omitted).

64 *Id.*

65 *Id.* at 599 (quoting N.Y. CIV. SERV. LAW § 105(1)(a)).

66 *Id.* at 600.

67 *Id.* at 604.

68 *Id.* at 600 (quoting N.Y. CIV. SERV. LAW § 105(1)(b)).

69 *Id.* at 600–01.

70 *Id.* at 601.

Amendment by creating an "atmosphere of suspicion and distrust" in which "scholarship cannot flourish."[71]

Keyishian teaches several important lessons relevant to the question reserved in *Garcetti*. First and foremost, professors can find refuge in the First Amendment when they teach and publish. Additionally, professors can assert this liberty interest directly against the state *and* the university itself, as the professors in *Keyishian* did.[72] Finally, public university faculty do not forfeit this freedom simply because they teach and publish "pursuant to their official duties"[73] as evidenced by the Court's censure of the University's use of the "annual review of every teacher" to enforce its regulations.[74] Given these clear answers, the *Garcetti* Court should have expressly exempted core academic speech from its "official duties" rule to affirm that the First Amendment safeguards such speech.

B. *Pre-*Garcetti *Precedent in the Federal Courts of Appeals*

Following the *Keyishian* Court's lead, the federal courts of appeals have also confirmed that professors' academic speech is entitled to free speech protection. For example, in *Dube v. State University of New York*,[75] Assistant Professor Ernest Dube claimed the University retaliated against him "based on [his] discussion of controversial topics in his classroom . . . ."[76] In Professor Dube's "Race and Politics" course, he presented Zionism, Nazism, and apartheid as examples of racism.[77] After receiving several complaints, the University cancelled the course, denied Dube's subsequent application for promotion and tenure, and terminated his appointment.[78] In court, school officials moved for qualified immunity on summary judgment, but the Second Circuit, relying on both *Keyishian* and *Pickering*, firmly rejected this defense:

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71 *Id.* at 603 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)).

72 *See id.* at 589 (stating that the primary defendant in *Keyishian* was the Board of Regents of the University of the State of New York); *see also* Matthew W. Finken, *On "Institutional" Academic Freedom*, 61 TEX. L. REV. 817, 842 (1983) (confirming that the regulations in *Keyishian* "worked a direct invasion only of the political freedom of the individual faculty members"). This point cannot be overemphasized, as many scholars have overlooked the fact that the university regents, through their own regulations, implemented the state laws against the professors. *See, e.g.*, Rabban, *supra* note 53, at 289 ("The Supreme Court has yet to address the merits of an individual claim by a faculty member against peers, the administration, or the trustees.").

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

74 *Keyishian*, 385 U.S. at 601–02.

75 900 F.2d 587 (2d Cir. 1990).

76 *Id.* at 588–89 (alteration in original).

77 *Id.* at 589.

78 *Id.* at 591–92.

> [F]or decades it has been clearly established that the First Amendment tolerates neither laws nor other means of coercion, persuasion or intimidation "that cast a pall of orthodoxy" over the free exchange of ideas in the classroom. We therefore conclude that, assuming the defendants retaliated against Dube based on the content of his classroom discourse, such conduct was, as a matter of law, objectively *un* reasonable.[79]

In other words, punishing a professor based on his or her classroom teaching is not even arguably constitutional. The Second Circuit thus powerfully confirmed that the First Amendment severely limits the power of public university employers to discipline professors for their in-class speech.

Likewise, the Sixth Circuit denied qualified immunity to college officials when they retaliated against communications instructor Kenneth Hardy for using offensive language in his classroom.[80] In the course, entitled "Introduction to Interpersonal Communication," Hardy used the words "nigger" and "bitch," as well as other loaded terms, as part of a classroom discussion to examine the impact of disparaging words upon oppressed groups in society.[81] After an African-American student complained about the class, the College decided not to renew Hardy's teaching contract.[82] College officials argued that they surely possessed the authority to discipline Hardy for using "sexist and racially derogatory" language in class.[83] But the Sixth Circuit disagreed:

> [T]he argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction, is totally unpersuasive. . .t. There is no doubt that the right allegedly violated in this case, based on the freedom of speech protected by the First Amendment, is one of our most fundamental and established constitutional rights.[84]

Again, the court relied directly on *Keyishian* to reach its conclusion. And again, the court's holding left no doubt about the First Amendment's reach into the college classroom.

Dube and *Hardy* present powerful reminders of the constitutional haven available for speech related to teaching. Indeed, the speech at issue in both cases touched upon highly sensitive and potentially inflam-

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79 *Id.* at 598 (emphasis in original) (citations omitted).
80 Hardy v. Jefferson Cmty. Coll., 260 F.3d 671 (6th Cir. 2001).
81 *Id.* at 674–75.
82 *Id.* at 675.
83 *Id.* at 680.
84 *Id.* at 680–82.

matory matters, yet both courts condemned the schools' actions as being clearly impermissible. While these cases represent perhaps the strongest of such statements in the circuits prior to *Garcetti*, virtually every other federal court of appeals has regarded a professor's classroom speech as constitutionally protected to some degree.[85]

While far fewer circuit courts have directly addressed the protection available for academic scholarship, the aforementioned body of cases likewise lends support to the position that public university faculty have speech rights in their scholarly writing. As a matter of constitutional policy, a public university's interest in restricting speech—if any—must be greater in a classroom setting with a captive audience of students than in an external audience of scholars.[86] Accordingly, scholarship should receive at least as much protection as teaching.

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[85] *See* Vanderhurst v. Colo. Mountain Coll. Dist., 208 F.3d 908, 913 (10th Cir. 2000) (recognizing that "teachers' classroom speech is entitled to some First Amendment protection"); Berg v. Bruce, 112 F.3d 322, 329 (8th Cir. 1997) ("Academic freedom is designed to 'protect the individual professor's classroom method from the arbitrary interference of university officials.'"); Cohen v. San Bernardino Valley Coll., 92 F.3d 968, 971–72 (9th Cir. 1996) (holding that imposition of discipline upon a professor for his sexually oriented classroom teaching violated the First Amendment because the college's sexual harassment policy was unconstitutionally vague); Ward v. Hickey, 996 F.2d 448, 452 (1st Cir. 1993) (holding that public schools may limit a teacher's classroom speech only if "the regulation is reasonably related to a legitimate pedagogical concern" and "the school provided the teacher with notice of what conduct was prohibited"); Bishop v. Aronov, 926 F.2d 1066, 1075–76 (11th Cir. 1991) (construing university's restrictions on a professor's classroom speech "narrowly because they implicate First Amendment freedoms"); Hillis v. Stephen F. Austin State Univ., 665 F.2d 547, 552–53 (5th Cir. 1982) (noting that the roots of academic freedom "have been found in the [F]irst [A]mendment insofar as it protects against infringements on a teacher's freedom concerning classroom content and method"); Clark v. Holmes, 474 F.2d 928, 931 (7th Cir. 1972) (officially recognizing that "although academic freedom is not one of the enumerated rights of the First Amendment, it is now clear that academic freedom, the preservation of the classroom as a 'market place of ideas,' is one of the safeguarded rights"). *But see* Boring v. Buncombe Cty. Bd. of Educ., 136 F.3d 364 (4th Cir. 1998) (holding that a public school drama teacher had no First Amendment rights in her selection of plays because drama was part of the school curriculum); Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 491 (3d Cir. 1998) (concluding that "a public university professor does not have a First Amendment right to decide what will be taught in the classroom"); Scallet v. Rosenblum, 106 F.3d 391 (4th Cir. 1997) (granting qualified immunity to university officials because "the parameters of the protection afforded to a university professor's academic speech were not clearly defined in May 1992 and are not clearly defined today").

[86] *See* Martin v. Parrish, 805 F.2d 583, 586 (5th Cir. 1983) (holding that professor's use of profanity in the classroom was not protected because the language "constituted a deliberate, superfluous attack on a 'captive audience' with no academic purpose or justification"); *Clark*, 474 F.2d at 931 (holding that professor's use of class time to criticize the university's administration and faculty was not protected because the criticisms were made "to a captive audience . . . that was composed of students who were dependent on him for grades and recommendations"). Furthermore, the Supreme Court's *Givhan* decision seems to limit the relevance of the public employee's audience for purposes of the *Pickering* analysis. *See supra* Part I.A (discussing *Givhan*).

The Second Circuit addressed the matter directly and expressly affirmed the speech protections available to a professor's publications. In *Levin v. Harleston*,[87] college administrators formally investigated Professor Michael Levin and encouraged students to transfer to an alternative class section after he authored three publications[88] that denigrated the "intelligence and social characteristics of blacks."[89] Fearing termination, Professor Levin turned down multiple offers to speak and write about his racial theories.[90] The College defended its actions on the grounds that it did not actually impose discipline or prevent him from teaching and publishing.[91] The Second Circuit was not convinced. It held that the College's reprisals created a "judicially cognizable chilling effect on Professor Levin's First Amendment rights"[92] which represented the "antithesis of freedom of expression."[93] The Second Circuit, thus, affirmed that the First Amendment limits the power of public universities to discipline professors for their scholarly speech. The pre-*Garcetti* legal landscape, therefore, left little room for the argument that public university professors forfeit their free speech rights when they enter the classroom or pick up a pen.

C. *Post*-Garcetti *Precedent in the Federal Courts of Appeals*

Perhaps recognizing this weight of authority, the two federal circuit courts that directly addressed the matter after *Garcetti* continued to shield professors' core academic speech from official reprisal, even when professors were speaking pursuant to professional duties.[94] Both the

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87 966 F.2d 85 (2d Cir. 1992).

88 *Id.* at 87. The publications consisted of a letter to the *New York Times*, a book review published in an Australian psychology journal, and a letter published in the *American Philosophical Association Proceedings*.

89 *Id.*

90 *Id.* at 89.

91 *Id.* at 88–89.

92 *Id.* at 89.

93 *Id.* at 88.

94 Two other federal courts of appeal have addressed professor speech after *Garcetti*, but the speech at issue was not related to teaching or scholarship. In *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008), the Seventh Circuit reviewed a professor's claim that he faced official reprisal for criticizing the university's use of proposed grant funds. Professor Kevin Renken secured a grant from the National Science Foundation that required matching funds from the school. *Id.* at 770–71. During the administration of the grant, Renken and the school's dean disagreed on the allocation of the funds. *Id.* at 771–72. Renken filed an internal complaint against the dean and sent emails that criticized the university's proposed use of the grant monies. *Id.* at 772. Consequently, the university decided to return the funds to the National Science Foundation. *Id.* at 773. Renken filed suit, alleging that the university retaliated against him by reducing his pay and returning the grant funds in violation of his free-speech rights. *Id.* The district court awarded summary judgment to the university and the Seventh Circuit affirmed, expressly relying on *Garcetti*. *Id.* at 774. In its analysis, the court of appeals did not even consider *Garcetti*'s reservation. This position was justified because Renken's

Fourth Circuit and Circuit effectively exempted teaching and scholarship from *Garcetti*'s "official duties" threshold.

In *Adams v. Trustees of University of North Carolina–Wilmington*, the Fourth Circuit became the first court of appeals to directly address how *Garcetti* would affect state university professors disciplined for speech related to their teaching and scholarship.[95] In 1993, Dr. Michael S. Adams was hired as an assistant professor of criminology in the Sociology and Criminal Justice Department at UNCW.[96] After being promoted to associate professor with tenure, Dr. Adams became a Christian, a change that transformed his religious and political beliefs.[97] Following his conversion, Dr. Adams wrote numerous website columns, delivered speeches, and published two books, all of which addressed a variety of social and political topics from a distinctly conservative perspective.[98] Dr. Adams relied on these activities, as well as his eleven peer-reviewed journal publications, numerous teaching awards, and a school-wide service award, when he applied for promotion to full professor in 2004.[99] The department chair denied his application.[100] Dr. Adams filed a speech retaliation claim in federal court, but the district court entered summary judgment for UNCW, holding that Adams was acting pursuant to his duties as a professor when he listed his "columns, publications and public appearances" in his application for promotion.[101]

Adams appealed and the Fourth Circuit reversed, concluding that the district court erred as a matter of law when it applied the "official duties" rule to Dr. Adams's teaching and scholarship[102]:

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speech was tied directly to a specific administrative job he was paid to do rather than teaching and scholarship.

In *Gorum v. Sessoms*, 561 F.3d 179 (3d Cir. 2009), Professor Wendell Gorum faced discipline for altering student grades in violation of university policy. *Id.* at 182. A university board recommended suspension but the president of the university recommended and procured Gorum's termination. *Id.* at 183. In response, Gorum sued, alleging that his termination was actually done in retaliation for his protected speech and association. *Id.* at 183. Specifically, Gorum alleged that he was terminated because he represented a student-athlete during a school disciplinary proceeding and because he had revoked the school president's invitation to speak at a fraternity prayer breakfast. *Id.* at 183–84. The court of appeals applied *Garcetti* and ruled that these activities were not entitled to constitutional protection because they were done pursuant to Gorum's official duties. *Id.* at 186. The Third Circuit, unlike the Seventh Circuit, expressly noted that Gorum's speech was "not speech related to scholarship or teaching." *Id.*

95 640 F.3d 550 (4th Cir. 2011). The author represented Dr. Adams through his appeal to the Fourth Circuit.

96 *Id.* at 553.

97 *Id.*

98 *Id.*

99 *Id.* at 554.

100 *Id.* at 555.

101 *Id.* at 561.

102 *Id.* at 562.

> Applying *Garcetti* to the academic work of a public university faculty member under the facts of this case could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment. That would not appear to be what *Garcetti* intended, nor is it consistent with our long-standing recognition that no individual loses his ability to speak as a private citizen by virtue of public employment.[103]

UNCW argued that Adams's speech was made pursuant to his official duties because he was employed as a professor "to engage in scholarship, research and service to the community."[104] But this reading of *Garcetti* was too abstract for the Fourth Circuit. In its view, the "official duties" analysis requires a closer nexus between the speech and the alleged job duty, especially in the academic context:

> 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. . . . [T]hat thin thread is insufficient to render Adams' speech "pursuant to [his] official duties" as intended by *Garcetti*.[105]

To further emphasize its point, the Fourth Circuit denied the defendants' qualified immunity defense, ruling instead that Adams's right to speak as a private citizen on matters of public concern was clearly established.[106] After *Adams*, it is evident that public university faculty members' scholarship and teaching shall not be considered part of their job duties simply because they hold the title of "professor."

The Ninth Circuit followed the Fourth Circuit's lead and upheld the protection of core academic speech in the public university context.[107] In *Demers v. Austin*, David Demers alleged that Washington State University (WSU) officials retaliated against him for distributing a pamphlet calling for the restructuring of his department.[108] The district court granted summary judgment to the defendants, reasoning that Demers's pamphlet was made "in the performance of Demers's official duties as a

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103 *Id.* at 564.

104 *Id.*

105 *Id.* (second alteration in original).

106 *Id.* at 565–66.

107 Demers v. Austin, 746 F.3d 402, 418 (9th Cir. 2014).

108 *Id.* at 406–07.

faculty member of WSU and [was] therefore not protected under the First Amendment."[109]

The Ninth Circuit agreed that Demers wrote and distributed the pamphlet as part of his official duties within the meaning of *Garcetti*,[110] but did not concur as to the legal consequences of that conclusion. Citing to *Adams* for support, the appellate court reversed, holding "that *Garcetti* does not—indeed, consistent with the First Amendment, *cannot*—apply to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher or professor."[111] The Ninth Circuit thereby carved an explicit exception into *Garcetti* for academic scholarship and classroom instruction. *Demers* thus followed *Adams*'s rationale regarding the provision of clear protection for academic freedom. Both decisions cautioned that *Garcetti* should not be applied to teaching and scholarship. Consequently, both decisions soundly affirmed what federal courts had been saying for decades prior to *Garcetti*: Public university faculty can still speak as citizens on matters of public concern when they teach and publish.[112]

III. CORE ACADEMIC SPEECH IS ENTITLED TO HEIGHTENED FIRST AMENDMENT PROTECTION

Establishing that core academic speech implicates the First Amendment does not, however, address the extent to which such speech is constitutionally insulated. Of course, under the public employee speech doctrine, a professor must speak on a matter of public concern to make any claim upon the Free Speech Clause.[113] Assuming a professor's

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109 *Id.* at 409. The court "put to one side" Demers's draft chapters because the chapters were not included in the record. *Id.* at 413–14. Hence, the court only considered the pamphlet outlining Demers's restructuring plan. *Id.*

110 *Id.* at 410.

111 *Id.* at 412 (emphasis added).

112 Two federal district courts have similarly refused to apply *Garcetti* to the classroom instruction of public university professors. *See* Kerr v. Hurd, 694 F. Supp. 2d 817, 844 (S.D. Ohio 2010) ("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."); Sheldon v. Dhillon, No. C-08-03438 RMW, 2009 WL 4282086, at *4 (N.D. Cal. Nov. 25, 2009) ("To the extent that the defendants took action against plaintiff because of her instructional speech to her class, and assuming without deciding at this stage of the proceedings that the instructional speech was within the parameters of the approved curriculum and within academic norms—i.e., that the defendants' actions were not reasonably related to legitimate pedagogical concerns—then the complaint has stated a claim for relief under 42 U.S.C. § 1983."). *But see* Nichols v. Univ. of S. Miss., 669 F. Supp. 2d 684, 698 (S.D. Miss. 2009) (holding that a professor's comments made to a student in class about homosexuality were made pursuant to the professor's official duties).

113 This Article addresses the level of judicial scrutiny appropriate for teaching and scholarship that touches upon matters of public concern. While a professor claiming retaliation must establish that his speech touches upon such matters, this should not be a high hurdle. *See* Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 679 (6th Cir. 2001) ("Because the essence of a

speech meets this threshold, how should courts "balance 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[?]"[114] This Article now turns to that question.

Many scholars have argued that the constitutional balance should be weighted in favor of the school to reflect either the university's "academic freedom"[115] or the perceived inability of judges to make purely academic decisions.[116] While there is some precedent for this position,[117] this section argues that the *Pickering* balance should be tipped in favor of the professor when the speech at issue is related to teaching and scholarship. As will be discussed below, this conclusion is buttressed by the very policy concerns used to justify the employee speech doctrine and the federal precedent in the academic setting.

A. Policy Underlying Pickering

To determine if a public employee's speech on a matter of public concern is ultimately protected, *Pickering* requires the court to balance both the employee's interest and society's interest in the speech against the needs of the government to perform its public functions.[118] The un-

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teacher's role is to prepare students for their place in society as responsible citizens, classroom instruction will often fall within the Supreme Court's broad conception of 'public concern.'"); Scallet v. Rosenblum, 911 F. Supp. 999, 1013 (W.D. Va. 1996), *aff'd*, 106 F.3d 391 (4th Cir. 1997) ("[Plaintiff-Instructor] as an educator, routinely and necessarily discusses issues of public concern when *speaking as an employee*. Indeed, it is part of his educational mandate.").

114 *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

115 Byrne, *supra* note 52, at 311 ("The Court has come to limit the judiciary's role to excluding non-academics from imposing ideological criteria on academic decision-making, while refusing to impose substantive limits on academic administrators who in good faith penalize faculty for academic speech. Even though the Court's approach appears anomalous given that the main thrust of the non-legal tradition of academic freedom has been to secure the autonomy of the individual teacher against improper interference by administrators, I have argued that the Court has struck the appropriate balance between its desire to protect free scholarship and its concern about involving itself in academic disputes.").

116 *Id.* at 286 ("It is incoherent to suggest that academic freedom could be furthered by reducing peer review and substituting the enforcement of rules by lay persons such as judges.").

117 Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985) ("When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.").

118 Garcetti v. Ceballos, 547 U.S. 410, 420 (2006). Certainly, the interests of the employee and the public will vary depending upon the nature of actual statements made. Indeed, the federal courts have consistently held that "[t]he government employer must make a stronger showing of the potential for inefficiency or disruption when the employee's speech involves a 'more substantial[t]' matter of public concern." Love-Lane v. Martin, 355 F.3d 766, 778 (4th Cir. 2004) (quoting Connick v. Myers, 461 U.S. 138, 152 (1983)). Notwithstanding, *Pickering* and its progeny have provided general guidelines for balancing the em-

derlying policy goal behind this balance is thus the maximization of employee expression on matters of public concern consistent with the mission of the particular governmental entity. In the academic context, because the First Amendment value of core academic speech to the professor and society is so high, and the university's corresponding interest in restraining such speech is so minimal, the *Pickering* balance should weigh decidedly in the professor's favor.

1. The Professor's Interest in Core Academic Speech

The *Pickering* Court tied the importance of the public employee's interest in his speech directly to its contribution to the "free and open debate" necessary to inform the electorate on matters of public interest.[119] The Court further explained that when teachers have more "informed and definite opinions" on certain matters, their freedom to speak freely on such questions without reprisal is "essential."[120] Professors as a class have such essential interests in their speech when they teach and publish on matters of public concern, for they exist to educate the electorate on subjects specifically related to their expertise.

Professors serve a unique and vital role in our society: They search for truth and share it with the public. Their basic function is to "critical[ly] inquir[e] [into] subjects within their scholarly expertise and [ ] disseminat[e] the results of their scholarship through teaching and publication . . . ."[121] They must "constantly striv[e] towards 'truth' in [their] discipline" by "generat[ing] better teaching and scholarship."[122] Unlike many outside the university, professors' exploration of ideas is not to be tainted by motives such as profit-building or policymaking.[123] Rather, their exploration is disinterested and detached; they "follow truth wherever it may lead."[124] Professors' academic speech thus distinctly advances the pursuit of truth and directly contributes to the goal of an

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ployee's interest in speech on a matter of public concern against the employer's interest in providing efficient government services.

[119] *Pickering*, 391 U.S. at 571–72; *see also* McVey v. Stacy, 157 F.3d 271, 277 (4th Cir. 1998) ("Protection of the public interest in having debate on matters of public importance is at the heart of the First Amendment, and, indeed, speech concerning public affairs is the essence of self-government.").

[120] *Pickering*, 391 U.S. at 572.

[121] Rabban, *supra* note 53, at 241.

[122] Nugent & Flood, *supra* note 9, at 151.

[123] Byrne, *supra* note 52, at 333–34 ("[T]he university is the preeminent institution in our society where knowledge and understanding are pursued with detachment or disinterestedness. Outside the university, people generally shape or criticize ideas to make money or influence public policy; this is preeminently the case with the mass media, the most powerful forum in which the exchange of ideas takes place.").

[124] Letter from Thomas Jefferson to William Roscoe (Dec. 27, 1820), *in* 15 THE WRITINGS OF THOMAS JEFFERSON 302, 303 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905).

informed public.[125] These are core values the First Amendment was designed to protect.[126]

That the professors' pursuit requires freedom is "almost self-evident."[127] They cannot fulfill their noble educational duty "if the conditions for the practice of a responsible and critical mind are denied to them."[128] "Scholarship cannot flourish in an atmosphere of suspicion and distrust."[129] The research process requires expansive breathing room and the liberty to fail and try again. What teacher would boldly explore ideas if this journey could cost her her job? When "publish *and* perish" becomes the unspoken university motto, all but the most daring professors will follow the argument where it leads.

Likewise, teaching cannot be effective where fear of official reprisal "cast[s] a pall of orthodoxy"[130] over the free exchange of ideas in the classroom. Education is an "inherently expressive enterprise [that] requires its participants to engage in speech and expressive conduct."[131] Teachers, particularly, must be free to communicate between and among themselves, students, and the larger community."[132] It is unreasonable to ask professors to share their knowledge with their students and with society if the state can punish them for doing so.

University professors thus play a unique role in educating their students and ultimately the public in their area of expertise. They directly contribute to "free and open debate" on a myriad of scientific, political, religious, sociological, and philosophical matters so that the electorate

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125 *See* American Association of University Professors (AAUP), 1940 Statement of Principles on Academic Freedom and Tenure, http://www.aaup.org/file/1940%20Statement.pdf ("Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition. Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.").

126 Adler v. Bd. of Educ., 342 U.S. 485, 511 (1952) (Douglas, J., dissenting); *see also* Red Lion Broad. Co., v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.").

127 Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); *see also* BOK, *supra* note 56, at 358 ("Guaranteeing the freedom of faculty members to speak and write as they choose must presumably be a [necessary ingredient for creating an environment conducive to inspiring creative thought]. . . . [O]ne must assume that restrictions on speech and thought will inhibit other creative minds from contributing all they might to human knowledge and understanding. As a result, freedom of expression is properly thought to be indispensable to academic life in America and has been respected as such for almost a century.").

128 Wieman v. Updegraff, 344 U.S. 183, 196 (1952).

129 *Sweezy*, 354 U.S. at 250.

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

131 Scott R. Bauries & Patrick Schach, *Coloring Outside the Lines:* Garcetti v. Ceballos *in the Federal Appellate Courts*, 262 ED. LAW REP. 357, 359 (2011).

132 *Id.*

can make informed decisions on the important policy matters of the day.[133] Moreover, they rely on the First Amendment to protect the teaching and scholarship that makes this education possible. While the First Amendment surely protects freedom of thought and expression for all, "none needs it more than the teacher."[134] Consequently, when professors teach and publish on matters of public concern, they have an especially weighty interest in such academic speech. That interest must be accounted for in the *Pickering* balance.[135]

2. Society's Interest in Core Academic Speech

The Supreme Court has recognized that First Amendment interests beyond those of the speaker are also at stake.[136] Accordingly, the *Pickering* balance must also promote the "public's interest in receiving the well-informed views of government employees engaging in civic discussion."[137] Society itself is heavily invested in professors' teaching and scholarship. In particular, society thrives upon the knowledge created both inside and outside the classroom.[138] Every day, university faculty yield new discoveries in the natural sciences that help solve many of the great problems facing the world. For example, their research does much to cure and prevent diseases, address pollution, and increase food pro-

133 Pickering v. Bd. of Educ., 391 U.S. 563, 571–72 (1968).

134 Adler v. Bd. of Educ., 342 U.S. 485, 508 (1952) (Douglas, J., dissenting). It is noteworthy that most of the successful plaintiffs in the Supreme Court's landmark public employee speech cases were teachers. *See generally* Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410 (1979); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Perry v. Sinderman, 408 U.S. 593 (1972); *Pickering*, 391 U.S. 563; *Keyishian*, 385 U.S. 589; Shelton v. Tucker, 364 U.S. 479 (1960); Sweezy v. New Hampshire, 354 U.S. 234 (1957); Wieman v. Updegraff, 344 U.S. 183 (1952).

135 Tepper & White, *supra* note 9, at 165 ("Research and publication further a core function of the university: knowledge creation. Teaching involves another core function: knowledge dissemination. These functions suggest that academic professionals are treated differently.").

136 Garcetti v. Ceballos, 547 U.S. 410, 419 (2006).

137 *Id.*; *see also* BOK, *supra* note 56, at 369 ("The informed opinion that professors can bring to public debate about important national issues is vital to a healthy democracy."); Spurgeon, *supra* note 11, at 407 ("[A] foundational pillar of First Amendment protection for public employee speech is 'the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion.'").

138 *See* BOK, *supra* note 56, at 1 ("In the modern world, colleges and universities have assumed an importance far beyond their role in earlier times. They are now the country's chief supplier of three ingredients essential to national progress—new discoveries in science, technology, and other fields of inquiry; expert knowledge of the kind essential to the work of most important institutions; and well-trained adults with the skills required to practice the professions, manage a wide variety of organizations, and perform an increasing proportion of the more demanding jobs in an advanced, technologically sophisticated economy."). *See generally* UNIVERSITY-DISCOVERIES, http://university-discoveries.com/ (last visited Oct. 1, 2015). This resource contains "thousands of discoveries, inventions, innovations, devices, concepts, techniques, and tools that were born at great American universities." *Id.*

duction.[139] Likewise, professors' research in the social sciences provides the public with insight into the nature of man and society in the hope of addressing such cultural ills as crime, inequality, and poverty.[140] And society has relied upon universities more and more to drive the nation's innovation and research:

> Today, universities perform 56 percent of all basic research, compared to 38 percent in 1960. Moreover, universities are increasingly passing on these results to the private sector: Between 1991 and 2009, the number of patent applications filed by universities increased from 14 per institution to 68 per institution; licensing income increased from $1.9 million per institution to $13 million per institution; and new start-ups formed as a result of university research increased from 212 in 1994 to 685 in 2009.[141]

Society's vital interest in the fruits of professors' teaching and research is evident.[142]

But professors provide another foundational benefit to our society: They lead the culture by providing training that facilitates self-governance.[143] Professor Byrne's insights on this training function are worth repeating. In his view, the faculty member's "careful [and] critical . . . method of discourse . . . creates the most favorable environment in which thinkers may formulate ideas that stand apart from popular opinion or

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[139] Byrne, *supra* note 52, at 337.

[140] *See* Sweezy v. New Hampshire, 354 U.S. 234, 261 (1957) (Frankfurter, J., concurring) ("Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities."); *see also Education for Sustainable Development*, UNESCO, http://www.unesco.org/new/en/education/themes/leading-the-international-agenda/education-for-sustainable-development/education-for-sustainable-development (last visited Apr. 8, 2016) (quoting Nelson Mandela: "Education is the most powerful weapon which you can use to change the world.").

[141] ROBERT D. ATKINSON & LUKE A. STEWART, INFO. TECH. & INNOVATION FOUND., UNIVERSITY RESEARCH FUNDING: THE UNITED STATES IS BEHIND AND FALLING 3 (2011).

[142] BOK, *supra* note 56, at 1 ("[Universities] supply the knowledge and ideas that create new industries, protect us from disease, preserve and enrich our culture, and inform us about our history, our environment, our society and ourselves.").

[143] Alan K. Chen, *Bureaucracy and Distrust: Germaneness and the Paradoxes of the Academic Freedom Doctrine*, 77 U. COLO. L. REV. 955, 963 (2006) ("One could argue that universities encourage and develop critical thinking processes in their students and the ability to challenge accepted wisdom, which leads not only to a better educated citizenry but also meaningfully facilitates self-governance in a democratic society.").

fashionable error."[44] Moreover, by critically examining knowledge past and present, faculty instill in students a capacity for "mature and independent judgment."[45] Such critical discourse and judgment are necessary for a culture that hopes to sustain a representative government like our own:

> That our democracy ultimately rests on public opinion is a platitude of speech but not a commonplace in action. Public opinion is the ultimate reliance of our society only if it be disciplined and responsible. It can be disciplined and responsible only if habits of open-mindedness and of critical inquiry are acquired in the formative years of our citizens. The process of education has naturally enough been the basis of hope for the perdurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards. To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole."[46]

And, as Thomas Jefferson affirmed in America's charter, our republic was instituted to secure the "unalienable rights" of mankind."[47] So it is also no exaggeration to regard professors as the guardians of our liberties."[48] These lofty accolades reflect the ancient knowledge of King Solomon, who also confirmed the role of scholars as cultural leaders in

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[44] Byrne, *supra* note 52, at 334. Professor Byrne is one of the leading experts on issues related to academic freedom. Though I agree with his apt description of the training function of the university, we ultimately disagree on the judicial standard for professors' speech retaliation claims for the reasons discussed in this Part and Part III.B.

[45] *Id.* at 335.

[46] Wieman v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring); *see also* BOK, *supra* note 56, at 1 ("[Universities] help to strengthen our democracy by educating its future leaders, preparing students to be active, knowledgeable citizens, and offering informed critiques of government programs and policies.").

[47] DECLARATION OF INDEPENDENCE ¶2 (1776) ("We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these Rights, Governments are instituted among Men . . . .").

[48] *See JMU Reports*, JAMES MADISON UNIV., https://www.jmu.edu/jmureports/index.shtml (last visited Apr. 8, 2016) (quoting James Madison: "The advancement and diffusion of knowledge is the only guardian of true liberty."); *More Quotes by John F. Kennedy*, FORBES QUOTES, http://www.forbes.com/quotes/author/john-f-kennedy/ (last visited Apr. 8, 2016) (quoting John F. Kennedy: "Liberty without learning is always in peril, and learning without liberty is always in vain."); NUHA FOUND., http://www.nuhafoundation.org/home/blog/blogging entries/2011/general/only_the_educated_are_free_epictetus_e_mnonjela#.VrpocMu4nfY (last visited Apr. 8, 2016) (quoting Epictetus: "Only the educated are free."); THOMAS JEFFERSON FOUND., https://www.monticello.org/site/jefferson/if-we-are-guard-against-ignorance-quotation (last visited Apr. 8, 2016) (quoting Thomas Jefferson: "If a nation expects to be ignorant and free in a state of civilization, it expects what never was and never will be.").

society: "The words of the wise are like goads, and the words of scholars are like well-driven nails, given by one Shepherd."[149]

Society is therefore deeply invested in both the discoveries and the training professors provide in their roles as teachers and scholars. Indeed, these citizen-servants grant the public access to new technology and ideas and also prepare its citizens to participate in robust debate on matters of public importance, both of which are fundamental First Amendment values."[150] Therefore, when a professor teaches and publishes, both he and society have substantial interests in his speech. These interests should weigh in favor of the professor in the *Pickering* balance.

3. The State University's Interest in Restricting Core Academic Speech

The state's interests in providing efficient services to the public must also be considered in the *Pickering* balance, but these functional interests are minimized in the academic context. Because controversy is inherent in the university's distinct educational mission, the university is "less likely to suffer a disruption in its provision of services" due to controversial speech than other public entities.[151]

The Supreme Court has clarified that the "extra power the government has [to limit its employees' speech] comes from the nature of the government's *mission* as employer."[152]

> Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do these tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's effective operations begins to say or do things that detract from the agency's effective operation, the government employer must have some power to restrain her."[153]

The state's power to restrict employee speech is thus justified only to the extent necessary to keep its employees in line with the agency's mission. Control and mission are directly related. Accordingly, an employee who

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149 *Ecclesiastes* 12:11.

150 *See* Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality of the Court explaining that professors play a "vital role in [our] democracy" by "guid[ing] and train[ing] our youth" and by making new discoveries; *see also* Pickering v. Bd. of Educ., 391 U.S. 563, 573 (1968) (describing the "public interest in having free and unhindered debate on matters of public importance" as "the core value of the Free Speech Clause of the First Amendment").

151 *See* Mills v. Steger, 64 F. App'x 864, 872 (4th Cir. 2003).

152 Waters v. Churchill, 511 U.S. 661, 674 (1994) (emphasis added).

153 *Id.* at 674–75.

speaks on a matter of public concern is only subject to those speech restrictions that prevent disruption of the employer's mission.[154]

This principle has naturally led the courts to apply varying levels of First Amendment scrutiny, depending upon the government institution at issue. For example, speech restrictions enacted by the military are subject to more deference to facilitate "the primary business of armies and navies to . .t. fight wars.'"[155] Likewise, courts have given more leeway to speech regulations enacted by prison officials[156] and public safety officials[157] to accommodate the unique missions of their respective institutions. The same principle warrants that the courts apply *stricter* scrutiny to university speech restrictions, given the academy's unique mission[158]:

> Universities serve a different function than any other governmental institution or any other governmental employer. They exist for the purpose of creating and disseminating knowledge. They are created as institutions of both teaching and research, which advance social interests in producing educated citizens and increasing understanding across multiple academic disciplines.[159]

When professors teach and publish, they presumptively advance the core functions of the university: knowledge creation and knowledge dissemination. Because the mission of the public university is promoted—not disrupted—when a professor teaches and publishes, the institution has a minimal interest in restricting such speech. To permit public universities to freely regulate professors' core academic speech would achieve the perverse result of silencing ideas in the very heart of the "marketplace of

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154 Garcetti v. Ceballos, 547 U.S. 410, 419 (2006) ("So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively."); *see also* Ridpath v. Bd. of Governors, 447 F.3d 292, 317 (4th Cir. 2006) ("For *Pickering* balancing 'we must take into account the context of the employee's speech' and 'the extent to which it disrupts the operation and mission' of the institution."); Cockrel v. Shelby Cty. Sch. Dist., 270 F.3d 1036, 1053 (6th Cir. 2001) ("In striking the balance between the State's and the employee's respective interests, this court has stated that it will 'consider whether an employee's comments meaningfully interfere with the performance of her duties [or] undermine a legitimate goal or mission of the employer.'").

155 Parker v. Levy, 417 U.S. 733, 743 (1974) (citation omitted).

156 Rabban, *supra* note 53, at 230–31 ("Courts have increasingly observed that the level of [F]irst [A]mendment protection varies with the functions of institutions. Newspapers and libraries, for example, are subject to very different [F]irst [A]mendment standards than military bases and prisons.").

157 Goldstein v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337, 354–55 (4th Cir. 2000) (noting that the interest in camaraderie and efficiency in a fire company merited "substantial weight").

158 Christian Legal Soc'y v. Martinez, 561 U.S. 661, 685–86 (2010) ("'First Amendment rights,' we have observed, 'must be analyzed in light of the special characteristics of the school environment.'").

159 Chen, *supra* note 143, at 964.

ideas."[160] This, in turn, "would effectively deprive the larger community, as well as the academic world, of that information and expertise which university professors are best equipped to derive from their scholarship and research within their academic disciplines."[161] Such an interpretation of the First Amendment would undercut the very raison d'être of the public university.

Of course, universities need to be efficient as well. But it bears emphasis that "their primary goals are research and teaching, not the delivery of services to the general public."[162] So professors presumptively further the university's educational mission even when their teaching and scholarship would be deemed controversial or disruptive in other contexts. Indeed, the search for knowledge *presupposes* a measure of "disruption."[163] For "[s]cientific and philosophical discoveries can be tested, verified and perfected, or analytical rashness rendered innocuous, and error exposed, only by the collision of mind with mind, and knowledge with knowledge."[164] Even the ancients recognized that knowledge is refined when "iron sharpens iron."[165] Accordingly, "[d]ebate that might be viewed as disruptive in other public agencies is an accepted, and even necessary, part of the production of new knowledge and its dissemination in classrooms."[166] Consequently, public universities must not only tolerate but embrace such rigorous exchange of ideas. In fact, it is the very "business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation."[167] Censorship of professors' teaching or scholarship is indeed the antithesis of the university's mission and the First Amendment.[168] The university that seeks to control its professors' academic speech in this manner should find no solace in the *Pickering* balance. Instead, the balance should weigh against that university.

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160 Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) ("The classroom is peculiarly the 'marketplace of ideas.'") (citations omitted).

161 Robert M. O'Neill, *Academic Speech in the Post-Garcetti Environment*, 7 FIRST AMEND. L. REV. 1, 20 (2008).

162 Areen, *supra* note 9, at 990.

163 *See* BOK, *supra* note 56, at 137 ("[T]he university is inherently a disruptive force.").

164 Nugent & Flood, *supra* note 9, at 151.

165 *Proverbs* 27:17.

166 Areen, *supra* note 9, at 990.

167 Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

168 Bonnell v. Lorenzo, 241 F.3d 800, 823 (6th Cir. 2001) ("Constitutional protection is afforded to the open and robust expression and communication of ideas, opinions, and information to further [First Amendment] objectives. This protection parallels a central mission of higher education: to nurture and preserve a learning environment that is characterized by competing ideas, openly discussed and debated.").

B. *Precedent Applying Heightened Scrutiny to Professor Speech Claims*

This position is consistent with several First Amendment rulings in the academic context. Indeed, the Supreme Court itself implicitly struck this balance in *Keyishian*. There, the state and the university system enacted a regulatory scheme to control the qualifications of its teachers and thereby prevent the subversion of the educational system.[169] The dissent characterized the laws as a means of "self-preservation" both for the educational system and, in turn, for the "future of our land."[170] The Supreme Court had previously labeled such interests as "vital" state concerns.[171] The *Keyishian* majority conceded that these interests were "substantial,"[172] but reaffirmed that even such important governmental interests could not be pursued by expansive means "when the end can be more narrowly achieved."[173] The "standards of permissible statutory vagueness are *strict* in the area of free expression."[174] New York State University's regulations could not stand as written because they broadly stifled the professors' "most precious freedoms."[175] The Court's reasoning echoes heightened First Amendment scrutiny, which requires the government to narrowly tailor its speech restrictions to accomplish an important or compelling governmental interest.[176] The University regulations failed this standard.[177] While the Court did not expressly invoke the *Pickering* balance—for it did not deliver that opinion until the following year—its decision foreshadowed *Pickering* by finding the University's interests insufficiently tailored to outweigh the professors' right to academic speech.[178]

This stricter standard is internally consistent with other aspects of the *Keyishian* Court's holding. The Court went beyond simply finding the regulatory scheme to be unconstitutionally vague. It wholly condemned the scheme as fatally overbroad because of its chilling effect on

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169 *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 601 (1967).

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

171 Shelton v. Tucker, 364 U.S. 479, 485 (1960) ("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 attitudes of young minds towards the society in which they live. In this, the state has a vital concern.'").

172 *Keyishian*, 385 U.S. at 602.

173 *Id.*

174 *Id.* at 604 (emphasis added).

175 *Id.* at 603–04.

176 *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015).

177 *Keyishian*, 385 U.S. at 603–04 (1967) (citations omitted) ("'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.' New York's complicated and intricate scheme plainly violates that standard.").

178 *Id.* at 604.

core academic speech."[179] The Court explained, in detail, how the regulations would deter all but the boldest professors from speaking freely in their classrooms and publications."[180] Professors in the New York State University system would surely not teach or publish zealously when they could be punished for expressions of mere abstract doctrine[181] or belief."[182] Teaching and scholarship "cannot flourish in an atmosphere of suspicion and distrust."[183] Preventing this chilling effect was thus central to the Court's ruling.

The Court's condemnation did not stop there. The Court asserted that in addition to the deficiencies of vagueness and overbreadth, the University's regulations cast a "pall of orthodoxy over the classroom."[184] The First Amendment precludes any state university from enforcing—or even appearing to enforce—a particular "belief or way of thinking that is accepted as true or correct."[185] This restriction recognizes the limits of state authority as well as the reality that mankind has not fully comprehended any field of education."[186] Such state regulation of professors' work would hamstring their effectiveness as educators and ultimately "imperil the future of our Nation."[187] The New York State University system "plainly"[188] could not bear the weight of the judicial burden the Court imposed upon it.

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179 *Id.* (" 'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.' New York's complicated and intricate scheme plainly violates that standard. When one must guess what conduct or utterance may lose him his position, one necessarily will 'steer far wider of the unlawful zone . . . .' For 'the threat of sanctions may deter . . . almost as potently as the actual application of sanctions.' The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.").

180 *See supra* Part II.A (discussing the effect of the regulations upon teaching and scholarship); *Keyishian*, 385 U.S. at 601 ("The very intricacy of the plan and the uncertainty as to the scope of its proscriptions make it a highly efficient ***in terrorem*** mechanism. It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery. The uncertainty as to the utterances and acts proscribed increases that caution in 'those who believe the written law means what it says.' The result must be to stifle 'that free play of the spirit which all teachers ought especially to cultivate and practice.'" (citations omitted)).

181 *Keyishian*, 385 U.S. at 599.

182 *Id.* at 600.

183 *Id.* at 603.

184 *Id.*

185 *See Orthodoxy*, MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/orthodoxy (last visited Apr. 8, 2016).

186 *See Keyishian*, 385 U.S. at 603 ("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.").

187 *Id.* at 603.

188 *Id.* at 604.

A proper balance under *Pickering* must also incorporate this judicial burden. A balancing test favoring the university's interests over the professor's speech—or even one that balanced them equivalently—would entirely ignore the Court's concerns. A close-call, post hoc legal balance does not lead to inspired teaching and research.[189] The professor must be assured *beforehand* that she is free to speak, and heightened First Amendment scrutiny gives her that assurance.

The federal courts of appeals that have addressed the issue specifically have also found university interests wanting in the *Pickering* balance.[190] As discussed in Part II.B, the Sixth Circuit has held that Jefferson Community College could not, consistent with the First Amendment, discipline Professor Hardy for using offensive language as part of his classroom instruction.[191] The College had asserted that Hardy's teaching created both an actual and potential interference with the school's operations. First, the College claimed—and the court accepted—that Hardy's speech created actual and substantial disharmony with the administration.[192] Typically, the Sixth Circuit and other federal circuit courts have held that such disharmony weighs against the employee in the *Pickering* balance.[193] In this case, however, the court found that the friction with the College's administration did not "impede[e] [Hardy's] proper performance of his daily duties in the classroom or . . . interfere[e] with the regular operation of the school[e] generally."[194] So Hardy's "disruption" did not, as a matter of law, interrupt the learning process.[195]

The College countered that Hardy's racially charged publications potentially threatened enrollment numbers by creating negative publicity

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189 *See* BOK, *supra* note 56, at 360–61 ("[P]rofessors are still not entirely sure how much protection academic freedom provides; in particular, its application to what instructors say in the classroom remains a murky area with few clear precedents."). Given this fogginess in the law, it is unsurprising when Bok reports that "more than half of the faculty in research universities do not now believe that 'the administration at your institution supports academic freedom.'" *Id.* at 361.

190 *See* Cohen v. San Bernardino Valley Coll., 92 F.3d 968, 971–72 (9th Cir. 1999) (holding that a college violated the First Amendment when it disciplined a tenured professor under the school's sexual harassment policy). The court did not conduct any balancing of interests, but rather concluded that the policy was unconstitutionally vague as applied to the professor's in-class comments. *Id.*

191 Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 682 (6th Cir. 2001).

192 *Id.* at 681.

193 *Id.* at 680–81 ("*Pickering* counsels that courts should consider whether an employee's comments meaningfully interfere with the performance of his duties or with the employer's general operations, undermine a legitimate goal or mission of the employer, create disharmony among coworkers, undercut an immediate supervisor's discipline over the employee, or destroy the relationship of loyalty and trust required of confidential employees.").

194 *Id.* at 681 (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 572–73 (1968)).

195 As discussed in Part V.A., a professor does not have a First Amendment right to stall the educational process.

for the school.[196] Outside the university context this argument might have prevailed, as the federal courts have "consistently given greater deference to government predictions of harm used to justify restriction of employee speech."[197] Here, however, the Sixth Circuit found the College's prediction to be nothing more than the "undifferentiated fear" of disturbance, which is never sufficient to overcome the freedom of expression.[198] Thus, the court of appeals ruled against the College under circumstances that would normally have yielded a victory for other government employers. *Hardy* demonstrates that the *Pickering* balance must be applied to fit the unique mission and circumstances of the academy. In this context, college claims of actual and potential disruption do not receive as much weight as they might in other employment scenarios.

The *Levin* decision, discussed in Part II.B, demonstrates just how far this principle can extend. There, the Second Circuit held that the First Amendment prohibited college officials from threatening to discipline Professor Levin for authoring controversial publications.[199] The court's decision is significant because both sides conceded that protests against Professor Levin's racial theories led to some actual class disruption.[200] The record at the district court level documented at least three occasions in which vocal student demonstrations interrupted Professor Levin's and other professors' classes.[201] In other circumstances, such disruption would have resulted in an easy win for the state employer, because the government's interests are at their zenith when the employee's speech disrupts the government's provision of services. In fact, actual disruption is not necessary; the employer need only reasonably forecast disruption of government services to prevail in the *Pickering* balance.[202] Yet the Second Circuit not only ruled in favor of Professor Levin, it actually considered the College's failure to control the student

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196 *Hardy*, 260 F.3d at 681.

197 Waters v. Churchill, 511 U.S. 661, 673 (1994).

198 *Hardy*, 260 F.3d at 682 (quoting Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 508 (1969)).

199 Levin v. Harleston, 966 F.2d 85, 87 (2d Cir. 1992).

200 *Id.* at 90 ("Appellants' final disputed response to Professor Levin's writings was one of inaction rather than action, *i.e.*, their alleged failure to take steps to prevent what they themselves describe as 'undisputed facts concerning disruptions' of Levin's classes.").

201 Specifically, the district court opinion cited the following disruptive incidents: On April 8, 1987, a group of students conducted a loud demonstration outside of Professor Levin's class which disrupted his and other nearby classes; in March of 1989, Professor Levin was forced to cancel class when about twenty students burst into his classroom chanting and shouting, led by one student with a bullhorn; and in March of 1990, about thirty-five students entered Professor Levin's classroom, surrounded his students, and shouted so loudly that teaching became impossible. Levin v. Harleston, 770 F. Supp. 895, 903–05 (S.D.N.Y. 1991), *order aff'd in part, vacated in part*, 966 F.2d 85 (2d Cir. 1992).

202 Connick v. Myers, 461 U.S. 138, 152 (1983) ("Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.").

protests as a possible stand-alone speech violation.[203] The court refused to go this far, but the power of its holding is unmistakable. Even in the face of actual class disruption, the court gave greater weight to Professor Levin's academic speech than to the government's interest in restraining it. To be sure, the employee speech doctrine does not (and should not) permit a professor to disrupt the educational process. But the disruption inquiry is far less deferential to the university than it is in non-academic settings.

IV. THE PROPOSAL IN PRACTICE

These cases affirm the novel proposal of this Article that a proper application of the *Pickering* balance should be weighted in favor of the public university professor when she teaches or publishes on a matter of public concern. Accordingly, a court hearing a professor's claim that her university retaliated against her because of speech related to her classroom instruction or academic scholarship should apply the *Pickering* framework in the following manner.

The court must first ask whether the professor spoke as a citizen on a matter of public concern. This threshold inquiry should not include the "official duties" inquiry because the application of that standard would defeat virtually all such claims, in contradiction to *Keyishian* and other precedents discussed above.[204] The court instead must examine the "content, form and context"[205] of the professor's statement to determine whether the statement referred to a matter of public concern or a matter of personal interest.[206] If the latter, the analysis ends. If the former, the court should proceed to balance the professor's interest in her speech and society's interest in receiving it against the institution's interest in restricting that speech.[207] This step is the focus of this Article. The court should assess this balance with a presumption in favor of the professor. The university may rebut this presumption, but it will carry a heavy burden. The policies the university seeks to enforce must be precisely tailored to accomplish a substantial interest. Justice Frankfurter captured the essence of this burden in his *Sweezy* concurrence:

> For society's good—if understanding be an essential need of society—inquiries into these problems, specula-

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203 *Levin*, 966 F.2d at 90–91e

204 *See supra* Part II.

205 *Connick*, 461 U.S. at 147–48.

206 *Id.* at 147.

207 Garcetti v. Ceballos, 547 U.S. 410, 420 (2006) ("The Court's decisions, then, have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions.").

> tions 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.[208]

If the university fails to rebut this presumption—as it often will—the court must rule in favor of the professor. As discussed above, this analysis is justified by the professor's unique truth-seeking and educational functions, society's interest in the knowledge she creates, and the state university's corresponding mission to facilitate the creation and dissemination of knowledge.

V. CONCEPTUAL CHALLENGES

The proposal for heightened scrutiny is not without its challengers. Although there are surely many "what-about-the-professor-who" hypotheticals that can be imagined, the most serious counterarguments appear to fall into three categories. The first challenge contends that heightened scrutiny over teaching and scholarship would actually undercut the university's mission by immunizing poor teachers from correction. The second counterargument flows from the first and maintains that academic officials, rather than judges, should make decisions about the worthiness of a professor's work product. The third challenge contends that the professor's core academic speech is government speech, and thus, she has no constitutional rights with respect to that speech. These arguments, while reasonable at first glance, lose much of their force upon closer examination.

A. Catch-22 for the University

Perhaps the most forceful counterargument maintains that public universities cannot function if they are unable to make content-based evaluations of their professors' teaching and scholarship.[209] Universities

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[208] Sweezy v. New Hampshire, 354 U.S. 235,e262 (1957) (Frankfurter, J., concurring).

[209] *See* Roosevelt III, *supra* note 9, at 657 ("The point, again, is that the academic environment is one in which assessments of quality are vitally important. There may be no such thing as a false idea, as far as the First Amendment is concerned, but in reality there is such a thing as a bad article or a soporific lecture, and schools cannot function if they are denied the ability to make that judgment."); Byrne, *supra* note 52, at 310 ("The First Amendment formally insists upon a complete relativity of value among ideas and expressions in order to preserve liberty. Imposing such a model on the university would be false and perverse. The government agents here—faculty and deans—presumptively are competent to judge by academic criteria the value of the speaker's ideas; if we deny their collective authority we deny the structural principle of collective scholarship upon which the university is built. To 'liberate' the fomenter of innovative scholarship from adverse consequences would introduce a thor-

require the best and brightest professors to produce the highest quality instruction and research. As an essential part of this selection process, "[s]cholars routinely are criticized for the content of their speech by other scholars, and some are eventually penalized by their institutions."[210] Indeed, it is the academy's essence to distinguish "worthy ideas" from "dull" ones and, necessarily, to value some speakers more than others."[211] While this sorting justification appears sufficient at first blush, it is founded on the faulty supposition that public university officials are incapable of evaluating professorial qualifications without using speech-discriminatory criteria.

The Fourth Circuit exposed this faulty logic in *Adams*. The district court granted summary judgment to UNCW, reasoning that if the First Amendment protected Adams's teaching and scholarship, universities would be placed in a constitutional bind every time they evaluated a professor's performance:

> [E]ither neglect employee requests and refuse to look at material, fueling allegations of free speech violations grounded in the refusal; or consider the material, knowing that doing so will open them up, in the event of an adverse outcome, to claims of free speech violations for basing denials on protected speech."[212]

In reversing, the Fourth Circuit concluded that this purported catch-22 is illusory:

> Adams' inclusion of the speech at issue as part of his application process asked the Defendants to consider it not according to the content qua speech, but as factoring into the sweeping requirements of scholarship and service necessary to support his promotion to full professor. The Defendants were not precluded from examining the materials for a permissible purpose using lawful criteria. At the same time, their review of those materials can be examined for an impermissible discriminatory use. This "bind" is no different than the commonplace consideration of criteria that govern all university employment decisions. It does not open the Defendants up to an

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oughgoing relativity into scholarly discourse that would destroy categories and disciplines, based as they are on accepted and identifiable—as well as disputed and changing—premises.").

210 Byrne, *supra* note 52, at 310.

211 *Id.*

212 Adams v. Trs. of Univ. of N.C.–Wilmington, 640 F.3d 550,562 (4th Cir. 2011).

> insurmountable dilemma as misidentified by the district court.[213]

Thus, a robust First Amendment is "neither a license for unlimited expression nor a basis to permit dysfunctional operations within the institution."[214] The university may appraise professors' academic speech for quality, as long as it does not discriminate against professors based upon its disagreement with their ideas.[215]

The proponents behind the catch-22 counterargument are obviously concerned that the First Amendment would shield poor or insubordinate teachers from proper discipline. But the *Adams* court made it clear that public universities may use "lawful criteria" to evaluate and ultimately terminate unqualified professors.[216] The federal courts have spelled out some of those criteria. For instance, professors must adhere to accepted professional standards. "[A] professor who plagiarizes a scholarly paper may be disciplined for a gross violation of professional ethics . . . ."[217] Likewise, "[g]rossly inaccurate speech about the Holocaust, for example, could be cause for dismissing a historian for incompetence."[218] Simi-

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213 *Id.*

214 Griffin, *supra* note 9, at 26; *see also* Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972) ("[W]e do not conceive academic freedom to be a license for uncontrolled expression . . . internally destructive of the proper functioning of the institution."); Pugel v. Bd. of Trs., 378 F.3d 659, 667 (7th Cir. 2004) ("[T]his court has affirmed the right of members of a university community to 'engage in academic debates, pursuits, and inquiries,' while noting nevertheless that a public employee's right to free speech is not absolute.").

215 Tepper & White, *supra* note 9, at 166–67 ("[A university] may evaluate the research and performance of its faculty, but it must do so based on legitimate and professional reasons. This conforms to well-established institutional norms of academic freedom: '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,' and '[t]eachers are entitled to freedom in the classroom in discussing their subject.'"); *see also* Areen, *supra* note 9, at 961 ("In evaluating the work of other scholars, faculty are expected to judge on the basis of the quality of the research methodology employed and the arguments presented rather than whether they agree with the conclusions reached. That is, both a scholar's work and peer evaluations of it are supposed to be objective or "disinterested," to use the terminology of the [1915] Declaration [of Principles on Academic Freedom and Academic Tenure].").

216 *See Adams*, 640 F.3d at 562.

217 Rabban, *supra* note 53, at 255. *See also Pugel*, 378 F.3d at 668 (affirming motion to dismiss where teaching assistant was terminated for knowingly presenting invalid data at an academic conference).

218 Rabban, *supra* note 53, at 242. Likewise, a public university could fire a chemistry professor who teaches alchemy to his students. The university may discipline the Holocaust denier and the alchemist because they are teaching factually false information which is not protected by the First Amendment in other contexts. For example, this standard is already utilized in the defamation context where "statements on matters of public concern must be provable as false before there can be liability under state defamation law." Milkovich v. Lorain Journal Co., 497 U.S. 1, 19 (1990). Conversely, "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." *Id.* at 20. This standard could easily be imported into the public university context to permit schools to discipline professors who teach or publish "provably false" information.

larly, a public university may "terminate a teacher [whose] teaching methods . . . do not conform with those approved by the university."[219] Simply put, the First Amendment does not force the university to compromise professional standards.[220]

The federal judiciary has also recognized that the university has a strong interest in implementing its curriculum.[221] The institution may thus require the professor to teach a certain course and to stay on topic.[222] Accordingly, "[n]o college or university is required to allow a chemistry professor to devote extensive classroom time to the teaching of James Joyce's demanding novel *Ulysses*, nor must it permit a professor of mathematics to fill her class hours with instruction on the law of

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219 Hetrick v. Martin, 480 F.2d 705, 708 (6th Cir. 1973) (upholding state university's decision not to rehire untenured professor due to her unapproved teaching methods); *see also* Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1176 (3d Cir. 1990) (upholding high school's decision to ban "Learnball" classroom teaching method); Ahern v. Bd. of Educ., 456 F.2d 399 (8th Cir. 1972) (holding that high school teacher discharged for introducing methods very similar to Learnball had no right to use methods in contravention of school policy).

220 Of course, this assumes the college is not applying the standard in a discriminatory manner. Public schools may not use professional standards as a pretext for unlawful discrimination. For example, in *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012), the Sixth Circuit reversed summary judgment where there was evidence that the university imposed a standard of counseling ethics on the plaintiff-student due to hostility to her religious beliefs. *Ward*, 667 F.3d at 738 ("Many of the faculty members' statements to Ward raise a similar concern about religious discrimination. A reasonable jury could find that the university dismissed Ward from its counseling program because of her faith-based speech, not because of any legitimate pedagogical objective."). Additionally, the Third Circuit recognized that professional ethics codes do not relieve public school officials of their duties under the Constitution. *See* Gruenke v. Seip, 225 F.3d 290, 307 (3d Cir. 2000) ("Because public school officials are state actors, they must not lose sight of the fact that their professional association ethical codes, as well as state statutes, must yield to the Constitution.").

221 *See, e.g.*, Keen v. Penson, 970 F.2d 252, 257 (7th Cir. 1992) ("This Court has recognized the supremacy of the academic institution in matters of curriculum content."); Piggee v. Carl Sandburg Coll., 464 F.3d 667, 671 (7th Cir. 2006) ("[W]e have also recognized that a university's 'ability to set a curriculum is as much an element of academic freedom as any scholar's right to express a point of view.'"); Kissinger v. Bd. of Trs., 5 F.3d 177, 181 (6th Cir. 1993) ("Courts have traditionally given public educational institutions, especially colleges and graduate schools, wide latitude to create curricula that fit schools' understandings of their educational missions. We would defeat that longstanding restraint if we ruled for [plaintiff] today."). Here, too, it is important to note that the university cannot use the curriculum as a pretext for discrimination. *See* Axson-Flynn v. Johnson, 356 F.3d 1277, 1293 (10th Cir. 2004) ("[W]e may override an educator's judgment where the proffered goal or methodology was a sham pretext for an impermissible ulterior motive.").

222 Tepper & White, *supra* note 9, at 131 ("Moreover, curriculum design is another area in which the right of the academic institution is very strong, and the institution may insist that faculty . . . stay on topic . . . ."). Public universities may not, however, punish a professor for expressing his thoughts on a permissible subject within the course curriculum. *See* Dube v. State Univ. of N.Y., 900 F.2d 587 (2d Cir. 1990); *see also* Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 680 (6th Cir. 2001); *see also* Sheldon v. Dhillon, No. C-08-03438 RMW, 2009 WL 4282086, at *4–5 (N.D. Cal. Nov. 25, 2009) (denying motion to dismiss on professor's speech retaliation and viewpoint discrimination claims where community college disciplined the professor for her response about the genetic basis of sexual orientation in a course titled "Human Heredity").

torts."[223] Consequently, federal courts have repeatedly rebuffed lawsuits brought by teachers attempting to dictate the curriculum or course content over the institution's objections.[224] Indeed, "no court has found that teachers' First Amendment rights extend to choosing their own curriculum."[225]

And it is self-evident that a professor is not free to invade the constitutional rights of his students. Professors who force students to engage in religious exercise,[226] unlawfully discriminate against students,[227] or compel students to affirm a message with which they disagree[228] will find no refuge from official discipline under the First Amendment. For similar reasons, a professor may not create a hostile environment that disrupts the learning process itself.[229] The Free Speech Clause is not a

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223 *Piggee*, 464 F.3d at 671.

224 *See id.* at 667 (holding that community college had right to insist that cosmetology instructor refrain from engaging in religious speech during class that was unrelated to the course content); Boring v. Buncombe Cty. Bd. of Educ., 136 F.3d 364 (4th Cir. 1998) (holding that high school drama teacher did not have First Amendment right to select particular play because play was part of the school's curriculum); Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 491 (3d Cir. 1998) (affirming state university's imposition of restrictions upon tenured professor's choice of classroom materials); Bishop v. Aronov, 926 F.2d 1066, 1072 (11th Cir. 1991) ("Courts agree . . . that the school's administration may at least establish the parameters of focus and general subject matter of curriculum."); Smith v. Kent State Univ., 696 F.2d 476 (6th Cir. 1983) (sustaining dismissal of professor who failed to teach assigned course); Clark v. Holmes, 474 F.2d at 930–31 (7th Cir. 1972) (upholding state university's decision not to rehire instructor who overemphasized sex in required health survey class).

225 Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1176 (3d Cir. 1990).

226 *Bishop*, 926 F.2d at 1076 (upholding state university memo restricting professor from interjecting religious beliefs into class discussion when unrelated to course subject).

227 Axson-Flynn v. Johnson, 356 F.3d 1277, 1282 (10th Cir. 2004) ("[T]eachers should not punish or reward [students] on the basis of inadmissible factors—race, religion, gender, political ideology.") (quoting Settle v. Dickson Cty. Sch. Bd., 53 F.3d 152, 155 (6th Cir. 1995)).

228 *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding that a public high school may not compel student to say the Pledge of Allegiance because the First Amendment prohibits the state from forcing citizens to affirm messages with which they disagree); *see also* Ward v. Polite, 667 F.3d 727, 733-35 (6th Cir. 2012) (holding that a state university cannot compel graduate counseling student to provide gay-affirming counseling where requirement was motivated by anti-religious bias); *Axson-Flynn*, 356 F.3d at 1282 (holding that a state university could not compel a Mormon theater student to speak offensive words in a script if the script requirement was motivated by anti-religious bias); BOK, *supra* note 56, at 374 ("Academic freedom does not give license to instructors to impose their own political views on students or to present only one side of controversial issues. As the American Association of University Professors made clear in their seminal 1915 report defining academic freedom, 'the teacher must also be especially on his guard against taking unfair advantage of the student's immaturity by indoctrinating him with the teacher's own opinions before the student has had an opportunity fairly to examine other opinions upon the matter in question and before he has sufficient knowledge and ripeness of judgment to form any definitive opinion of his own.'"). *See generally* Martins, *supra* note 13, at 192.

229 *See* Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 681 (6th Cir. 2001) ("*Pickering* counsels, however, that a school's interest in limiting a teacher's speech is not great when those public statements 'are neither shown nor can be presumed to have in any way either

warrant for professors to use profane,[230] racist,[231] or sexist language[232] without any legitimate academic justification.[233] Simply put, the First Amendment permits the public university to protect its academic integrity by disciplining professors who disregard professional standards, ignore the curriculum, or violate students' rights. Such discipline is permissible—assuming it is pursuant to precisely tailored regulations—because the university has overriding interests in preventing such behavior.

B. Deference to the Academy

The second major counterargument contends that judges should defer to the university on academic decisions such as the evaluation of the quality of teaching and research. This deference model is derived from *Regents of the University of Michigan v. Ewing*, in which the Supreme Court upheld a university's decision to dismiss a student from its medical program for academic reasons[234]:

> When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.[235]

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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.'t') (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 572–73 (1968)).

230 *See* Bonnell v. Lorenzo, 241 F.3d 800, 824 (6th Cir. 2001) (holding that professor does not have a First Amendment right to use profanity in a classroom setting where such language is not germane to the course subject matter); Keen v. Penson, 970 F.2d 252 (7th Cir. 1992) (holding that a university's right to protect students from "demeaning, insulting, and inappropriate comments" outweighed any First Amendment rights of the professor); Martin v. Parrish, 805 F.2d 583, 584–85 (5th Cir. 1986) (holding that a professor had no constitutional right to use profanity that had no legitimate academic purpose).

230 *See* Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1180 (6th Cir. 1995) (holding that university's termination of coach did not violate First Amendment because coach's use of the word "nigger" in locker room was not speech on a matter of public concern).

232 *See* Trejo v. Shoben, 319 F.3d 878 (7th Cir. 2003) (upholding university's decision not to rehire professor who made sexually charged and demeaning comments to female professors and students at academic conference); *see also* Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 633 (1999) ("[Title IX] action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.").

233 *See* BORK, *supra* note 56, at 359 ("While faculty members enjoy broad freedom of expression, their liberty is not and cannot be absolute. Academic freedom does not protect professors who insult students in their classes or engage in long harangues about controversial matters unrelated to the subject of their course.").

234 Regents of Univ. of Mich. v. Ewing, 474 U.S. 214 (1985).

235 *Id.* at 225.

This position assumes that judges lack the training and expertise necessary to review purely academic decisions.[236] Several scholars have argued that *Ewing*'s deferential approach is the proper standard for evaluating *all* academic decisions rendered by a public university, including those related to a professor's work product.[237] These scholars point out that, in multiple cases,[238] the High Court has cautioned courts to resist "substitut[ing] their own notions of sound educational policy for those of . . . the school authorities" which they review.[239]

This position, however, breaks down when applied to the precise issue of the university's authority to regulate professors' instruction and research under the Free Speech Clause. As an initial matter, the Supreme Court formulated the *Ewing* standard in the context of a public univer-

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[236] *See id.* at 226 ("If a 'federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies,' far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require 'an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.' ").

[237] *See, e.g.*, Rabban, *supra* note 53, at 287 ("Whatever their holdings, these decisions emphasize that courts should afford broad deference to professional expertise. Academic decisions are necessarily subjective and beyond the competence of judges. Courts cannot become a 'Super-Tenure Review Committee' or 'evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions.' Rather, judges should override 'a genuinely academic decision' only if 'it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.' "); Chen, *supra* note 143, at 979–80 ("That is, while the law would require a tighter fit between the means (restricting speech) and the ends (advancement of a specific component of the academic mission), it would not require the university to show that the interest is an important or compelling one. The importance of the university's advancement of the academic mission is understood. So long as the university's interest is legitimate (in the same sense as required under a rational basis analysis) in that it serves to advance the academic mission and is stated at a fairly narrow level of generality, the court would examine only the germaneness of the restriction.").

[238] Christian Legal Soc'y v. Martinez, 561 U.S. 661, 687 (2010). ("[The university's] decisions about the character of its student-group program are due decent respect."); Grutter v. Bollinger, 539 U.S. 306, 328 (2003) ("The Law School's educational judgment that [racial] diversity is essential to its educational mission is one to which we defer. . . . Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits."); Bd. of Curators v. Horowitz, 435 U.S. 78, 89–90 (1978) ("The decision to dismiss respondent, by comparison, rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking. Under such circumstances, we decline to ignore the historic judgment of educators and thereby formalize the academic dismissal process by requiring a hearing.").

[239] *Martinez*, 561 U.S. at 686 (alteration in original) (quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982)).

sity's judgment of student[240]—not professor—qualifications. Additionally, the Court's judgment addressed not a First Amendment claim, but rather, a claim that the University violated the student's "substantive right under the Due Process Clause to continued enrollment free from *arbitrary* state action."[241] These points are significant because the *Ewing* standard conflicts with the First Amendment standard the Court applied to the teaching and scholarship regulations in *Keyishian*.[242] There, the Court refused to defer to the state university's judgment when that judgment directly restricted the professors' freedom to teach and publish.[243] Since neither *Ewing* nor any other Supreme Court decision has overturned *Keyishian*, its heightened scrutiny is the appropriate standard to apply to professor retaliation claims involving core academic speech.

In addition to this legal flaw, the deference model fails on principled and pragmatic grounds because it places too much trust in state officials to regulate speech.[244] One scholar described this implicit faith as follows:

> This model relies on a generous amount of trust in the professional academic judgment of the critical decision makers in public university settings. These decision makers include publicly-elected members of boards of regents, university presidents and provosts, department chairs, and internal peer reviewer panels made up of individual faculty members. It assumes that such decision makers, through their professional training and corresponding objectivity, can be trusted in most cases to make decisions about the quality of a professor's teaching or research that are legitimate exercises of their professional discipline. In this professional context, this view suggests that the chances of illicit viewpoint or content discrimination based on non-academic factors, such as a professor's personal political views, are substantially diminished.[245]

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240 *See* Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 215–16 (1985).

241 *Id.* at 223 (emphasis added).

242 *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 599–604 (1967).

243 *See supra* Part III.B; *see also Grutter*, 539 U.S. at 363–64 (Scalia, J., dissenting) ("Again, however, the [*Keyishian*] Court did not relax any independent constitutional restrictions on public universities.").

244 *See* Bishop v. Aronov, 926 F.2d 1066, 1075 (11th Cir. 1991) ("[W]e cannot supplant our discretion for that of the University. Federal judges should not be ersatz deans or educators. In this regard, we trust that the University will serve its own interests as well as those of its professors in pursuit of academic freedom.").

245 Chen, *supra* note 143, at 970.

This assumed trust in public officials, however, clashes with a foundational constitutional principle. The First Amendment is "[p]remised on *mistrust* of government power" to regulate ideas.[246] Just last year the Supreme Court reaffirmed this suspicion by ruling that all government-imposed content-based speech restrictions presumptively violate the Constitution[247] because they "may interfere with . . . the search for truth."[248] This constitutional mistrust is well-founded in the classroom of world history. It is common knowledge that tyrannical regimes seek to consolidate power by controlling their nations' educational systems and their teachers. Even the German universities, which were renowned for their independence, were eventually made tools of the Nazi state.[249] And when such governments have consolidated control over the education system, the results have proven disastrous.[250] Standing alone, the collapse of Russian agriculture from "Stalin's enforcement of Lysenko biology orthodoxy [over the Russian education system] stand[s] as a strong counter example to those who would discipline university professors for not following the 'party line.'"[251] Further, we know that the efforts of the Roman Empire, the Soviet Union, and the Third Reich to

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246 Citizens United v. FEC, 558 U.S. 310, 340 (2010) (emphasis added); *see also* Snyder v. Phelps, 562 U.S. 443, 460–61 (2011) (explaining that the government cannot even censor speech whose "contribution to public discourse may be negligible" because of the potentially "stifl[ing effect upon] public debate"); Judge Thomas L. Ambro & Paul J. Safier, *The First Amendment, the Courts, and "Picking Winners,"* 87 WASH. L. REV. 397, 399 (2012) ("[T]he First Amendment is peculiarly concerned with state action. Above all else, the Amendment expresses a fear of the dangers uniquely associated with government interference in the development and expression of ideas.").

247 Reed v. Town of Gilbert, 135 S. Ct. 2218, 2232 (2015) ("Not 'all distinctions' are subject to strict scrutiny, only *content*-based ones are." (emphasis in original)).

248 *Id.* at 2233 (Alito, J., concurring).

249 Matthew W. Finkin, *On "Institutional" Academic Freedom*, 61 TEX. L. REV. 817, 824–25 (1983) ("It was only with the advent of the Weimar Republic that the professoriate became aware that much of its autonomy had actually been lost. By that time, the conflict was between a professoriate and a political system estranged from one another; and by that time the authority of the state over the universities was too firmly established.").

250 *Id.* at 824–25 ("Under National Socialism, state authority would be exercised with a vengeance and in complete disregard of such autonomy as had theretofore been secured."); *see* S. Hildebrandt, *Anatomy in the Third Reich: An Outline, Part I*, 22 CLINICAL ANATOMY 883, 885 (2009) (discussing German universities which responded to Nazi pressure to reorganize their science curricula in accordance with National Socialist doctrine in a process called "self-alignment"); *see also Hundred Flowers Campaign*, NEW WORLD ENCYCLOPEDIA (Mar. 27, 2014), http://www.newworldencyclopedia.org/entry/Hundred_Flowers_Campaign (discussing Mao Zedong's attack on Chinese university professors after they enthusiastically criticized his regime in response to his invitation to speak freely about their opinions of the government); *Supreme Cultural Revolution Council (SCRC)*, GLOBALSECURITY.ORG, http://www.globalsecurity.org/military/world/iran/scrc.htm (last visited Oct. 29, 2015) (discussing the takeover of Iranian schools by forces loyal to Imam Khomeini who "deleted certain courses such as music as 'fake knowledge.' Committees established after the 1979 Revolution came to similar conclusions concerning all subjects in the humanities such as law, political sciences, economy, psychology, education and sociology.").

251 Kerr v. Hurd, 694 F. Supp. 2d 817, 843–44 (S.D. Ohio 2010).

stamp out dissent ultimately led to the extermination of the dissenters.[252] "Compulsory unification of opinion achieves only the unanimity of the graveyard."[253] We ignore these lessons from history at our peril.

Deference proponents counter, claiming the unique self-regulating aspects of the university system justify this additional trust. If this argument was true at one time, the current form of the modern public university warrants against it today. The realities of today's public colleges undermine the confidence one should place in university officials to render objective academic judgments. In many universities, school administrators, rather than academic experts in the relevant field, are the ones evaluating professor speech.[254] And it is increasingly common that such administrators are not even professional educators.[255] Moreover, the university trustees or regents who make the final decisions about faculty retention are often elected or otherwise subjected to political pressure that may influence their review of faculty teaching and scholarship.[256] Corporations have also increased their influence over academic

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252 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624,t641 (1943) ("Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies.").tt

253 *Id.* at 641.

254 *See* Chen, *supra* note 143, at 972 ("[T]he modern university is not your grandparents' university: 'the German idea [of academic freedom] was premised upon the university as a self-governing body of faculty. In America, "the university" encompasses a lay governing board and its administrative delegates to which the faculty is legally subordinate.' Accordingly, in many university settings, it is not entirely true that decisions to restrict a professor's speech are necessarily being made by experts in her field.").

255 *See id.* ("One example of the transformation of the contemporary American university is that it is increasingly common for universities to hire presidents from a non-academic background. Also . . . trustees or regents, the ultimate decision makers in the hierarchy of university governance, may not even be professional educators, much less in a position to objectively evaluate a professor's work."). While Bok claims that "less than 20 percent of college presidents have had no previous faculty position," he too ultimately concedes that most presidents are far removed from the academic realities of university life. BOK, *supra* note 56, at 49. "The candidate whom trustees tend to choose is someone who left teaching and research long ago to become a professional administrator . . . ." *Id.* at 49. Moreover, presidents "have less and less time to spend on matters of education and research but must devote almost all of their attention to financial, administrative, and ceremonial tasks for which their past academic experience has scarcely prepared them." *Id.* Indeed, "[a] survey by the American Council on Education to determine how presidents spend their day found that academic affairs ranked last in a set of six familiar types of activity. *Id.* at 48–49. These statistics do not provide reason to put great confidence in trustees and presidents to make informed academic decisions about a professor's teaching and research.

256 *See* Chen, *supra* note 143, at 972 ("Trustees for public universities, moreover, are elected and may be subject to extreme political pressure when reviewing a professor's controversial teaching or scholarship."); *see also* BOK, *supra* note 56, at 46 ("At the same time, trustees are handicapped because they typically lack much experience in academic life and meet too infrequently to learn a great deal through their membership on the board. . . . In public universities, the usefulness of the board is frequently impaired by the way in which

decisions as universities have become increasingly dependent upon corporate dollars in the wake of state budget cuts.[257] For these reasons, the trust implicit in the deference model is questionable at best.

Likewise, due to these realities, it is less than evident why judges should defer their judgment to that of university officials. Most judges have advanced degrees themselves, so they are reasonably capable of understanding and respecting academic norms.[258] This training combined with their knowledge of constitutional limits has empowered judges to become effective at distinguishing between legitimate academic judgments and illicit discriminatory motives.[259] Further, the independence of the federal bench makes it uniquely qualified to review academic decisions.[260] Judges are freer to make objective decisions precisely because they are not subject to the political and economic influences that may sway a university official.[261] The fact that judges are not doctors does not prevent them from making rulings in medical malpractice cases. The fact that they are not military experts does not prevent them from ruling on national security issues, such as detention policies. Judges do not rule on cases because they are subject matter experts; they rule on cases because they are judges.[262] And the law should apply

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trustees are selected. In most states, members are appointed by the governor, sometimes with the help of recommendations from a panel of advisers. Although many public boards have had some extremely capable members, especially in matters of finance and dealings with state governments and other outside groups, governors often appoint persons with limited knowledge of higher education, such as campaign contributors or individuals recommended by political allies, labor unions, business organizations, and other prominent interest groups.").

257 *See* Chen, *supra* note 143, at 972–73 ("Finally, there has been a steady decrease in public funding as a source for public university revenue, which will inevitably increase the demand for corporate dollars to make up the difference. The more beholden universities are to corporate donors, the greater chance that such donors may attempt to wield influence over academic decisions with which they disagree.").

258 Byrne, *supra* note 52, at 336–38 (noting that judges are "sufficiently well qualified" to review academic decisions due in part to the fact that most have "advanced degrees").

259 *See* Chen, *supra* note 143, at 973 ("What is good or bad, rigorous or not rigorous can be sorted out through the use of expert testimony, the same way it is in other fields about which judges know little or nothing. Moreover, while courts may not be experts in academic standards, they are good, or at least more experienced than other institutions, at one thing—applying doctrinal tools and evaluating evidence in cases involving disputes about the underlying motivation of potentially bad state actors.").

260 *See id.* ("It is not that courts are better than academics at determining what is good teaching and what is bad or which scholarship is rigorous and which is shoddy. It is that they have more independence.").

261 *See* Byrne, *supra* note 52, at 336–38 ("Judges are sufficiently well qualified by background (most have advanced degrees), insulated from political buffeting and economic pressures, and familiar with constitutional norms to perceive the special values of a university and to protect them from legislation.").

262 *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639–40 (1943) ("Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. . . . [W]e act in these matters not by authority of our competence but by force of our commissions. We cannot,

equally to all state entities. Public universities are not entitled to a "get-out-of-jail-free card," especially in an area fraught with First Amendment implications. Thus, while the deference opinion has acquired support in the opinions of some judges and scholars, its foundations are found wanting when applied specifically to teaching and scholarship.

C. *Government Speech Doctrine*

The government speech doctrine also stands as a challenge to this Article's proposal. The doctrine states, "[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."[263] Because a "state-controlled [u]niversity [has the] right[t] to use its own funds to advance a particular message,"[264] it may even impose viewpoint-based restrictions to ensure that its message is not distorted.[265] The Supreme Court has even intimated that this principle would apply to the speech of professors.[266] Under this reasoning, public universities effectively "own" the core academic speech of their professors and can make content-based—or even viewpoint-discriminatory—decisions about instruction and research.

But there are fundamental errors in this categorical approach. This broad application of the doctrine assumes that the state hires public university professors to produce a particular message. Incidentally, teaching and scholarship are not paid for exclusively by the state: public universities receive a substantial amount of money in the form of student-paid

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because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.").

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

264 Bd. of Regents v. Southworth, 529 U.S. 217, 229 (2000).

265 *Rosenberger*, 515 U.S. at 833–34 (1995) ("When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee. It does not follow, however, and we did not suggest in *Widmar*, that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers. A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles.").

266 *Southworth*, 529 U.S. at 234–35 ("Our decision ought not to be taken to imply that in other instances the University, its agents or employees, or—of particular importance—its faculty, are subject to the First Amendment analysis which controls in this case. Where the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different. . . . In the instant case, the speech is not that of the University or its agents. It is not, furthermore, speech by an instructor or a professor in the academic context, where principles applicable to government speech would have to be considered.").

tuition[267] and corporate dollars.[268] In fact, in 2008, "most of the nation's public research universities had more than half of their costs paid by tuition . .t. and other four-year public institutions were hovering near the 50 percent mark.[269] While the Court has not explained how or whether this "hybrid" funding model affects the government speech doctrine, the presence of multiple private contributors would seem to lessen the extent to which the government could dictate its message under the doctrine.

More significantly, the government speech doctrine is only applicable where the government is attempting to speak a "particular message"[270]—something that does not occur in the context of faculty academic speech. "[U]niversities do not hire academics to promote a specific government message. Universities provide funding to academics to teach and produce scholarship."[271] "The job of faculty is to produce and disseminate new knowledge and to encourage critical thinking, not to indoctrinate students with ideas selected by the government."[272] The multifarious voices of the university's faculty certainly speak broadly in support of the school's academic mission. But it simply strains credulity to contend that the American university speaks a specific and coherent message when it is in fact the quintessential "marketplace of ideas."[273]

Moreover, the relevant case precedent refutes a categorical application of the government speech doctrine to faculty work product. In its seminal government speech case, the Supreme Court explained:

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267 Spurgeon, *supra* note 11, at 417 ("Students compete for admission and pay substantial tuitions.").

268 *See* Chen, *supra* note 143, at 972–73.

269 Tamar Lewin, *Public Universities Relying More on Tuition Than State Money*, N.Y. TIMES (Jan. 24, 2011), http://www.nytimes.com/2011/01/24/education/24tuition.html?_r=1.

270 *Southworth*, 529 U.S. at 229.

271 Darryn Cathryn Beckstrom, *Reconciling the Public Employee Speech Doctrine and Academic Speech After* Garcetti v. Ceballos, 94 MINN. L. REV. 1202, 1227 (2010); *see also* Garcetti v. Ceballos, 547 U.S. 410, 437 (2006) (Souter, J., dissenting) ("Some public employees are hired to 'promote a particular policy' by broadcasting a particular message set by the government, but not everyone working for the government, after all, is hired to speak from a government manifesto.").

272 Areen, *supra* note 9, at 991–92.

273 Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967). This conclusion is buttressed by the Supreme Court's decision in *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001). In *Velazquez*, the Court addressed the Legal Services Corporation Act, which provided funds to organizations that offered free legal assistance to indigent clients. *Id.* at 536. The Act, however, prohibited "legal representation funded by recipients of LSC moneys if the representation involves an effort to amend or otherwise challenge existing welfare law." *Id.* at 537–38. Various lawyers challenged the restriction on the grounds that it violated their right to free speech by preventing them from arguing that welfare laws were unconstitutional. *Id.* The Court held that the restriction violated the First Amendment. The government speech doctrine did not shield the restriction, because the LSC program sought to facilitate private speech rather than promote a particular government message. *Id.* at 542. "Like lawyers, professors are not hired to act under color of state law and speak a prescribed message." Spurgeon, *supra* note 11, at 421.

> [T]he university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.[274]

By citing directly to *Keyishian* for support, the Court strongly cautioned against an application of the doctrine that would chill faculty speech in teaching and research.

The conclusion is the same in the related public employee speech cases, where the courts consider whether the public employer "commissioned" or "paid" for the speech at issue.[275] The *Garcetti* Court at least questioned such an application to academic speech when it refused to rule categorically that the teaching and scholarship paid for by a public college constituted unprotected speech.[276] And the Fourth Circuit made precisely this point when it ruled in favor of Professor Adams. The court of appeals clarified that the "official duties" test might apply to a public university professor's speech when his "assigned duties include a specific role in declaring or administering university policy, *as opposed to scholarship or teaching*."[277] The University could not render a faculty member's core academic speech unprotected simply by stating that the teacher was paid for "writing, public appearances, and service within [his] respective field[ ]."[278] That "thin thread" was insufficient to render Adams's academic speech part of the University's message,[279] and the Ninth Circuit concurred with this reasoning.[280] Consequently, the government speech doctrine fares no better than the prior counterarguments when applied to faculty speech.

The three counterarguments ultimately collapse because they incorrectly assume that the government should be the primary—if not the sole—institution engaged in the search for truth. This position fails to recognize that there are other private institutions engaged in this pursuit,

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274 Rust v. Sullivan, 500 U.S. 173, 200 (1991) (citing *Keyishian*, 385 U.S. at 603, 605–06 (1967)).

275 Garcetti v. Ceballos, 547 U.S. 410, 411 (2006) ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.").

276 *Id.* at 425.

277 Adams v. Trs. of Univ. of N.C.–Wilmington, 640 F.3d 550, 563 (4th Cir. 2011) (emphasis added).

278 *Id.* at 564.

279 *Id.*

280 *See* Demers v. Austin, 746 F.3d 402, 412 (9th Cir. 2014); *see also supra* Part II.C.

the foremost being private universities.[281] Further, the First Amendment protects the freedom of these private institutions to pursue this venture even from particular worldviews that some might find controversial or incompatible with democratic values.[282] Aversion to these proprietary ventures does not dilute the limits the Free Speech Clause simultaneously places upon the public university.[283] It must search for knowledge without a preference for any particular worldview because public universities are precluded from determining what is orthodox.[284] Public university officials may bristle at this restriction, but it is the price for being the arm of the state.[285] "Arguably, this [F]irst [A]mendment combination of limiting state interference with the discretion of private universities while constraining their public counterparts"[286] produces greater freedom for all. The resulting pluralism within the academic world provides a greater diversity of ideas than would a uniform "rule that would subject all universities to the commitment to diversity of thought that the [F]irst [A]mendment imposes on public ones."[287] Our nation has taken the position that truth is better found "out of a multitude of tongues, (rather) than through any kind of authoritative selection."[288] Those arguments

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281 BOK, *supra* note 56, at 15 ("Most of [America's colleges and universities] are private . . . .").

282 Rabban, *supra* note 53, at 268 ("Private universities may choose to establish educational policies that deviate from democratic values in ways forbidden to state institutions.").

283 Because private universities have their own institutional First Amendment rights to control their message, professors at such private schools have *less* academic freedom than faculty at public universities where the First Amendment protects the individual professors from discriminatory state action.

284 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.").

285 Of course, complete privatization is always an option for public colleges that do not want to be constrained by these constitutional limits. The University of Virginia, for example, appears to be moving in that direction by initiating a massive funding campaign to raise private financial support. *See* Erin Strout, *U. of Virginia Unexpectedly Opens $3-Billion Campaign to Become a 'Private' Public University*, CHRON. HIGHER EDUC. (June 25, 2004), http://chronicle.com/article/U-of-Virginia-Unexpectedly/9589/. Furthermore, the University's schools of business and law have agreed with state officials "to forgo any state funding in return for freedom to set their own tuition, admit more nonresident students and escape state supervision over their internal affairs." BOK, *supra* note 56, at 66. An even more extreme proposal would effectively privatize the entire system of higher education. Under this proposal, state governments would eliminate all direct subsidies to state institutions. Instead, "states would maintain levels of support similar to those previously given to institutions but give the funds to students in the form of scholarships . . . ."). *Id.* at 67.

286 Rabban, *supra* note 53, at 268.

287 *Id.* at 268–69; *see also* BOK, *supra* note 56, at 22 ("The number and diversity of our colleges and universities allow prospective students to find a program to suit almost any special need or preference.").

288 Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (alteration in original) (citation omitted).

that would weaken the First Amendment's force over teaching and scholarship would also weaken the robust educational heritage that the amendment preserves.

CONCLUSION

A public university professor's speech related to classroom instruction and academic scholarship should be entitled to heightened First Amendment protection under the public employee speech doctrine. The High Court effectively affirmed this position in *Keyishian*—the one Supreme Court case that directly addressed a state university's power under the First Amendment to restrict teaching and publishing. The federal courts of appeals that have addressed the issue directly have held the same. Further, these holdings are consistent with the policy behind the public employee speech doctrine, which favors maximum freedom of private speech on matters of public interest consistent with the government employer's mission. In the academic context, professors and the public at large have vital interests in the knowledge yielded in teaching and scholarship; the state university, whose mission is to facilitate the creation and dissemination of such knowledge, simply has little grounds to restrict it. Therefore, as a general matter, when a public university seeks to discipline a professor who teaches or writes on a matter of public concern, the *Pickering* balance should weigh presumptively in the professor's favor. This standard does not shield inferior and insubordinate teachers from discipline, nor does it hamstring the university from protecting its curriculum, its students, and its academic integrity. The standard simply recognizes that the teacher at a public college is a private citizen with a unique educational calling and that his employer is, in the end, a government agency accountable to the Constitution. The professor must be free to teach and write, and the Constitution grants him that freedom.