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## *Garvetti* and Salaita: Revisiting Academic Freedom

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### Abstract

This article revisits the legal concept of academic freedom in the wake of Professor Steven Salaita's de-hiring and the 2006 US Supreme Court decision in *Garvetti v. Ceballos*. The *Garvetti* decision narrowed the scope of protected employee speech. However, the Court left unclear how, and to what extent, the decision applies to higher education. As a result, subsequent lower court decisions have reached varying conclusions about the scope and limits of academic freedom. This article examines four key post-*Garvetti* decisions, each of which illustrates a potential solution to courts facing issues of academic freedom, and each of which has different implications for Professor Salaita's de-hiring. Given the uncertain application of *Garvetti* to higher education, this issue will likely again come before the Supreme Court. Thus, this article also proposes a new legal concept of academic freedom that would empower rather than restrict professors.

### Introduction

In 2006 the United States Supreme Court decided *Garvetti v. Ceballos*,<sup>1</sup> which restricted the rights of employees to use the First Amendment to protect their speech within the workplace.<sup>2</sup> However, the decision left open whether the *Garvetti* decision would apply to higher education. Lacking a clear explanation, federal circuit courts, tasked with deciding higher education employment cases, have unevenly applied the *Garvetti* decision, or applied other decisions entirely.<sup>3</sup> This uncertainty provides the Supreme Court with the opportunity to do what should have been done in *Garvetti*: develop a new, clear standard of academic freedom that empowers, rather than restricts, professors. Without the academic freedom to control course content or to advance knowledge at a university, we risk losing the role of the university as a center of free inquiry and study.

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The recent de-hiring of Professor Steven Salaita by the University of Illinois at Urbana-Champaign aptly illustrates this risk. In October 2014, Salaita was offered a tenured position as a full professor. Salaita's tweets, on his personal Twitter account, were subsequently used as justification for revoking his offer of a tenured position. Chancellor Phyllis Wise reasoned that Salaita's termination came because the university "will not tolerate" disrespectful "words or actions that demean and abuse either viewpoints themselves or those who express them."<sup>4</sup> If a university's administration can forbid comments that demean "viewpoints," then the concept of the university as a place where ideas are debated and argued will not be possible. Salaita's firing shows the urgency with which a revised legal concept of academic freedom must be formulated. This article will illustrate what this revised legal concept must entail.

This article has four main parts. Part 2 of this article traces the concept of modern academic freedom to its inclusion within free speech rights for public employees. Part 3 centers on the Supreme Court's 2006 decision in *Garvetti v. Ceballos*. Not only does this decision imperil academic freedom in higher education but it also leaves unclear how, and to what extent, the decision applies to higher education. The result has been the uneven application of *Garvetti* among the circuit courts. Some circuits have not recognized an academic freedom exception, some circuits have recognized a limited exception, and others have embraced an exception in the higher education context, applying instead the test used prior to *Garvetti*, the *Pickering-Connick* test. Part 4 looks beyond the *Garvetti* decision. It examines why the *Pickering-Connick* test fails to resolve many academic freedom cases. Finally, part 4 also proposes a new concept of academic freedom that would grant professors considerable latitude of expression, while ensuring that this expression does not contravene the knowledge-seeking activities of the university.

## The Birth of Modern Academic Freedom

Two separate Supreme Court decisions provide essential background for the *Garvetti* decision and the circuit court cases that followed. While primarily concerning public employees rather than academic freedom per se, the test that developed from them has been extensively used to evaluate the protected speech of professors.<sup>5</sup> *Garvetti's* alteration of this test has seriously damaged protections for professors.

In 1968 the Court decided *Pickering v. Board of Education*,<sup>6</sup> which centered on the dismissal of a high school teacher who wrote a letter to the local newspaper criticizing the Will County, Illinois, Board of Education. The Court dismissed this retaliatory action on the grounds that teachers may not be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens.<sup>7</sup> The Court created a balancing test, with two inquiries, to determine whether speech would be protected: "The first requires determining whether the employee spoke as a citizen on a matter of public concern," while the second inquiry "becomes whether the

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relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.”<sup>8</sup> As discussed later, these two inquiries poorly assess a university’s mission and values.

In 1983, the Supreme Court examined the dismissal of an assistant district attorney in *Connick v. Myers*.<sup>9</sup> After being informed of a transfer that she did not want, Sheila Myers created a questionnaire asking for views on such topics as office morale and levels of confidence in supervisors. Her supervisor, Harry Connick, subsequently terminated Myers’s employment. The *Pickering* balancing test required weighing Myers’s personal speech interest against the office’s interest in institutional efficiency and effective functioning, and the Court determined that Myers’s questionnaire was, in effect, an act of insubordination. These two cases firmly established the two-pronged *Pickering-Connick* balancing test: whether the employee spoke as a citizen on a matter of public concern, and the importance of the personal speech interest compared to the institution’s interest in functioning.

### **Altering the Test: *Garretti v. Ceballos* and Its Potential Threat to Academic Freedom**

The *Garretti* decision in 2006 fundamentally changed the *Pickering-Connick* balancing test by altering the first prong: whether the employee spoke as a citizen on a matter of public concern.<sup>10</sup> Thus, in analyzing this prong of the *Pickering* balancing test, courts must now also consider whether “the employee is simply performing his or her job duties,” or, put differently, whether the employee’s speech is made “pursuant to official duties.”<sup>11</sup> If so, the employee is not speaking as a public citizen, and the employer may regulate his or her speech.

### ***The Garretti Decision***

*Garretti* centered on two memos written by Richard Ceballos, a deputy district attorney, who contested the accuracy of a police officer’s affidavit used to obtain a search warrant. Submission of these memos to his supervisor resulted in controversy. Ceballos alleged that the district attorney’s office retaliated against him through demotion and reassignment. The Supreme Court held that “Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case,” and therefore acted as a government employee.<sup>12</sup> The Court noted that unlike *Pickering* or *Connick*, in which statements were made outside the duties of employment, Ceballos’s statements were made pursuant to his official duties. Thus, for speech to be protected, *Garretti* for the first time required that the speaker not only speak as a citizen on a matter of public concern, but that the speaker also must not speak “pursuant to official duties.”

*Garretti* doubtlessly restricts the First Amendment protections of public employees by requiring them to speak on matters of public concern as well as to speak as a citizen rather than an employee. However, the

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graver threat that the *Garvetti* decision imposes lies in its application to the academic context. A conflict must exist between a categorical denial of First Amendment protection to public employees speaking within their job duties and the freedom that public university faculty have to express themselves without fear of retaliation, particularly when that speech falls within their academic discipline.<sup>13</sup>

This incongruity worried Justice Souter; his dissent in *Garvetti* strongly cautions against the potential extent of the majority's decision: "I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties.'"<sup>14</sup> The majority's response to Justice Souter's concern proved tepid: "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."<sup>15</sup> Consequently, the application of the *Garvetti* rule to academic freedom cases hung in the balance, with lower courts left to divine when and how *Garvetti* should apply.

Unsurprisingly, their decisions have not been uniform. As professors take on quasi-administrative or advising duties in addition to their teaching and scholarship, the boundary between their official job duties and the reach of *Garvetti* has become blurred.<sup>16</sup> Circuit courts have used dissimilar reasoning and justifications to decide academic freedom cases and hence the extent of *Garvetti's* application.

### ***Post-Garcetti: The Uneven Application in the Circuit Courts***

Four major circuit cases illustrate the difficulty of applying *Garcetti* to cases of academic freedom. The courts have applied *Garcetti* rigidly (in 2008) and cautiously (in 2008), or have rejected *Garcetti* (2013) and selectively applied *Pickering-Connick* (in 2011 and 2014). Yet these cases, despite their hesitant or flawed conclusions, also point to potential avenues for locating a fair and uniform standard that protects academic freedom while providing autonomy for university leaders.

The earliest case, *Renken v. Gregory*,<sup>17</sup> was decided in 2008, two years after the *Garvetti* decision. There, the Seventh Circuit Court of Appeals examined a professor's allegation of reduced pay and a terminated grant after he criticized the university for its use of grant funds. Attempting to cast his actions as those of a citizen and not an employee, Renken framed his criticism as made "in the course of his job and not as a requirement of his job," to avoid the "pursuant to official duties" reach of *Garvetti*.<sup>18</sup> However, the court disagreed, determining that administering the grant fell within "the teaching and service duties that he was employed to perform."<sup>19</sup> The court noted that the grant was so closely tied to his teaching duties that fulfilling the grant obligations would have resulted in a reduction in his teaching load. This decision takes a broad view of an employee's duties, finding that Renken's grant application, even though not required, was sufficiently *related* to

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the employment requirements of teaching and scholarship to invoke the *Garvetti* standard of “pursuant to official responsibilities.”

However, the *Renken* case is more notable for what it did not say. Renken presented no specific academic freedom argument, instead framing his claims within a general First Amendment protection, and the court made no mention of academic freedom in its decision.<sup>20</sup> In some ways, this omission is frustrating, as Renken’s claim exemplifies what academics fear: Renken’s criticism of a lack of lab space and grant funding is treated as a garden-variety employment grievance. This case also blurs the line between administrative duties and those related to scholarship and teaching. While applying for and administering a grant can be framed as an administrative duty, Renken’s grant would, in the words of the court, “enhance the education of hundreds of students a year.”<sup>21</sup> Such claims certainly fall within *Garvetti*’s reach; however, they also fall within Justice Souter’s concern that academic scholarship is necessarily attached to a professor’s official duties. Thus, *Renken* stands for one option for lower courts in the post-*Garvetti* world, and a chilling one for academics.<sup>22</sup> University professors would be given no special deference or insulation and would be treated the same as other public employees.<sup>23</sup>

Further, the *Renken* decision provides cold comfort for Steven Salaita. A strong argument can be (and has been) made that Salaita’s personal Twitter account, from which he tweeted in the late evening from his home and under his own name, as opposed to, for example, “@ProfessorSalaita,” is speech made purely as a citizen and not pursuant to any official university duties. Yet the *Renken* decision supported a comparatively broad view of “pursuant to official duties,” finding Renken’s speech about grant funds sufficiently related to his scholarship and teaching. Given that Salaita’s lawsuit has been filed in the Northern District of Illinois, whose appellate court, the Seventh Circuit, decided *Renken*, one would hope that the circuit court would not extend “pursuant to official duties” so far as to link Salaita’s tweets to his scholarly publications on the Middle East and Israel. Yet the *Renken* decision leaves this possibility open.

In the second case, *Gorum v. Sessoms*, also from 2008, the Third Circuit Court of Appeals examined a similar case.<sup>24</sup> An audit revealed that Wendell Gorum, chair of the Mass Communications Department at Delaware State University, had changed students’ grades in his department without the permission of the professor. The president of the university, Allen Sessoms, proceeded with a dismissal action that the board accepted, and Gorum was terminated. Gorum contended that his dismissal was retaliatory, noting that he had objected to Sessoms’s selection as president, withdrawn an invitation for Sessoms to speak at a prayer breakfast, and supported a student athlete charged with violating the university’s weapons policy. Applying the *Garvetti* test, the Third Circuit determined that Gorum did not speak as a citizen because his actions fell within the scope of his official duties, noting that Faculty Senate Bylaws included both advising and

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mentoring students. Additionally, the court found that his speech did not involve public concern because the statements were made in private and affected only one party.

However, the court observed that “the Supreme Court did not answer in *Garvetti* whether the official duty analysis would apply” to a case involving speech related to scholarship or teaching.<sup>25</sup> Yet, because Gorum’s actions were so far outside the realm of scholarship or teaching, and because the court believed that academic freedom was not imperiled by its decision, it applied the official duty test. While the Third Circuit’s recognition of an additional constitutional interest in scholarship and teaching might give academics some relief, the practicality of the decision undermines the importance of academic involvement outside scholarship and teaching, thereby “discourag[ing] faculty participation.”<sup>26</sup>

If we assume that Gorum’s dismissal was in retaliation for his opposition to Sessoms as president, his withdrawal of a speaking invitation, and his role advising a football player,<sup>27</sup> then because none of these relates to scholarship or teaching, none is protected speech.<sup>28</sup> Thus, the decision creates an incentive for faculty *not* to participate in faculty hiring committees, to mentor students in difficult situations, or to serve as faculty advisors to on-campus organizations.<sup>29</sup> Even for faculty who choose to participate in, for example, a hiring committee, the potential chilling effect on free discourse that the *Garvetti* decision establishes is palpable. Further, these duties may be used as factors in promotion and thus may not be optional. The *Gorum* decision is unsettling because the typical activities of a professor stretch far beyond mere classroom instruction and scholarly publication.<sup>30</sup>

Third, in 2011, the Fourth Circuit Court of Appeals examined a professor’s allegations of religious and speech-based discrimination in *Adams v. Trustees of the University of North Carolina–Wilmington*.<sup>31</sup> While Mike Adams received favorable reviews from faculty and students, he became increasingly vocal about his Christian faith and conservative beliefs. When Adams applied for a promotion, the senior faculty voted to oppose his promotion, which the department chair supported: his scholarly productivity was “too thin.”<sup>32</sup> Adams charged that the refusal to promote was due to his conservative and Christian beliefs. In analyzing Adams’s First Amendment retaliation claims, the Fourth Circuit Court of Appeals concluded that the district court had misinterpreted *Garvetti*, which clearly “casts doubt” on whether it applies “in the academic context of a public university.”<sup>33</sup>

The Fourth Circuit continued that because Adams’s speech involved scholarship and teaching, and was directed at a public audience, *Garvetti* should not apply. Further, directly rejecting the argument that Adams’s speech was pursuant to his official duties, the court argued that such a “thin thread” tying his speech to the general duties of a professor to engage in speaking and writing was an insufficient basis for applying the

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*Garvetti* test. Instead, the court returned to the application of the *Pickering-Connick* test. While the court remanded the case to the lower court for further evaluation, the precedent it established is significant.

The *Adams* decision marks an important distinction from the previous circuit court cases that had offered no exception or a limited exception to *Garvetti*.<sup>34</sup> Here, the Fourth Circuit held that “where academics at public colleges and universities engage in speech involving core academic functions, such expression may be protected.”<sup>35</sup> However, as will be discussed later, the reversion to the *Pickering-Connick* test does not provide an adequate solution to the unique demands of academics—as neither case involved the higher education context—nor the expansive demands on professors, which range from dealing with administrative procedures to leading extracurricular organizations.<sup>36</sup>

Further, the *Adams* decision leaves open a broad gray area concerning the application of *Garvetti* (or *Pickering-Connick*) to speech “loosely connected to core academic functions involving quasi-administrative activities.”<sup>37</sup> Of high concern is the potentially chilling effect: if professors cannot speak openly without risking retaliation, and if they have no recourse for retaliation, many will not speak out.<sup>38</sup>

Steven Salaita’s dehiring at the University of Illinois aptly illustrates this concern. In a letter to the incoming university president, thirty-four University of Illinois department chairs indicated that more than three dozen scheduled talks and conferences had been cancelled as a result of Salaita’s dehiring.<sup>39</sup> As Omar Shakir, one of Salaita’s attorneys, argues, Salaita’s dehiring “sends a dangerous message to professors at all universities that speech on particular hot-button issues is not welcome on campus.”<sup>40</sup> If university administrators know that courts will protect them, they will not hesitate to take actions such as firing a tenured professor for personal views.

In 2013, the Ninth Circuit Court of Appeals examined this issue in *Demers v. Austin*.<sup>41</sup> David Demers contended that Washington State University retaliated against him for distributing a pamphlet and chapters of his book that criticized his department and the university. Demers argued both that the pamphlet and book chapters were not written pursuant to his official duties and that even if they were, “*Garvetti*’s holding does not extend to speech and academic writing by a publicly employed teacher.”<sup>42</sup> The Ninth Circuit disagreed with his first argument, noting that his positions on a university committee and in his department showed that the publications were pursuant to his official duties. However, the court gave more credence to his second claim, noting the “possibility of an exception” to *Garvetti*, as well as to the fact that academic “teaching and writing are ‘a special concern of the First Amendment.’”<sup>43</sup> Accordingly, the court held that *Garvetti* cannot apply to teaching and academic writing pursuant to the official duties of the faculty member and instead held that the *Pickering-Connick* test should be applied. The court acknowledged that “the *Pickering* balancing process in cases involving academic speech is likely to be particularly subtle and difficult.”<sup>44</sup> The court concluded, “We should hesitate before concluding that academic disagreements about what may appear to be esoteric

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topics are mere squabbles over jobs, turf, or ego.”<sup>45</sup> Thus, arising from this hesitancy, the boundary between protected and unprotected speech remained blurred.

More recently, in January 2014, the Ninth Circuit Court of Appeals replaced its previous opinion in *Demers*, and attached a new opinion.<sup>46</sup> Reviewing the district court’s grant of summary judgment for the university, the Ninth Circuit continued to hold that *Garvetti* does not apply to speech related to scholarship or teaching, but is instead governed by the *Pickering-Connick* test. The court noted that “if applied to teaching and academic writing, *Garvetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court.”<sup>47</sup> Applying the *Pickering-Connick* test, the court concluded that under the first prong, Demers’s pamphlet criticizing the department did become a matter of public concern because it contained “serious suggestions about the future course of an important department.” The Ninth Circuit then remanded the case back to the district court. As a telling indicator of the unsettled law after *Garvetti*, the Ninth Circuit held that the university defendants were entitled to qualified immunity, given that “there is no Ninth Circuit law on point to inform defendants about whether or how *Garvetti* might apply to a professor’s academic speech.”

These four circuit cases offer three solutions to courts facing issues of academic freedom: to apply *Garvetti* and severely threaten academic freedom; to apply *Garvetti* cautiously, aware of its threat to academic freedom; or to revert to the *Pickering-Connick* test. Each of these three solutions is fundamentally flawed. Courts must instead look to a new theory of academic freedom that will extend it into intramural speech, regardless of public concern, so long as this speech extends to the knowledge-seeking activities of the university.

## Toward a New Theory of Academic Freedom

### *The Failure of the Pickering-Connick Test to Protect Academic Freedom*

The shift away from the *Garvetti* test by both the Fourth Circuit Court of Appeals and the Ninth Circuit Court of Appeals recognizes the unique nature of academia.<sup>48</sup> However, the solution that both offer—a return to the *Pickering-Connick* test—does not provide a sufficient solution to resolving issues of academic freedom. To reiterate, the *Pickering-Connick* balancing test requires weighing the personal speech interest against the government’s interest in institutional efficiency and effective functioning.<sup>49</sup> *Connick* stipulated that the personal speech be on a matter of public concern.<sup>50</sup> The Ninth Circuit Court of Appeals, in its original opinion, admitted that using the *Pickering-Connick* test in academia would be “subtle and difficult.”<sup>51</sup> That the case required a second remand illustrates this fact. Yet larger and more serious problems exist, two of which



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preclude the *Pickering-Connick* test from serving as a sufficient substitute for the *Garvetti* test and as an effective test in higher education generally.

### *The Higher Education Context*

Neither *Pickering* nor *Connick* concerned higher education. *Pickering* involved a high school teacher; *Connick* involved an assistant district attorney. A tripartite set of arguments explains the failure of the *Pickering-Connick* test to reach fair and accurate decisions in academia: the values of the university differ from those of a government organization, academics by definition engage in matters of public concern, and academic governance is unique.

Whereas the *Pickering-Connick* test counterbalances an individual's speech interest against an organization's effective functioning, the academic workplace emphasizes other values.<sup>52</sup> As Judith Areen argues, "in a university, debate is not only acceptable, it is a vital part of the continuing dialogue . . . a dialogue that depends on the expression of different points of view."<sup>53</sup> In a traditional office, internal dissent deters an organization's efficiency and effective functioning, and may yield outright insubordination (for example, the memo controversy in *Garvetti v. Ceballos*).<sup>54</sup> By contrast, a university does not march toward efficiency as an end goal, but rather toward the discovery and production of knowledge while testing and challenging opinions and beliefs.<sup>55</sup> In fact, the existence of debate and dissension within the university indicates that a clash of ideas is occurring—a clash that is the hallmark of critical thinking and analysis.

The de-hiring of Steven Salaita underscores the misplacement of the *Pickering-Connick* test when used to evaluate academic freedom. The University of Illinois revoked an offer for a tenured position on the basis of, by its own admission, the content of Salaita's speech. Omar Shakir observes that the university's "concerns about the supposedly 'uncivil' manner in which Professor Salaita expressed himself on Twitter reveals its intent to silence unpopular political speech, in this case due to donor pressure."<sup>56</sup> If a university is permitted to fire professors expressing unpopular viewpoints, the concept of free inquiry and study has been undermined. For this reason, as Omar Shakir notes, academics "have long rejected holding civility up as a standard of conduct, since it clashes with academic freedom."<sup>57</sup> Thus, the values that the *Pickering-Connick* test balances fundamentally misrepresent the goals of the university.

In addition to the unique values of the university, academics by their nature comment on matters of public concern. *Connick* stressed that the speech must comment on a matter of public concern, as opposed to merely being employment-related speech.<sup>58</sup> However, this distinction does not work in higher education. Scholarly publication and dissemination inherently involve matters of public concern. Scholarly publication and dissemination of ideas *precisely define* a professor's job. More important, a professor would seldom engage

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in such research or teaching were it not for the remuneration of the job. Justice Souter voiced the same concern in *Garvetti*, when he pointed out that “teachers necessarily speak and write ‘pursuant to . . . official duties.’”<sup>59</sup>

A return to the *Pickering-Connick* test does not resolve this problem. The test creates two camps: speaking as a citizen on a matter of public concern (largely protected), and speaking as an employee offering employment-related speech (largely unprotected).<sup>60</sup> A professor’s research and teaching focus on matters of public concern, yet also fulfill the professor’s responsibilities as an employee of the university.<sup>61</sup> Thus, creating two camps of speech, with protection for one but not the other, fails to satisfy the academic context. Research and teaching fall into both camps.

Apart from the concern for protected speech, the *Pickering-Connick* test does not take adequate account of the distinctive nature of universities as marketplaces of ideas governed democratically. Unlike a traditional office, with a hierarchical structure between bosses, managers, and workers, the academic workplace organizes itself differently. As the Supreme Court in *N.L.R.B. v. Yeshiva University*<sup>62</sup> noted, “The record shows that faculty members at Yeshiva also play a predominant role in faculty hiring, tenure, sabbaticals, termination and promotion. These decisions clearly have both managerial and supervisory characteristics.”<sup>63</sup> Professors not only straddle the roles of “worker” and “supervisor” but also intermittently move between them. Professors selected to serve as the chair of an academic department will possess high levels of managerial and supervisory powers; they will serve their terms and then return to their role as professor when a new professor is selected as chair.<sup>64</sup> By contrast, the *Pickering-Connick* test requires a formal differentiation between employee and employer. As *Yeshiva* suggests, to some degree, professors govern themselves, or at least, choose leaders from their ranks.<sup>65</sup> Other professors still retain roles of power by serving on committees with wide-ranging powers; for example, the post-*Garvetti* case of *Gorum v. Sessoms* involved a faculty disciplinary committee sanctioning Gorum for his actions.<sup>66</sup> The *Pickering-Connick* test fails to account for the different roles that professors may hold and thus serves as an inefficient vehicle for evaluating claims of academic freedom.

### Quasi-Professorial Speech

Related to the problem of differentiating supervisor from employee under the *Pickering-Connick* test is the problem of what can be termed intramural or quasi-professorial speech.<sup>67</sup> A professor’s activities go far beyond scholarship or teaching, writes Oren Griffin, and routinely include “advising students and colleagues, scholarly research, preparing manuscripts for publication, symposia participation, committee service, [and] faculty governance.”<sup>68</sup> This wide range of activities creates multiple problems. Under the current *Garvetti*

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standard, circuit court decisions finding no (or little) academic freedom exception<sup>69</sup> have cast a wide net in what constitutes an employee's duties. In *Renken*, for example, an adequate relation to teaching and scholarship sufficed to make *Renken's* actions "pursuant to official duties" under *Garretti*.

Additionally, a return to the *Pickering-Connick* test presents the further problem that the test's protection does not extend to matters of internal concern: intramural, or quasi-professional speech.<sup>70</sup> Yet a professor's ability to comment on or criticize the administration of a university, the operation of a department, or the allocation of funding for athletics or other programs is a core value of academic freedom and *should* be protected speech. The value of a university lies not in its ability to offer a public service with efficiency and without internal disruption (values the *Pickering-Connick* test strives to achieve), but rather to sow and create knowledge, with debate and dissension as an essential element in the exchange of ideas.<sup>71</sup> Steven Salaita's dehire underscores the misplacement of the *Pickering-Connick* test when used to evaluate academic freedom. While an absolute right to free expression for academics should not be granted, a more generous balance must be struck between professorial free speech interests and institutional interests regarding workforce control. Dissension cannot mean deliberate disruption of the educational mission, but dissension can mean a high level of tolerance for intellectual inquiry that may prove unconventional or disturbing. The University of Illinois's decision to dehire Steven Salaita is disturbing not only because of its low tolerance for unconventional comments, especially if (as it appears) the board of trustees succumbed to outside pressure. Instead, the dehire shows the intent of the university to control the professional lives of its professors in the comments they make outside of, and disconnected from, their teaching environment.

This expansion of academic freedom proves even more important given that other commentators, even those who reject the *Pickering-Connick* test, propose protection of the speech of individual faculty members that extends only to "speech concern[ing] research, teaching, or faculty governance matters."<sup>72</sup> Such protection does not go far enough. The fate of seven English professors at Virginia Military Institute (VMI) illustrates the lack of protection that such a concept of academic freedom allows. The institute's administration decided to change the focus of the English department from literature to rhetoric.<sup>73</sup> In reaching this decision, the administration apparently gave professors "no role in the decision to shift the department's focus."<sup>74</sup> The seven professors filed a formal grievance with the institute. In a personal interview, former VMI professor Kurt Ayau cited the formal grievance as the culmination of a "ten-year period of creeping usurpation of our rights and duties as faculty."<sup>75</sup> Following the issuance of the grievance, the dean allegedly told the professors that "any further complaints about department leaders would constitute a cause for dismissal."<sup>76</sup> This more serious warning was only given orally. Instead of remaining in such an academic environment, all resigned or took early retirement.<sup>77</sup>

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This is a troubling result because it violates the academic mission of the institution, which should permit “an exchange of information between administration and faculty (among others), and an effort to reach consensus in the best interests of all parties, especially the students.”<sup>78</sup> Instead, although the professors at VMI originally felt “fully within [their] rights to question practices and procedures,” Ayau and the others felt increasingly isolated from “any kind of meaningful decision making.”<sup>79</sup> While excessive dissension disrupts the learning environment as a whole, the university also serves to foster such debate.<sup>80</sup> Academics, acting as professionals in their own field, should be permitted to articulate their beliefs to the administration concerning a core curriculum change. If professors cannot express such beliefs without fear of retaliation, such an institution will “rapidly become dysfunctional and, most likely, ungovernable.”<sup>81</sup>

Effective mediation preserves rather than stifles dissent. Actions by a university are particularly egregious when the institution voluntarily adopts academic freedom policies.<sup>82</sup> VMI’s academic freedom policy provides that “all members of faculty, whether tenured or not, are entitled to academic freedom. In this context the administration acknowledges the 1940 Statement.”<sup>83</sup> As Neal Hutchens argues, “It is legally incongruous for institutions to adopt and tout academic freedom policies, which encourage professors to express their views openly, but then to fall back on *Garvetti* when a faculty member claims that he or she has suffered retaliation for accepting the invitation to engage in free speech.”<sup>84</sup> In essence, public colleges and universities may seek to receive the best of both worlds: defining themselves as encouraging faculty members to express their candid views, but then relying on *Garvetti* if the administration disagrees with the offered speech.<sup>85</sup> Such a result must be avoided. In the VMI case, the administration’s desire to alter the core curriculum was imposed from above. The difficulty was not change itself, but the process by which change was sought.

Professor Salaita’s situation raises a related academic freedom issue: the autonomy of the faculty of the American Indian Studies Program at the University of Illinois. After interviews and a scholarship review, the faculty in the program chose to hire Salaita. Yet the chancellor of the university, Phyllis Wise, overrode that decision and terminated Salaita. Just like what happened at VMI, an administration’s desire has been imposed from above, cutting the faculty themselves out of the decision. Wise’s recent resignation from her position as chancellor underscores the degree to which she overstepped her bounds.

### **A New Approach: Academic Freedom as Intramural Speech, Limited to Knowledge-Seeking Activities**

Without a doubt, as James Griffin writes, “academic freedom is not free and all speech is not protected.”<sup>86</sup> Extending academic freedom to intramural speech, regardless of public concern, so long as it relates to the knowledge-seeking activities of the university, must still have clear limits. This concept of academic freedom

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extends to intramural activities but also requires a clear connection to the knowledge-seeking activities of the university.

A case decided by the US District Court for the District of Kansas in early February 2015 illustrates both how this new concept of academic freedom would operate to protect academics and how the *Garvetti* decision is already damaging litigants. In *Klaassen v. University of Kansas School of Medicine*,<sup>87</sup> Dr. Curtis Klaassen, a professor of medicine and department chair of the Pharmacology & Toxicology department at the University of Kansas School of Medicine, became dissatisfied with the leadership of the dean of the School of Medicine, Barbara Atkinson. He formed a committee of eight other department chairs and met with Dean Atkinson. There, Klaassen accused the school of taking money from science programs to pay for other university programs. One month later, Dean Atkinson removed Klaassen as chair of the department. Klaassen then voiced his concerns to other members of his department that the school was mismanaging federal grant money. Subsequently, the vice chancellor for research directed the school to place Klaassen on administrative leave. Eventually, the school held a hearing before the faculty committee, charging Klaassen with professional misconduct and requesting his termination. Instead, the faculty committee voted to reinstate Klaassen and give him only a written warning. The school's executive vice chancellor ignored this recommendation and terminated Klaassen. In the lawsuit that followed, Klaassen alleged, among other counts, that the university retaliated against him in violation of the First Amendment.

The district court noted that the *Garvetti* decision left open the possibility of an exception involving academic freedom, but also noted that neither the Supreme Court nor the Tenth Circuit (the federal appellate court in Kansas) had decisively ruled on the issue. Therefore, the court reasoned, "the uncertain state of law operates to defendants' advantages here."<sup>88</sup> The court observed that it may grant qualified immunity to the defendants where a purported right has not been "clearly established," without resolving the "often more difficult question" of whether the purported right exists.<sup>89</sup> Because it is unclear whether *Garvetti* or *Pickering-Connick* is the proper test to apply, qualified immunity protects the defendants if a reasonable official could believe that *Garvetti* was the proper test. The court concluded that because Klaassen's comments were related to the performance of his official duties, and were internal statements, *Garvetti* offered no protection. Therefore, because a reasonable officer could conclude that *Garvetti* applied to Klaassen's statements, the court held that the defendants were entitled to qualified immunity.

Clearly, the fact that the court does not need to address the legal issues underpinning Klaassen's lawsuit shows the damage that *Garvetti*, and the uncertainty surrounding the decision, has had on academic freedom cases. Klaassen's case highlights why academic freedom must extend to intramural speech. Klaassen's speech firmly connects to the knowledge-seeking activities of the university: his concerns that department money was being shunted to other programs—and that federal grant money, allotted for research, had been misused—go

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to the core of the academic mission. Klaassen's case also underscores why *Garvetti's* distinction between internal and external speech is misguided. Academic issues generally, and Klaassen's comments specifically, are by nature of public concern. Yet under the *Garvetti* standard, Klaassen has a weaker case because he made his comments internally. Such reverse logic illustrates why "public concern" must be irrelevant to issues of academic freedom.

The test proposed in this essay must answer this question: Is a professor's speech so inflammatory that listeners are incited to behave in disruptive ways that prevent others in the university from searching for truth? If an answer is yes, then that speech is not protected.

An example frequently used to evaluate academic freedom concerns a professor using the captive audience of a class to provide her personal views on an irrelevant contemporary political or religious matter. Many tests of academic freedom seek to exclude such behavior.<sup>90</sup> This revised concept of academic freedom proposed here does not seek to ensure that such actions are categorically excluded. Otherwise, a return to academic freedom defined strictly by "professional expertise" would be necessary, which, as discussed above, is unworkable. However, ensuring that an academic freedom test excludes the above example is unnecessary. A professor of geography could not teach her students that the world is flat, a professor of astronomy could not teach his students that the Earth is six thousand years old, and a history professor could not deny that the Holocaust occurred.<sup>91</sup>

The justification for this distinction goes beyond an academic freedom test or even a job description. Rather, such false beliefs are not even entertained in those respective fields such that teaching students that the world is flat does not teach the field of geography. Similarly, opining on the justifications for the war in Iraq does not teach biblical stories of warfare in a religion class. Thus, ensuring that a definition of academic freedom excludes such examples as these proves unnecessary. Such actions would be excluded *anyway* as having no relevance to the course taught and, therefore, not falling within the category of actions protected by academic freedom. By creating a revised concept of academic freedom that moves beyond limits of "professional expertise," professors can express a broader variety of opinions and viewpoints that relate to the knowledge-seeking functions of the university.

## Conclusion

*Garvetti v. Ceballos* unquestionably threatens the idea of academic freedom and a professor's free ability to articulate ideas, beliefs, and opinions within the setting of academia. Given the uneven application of, variously, the *Garvetti* test—recognizing the potential limitations of *Garvetti* for academic freedom cases but applying it regardless, and a return to the *Pickering-Connick* test—the result of the Supreme Court's decision

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has been to further muddy the waters of academic freedom rather than clarify them. A return to the *Pickering-Connick* test creates unpredictable results and overemphasizes values that have little worth in a university setting. Accordingly, a revised theory of academic freedom is necessary. While various alternative standards of what qualifies for academic freedom have been proposed, many disregard the reality that a professor's contribution to the academic community extends far beyond scholarship and teaching, and includes intramural speech and voluntary activities within the university. This informal curriculum must also be protected.

Salaita's dehiring underscores the urgency with which a revised legal concept of academic freedom must be formulated. The new theory this paper proposes would extend academic freedom to the informal curriculum of the university, provided it advances the knowledge-seeking activities of the university. Following this reformulation, the Supreme Court can ensure that the university will remain a bastion of free inquiry and study.

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## Notes

- <sup>1</sup>. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).
- <sup>2</sup>. *Id.* at 421.
- <sup>3</sup>. *Renken v. Gregory*, 541 F.3d 769, 775 (7th Cir. 2008); *Adams v. Trustees of the Univ. of N.C.–Wilmington*, 640 F.3d 550, 562 (4th Cir. 2011).
- <sup>4</sup>. Phyllis M. Wise, “The Principles on Which We Stand,” *Chancellor’s Blog*, August 22, 2014, <https://illinois.edu/blog/view/1109/115906>.
- <sup>5</sup>. See Robert J. Tepper and Craig G. White, “Speak No Evil: Academic Freedom and the Application of *Garcetti v. Ceballos* to Public University Faculty,” *Catholic University Law Review* 59 (2009): 150–51.
- <sup>6</sup>. *Pickering v. Board of Education*, 391 U.S. 563 (1968).
- <sup>7</sup>. *Id.* at 568.
- <sup>8</sup>. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).
- <sup>9</sup>. *Connick v. Myers*, 461 U.S. 138, 154 (1983).
- <sup>10</sup>. Tepper and White, “Speak No Evil,” 157–58.
- <sup>11</sup>. *Ceballos*, 547 U.S. at 423.
- <sup>12</sup>. *Id.* at 422.
- <sup>13</sup>. See Oren D. Griffin, “Academic Freedom and Professorial Speech in the Post-*Garcetti* World,” *Seattle University Law Review* 37 (2013): 7.
- <sup>14</sup>. *Garcetti v. Ceballos*, 547 U.S. 410, 438 (2006). Souter, J., dissenting. Quoting *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).
- <sup>15</sup>. *Garcetti*, 547 U.S. at 425. Majority opinion.
- <sup>16</sup>. Tepper and White, “Speak No Evil,” 158–59.
- <sup>17</sup>. *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008).
- <sup>18</sup>. *Id.* at 773.
- <sup>19</sup>. *Id.* at 774.
- <sup>20</sup>. See Leonard M. Niehoff, “Peculiar Marketplace: Applying *Garcetti v. Ceballos* in the Public Higher Education Context,” *Journal of College and University Law* 35 (2008): 92.
- <sup>21</sup>. *Gregory*, 541 F.3d at 770–71.
- <sup>22</sup>. *Id.* at 775.
- <sup>23</sup>. Griffin, “Academic Freedom,” 41.
- <sup>24</sup>. *Gorum v. Sessoms*, 561 F.3d 179, 186 (3rd Cir. 2009).
- <sup>25</sup>. *Id.* at 186. Quoting *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).
- <sup>26</sup>. Tepper and White, “Speak No Evil,” 163.
- <sup>27</sup>. *Sessoms*, 561 F.3d at 183–84.
- <sup>28</sup>. *Id.* at 186–87.
- <sup>29</sup>. Tepper and White, “Speak No Evil,” 164.
- <sup>30</sup>. Neal H. Hutchens, “A Confused Concern of the First Amendment: The Uncertain Status of Constitutional Protection for Individual Academic Freedom,” *Journal of College and University Law* 36 (2009): 149.
- <sup>31</sup>. *Adams v. Trustees of the Univ. of N.C.–Wilmington*, 640 F.3d 550, 562 (4th Cir. 2011).
- <sup>32</sup>. *Id.* at 555.
- <sup>33</sup>. *Id.* at 561.
- <sup>34</sup>. *Gorum v. Sessoms*, 561 F.3d 179, 183 (3d Cir. 2009); *Renken v. Gregory*, 541 F.3d 769, 775 (7th Cir. 2008).
- <sup>35</sup>. Griffin, “Academic Freedom,” 31.
- <sup>36</sup>. Owen Fiss, “The Democratic Mission of the University,” *Albany Law Review* 76 (2013): 736.
- <sup>37</sup>. *Ibid.*, 39.
- <sup>38</sup>. Tepper and White, “Speak No Evil,” 170.
- <sup>39</sup>. Omar Shakir, attorney, Center for Constitutional Rights, e-mail interview with the author, Feb. 24, 2015.
- <sup>40</sup>. *Ibid.*
- <sup>41</sup>. *Demers v. Austin*, 729 F.3d 1011, 1018 (9th Cir. 2013).



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42. *Id.* at 1018.
43. *Id.*
44. *Id.* at 1012.
45. *Id.*
46. *Demers v. Austin*, No. 11–35558, 2014 WL 306321, at \*1 (Jan. 29, 2014).
47. *Id.* at \*6.
48. *Demers v. Austin*, 729 F.3d 1011,1018 (9th Cir. 2013); *Adams v. Trustees of the Univ. of N.C.–Wilmington*, 640 F.3d 550, 562 (4th Cir. 2011).
49. *Connick v. Myers*, 461 U.S. 138, 142 (1983).
50. *Id.* at 146.
51. *Austin*, 729 F.3d at 1012.
52. Judith Areen, “Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance,” *Georgetown Law Journal* 97 (2009): 975.
53. *Ibid.*
54. *Garcetti v. Ceballos*, 547 U.S. 410, 414–15 (2006).
55. Fiss, “The Democratic Mission of the University,” 736.
56. Omar Shakir, e-mail interview.
57. *Ibid.*
58. *Connick v. Myers*, 461 U.S. 138, 146 (1983).
59. *Ceballos*, 547 U.S. at 438. Souter, J., dissenting.
60. *Myers*, 461 U.S. at 142.
61. Kevin L. Cope, “Defending the Ivory Tower: A Twenty-First Century Approach to the Pickering-Connick Doctrine and Public Higher Education Faculty After *Garcetti*,” *Journal of College and University Law* 33 (2007): 353.
62. *N.L.R.B. v. Yeshiva University*, 444 U.S. 672 (1980).
63. *Id.* at 686 n.23.
64. James J. Fishman, “Tenure and Its Discontents: The Worst Form of Employment Relationship Save All of the Others,” *Pace Law Review* 21 (2000): 193.
65. *Yeshiva Univ.*, 444 U.S. at 686 n.23.
66. *Gorum v. Sessoms*, 561 F.3d 179, 183 (3d Cir. 2009).
67. Griffin, “Academic Freedom,” 20.
68. *Ibid.*
69. *Renken v. Gregory*, 541 F.3d 769, 775 (7th Cir. 2008); *Sessoms*, 561 F.3d at 183.
70. Griffin, “Academic Freedom,” 21.
71. Areen, “Government as Educator,” 990.
72. *Ibid.*, 994.
73. Robin Wilson, “Mass Exodus from VMI’s English Dept. Follows Complaint of Hostile Workplace,” *Chronicle of Higher Education*, July 2, 2013, <http://chronicle.com/article/article-content/140097/>.
74. Kurt Ayau, e-mail interview with the author, Feb. 26, 2014.
75. *Ibid.*
76. *Ibid.*
77. Wilson, “Mass Exodus from VMI’s English Dept.”
78. William Pannacker, “Shared Governance, Tenure, and Academic Freedom are Worth the Trouble,” *Chronicle of Higher Education*, January 13, 2014, <http://chronicle.com/article/Shared-Governance-Tenure-and/143947/>.
79. Kurt Ayau, interview.
80. Areen, “Government as Educator,” 990.
81. Pannacker, “Shared Governance, Tenure, and Academic Freedom,” 78.
82. Neal H. Hutchens, “A Confused Concern of the First Amendment: The Uncertain Status of Constitutional Protection for Individual Academic Freedom,” *Journal of College and University Law* 36 (2009): 176.
83. “Appendix B,” *Virginia Military Institute Faculty Handbook* (May 2013), sec. XII(a), p. 86.

<sup>84</sup>. Hutchens, "A Confused Concern of the First Amendment," 177.

<sup>85</sup>. *Ibid.*

<sup>86</sup>. Griffin, "Academic Freedom," 52.

<sup>87</sup>. *Klaassen v. University of Kansas School of Medicine*, No. 13-CV-2561-DDC-KGS, 2015 WL 437747 (Feb. 3, 2015).

<sup>88</sup>. *Id.* at \*17.

<sup>89</sup>. *Id.* at \*18.

<sup>90</sup>. Alan K. Chen, "Bureaucracy and Distrust: Germaneness and the Paradoxes of the Academic Freedom Doctrine," *University of Colorado Law Review* 77 (2006): 977.

<sup>91</sup>. David M. Rabban, "Functional Analysis of 'Individual' and 'Institutional' Academic Freedom Under the First Amendment," *Law and Contemporary Problems* 52 (1990): 242.