

Academic freedom in the United States after *Garcetti v. Ceballos*

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Abstract. *This paper focuses on the constitutional limits of instructor speech at public post-secondary institutions of learning in the United States. Specifically, the paper attempts to clarify these boundaries after the U.S. Supreme Court's uncertain ruling in *Garcetti v. Ceballos* (2006). In that case, a narrow 5-4 majority held that the government – in its capacity as employer – may discipline an employee for communications made pursuant to his/her official duties when that speech undermines the government's mission of delivering efficient services to the public. *Garcetti* would uphold the government's adverse employment decision even if the employee's controversial speech dealt with issues of relevance to the community. The *Garcetti* majority, however, declined to decide whether the ruling would also extend to “speech related to scholarship of teaching”, that is, whether *Garcetti*'s “official-duties” standard would apply to a particular group of public employees: teachers and professors. This uncertainty is compounded by the indecisive jurisprudence of the Court over the beneficiary of academic freedom. Whereas some decisions seem to uphold an individual academic freedom – i.e., the teacher's liberty to seek and disseminate truth without fear of retaliation – other opinions have argued for an institutional type of academic freedom, whereby the public institution of learning – not the individual – decides what to teach and how to teach it. The analysis concludes with advice to faculty members of public post-secondary institutions so that they may protect themselves from the risk of adverse employment decisions justified by the Supreme Court.*

Keywords: *Constitutional Law, Freedom of Speech, Public Education, United States, Academic Freedom.*

Resumo. *Este artigo discute os limites constitucionais do discurso do professor em instituições públicas de ensino pós-secundário nos Estados Unidos. Especificamente, este artigo procura clarificar estes limites, na sequência do acórdão vacilante do Supremo Tribunal dos Estados Unidos em *Garcetti v. Ceballos* (2006). Neste caso, uma pequena maioria de 5-4 determinou que o governo – na sua capacidade de empregador – pode instaurar processos disciplinares a um funcionário por comunicações feitas no âmbito das suas funções oficiais sempre que esse discurso minar a missão do governo de prestar serviços eficazes ao público.*

Garcetti sustentaria a decisão laboral adversa do governo, mesmo que o discurso controverso do funcionário versasse sobre questões de relevância para a comunidade. A maioria Garcetti, porém, recusou-se a decidir se o acórdão também seria extensível a “discurso relacionado com os estudos em pedagogia”, ou seja, se a norma de “funções oficiais” de Garcetti também se aplicaria a um grupo específico de funcionários públicos: professores e docentes. Esta incerteza é agravada pela jurisprudência hesitante do Tribunal relativamente ao beneficiário da liberdade acadêmica. Embora algumas decisões pareçam sustentar uma liberdade acadêmica individual – i.e., a liberdade do professor para procurar e disseminar a verdade sem receio de retaliação –, opiniões concorrentes defenderam um tipo de liberdade acadêmica institucional, segundo a qual a instituição de ensino pública – e não o indivíduo – decide o que ensinar e como ensinar. A análise realizada termina com alguns conselhos destinados a membros de Faculdades de instituições públicas de ensino pós-secundário que lhes permitam proteger-se contra o risco de decisões laborais adversas fundamentadas pelo Supremo Tribunal.

Palavras-chave: *Direito Constitucional, liberdade de expressão, Ensino Público, Estados Unidos, liberdade acadêmica.*

Introduction: the First Amendment to the U.S. Constitution

The free-speech clause of the First Amendment to the U.S. Constitution forbids the government from curtailing the people’s freedom of speech. As interpreted by the U.S. Supreme Court – the nation’s highest judicial body – the Amendment protects oral, written, and visual expressions (e.g., a televised speech, a literary work, or a painting, respectively); expressions that have not yet occurred (e.g., a journalistic article barred from publication); and conduct conjoined with speech, also known as “symbolic speech” (e.g., burning the U.S. flag to express displeasure with the national government).

In principle, the Amendment shields speech against content-based restrictions, especially restrictions on political speech because of its deleterious effect on a democratic society. For example, the ordinance in *R.A.V. v. City of St. Paul* (1992: 379) punished the placing of “any symbol, object, appellation, characterization or graffiti ... which one knows or has reasonable grounds to know arouses anger, alarm or resentment ... on the basis of race, color, creed, religion or gender”. Citing its content-based nature, the Court struck down the ordinance for allowing abusive speech as long as it did not address the recipient’s race, color, creed, religion or gender.

Courts treat content-based speech restrictions as constitutionally suspect by subjecting them to an exacting test known as “strict scrutiny”. These speech restrictions will survive strict scrutiny only if they are narrowly drawn to further a compelling government interest. For instance, in *Wooley v. Maynard* (1977), the Court applied strict scrutiny to a New Hampshire statute that made it a misdemeanor to obscure the state’s motto “Live Free or Die”, which was embossed on passenger vehicles’ license plates. The Court (1977: 716) did not find sufficiently compelling the state’s asserted interests in facilitating the identification of passenger vehicles, and promoting “appreciation of history, individualism, and state pride”.

First-Amendment jurisprudence has also struck down speech restrictions due to their vagueness. A vaguely written law, the Supreme Court reasons, ends up chilling speech (*Reno v. American Civil Liberties Union*, 1997: 872) because it forces people of

common intelligence to guess at its purported meaning (*Connally v. General Construction Company*, 1926: 391). In other words, fear of punishment forces speakers to confine their speech to that which is undeniably safe (*Baggett v Bullitt*, 1964: 372). For example, in *Smith v. Goguen* (1974: 574), the Court invalidated a Massachusetts statute punishing anyone who treated “contemptuously” the flag of the United States for failing to distinguishing clearly between criminal and lawful treatment of the flag.

Furthermore, even clearly-drafted speech restrictions will be held unconstitutional if their scope is deemed so overbroad as to punish permissible speech. For example, in *United States v. Stevens* (2010), the Supreme Court struck down a federal statute criminalizing the creation, sale, or possession of portrayals of animal cruelty for commercial gain because of its substantial sweep over protected speech, such as depictions of lawful hunting.

Despite these protections, the Court held in *Konigsberg v. State Bar of California* (1961: 50) that the First Amendment does not amount to “an unlimited license to talk”. For instance, in *Burson v. Freeman* (1992), the Court upheld a law prohibiting, *inter alia*, the distribution of political campaign materials within 100 feet of the entrance to a polling site. Applying strict scrutiny, the Court found the law necessary to serve the government’s compelling interest of protecting the people’s right to vote freely.

In fact, the Court has carved out a series of exceptions for certain content-based speech restrictions. These are narrowly defined categories of low-value speech, *i.e.*, expressions that do not further First-Amendment values (Stone, 2009: 283). For example, in *Brandenburg v. Ohio* (1969: 447), the Court ruled that the First Amendment did not protect speech that is aimed at inciting or producing “imminent lawless” activity, and is “likely to incite or produce” such activity. Likewise, in *New York Times Co. v. Sullivan* (1964), the Court excluded from constitutional protection defamatory statements about a public official when the speaker knows that these statements are false.

In the same restrictive vein, the government – in its role as employer – can punish employees for the content of their speech without having to meet strict scrutiny. Specifically, in *Garcetti v. Ceballos* (2006) the Court allowed the government to discipline public employees for making statements pursuant to their duties when such statements disrupt the government’s mission of delivering efficient services to the public.

The *Garcetti* majority, however, declined to address whether the ruling would also affect “speech related to scholarship or teaching” (2006: 425). In other words, the majority did not comment on the repercussions – if any – of the ruling on the free-speech rights of a specific group of public employees: educators. Due to this uncertainty, federal circuit courts have differed over whether – and, if so, when – *Garcetti*’s “official-duty test” applies to instructor speech (*Gorum v. Sessoms*, 2009: 186).

In the absence of guidance from the Court, this paper will attempt to clarify the extent to which *Garcetti* can restrict academic freedom in public education in the United States, with an emphasis on post-secondary education, because of the multifaceted responsibilities of its faculty members. Specifically, the analysis will focus on those instances in which a public college professor claims that his/her institution retaliated against him for his/her speech. In other words, the analysis will not discuss prior restraint, that is, situations in which an employee is forced into silence for fear of reprisal.

The analysis begins with a discussion of the notion of “academic freedom” as interpreted by the Supreme Court, followed by a discussion of the three standards currently used by courts to decide on the constitutional boundaries of public-employee speech: *Pickering*, *Hazelwood*, and *Garcetti*. The paper then narrows down its scope by focusing on the repercussions of *Garcetti* on *instructor* speech, and concludes with a series of recommendations for teachers and professors working for public institutions.

Academic freedom

From an intellectual perspective, academic freedom can be defined as an educator’s liberty to seek and spread truth. Academic freedom would, therefore, grant him/her the autonomy to further this intellectual pursuit – e.g., by selecting classroom content, or establishing the contours of their scholarship – without the threat of retaliation from school officials (Griffin, 2013: 9). Or, as put by Professor Arthur Lovejoy – co-author of the influential 1915 Declaration of Principles on Academic Freedom and Academic Tenure – “the distinctive social function of the scholar’s trade can not be fulfilled if those who pay the piper are permitted to call the tune” (1938: 414).

From a legal perspective, however, the level of protection conferred upon academic freedom remains unclear. In *Regents of University of California v. Bakke* (1978: 312), Justice Powell held that academic freedom has “special” First-Amendment ramifications, while also acknowledging that the concept “[is] not a specifically enumerated constitutional right”. This uncertainty is compounded by the indecisiveness of the Supreme Court over the beneficiary of academic freedom. On the one hand, the Court has praised the public school as the “cradle ... of democracy” (*Adler et al. v. Board of Education*, 1952: 508), where teachers instill the democratic values of open-mindedness and critical inquiry (*Wieman v. Updegraff*, 1952: 196). To undertake this “noble task” (*Wieman v. Updegraff*, 1952: 196), teachers must be free to produce and disseminate knowledge. Scholarship “cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die” (*Sweezy v. New Hampshire*, 1957: 250). Academic freedom is a “special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom” (*Keyishian v. Board of Regents*, 1967: 603). These decisions, therefore, seem to indicate that academic freedom belongs to the teacher.

Other Supreme Court opinions, however, have construed academic freedom as an institutional – not an individual – right. Put differently, academic freedom would not belong to the educator, but to the educational institution for which s/he works. Under this doctrine, institutions – not educators – must remain free to determine “who may teach, what may be taught, how it shall be taught, and who may be admitted to study” (*Sweezy v. State of New Hampshire*, 1957:263). In other words, universities enjoy the freedom “to make ... [their] own judgments as to education” (*Regents of the University of California v. Bakke*, 1978: 312).

Predictably, lower courts have differed over the meaning of academic freedom. Some have argued for an institutional type of academic freedom, whereby the institution is the one party invested with the right “to be free from government interference in the performance of core educational functions” (Byrne, 1989: 311). The Court of Appeals for the Sixth Circuit, for example, has adhered to this view. In his concurrence in *Evans-*

Marshall v. Board of Education (2005: 235), Justice Sutton held that the school district “has the right [for First-Amendment purposes,] to retain control over what is being taught in the classroom”. Similarly, another appellate court, the Fourth Circuit, ruled in *Urofsky v. Gilmore* (2000: 412) that even if the Supreme Court had constitutionalized a right to academic freedom, it appears to have recognized “only an institutional right of self-governance in academic affairs.”

Other lower courts have adopted the individual interpretation of academic freedom. For instance, in *Demers v. Austin* (2013: 1019), the Court of Appeals for the Ninth Circuit leaned on the Supreme Court’s decisions in *Sweezy* and *Keyishian* to designate “teaching and academic writing” a special concern of the First Amendment, which protects the teacher’s freedom to seek truth. However, even a court’s preference for this type of analysis does not guarantee that the First Amendment will protect any form of instructor speech, given the constraints of the three judicial standards currently used: *Pickering*, *Hazelwood*, and *Garcetti*.

The pre-*Garcetti* years: *Pickering* (1968)

Pickering v. Board of Education (1968) focused on a public-school teacher who had written a letter to a local newspaper criticizing the Board of Education’s handling of proposals to raise revenue for the schools. The Board dismissed him because it considered the publication of the letter harmful to the efficient operation and administration of the district’s schools.

The Supreme Court held that the First-Amendment right to speak freely about issues of relevance to the community has to be balanced against the Government’s right to ensure a productive working atmosphere. In this balancing test, the Government will most likely prevail if: (1) the speech focused on a private matter, i.e., a matter that does not affect the community directly (*City of San Francisco v. Roe*, 2004: 83-84); or (2) the public-matter speech undermined the government’s mission of serving the public efficiently (*Connick v. Myers*, 1983: 146, 152-153). This mission is undermined, for example, when the employee’s speech interferes with his/her duties; when it leads to discord among fellow employees; or when the speech undermines a superior’s authority (*Pickering v. Board of Education*, 1968: 569-70). *Pickering*’s subsequent refinement in *Waters v. Churchill* (1994: 702-703) eased the government’s burden of proof, thereby increasing the government’s chances of winning the case. Instead of showing that the employee’s expression actually damaged its mission, the Government needs to show only that it was reasonable to predict that such damage might have resulted from the expression. The lower courts, however, are not forced to follow *Waters* because the ruling was delivered only by a relative majority of Justices (seven of the nine Justices arrived at the same conclusion, but only four applied the same reasoning).

The pre-*Garcetti* years: the *Hazelwood* standard (1988)

Alternatively, courts may analyze the instructor’s speech according to the Supreme Court standard established in *Hazelwood School District v. Kuhlmeier* (1988) to evaluate student speech. Specifically, the case revolved around a student newspaper that was part of a journalism class taught for credit during school hours. The administration barred from the pre-publication copy a section dealing with topics of interest to teenagers because “the references to sexual activity and birth control” in one of the articles were “inappropriate for some of the younger students at the school” (1988: 263). In

the Court's view (1988: 271), instructors may exercise greater control over "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school". This control over student speech is grounded in legitimate pedagogical concerns, which dictate that audience members be protected from inappropriate material for their maturity level, and that the speaker's views not be mistakenly attributed to the school (1988: 271). Applying the standard, the Court held that the section on sexual activity and birth control in the newspaper could have been reasonably construed as being "inappropriate in a school-sponsored publication distributed to 14-year-old freshmen"¹ (1988: 274).

Soon after the Supreme Court decision, the Court of Appeals for the First Circuit extended *Hazelwood* to instructor's classroom speech: like the student newspaper in *Hazelwood*, the court reasoned, "a teacher's classroom speech is part of the curriculum. Indeed, a teacher's principal classroom role is to teach students the school curriculum. Thus, schools may reasonably limit teachers' speech in that setting" (*Ward v. Hickey*, 1993: 453). Likewise, the Second Circuit used *Hazelwood* in *Silano v. Sag Harbor Free School District Board Of Education* (1994), a case about a guest lecturer who had shown photographs of bare-breasted women to tenth-grade mathematics students during a lecture on a scientific phenomenon. The court (1994: 723) rejected the lecturer's First-Amendment claim after weighing "the age and sophistication of the students, the relationship between the teaching method and valid educational objectives, and the context and manner of the presentation".

Some legal analysts (e.g. Gardner, 2008: 238–239) have criticized the incongruence of evaluating instructor speech through a test originally applied to student expression. Regardless of the validity of these criticisms, most cases dealing with instructor speech do not apply *Hazelwood* (Cooley, 2014: 269–270). Moreover, the standard is applied to teacher and student speech at compulsory levels of the educational system, and with post-secondary student speech (LaVigne, 2008: 1206). For this reason, the following sections will focus only on the two most commonly applied standards at the post-secondary level: *Garcetti* and *Pickering-Waters*.

***Garcetti v. Ceballos* (2006)**

Garcetti v. Ceballos (2006) shifted the threshold inquiry to the role of the speaker (employee vs. citizen) from *Pickering's* inquiry "into the content of the speech" i.e., into whether the speech touched on a public matter (*Spietla v. Hull*, 2007: 965). The case focused on a controversial memorandum written by Richard Ceballos, a deputy district attorney. In this memorandum Ceballos criticized the manner in which the sheriff's office had obtained a crucial affidavit related to a particular case. At trial, Ceballos claimed that his superiors punished him for writing that memorandum by denying him a promotion and transferring him to a less desirable destination. The Supreme Court (2006: 421) held that the First Amendment does not insulate public employee speech from employer discipline when expressed "pursuant to" the employee's official duties. Otherwise, his/her expressions could end up disrupting the government's mission of serving the public efficiently. For example, a relaxed attitude towards sarcasm, criticism, etc. might end up disrupting the harmony among employees and/or undermining the supervisors' authority (*Rankin v. McPherson*, 1987:388). In Ceballos's case, the Court found that the First Amendment did not protect his (written) expressions because his duties as deputy district attorney included preparing memoranda on pending cases.

Conversely, in *Lane v. Franks* (2014), an administrator for a public community college had suffered adverse employment consequences for providing truthful subpoenaed testimony against a fellow employee. Shortly after his testimony, the fellow employee was indicted on charges of mail fraud and theft concerning a federally-funded program. Because the administrator's courtroom speech was made outside the course of his ordinary job responsibilities, the Supreme Court turned to *Pickering* to determine whether his speech – as a citizen, not an employee – touched on a matter of public concern. In a unanimous opinion, the Court (2014: 2380) found that the administrator's sworn testimony dealt with corruption in a public program and misuse of state funds, "obviously... a matter of significant public concern".

Garcetti has been harshly criticized by law scholars (e.g. Cooper, 2006: 91; Kleinbrodt, 2013; Wenell, 2007: 627–628), and members of the judiciary, including the dissenting Justices in that case. Three of the Court's nine Justices argued that *Garcetti* deters public employees from revealing first-hand information about the Government's operations (2006: 428). This restriction contravenes the spirit of the First Amendment because, as the Court itself has held (e.g. *Roth v. United States*, 1957: 484), the uninhibited exchange of ideas on public issues helps the people choose the representatives best fit to serve the nation. Furthermore, *Garcetti* leaves state employees without federal recourse with which to challenge an adverse employment decision against them for denouncing wrongdoing in the workplace (*Williams v. Riley*, 2007: 584-585). Moreover, Justice Souter's dissent expressed his concern about the effect of *Garcetti* on instructor speech: "I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to... official duties'" (2006: 438).

Despite these criticisms, *Garcetti* is still in effect. *Stare decisis* – the practice of adhering to the principles established by previous decisions – directs the lower courts to adhere to the opinions of higher courts when presented with indistinguishable facts (Berland, 2011: 697–698). The binding force of precedents thus directs lower courts to apply *Garcetti* when ruling on the constitutionality of disciplinary measures against public employees because of their speech. These rulings tend to favor the Government, given the courts' broad interpretation of what constitutes the employees' official duties (Cooley, 2014: 279), which, in turn, increases the already high frequency with which public employees are disciplined for comments made pursuant to their duties (Daly, 2009: 24); (Drechsel, 2011: 143). For instance, at least five of the twelve Courts of Appeals – with jurisdiction over 26 of the 50 states of the country – have found for the Government when the duties in question had not been "required by, or included in, the employee's job description" (*Weintraub v. Board of Education*, 2010: 203).

This sweeping trend is beginning to affect academia as well. Instructors, particularly those in post-secondary education, engage in a wide panoply of expressive functions that could be considered part of their official duties, and, therefore, within *Garcetti*'s sphere: classroom teaching, scholarly research, student advising, committee service, faculty governance, and public speaking, among others (Griffin, 2013: 20). In Cooley's (2014: 279) estimation, "most courts" using *Garcetti* to evaluate instructor speech have expanded the scope of official duties and, therefore, deemed a broader amount of speech – on and off school grounds – as constitutionally unprotected. Compounding the employee's chances of winning the case, even if the speech is found to be unrelated to the instructor's official

duties, it must still survive *Pickering*, one of the pre-*Garcetti* standards. The following section will analyze how instructor speech would fare in these scenarios.

***Garcetti* applied to instructor speech**

In the first scenario, the court decides to apply *Garcetti* (*Williams v. Dallas Independent School District*, 2007: 692). It follows that *Garcetti* would authorize school officials to discipline those instructors found to have undermined the educational mission of the institution² because of expressions made pursuant to their official duties. As mentioned above, instructors at the post-secondary level may be required not only to teach their classes, but also to engage in activities outside the classroom, such as research and committee work. Since these functions carry an expressive component, *Garcetti* severely restricts the zone within which a public university instructor can exercise his/her First-Amendment right to free speech. *Garcetti* also imposes a high clearance bar for controversial instructor speech because it emphasizes the role of the speaker (employee vs. citizen) at the expense of the content of the expression. Even if the content veered from teaching, academic writing, or service – e.g., the quality of the food at the faculty dining room, or the schedule of the campus bus (O’Neil, 2008: 20) – that speech would be unprotected for First-Amendment purposes if expressed as part of the professor’s duties (e.g., while teaching a class).

For example, the Seventh Circuit employed *Garcetti* in *Renken v. Gregory* (2008), a case dealing with a dispute over the administration of a grant that the National Science Foundation (NSF) had awarded to a public university to support a tenured professor’s project. The professor, one of the project’s principal investigators, alleged that the institution had reduced his pay and terminated the NSF grant in retaliation for his criticisms of the University’s proposed use of the funds. The court (2008: 773) noted that the grant helped the professor fulfill his teaching responsibilities because, as he himself had admitted, the purpose of the grant was “undergraduate education development.” In other words, the professor made his complaints about the use of NSF funds “pursuant to his official duties as a University professor” (2008: 775). Because his speech was unprotected for First-Amendment purposes, the court granted summary judgment in favor of the University.

Hong v. Grant (2007) also exemplifies a *Garcetti*-based ruling about the constitutionality of disciplining a public university professor for comments made outside the classroom. In this case, a tenured professor claimed that he had been denied a raise for criticizing at meetings the hiring and promotion of other colleagues. Applying *Garcetti*, the court held that the professor made those comments while carrying out the administrative duties of tenured professors at that institution³ (2007: 1167). Therefore, his speech was not protected for First-Amendment purposes.

As mentioned above, court decisions based on *Garcetti* tend to favor the Government even when the employee speech was made pursuant to duties not included in the original job description or contract. This tendency is evident in the academic context. For instance, in *Gorum v. Sessoms* (2009) a tenured university professor claimed that the institution dismissed him for helping a student appeal a sanction. The Court of Appeals for the Third Circuit (2009:185) ruled that an employee’s speech might be considered part of his/her duties when related to “special knowledge” or “experience” acquired through his/her job. In this case, the professor’s experiences with and knowledge about the Code

of Conduct of the institution (which he himself had written), made him the *de facto* advisor of students with disciplinary issues. Therefore, the professor was fulfilling part of his responsibilities when he advised the student on the appeal.

Perhaps the only exception to an outcome detrimental to the instructor's interests as a result of *Garcetti* would involve speech authorised by the institution's administrators (Forster, 2010: 707). This approval may stem from normative documents, such as the curriculum or a Collective Bargaining Agreement. For example, in *Stachura v. Truszkowski* (1985), a Primary Education teacher was dismissed after some parents complained that he had shown images of the reproductive organs in his Life Science class. The Court of Appeals for the Second Circuit held for the professor, arguing that school administrators had previously approved the content and methodology for his class.

Surviving *Pickering*

In the second scenario, the professor's speech would have to survive *Pickering*. This scenario can occur when the court cannot find a link between the expression and the instructor's official duties, or when the court holds that *Garcetti* does not apply to instructor speech. Only two appellate courts – the Fourth and Ninth Circuits – have declined to extend *Garcetti* to academic speech at the university level (Bauries, 2014: 716). The Fourth Circuit, for example, decided so in *Adams v. Trustees of the University of North Carolina-Wilmington* (2011), a case about a tenured university professor's failed bid for promotion. The court (2011: 562) held that “*Garcetti* would not apply in the academic context of a public university as represented by the facts of this case”. Specifically, if the speech in question involved scholarship or teaching, the court would apply *Pickering*, not *Garcetti*. The court, however, left the door open for *Garcetti* by holding that when the assigned duties of a public-university faculty member include “declaring or administering university policy, as opposed to scholarship or teaching”, *Garcetti* “may” apply to the speech of the faculty member discharging those duties (2011: 563). Likewise, the Ninth Circuit employed *Pickering* instead of *Garcetti* in *Demers v. Austin* (2013). In that case, a tenured university professor alleged that university administrators had retaliated against him – e.g., by giving him negative performance reviews – for, *inter alia*, a self-published proposal in favor of disaggregating the College of Communication. The court (2013: 1019) declined to extend *Garcetti* to “teaching and academic writing” performed pursuant to the official duties “of a teacher and a professor” because of *Garcetti*'s conflict with the Supreme Court decision in *Keyishian*, which enshrined academic freedom as a special concern of the First Amendment.

Under *Pickering*, the instructor would most likely win the case if his/her expression (1) were deemed of public interest; and (2) prevailed over the Government's right to fulfill its educational mission. Despite being less restrictive than *Garcetti*, even *Pickering* poses a difficult hurdle for the instructor to overcome. First, lower courts have differed over whether the same type of expression touched on a matter of public interest (Gardner, 2008: 219–222). For instance, the Court of Appeals in *Hardy v. Jefferson Community College* held that teachers prepare their students so that the latter may become responsible citizens. Consequently, classroom instruction frequently deals with aspects that the Supreme Court would deem as ‘of public interest’ (*Hardy v. Jefferson Community College*, 2001: 679). In *Cockrel v. Shelby County School District* (2001: 1051-1052), the same court reinforced this view by holding that the controversial presentation leading to the

teacher's dismissal – industrial hemp – was of public interest because it had appeared frequently in the local media. Conversely, the Fourth Circuit held in the post-*Garcetti* case *Lee v. York County School Division* (2007: 694) that curricular materials do not deal with public issues, which means the instructor would have no First-Amendment recourse, regardless of the speech's actual damage to the institution's educational mission.

Furthermore, even speech expressed outside the classroom can be found to touch on private matters, and be thus unprotected for First-Amendment purposes. For instance, the court in *Hong v. Grant* (2007: 1169) held that the tenured professor's criticisms about the hiring of certain professors and the assigning of certain courses to lecturers focused on administrative disputes that did not affect the community, i.e., private matters. Likewise, the district court in *Payne v. University of Arkansas Fort Smith* (2006: 13) ruled that the number of hours that professors had to stay on campus constituted an internal matter on working conditions.

These matters may remain private even when the community learns about them. In *Colburn v. Trustees of Indiana University* (1992), the Court of Appeals (1992: 586) held that even though the public would be displeased to learn about the biased evaluations of untenured professors at a public university, the issue at hand did not affect the community directly. Therefore, the First Amendment would not protect a professor's comments on this topic.

Even if the teacher's expression is deemed as touching on a public matter, *Pickering* dictates that courts balance the social value of the expression with the Government's right to keep the workplace free of disruptions that damage the delivery of efficient services to the public. In *Hardy v. Jefferson Community College* (2001), a college professor had used vulgar expressions in his class to exemplify the ostracism experienced by traditionally oppressed groups. After one of his students complained to the professor's superiors, the professor continued teaching the class for the rest of the semester without further conflicts with the students or his colleagues. Nevertheless, the institution did not renew his contract. Following *Pickering*, the Court of Appeals (2001: 679) held that the professor's speech on power conflicts in society focused on a topic of public interest. The court then weighed the professor's right to comment on matters of public concern with the Government's right to discipline employees who undermine its educational mission. In its balancing analysis, the Court (2001: 680-681) held that the class did not interfere with the professor's performance or with the institution's operations, nor did it promote disharmony among coworkers, undermine an immediate supervisor's discipline over employees, or undermine the 'loyalty and trust' required of employees. After concluding that the professor had satisfied "both prongs of the *Pickering* test in successfully alleging a First Amendment violation," the court remanded the case for further proceedings. Regrettably, however, the professor died of lung cancer in 2002, before the case was reheard by the federal district court.

On other occasions, however, the expression is found to be harmful to the institution's mission. As explained above, the Supreme Court has hinted that academic freedom belongs to the institution. Accordingly, some Courts of Appeals have granted public colleges and universities control over curricular matters⁴ (*Cohen v. San Bernardino Valley*, 1995: 1413). This control implies that the teacher risks undermining the Government's educational mission if s/he deviates from the decisions of the institution regarding what to teach and how to teach it. For instance, in *Piggee v. Carl Sandburg College* (2006), a

public university did not renew a Cosmetics professor because she had distributed pamphlets against homosexuality during class time. The Court of Appeals (2006: 672) ruled that, even though the subject matter of the pamphlet was of public interest, a public university may require a faculty member to hew to the subject matters that s/he was contracted to teach. In the same restrictive vein, the court in *Lovelace v. Southeastern Massachusetts University* (1986: 424) ruled that the government's control on curricular matters extends not only to the content of the course, but also to the amount of homework assigned and the grading system used to evaluate the students' performance in that course.

Instructors have even fewer odds of prevailing if the court follows *Waters v. Churchill* (1994: 702-703). As explained above, the Government relaxed *Pickering's* second prong by allowing the Government to show only a reasonable prediction of the disruptive consequences that the teacher's speech could have produced. For instance, the Court of Appeals in *Jeffries v. Harleston* (1995: 13) affirmed a public University's decision to limit a professor's term as Chair after he had criticized Jews during a televised speech. In the court's view, it was reasonable to believe that the criticisms could have undermined the institution's mission. However, because the lower courts are not bound to follow *Waters*, the ruling is applied to academic speech inconsistently (Hitz, 2010: 1170). For example, in *Settlegoode v. Portland Public Schools* (2004), a teacher for disabled students began to receive negative supervisor evaluations after complaining about substandard working conditions. The Court of Appeals found for the teacher in the absence of any actual destabilizing effects from her complaint.

Conclusions

As Blanchard (2014: 201) points out, academic freedom is another type of "freedom," i.e., a liberty in that it immunizes a group of people – teachers and professors – from the restraining power of others. *Garcetti*, however, leaves the door open to sweeping restrictions to this freedom.

Even before *Garcetti*, the *Pickering* standard already restricted the instances in which a public instructor could argue convincingly that the institution had violated his/her First-Amendment rights by making retaliatory employment decisions because of his/her speech. Under *Pickering*, the most favorable conditions for the instructor would involve speech on a matter of public interest not disruptive of the institution's educational mission. If *Garcetti* were applied to academia, the instructor's free speech would be restricted even more. *Garcetti* would justify adverse employment measures if the expression had been made pursuant to the instructor's duties – including not only those functions for which s/he was hired explicitly (teaching, research, service, etc.), but also any activities indirectly associated with these duties – regardless of the public nature of the speech.

In light of *Pickering* and *Garcetti*, the spirited defense of academic freedom mounted, on certain occasions, by the Supreme Court has waned to an exercise brimming with rhetorical flourishes, but devoid of judicial force. The Court would even allow the Government to discipline an educator for engaging in speech that does not immediately cause any workplace disruption (under *Waters*), when, in fact, the teacher's "noble task" of fomenting open minds (*Wieman v. Updegraff*, 1952: 196) is intricately linked to the expression of controversial opinions.

Perhaps the Court will begin to uphold academic freedom more firmly when it realizes the other consequence of insufficient guidance in *Garcetti*: instructors might end up deciding to refrain from speaking for fear of a disciplinary measure that a lower court might uphold under *Garcetti*. Ironically, the ruling risks creating the same chilling effect on speech that the Court has so vehemently opposed when striking down speech restrictions on the grounds of vagueness (e.g. *Smith v. California*, 1959: 151; *Stromberg v. California*, 1931: 369). Until the Court adjudicates on the issue more decisively, *Garcetti*, and – to a lesser degree – *Pickering-Waters* will continue hindering the “vital role in a democracy” (*Sweezy v. New Hampshire*, 1957: 250) performed by those who educate the country’s youth.

Until that moment, public-education teachers and professors should protect themselves from the risk of adverse employment decisions justified under *Garcetti* or *Pickering* by following a series of steps. First, these employees should familiarize themselves with the official documents specifying their duties. Second, they should be well aware of the culture of the institution that has hired them. Not all academic institutions are willing to risk exercising their authority on curricular matters oppressively lest they might start losing competent teachers (*Bishop v. Aronov*, 1991:1075). And third, instructors should familiarize themselves with the rulings of the courts with jurisdiction over the area where the institution is located.

Notes

¹In addition to the students’ younger age, the compulsory nature of primary and secondary education prevents teachers from enjoying the same degree of freedom as their post-secondary counterparts (Kuhn, 2006: 999); (Nahmod, 2008: 62). Specifically, the Supreme Court has reasoned that because these younger students must attend class, they cannot avoid being exposed to the ideas expressed by their teachers. Therefore, these students become a captive audience, which contravenes the people’s First-Amendment right to decide what ideas to listen to (*Cohen v. California*, 1971: 21; *Rowan v. United States Post Office Dept.*, 1970: 736).

²As a quintessential example of the educational mission of U.S. public universities, the University of North Carolina at Chapel Hill – the first public university in the country to admit students – aims to serve “as a center for research, scholarship and creativity and to teach a diverse community of ... students to become the next generation of leaders” (*University of North Carolina at Chapel Hill*, 2015).

³A Court of Appeals (*Hong v. Grant*, 2010: 237) affirmed the ruling, albeit on non-First Amendment grounds. Regardless of the new reasoning, it is reasonable to conclude that cases involving similar circumstances would be decided in the Government’s favor if the court applied *Garcetti*.

⁴This institutional prerogative over curricular matters, however, is not absolute. For example, in *Ep-person v. State of Arkansas* (1968, 1107), the state violated the neutrality of the government in religious matters (also mandated by the First Amendment) by prescribing the teaching of the origin of mankind based on the Book of Genesis.

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