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LAW REVIEW

"PRIESTS OF OUR DEMOCRACY: THE FIRST AMENDMENT'S SPECIAL CONCERN FOR FACULTY ACADEMIC FREEDOM"

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INTRODUCTION

In 2022, several state university professors successfully mounted a First Amendment challenge to the educational edict of Florida's "Stop W.O.K.E." Act, which prohibited public college professors from expressing race or sex-conscious viewpoints in their courses.[1] In 2023, a Texas jury rejected a history professor's First Amendment claim against a public college for allegedly refusing to renew his

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[1] Pernell v. Fla. Bd. of Governors of State Univ. Sys., 641 F. Supp. 3d 1218 (N.D. Fla. 2022), *appeal denied*, 2023 WL 2543659 (11th Cir. 2023).

contract due to his public commentary and advocacy on race relations.[2] In 2024, a computer science professor disciplined by his public university for adding a controversial statement to his course syllabus plausibly alleged First Amendment viewpoint discrimination, but lost on summary judgment.[3] Though notably disparate in their origins and outcomes, these three cases shared one common invocation: a public college professor's constitutional right to academic freedom.

Eighteen years ago, the Supreme Court's decision in *Garcetti v. Ceballos*[4] fractured First Amendment speech rights for public sector employees.[5] The Court held that public employees do not speak as private citizens when carrying out their official responsibilities, stripping most work-related speech of constitutional protection.[6] *Garcetti* arose out of litigation concerning a district attorney's office and subsequently applied to nearly all government jobs—but its bright-line rule stopped short of the college campus. Justice Kennedy's opinion recognized "some argument that expression related to academic scholarship or classroom instruction implicate[d] additional constitutional interests . . . not fully accounted for" by its public employee speech doctrine.[7] The *Garcetti* Court expressly reserved the issue of whether its analysis would apply to academia, given the "important ramifications for academic freedom, at least as a constitutional value."[8]

Garcetti's nod to academic freedom, however tacit, acknowledged a type of educator expression imbued with special First Amendment significance, distinct from the individual liberty interest in free speech.[9] Academic freedom has been a core component of First Amendment jurisprudence in schools, attending seminal Supreme Court decisions at the intersection of expression and education[10] for over

[2] Phillips v. Collin Cmty. Coll. Dist., F. Supp. 3d 525 (E.D. Tex. 2023).

[3] Reges v. Cauce, No. 2:22-CV-00964-JHC, 2024 WL 2140888 (W.D. Wash. May 8, 2024).

[4] 547 U.S. 410 (2006).

[5] *See* Julie A. Wenell, Note, *Garcetti v. Ceballos: Stifling the First Amendment in the Public Workplace*, 16 WM. & MARY BILL RIGHTS J. 623, 623 (2007).

[6] *Garcetti*, 547 U.S. at 421.

[7] *Id.* at 425.

[8] *Id.*

[9] *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment . . . .").

[10] *See id.*; Sweezy v. New Hampshire, 354 U.S. 234 (1957); Shelton v. Tucker, 364 U.S. 479 (1960); Whitehill v. Elkins, 389 U.S. 54, 60 (1967); Epperson v. Arkansas, 393 U.S. 97 (1968); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); Healy v. James, 408 U.S. 169 (1972); Tilton v. Richardson, 403 U.S. 672 (1971); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); Grutter v. Bollinger, 539 U.S. 306 (2003).

fifty years.[11] Yet, the myriad ways it has been described and deployed reveals an amorphous doctrine, more philosophical reflection than guiding principle. Academic freedom has stood for the teacher's rights to free speech and association;[12] the institution's operational autonomy[13] and professional judgment;[14] as well as the student's protected interests in expression,[15] association,[16] and information.[17] Its malleable shield has guarded against the state acting as sovereign,[18] educator,[19] and employer.[20] In the arena of higher education, its constitutional value appears outclassed by its weight as a professional standard.[21]

Nearly two decades after *Garcetti*'s ambiguous acknowledgment, the contours of faculty free speech remain uncertain. Many of the federal circuits have

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[11] The first mention of "academic freedom" in a Court opinion arrived via Justice Douglas's dissent in *Adler v. Bd. of Educ.*, 342 U.S. 485, 509 (1952); its most recent appearance was in last year's affirmative action decision, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 209 (2023).

[12] *See Sweezy*, 354 U.S. at 249–50 (declaring that a professor's "right to lecture and his right to associate with others were constitutionally protected freedoms…"); *see also Shelton*, 364 U.S. 479 at 486 (explaining that a "teacher's right of free association, a right closely allied to freedom of speech[,] . . . lies at the foundation of a free society").

[13] *See Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring) (outlining the "four essential freedoms" of a university: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study"); *Bakke*, 438 U.S. at 312 (reasoning that "the freedom of a university to make its own judgments as to education includes the selection of its student body"); *Grutter*, 539 U.S. at 329 (same).

[14] *See* Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226–27 (1985) (cautioning against judicial review of "the substance of the multitude of academic decisions" made by faculty under "accepted academic norms").

[15] *See Tinker*, 393 U.S. 503, 511 (1969) (opining that, absent "constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views").

[16] *See* Healy v. James, 408 U.S. 169, 181 (1972) (concluding that a college's refusal to recognize an organization burdened students' rights "to associate to further their personal beliefs").

[17] *See* Bd. of Educ. v. Pico, 457 U.S. 853, 866–67 (1982) (reasoning that partisan removal of school library books "directly and sharply implicated" students' constitutional "right to receive information and ideas").

[18] *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 609–10 (1967) (striking down a state law that provided for the removal of any public school employee affiliated with a subversive group).

[19] *See* Rosenberger v. Rector & Visitors Univ. of Va., 515 U.S. 819, 836 (1995) (finding a university's guidelines for student publications amounted to an unconstitutional exercise of viewpoint discrimination that "risk[ed] the suppression of free speech and creative inquiry" on college campuses).

[20] *See* Whitehill v. Elkins, 389 U.S. 54, 59–60 (1967) (rebuking a loyalty oath embedded in a university's teaching contract as a "continuing surveillance" on professors that was "hostile to academic freedom").

[21] *See generally* Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265 (1988) (describing tensions between the two different definitions of academic freedom constructed by the academy and the judiciary).

either addressed or implied *Garcetti*'s limited application to higher education.[22] Four appellate courts have explicitly adopted an "academic-freedom exception" to its bar.[23] They differ, however, in defining the scope of that exception, taking divergent approaches to what constitutes "expression related to academic scholarship or classroom instruction . . . ."[24] In the absence of any clarity from the Court, the First Amendment's application to teaching and scholarship continues to be dissected and debated from different angles.

Meanwhile, mounting economic and political pressures compress the spectrum of acceptable faculty speech. While state legislatures advance sweeping measures of curriculum control,[25] state universities retreat from institutional platitudes and cull teaching contracts. As colleges and universities increasingly rely on contingent faculty appointments, tenured positions become rarified.[26] Professional protection for academic freedom narrows as sociopolitical rifts split ever wider.

This article proposes that the First Amendment interest in academic freedom is more concerned with a professor's political activity than his academic ideas. Part II briefly explores the history of the academic freedom doctrine, which

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[22] *See, e.g.* Alberti v. Carlo-Izquierdo, 548 F. App'x 625, 639 (1st Cir. 2013) (applying *Garcetti* to an instructor's administrative grievance letter, but observing that academic freedom protects "speech in the context of classroom teaching that communicates" social or political ideas); Gorum v. Sessoms, 561 F.3d 179, 186 (3rd Cir. 2009) (applying *Garcetti* to a professor's conduct in student organizations and disciplinary hearings because his actions were unrelated to teaching or scholarship, and would not "imperil First Amendment protection of academic freedom in public colleges and universities"); Buchanan v. Alexander, 919 F.3d 847, 852 (5th Cir. 2019) (applying *Pickering-Connick* to a university professor's class speech, noting "classroom discussion is protected activity"); Brown v. Chi. Bd. of Educ., 824 F.3d 713, 716 (7th Cir. 2016) (applying *Garcetti* to a sixth grade teacher's speech, contrasting the primary school classroom from the "long-standing recognition that academic freedom in a university" receives special protection); Emergency Coal. to Def. Educ. Travel v. U.S. Dep't of the Treasury, 545 F.3d 4, 12 (D.C. Cir. 2008) (acknowledging that "[a]ny substantive governmental restriction on [a professor's] academic lectures would obviously violate the First Amendment").

[23] *See* Heim v. Daniel, 81 F.4th 212, 227–28 (2d Cir. 2023) (holding that *Garcetti* does not apply to a public university professor's "teaching and academic writing"); Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550, 564 (4th Cir. 2011) (holding that *Garcetti* does not extend to the "academic work of a public university faculty member"); Meriwether v. Hartop, 992 F.3d 492, 507 (6th Cir. 2021) (holding that "the academic-freedom exception to *Garcetti* covers all classroom speech related to matters of public concern"); Demers v. Austin, 746 F.3d 402, 412 (9th Cir. 2014) (holding that *Garcetti* cannot "apply to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor").

[24] Garcetti v. Ceballos, 547 U.S. 410, 425 (2006).

[25] *See*, *e.g.,* Fla. Stat. § 1000.05(2)(a) (2022); Miss. Code Ann. § 37-13-2 (West 2022).

[26] *See* Glenn Colby, *Data Snapshot: Tenure and Contingency in US Higher Education*, AM. ASS'N OF UNIV. PROFESSORS (Mar. 2023), https://www.aaup.org/sites/default/files/AAUP%20Data%20Snapshot.pdf

emerged in response to political persecution, then developed into an institutional protection. Part III examines academic freedom in the employment context, questioning its protection for professional academic speech, and contemplating its heightened concern for private political expression.

II. ACADEMIC FREEDOM, FROM THE PLUTOCRACY TO THE MARKETPLACE

Sociopolitical upheaval spawned and shaped the American ideal of academic freedom. The concept germinated from the economic conflict of the Progressive Era, conceived as professional protection from corporate interests that dominated private universities. It grew into a legal principle in the political climate of the McCarthy era, bolstering the educator's First Amendment rights against state efforts to purge Communist ideas from public schools. Throughout its early development, the academic freedom doctrine has primarily served one type of expression: a professor's political speech.

A. *Emerging as a Professional Protection*

The words "academic freedom" first entered the Congressional record on February 8, 1917, when Senator George E. Chamberlain took the floor of the United States Senate to read a letter from the president of a small public college in River Falls, Wisconsin.[27] It included a resolution passed in a 1914 meeting of the National Education Association:

> We view with alarm the activity of the Carnegie and Rockefeller Foundations—agencies not in any way responsible to the people—in their efforts to control the policies of our State educational institutions, to fashion after their conception and to standardize our courses of study, and to surround the institutions with conditions which menace true academic freedom and defeat the primary purpose of democracy as heretofore preserved inviolate in our common schools, normal schools, and universities.
>
> There are two kinds of government—the one handed down from above, and the other coming through the people. Corresponding to these two theories in government are two policies in education. The one

[27] 64 Cong. Rec. 2835 (1917).

> which is handed from above is plutocracy in education, and the other is democracy in education.[28]

Plutocracy in education galvanized the American professional movement for academic freedom. Institutional controversies began fomenting in the late nineteenth century,[29] as economics replaced religion as the dominant influence in higher education.[30] Flushed with industrial wealth, the new millionaire class ushered in an era of "big-business philanthropy," converting endowments to entrepreneurship through active involvement in educational policies.[31]

At the turn of the century, industry's iron grip on American policy[32] fueled the mounting conflict between capital and labor.[33] Outside the university gates, violent clashes and economic crisis stoked nationwide strikes, mass demonstrations, and revolutionary rhetoric.[34] Inside its meeting rooms, "the roster of American trustees of higher learning read like a corporate dictionary."[35] Small wonder that so many of the early academic freedom cases involved economists fired for their labor sympathies or antimonopoly teachings.[36]

Three politically motivated dismissals sparked the faculty fight for professional protections. Edward Bemis, an economics professor at the University of Chicago, spoke out publicly during the 1894 Pullman strike, urging railroad

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[28] *Id.*

[29] Marjorie Heins, *Academic Freedom and the First Amendment*, 0 J. OF COLLECTIVE BARGAINING IN THE ACAD. 9, 1 (2014).

[30] *See* John Karl Wilson, A History of Academic Freedom in America (Sep. 23, 2014) (Ph.D. dissertation, Illinois State University) (ProQuest) ("By the end of the 19th [c]entury, businessmen replaced the clergy as the primary conservative influence upon American colleges at the elite level.")

[31] RICHARD HOFSTADTER & WALTER P. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 412–14 (1st ed. 1955).

[32] *See* HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 261(Harper Perennial Modern Classics 2015) (1980) (In 1886 alone, "the [Supreme] Court did away with 230 state laws that had been passed to regulate corporations."); *see also* Adam Winkler, *The Long History of Corporate Rights*, 98 B.U. L. REV. ONLINE 64, 66–67 (2018) ("During the same time the Court was reading the [Fourteenth] [A]mendment narrowly to allow Jim Crow laws . . . the *Lochner* justices were striking down laws regulating wages, labor relations, and zoning. Between 1868, when the Fourteenth Amendment was ratified, and 1912, the Supreme Court heard 28 cases on the rights of African Americans and 312 cases on the rights of business corporations.").

[33] *See generally*, ZINN, *supra* note 32, at 238–95.

[34] *See id.* at 270–82 (discussing the Haymarket Affair, the 1893 Depression, and the Pullman railway workers' strike in the context of labor movements).

[35] 2 CHARLES A. BEARD & MARY R. BEARD, THE RISE OF AMERICAN CIVILIZATION: THE INDUSTRIAL ERA 470 (Wilfred Jones ed., 1927).

[36] *See* HOFSTADTER & METZGER, *supra* note 31, at 421–25 (appraising a list of university professors and presidents, either dismissed or forced to resign for espousing disfavored economic views).

companies to "set the example" if they expected "law-abiding" workers.[37] In response, he received an irritated letter from the university's president, warning Bemis to "exercise very great care in public utterance about questions that are agitating the minds of the people" while he remained linked to the school—a connection it swiftly severed at the end of the year.[38]

In 1893, Edward A. Ross arrived at Stanford University, ready to test his mettle as an "independent scholar" in a time of "growing pressure on economists."[39] Despite Ross's iconoclastic views—he defended Eugene Debs, supported public ownership of utilities, advocated for free silver, and railed against Chinese immigration[40]—the outspoken professor was popular among students and esteemed in his field.[41] Yet even while Stanford's president defended Ross's "impeccable" scholarship and "judicious" teaching, Stanford's founder—a one-woman board of trustees—demanded his resignation.[42]

Ross's forced departure was perceived by his peers as "a blow aimed directly at academic freedom . . . a deep humiliation to Stanford University and to the cause of American education."[43] Seven professors resigned in protest, and the American Economic Association launched an investigation—the very "first professorial inquiry into an academic freedom case."[44]

In 1915, the summary dismissal of yet another economics professor ushered in the nationwide movement for academic freedom. Scott Nearing, a prominent left-wing intellectual, was an "immensely popular teacher" at the University of Pennsylvania's Wharton School.[45] His introductory economics course commanded 400 students, the largest class in the university.[46] His political activism, however, offended university trustees with corporate affiliations.[47] Nearing, a former

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[37] *Id.* at 427.

[38] *Id.* at 427–28.

[39] *Id.* at 438.

[40] *Id.*

[41] Brian Eule, *Watch Your Words, Professor*, STANFORD MAG.., Jan.–Feb. 2015, at 1.

[42] In a letter to the university's president, Jane Stanford complained that Ross, "who should prize the opportunities given to him to distinguish himself . . . in the high and noble manner of his life and teachings," instead dared to "step[] aside, and out of his sphere, to associate himself with the political demagogues of [the] city" and "the lowest and vilest elements of socialism." HOFSTADTER & METZGER, *supra* note 31, at 438–39.

[43] *Id.* at 439.

[44] *Id.*

[45] MARJORIE HEINS, PRIESTS OF OUR DEMOCRACY: THE SUPREME COURT, ACADEMIC FREEDOM, AND THE ANTI-COMMUNIST PURGE 21 (2013).

[46] *Id.*

[47] *See id.*; *see also* Wilson, *supra* note 30, at 150 ("While a lecturer at the Wharton School . . . Nearing was denied a promotion despite the recommendations of the faculty and the Academic Council. Dean Robert Young warned him, 'Mr. Nearing, if I were in your place I would do a little less speaking about child labor.'"); Charles Willis Thompson, *The Truth About Nearing's*

secretary on the Pennsylvania Child Labor Committee, had long advocated for an end to child labor and exploitation in American industry.[48] This position was deeply unpopular with "a group of business-oriented alumni," who successfully pressured the board of trustees to fire him in the summer of 1915.[49]

Nearing's highly publicized termination stoked outrage across the country,[50] galvanizing the newly formed American Association of University Professors ("AAUP") to draft its founding document, the 1915 Declaration of Principles on Academic Freedom and Academic Tenure.[51] The AAUP's crusade for faculty job security eventually produced the modern concept of tenure.[52] Its subsequent 1940 Statement of Principles on Academic Freedom and Tenure served as the blueprint for the tenure system, referenced and adopted by higher education institutions across the country.[53]

Professors Bemis, Ross, and Nearing were all professionally penalized for their public utterances, affiliations, and advocacy on pressing economic issues. However, despite the dismissals that spurred them to action, AAUP's founders were primarily concerned with protecting the academy's prestige—not its professors.[54] Far from shielding unpopular ideas, the organization sought to elevate the profession by unifying it under consensus scholarly opinions.[55] To that end, AAUP's 1915 Declaration carefully positioned itself as a politically neutral effort to preserve the "integrity and . . . progress of scientific inquiry," rather than the social or economic ideas that prompted its founding.[56]

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*Case: Both Sides of the Controversy That Has Raised a Storm at the University of Pennsylvani*a, N.Y. TIMES, July 18, 1915, at 4–5 (pointing out that several "[t]rustees who voted against Nearing [were] closely affiliated with"—and likely influenced by—certain "big corporations").

[48] UPTON SINCLAIR, THE GOOSE-STEP: A STUDY OF AMERICAN EDUCATION 102 (1923).

[49] HEINS, *supra* note 45, at 21; *see also* SINCLAIR, *supra* note 48, at 106 ("The real reason behind the whole proceeding was revealed by a legislator up in Harrisburg, who got drunk at the Majestic Hotel and told how 'Joe' Grundy, woolen manufacturer of Bristol, and president of the State Manufacturers' Association, had fixed it up with Senator Buckman, his political boss, that the university should not get its annual appropriation until Nearing was fired.").

[50] HEINS, *supra* note 45, at 21.

[51] AM. ASS'N OF UNIV. PROFESSORS, 1915 *Declaration of Principles on Academic Freedom and Academic Tenure* (1915), https://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf.

[52] *Tenure*, AM. ASS'N OF UNIV. PROFESSORS, https://www.aaup.org/issues/tenure (last visited May 13, 2024).

[53] *Id.*

[54] The founders vehemently repudiated the notion of the AAUP as a trade union—an economic tool for the working class, inapplicable to "well balanced men" of high ideals and scholarly interests. Wilson, *supra* note 30 at 144; *see also* HOFSTADTER & METZGER, *supra* note 31, at 466–67.

[55] Wilson, *supra* note 30, at 146–47.

[56] Wilson, *supra* note 30, at 138.

B. *Evolving into a Constitutional Concern*

Those same social and economic ideas also raised the First Amendment's "special concern."[57] Academic freedom's shaky legal development spawned from its controversial political roots. The doctrine germinated from the dismissals of left-wing intellectuals, dissidents who criticized institutional power. Its legal growth, therefore, remained at the mercy of America's political climate during an era of anti-Communist fervor.

Politics in education inserted the state into the classroom in unprecedented ways, creating the conditions for constitutional concern. Even while the Court ruled that students could not be forced to pledge allegiance to the flag in violation of their conscientious beliefs,[58] over half the states commanded loyalty oaths from its teachers.[59] In 1940, when City College of New York hired Bertrand Russell as a philosophy professor, a state trial court blocked his appointment.[60] The trial court announced that it had "a duty to act," to prevent a public college from "employing teachers who are not of good moral character."[61] It added: "Academic freedom does not mean academic license. It is the freedom to do good and not to teach evil."[62] In 1948, a state committee on the hunt for Communists investigated dozens of faculty members at the University of Washington.[63] Far from defending their academic freedom, the university administration "praised the committee" and fired three tenured professors.[64]

Only when the tides of McCarthyism receded, professors' Constitutional rights were finally vindicated. Three landmark cases broke First Amendment grounds for academic freedom in the classroom. Decided in 1957, *Sweezy v. New Hampshire by Wyman* denounced legislative inquiries into the Marxist leanings of a college professor's lectures as an unquestionable invasion of his academic freedom and political expression.[65] Writing for the plurality, Chief Justice Warren premised freedom of thought in American universities as a fundamental pillar of democracy: "[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization

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[57] Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

[58] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[59] Stuart J. Foster, *Red Alert! The National Education Association Confronts the "Red Scare" in American Public Schools, 1947-1954*, 14 Educ. & Culture, no. 2, Fall 1997, at 4.

[60] HEINS, *supra* note 45, at 46.

[61] Matter of Kay v. Bd. of Higher Educ., 173 Misc. 943, 952, 18 N.Y.S.2d 821, 830 (Sup. Ct. 1940), *aff'd per curiam*, 259 A.D. 879, 70 N.Y.S.2d 1016 (N.Y. App. Div. 1940) (no opinion).

[62] *Matter of Kay*, 173 Misc. at 951, 18 N.Y.S.2d at 829.

[63] HEINS, *supra* note 45, at 70.

[64] *Id.*

[65] 354 U.S. 234, 250 (1957).

will stagnate and die."[66] In 1960, *Shelton v. Tucker* invalidated a state statute that required teachers to disclose their political affiliations explaining that "[t]he vigilant protection" of free speech, inquiry, and association was "nowhere more vital than in the community of American schools."[67]

In 1964, faculty members at the State University of New York ("SUNY") put this theory of freedom to a test.[68] Five professors decided not to sign their "Feinberg certificate," a disclaimer of Communist Party affiliation that the SUNY Board of Trustees required as a condition of employment.[69] They met with an ACLU attorney instead.[70] Three years later, the *Keyishian* Court affirmed *Sweezy*'s poignant vision of academic freedom, placing it in the core of the First Amendment.

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." . . . The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, (rather) than through any kind of authoritative selection."[71]

Stamped in faculty charters, AAUP publications, and lower court opinions, *Keyishian's* impassioned rhetoric has spearheaded the defense of academic freedom. Yet, its impact on the Supreme Court's First Amendment jurisprudence appears negligible. When the Warren court ended in 1969,[72] *Keyishian*'s towering dicta retreated. Since 1970, *Keyishian* has been cited in just one Court decision favorable to professorial speech, unrelated to any exercise of academic freedom.[73]

[66] *Id.* at 249.

[67] 364 U.S. 479, 487 (1960).

[68] *See* Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).

[69] HEINS, *supra* note 45, at 192.

[70] *Id.* at 192–99.

[71] *Keyishian*, 385 U.S. at 603 (internal citations omitted).

[72] *See generally*, Ronald J. Krotoszynski, Jr., *A Remembrance of Things Past?: Reflections on the Warren Court and the Struggle for Civil Rights*, 59 WASH. & LEE L. REV. 1055 (2002).

[73] *See* Perry v. Sindermann, 408 U.S. 593, 597 (1972) (holding that summary judgment for a state college was improper where the professor alleged that his teaching contract was not renewed

Only its invocation of a college classroom as the "marketplace of ideas"[74] seems to have had some purchase in subsequent opinions.[75]

C. *Developing into an Institutional Protection*

Nothing is certain except death, taxes,[76] and a marketplace of ideas in a First Amendment opinion. The metaphor owes its existence to Justice Holmes's *Abrams* dissent,[77] a passage widely regarded as the foundation of First Amendment jurisprudence.[78] The marketplace of ideas represents society's general interest in a "broad public arena" of expression and discourse.[79] Since its inception, the ubiquitous bazaar has popped up in over a hundred Supreme Court decisions spanning "virtually every arena of First Amendment law."[80] It has circulated information and ideas to the public;[81] approved trademark applications;[82] created open venues for debate on public sidewalks[83] (but not utility poles[84]); and burned a Texas flag.[85] Since the 1970s, it has stayed open for business in cases at the

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because he publicly criticized the board of regents' policies when he testified at legislative committees).

[74] *Keyishian*, 385 U.S. at 603.

[75] *See, e.g.*, Healy v. James, 408 U.S. 169, 180 (1972); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 831 (1995); Grutter v. Bollinger, 539 U.S. 306, 324 (2003).

[76] Letter from Benjamin Franklin to Jean Baptiste Le Roy (Nov. 13, 1789), in 1 The Private Correspondence of Benjamin Franklin 265, 266 (William Temple Franklin ed., 1817).

[77] Abrams v. United States, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.")

[78] *See, e.g.,* Robert Post, *Writing the Dissent in Abrams*, 51 SETON HALL L. REV. 21(2020) (opining that the passage "virtually invent[ed] First Amendment doctrine").

[79] *See* Rodney A. Smolla, *The Meaning of the "Marketplace of Ideas" in First Amendment Law*, 24 COMM. L. & POL'Y 437, 448 (2019).

[80] *Id.* at 439.

[81] *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[82] *See* Matal v. Tam, 582 U.S. 218 (2017).

[83] *See* City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984).

[84] *See* McCullen v. Coakley, 573 U.S. 464 (2014).

[85] *See* Texas v. Johnson, 491 U.S. 397 (1989).

intersection of speech and money,[86] often invoked when dealing First Amendment protection to commercial messages[87] and campaign finance.[88]

On the college campus, the marketplace metaphor reshaped academic freedom jurisprudence. *Keyishian*'s description of the classroom as a marketplace of ideas highlighted the general public interest in collegiate intellectual diversity—but not the teacher's unique role in facilitating it. So too, do the Court's subsequent decisions, which revisit the marketplace to protect student expressions and university prerogatives—but not faculty speech.

Emphasis on the expressive marketplace in higher education[89] shifted the locus of academic freedom from the individual to the institution. Over the following decades, the Court seemingly recalibrated *Sweezy*'s impact on academic freedom, moving its focus from the educator to the environment. Later decisions rarely reference the plurality's concern for "the intellectual leaders in our colleges and universities."[90] Instead, they have primarily relied upon Justice Frankfurter's concurrence, making it "the business of a university to provide that atmosphere" of free inquiry.[91] *Sweezy* may have centered on an individual professor's "right to lecture and . . . associate with others,"[92] but citing opinions after 1970 have coalesced around Frankfurter's "four essential freedoms of a university."[93]

If *Keyishian* enshrined academic freedom in the college classroom, *Regents of University of California v. Bakke* inserted it in the administration's office.[94] *Bakke* and its progeny relied on the last of Frankfurter's four freedoms, "who may

[86] *See* Bigelow v. Virginia, 421 U.S. 809 (1975) ("The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas."); *see also* Smolla, *supra* note 78, at 445–55 (discussing the marketplace metaphor's "pivotal role in the development of modem commercial speech doctrine").

[87] *See, e.g.,* Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976); 44 Liquormart, Inc., v. Rhode Island, 517 U.S. 484 (1996).

[88] *See, e.g.,* Buckley v. Valeo, 424 U.S. 1 (1976); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

[89] *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (describing an "atmosphere of 'speculation, experiment and creation'" as "essential to the quality of higher education").

[90] *Sweezy*, 354 U.S. at 250 (1957). Before his Supreme Court appointment, Justice Frankfurter was a tenured Harvard Law professor who was involved in several academic freedom challenges at his university. Judith Areen, *Government As Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J 945, 969 n.104 (2009).

[91] *Id.* at 263 (Frankfurter, J., concurring).

[92] *Id.* at 249.

[93] *Id.* at 263 (Frankfurter, J., concurring) (These include the freedom "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.").

[94] *See Bakke*, 438 U.S. at 313 (acknowledging the First Amendment interest supporting a university's "right to select those students who will contribute the most to the 'robust exchange of ideas.'") (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

be admitted to study" at a university, to justify race-conscious student admissions policies.[95] Viewed as an institutional goal, academic freedom justified deference to university decision-making. This framework supported affirmative action in college admissions for decades, until ultimately dismantling in 2023.[96]

D. *Preserving Classroom Viewpoints*

The Court's current conception of academic freedom protects professors from state-imposed viewpoint restrictions on classroom speech, as Florida attempted with its "Stop W.O.K.E." Act.[97] *Keyishian*'*s* legacy may have been tenuous for professorial academic freedom, but its emphatic rejection of "laws that cast a pall of orthodoxy over the classroom"[98] squarely blocked Florida's attempt to eliminate race and sex-conscious instruction from its university lecture halls.[99] Unconvincingly redubbed the "Individual Freedom Act,"[100] the law prohibited professors from expressing any support for eight specific concepts relevant to critical race and gender studies.[101] The proscribed ideas could be discussed—but only in "an objective manner" and "without endorsement."[102]

Florida's crusade against "woke indoctrination"[103] may have been more successful if it had banned the topics entirely. As the district court acknowledged, a state is certainly "permitted to determine the content of its public school curriculum."[104] Prohibiting the concepts could be content control; prohibiting a specific stance on the concepts, however, was viewpoint control.[105] The First Amendment's protection for classroom discussion certainly drew the line between a university's academic authority and a professor's free speech at "rank viewpoint discrimination."[106]

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[95] *Id.* at 312; *See also* Grutter v. Bollinger, 539 U.S. 306, 324 (2003); *See also* Fisher v. Univ. of Tex., 570 U.S. 297, 308 (2013).

[96]*See generally* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 209 (2023) (cautioning that a university's "academic freedom 'to make its own judgments as to . . . the selection of its student body' . . . was not unlimited").

[97] *See* Pernell v. Fla. Bd. of Governors, 641 F. Supp. 3d 1218, 1230 (N.D. Fla. 2022).

[98] *Keyishian*. 385 U.S. at 603.

[99] *See Pernell*, 641 F. Supp. 3d at 1237,1277.

[100] The district court scathingly described Florida's "doublespeak," which defined "academic freedom" as "the 'freedom' to express only those viewpoints of which the [s]tate approve[d]." *Id.* at 1230 n.4.

[101] *Id.* at 1231.

[102] *Id.* at 1231–32.

[103] *Id.* at 1230 n.2.

[104] *Pernell*, 641 F. Supp. 3d at 1241–42.

[105] *Id.* at 1238.

[106] *Id.* at 1272.

Pernell's connection to *Keyishian* and *Sweezy* is unmistakable. Like its predecessors, *Pernell* challenged state legislation. Although employed by the state university system, the professors sued their respective boards of trustees for enforcing the speech restrictions as an arm of the state—not as an employer.[107] The distinction between the state entity acting as sovereign rather than employer meant that *Pernell* did not invite competing claims to academic freedom. Thus, Florida's "positively dystopian" attempt to impose its "chosen orthodoxy of viewpoint" in college classrooms was precisely the pall that *Keyishian* described—"antithetical to academic freedom," intolerable to the First Amendment.[108]

III. ACADEMIC FREEDOM AND THE EMPLOYER

Institutional academic freedom offers a shield against the state, allowing a university to pursue its objectives without government interference.[109] However, Justice Frankfurter's other three university freedoms— "who may teach, what may be taught, how it shall be taught"[110] —equipped a sword against the professor. In a famous footnote to *Regents of University of Michigan v. Ewing*, the Court explained that "[a]cademic freedom thrives on not only on the independent and uninhibited exchange of ideas among teachers and students . . . but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself."[111] The classroom marketplace of ideas—orchestrated by an instructor, but operated by a university—gave both parties competing claims to academic freedom.

A. *"Related to Scholarship or Teaching": Protecting Academic Expression*

As *Bakke* and *Ewing* ushered in an era of academic freedom for universities, other decisions seemed to undermine it for professors. Two cases, both arising from labor disputes, illustrate the Court's dismissive view of faculty academic freedom in the employment context.

In *NLRB v. Yeshiva University*, professors who participated in academic governance did not have their own, separately identifiable academic interests.[112] In *Yeshiva*, the Court concluded that the full-time faculty of a private university were all managerial employees excluded from National Labor Relations Act protections because it viewed the professors and the university as "essentially the same."[113] It

[107] *Id.* at 1263–64.
[108] *Id.* at 1230, 1273, 1277.
[109] Piarowski v. Ill. Cmty. Coll. Dist. 515, 759 F.2d 625, 629 (7th Cir. 1985).
[110] Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).
[111] Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1985).
[112] NLRB v. Yeshiva Univ., 444 U.S. 672, 688 (1980).
[113] *Id.*

explained that the management-employee relations of "the industrial setting [could not] be 'imposed blindly on the academic world.'"[114] Looking to the early collegial tradition of shared governance, where "the faculty were the school," the Court reasoned that a professor's own "professional interest . . . [could not] be separated from those of the institution."[115] Both, the Court surmised, sought the identical goal of "academic excellence and institutional distinction."[116]

In *Minnesota Board for Community Colleges v. Knight*, professors who wanted to participate in academic governance had no constitutional right to have their voices heard.[117] There, the Court upheld a state statutory provision that prohibited instructors from discussing academic policies during formal employment meetings.[118] While the historic "tradition of faculty participation in school governance" equated the *Yeshiva* professors with their institution, it did not enable the *Knight* professors to influence theirs. *Knight* reflects the Court's skepticism towards a First Amendment interest in faculty academic expression.[119] It explained: "Even assuming that speech rights guaranteed by the First Amendment take on a special meaning in an academic setting, they do not require government to allow teachers" a voice in policymaking.[120] Taken to its logical conclusion, *Knight* suggests that an individual professor's scholarly interests would hold no special First Amendment weight against the institution's own academic decisions.

In both *Yeshiva* and *Knight*, Justice Brennan authored dissenting opinions that sounded the alarm for academic freedom, but failed to influence the outcomes. Yet, perhaps because *Garcetti* arose outside the academy, a similar dissent from Justice Souter gained a foothold in the majority's opinion.[121] Justice Souter pointed

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[114] *Id.* at 681.

[115] *Id.* at 680, 688.

[116] *Id.* at 688. In a dissenting opinion, Justice Brennan criticized the majority's reinvention of the employment relationship in academia. He pointed out that the "big business" of education had long-since transferred university authority "from the faculty to an autonomous administration" operating under economic exigencies, accountable to alumni and special interest groups. *Id.* at 702–04 (Brennan, J., dissenting). In light of the faculty's increasingly diminished role, the majority's reasoning was untethered from the "governance structure of the modern-day university," and "antithetical to … academic freedom." *Id.* at 700, 702.

[117] Minnesota State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 286 (1984).

[118] *Id.* at 292.

[119] *Id.* at 287.

[120] *Id.* at 288. Justice Brennan disagreed, finding the prohibition "plainly violate[d] the principles of academic freedom enshrined in the First Amendment." *Id.* at 297 (Brennan, J., dissenting). He posited that the "First Amendment freedom to explore novel or controversial ideas in the classroom is closely linked to the freedom of faculty members to express their views to the administration concerning matters of academic governance." *Id.* at 296–97. Both inform the "free play of the spirit within [] institutions of higher learning." *Id.* at 297. Preventing the faculty from participating in matters of academic policies and decision-making would jeopardize the "freedom to teach without inhibition," just as gravely as a direct restraint on classroom discussion. *Id.*

[121] Garcetti v. Ceballos, 547 U.S. 410, 425 (2006) (Souter, J., dissenting)

out that public university professors "necessarily speak and write 'pursuant to . . . official duties'"; *Garcetti*'s blanket rule would thus convert their expressions to "controllable government speech."[122] Seeking to avoid "important ramifications for academic freedom," the majority carved "expression related to academic scholarship or classroom instruction" out of its public-employee speech doctrine.[123]

Yet, *Garcetti*'s open door inadvertently invited at least one ramification for academic freedom: it shifted the doctrine's attention to intramural speech. The earliest academic freedom dismissals took aim at professors' extramural utterances, affiliations, and activism.[124] So too did the constitutional cases, where conditions on employment targeted teachers' personal political alignments.[125] In contrast, contemporary academic freedom cases centered on teaching and scholarship are thinly slicing the parameters of job-duty speech, leaving courts to sift the academic from the operational.

They have produced mixed results. Circuits that have acknowledged some measure of First Amendment protection for university faculty speech[126] disagree on the scope of that protection. The Sixth Circuit emphatically declared that academic freedom "covers all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not."[127] Yet, the Fifth Circuit questioned the academic purpose of a professor's comments and its relevance to her assigned subject matter.[128] The Fourth Circuit found that a professor's controversial scholarship fell comfortably outside *Garcetti*'s purview because it "was intended for and directed at a national or international audience on issues of public importance unrelated to any of [his] assigned teaching duties" at the university.[129] In contrast, the Ninth Circuit applied the academic freedom exception to a professor's proposed plan for his college's communications

[122] *Id.* at 438.
[123] *Id.* at 425.
[124] *See supra* pp. 8–10.
[125] *See supra* p. 12.
[126] The Second, Fourth, Sixth, and Ninth Circuits have expressly adopted an "academic-freedom exception" to *Garcetti*, proceeding to the *Pickering-Connick* analysis instead. *See* Heim v. Daniel, 81 F.4th 212, 225–27 (2d Cir. 2023); Adams v. Trustees of the Univ. of N.C.-Wilmington, 640 F.3d 550, 563–65 (4th Cir. 2011); Meriwether v. Hartop, 992 F.3d 492, 507 (6th Cir. 2021); Demers v. Austin, 746 F.3d 402, 412 (9th Cir. 2014). The Fifth Circuit has not explicitly discussed *Garcetti*'s inapplicability to academia, but it implied as much when it recognized that "classroom discussion is protected activity," thus contemplating a college professor's First Amendment claim under the *Pickering-Connick* balancing test. Buchanan v. Alexander, 919 F.3d 847, 852 (5th Cir. 2019).
[127] *Meriwether*, 992 F.3d at 507.
[128] *Buchanan*, 919 F.3d at 854.
[129] *Adams*, 640 F.3d at 564.

department, specifically because the document was prepared "in connection with his official duties as a faculty member" of the school.[130]

The strength of the protection afforded to academic expression is also dubious. A First Amendment claim not barred by *Garcetti* is evaluated under the *Pickering-Connick* test, which weighs the public employee's interest in speaking as a citizen on a matter of public concern against the government employer's interest in operating efficiently.[131] When the employer is a university, academic freedom's dual utility as both an institutional goal and an individual interest[132] skews the balancing test. In a dispute over academic ideas, the scales are tilted against the professor. An individual educator's academic freedom must be measured against two institutional interests: the employer's need for efficient operations, and the university's pursuit of its own academic objectives.[133]

Litigation centered on classroom instruction has often deferred to the university's decisions. As the Sixth Circuit observed, resolving conflicting pedagogical perspectives between faculty and administration asks a court to interfere with the "internal operations of the academy,"—threatening its autonomy.[134] Judicial intervention is inappropriate unless the clash "directly and sharply implicate[s] basic constitutional values."[135] Reluctant to wade into school operations, several circuits have granted the employer control over curriculum

[130] *Demers*, 746 F.3d at 414.

[131] *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968); Connick v. Myers, 461 U.S. 138, 142 (1983).

[132] *See* Parate v. Isibor, 868 F.2d 821, 826 (6th Cir. 1989) (recognizing the conflict "between the academy and individual academics when both parties claim a constitutional right to academic freedom").

[133] *See* Heim v. Daniel, 81 F.4th 212, 230 (2d Cir. 2023) ("[H]ere, the professor's well-established First Amendment interests are not set only against the usual government employer's interests in the efficient, effective, disruption-free delivery of public services . . . but also against the countervailing 'First Amendment principles' that propel a public university's own 'underlying mission.'") (internal citations omitted).

[134] *Parate*, 868 F.2d at 827.

[135] Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

content,[136] teaching methods,[137] and grading protocols[138]—leaving little protection for a professor's pedagogy.

Academic scholarship faces similar hurdles. In *Heim v. Daniel*, the Second Circuit joined its sister circuits in emphatically declaring that *Garcetti*'s First Amendment bar "cannot be squared with the Supreme Court's long-professed, 'deep[ ] commit[ment] to safeguarding academic freedom.'"[139] The speech at issue in *Heim* was purely academic. It centered on a professor's preference for traditional Keynesian economic concepts—a methodology disfavored by his colleagues, and detrimental to his tenure-track candidacy.[140] Despite recognizing "the wealth of authority championing individual educators' interest in academic freedom," principles of institutional academic freedom loomed larger for the Second Circuit.[141] On that side of the balance, it observed, "courts have consistently celebrated the need to safeguard universities' self-determination over the substance of the education they provide and the scholarship they cultivate."[142] The Second Circuit followed suit, concluding that the university's "deliberate adherence to a particular intellectual methodology or approach" trumped the professor's academic interest.[143]

Strangely, this leaves non-scholarly job duty speech with the best chance of protection. Resistance to university policies and programs, framed as speech on matters of public concern, now litter the federal dockets.[144] The Sixth Circuit's

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[136] *See* Bishop v. Aronov, 926 F.2d 1066, 1074–77 (11th Cir. 1991) (upholding a university's authority to "reasonably control the content of its curriculum"; the institution's conclusions about the courses it offers "must be allowed to hold sway over an individual professor's judgments."); *See also* Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 492 (3d Cir. 1998) (holding that a university professor does not have a First Amendment right to choose his own "curriculum materials in contravention of the University's dictates.").

[137] *See* Hetrick v. Martin, 480 F.2d 705, 708 (6th Cir. 1973) (holding that a university does not violate the First Amendment by terminating a professor whose "teaching methods and educational philosophy" are "incompatible with [its] pedagogical aims"— the court agreed with the district court's findings of fact and conclusions of law in that a school "has a right to require some conformity with whatever teaching methods are acceptable to it.");

[138] *See, e.g.,* Brown v. Armenti, 247 F.3d 69, 75 (3d Cir. 2001) (holding that "a public university professor does not have a First Amendment right to expression via the school's grade assignment procedures.").

[139] Heim v. Daniel, 81 F.4th 212, 227 (2d Cir. 2023) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

[140] *Id.* at 217.

[141] *Id.* at 230–31.

[142] *Id.* at 231.

[143] *Id.*

[144] *See* Haltigan v. Drake, No. 5:23-CV-02437-EJD, 2024 WL 150729 (N.D. Cal. Jan. 12, 2024) (unpublished) (challenging a university's diversity, equity, and inclusion ('DEI') statement requirement for tenure-track candidates); *See also* Johnson v. Watkin, No. 1:23-CV-00848-ADA-CDB, 2023 WL 7624024 (E.D. Cal. Nov. 14, 2023) (challenging a university's use of DEI

decision in *Meriwether v. Hartop*[145] helped pave the way for such claims. In *Meriwether*, a philosophy professor's refusal to use pronouns consistent with his students' asserted gender identity[146] bore little relation to the substance of his course. Yet, the Sixth Circuit reasoned that his objection to the college's gender-identity policy amounted to academic speech because it raised a matter of public concern.[147] His mode of addressing students "reflected his conviction that one's sex cannot be changed," a news topic that had "become an issue of contentious political . . . debate."[148]

This expansive definition of academic expression can extend protection to speech untethered from any educational purpose. *Reges v. Cauces*, a recent district court decision, exemplifies the reach of *Meriwether*'s reasoning.[149] In *Reges*, a Washington state university seeking to "provide a welcoming environment" for native students suggested that faculty members include an indigenous land acknowledgment statement in their course syllabi.[150] A computer science professor promulgated his own contrary statement instead, disclaiming any native historical ownership of the university's land.[151] Although unjustified by any academic purpose[152] and unrelated to his introductory computer programming course, the district court found the syllabus statement sufficiently "related to scholarship or teaching."[153] In *Reges*, much like *Meriwether*, simply "present[ing] a view on a social and political issue"[154] while carrying out administrative policies could substantiate a First Amendment claim.

Reverse engineering speech protections from the classroom marketplace of ideas has produced confusing contours for First Amendment rights. Under this fractured formulation of academic freedom, a professor's intellectual idea might not prevail, but a workplace grievance touching a hot topic issue could. Whereas

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competencies in its newly adopted employment qualifications); *See also* Lowery v. Mills, No. 1:23-CV-129-DAE, 2023 WL 9958266 (W.D. Tex. Sept. 5, 2023) (unpublished) (challenging a university's disciplinary response to a professor's vocal criticism of its DEI initiatives).

[145] Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021).

[146] *Id.* at 498–99.

[147] *Id.* at 508.

[148] *Id.* (quoting *Cockrel v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036, 1051 (6th Cir. 2001)).

[149] Reges v. Cauces, 123 F. Supp. 3d 456 (D.D.C. 2024); Meriwether v. Trustees of Shawnee State Univ., 992 F.3d 492 (6th Cir. 2021).

[150] *Id.* at *1.

[151] *Id. at *2.* (The professor's syllabus stated: "I acknowledge that by the labor theory of property the Coast Salish people can claim historical ownership of almost none of the land currently occupied by the University of Washington.")

[152] *Id.* (The professor explained that he "intended to make fun of land acknowledgments . . . causing trouble on purpose" by promulgating his statement in his syllabus, on his office door, and in his email signature.).

[153] *Id.* at *10.

[154] *Id.* at *11.

the doctrine once formed a shield against intrusions into educators' politics as private citizens, it is now wielded as a sword to politicize their professional tasks. Preoccupied with classroom speech, the current landscape of faculty academic freedom has strayed far from the cases that animated its development.

B. *"[P]riests of our Democracy": Protecting Political Expression*

Sweezy's reference to the "business of a university"[155] may have guided the Court's academic freedom jurisprudence away from its origins. Yet, the proper understanding of a professor's First Amendment protection lies in a different Justice Frankfurter concurrence. It is his thoughts in *Wieman v. Updegraff*—not *Sweezy*—that clarify the educator's crucial role in generating academic freedom:

> It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma.[156]

The vibrant marketplace of ideas in the college classroom begins with its purveyor, not its patron. Justice Frankfurter's description of teachers as the "priests of our democracy," while perhaps vaunted, recognized that instructors—not institutions—produce the atmosphere of "open-mindedness and free inquiry" essential to higher education.[157] The stalwart protection of a professor's First Amendment rights, therefore, is a necessary precursor to the "robust exchange of ideas"[158] in universities.

That protection has been more concerned with politics than pedagogy. The first academic freedom cases entered First Amendment territory because they

[155] Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).
[156] Wieman v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).
[157] *Id.*
[158] Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

threatened teachers' freedom of association and political expression. State efforts to root out Communist Party affiliations by exacting loyalty oaths from college professors[159] and conducting probing inquiries into their ideologies[160] sought to squash political advocacy—striking at the core of the First Amendment.

The corresponding opinions do not expand the scope of that concern. In *Wieman*, Justice Frankfurter did not make a broad appeal to all academic ideas—rather, he specified the teacher's freedom to question "social and economic dogma."[161] Dissenting from *Adler*, Justice Douglas described the dangers of policing an educator's political associations: where surveillance holds scholars "in line for fear of their jobs, there can be no exercise of the free intellect."[162] Their nervousness permeates the classroom, deadening free inquiry, transforming the professor into "a pipe line for safe and sound information."[163] While *Sweezy*'s plurality opinion generally extolled the "essentiality of freedom in . . . universities," it specifically protected the First Amendment "right to engage in political expression and association"—a "fundamental principle of a democratic society."[164] In *Shelton*, compelling teachers to disclose their political affiliations violated their "right of free association," threatening termination for those belonging to "unpopular or minority organizations."[165] Overturning *Adler*, *Keyishian* spoke directly to the rights of free speech, press, and assembly that serve "free political discussion" and prompt change—"the very foundation of constitutional government."[166] By limiting teachers' political activities, the Feinberg certificate threatened academic freedom; "the stifling effect on the academic mind from curtailing freedom of association in such manner [was] manifest" and well-studied.[167] The AAUP may have dressed academic freedom in a one-size-fits-all lab coat, but the Court tailored it to political activity.

Political expression lies at the heart of the First Amendment—"[n]o form of speech is entitled to greater constitutional protection."[168] It is the "lifeblood of a self-governing people,"[169] innervating the First Amendment's primary purpose:

[159] *See id.*; Shelton v. Tucker, 364 U.S. 479 (1960); Whitehill v. Elkins, 389 U.S. 54 (1967).
[160] *See Sweezy*, 354 U.S. at 248–49.
[161] *Wieman*, 344 U.S. at 196 (Frankfurter, J., concurring).
[162] Adler v. Bd. of Educ., 342 U.S. 485, 510 (1952) (Douglas, J., dissenting), *overruled by* Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).
[163] *Adler*, 342 U.S. at 510 (Douglas, J., dissenting).
[164] *Sweezy*, 354 U.S. at 250.
[165] Shelton v. Tucker, 364 U.S. 479, 486–87 (1960).
[166] *Keyishian*, 385 U.S. at 602 (quoting De Jonge v. Oregon, 299 U.S. 353, 365 (1937)).
[167] *Keyishian*, 385 U.S. at 607.
[168] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995).
[169] McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 228 (2014) (Thomas, J., concurring) (quoting Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 466 (2001)).

preserving the "interchange of ideas for the bringing about of political and social changes desired by the people."[170] Core political speech is not limited to electioneering.[171] Rather, it encompasses advocacy on social, economic, and governmental issues—open discussion of public issues to bring about political change.[172]

The crossover between political discourse and academic responsibilities necessitates an exception to *Garcetti*'s blanket rule. *Garcetti* was premised on the belief that public employees speak only as the government when performing their job duties, because such speech "owes its existence to [their] professional responsibilities," having "no relevant analogue" to citizen speech.[173] The distinction between official duty speech and individual citizen speech is clear when a prosecutor prepares filings—an act that can only be done as a government official.[174] Yet, the binary collapses when an economics professor supports a labor strike—an academic position associated with his profession, but also political expression that private citizens can and do engage in.[175]

Academic speech benefits the collegiate marketplace of ideas but does not entirely escape *Garcetti*'s logic. Under certain circumstances, academic expressions could reasonably be described as "speech that owes its existence"[176] to a university employer. An institution could credibly argue that scholarship or research that it funded and directed would reflect speech that "the employer itself has commissioned or created."[177] Moreover, treating some forms of academic expression as unprotected speech would not necessarily "prevent [professors] from participating in public debate"[178] on an extramural basis. In *Heim*, the Second Circuit noted that the plaintiff professor "was never deprived of the opportunity to

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[170] Roth v. United States, 354 U.S. 476, 484 (1957).
[171] *See McIntyre*, 514 U.S. at 347.
[172] *See id.* at 346.
[173] Garcetti v. Ceballos, 547 U.S. 410, 421, 424 (2006).
[174] *Id.* at 422.
[175] *Id. at* 421.
[176] *Id.* at 421.
[177] *Id.* at 422; *cf.* Klaassen v. Atkinson, 348 F. Supp. 3d 1106, 1170–71 (D. Kan. 2018) (concluding that a professor's comments about the mismanagement of research grant funds was speech that his university employer had "commissioned or created"); Douglas v. Univ. of Haw., No. 21-CV-00217-DKW-WRP, 2023 WL 5019524, at *5 (D. Haw. Aug. 7, 2023) (rejecting a professor's argument that his university violated his First Amendment speech rights and "interfered with his academic freedom . . . by destroying his lab and past research materials," because the university owned all the samples and supplies at issue); Radolf v. Univ. of Conn., 364 F. Supp. 2d 204, 216 (D. Conn. 2005) (explaining that "no court has ever held that a university professor has a First Amendment right of academic freedom to participate in writing any particular grant proposal or performing research under any particular grant.").
[178] *Garcetti*, 547 U.S. at 422.

continue his research, or to share his Keynesian perspectives in his lectures."[179] Although his academic views disqualified him from a tenure-track position, the university "actively encouraged [the professor] to continue his own research"—which he did.[180] Despite missing out on the position, he was able to publish several books alongside his ongoing teaching responsibilities, which were "promptly celebrated and publicized by the university."[181]

Political expression, on the other hand, is wholly private citizen speech, unrelated and unattributable to university employment.[182] Yet, any overlap between a scholar's political viewpoint and academic discipline could allow an employer to blur the line between professorial and private activity.[183] As the Fourth Circuit observed in *Adams*, professors generally "engage in writing, public appearances, and service within their respective fields," outside of their faculty duties and independent from their employer.[184] Conflating their political expression with government work product would grant the state complete control over the form of expression dearest to the First Amendment—a substantial infringement justifying special attention.

Historically, that concern was triggered by cases like *Phillips*, which challenged a university employer's control over private political activities.[185] After fourteen years of teaching at a public college, the plaintiff history professor received a notice of nonrenewal.[186] The professor contended that the nonrenewal decision was precipitated by his commentary on public issues.[187] In recent years, he had co-authored a Dallas Morning News article calling for the removal of confederate monuments,[188] given a Washington Post interview about racial tensions in north Texas;[189] and criticized the college's anti-masking COVID-19

[179] Heim v. Daniel, 81 F.4d 212, 233 (2d Cir. 2023).
[180] *Id.*
[181] *Id.*
[182] *Garcetti*, 547 U.S. at 422.a
[183] Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550, 550 (4th Cir. 2011).
[184] *Adams*, 640 F.3d at 564.
[185] Phillips v. Collin Cmty. Coll. Dist., 701 F. Supp. 3d 525, 525 (E.D. Tex. 2023).
[186] AM. ASS'N OF UNIV. PROFESSORS, *Academic Freedom and Tenure: Collin College (Texas),* 11 (2023), https://www.aaup.org/file/Collin_College_0.pdf.
[187] *Id.*
[188] Michael Phillips & Edward Sebesta, *Dallas' Confederate Memorials Scream 'White Supremacy'*, DALL. MORNING NEWS (Aug. 4, 2017), https://www.dallasnews.com/opinion/commentary/2017/08/04/dallas-confederate-memorials-scream-white-supremacy.
[189] Rachel Chason, Annette Nevins, Annie Gowen, & Hailey Fuchs, *As His Environment Changed, Suspect in El Paso Shooting Learned to Hate*, WASH. POST (Aug. 9, 2019), https://www.washingtonpost.com/national/as-his-environment-changed-suspect-in-el-paso-shooting-learned-to-hate/2019/08/09/8ebabf2c-817b-40a3-a79e-e56fbac94cd5_story.html.

protocols on his social media accounts.[190] These comments, according to the school, violated its Code of Professional Ethics and Employee Expression policy.[191] The professor subsequently challenged these policies as unconstitutional prior restraints, as applied to his speech on matters of public concern—effectively, a "preclearance mechanism" to chill his protected expression.[192]

While ultimately unsuccessful,[193] *Phillips* bore a closer resemblance to the original academic freedom cases than job duty speech disputes like *Reges*. The expressions in *Phillips* were made as a private citizen on matters of public concern.[194] Although relevant to his discipline as a historian of race relations, the professor's news commentary was a far cry from the research or writing that would constitute "academic scholarship."[195] Nor did his extramural activity implicate "classroom instruction."[196] Yet, as a scholar and educator, his viewpoints on racial issues implicated his interest in academic freedom. Of the three incidents, his advocacy in the Dallas Morning News—urging government action on a salient issue of public concern—was the clearest instance of political expression. Like Bemis, Ross, and Nearing, the *Phillips* professor's advocacy earned a disciplinary response from his college.[197] Like those early academic freedom dismissals, the college's adverse actions appeared ideologically motivated.[198] Yet, perhaps because the speech in *Phillips* was not explicitly framed as protected political activity, it received short shrift in the district court's analysis.

In contrast, a different decision from the same district court found First Amendment protection for criticism scrawled on a faculty lounge chalkboard. In *Hiers v. Board of Regents of the University of North Texas System*, an adjunct

[190] *Phillips, 701 F. Supp. 3d at 533.*
[191] *Id*. at 532–33.
[192] *Id.* at 537.
[193] Kate McGee, *Jury Rules Against Texas Professor Who Claimed Suburban Community College Retaliated Against Him for Political Speech*, TEX. TRIB. (Nov. 14, 2023), https://www.texastribune.org/2023/11/14/collin-college-free-speech-lawsuit/.
[194] *Phillips*, 2023 WL 7302000, at *1.
[195] Garcetti, 547 U.S. at 425.
[196] *Id.*
[197] *Compare supra* notes 36–40, 47–49 and accompanying text *with* AM. ASS'N OF UNIV. PROFESSORS, *supra* note 183, at 12–13 (recounting the *Phillips* professor's "ominous" conversation with his college's president, who suggested that the "professor's outspokenness [about Confederate statutes] could backfire"). The professor also provided evidence of "another incident where the administration prohibited even the mention of politics in connection with the college." *Id.* at 12 n.25.
[198] *See* Collin Chapter of the Texas Faculty Association (Collin TFA), *Bob Collins: Collin College Doesn't Have Tenure "By Design,"* FACEBOOK (Jan. 31, 2022),https://www.facebook.com/watch/?v=1045423022670168 ("Longtime Board of Trustees member Bob Collins told local conservative groups in 2015 that tenure at the college is explicitly denied to prevent 'ultra-liberal, anti-capitalism, socialistic professors' from gaining a foothold.").

algebra professor expressed his annoyance towards a stack of flyers about "microaggressions" in his department's faculty lounge by writing "[p]lease don't leave garbage lying around" on a nearby chalkboard.[199] Like *Phillips*, the commentary at issue constituted private citizen speech rather than job duty speech. Yet, in *Hiers*, the district court's focus on political speech protections elevated an "intended . . . joke" to a "protest."[200] Framed as political commentary "concerning a hotly contested cultural issue in this country," even an intra-office message "directed at . . . coworkers and supervisors" could transcend the boundaries of a workplace grievance, taking on First Amendment significance.[201]

Protection for professors' political activity is especially crucial at the present juncture, where the world outside the university gates is aflame again, embroiled in sociopolitical turmoil. Yet, unlike the economic crisis of the Progressive era, the humanitarian crisis in Palestine has brought political expression directly to the college campus, as students and faculty hold mass demonstrations against their institutions' military investments.[202] These nationwide protests have swept public colleges and universities, pitting professors' private political expressions against their university employer's interests.[203] This clash, moreso than any workplace squabble or scholarly debate, invites the same concerns for individual political freedom that *Sweezy* and *Keyishian* once confronted. Robust First Amendment protection for these professors' political assembly and expression, therefore, may call for a conception of academic freedom that returns the doctrine to its roots.

IV. CONCLUSION

Despite its enduring presence in First Amendment jurisprudence, the elastic academic freedom doctrine has given unsteady grounds for protecting faculty speech. Once sparked by ideologically motivated dismissals of university professors, then fueled by state persecution of public educators, the doctrine's professional and legal roots demonstrated the First Amendment's devotion to faculty political expression. Yet, in the intervening years, the Court's academic freedom jurisprudence recentered it within the institution, casting doubt on the constitutional value of professorial speech.

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[199] Hiers v. Bd. of Regents, No. 4:20-CV-321-SDJ, 2022 WL 748502, at *2 (E.D. Tex. Mar. 11, 2022).

[200] *Id.* at *2, 7.

[201] *Id.* at *8, 10.

[202] *See* Brian Osgood, *U.S. University Ties to Weapons Contractors Under Scrutiny Amid War in Gaza*, AL JAZEER (May 13, 2024), https://www.aljazeera.com/news/2024/5/13/usuniversity-ties-to-weapons-contractors-under-scrutiny-amid-war-in-gaza.

[203] *See* Nadra Nittle, '*This Is the Job': How Some College Professors Are Supporting Student Protesters*, 19TH NEWS(May 8, 2024), https://19thnews.org/2024/05/campus-protests-how-faculty-professors-support-students/; *See also* Halina Bennet et al., *Where Protesters on U.S. Campuses Have Been Arrested or Detained*, N.Y. TIMES (May 13, 2024), https://www.nytimes.com/interactive/2024/us/pro-palestinian-college-protests-encampments.html.

By expressly reserving teaching and scholarship from its public employee speech doctrine, *Garcetti* seemingly rekindled the First Amendment's special concern for faculty free speech. The eighteen years since *Garcetti* have only produced murky contours for a constitutional right to academic expression. However, the sixty years that led to *Keyishian* may shed more light on the original understanding of First Amendment academic freedom: not a principle of professional autonomy, but the product of a professor's political liberty.