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ACADEMIC FREEDOM AND THE CONSTITUTION

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IN MODERN AMERICAN usage, the concept of academic freedom can refer either to the set of institutional principles by which universities should ideally be governed, or it can refer to the standards by which universities and their personnel receive constitutional protection.[1] In this chapter I shall discuss academic freedom understood as a concept of constitutional law.

For the past fifty years, the First Amendment has been interpreted to generate protections for academic freedom. The Supreme Court has proclaimed that academic freedom is a "special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[2] But the doctrine of academic freedom stands in a state of shocking disarray and incoherence. One eminent commentator has remarked that "there has been no adequate analysis of what academic freedom the Constitution protects or of why it protects it. Lacking definition or guiding principle, the doctrine floats in the law, picking up decisions as a hull does barnacles."[3]

The constitutional doctrine of academic freedom is incoherent because courts lack an adequate theory of why the Constitution should protect academic freedom. The Supreme Court believes that academic freedom should be protected because the First Amendment demands that the "marketplace of ideas" must be safeguarded. It has announced that "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.'"[4]

In this chapter I shall argue that this theory of constitutional protection for academic freedom is fundamentally unsound, and I shall advance what I regard as a more defensible account of why the Constitution might protect academic freedom. The theory I advance should strip barnacles from the hull of the great ship of academic freedom, resolving many of the puzzles that presently paralyze its progress and usefulness.

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Today we are likely to find unexceptionable, perhaps even banal, Karl Jasper's claim that "the university is the corporate realization of man's basic determination to know. Its most immediate aim is to discover what there is to be known and what becomes of us through knowledge."[5] Almost every modern university includes in its mission statement the purpose of striving "to create knowledge."[6] The modern university is indeed defined in terms of "the preservation, advancement, and dissemination" of knowledge.[7]

This concept of the university did not always exist in the United States. During the major part of the nineteenth century, the objective of most American colleges was to instruct young men in received truths, both spiritual and material. It is only when American scholars became infected with the German ideal of *Wissenschaft*, with the idea of systematizing and expanding knowledge, that American universities began to transform their mission. It is a moment of great historical significance when Daniel Coit Gilman could in 1885 address the assembled officers, students, and friends of the Johns Hopkins University to assert, with confidence and at length, that the "functions" of the university "may be stated as the acquisition, conservation, refinement and distribution of knowledge. . . . It is the business of a university to advance knowledge."[8]

The professional concept of academic freedom, as distinct from the constitutional concept of academic freedom, emerged in the United States at roughly the same time and in response to this transformation of the purpose of higher education.[9] Writing during this moment of transition, John Dewey could with characteristic lucidity observe the emerging relationship between the new concept of the university and the new idea of academic freedom:

> In discussing the questions summed up in the phrase academic freedom, it is necessary to make a distinction between the university proper and those teaching bodies, called by whatever name, whose primary business is to inculcate

> a fixed set of ideas and facts. The former aims to discover and communicate truth and to make its recipients better judges of truth and more effective in applying it to the affairs of life. The latter have as their aim the perpetuation of a certain way of looking at things current among a given body of persons. Their purpose is to disciple rather than to discipline. . . . The problem of freedom of inquiry and instruction clearly assumes different forms in these two types of institutions.[10]

Real universities *discipline*, institutions without academic freedom merely disciple.

Dewey's distinction quite accurately captures the professional ideal of academic freedom of research and publication,[11] which was first systematically set forth in the 1915 *Declaration of Principles on Academic Freedom and Academic Tenure*, published by the newly formed American Association of University Professors (AAUP), of which John Dewey was then president.[12] The *Declaration* justifies academic freedom of research and publication on the ground that universities cannot fulfill their purpose, which is "to promote inquiry and advance the sum of human knowledge,"[13] unless they award faculty "complete and unlimited freedom to pursue inquiry and publish its results. Such freedom is the breath in the nostrils of all scientific activity."[14]

The freedom protected by the *Declaration* is at root *disciplinary* in nature. The *Declaration* explicitly repudiates the position "that academic freedom implies that individual teachers should be exempt from all restraints as to the matter or manner of their utterances, either within or without the university."[15] Instead it announces that academic freedom implies that the "liberty of the scholar within the university to set forth his conclusions, be they what they may, is conditioned by their being conclusions gained by a scholar's method and held in a scholar's spirit; that is to say, they must be the fruits of competent and patient and sincere inquiry."[16] The *Declaration* conceives academic freedom as the freedom to pursue the "scholar's profession"[17] according to the standards of that profession.[18]

Academic freedom, the *Declaration* precisely notes, upholds "not the absolute freedom of utterance of the individual scholar, but the absolute freedom of thought, of inquiry, of discussion and of teaching, of the academic profession."[19] Disciplinary norms of the profession link the university to the achievement of its mission to produce knowledge. Universities produce knowledge because they give scholars the freedom to pursue the disciplinary practices that produce the kind of expert knowledge we demand of universities.

This view of academic freedom implies that it must depend upon a *double* recognition: that knowledge cannot be advanced "in the absence of free inquiry" and that "the right question to ask about a teacher is whether he is competent."[20] Only competent faculty can advance knowledge. Universities assess competence by using the standards of the scholarly profession. And they assess the competence of faculty all the time: whenever they hire, promote, tenure, or award grants to professors. Universities invoke the doubled structure of academic freedom whenever they honor the need for critical freedom while simultaneously making the judgments of quality required to advance knowledge.[21]

This doubled structure differentiates academic freedom from the larger genus of "intellectual freedom." All persons are entitled to intellectual freedom, but only academics are entitled to academic freedom. Intellectual freedom does not presume the responsibility of competence, but academic freedom does. Intellectual freedom is not bound to any specific institution, like a university, but academic freedom is. Like intellectual freedom, however, academic freedom presupposes the necessity and importance of critical inquiry.

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The theory of the marketplace of ideas, which the court believes generates the constitutional concept of academic freedom, is radically incompatible with the doubled structure of academic freedom. The theory of the marketplace of ideas was first articulated by Justice Holmes in his justly famous dissent in *Abrams v. United States*:[22]

> 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.[23]

The U.S. Supreme Court has since and frequently proclaimed that "it is the purpose of the First Amendment to preserve an uninhibited marketplace of

ideas in which truth will ultimately prevail."[24] There is a general belief in constitutional circles that the point of First Amendment doctrine is to "advance knowledge and the search for truth by fostering a free marketplace of ideas and an 'uninhibited, robust, wide-open debate on public issues.'"[25] Indeed, "the most influential argument supporting the constitutional commitment to freedom of speech is the contention that speech is valuable because it leads to the discovery of truth."[26]

The premise of the marketplace of ideas is that truth will emerge from the clash of conflicting opinions. The theory of the marketplace of ideas therefore deploys First Amendment doctrine to prevent the state from interfering in the free flow of public discussion. It permits the regulation of speech only when the state can meet a strict "requirement of viewpoint neutrality."[27] Courts pursuing the ideal of the marketplace of ideas apply "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."[28]

A doctrinal structure of this nature is in fundamental tension with the forms of disciplinary knowledge that underlie academic freedom of research and publication. The point of the professional ideal of academic freedom is to ensure that universities are organized to advance their mission of producing expert, disciplinary knowledge. But if, as the theory of the marketplace of ideas holds, "the First Amendment recognizes no such thing as a 'false' idea,"[29] then it cannot sustain, or even tolerate, the disciplinary practices necessary to sustain the truth claims to which the ideal of expert knowledge aspires.[30]

Not only is the theory of the marketplace of ideas incompatible with ordinary judgments that universities must continuously make to identify and promote "competence," it is also incompatible with the forms of social order our society ordinarily uses to produce professional knowledge. Expert knowledge is produced by disciplines, and as the *Oxford English Dictionary* reminds us, disciplinarity refers to "the training of scholars or subordinates to proper and orderly action by instructing and exercising them." Disciplines are not organized according to market or even democratic principles.

For example, disciplines commonly use professional journals to serve as gatekeepers for the recognition and distribution of knowledge. Journals could not perform this function if they were required to operate according to the theory of the marketplace of ideas. If disciplinary journals were forced by constitutional doctrine to accept all manuscripts on a first-come, first-served basis, or if they were constitutionally prohibited from engaging in the content

discrimination required to distinguish good from poor submissions, they could no longer serve as disciplinary gatekeepers for the recognition and distribution of knowledge. If a marketplace of ideas model were to be imposed upon *Nature* or the *American Economic Review* or *The Lancet*, such publications would very rapidly lose their capacity to authoritatively register what we do and do not know about the world.[31]

I do not mean to deny that scholars in the arts, humanities, and sciences sometimes possess powerful personal charisma. My point is rather that the creation of disciplinary knowledge—the kind of knowledge that justifies modern universities and therefore also the professional ideal of academic freedom—requires the maintenance of *disciplinary* authority.[32] Disciplinary authority rests on forms of discrimination incompatible with the marketplace of ideas. It is simply a confusion to believe the marketplace of ideas can generate doctrine remotely compatible with modern university practices. If the constitutional concept of academic freedom is to be justified, therefore, it cannot be by the theory of the marketplace of ideas. Instead we need a constitutional rationale that can validate simultaneous commitments to critical freedom *and* to rigorous disciplinary standards of judgment.[33]

Universities cannot fulfill their social function unless they are authorized to evaluate scholarly speech based upon its content and professional quality.[34] No doubt if the *New York Times* were to editorialize that the moon is made of green cheese, the First Amendment, deploying the concept of the marketplace of ideas, would prohibit government from imposing any sanction. Yet no astronomy department could survive if it were constitutionally prohibited from denying tenure to young scholars who were similarly convinced. It is no wonder that the constitutional doctrine of academic freedom lies in shambles: it is justified by a theory that is incompatible with the mission of the modern university.

How, then, might we justify a constitutional law of academic freedom? The more one knows about the organizing logic of First Amendment jurisprudence, the more difficult the question becomes.

This chapter is not the venue in which to defend the point, but I have elsewhere argued in detail that the fundamental purpose of the First Amendment is to protect a communicative process of democratic legitimation.[35]

It is essential that our state maintain its democratic legitimacy—that "we the people" continue to believe that our government represents us, that it speaks for us, and that it is answerable to us. As a matter of constitutional design, we accomplish this goal by ensuring that government is responsive to public opinion and that the state is precluded from interfering with persons who wish to participate in the formation of public opinion.

If we denominate as "public discourse" the communicative practices deemed necessary for public opinion formation, the First Amendment prohibits viewpoint and content discrimination within public discourse in order to guarantee to each person the unfettered possibility of altering the content of public opinion. Democratic legitimation is egalitarian, because it values equally each person's effort to shape public opinion. Discrimination between persons based upon the content of their speech is inconsistent with this equality. To the extent that the state excludes a person from public discourse, it denies the potential of democratic legitimation to that person.

Although law must frequently distinguish true from false factual statements, expressions of expert knowledge in public discourse tend to be constitutionally characterized as statements of opinion. The first Amendment holds that opinions cannot be penalized as false. Statements "that describe present or past conditions capable of being known through sense impressions"[36] are classified as factual, whereas statements in which a speaker "is expressing a subjective view, an interpretation, a theory, conjecture, or surmise"[37] tend to be classified as opinion, which is protected from state regulation.

This tendency is no accident, for First Amendment doctrine presupposes that democratic legitimation is maximized whenever participation in public discourse is protected from state control. First Amendment doctrine thus displays a pronounced inclination to characterize assertions of expert knowledge within public discourse as statements of opinion and in this way to protect a marketplace of ideas within public discourse.

The egalitarian premises built into the foundations of First Amendment doctrine undermine the disciplinary authority necessary for the maintenance of expert knowledge. Whereas law has no difficulty holding accountable for malpractice a lawyer who gives bad advice to a client outside of public discourse, a lawyer who offers the same advice to the gullible public tends to be immunized from legal regulation. Because scholarship is often addressed to the public, the question of how to reconcile First Amendment doctrine with university judgments of competence is quite perplexing.

A solution to this dilemma emerges if we carefully consider the concept of democratic legitimation. Because "contemporary Western societies are in one sense or another ruled by knowledge and expertise,"[38] a state that can freely manipulate the production and distribution of disciplinary knowledge can set the terms of its own legitimacy. By fiat it can make the dangers of climate change inevitable or illusory, or it can make the harms of smoking obvious or speculative. By controlling knowledge, it can make a mockery of the aspiration to democratic self-governance.

The insight is common in the twentieth century.[39] No less a democrat than John Dewey affirms that "opinions and beliefs concerning the public presuppose effective and organized inquiry" and that "genuine public policy cannot be generated unless it be informed by knowledge, and this knowledge does not exist except when there is systematic, thorough, and well-equipped search and record."[40] Claude Lefort concisely summarizes the insight when he distinguishes democratic from totalitarian regimes on the ground that in the latter "a condensation takes place between the sphere of power, the sphere of law and the sphere of knowledge. Knowledge of the ultimate goals of society and of the norms which regulate social practices becomes the property of power, and at the same time power itself claims to be the organ of discourse which articulates the real as such."[41]

This line of analysis suggests that within the constitutional value of democratic legitimation lies implied a second constitutional value, which I shall call "democratic competence." Democratic competence refers to the cognitive empowerment of those who participate within public discourse. In this chapter I shall focus on the aspects of democratic competence that concern the production and distribution of expert knowledge, which it is the business of universities to generate and publish. Only on the basis of expert knowledge can we know whether nicotine is in fact harmful, or whether climate change is indeed probable and caused by human factors.

Although democratic legitimation requires democratic competence, democratic legitimation rests upon a doctrinal structure that is inconsistent with the maintenance of democratic competence. Democratic legitimation requires that the speech of all persons be treated with toleration and equality. By contrast, democratic competence requires legal support for disciplinary authority capable of distinguishing good ideas from bad ones.

In circumstances of direct conflict, the value of democratic legitimation should prevail over that of democratic competence. Democratic legitimation underwrites the general legitimacy of the government and is therefore

a necessary prerequisite for any and all government action. Nevertheless, because many communications lie outside the domain of public discourse where democratic legitimation holds sway, there remain many opportunities for courts to implement the value of democratic competence.

A simple illustration of the difficulty may be found in a recent Nebraska statute that requires doctors who are treating women seeking an abortion to disperse false information to their patients.[42] Communications between doctors and patients in the course of medical treatment are not within public discourse; they are not attempts to participate in the formation of public opinion. Thus the state can freely regulate physician speech in order to uphold professional standards. A doctor sued for malpractice will not have a First Amendment defense; he will not be able to claim, with Justice Holmes, that his advice was "an experiment, as all life is an experiment." The doctrinal principles appropriate to democratic legitimation do not apply to physician–patient communications.

Yet if the state were to require doctors to communicate false information to patients, the independent value of democratic competence may be implicated. We can thus glimpse the influence of democratic competence when we find a federal district court easily concluding that the First Amendment rights of physicians were violated by the Nebraska statute, because it would compel them "to give untruthful, misleading and irrelevant information to patients."[43] The Nebraska statute runs afoul of the distinct constitutional value of democratic competence. It corrupts the communication of expert knowledge to the population.[44]

If we ask how the district court is able to determine that the information required to be communicated by the Nebraska statute is in fact false, the answer must be that the court hears and credits expert medical testimony. This point has quite radical implications. It suggests that the protection of democratic competence extends independent constitutional status to professional disciplinary practices that produce expert knowledge. Democratic competence would have no meaning if the state could freely manipulate these knowledge practices, which exemplify disciplinarity.

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We are now in a position to postulate how academic freedom might become an independent, freestanding constitutional concept. The value of democratic competence, already visible in many aspects of contemporary First Amendment jurisprudence,[45] attributes constitutional status to the creation

and distribution of expert knowledge. Universities are unique institutions in this regard. Although knowledge is widely produced by many contemporary organizations, ranging from pharmaceutical companies to think tanks, only universities define, reproduce, and constitute the disciplinary standards by which expert knowledge is recognized and validated. That is why virtually all contemporary sites of knowledge production employ personnel trained in universities.

The value of democratic competence should lie at the core of the constitutional concept of academic freedom. As a constitutional principle, academic freedom must preserve the integrity of disciplinary practices from unrestrained political control.[46] This is consistent with the professional ideal of academic freedom,[47] which essentially claims that the scholarly profession should be self-regulating. Decisions about disciplinary competence cannot be made on the basis of public opinion or on the basis of the personal views of those who happen to provide the funds that support universities.

Conceiving constitutional academic freedom in this way solves many of the doctrinal puzzles that presently render the constitutional law of academic freedom all but incoherent. In the remainder of this chapter, I discuss three such puzzles.

DOES CONSTITUTIONAL ACADEMIC FREEDOM APPLY TO PROFESSORS OR TO INSTITUTIONS?

Courts[48] and commentators[49] have noticed a potential conflict between individual and institutional concepts of academic freedom. The question is whether individual professors hold constitutional rights of academic freedom, or whether these rights are instead held by universities as institutions. The conflict between the two perspectives comes into view if a professor, alleging a violation of academic freedom, sues a university for the denial of tenure. A university might well defend the suit on the ground of its own academic freedom to determine the quality of its faculty. A great deal of ink has been spilled over the question of whether rights of constitutional academic freedom attach to individuals or to universities.

The tension between individual and institutional academic freedom can be reconciled if we appreciate that constitutional protections for academic freedom of research and publication serve the distinct value of democratic

competence. This value encompasses *both* the ongoing health of universities as institutions that promote the growth of knowledge *and* the capacity of individual scholars to inquire and to disseminate the results of their inquiry.

Universities promote the growth of new knowledge when they support scholars who apply and improve the professional scholarly standards that define knowledge in particular disciplines. That is why American university administrators, despite their formal legal control over university governance, nevertheless typically and properly defer heavily to the peer judgments of faculty when making decisions about how to govern university affairs, especially in evaluating faculty competence.

If administrators were instead to defer to "the prevailing opinions and sentiments of the community in which they dwell" and thus override professional standards in the name of "this multitudinous tyrannical opinion,"[50] universities as institutions would cease to serve the constitutional value of democratic competence. They would become, in the words of the *Declaration*, "essentially proprietary institutions" that do not "accept the principles of freedom of inquiry, of opinion, and of teaching; . . . Their purpose [would not be] to advance knowledge by the unrestricted research and unfettered discussion of impartial investigators, but rather to subsidize the promotion of opinions held by the persons, usually not of the scholar's calling, who provide the funds for their maintenance."[51] It is "manifestly important," the *Declaration* asserts, that such institutions "not be permitted to sail under false colors."[52]

From a constitutional point of view, therefore, academic freedom has nothing to do with the autonomy of institutions that happen to include the name "university" in their titles. It applies only to institutions that actually protect the application of professional scholarly standards to advance knowledge.[53] Academic freedom does not entail deference to university administrators "who have expertise in education."[54] It instead entails deference to the professional scholarly standards by which knowledge is created. If a professor sues a university for a violation of academic freedom for its refusal to award him tenure, the right question for a court to decide is neither the individual rights of the professor nor the institutional prerogatives of the university. It is instead whether the tenure decision is made on the basis of the proper disciplinary standards.

In deciding this question it is entirely appropriate for courts to conclude that "when judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional

judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."[55]

The justification for this deference is that courts are not well equipped to second-guess the exercise of the professional scholarly standards that advance the constitutional value of democratic competence in the context of university scholarship. Courts are properly concerned that "judges should not be ersatz deans and educators."[56] Nothing in the concept of academic freedom, however, justifies deference when universities make executive decisions that do not purport to reflect professional standards.[57]

This suggests that the supposed tension between the institutional and individual accounts of academic freedom is based upon a misunderstanding. The constitutional value of academic freedom depends upon the exercise of professional standards, which inhere neither in institutions as such nor in individual professors as such. In the context of academic freedom, courts should ask how to fashion doctrine that best protects the "freedom of thought, of inquiry . . . of the academic profession."[58]

This can be a complicated question, because administrative decisions often purport to express professional standards. It is important, however, not to confuse the question of when deference is appropriate with the question of whether academic freedom inheres in institutions or in individuals.[59]

DOES ACADEMIC FREEDOM APPLY ONLY TO MATTERS OF PUBLIC CONCERN?

The most controversial recent decision involving academic freedom has been *Urofsky v. Gilmore*,[60] decided en banc by the Fourth Circuit in 2000. The case concerns a challenge to a Virginia statute providing that state employees, including university professors, cannot "access, download, print or store any information infrastructure files or servers having sexually explicit content," unless such access is approved in writing by an "agency head."[61]

Gilmore realizes that the statute, because it restricts the research of faculty, is inconsistent with academic freedom conceived as "a professional norm,"[62] but it concludes that "the Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs" rather than "a First Amendment right of academic freedom that belongs to the professor as an

individual."[63] *Gilmore* does not seem to realize that if the Supreme Court had articulated a constitutional right of academic freedom that attaches to universities, the only possible constitutional value at stake is that of democratic competence, which must apply equally to the need for individual professors to pursue their professional research free from government interference.[64]

Gilmore is explicit that "because the Act does not infringe the constitutional rights of public employees in general, it also does not violate the rights of professors."[65] *Gilmore* uses Supreme Court precedents like *Pickering v. Board of Education*,[66] *Connick v. Myers*,[67] and *Waters v. Churchill*[68] to analyze the constitutional rights of public employees. These decisions hold that the First Amendment does not protect the speech of state employees unless their speech involves "a matter of public concern."[69]

Gilmore is unusual because it frankly acknowledges that the "public concern" test of the *Pickering–Connick–Churchill* line of cases refers to general First Amendment rights that apply to all public employees and hence that have no particular relevance to the specific value of academic freedom. But courts generally have not recognized this, and they have used the "public concern" test to assess whether state regulations infringe academic freedom.[70] This represents a rather deep misunderstanding of the nature of academic freedom of research and publication.[71]

The *Pickering–Connick–Churchill* line of cases rests on the premise that in a democracy the implementation of government decisions frequently requires the creation of organizations. If a democratic state wishes to create a social security system, it must establish a social security administration; if it wishes to provide a welfare system, it must establish a social service bureaucracy. State organizations are purposive; they exist to achieve the ends for which they are created. Within such organizations the state must manage its employees, including their speech, in ways designed to fulfill organizational objectives. That is why the speech of soldiers can be regulated as is necessary to secure the national defense, or the speech of lawyers within a courtroom can be regulated as is necessary to secure justice.[72] "The state has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the regulation of the speech of the citizenry in general."[73]

When an employee speaks about a matter of "public concern," she is attempting to participate in public discourse "as a citizen."[74] The state must therefore "balance between the interests of the [employee], as a citizen, in

commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[75] The instrumental logic of an organization must somehow be reconciled with the egalitarian structure of public discourse. The *Pickering–Connick–Churchill* line of cases is about how this reconciliation should be effected.

The management of faculty at public universities must also be reconciled with the faculty's participation in public discourse as citizens. Within the organizational domain of the university, the speech of faculty is typically regulated as is necessary to achieve the purposes of higher education.[76] Faculty can be required to teach at certain hours on certain days about certain subjects. Their speech can be sanctioned if it is inconsistent with the educational mission of a university—if it is abusive or harassing or violates professional confidences. But because faculty may also wish to participate in public discourse as citizens, the value of democratic legitimation requires that their speech about matters of "public concern" should receive independent constitutional protection, in the same manner as would the public speech of any government employee.

Courts that use the "public concern" test to measure the scope of academic freedom fail to recognize that academic freedom of research and publication does not concern the freedom of faculty to speak in public "as citizens." Academic freedom triggers First Amendment coverage not because of the value of democratic legitimation, which protects the right of all citizens equally to participate in the formation of public opinion, but because of the value of democratic competence, which concerns the creation and distribution of knowledge. University faculty are uniquely situated with respect to the value of democratic competence, which is why academic freedom does not apply equally to all government employees.

Because the criterion of "public concern" turns on the application of the value of democratic legitimation, it has nothing to do with the value of democratic competence that underlies constitutional protections for academic freedom. Constitutional questions of academic freedom arise whenever the freedom of the scholarly profession to engage in research and publication is potentially compromised. It makes no difference whether a scholar wishes to publish about a matter of public concern, like American foreign policy, or about Hittite inscriptions, which may not constitute a matter of public concern debated by citizens in public discourse. Constitutional protections

for academic freedom exist to ensure the effective creation and distribution of expert knowledge at universities.

If the "public concern" test of the *Pickering–Connick–Churchill* line of cases is relevant to any aspect of academic freedom, it is to the component of academic freedom that the *Declaration* called "freedom of extramural utterance and action."[77] This aspect of professional academic freedom refers to the freedom to "speak or write as citizens"[78] rather than as experts. An example of freedom of extramural expression might be an astronomer who wishes to write in public about NAFTA[79] or a computer scientist who wishes to speak out about the war in Afghanistan.[80] When faculty engage in such speech, they attempt to influence public opinion so as to make it responsive to their views. They do not speak as experts conveying knowledge but as citizens participating in public debate.

Experts have for years debated whether freedom of extramural speech should be considered an aspect of professional academic freedom. The difficulty is that extramural speech is by hypothesis unrelated to the special training and expertise of faculty.[81] From a constitutional point of view, however, freedom of extramural expression raises the same question of democratic legitimation as that which arises whenever government seeks to suppress the participation of its employees in public discourse. The "public concern" test of the *Pickering–Connick–Churchill* line of cases is an effort to identify and resolve this question. This is a quite different question than that of academic freedom of research and publication, which turns on the constitutional value of democratic competence rather than that of democratic legitimation.

WHO IS SPEAKING—WHEN CAN PROFESSORS ASSERT THE PROTECTIONS OF ACADEMIC FREEDOM?

If the "public concern" test of the *Pickering–Connick–Churchill* line of cases is frequently invoked by lower courts attempting to wrestle with thorny questions of constitutional academic freedom, so also is another decision of the Supreme Court—*Hazelwood School Dist. v. Kuhlmeier*.[82] In *Hazelwood* the court held that a secondary school was authorized to restrict or compel speech as necessary in order to fulfill its chosen curriculum. In the context of higher education, *Hazelwood* is typically invoked whenever a professor claims that a university has interfered with his freedom in the classroom. A good example

is *Bishop v. Aronov*,[83] in which a university professor was instructed to refrain from interjecting his religious beliefs or preferences during instructional time periods.

Citing *Kuhlmeier*, the court in *Aronov* held that "as a place of schooling with a teaching mission, we consider the University's authority to reasonably control the content of its curriculum, particularly that content imparted during class time. Tangential to the authority over its curriculum, there lies some authority over the conduct of teachers in and out of the classroom that significantly bears on the curriculum or that gives the appearance of endorsement by the university."[84] *Aronov* felt driven to the conclusion that "though we are mindful of the invaluable role academic freedom plays in our public schools, particularly at the post-secondary level, we do not find support to conclude that academic freedom is an independent First Amendment right."[85]

Most apparently at issue in *Aronov* was the component of academic freedom that the *Declaration* identifies as freedom of teaching.[86] Freedom of teaching is an exceedingly complex and ill-defined topic, for it must be reconciled not only with the capacity of faculty departments and universities to design and implement curricular requirements,[87] but also with the academic freedom of students. If there is an argument for constitutionalizing freedom of teaching, it must be of the kind sketched by Frankfurter in his famous concurrence in *Wieman v. Updegraff*:

> That our democracy ultimately rests on public opinion is a platitude of speech but not a commonplace in action. Public opinion is the ultimate reliance of our society only if it be disciplined and responsible. It can be disciplined and responsible only if habits of open-mindedness and of critical inquiry are acquired in the formative years of our citizens. The process of education has naturally enough been the basis of hope for the perdurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards.
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> To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. 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. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or State government.[88]

In this passage, Frankfurter advances the argument that democracy can succeed only if persons are educated to become competent democratic citizens. The forms of pedagogy necessary for what we may call "democratic education"[89] should thus be invested with constitutional value.[90]

I do not in this chapter address the thorny subject of freedom of teaching.[91] I focus instead on classroom regulations that affect academic freedom of research and publication. This freedom includes the right to disseminate the results of research to laypersons, including and most especially to students in the classroom. Freedom of research and publication is implicated in the classroom not merely because classrooms are a primary medium for the transmission of scholarly expertise to the public, but also because classrooms are the only medium through which the next generation of scholars can be produced.

Freedom of research does not in this sense seem to have been at issue in *Aronov*, because in that case the professor was teaching a class in "exercise physiology" and the classroom remarks for which he was disciplined concerned how "God came to earth in the form of Jesus Christ and he has something to tell us about life which is crucial to success and happiness."[92] It is difficult to construe these remarks as a report of scholarly expertise. At most they were an effort to motivate and engage students in the classroom. Such an effort would exemplify freedom of teaching rather than freedom of research and publication.

A university must be free to regulate the incompetent communication of research within the classroom. But a university cannot regulate the communication of research within the classroom on the ground that it disapproves of the message that is conveyed. Such a purpose would be, as Dewey observed at the outset of the last century, to perpetuate "a certain way of looking at things current among a given body of persons. . . . To disciple rather than to

discipline."[93] The effort to disciple the communication of research, inside or outside the classroom, ought to be regarded as inconsistent with the constitutional value of democratic competence.

Several years ago the court rendered a decision that potentially takes a long step toward entrenching a constitutional vision of universities that disciple rather than discipline. In *Garcetti v. Ceballos*,[94] the court held "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[95] In the secondary school context, *Garcetti* has been interpreted to deny all academic freedom in the classroom, because a "school system does not 'regulate' teachers' speech as much as it *hires* that speech. Expression is a teacher's stock in trade, the commodity she sells to her employer in exchange for a salary."[96] In the context of public universities, courts are beginning to interpret *Garcetti* to mean that "in order for a public employee to raise a successful First Amendment claim, he must have spoken in his capacity as a private citizen and not as an employee."[97] This conclusion essentially implies that universities are proprietary institutions that hire faculty in order to speak for them.

Aware that this holding would have drastic implications for academic freedom of research, *Garcetti* itself notes that "there is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence," and it concludes that "we need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."[98]

It is precisely to avoid the logic implicit of *Garcetti* that the drafters of the *Declaration* insisted that faculty "are the appointees, but not in any proper sense the employees," of universities.[99]

> Once appointed, the scholar has professional functions to perform in which the appointing authorities have neither competency nor moral right to intervene. The responsibility of the university teacher is primarily to the public itself, and to his judgment of his own profession; and, while, with respect to certain external conditions of his vocation, he accepts a responsibility to the authorities of the institution in which he serves, in the essentials of his professional activity his

> duty is to the wider public to which the institution itself is morally amenable. So far as the university teacher's independence of thought and utterance is concerned—though not in other regards—the relationship of professor to trustees may be compared to that between judges of the federal courts and the executive who appoints them. University teachers should be understood to be, with respect to the conclusions reached and expressed by them, no more subject to the control of the trustees, than are the judges subject to the control of the president, with respect to their decisions; while of course, for the same reason, trustees are no more to be held responsible for, or to be presumed to agree with, the opinions or utterances of professors, than the president can be assumed to approve of the legal reasonings of the courts.[100]

Translated into contemporary constitutional terms, the argument of the *Declaration* is that faculty serve the "public" insofar as they serve the public function of identifying and discovering knowledge. It is this function that triggers the constitutional value of democratic competence. Were faculty to be merely the employees of a university, as *Garcetti* conceptualizes employees, they would be responsible in their "official duties" for promulgating the opinions of the governors (or underwriters) of the university. They could then no longer serve the function of identifying and advancing knowledge, because in modern society the creation of knowledge is inseparably connected to the application of professional, disciplinary standards.

Were that consequence to obtain, our nation would have lost an invaluable resource, one that has propelled us to the forefront of the world stage. In today's information age, intellectual stagnation implies economic and military death. Much depends, therefore, on the extent to which the court appreciates the full weight that rides on the casual reservation that it advanced in *Garcetti*. The implications of *Garcetti* are especially foreboding in a world in which universities are increasingly desperate for funding and perhaps even willing to sell the academic freedom of their faculty in order to secure a stable financial future.

NOTES

1. Walter P. Metzger, "Profession and Constitution: Two Definitions of Academic Freedom in America," *Texas Law Review* 66 (1988): 1265.
2. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).
3. J. Peter Byrne, "Academic Freedom: A 'Special Concern of the First Amendment,'" *Yale Law Journal* 99 (1989): 253.

4. *Keyishian*, 385 U.S. See Rosenberger v. Rectors and Visitors of the University of Virginia, 515 U.S. 819, 831 (1995); Healy v. James, 408 U.S. 169, 180 (1972); Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1188 (6th Cir. 1995) ("the purpose of the free-speech clause . . . is to protect the market in ideas, broadly understood as the public expression of ideas, narratives, concepts, imagery, opinions—scientific, political, or aesthetic—to an audience whom the speaker seeks to inform, edify, or entertain."); Thomas Gibbs Gee, "Enemies or Allies? In Defense of Judges," *Texas Law Review* 66 (1988): 1617 (referring to "academic freedom and to the all but indistinguishable first amendment right of free speech.").
5. Karl Jaspers, *The Idea of the University*, trans. H. A. T. Reiche and H. F. Vanderschmidt (Boston: Beacon, 1959), 2.
6. "What Is Harvard's Mission Statement?," Harvard University, www.harvard.edu/faqs/mission-statement. For a good survey, see R. George Wright, "The Emergence of First Amendment Academic Freedom," *Nebraska Law Review* 85 (2007): 793.
7. David Madsen, "Review Essay: The American University in a Changing Society: Three Views," *American Journal of Education* 91, 356–65 (1983): 361. See Harry D. Gideonse, "Changing Issues of Academic Freedom," *Proceedings of the American Philosophical Society* 94 (1950): 92 ("The function of a university is the discovery and the dissemination of the truth in all branches of learning.").
8. D. C. Gilman, *The Benefits Which Society Derives from Universities: An Address* (1885). Gilman's view should be contrasted with John Henry Newman's assertion in 1852 that the "*essence*" of a university was to be a place "of *teaching* universal *knowledge*," which for Newman implied that the purpose of a university was "the diffusion and extension of knowledge rather than the advancement. If its object were scientific and philosophical discovery, I do not see why a University should have students." John Henry Newman, *The Idea of a University*, ed. Frank M. Turner (New Haven, Conn.: Yale University Press, 1996), 3.
9. Arthur Twining Hadley, the president of Yale, noted in 1903 that "in Germany the increase of academic freedom is to a surprisingly large measure the result of public interest in modern science and public demand for competent and trained technical experts." Arthur Twining Hadley, "Academic Freedom in Theory and Practice," *Atlantic Monthly* 91 (1903): 341.
10. John Dewey, "Academic Freedom," *Educational Review* 23 (1902): 1–14. "The university function is the truth-function. At one time it may be more concerned with the tradition or transmission of truth, and at another time with its discovery. Both functions are necessary, and neither can ever be entirely absent" (3). For an example of how academic freedom would appear under the more traditional concept of education, see Kay v. Board of Higher Education of City of New York, 18 N.Y.S. 2d 821, 829 (N.Y. Sup. Ct 1940), upholding dismissal of Bertrand Russell from the College of the City of New York because "this court . . . will not tolerate academic freedom being used as a cloak to promote the popularization in the minds of adolescents of acts forbidden by the penal Law. . . . Academic freedom does not mean academic license. It is the freedom to do good and not to teach evil. . . . Academic freedom cannot teach that

. . . adultery is attractive and good for the community. There are norms and criteria of truth which have been recognized by the founding fathers."

11. There are four components to the professional idea of academic freedom: freedom of research and publication; freedom of teaching; freedom of extracurricular speech; freedom of intramural speech. See Matthew Finkin and Robert Post, *For the Common Good: Principles of American Academic Freedom* (New Haven, Conn.: Yale University Press, 2009). In this chapter I discuss academic freedom *only* as it pertains to freedom of research and publication.
12. The "Declaration" is reprinted in American Association of University Professors, *Policy Documents and Reports*, 9th ed. (Washington, D.C.: AAUP, 2001), 291–301 (hereafter referred to as *AAUP Documents*). Its major authors included Edwin R. A. Seligman and Arthur O. Lovejoy. See Walter P. Metzger, "The 1940 Statement of Principles on Academic Freedom and Tenure," *Law and Contemporary Problems* 3 (1990): 12–13. The concept of academic freedom advanced in the "Declaration" was later incorporated in the canonical "1940 Statement of Principles on Academic Freedom and Tenure," *AAUP Documents*, 3–11. The "1940 Statement" has been endorsed by more than 180 educational organizations and has become "the general norm of academic practice in the United States." William W. Van Alstyne, "Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review," *Law and Contemporary Problems* 53 (Summer 1990): 79. See Browzin v. Catholic Univ. of Am., 527 F.2d 843, 848 & n. 8 (D.C. Cir. 1075), "[The 1940 Statement] represent[s] widely shared norms within the academic community, having achieved acceptance by organizations which represent teachers as well as organizations which represent college administrators and governing boards."
13. "Declaration," 295.
14. Ibid.
15. Ibid., 300.
16. Ibid., 298. On the relationship between academic freedom and a theory of knowledge, see John R. Searle, "Two Concepts of Academic Freedom," in *The Concept of Academic Freedom*, ed. Edmund L. Pincoffs (Austin, Tex.: University of Texas Press, 1975), 88–89, 92.
17. "Declaration," 298, 31–45.
18. For a discussion, see Finkin and Post, *For the Common Good*, 31–45.
19. "Declaration," 294. Hence the conclusion of Thomas Haskell: "Historically speaking, the heart and soul of academic freedom lie not in free speech but in professional autonomy and collegial self-governance. Academic freedom came into being as a defense of the disciplinary community (or, more exactly, the university conceived as an ensemble of such communities)." Thomas L. Haskell, "Justifying the Rights of Academic Freedom in the Era of "Power/Knowledge," in *The Future of Academic Freedom*, ed. Louis Menand (Chicago: University of Chicago Press, 1996), 54.
20. Robert M. Hutchins, "The Meaning and Significance of Academic Freedom," *Annals of the American Academy of Political and Social Science* 300 (July 1955): 72–73.

21. On the paradoxes that underlie this doubled stance, see Finkin and Post, *For the Common Good*, 38–41.
22. Abrams v. United States, 250 U.S. 616 (1919).
23. *Abrams*, 250 U.S. 630 (Holmes, J., dissenting).
24. Red Lion Broad. v. FCC, 395 U.S. 367, 390 (1969).
25. Gloria Franke, "The Right of Publicity vs. The First Amendment: Will One Test Ever Capture the Starring Role?," *Southern California Law Review* 79 (2006): 958. See S. Brannon Latimer, "Can Felon Disenfranchisement Survive Under Modern Conceptions of Voting Rights?: Political Philosophy, State Interests, and Scholarly Scorn," *Southern Methodist University Law Review* 59 (2006): 1862 (A central purpose of the First Amendment is that of "'advancing knowledge' and 'truth' in the 'marketplace of ideas.'")
26. William P. Marshall, "In Defense of the Search for Truth as a First Amendment Justification," *Georgia Law Review* 30 (1995): 1.
27. *Rosenberger*, 515 U.S. 819 at 834 (1995).
28. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994).
29. Hustler Magazine v. Falwell, 485 U.S. 46, 51 (1988).
30. See, e.g., the opinions in the court's recent decision in United States v. Alvarez, 567 U.S. 11–210 (2012), in which the court ruled that Congress could not impose criminal sanctions on false claims to have won a Congressional Medal of Honor. Even the dissent, which would have allowed such sanctions, was moved to remark:

> There are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech. Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern would present such a threat. The point is not that there is no such thing as truth or falsity in these areas or that the truth is always impossible to ascertain, but rather that it is perilous to permit the state to be the arbiter of truth.
>
> Even where there is a wide scholarly consensus concerning a particular matter, the truth is served by allowing that consensus to be challenged without fear of reprisal. Today's accepted wisdom sometimes turns out to be mistaken. And in these contexts, "even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" . . .
>
> Allowing the state to proscribe false statements in these areas also opens the door for the state to use its power for political ends. Statements about history illustrate this point. If some false statements about historical events may be banned, how certain must it be that a statement is false before the ban may be upheld? And who should make that calculation? While our cases prohibiting viewpoint discrimination would fetter the state's power to some degree, . . . the potential for abuse of power in these areas is simply too great.

> In stark contrast to hypothetical laws prohibiting false statements about history, science, and similar matters, the Stolen Valor Act presents no risk at all that valuable speech will be suppressed. (Alito, J., dissenting)

Justice Alito's opinion was joined by Justices Scalia and Thomas. Concurring, Justice Breyer, joined by Justice Kagan, asserted:

> As the dissent points out, "there are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech." . . . Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and the like raise such concerns, and in many contexts have called for strict scrutiny. But this case does not involve such a law. The dangers of suppressing valuable ideas are lower where, as here, the regulations concern false statements about easily verifiable facts that do not concern such subject matter. Such false factual statements are less likely than are true factual statements to make a valuable contribution to the marketplace of ideas. (Breyer, J., concurring)

31. "The institutional structure of scholarly journals serves to reinforce disciplinary hierarchies: at the lowest level, the evaluator, reader, or reviewer is implicitly considered to be qualified to make judgments about a contribution at a level above that of the contributor himself. From there the hierarchy extends to the editorship, and the selection processes for filling the intervening positions evidently reinforce the hierarchizing and orthodoxy of the discipline in question." Wolfram W. Swoboda, "Disciplines and Interdisciplinarity: A Historical Perspective," in *Interdisciplinarity in Higher Education*, ed. Joseph J. Kockelmans (University Park: Pennsylvania State University Press, 1979), 78–99. See Ellen Messer-Davidow, "Book Review," *Signs*, 17, no. 3 (Spring 1992): 676–688: "Gatekeepers, by virtue of their position as evaluators (editors of journals, referees of manuscripts, reviewers of grant proposals), decide which work will be presented in public forums and which will languish in obscurity. Upon cumulative decisions of this kind depend the professional and epistemological selections—who gets tenured and promoted, which knowledges are advanced and disseminated—that constitute a disciplinary repertoire" (679).
32. For a discussion of this difference, see Robert Post, "Debating Disciplinarity," *Critical Inquiry* 35, (2009): 749.
33. Perhaps Charles Sanders Peirce said it best:

> Some persons fancy that bias and counter-bias are favorable to the extraction of truth—that hot and partisan debate is the way to investigate. This is the theory of our atrocious legal procedure. But Logic puts its heel upon this suggestion. It irrefragably demonstrates that knowledge can only be furthered by the real desire for it, and that the methods of obstinacy, of authority, and every mode of trying to reach a foregone conclusion, are absolutely of no value. These things are proved. The reader is at liberty to think so or not as long as the proof is not set forth, or

> as long as he refrains from examining it. Just so, he can preserve, if he likes, his freedom of opinion in regard to the propositions of geometry; only, in that case, if he takes a fancy to read Euclid, he will do well to skip whatever he finds with A, B, C, etc., for, if he reads attentively that disagreeable matter, the freedom of his opinion about geometry may unhappily be lost forever.

Charles Sanders Peirce, *Collected Papers*, ed. Charles Hartshorne, Paul Weiss, and Arthur Burks (Cambridge, Mass.: Harvard University Press, 1931–1958), 2:635.

34. "Academic freedom is not a doctrine to insulate a teacher from evaluation by the institution that employs him." Carley v. Arizona Board of Regents, 737 P.2d 1099, 1103 (Aria. App. 1987).
35. Robert Post, *Democracy, Expertise, Academic Freedom: A First Amendment Jurisprudence for the Modern State* (New Haven, Conn.: Yale University Press, 2012); Robert Post, *Citizens Divided: Campaign Finance Reform and the Constitution* (Cambridge, Mass.: Harvard University Press, 2014).
36. Ollman v. Evans, 750 F.2d 970, 978 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985).
37. Haynes v. Alfred A. Knopf, 8 F.3d 1222, 1227 (7th Cir. 1993). See Gray v. St. Martin's Press, Inc., 221 F.3d 243, 248 (1st Cir. 2000), *cert. denied*, 531 U.S. 1075 (2001).
38. Karen Knorr Cetina, *Epistemic Cultures: How The Sciences Make Knowledge* (1999), 5. Nikolas Rose and Peter Miller, "Political Power Beyond the State: Problematics of Government," *British Journal of Social Psychology* 43 (1992): 175 ("Knowledge is . . . central to [the] activities of government and to the very formation of its objects, for government is a domain of cognition, calculation, experimentation and evaluation.").
39. See, e.g., George Orwell, *The Collected Essays, Journalism, and Letters of George Orwell: As I Please, 1943–1945*, ed. Sonia Orwell and Ian Angus (New York: Harcourt, 2000), 3:87–89: "The really frightening thing about totalitarianism is not that it commits 'atrocities' but that it attacks the concept of objective truth; it claims to control the past as well as the future."
40. John Dewey, *The Public and Its Problems* (New York: Holt, 1927), 177–79. "Unless there are methods . . . what passes as public opinion will be 'opinion' in its derogatory sense rather than truly public, no matter how widespread the opinion is" (177).
41. Claude Lefort, *Democracy and Political Theory*, trans. David Macey (Cambridge, UK: Polity, 1988), 15.
42. Planned Parenthood v. Heineman, 724 F.Supp.2nd 1025 (D. Neb.2010).
43. Ibid. at 1048.
44. Similarly, the constitutional value of democratic competence is implicated whenever the state attempts to prevent the communication of true expert knowledge outside of public discourse. See Post, *Democracy, Expertise, and Academic Freedom*, 47–53.
45. Post, *Democracy, Expertise, and Academic Freedom*, 34.
46. In American constitutional law, constitutional rights generally apply only against state action. Professional ideals of academic freedom are not so restricted.

47. I stress once again that in this chapter I am analyzing only academic freedom of research and publication, and not the other three dimensions of academic freedom. See note 11.

48. Regents of University of Michigan v. Ewing, 474 U.S. 214, 226 n.12 (1985). (Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students. See *Keyishian*, 385 U.S. at 603; Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (opinion of Warren, C. J.), but also, and somewhat inconsistently, on autonomous decision making by the academy itself, see Regents of the University of California v. Bakke, 438 U.S. 265, 312 (1978) (opinion of Powell, J.); *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring in result.); Dow Chemical Co. v. Allen, 672 F.2d 1262, 1275 (7th Cir. 1982) ("Case law considering the standard to be applied where the issue is academic freedom of the university to be free of governmental interference, as opposed to academic freedom of the individual teacher to be free of restraints from the university administration, is surprisingly sparse."); Piarowski v. Illinois Community College District 525, 759 F.2d 625, 629 (7th Cir. 1985) ("Though many decisions describe 'academic freedom' as an aspect of the freedom of speech that is protected against governmental abridgment by the First Amendment, . . . the term is equivocal. It is used to denote both the freedom of the academy to pursue its ends without interference from the government (the sense in which it used, for example, in Justice Powell's opinion in Regents of the University of California v. Bakke, 438 U.S. 265, 312 (1978), or in our recent decision in EEOC v. University of Notre Dame Du Lac, 715 F.2d 331, 335–36 (7th Cir.1983)), and the freedom of the individual teacher (or in some versions–indeed in most cases–the student) to pursue his ends without interference from the academy; and these two freedoms are in conflict, as in this case."); Keen v. Penson, 970 F.2d 252, 257 (7th Cir. 1992) ("As this case reveals, the assertion of academic freedom of a professor can conflict with the academic freedom of the university to make decisions affecting that professor."); Cooper v. Ross, 472 F. Supp 802,813 (D.C. Ark. 1979) ("The present case is particularly difficult because it involves a fundamental tension between the academic freedom of the individual teacher to be free of restraints from the university administration, and the academic freedom of the university to be free of government, including judicial, interference.").

49. Byrne, "Academic Freedom: A 'Special Concern of the First Amendment,'" 3; J. Peter Byrne, "The Threat to Constitutional Academic Freedom," *Journal of College & University Law* 31 (2004): 79; David M. Rabban, "Functional Analysis of 'Individual' and 'Institutional' Academic Freedom Under the First Amendment," *Law and Contemporary Problems* 53 (Summer 1990): 227–302; Richard H. Hiers, "Institutional Academic Freedom vs. Faculty Academic Freedom in Public Colleges and Universities," *Journal of College & University Law* 35 (2002): 31; Richard H. Hiers, "Institutional Academic Freedom or Autonomy Grounded Upon the First Amendment: A Jurisprudential Mirage," *Hamline Law Review* 1 (2007): 30; Elizabeth Mertz, "The Burden of Proof and Academic Freedom: Protection for Institution or Individual?," *Northwestern University Law Review* 82 (1988): 292; Frederick Schauer, "Is There a Right to Academic Freedom?," *University of Colorado Law Review* 77 (2006): 907; Matthew Finkin, "On 'Institutional' Academic Freedom," *Texas Law Review* 61 (1983): 817; Michael A. Olivas,

"Reflections on Professorial Academic Freedom: Second Thoughts on the Third 'Essential Freedom,'" *Stanford Law Review* 45 (1993): 1835; Rachel Fugate, "Choppy Waters Are Forecast for Academic Free Speech," *Florida State University Law Review* 26 (1998): 187; Mark G. Yudof, "Three Faces of Academic Freedom," *Loyola Law Review* 32 (1987): 853–57; Alan K. Chen, "Bureaucracy and Distrust: Germaneness and the Paradoxes of Academic Freedom Doctrine," *University of Colorado Law Review* 77 (2006): 955.

50. Charles W. Eliot, "Academic Freedom," *Science* 26 (July 5, 1907): 1–2.
51. "Declaration," 293.
52. Ibid.
53. As Kant observes, "The university would have a certain autonomy (since only scholars can pass judgment on scholars as such)." Immanuel Kant, *The Conflict of the Faculties*, trans. J. Gregor (New York: Abaris, 1979), 23.
54. Carley v. Arizona Board of Regents, 737 P.2d 1099,1102 (Ariz. App. 1987).
55. *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985). See Board of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78, 90–92 (1978); ibid. at 96 n.6 (Powell, J., concurring); Clark v. Whiting, 607 F.2d 634 (4th Cir. 1979); Brown v. George Washington Univ., 802 A.2d 382, 385 (D.C. 2002).
56. Bishop v. Aronov, 92 F.2d 1066, 1075 (11th Cir. 1991).
57. See, e.g., Judith Areen, "Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance," *Georgetown Law Journal* 97 (2009): 945, 994–99.
58. "Declaration," 294.
59. For a discussion of when judicial deference may or may not be appropriate when reviewing institutional decision making, see Robert Post, "Between Management and Governance: The History and Theory of the Public Forum," *UCLA Law Review* 34 (1987): 1713.
60. Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000).
61. Ibid. at 404.
62. Ibid. at 411.
63. Ibid. at 412. "The Court has focused its discussions of academic freedom solely on issues of institutional autonomy" (at 415).
64. The court also failed to realize that the Virginia statute was in fact a regulation of the university itself. See Byrne, supra note 49, at 112. *Gilmore* should be compared to Henley v. Wise, 303 F.Supp. 62, 66 (D.C. Ind. 1969), which struck down an Indiana statute criminalizing the possession of obscene material without intent to sell, lend, or give away, in part because the statute "intruded" into "the right of scholars to do research and advance the state of man's knowledge."
65. *Gilmore*, 216 F.3d at 415.
66. Pickering v. Board of Education, 319 U.S. 563 (1968).
67. Connick v. Myers, 461 U.S. 138 (1983).
68. Waters v. Churchill, 511 U.S. 661 (1994).
69. *Connick*, 461 U.S. at 146–47.
70. Hardy v. Jefferson Community College, 260 F.3d 671 (6th Cir. 2001); Jeffries v. Harleston, 52 F.3d 9 (2nd Cir. 1995); Hong v. Grant, 516 F.Supp.2d 1158 (C.D. CA. 2007); Blum v. Schlegel, 18 F.3d 1005 (2nd Cir. 1994); Bonnell v. Lorenzo, 241 F.3d 800 (6th

Cir. 2001); Dambrot v. Central Michigan University, 55 F.3d 1177 (6th Cir. 1995); Scallet v. Rosenblum, 911 F.Supp. 999, 1009–14 (W.D. Va. 1996); Trejo v. Shoben, 319 F.3d 878 (7th Cir. 2003); Rubin v. Ikenberry, 933 F.Supp. 1425 (C.D. Ill. 1996); Silva v. University of New Hampshire, 888 F. Supp. 293 (D.N.H. 1994); Robert J. Tepper, "Speak No Evil: Academic Freedom and the Application of *Garcetti v. Ceballos* to the Public University Faculty," *Catholic University Law Review* 59 (2009): 129; Ailsa W. Chang, "Resuscitating the Constitutional 'Theory' of Academic Freedom: A Search for a Standard Beyond Pickering and Connick," *Stanford Law Review* 53 (2001): 915; Chris Hoofnagle, "Matters of Public Concern and the Public University Professor," *Journal of College and University Law* 27 (2001): 669; Edgar Dyer, "Collegiality's Potential Chill Over Faculty Speech: Demonstrating the Need for a Refined Version of Pickering and Connick for Public Higher Education," *Education Law Reporter* 119 (1997): 309; Richard H. Hiers, "Academic Freedom in Public Colleges and Universities: O Say, Does That Star-Spangled First Amendment Banner Yet Wave?," *Wayne Law Review* 40 (1993): 1; Jennifer Elrod, "Academics, Public Employee Speech, and the Public University," *Buffalo Public Interest Law Journal* 22 (2003–2004): 1.

71. See Areen, "Government as Educator," 975–76.
72. The logic of this and the following paragraph is developed in detail in Post, supra note 59.
73. *Pickering*, 391 U.S. at 568.
74. *Connick*, 461 U.S. at 142.
75. Ibid. Immanuel Kant early on identified this tension. In "An Answer to the Question: 'What is Enlightenment?'" he observes:

> The public use of man's reason must always be free. . . . the private use of reason may quite often be very narrowly restricted. . . . By the public use of one's own reason I mean that use which anyone may make of it as a man of learning addressing the entire reading public. What term the private use of reason is that which a person may make of it in a particular civil post or office with which he is entrusted.
>
> Now in some affairs which affect the interests of the commonwealth, we require a certain mechanism whereby some members of the commonwealth must behave purely passively, so that they may, by an artificial common agreement, be employed by the government for public ends. . . . It is, of course, impermissible to argue in such cases; obedience is imperative. But in so far as this or that individual who acts as part of the machine also considers himself as a member of a complete commonwealth or even of cosmopolitan society, and thence as a man of learning who may through his writings address a public in the truest sense of the word, he may indeed argue without harming the affairs in which he is employed for some of the time in a passive capacity. Thus it would be very harmful if an officer receiving an order from his superiors were to quibble openly, while on duty, about the appropriateness or usefulness of the order in question. He must simply obey. But he cannot reasonably be banned from making observations as a man of learning on the errors in the military service, and from submitting these to his public for judgement.

Immanuel Kant, *Political Writings*, ed. Hans Reiss, trans. H. B. Nisbet (New York: Cambridge University Press, 1991), 55–56.

76. Yudof, "Three Faces of Academic Freedom," 838–40; Robert Post, "Racist Speech, Democracy, and the First Amendment," *William and Mary Law Review* 32 (1990): 317–25.
77. See note 11.
78. "1940 Statement," quoted in note 12.
79. See, in this regard, the remarks of Harvard President Abbott Lawrence Lowell:

> The right of a professor to express his views without restraint on matters lying outside the sphere of his professorship is not a question of academic freedom in its true sense, but of the personal liberty of the citizen. It has nothing to do with liberty of research and instruction in the subject for which the professor occupies the chair that makes him a member of the university. The fact that a man fills a chair of astronomy, for example, confers on him no special knowledge of, and no peculiar right to speak upon, the protective tariff. His right to speak about a subject on which he is not an authority is simply the right of any other man, and the question is simply whether the university or college by employing him as a professor acquires a right to restrict his freedom as a citizen

Quoted in Henry Aaron Yeomans, *Abbott Lawrence Lowell, 1856–1943* (Cambridge, Mass.: Harvard University Press, 1948), 310.

80. Consider the case of Sami Al-Arian, a computer science professor, who was disciplined for statements concerning terrorism in the Middle East after September 11, 2001. See Joe Humphrey, "Professors Condemn Al-Arian's Firing," *Tampa Tribune*, June 15, 2003. For the AAUP investigative report on the Al-Arian case, see *Academe* 89, no. 3 (2003): 59.
81. For a discussion, see Finkin and Post, *For the Common Good*; William W. van Alstyne, "The Specific Theory of Academic Freedom and the General Issue of Civil Liberties," *Annals of the American Academy of Political and Social Science* 404 (1972): 140–156, 146.

> The phrase "academic freedom," in the context "the academic freedom of a faculty member of an institution of higher learning" refers to a set of vocational liberties: to teach, to investigate, to do research, and to publish on any subject as a matter of professional interest, without vocational jeopardy or threat of other sanction, save only upon adequate demonstration of an inexcusable breach of professional ethics in the exercise of any of them. Specifically, that which sets academic freedom apart as a distinct freedom is its vocational claim of special and limited accountability in respect to all academically related pursuits of the teacher-scholar: an accountability not to any institutional or societal standard of economic benefit, acceptable interest, right thinking, or socially constructive theory, but solely to a fiduciary standard of professional integrity. To condition the employment or personal freedom of the teacher-scholar upon the institutional or society approval of his academic investigations or utterances, or to quality either even by the immediate aspect of his professional endeavors upon the economic

well-being or good will of the very institution which employs him, is to abridge his academic freedom. The maintenance of academic freedom contemplates an accountability in respect to academic investigations and utterances solely in respect of their professional integrity, a matter usually determined by reference to professional ethical standards of truthful disclosure and reasonable care.

Van Alstyne explicitly contrasts academic freedom to the civil liberties protected by extramural speech: "The legitimate claims of personal autonomy possessed equally by all persons, wholly without reference to academic freedom, frame a distinct and separate set of limitations upon the just power of an institution to use its leverage of control" (146). At the time of the "1940 Statement," before the demise of the rights/privilege distinction, First Amendment doctrine did not extend the civil liberty to participate in public discourse to government employees.

82. Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988). "The most commonly applied tests are variations of one sort or another of what we have called the Hazelwood test and the Pickering-Connick-Garcetti or PCG test." R. George Wright, "The Emergence of First Amendment Academic Freedom," *Nebraska Law Review* 85 (2007): 816. See Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004); Scallet v. Rosenblum, 911 F. Supp. 999, 1010 (W.D. Va. 1996).
83. Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991).
84. Ibid. at 1074.
85. Ibid. at 1075.
86. See note 11.
87. For a discussion of this tension, see Piggee v. Carl Sandburg College, 464 F.3d 667, 670–71 (7th Cir. 2006).
88. Wieman v. Updegraff, 344 U.S. 183, 196–98 (1952) (Frankfurter, J., concurring).
89. Amy Gutmann, *Democratic Education* (Princeton, N.J.: Princeton University Press, 1987). See Benjamin R. Barber, *An Aristocracy of Everyone: The Politics of Education and the Future of America* (New York: Ballantine, 1992), 15: "In democracies, education is the indispensable concomitant of citizenship."
90. Court decisions have sometimes analyzed student rights in primary and secondary schools on the assumption that the constitutional purpose of public education is to produce democratically competent students, and they have sometimes analyzed such rights on the assumption that the constitutional purpose of public education is to reproduce existing cultural values. Compare Tinker v. Des Moines School District, 393 U.S. 503 (1969) with Bethel v. School Dist. No. 403 v. Frazer, 478 U.S. 675 (1986). For a discussion, see Post, supra note 76, at 317–25.
91. Nor do I address academic freedom to engage in so-called "intramural speech," which concerns matters of internal university governance. See Areen, "Government as Educator," 975–76.
92. *Aronov*, 926 F.2d at 1068.
93. Dewey, "Academic Freedom."
94. Garcetti v. Ceballos, 547 U.S. 410 (2006).

95. Ibid., 421.
96. Mayer v. Monroe County Community School Corp., 474 F.3d 477, 479 (7th Cir. 2007). Yudof observes that "unless an abridgement of speech lies in every exercise of governmental authority to speak through individuals—and how else might abstract entities called governments speak?—it is difficult to countenance the view that government control of its own professional speakers violates the historically developed concepts of freedom of expression." Yudof, "Three Faces of Academic Freedom," 839.
97. Renken v. Gregory, 541 F.3d 769, 773 (7th Cir. 2008). See, e.g., Isenalumhe v. McDuffie, F.Supp.2d, 2010 WL 986580 (E.D.N.Y.); Sadid v. Idaho State University, 6th Jud. Dist. Idaho, No. CV-2008–3942-OC, December 18, 2009. But see Kerr v. Hurd, 694 F.Supp.2d 817, 843–44 (S.D. Ohio 2010). See also Savage v. Gee, F.Supp.2d, 2010 WL 2301174 (S.D. Ohio 2010); Tepper, "Speak No Evil," supra note 70.
98. *Garcetti*, 547 U.S. at 425.
99. "Declaration," 295.
100. Ibid. See "Matthew Finkin, Intramural Speech, Academic Freedom, and the First Amendment," *Texas Law Review* 66 (1988): 1337–38, esp. 1323.