Safeguarding the Search for Truth: Carving Out Academic Freedom's Place in a Domain Dominated by Government Speech

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Abstract

Across the United States, academic freedom is facing its most significant and sustained assaults since the days of Joseph McCarthy. The state governments launching these attacks have sought refuge in the broad confines of government speech, a doctrine that first emerged decades after the Supreme Court's seminal academic freedom decisions. Because professors at public universities are government employees, these states have taken the position that they can control what ideas can be introduced and which viewpoints can be debated in college classrooms. Courts are now facing the question of how to reconcile the government speech and academic freedom doctrines. The resolution of this question will determine whether university classrooms remain havens for free inquiry or become vehicles for compelled ideological conformity.

Complicating the judiciary's efforts to address this important issue are the doctrinal disarray and incoherence that mark the current approaches to both government speech and academic freedom. This Article thus seeks to offer much-needed clarity on the application of these two doctrines. First, it offers a definition for government speech that harmonizes the doctrine's three lines of cases. Second, it provides an overview of the constitutional academic freedom doctrine, detailing its internal inconsistencies. Finally, it lays out a new framework for academic freedom that distinguishes between speech restrictions imposed by public universities and those imposed by extramural governmental institutions, such as state legislatures. This approach accommodates the government speech doctrine while also giving universities the breathing space they need to flourish, ensuring that free inquiry will continue to define the American public university.

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* Staff Attorney, ACLU of Florida. All views expressed in this Article are my own. I would like to thank my incredible colleagues and co-counsel from the *Pernell v. Lamb* litigation team. I remain in constant awe of your brilliance and skill. The innovative theories we discussed during the course of our litigation served as a major influence on this Article. I would also like to extend my gratitude to the members of the *Harvard Law & Policy Review* for all the great work they did to help get this Article across the finish line.

Introduction

"[A]bove all," a university "must be free."[1] These were the words of famed Harvard President Charles W. Eliot in his 1869 inaugural address.[2] Eliot and his contemporary educational reformers set America on the path to adopting the vigorous academic freedom protections we benefit from today.[3] We, as a society, stand now at a crossroads. Facing the most significant assaults on academic freedom since the Red Scare,[4] we must decide if we are truly committed to the free inquiry and "robust exchange of ideas"[5] that characterize our elite system of higher education. The last time academic freedom was under this sort of attack, the Supreme Court eventually stood strong and laid the foundations to the constitutional academic freedom[6] doctrine.[7] But government speech—the First Amendment's '90s child—now threatens

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[1] Richard Hofstadter & Walter P. Metzger, The Development of Academic Freedom in the United States 394 (1955) (quoting Charles W. Eliot, Inaugural Address, Educational Reform 30 (New York, 1898)).

[2] *Id.* Woodrow Wilson once said of Eliot, "No man has ever made a deeper impression upon the educational system of a country than President Eliot has upon the educational system of America." *Eliot Spends Ninety-First Birthday Quietly at Home*, Harvard Crimson (March 20, 1925), https://www.thecrimson.com/article/1925/3/20/eliot-spends-ninety-first-birthday-quietly-at/ [https://perma.cc/E8CV-7LKN].

[3] *See generally* Hofstadter & Metzger, *supra* note 2, at 367–98.

[4] *See, e.g.*, Keith E. Whittington, *Professorial Speech, the First Amendment, and Legislative Restrictions on Classroom Discussions*, 58 Wake Forest L. Rev. 463, 467–82 (2023); Leah M. Watson, *The Anti-"Critical Race Theory" Campaign – Classroom Censorship and Racial Backlash by Another Name*, 58 Harv. C.R.-C.L. L. Rev. 487, 500–20 (2023).

[5] Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967).

[6] I use "constitutional academic freedom" here to distinguish between the legal doctrine and "professional academic freedom." *See generally* Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 Tex. L. Rev. 1265 (1988). In this Article, I will focus on the freedom to teach and research when discussing "constitutional academic freedom." While some leading scholars have made persuasive arguments that extramural speech should be included under academic freedom's umbrella, I leave that question for another day. *See* Keith E. Whittington, *Academic Freedom and the Mission of the University*, 59 Houston L. Rev. 821, 828–34 (2022); Matthew W. Finkin & Robert C. Post, For the Common Good: Principles of American Academic Freedom 127–49 (2009).

[7] *See generally Keyishian*, 385 U.S. 589; Sweezy v. New Hampshire, 354 U.S. 234 (1957).

academic freedom's place in our society.[8] These two doctrines are on a collision course. The judiciary's resolution of them will determine whether free inquiry or "compel[led] ideological conformity"[9] will define the future of America's public higher education system.

In recent history, scholars celebrated the cessation of the sort of political attacks on academic freedom that characterized the Red Scare era.[10] Yet, these attacks have returned, tied largely to the "anti-CRT"[11] movement.[12] Regrettably, I must concede that constitutional academic freedom is not prepared to meet this moment. It is a doctrine in a state of disarray, marked by incoherence.[13]

Florida serves as a strong example of how state governments are taking advantage of the constitutional academic freedom doctrine's current shortcomings. In 2022, Florida passed the Stop W.O.K.E. Act, which restricted university professors' ability to discuss certain viewpoints regarding race and gender in their courses.[14] A federal judge correctly recognized that this law violates the constitutional academic freedom doctrine and enjoined it.[15] But

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[8] *See, e.g.*, Kristi L. Bowman, *The Government Speech Doctrine and Speech in Schools*, 48 Wake Forest L. Rev. 211, 224–27 (2013) (discussing the government speech doctrine's origins in '90s case law).

[9] Meriwether v. Hartop, 992 F.3d 492, 506 (6th Cir. 2021).

[10] *See* David M. Rabban, *Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 Law & Contemp. Probs. 227, 280 (1990) ("In the generation since the McCarthy period, the legislative and executive branches have not intruded directly into the core academic decisions of state universities."); J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 Yale L.J. 251, 298 (1989) ("Today, few politicians seek political capital by attacking academics for their political opinions, and those who do only provide their victims with lawsuits that usually fortify their academic positions against more subtle or justifiable assault."); *cf.* Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 Geo. L.J. 945, 967 (2009) ("After 1968, most Court cases involved internal rather than external challenges to academic freedom.").

[11] The rationale of the "anti-CRT" movement seems to be that the ideas advanced by "critical race theory" are *per se* discriminatory and therefore can be outlawed. *See generally* Fla. House Bill 7 (2022) (housing the "anti-CRT" speech restrictions in the state's anti-discrimination law). There is a hint of irony to this thought process because some of the leading critical race theorists argued in the past that discriminatory speech should not receive First Amendment protection. *See generally* Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado, & Kimberlé W. Crenshaw, Words That Wound: Critical Race Theory, Assaultive Speech, and The First Amendment (1993). Henry Louis Gates offered a forceful and persuasive rebuke of that theory. *See* Henry Louis Gates, *Critical Race Theory and Freedom of Speech*, The Future of Academic Freedom 154–57 (Louis Menand ed., 1996).

[12] *See* Whittington, *supra* note 4, at 467–77; Watson, *supra* note 4, at 500–12. *See, e.g.*, Fla. Senate Bill 266 (2023); Fla. House Bill 7 (2022); Okla. House Bill 1775 (2021). However, not all of these infringements on academic freedom have come from the anti-CRT movement. *See, e.g.*, *LAWSUIT: FIRE sues to stop California from forcing professors to teach DEI*, Found. for Individual Rts. & Expression (Aug. 17, 2023), https://www.thefire.org/news/lawsuit-fire-sues-stop-california-forcing-professors-teach-dei [https://perma.cc/S55M-MD9V].

[13] *See* Robert C. Post, Democracy, Expertise, and Academic Freedom 62 (2012) ("At present, however, the doctrine of academic freedom stands in a state of shocking disarray and incoherence."); Areen, *supra* note 10, at 946 ("[T]he Court has not developed a coherent theory to guide constitutional protection of academic freedom"); Byrne, *supra* note 10, at 252 ("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.").

[14] *See* Pernell v. Fla. Bd. of Governors of State Univ. Sys., 641 F. Supp. 3d 1218, 1230–31 (N.D. Fla. 2022).

[15] *See id.* at 1230, 1277–78, 1289–92.

Florida was not deterred. In 2023, it passed Senate Bill 266, a law that also limited discussions of race in university classrooms. This time, however, learning from its Stop W.O.K.E. Act failure, the state targeted course, program, and curriculum approval processes, instead of classroom instruction.[16] Unfortunately, in its current state, academic freedom is vulnerable to attacks on these approval processes due to imprecise language in court dicta, language that appeared to be attempting to protect universities' institutional academic freedom interests.[17] To blunt these assaults, courts must develop a framework that properly accommodates both individual and institutional academic freedom rights, recognizing that public universities cannot be treated as merely an alter ego of the state's extramural governments if academic freedom is to protect public universities and their faculty.[18] This Article proposes an approach that can successfully thread that needle.

However, in attempting to modernize the constitutional academic freedom doctrine, there is another complicating factor in the analysis—government speech. When the government speech doctrine applies, the Free Speech Clause offers no protection to expression.[19] Emerging in 1991 in *Rust v. Sullivan*[20] and undergoing a rapid expansion in the mid-to-late 2000s,[21] the doctrine has spread its tentacles into three specific areas: speech hosted on government platforms or property, speech subsidized or funded by the government, and public employees' speech. Recognizing the danger that the monster it created poses to free speech, the Supreme Court has in recent years sought to tame this leviathan.[22] Yet, the doctrine's interaction with constitutional

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[16] *See* Fla. Senate Bill 266, §§ 1, 9 (2023).

[17] This vulnerability exists because courts have blurred the lines between public universities, which have institutional academic freedom rights, and government more generally, which does not. *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995) ("[W]hen the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.").

[18] *See* Regents of Univ. of Mich. 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, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself." (internal citations omitted)). Institutional academic freedom guarantees *universities* the right to decide "who may teach, what may be taught, how it shall be taught, and who may be admitted to study." Widmar v. Vincent, 454 U.S. 263, 276 (1981) (citation omitted). Individual academic freedom provides faculty with a right to teach, research, and produce scholarship without government interference. *See* Heim v. Daniel, 81 F.4th 212, 226–28 (2d Cir. 2023). Sometimes, these rights are in tension. Sometimes, they are aligned. Current academic freedom frameworks fail to account for this because they do not explicitly distinguish between universities' academic decisions and speech restrictions imposed by extramural governments. *See infra* Part III.

[19] *See* Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009) ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.").

[20] 500 U.S. 173 (1991).

[21] *See generally Summum*, 555 U.S. 460; Garcetti v. Ceballos, 547 U.S. 410 (2006).

[22] *See generally* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 526–31 (2022); Shurtleff v. City of Boston, 596 U.S. 243 (2022); Matal v. Tam, 582 U.S. 218 (2017). In fact, Justice Alito, the author of *Summum*, criticized the Court for its overreliance on the analysis he pioneered in that opinion. *See Shurtleff*, 596 U.S. at 262 (Alito, J., concurring in judgment) (criticizing the majority for relying on the three factors from *Summum*); *id.* at 263 (recommending instead that "courts . . . focus on the identity of the speaker"). In *Matal*, Justice Alito warned courts to "exercise great caution before extending our government-speech precedents." 582 U.S. at 235.

academic freedom is a question we must confront and one the Supreme Court has not yet answered.[23] Accordingly, I offer a thorough accounting of the government speech doctrine and explain how to square it with constitutional academic freedom.

There is a genuine need to address these issues, as state governments are already seeking refuge in the broad confines of government speech to justify their assaults on academic freedom.[24] At a time when 68% of faculty members at colleges and universities in the United States are not tenured or even on the tenure track,[25] constitutional academic freedom stands as a bulwark against censorship in higher education. It thus remains essential to ensuring "the independent and uninhibited exchange of ideas among teachers and students" in university classrooms.[26] The American Bar Association—the main accrediting body for law schools in the United States—has been so troubled by recent developments that it has proposed a new standard to protect academic freedom and free expression on law school campuses, specifically to give faculty and students the breathing room needed "to communicate ideas that may be controversial or unpopular."[27]

Moreover, with the prominent role the internet plays in our modern society, it is as vital as ever for professors to have the freedom to offer unpopular opinions and study controversial issues. As Brian Leiter put it, "[t]he Internet is the epistemological crisis of the 21st century: it magnifies ignorance and stupidity and is now leading hundreds of millions of people to act on the basis of the fantasy world it constructs. That fact makes academic freedom even

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[23] *See, e.g.*, *Garcetti*, 547 U.S. at 425 ("There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."); Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000) ("[The speech here] is not . . . speech by an instructor or a professor in the academic context, where principles applicable to government speech would have to be considered."); Univ. of Penn. v. E.E.O.C., 493 U.S. 182, 198 n.6 (1990) ("Where, as was the situation in the academic-freedom cases, government attempts to direct the content of speech at public educational institutions, complicated First Amendment issues are presented because government is simultaneously both speaker and regulator.").

[24] *See* Pernell v. Fla. Bd. of Governors of State Univ. Sys., 641 F. Supp. 3d 1218, 1230 (N.D. Fla. 2022) ("Defendants argue that, under this Act, professors enjoy 'academic freedom' so long as they express only those viewpoints of which the State approves. This is positively dystopian."). These attacks on academic freedom are having a real impact. In Florida, 46 percent of faculty members surveyed said they planned to look for a job in another state, and 85 percent said they would not encourage a professor or graduate student in another state to come to Florida. Divya Kumar & Ian Hodgson, *New Laws in Florida and Elsewhere Are Pushing Faculty to Leave, Survey Says*, Tampa Bay Times (Sept. 8, 2023), https://www.tampabay.com/news/education/2023/09/07/new-laws-florida-elsewhere-are-pushing-faculty-leave-survey-says/ [https://perma.cc/3GMC-569X].

[25] Glenn Colby, *Data Snapshot: Tenure and Contingency in US Higher Education*, Am. Ass'n of Univ. Professors (2023), https://www.aaup.org/article/data-snapshot-tenure-and-contingency-us-higher-education [https://perma.cc/R2LP-X7XD].

[26] Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1985).

[27] *Council eyes law school freedom of expression standard*, Am. Bar Ass'n (Aug. 28, 2023), https://www.americanbar.org/news/abanews/aba-news-archives/2023/08/council-eyes-freedom-of-expression-standard/ [https://perma.cc/R75Q-EQBF].

more important than ever before . . . ."[28] Scholarship, research, and expertise act as important checks on misinformation.[29] Politicians obstructing necessary research or truthful instruction based on the popularity of ideas is the exact thing the constitutional academic freedom doctrine was created to prohibit.[30]

How then do we craft a framework for academic freedom that brings coherence to the doctrine and can be reconciled with government speech? First, we must do what courts, including the Supreme Court, have struggled to do: Articulate a comprehensive theory of government speech that harmonizes the doctrine's three lines of cases and produces consistent results. As I see it, the best conception of government speech is that the doctrine applies only when the government is acting pursuant to its managerial authority[31] and is seeking solely to convey its chosen viewpoint.[32] This of course means that when the government opens its forum to a range of viewpoints or regulates speech using its governance authority,[33] courts should conclude that the expression at issue is not government speech. This theory resolves many of the inconsistencies that are presently confounding courts while remaining true to the rationale that underpins the doctrine. It also demonstrates why government speech is such a poor frame for the exchange of ideas and robust debate that occur in public universities and colleges.[34]

Next, in creating a workable framework for academic freedom cases, courts must first distinguish between extramural governments[35] and public universities when evaluating restrictions on speech related to teaching or research. If a university is imposing the restriction, courts should defer to the institution unless it is seeking to suppress unpopular viewpoints central to the

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[28] Brian Leiter, *Why Academic Freedom*, *in* The Value and Limits of Academic Speech: Philosophical, Political, and Legal Perspectives 31, 43 (Donald A. Downs & Chris W. Surprenant eds., 2018).

[29] *See id.*; Post, *supra* note 13, at 33 ("A state that controls our knowledge controls our minds. Because contemporary Western societies are in one sense or another ruled by knowledge and expertise, a state that can manipulate the production of disciplinary knowledge can set the terms of its own legitimacy. It can undermine the capacity of citizens to form autonomous and critical opinions." (citation omitted)).

[30] *See* Keyishian v. Bd. of Regents of Univ. of State of N. Y., 385 U.S. 589, 603 (1967); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion).

[31] *See generally* Robert C. Post, Constitutional Domains: Democracy, Community, Management 199–267 (1995). Post defines "managerial authority" as when the government "acts to administer organizational domains dedicated to instrumental conduct." *Id.* at 200.

[32] *Cf.* Ross Rinehart, *"Friending" and "Following" the Government: How the Public Forum and Government Speech Doctrines Discourage the Government's Social Media Presence*, 22 S. Cal. Interdisc. L.J. 781, 807 (2013) ("These early government speech cases outlined the theory justifying the doctrine's deferential standard: the government has a managerial interest in controlling its own speech. Therefore, the government speech doctrine, which permits the government to exclude alternative viewpoints, ensures that the government can clearly convey its message.").

[33] Robert Post defines "governance authority" as the power the government exercises over the public realm. Post, *supra* note 31, at 200.

[34] *See, e.g.*, Healy v. James, 408 U.S. 169, 180 (1972) (noting that the "college classroom" is a "marketplace of ideas" (citation omitted)); Meriwether v. Hartop, 992 F.3d 492, 507 (6th Cir. 2021) ("The need for the free exchange of ideas in the college classroom is unlike that in other public workplace settings.").

[35] When I use the term "extramural governments," I mean any governmental entity that is not the public university or its board of trustees.

professor's discipline or engaging in unlawful discrimination.[36] This approach accommodates institutional academic freedom by deferring to universities' genuine academic decisions without eviscerating individual academic freedom protections. Conversely, when an extramural government is imposing the speech restriction, courts should apply ordinary First Amendment principles via the forum analysis.[37] This will insulate universities and professors alike from extramural interference in their academic decisions.[38]

This Article will thus proceed in three parts. In the first part, I will detail the development of the government speech doctrine, examine each of its three lines of cases, and analyze how my theory of government speech fits with the case law. In the second part, I will offer an overview of constitutional academic freedom, including its origins, its protections for universities as institutions, and its protections for individual professors. Finally, in the third part, I will reconcile constitutional academic freedom with government speech and lay out the framework I am recommending courts adopt.

I. Government Speech and Its Three Lines of Cases

First, we start with a discussion of "the recently minted government speech doctrine."[39] Arising as a response to forum analysis's stranglehold over First Amendment law,[40] the government speech doctrine began to emerge in case law in the early 1990s.[41] But the doctrine did not see rapid expansion until two Supreme Court decisions in the mid-to-late 2000s—*Garcetti* and *Summum*.[42] Recognizing the danger inherent in a principle that broadly empowers government censorship, the Supreme Court has in recent years focused on constraining the doctrine and cautioning courts not to extend it

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[36] In deferring to the university, courts should apply the professional judgment standard. *See* Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985) ("[Courts] may not override [a university decision] 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.").

[37] This would subject any content- or viewpoint-based restrictions on academic speech to strict scrutiny. *See* Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1885 (2018). The exception to this is when researchers challenge the decisions of selective government-run grant programs on free speech grounds. In that scenario, courts should apply the government speech doctrine. *Cf.* National Endowment for the Arts v. Finley, 524 U.S. 569, 585 (1998).

[38] *See* Whittington, *supra* note 4, at 467–77, 516–22.

[39] Pleasant Grove City v. Summum, 555 U.S. 460, 481 (2009) (Stevens, J., concurring).

[40] *See* Bowman, *supra* note 8, at 224–25. Forum analysis "focuses on determining when members of the public can use government property to communicate their own messages," basing the government's power to impose speech restrictions on the nature of the forum. *Id.* Courts have recognized four types of public fora: the traditional public forum, designated public forum, limited public forum, and nonpublic forum. *Id.* The government has significantly more authority to restrict speech in a nonpublic forum than it does in a traditional public forum, for example. *Id.*

[41] *See, e.g.*, *id.* at 225–27; Mark Strasser, *Ignore the Man Behind the Curtain: On the Government Speech Doctrine and What It Licenses*, 21 B.U. Pub. Int. L.J. 85, 88 (2011); Carl G. DeNigris, *When Leviathan Speaks: Reining in the Government-Speech Doctrine Through a New and Restrictive Approach*, 60 Am. U. L. Rev. 133, 140 (2010).

[42] *See generally Summum*, 555 U.S. 460 (majority opinion); Garcetti v. Ceballos, 547 U.S. 410 (2006).

further than necessary.[43] Because the government speech doctrine is on a collision course with the constitutional protections afforded by academic freedom, it is necessary to explore how this doctrine has developed, examine what it covers, and define its outer limits before turning to the constitutional academic freedom doctrine.

The government speech doctrine rests on the fundamental premise that while "[t]he Free Speech Clause restricts government regulation of private speech," "it does not regulate government speech."[44] When the government speaks, "it is entitled to say what it wishes."[45] This sort of doctrine is necessary because the government must be able to promote its programs, espouse its policies, and control what its spokespeople say in order to function.[46] And while the First Amendment will not restrain the government, the people can still hold it accountable for its speech using the "democratic electoral process."[47] All this to say, when expression is government speech, there is no viable free speech claim.

Yet, it has proven much easier to talk about government speech in the abstract than to precisely define what it is. As this Part will discuss, courts have wrestled with the question of how to define government speech in a way that allows the government to operate efficiently and effectively without defining it so broadly as to permit the government to censor disfavored viewpoints. Drawing on Robert Post's scholarship regarding managerial and governance authority,[48] my recommendation is that courts should recognize government speech only when the government is acting through its managerial authority[49] and is seeking solely to express its own viewpoint. In other words, if the government is acting pursuant to its governance authority[50] or providing a forum for varying views, the expression at issue is not government speech. Applying this definition universally will offer more certainty and resolve doctrinal inconsistencies.

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[43] *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 531 (2022) (observing that the lower court's application of the government speech doctrine from *Garcetti* risked "eviscerat[ing] this Court's repeated promise that teachers do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate'" (citation omitted)); Shurtleff v. City of Boston, 596 U.S. 243, 263 (2022) (Alito, J., concurring in judgment) (articulating a new test to prevent the "government-speech doctrine from being used as a cover for censorship"); Matal v. Tam, 582 U.S. 218, 235 (2017) ("[W]hile the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse . . . . [W]e must exercise great caution before extending our government-speech precedents.").

[44] *Summum*, 555 U.S. at 467.

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

[46] Shurtleff v. City of Boston, 596 U.S. 243, 247 (2022); *Garcetti*, 547 U.S. at 418–20.

[47] Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 207 (2015).

[48] *See supra* notes 31–33.

[49] At its core, what "managerial authority" means is the government exercising authority over its own internal operations, whether that is controlling its property, managing its employees, or directing the selection process of its own grant program. *See* Post, *supra* note 31, at 200, 247, 250–51; Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. Rev. 1713, 1784 (1987).

[50] Governance authority can be best described as the government's authority over the public domain—i.e., generally applicable statutes, rules, and regulations. *See id.* These are government actions that seek to influence how the general public lives its lives, like statutes outlawing true threats.

This theory of government speech is sensible because it captures the essence of the doctrine. The government certainly is not itself speaking when it enacts speech restrictions that govern the "public realm."[51] Defining government speech that broadly would swallow the Free Speech Clause whole. Nor is the government speaking when it provides a forum for a panoply of viewpoints. The government speaks only when it is acting pursuant to its authority to manage its own affairs and seeking to convey solely its own message.[52] This narrow definition successfully avoids entangling government speech with private speech.

Turning from the theoretical to the practical, as the government speech doctrine has developed, it has split into three lines of cases. First, there is government-hosted speech. This aspect of the doctrine is usually implicated where a private speaker is denied the opportunity to use government property or a government platform to amplify their message. The doctrine's second line is government-subsidized speech. Disputes in this area usually occur when the government places content- or viewpoint-based conditions on speech it is funding via grants to private organizations or citizens. The final offshoot of the doctrine is public employee speech. Cases arise out of this part of the doctrine when a government employer punishes an employee for their speech or the government puts laws or regulations in place that restrict the speech of its employees. I will explore the development of each of these lines of government speech, highlight inconsistencies in the case law, and—relying on my theory of the doctrine—make recommendations on how to resolve these inconsistencies. This is important because precisely defining the contours of the government speech doctrine is crucial to safeguarding free speech and academic freedom.

A. Government-Hosted Speech

The first of the three lines of cases concerns private speakers seeking to use government platforms or property to amplify their own speech. These cases usually arise out of scenarios where the government has refused to let a person speak or otherwise engage in expression due to the message they seek to convey. The seminal cases for this offshoot of the doctrine are *Pleasant Grove City v. Summum*;[53] *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*;[54] *Matal v. Tam*;[55] and *Shurtleff v. City of Boston*[56]—each decided since 2009. *Summum* and *Walker* set out the three most commonly used factors in

[51] Post, *supra* note 31, at 200 (quoting Hannah Arendt, The Human Condition 22–78 (1959)).

[52] When courts seek to discern whether the government is conveying solely its own message, they should not approach the inquiry narrowly. Courts should evaluate the event, program, course, etc. as a whole, rather than just looking to individual messages expressed within them. Controlling only one viewpoint in a broader event, program, or course is an act of censorship, not government speech.

[53] 555 U.S. 460 (2009).

[54] 576 U.S. 200 (2015).

[55] 582 U.S. 218 (2017).

[56] 596 U.S. 243 (2022).

what the Supreme Court has called a "holistic inquiry,"[57] while *Matal* and *Shurtleff* sought to establish boundaries for a doctrine that risks empowering widescale government censorship of disfavored views.

Summum involved a private religious group that argued the First Amendment required a municipality to accept a permanent monument the group sought to donate to a city park. The park contained fifteen permanent monuments, eleven of which had been donated by private groups or individuals, including a Ten Commandments statue.[58] The private religious organization wanted to erect a stone monument similar in size to the Ten Commandments statue that would contain the Seven Aphorisms of Summum.[59] The city repeatedly rejected their requests, so the religious organization sued.

In considering the organization's lawsuit, the Supreme Court first observed that the Free Speech Clauses only "restricts government regulation of private speech," not government speech.[60] The government is allowed to say what it wishes and to select the views it wants to express. Justice Alito, the author of the opinion, further explained that this right for the government to say what it wishes holds even "when it receives assistance from private sources," as long as it is "for the purpose of delivering a government-controlled message."[61] And if a person disagrees with the message the government is expressing, they can seek accountability through democratic means. But Justice Alito did clarify that while the First Amendment does not restrict government speech, that does not give the government carte blanche in censoring private speech on its property. There, it must still abide by ordinary First Amendment principles.[62] The dispositive question is: Is the government regulating private speech or making decisions about its own expression?

Justice Alito then developed the inquiry that courts typically use today to assess cases where a private speaker seeks to use government property or a government platform to amplify their private speech.[63] He looked to whether the government had historically used the medium to speak to the public (history), whether the public would reasonably view the government's decision to host that speech on its property as the government endorsing the message

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[57] *Id.* at 252.

[58] *Summum*, 555 U.S. at 464–65.

[59] *Id.* at 465.

[60] *Id.* at 467 (citing Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005)).

[61] *Id.* at 468. Steven Goldberg has argued that Justice Alito's support for his government-speech rule statements in this part of the opinion are little more than an illusion, allowing him to massively expand what was at most a minor and shrinking doctrine. *See* Steven H. Goldberg, *The Government-Speech Doctrine: "Recently Minted," but Counterfeit*, 49 U. Louisville L. Rev. 21, 24–34 (2010).

[62] *See Summum*, 555 U.S. at 469–70.

[63] Justice Alito's opinion was influenced by a prelude to *Summum*, Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005), a decision authored by Justice Scalia. Therein, Justice Scalia upheld a government advertising program that was paid for by taxes on private entities on the grounds that it was government speech. *Id.* at 560–62. A core part of Justice Scalia's holding was the control the government exercised over the message, *id.*, foreshadowing one of the factors the Court set out in *Summum*.

(endorsement), and the government's selectiveness in the messages private citizens were allowed to convey on that property (control).[64]

Considering history first, Justice Alito assessed monuments on public property in a general sense, observing that "[p]ermanent monuments displayed on public property typically represent government speech."[65] He noted that there is a historical tradition of governments using monuments to speak to the public, going back to ancient times, and this includes privately financed and donated monuments, not just government-commissioned monuments.[66]

Looking next to endorsement, "because property owners typically do not permit the construction of such monuments on their land, persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner's behalf . . . . This is true whether the monument is located on private property or on public property."[67]

Finally, Justice Alito observed that the government has practiced "selective receptivity" when it comes to accepting donated monuments on public land.[68] Government entities that select these monuments exercise control over their design and routinely reject monuments that do not express messages with which they agree.[69]

After analyzing monuments in public parks generally, Justice Alito then looked to the specific monuments in Pleasant Grove's park to determine if they were government speech. He held that they were. This was because the city never opened the park up to the placement of whatever permanent monuments private donors offered, it effectively controlled the message conveyed by the monuments by exercising final approval authority over their selection, and there was only limited space in the park to accommodate permanent monuments.[70] Justice Alito contrasted this with parades or demonstrations at the park because they are temporary and do not defeat the essential function of the land. Public monuments, however, "monopolize the use of the land on which they stand and interfere permanently with other uses of public space."[71] So, as he saw it, common sense justified treating them differently under the law.

About six years after the *Summum* decision, the Supreme Court took up the next major government-hosted speech case, *Walker*.[72] *Walker* confirmed that courts should use the three-factor inquiry from *Summum* to analyze cases from this line of the government speech doctrine. In *Walker*, the Texas

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[64] *See Summum,* 555 U.S. at 470–72. Ironically, Justice Alito later criticized the majority of the Supreme Court for being too mechanical in the application of the test of his own creation. *See* Shurtleff v. City of Boston, 596 U.S. 243, 263 (2022) (Alito, J., concurring in judgment) ("[T]he Court goes wrong in proceeding as though our decisions in *Walker* and *Summum* settled on anything that might be considered a 'government-speech analysis.' . . . We did not set out a test to be used in all government-speech cases, and we did not purport to define an exhaustive list of relevant factors . . . . When considered in isolation from that inquiry, the factors central to *Walker* and *Summum* can lead a court astray.").

[65] *Summum*, 555 U.S. at 470.

[66] *Id.* at 470–71.

[67] *Id.* at 471.

[68] *Id.*

[69] *Id.* at 471–72.

[70] *Id.* at 472–73, 478.

[71] *Id.* at 479.

[72] Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200 (2015).

Division of the Sons of Confederate Veterans requested that the state approve their proposed specialty license plate featuring a Confederate battle flag.[73] State law allowed organizations to submit plate designs featuring a slogan or a graphic. Drivers could choose to display one of the state's general-issue license plates or a specialty license plate selected from approved designs. The Texas Department of Motor Vehicles Board was the government entity tasked with approving designs.[74] In both 2009 and 2010, the Sons of Confederate Veterans applied for a specialty license plate to be approved. Each time, the DMV Board voted against issuing the plate.[75] The Sons of Confederate Veterans sued for a violation of their First Amendment rights, with the case turning on the question of whether the specialty plates were government speech.

Based on the analysis in *Summum*,[76] the Supreme Court examined whether license plates historically conveyed government messages, whether they're "closely identified in the public mind with the State," and whether Texas maintained control over the messages conveyed on its specialty plates.[77] First, the Court detailed the history of graphics and slogans on license plates in this country, including in Texas, and determined that they have often communicated the messaging of the states.[78] Next, the Supreme Court held that "Texas license plates are, essentially, government IDs," so a reasonable observer would construe them as conveying a message on behalf of the government entity that issues them.[79] Finally, the Court concluded that Texas exercises sufficient control over the messages conveyed by its specialty plates because the state "has sole control over the design, typeface, color, and alphanumeric pattern for all license plates," must approve every specialty plate design, and actively used its approval authority to reject numerous proposed designs.[80] Because each of these factors favored the state of Texas, the Supreme Court ruled that this was government speech.

Walker marked the peak of this line of government speech cases.[81] Following the decision, the Supreme Court began the process of constraining a doctrine that risked growing out of control. In the first of the decisions setting out the boundaries of this doctrine, the Court considered whether the Lanham Act's provision prohibiting the registration of trademarks that "disparage … or bring … into contempt[] or disrepute" "persons, living or dead, institutions, beliefs, or national symbols"[82] was unconstitutional.[83] The Patent and Trademark Office had denied a band's application for a federal trademark

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[73] *Id.* at 203.
[74] *Id.* at 203, 205.
[75] *Id.* at 206.
[76] *Id.* at 209–10 (discussing *Summum*).
[77] *Id.* at 210–14 (quoting *Summum*, 555 U.S. at 472).
[78] *Id.* at 210–11.
[79] *Id.* at 212.
[80] *Id.* at 213 (quoting Tex. Transp. Code § 504.005).
[81] *See* Matal v. Tam, 582 U.S. 218, 238 (2017) (noting that *Walker* "likely marks the outer bounds of the government-speech doctrine").
[82] 15 U.S.C. § 1052(a).
[83] *Matal*, 582 U.S. at 223.

because its name was a racial slur.[84] The government sought to defend this decision on the grounds that federal trademarks are government speech. The Supreme Court disagreed.

While recognizing that the government speech doctrine is "essential," Justice Alito, writing for the majority, warned that "it is a doctrine that is susceptible to dangerous misuse."[85] He further observed that "[i]f private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints."[86] Thus, courts "must exercise great caution before extending . . . government-speech precedents."[87]

Looking to the speech at issue in the case before him, Justice Alito noted that the federal government does not create or edit the trademarks submitted for registration; it is not empowered to reject a trademark based on the message it conveys, except as required by the statute at issue; and the government cannot remove a trademark once it is registered except in very limited circumstances.[88] Moreover, if trademarks were considered government speech, the federal government was "babbling prodigiously and incoherently," "saying many unseemly things," and "expressing contradictory views."[89] And looking to the aforementioned government speech cases only confirmed this point, as Justice Alito recognized that "none of [the three] factors are present in this case."[90] Because trademarks are not government speech, the court went on to apply First Amendment principles and held that the disparagement clause in 15 U.S.C. § 1052(a) is unconstitutional.[91]

Shurtleff, decided in 2022, continued the Court's trend of confining the government speech doctrine. There, the Supreme Court considered whether the City of Boston's denial of a religious group's request to fly a Christian flag violated the First Amendment when the City had "approved hundreds of requests to raise dozens of different flags."[92] In fact, the city did not deny a single request until 2017, when Harold Shurtleff asked to fly a Christian flag, and did so out of fear that it would violate the Establishment Clause.[93]

In assessing whether the First Amendment would apply, the Court first needed to determine "whether Boston's flag-raising program constitute[d] government speech."[94] It noted that to answer this question, it would apply a "holistic inquiry" based on "a case's context rather the rote application of rigid factors."[95] Yet, the Supreme Court relied on the three factors it had used in past cases: "the history of the expression at issue; the public's likely perception

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[84] *Id.* at 228–29. The band, comprised of Asian-Americans, had chosen this name—which was a slur for persons of Asian descent—to reclaim the term. *Id.* at 223, 228.
[85] *Id.* at 235.
[86] *Id.*
[87] *Id.*
[88] *Id.* at 235–36.
[89] *Id.* at 236.
[90] *Id.* at 238.
[91] *Id.* at 239, 247.
[92] Shurtleff v. City of Boston, 596 U.S. 243, 248 (2022).
[93] *Id.* at 248, 250.
[94] *Id.* at 251.
[95] *Id.* at 252.

as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression."[96]

In applying these factors, the Supreme Court observed that they did not all favor one side, as they had in *Summum*, *Walker*, and *Matal*. History favored the City of Boston, as flags have been used to convey government messages going back to almost the beginning of human civilization.[97] And even when governments fly flags that are not their own, that too can be used to convey a government message. On the question of whether the public would reasonably view the flying of the flag as the government's speech, the Court noted that the city square where this flagpole sat included two other flagpoles that flew the United States flag and the Commonwealth of Massachusetts's flag. The flagpole often flew the City of Boston's flags, but on days where the city allowed private flags to fly, it removed its own flag.[98] Thus, a reasonable person would ordinarily associate the flag's message with Boston. That said, the City had flown around fifty different private flags over the years, ranging from flags of other countries to flags of groups or causes, such as Pride Week and a community bank.[99] So the Court considered this factor to be mixed.

Finally, the Court examined "the extent to which Boston actively controlled these flag raisings and shaped the messages the flags sent."[100] The Supreme Court's pithy answer was "not at all," and "that [was] the most salient feature of this case."[101] While Boston controlled the dates and times of events and the plaza's physical premises, it did not exercise control over the content of the flags, at least until Harold Shurtleff sought to fly a Christian flag. Boston had final approval authority, but it had no record of using it to control the messages conveyed during the hundreds of previous flag-raising ceremonies. It had never requested to review a flag, requested changes to a flag, or denied a request, prior to the Shurtleff request.[102] Ultimately, control over the message proved to be the decisive factor in *Shurtleff*. The City's lack of control led the Supreme Court to rule that the flag raisings were private speech.[103] And because the City engaged in viewpoint discrimination, it violated Harold Shurtleff's First Amendment rights.[104]

The key takeaway from these cases is that courts will often look to the three factors—history, endorsement, and control—when evaluating whether a refusal to allow private speech on government property or a government platform is constitutional. What *Shurtleff* indicates is that the control the government exercises over the message will often be the dispositive factor. And control is not limited to final approval authority or the power the government

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[96] *Id.*
[97] *Id.* at 253–55.
[98] *See id.* at 255.
[99] *Id.* at 250, 255.
[100] *Id.* at 256.
[101] *Id.*
[102] *Id.* at 257.
[103] *Id.* at 258 ("All told, while the historical practice of flag flying at government buildings favors Boston, the city's lack of meaningful involvement in the selection of flags or the crafting of their messages leads us to classify the flag raisings as private, not government, speech.").
[104] *Id.* at 258–259.

could exercise. *Shurtleff* makes clear that the government must actively exercise control over the message.[105]

Over the past fifteen years, the circuits have often run into cases raising issues related to this part of the government speech doctrine. Some instances where they found the speech at issue to be government speech include a city parade to honor war veterans,[106] banners advertising tutoring services from school fences,[107] art exhibited in government buildings,[108] a town's website,[109] cheerleading at a college football game,[110] and legislative invocations.[111] Meanwhile, circuits have held that rallies on the steps of a courthouse,[112] events inside city hall,[113] parades led by private groups,[114] and private vendors participating in a city-organized lunch program[115] do not qualify as government speech. The development of the doctrine is still in a state of flux and will undoubtedly continue to evolve in future years.

Of particular interest is how evolving technologies will shape the government speech doctrine. We have already seen government actors attempt to avail themselves of it in social media cases.[116] As we see innovations in the way government and private citizens platform speech, we will undoubtedly see the government engage in novel means of censorship. Courts should take heed of Justice Alito's warnings from his concurrence in *Shurtleff*: "[C]ourts must be very careful when a government claims that speech by one or more private speakers is actually government speech," lest the government speech doctrine become "cover for censorship."[117] Justice Alito has the right of it here.[118]

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[105] *Id.* at 257 (noting that Boston "had no record of denying a request until Shurtleff's").

[106] Leake v. Drinkard, 14 F.4th 1242, 1248–53 (11th Cir. 2021).

[107] Mech v. Sch. Bd. of Palm Beach Cnty., Fla., 806 F.3d 1070, 1074–79 (11th Cir. 2015).

[108] Newton v. LePage, 700 F.3d 595, 601–04 (1st Cir. 2012) (mural in government building). *See also* McGriff v. City of Miami Beach, 84 F.4th 1330, 1332–36 (11th Cir. 2023) (art exhibition at storefront rented by city); People for the Ethical Treatment of Animals, Inc. v. Gittens, 414 F.3d 23, 25 (D.C. Cir. 2005) (outdoor art exhibition). Some district courts have come to the same conclusion. *See, e.g.*, Penkoski v. Bowser, 548 F. Supp. 3d 12, 21 (D.D.C. 2021) (mural painted on public street); Raven v. Sajet, 334 F. Supp. 3d 22, 28–32 (D.D.C. 2018) (art displayed in National Portrait Gallery); Pulphus v. Ayers, 249 F. Supp. 3d 238, 247–54 (D.D.C. 2017) (painting in U.S. Capitol Complex).

[109] Sutliffe v. Epping Sch. Dist., 584 F.3d 314, 329–35 (1st Cir. 2009).

[110] Dean v. Warren, 12 F.4th 1248, 1264–66 (11th Cir. 2021)

[111] Gundy v. City of Jacksonville, Fla., 50 F.4th 60, 73–80 (11th Cir. 2022); Fields v. Speaker of Pa. House of Representatives, 936 F.3d 142, 158–60 (3d Cir. 2019).

[112] Higher Soc'y of Ind. v. Tippecanoe Cnty., Ind., 858 F.3d 1113, 1117–18 (7th Cir. 2017).

[113] Miller v. City of Cincinnati, 622 F.3d 524, 536–37 (6th Cir. 2010).

[114] Int'l Women's Day Mar. Plan. Comm. v. City of San Antonio, 619 F.3d 346, 359–63 (5th Cir. 2010).

[115] Wandering Dago, Inc. v. Destito, 879 F.3d 20, 34–38 (2d Cir. 2018).

[116] *See, e.g.*, Davison v. Randall, 912 F.3d 666, 686–87 (4th Cir. 2019) (rejecting claim that the public comment section of a politician's official Facebook page was government speech); Blackwell v. City of Inkster, 596 F. Supp. 3d 906, 917–22 (E.D. Mich. 2022) (public comments on Facebook page were not government speech); Faison v. Jones, 440 F. Supp. 3d 1123, 1136–37 (E.D. Cal. 2020) (same). *See also* Knight First Amend. Inst. v. Trump, 928 F.3d 226, 239–40 (2d Cir. 2019), *vacated as moot,* Biden v. Knight First Amend. Inst., 141 S. Ct. 1220 (2021) (rejecting argument that president blocking users on Twitter was government speech).

[117] *Shurtleff*, 596 U.S. at 262–263 (Alito, J., concurring in judgment).

[118] Indeed, one major issue with the factor-based analysis is that history almost always favors the government. Judge McFadden, of the U.S. District Court for the District of Columbia, attempted to resolve this issue by focusing on the level of generality in defining the medium. Penkoski v. Bowser, 548 F. Supp. 3d 12, 22–23 (D.D.C. 2021) (observing that "artistic displays" was

Courts should be reluctant to extend the doctrine articulated in this line of cases. It is best to err on the side of protecting private speech and against government censorship.

Where Justice Alito goes wrong is in his suggestion for a new test: "government speech occurs if—but only if—a government purposefully expresses a message of its own through persons authorized to speak on its behalf, and in doing so, does not rely on a means that abridges private speech."[119] Justice Alito's heart is in the right place, but the standard he articulates would be difficult to implement. After all, the precise challenge the government speech doctrine presents is defining what is and is not "private speech." That said, I agree with Justice Alito that the government must be purposefully expressing a message of its own, or at least purposefully adopting a message as its own. The better approach is to rely on the theory I articulated earlier: the government must be managing its property or platform and expressing its own message.

The first aspect of this inquiry is often going to be easy to figure out. Is the government passing a law or regulation that is generally applicable or simply focused on managing operations as if it were a private owner of the property? In three of the four cases discussed in this Section, the government was acting through its managerial authority: *Summum*, *Walker*, and *Shurtleff*. In *Summum*, it was managing its park. In *Walker*, it was managing its license-plate program. And in *Shurtleff*, it was managing the use of its flagpole and plaza. *Matal*, conversely, presented a case where the government was regulating speech pursuant to its governance authority. The statutory provision at issue denied a generally available legal protection to expression the government disfavored.[120]

With regard to the second part of my theory, control is the lodestar. In assessing whether the government is expressing its own message (or at least intentionally adopting a private party's viewpoint as its own), the control the government exercises over selecting what speech is and is not featured in the relevant space is dispositive.[121] The government must exercise active control or use its editorial discretion. If the government opens the medium up to a number of viewpoints, that demonstrates it is not seeking to express its own message. *Matal* serves as a strong example of the government exercising almost no control over viewpoint.[122] *Shurtleff* is another example where the government

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too general, while "colorful paint on the asphalt of 16th Street" was too specific). That approach is an improvement, but government has existed for so long and has used so many different mediums to speak that it is hard to conceive of a significant number of cases where the government will not prevail on the history factor. A factor that almost always favors the government does not align with the warning that courts "must exercise great caution before extending . . . government-speech precedents." *Matal*, 582 U.S. at 235.

[119] *Shurtleff*, 596 U.S. at 267 (Alito, J., concurring in judgment).

[120] *See* Post, *supra* note 49, at 1788–93 (distinguishing between two types of state restriction of speech, the "internal management" of expression within the government and regulating public discussion, a "matter of governance").

[121] This is consistent with the Supreme Court's approach in *Shurtleff*. *See* 596 U.S. at 256 (majority opinion).

[122] *See* 582 U.S. at 236 (demonstrating the absurdity of considering trademarks to be expressing a governmental message).

made no effort to control the message private parties conveyed on its flagpole, at least until it decided to censor Harold Shurtleff's expression.[123]

Ultimately, jettisoning the three-factor holistic analysis and focusing instead on control over the message and the capacity the government was acting in (as a property/platform owner or as a regulator of society writ large) should be easier to implement and lead to more consistent results. The history factor in the current framework is rarely helpful,[124] and endorsement forces courts to speculate about what a reasonable observer would believe. Instead, the test should generally turn on control.[125] That will lead to the best and most consistent results. This is because control is the easiest of the three factors to evaluate, the one most consistent with the purpose of government speech—enabling the government to express its own views, and the factor most likely to protect private speech.[126] After all, as Justice Alito observed, in setting out the boundaries for government speech, preventing the censorship of private speakers must take precedence.[127]

B. Government-Subsidized Speech

The government speech doctrine's second line of cases arises when the government restricts speech as a condition of financing or subsidizing a program. Its seminal case is *Rust v. Sullivan*.[128] Since that decision, the Supreme Court has focused more on cabining *Rust* than offering guidance on the exact reach of this part of the doctrine.[129] Due to that, there is still much uncertainty as to the scope of this aspect of the government speech doctrine.

Looking first to *Rust*, doctors and other recipients of Title X grant funds filed, *inter alia*, a facial First Amendment challenge to regulations created by the Department of Health and Human Services (HHS) that restricted their

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[123] *See* 596 U.S. at 256–58. This might beg the question of when a government can reclaim control over its property when it previously accommodated all speech. My best answer is that the government must articulate a clear intention to do this through some sort of standard or statement before it engages in an act of isolated censorship. Doing it after it engages in censorship might suffice moving forward, but it would not justify that censorship.

[124] *See, e.g.*, *supra* note 118.

[125] While the source of authority is part of the inquiry, there are not many situations where a government acting purely in its governance capacity could exercise control over its message in a manner that would satisfy the second part of the test, at least among this line of cases.

[126] It is worth emphasizing that this approach is merely for determining whether expression is private speech or government speech. The government cannot use control as an excuse to deny private speakers access to a traditional public forum, for example. Such a restriction would still offend the First Amendment. *See, e.g.*, Warren v. Fairfax Cnty., 196 F.3d 186, 192 (4th Cir. 1999) (explaining the limitations on the government's ability to restrict access to traditional public fora).

[127] *See Shurtleff*, 596 U.S. 262–64 (Alito, J., concurring in judgment).

[128] 500 U.S. 173 (1991).

[129] *See, e.g.*, Strasser, *Ignore the Man Behind the Curtain: On the Government Speech Doctrine and What It Licenses*, *supra* note 41, at 88 (noting that the actual *Rust* opinion is hard to square with the Supreme Court's subsequent interpretations of it); Goldberg, *supra* note 61, at 28 ("Decided during the Rehnquist Court's retreat from earlier post-*Roe* decisions nullifying state laws that burdened a woman's right to terminate a pregnancy, *Rust* is one of those abortion cases rarely cited and never used by the Court as precedent supporting a decision in any other context . . . .").

ability to offer abortion referrals.[130] The regulations at issue implemented Title X of the Public Health Service Act of 1970,[131] which authorized the Secretary of HHS to "make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services."[132] The statute however prohibited any funds from being used in programs where abortion is a method of family planning.[133]

Based on this restriction, the Secretary of HHS issued regulations designed to provide guidance on how to preserve the distinction between Title X programs and abortion services, which placed "three principal conditions" on the grant of Title X funds.[134] "First, the regulations specif[ied] that a 'Title X project [could] not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.'"[135] Second, the regulations broadly prohibited recipients from engaging in activities that promoted abortion as a method of family planning in their Title X program.[136] Third, recipients had to organize their Title X projects so that they were "physically and financially separate" from the prohibited abortion activities.[137] However, the regulations did make an exception for abortion referrals when a patient required emergency care.[138]

The plaintiffs structured their First Amendment challenge around the theory that the regulations impermissibly discriminated based on viewpoint against providers who wanted to counsel patients on abortion as a viable family planning method.[139] In essence, their argument was that the regulations forced them to take the "anti-choice" side of the debate in counseling plaintiffs, instead of the "pro-choice" side. The Supreme Court rejected this argument. It held that the government is allowed to choose the "anti-choice" side of the debate when allocating public funds: "The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."[140] As the Court saw it, this was not viewpoint discrimination; it was "merely [choosing] to fund one activity to the exclusion of the other."[141] It then distinguished between a scenario where the government penalized protected activity and a scenario, like *Rust*, where the government merely refused to fund it.

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[130] 500 U.S. at 181.
[131] 84 Stat. 1506 (1970) (codified as amended at 42 U.S.C. §§ 300 to 300a–6).
[132] *Rust*, 500 U.S. at 178 (quoting 42 U.S.C. § 300(a)).
[133] *Id.*; *see also* 42 U.S.C. § 300(a)-6.
[134] *Rust*, 500 U.S. at 179.
[135] *Id.* (quoting 42 C.F.R. § 59.8(a)(1) (1989)).
[136] *See id.* at 180; 42 C.F.R. § 59.10(a) (1989).
[137] *Rust*, 500 U.S. at 180 (quoting 42 C.F.R. § 59.9).
[138] *See id.* at 195; 42 C.F.R. §§ 59.8(a)(2), 59.5(b)(1) (1989).
[139] *Rust*, 500 U.S. at 192.
[140] *Id.* at 193.
[141] *Id.*

The Supreme Court also rejected the plaintiffs' unconstitutional conditions theory.[142] It noted that "the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized."[143] Of particular import in this determination was the fact that recipients could still offer abortion counselling and advocate for the "pro-choice" side of the debate, as long as they kept it separate from the Title X program. Because the government placed the condition on the program, not the recipient, it was not unconstitutional.[144] But the Supreme Court did caution not to extend this holding into areas where the government is subsidizing speech in forums traditionally or expressly open to speech activity.[145] Interestingly enough, the *Rust* decision never used the phrase "government speech," but subsequent decisions have interpreted it as a government speech case.[146]

Rust's vigor was short-lived. The Supreme Court spent the next decade largely walking it back. First came *Rosenberger*.[147] There, the University of Virginia refused to fund the printing costs of a student magazine that espoused Christian views. Despite using student activity funds to support student news and opinion publications, the university justified this refusal by pointing to a rule that stated it would not fund publications that engaged in religious activities, among other things.[148] The Christian magazine and the students who ran it sued, alleging that the university violated their First Amendment rights. The Supreme Court agreed.

The Court first noted that "the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression."[149] It next applied the forum analysis, ruling that the money provided by the student activity fund was akin to a limited public

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[142] The unconstitutional conditions doctrine holds that "[t]he government may not deny an individual a benefit, even one an individual has no entitlement to, on a basis that infringes his constitutional rights." Planned Parenthood of Greater Ohio v. Hodges, 917 F.3d 908, 911 (6th Cir. 2019). "[T]he government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." Dolan v. City of Tigard, 512 U.S. 374, 385 (1994). An example of this would be forcing a person to agree to not criticize the government in order to become eligible for a tax exemption. *Cf.* Speiser v. Randall, 357 U.S. 513, 529 (1958).

[143] *Rust*, 500 U.S. at 196.

[144] *Id.* at 197 ("[O]ur 'unconstitutional conditions' cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.").

[145] In doing so, the Court expressly referenced universities as an example of where this might violate the Constitution. *Id.* at 200 ("[W]e have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.").

[146] *See, e.g.*, Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 208 (2015); Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009); Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229, 235 (2000); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995).

[147] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).

[148] *Id.* at 824–25.

[149] *Id.* at 828.

forum.[150] It then rejected the university's argument that it was only engaging in a content-based restriction justified by the forum, holding that the prohibition on funding for groups that advocated for religious perspectives was viewpoint discrimination.[151] The Supreme Court distinguished *Rosenberger*'s facts from *Rust*'s facts because *Rust* involved a situation where "the government disburse[d] public funds to private entities to convey a governmental message, [so] it [could] take legitimate and appropriate steps to ensure that its message [was] neither garbled nor distorted by the grantee."[152] Conversely, the Court saw *Rosenberger* as a case where the university was funding "private speakers who convey their own messages," and thus it could "not silence the expression of selected viewpoints."[153]

National Endowment for the Arts v. Finley[154] followed *Rosenberger*. In *Finley*, the Supreme Court considered artists' First Amendment challenge to the requirement that the Chairperson of the National Endowment of the Arts (NEA) consider "general standards of decency and respect for the diverse beliefs and values of the American public"[155] when judging applications from artists seeking grants.[156] The artists alleged that this constituted impermissible viewpoint discrimination under the First Amendment. The Supreme Court came to a different conclusion.

The Court interpreted the statutory provision as more of a suggestion, calling it "advisory language."[157] The Supreme Court's rationale was that the "decency and respect" criteria was merely something the NEA took into consideration, so there was insufficient evidence to demonstrate that the text of the statute itself would result in the suppression of protected speech.[158] The Court distinguished *Rosenberger* on the ground that the student activity funds were purportedly available to all organizations, while the NEA necessarily has to pick and choose which artists get funding.[159] Invoking *Rust*, the Supreme Court also noted that the Constitution permitted Congress to fund one activity to the exclusion of the other.[160] Interestingly, though, the majority implied that if the NEA "leverage[d] its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints," it would be engaging

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[150] *Id.* at 829; *see also id.* at 830 ("The [student activity fund] is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.").

[151] *See id.* at 830–37.

[152] *Id.* at 833 ("[T]he government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.").

[153] *Id.* at 835.

[154] 524 U.S. 569 (1998).

[155] 20 U.S.C. § 954(d)(1).

[156] *Finley*, 524 U.S. at 572–77.

[157] *Id.* at 581.

[158] *Id.* at 581–85.

[159] *Id.* at 586 ("In the context of arts funding, in contrast to many other subsidies, the Government does not indiscriminately encourage a diversity of views from private speakers. The NEA's mandate is to make esthetic judgments, and the inherently content-based 'excellence' threshold for NEA support sets it apart from the subsidy at issue in *Rosenberger*—which was available to all student organizations" (citation omitted)).

[160] *Id.* at 588.

in viewpoint discrimination in violation of the First Amendment.[161] This comment, along with its statutory interpretation, prompted a passionate concurrence from Justice Scalia, where he explained that there is a fundamental "distinction between 'abridging' speech and funding it."[162] As Justice Scalia saw it, the government could engage in viewpoint discrimination to its heart's desire when funding speech—as long as it had not established a public forum, like it did in *Rosenberger*.

Legal Services Corporation v. Velazquez was the Supreme Court's next major government-funding decision.[163] Congress enacted the Legal Services Corporation Act of 1974[164] to provide grants for eligible local organizations for the purpose of providing legal assistance in noncriminal matters to persons who could not afford attorneys.[165] The Act also established the Legal Services Corporation (LSC)—which is the entity that issued the grants—as a nonprofit, and the Act imposed a rather significant condition on those grants—an attorney working for a grantee could not argue to a court that a welfare statute violated the U.S. Constitution or was preempted by federal law.[166]

Attorneys who worked for LSC grantees challenged this condition as violative of the First Amendment, arguing that it constituted viewpoint discrimination. The government relied on *Rust* to argue that the program merely funded government speech, so it was allowed to dictate the terms of the program.[167] The Supreme Court distinguished *Rust* because "like the program in *Rosenberger,* the LSC program was designed to facilitate private speech, not to promote a governmental message."[168] The Court's basic rationale was that "[t]he lawyer is not the government's speaker . . . . [The lawyer] speaks on the behalf of his or her private, indigent client."[169] The Supreme Court noted allowing a restriction like this would "distort[] the legal system" by preventing attorneys from making necessary arguments on their clients' behalf and from assisting the courts by putting all of the vital issues before them.[170] This condition thus undermined the attorney-client relationship and interfered with attorneys' ethical obligations. In partial retreat from *Rust*, the Court observed that "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple

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[161] *Id.* at 587.
[162] *Id.* at 599 (Scalia, J., concurring in judgment).
[163] 531 U.S. 533 (2001).
[164] 42 U.S.C. § 2996.
[165] *Velazquez*, 531 U.S. at 536 (quoting 42 U.S.C. § 2996b(a)).
[166] *Id.* at 536–39.
[167] *Id.* at 540–42; *see also id.* at 541 ("We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker or instances, like *Rust*, in which the government used private speakers to transmit specific information pertaining to its own program." (citations omitted)).
[168] *Id.* at 542 (but also conceding that, unlike in *Rosenberger*, the purpose of the LSC program was not to encourage a diversity of views).
[169] *Id.*
[170] *Id.* at 544.

semantic exercise."[171] It ultimately held that the funding condition was invalid under the First Amendment.[172]

Justice Scalia was not amused. He reiterated the distinction between regulations and subsidies: "Regulations directly restrict speech; subsidies do not."[173] His view was that subsidies are only constitutionally problematic when they have a coercive effect on people who do not hold the subsidized position. He saw *Rust* as directly on point and rejected the majority's argument that the LSC was funding "private speech."[174] After all, how different is a lawyer's confidential advice to a client from a doctor's confidential advice to a patient?[175] Justice Scalia is not the only one who saw it that way. One commentator summed *Velazquez*—in relation to *Rust*—as "the same case, but in lawyer's clothing."[176] Justice Scalia was right about the hollowness of the distinction, but the *Velazquez* majority was right about the outcome of the case. It was *Rust* that was wrong, for reasons I will discuss later in this Section.

In the years since *Velazquez*, courts have continued to try and make sense of this line of cases, despite its lack of internal consistency. In later cases, the Supreme Court held that the First Amendment does not take issue with Congress requiring public libraries to use internet filtering software as a condition of receiving federal funds that provide internet access,[177] but it does violate the First Amendment for Congress to require organizations that receive HIV and AIDS funding to have a policy expressly opposing prostitution.[178] The circuits too have wrestled with these issues. For example, the Fifth Circuit, seizing on *Rust*, upheld a Texas statute that denied funding to organizations that "promote[d] elective abortions," even when those organizations maintained a separation between abortion-providing clinics and family-planning clinics.[179]

In assessing this line of cases, the lack of a coherent standard has led to inconsistent and irreconcilable results. Applying my theory—that courts should recognize government speech only when the government is acting

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[171] *Id.* at 547.

[172] The Court came to that conclusion by applying a forum analysis of sorts, implying that the act had created a limited public forum using its subsidy. *See id.* at 543–44; *see also* Legal Aid Servs. of Or. v. Legal Servs. Corp., 608 F.3d 1084, 1094 (9th Cir. 2010) (observing that *Velazquez* "analyzed the grantee plaintiffs' unconstitutional conditions claim through the lens of the Court's limited public forum cases").

[173] *Velazquez*, 531 U.S. at 552 (Scalia, J., dissenting).

[174] *Id.* at 553.

[175] *See id.* at 554 ("If the private doctors' confidential advice to their patients at issue in *Rust* constituted 'government speech,' it is hard to imagine what subsidized speech would *not* be government speech.").

[176] Goldberg, *supra* note 61, at 27; *see also id.* at 28 ("The idea that restricting doctor counseling of patients was constitutional because it was government speech, but restricting lawyer counseling of clients was unconstitutional because it was not government speech, must have struck doctors as a distinction only a lawyer could love.").

[177] United States v. Am. Libr. Ass'n, Inc., 539 U.S. 194, 212 (2003) ("As the use of filtering software helps to carry out [Congress's internet assistance] programs, it is a permissible condition under *Rust*."); *id.* at 213 (distinguishing *Velazquez* because public libraries "have no comparable role that pits them against the Government").

[178] Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 216–21 (2013) (distinguishing *Rust* on the ground that the statute compels recipients "to pledge allegiance to the Government's policy of eradicating prostitution").

[179] Planned Parenthood Ass'n of Hidalgo Cnty. Tex., Inc. v. Suehs, 692 F.3d 343, 347, 349–51 (5th Cir. 2012).

through its managerial authority and is seeking solely to express its own viewpoint—would resolve at least some of these problems. *Rust* and *Velazquez*, for example, would both come out the same way: not government speech. This is because Congress provided these grants in a generally applicable, unselective manner (requiring only that the grantee met eligibility requirements) and did not seek to control the viewpoints espoused, except to the extent it sought to prohibit certain disfavored views. Thus, Congress acted through its governance authority[180] and did not exercise enough control to credibly say the government was seeking to convey its own message.[181]

Finley is a different story. While the outcome would be the same, the Supreme Court should have ruled that the NEA's funding decisions in that case were government speech. This is because *Finley* involved the government acting through its managerial authority and using its editorial discretion to carefully select the messages it wanted to fund. After all, Congress created the standard at issue as guidance for the government employees operating its grant program,[182] and the government was responsible for meticulously choosing only certain projects to fund based on its subjective preferences, rather than offering a pot of money open to all comers. This is quintessential government speech.[183]

Finally, it is worth noting that this line of cases has had minimal interaction with academic freedom issues. To the extent they have arisen, it was generally in Supreme Court dicta in opinions dealing with the funding of student speech.[184] Because these opinions predate much of the recent evolution

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[180] *See* Robert C. Post, *Subsidized Speech*, 106 Yale L.J. 151, 171 (1996) (rejecting the idea that *Rust* was a managerial domain case).

[181] On the latter point, the Supreme Court in *Rosenberger* asserted that the message in *Rust* was a "governmental" one. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995). But this stance strains credulity, as neither Congress nor HHS sought to tell doctors what message they must convey when offering family-planning services. Instead, they merely told doctors what view they disfavored (counseling that is pro-abortion). *See* Rust v. Sullivan, 500 U.S. 173, 209 (1991) (Blackmun, J., dissenting) ("Title X grantees may provide counseling and referral regarding any of a wide range of family planning and other topics, save abortion."). Government speech requires far more control over the message. *See* Shurtleff v. City of Boston, 596 U.S. 243, 256–59 (2022).

[182] *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 573–77, 580–83 (1998). Admittedly, this can sometimes be a blurry line. One might reasonably ask why this is different from the statute in *Matal*. The difference is that in *Finley*, the statute offered guidance to the employees running a selective government program about the sort of message the government wanted to convey. In *Matal*, the statute prohibited the general public from obtaining trademark protection of ideas the government disfavored. These statutes therefore operated quite differently: one guiding government employees on how to wield the government's editorial discretion, the other excluding disfavored ideas from a legal protection that is available to the general public.

[183] Interestingly, while the funding itself is government speech, the research and artistic expression funded often will not be government speech. *See* Part III.C.

[184] Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 234–35 (2000) ("Our decision ought not to be taken to imply that in other instances the University, its agents or employees, or—of particular importance—its faculty, are subject to the First Amendment analysis which controls in this case. Where the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different."); *id.* at 235 ("In the instant case, the speech is not that of the University or its agents. It is not, furthermore, speech by an instructor or a professor in the academic context, where principles applicable to government speech would have to be considered."). *Rosenberger*, 515 U.S. at 833 ("[W]hen the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and

of the government speech doctrine, it is not entirely clear how courts should apply them to academic freedom disputes. This Article will explore that issue in Part III.

C. Public Employee Speech

The third and final line of government speech cases involves the public employee speech doctrine. Originating in the 1960s via the *Pickering* decision,[185] the introduction of the government speech doctrine through *Garcetti v. Ceballos*[186] in 2006 radically transformed this area of law. This part of the government speech doctrine is the most developed of the three, but there are still some significant questions that remain in the aftermath of *Garcetti*, including how that decision affects academic freedom precedents.[187]

Prior to the 1950s, the Supreme Court paid little mind to the free speech rights of public employees. Its general outlook towards public employees' free speech rights was best summed up by Justice Oliver Wendell Holmes's quote from his time on the Massachusetts Supreme Court: "[A policeman] may have a constitutional right to talk politics, but he has no constitutional right

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we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message."); *id.* at 834 ("It does not follow, however, . . . that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers. A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles.").

[185] Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cnty., Ill., 391 U.S. 563 (1968).

[186] 547 U.S. 410 (2006). While the *Garcetti* majority never used the phrase "government speech," the Supreme Court subsequently clarified that it was indeed a government speech decision. *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 528–29 (2022) ("[T]he prosecutor's memorandum [in *Garcetti*] was government speech because it was speech the government itself had commissioned or created and speech the employee was expected to deliver in the course of carrying out his job." (cleaned up)).

[187] This uncertainty has caused much consternation among legal commentators. *See, e.g.*, Mark Strasser, Pickering, Garcetti, *& Academic Freedom*, 83 Brook. L. Rev. 579, 611 (2018) ("Commentators are correct to suggest that the *Garcetti* exception to *Pickering* might be read to endanger academic freedom as it is commonly understood."); Matthew Jay Hertzog, *The Misapplication of* Garcetti *in Higher Education*, 2015 B.Y.U. Educ. & L.J. 203, 223 (2015) ("If *Garcetti*, and its categorical approach to defining employee speech as an unprotected right of the First Amendment, is applied in higher education without university administration and the district courts first understanding the Supreme Court's meaning of employee speech and how it applies within higher education, professors will receive little or no protection from the disciplinary action of university administrators for the professor's use of speech and academic writing that has been classified as being pursuant to their official duties at their university."); Steve Sheppard, *Academic Freedom: A Prologue*, 65 Ark. L. Rev. 177, 187 (2012) ("Perhaps unbelievably, the Supreme Court has recently held that speech might not receive protection for state-employed faculty members, when the speech is in the scope of the faculty members' official duties."); Suzanne R. Houle, *Is Academic Freedom in Modern America on Its Last Legs After* Garcetti v. Ceballos*?*, 40 Cap. U. L. Rev. 265, 283 (2012) ("Although the facts of *Garcetti* had nothing to do with higher education or academic freedom, the implications of the decision have the potential to wreak havoc in higher academia.").

to be a policeman."[188] *Pickering*, decided in 1968, marked a substantial shift in First Amendment doctrine in favor of public employees.[189]

There, Justice Thurgood Marshall, writing for the majority, considered the case of Marvin Pickering, a teacher in Will County, Illinois. The board of education for his school district fired Pickering from his teaching position because of a letter to the editor he wrote to his local newspaper regarding a proposed tax increase.[190] In the letter, Pickering criticized the board of education's fiscal responsibility and charged the superintendent with attempting to prevent teachers in the district from opposing the tax increase.[191] In response to the alleged falsities contained in the letter, the board fired Pickering. Pickering sued, with the Supreme Court taking up the case after it made its way through Illinois's state courts.

In its opinion, the Supreme Court first made clear that it had repeatedly rejected the premise that the government could compel teachers "to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work."[192] Instead, the Court sought to find "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[193] In striking that balance, Justice Marshall first noted that the statements in the letter were not directed at any person with whom Pickering would be in contact in the course of his normal duties as a teacher. That ruled out the potential issues "of maintaining either discipline by immediate superiors or harmony among coworkers."[194] Justice Marshall next rejected the idea that the false statements in the letter harmed the school. Finally, he observed that Pickering spoke on "a matter of legitimate public concern"[195] and concluded that the false statements were erroneously made.[196] "In sum," Justice Marshall held that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[197]

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[188] McAuliffe v. City of New Bedford, 29 N.E. 517, 517 (Mass. 1892). *See also* Connick v. Myers, 461 U.S. 138, 143–44 (1983) (collecting cases). Indeed, the Tennessee Supreme Court's review of John Scopes's constitutional claims following the Scopes Monkey Trial only confirms that this was the prevailing view at the time. *See* Scopes v. State, 289 S.W. 363, 365 (Tenn. 1927) ("In dealing with its own employees engaged upon its own work, the state is not hampered by the limitations of section 8 of article 1 of the Tennessee Constitution, nor of the Fourteenth Amendment to the Constitution of the United States.").

[189] The Supreme Court did lay some foundation for the protection of public employees leading up to *Pickering*, including in the academic freedom cases of the 1950s and 1960s. *See infra* Part II.

[190] Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cnty., Ill., 391 U.S. 563, 564, 566–67 (1968).

[191] *Id.* at 566.

[192] *Id.* at 568.

[193] *Id.*

[194] *Id.* at 570.

[195] *Id.* at 571.

[196] *Id.* at 572.

[197] *Id.* at 574.

Connick v. Myers later clarified that the *Pickering* framework also requires that a public employee's speech relate to a matter of public concern to receive First Amendment protection.[198]

Thus, prior to the Supreme Court's *Garcetti v. Ceballos* decision, the *Pickering* framework ordinarily asked:

> (1) Does the public employee's expression regard a matter of public concern? (If no, then the employee's First Amendment claim fails.)
> (2) If yes, does the employee's interest in expressing himself on that matter outweigh the interests of the government, as an employer, in promoting the efficiency of the public services it performs through employees?[199]

This version of the framework applied to individual "disciplinary actions taken in response to a government employee's speech."[200] However, when the government targeted "a broad category of expression by a massive number of potential [public employee] speakers," its burden under the *Pickering* framework was much greater.[201]

In 2006, though, the Supreme Court dropped an atomic bomb on the public employee speech doctrine—*Garcetti v. Ceballos*.[202] *Garcetti* involved a deputy district attorney, Richard Ceballos, who wrote a memorandum expressing his concerns about what he determined to be misrepresentations in a search warrant and recommending dismissal of the criminal case.[203] Ceballos's supervisor instead decided to proceed with the prosecution. The defense attorney filed a motion challenging the search warrant, and at the hearing, the defense called Ceballos to the stand, where he testified about his concerns regarding the warrant.[204] Following this, Ceballos alleged that his office engaged in a series of retaliatory employment actions towards him based on his memorandum in violation of the First Amendment.[205]

The question before the Supreme Court was whether the memo Ceballos wrote as part of his official duties constituted protected speech under the First Amendment. The Court held that it was not. Central to that holding was

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[198] Connick v. Myers, 461 U.S. 138, 146 (1983) ("When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.").

[199] *See, e.g.*, City of San Diego, Cal. v. Roe, 543 U.S. 77, 82–83 (2004); Waters v. Churchill, 511 U.S. 661, 668 (1994) (plurality opinion). The Supreme Court extended this First Amendment protection to government contractors in the late 1990s. *See* Bd. of Cnty. Comm'rs, Wabaunsee Cnty., Kan. v. Umbehr, 518 U.S. 668, 685 (1996).

[200] United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 466 (1995).

[201] *Id.* at 467–68 ("The Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's necessary impact on the actual operation of the Government." (citation omitted)).

[202] 547 U.S. 410 (2006).

[203] *Id.* at 413–14.

[204] *Id.* at 414–15.

[205] *Id.* at 415.

the Supreme Court's rationale that it did not want to "constitutionalize the employee grievance."[206] Further, it recognized that because public employees "often occupy trusted positions in society," "[w]hen they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions."[207] The Supreme Court was concerned that broad First Amendment protections would make it difficult for the government as an employer to manage its employees.[208] Ultimately, the Court concluded 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."[209] In other words, when a public employee is speaking as part of his job duties, it is government speech and unprotected by the First Amendment. Following *Garcetti*, courts applying the *Pickering* framework ask as part of the first step: (1) Is the public employee speaking *as a citizen* on a matter of public concern?[210] If they are not speaking as a citizen or not speaking on a matter of public concern, the First Amendment claim fails, and the court will not proceed to *Pickering* balancing.

There is one other significant aspect of the *Garcetti* decision: In his dissent, Justice Souter expressed concern that *Garcetti* would "imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write pursuant to official duties."[211] After all, some public employees, including faculty at public universities, are not "hired to speak from a government manifesto."[212] The majority addressed Justice Souter's argument by noting that "expression related to academic scholarship or classroom instruction implicates additional constitutional interests . . . not fully accounted for by this Court's customary employee-speech jurisprudence."[213] The Supreme Court therefore did not decide whether its *Garcetti* analysis "would apply in the same manner to a case involving speech related to scholarship or teaching."[214] That question remains open today, at least as it applies to higher education.[215]

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[206] *Id.* at 420 (quoting *Connick*, 461 U.S. at 154).

[207] *Id.* at 419.

[208] *See id.* at 418 ("Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services.").

[209] *Id.* at 421.

[210] *See* Lane v. Franks, 573 U.S. 228, 237 (2014). Many courts break this up into two separate inquiries: Is the employee speaking pursuant to their official duties? If not, is this speech on a matter of public concern? *See, e.g.*, Dougherty v. Sch. Dist. of Philadelphia, 772 F.3d 979, 987 (3d Cir. 2014); Jackler v. Byrne, 658 F.3d 225, 235 (2d Cir. 2011); Boyce v. Andrew, 510 F.3d 1333, 1342 (11th Cir. 2007); Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1202 (10th Cir. 2007).

[211] *Garcetti*, 547 U.S. at 438 (Souter, J., dissenting) (cleaned up).

[212] *Id.* at 437.

[213] *Id.* at 425 (majority opinion).

[214] *Id.*

[215] *See infra* Part II.C. The circuits have overwhelmingly concluded that the *Garcetti* analysis governs First Amendment claims from K-12 teachers. *See, e.g.*, Brown v. Chicago Bd. of Educ., 824 F.3d 713, 715 (7th Cir. 2016) (applying *Garcetti* to sixth grade teacher's use of a racial epithet during a lesson); Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 966–70 (9th Cir. 2011) (applying *Garcetti* to calculus teacher's in-class speech); Evans-Marshall v. Bd. of Educ. of

Additionally, there continue to be questions about where to draw the line on the issue of whether speech was made pursuant to an employee's official duties.[216] Recently, the Supreme Court offered some additional guidance in *Kennedy v. Bremerton School District*, where it held that a football coach's on-the-field prayer after a game did not qualify as speech made pursuant to his official duties.[217] Additional examples the Court used to demonstrate what would not qualify as government speech were "a Muslim teacher . . . wearing a headscarf in the classroom" or "a Christian aide . . . praying quietly over her lunch in the cafeteria."[218] Questions still linger, though. For example, are the name, personal title, and personal pronouns employees use to introduce themselves government speech?[219]

What is interesting about *Garcetti* is that it essentially turns on the theory of government speech I have articulated—that the government should be able to act through its managerial authority and convey its own message without having to worry about the First Amendment. That is at the core of the Supreme Court's inquiry into whether a government employee is speaking pursuant to official duties. What this inquiry is really asking is whether the government is acting as a manager in regulating speech and whether the government is entitled to require an employee to express only its message as the employer. Generally speaking, this is an appropriate way of framing the government speech doctrine when evaluating public employee speech.[220]

Tipp City Exempted Vill. Sch. Dist., 624 F.3d 332, 339–43 (6th Cir. 2010) (applying *Garcetti* to ninth grade teacher's curricular speech); Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 478–80 (7th Cir. 2007) (applying *Garcetti* to elementary school teacher's discussion of current events issue).

[216] In attempting to provide guidance, the Eleventh Circuit has held that "[t]he central inquiry is whether the speech at issue owes its existence to the employee's professional responsibilities." Moss v. City of Pembroke Pines, 782 F.3d 613, 618 (11th Cir. 2015) (citation omitted). "Practical factors that may be relevant to, but are *not* dispositive of, the inquiry include the employee's job description, whether the speech occurred at the workplace, and whether the speech concerned the subject matter of the employee's job." Alves v. Bd. of Regents of the Univ. Sys. of Ga., 804 F.3d 1149, 1161 (11th Cir. 2015). The Fifth Circuit has held that an employee is "not speaking pursuant to his official duties" when his government employer has asked him to violate civil or criminal laws. Anderson v. Valdez, 845 F.3d 580, 598 (5th Cir. 2016); *id.* at 593 (explaining that a public employee does not speak pursuant to his official duties merely because he speaks "*at* work" or "*about* work").

[217] 597 U.S. 507, 529 (2022) ("[Kennedy] did not speak pursuant to government policy. He was not seeking to convey a government-created message. He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach."); *id.* at 531 ("Mr. Kennedy's actual job description left time for a private moment after the game to call home, check a text, socialize, or engage in any manner of secular activities . . . . That Mr. Kennedy chose to use the same time to pray does not transform his speech into government speech.").

[218] *Id.*; *see also id.* ("[I]t [is not] dispositive that Mr. Kennedy's prayers took place 'within the office' environment—here, on the field of play. Instead, what matters is whether Mr. Kennedy offered his prayers while acting within the scope of his duties as a coach." (citation omitted)).

[219] *See* Fla. Stat. § 1007.071(3) (2023) (prohibiting K-12 teachers from "provid[ing] to a student his or her preferred personal title or pronouns if such preferred personal title or pronouns do[es] not correspond to his or her sex").

[220] The wisdom of applying *Pickering* even when a public employee is not engaging in speech pursuant to their official duties is the recognition that speech outside of work may impact a public employee's ability to do their job at work. This is properly not considered government speech because the government has no right to insist on an employee conveying a governmental message outside of work, but courts are right to give the government as an employer the

However, where this inquiry runs into issues is with government employees who engage in professional speech pursuant to their official duties. Think about doctors, scientists, psychologists, public defenders, and professors. Their jobs are not just to convey a governmental message.[221] They are expected to operate according to the standards of their profession, regardless of whether that is consistent with the policy goals of government officials. Certainly, a government employer must have the power to punish a professional employee who is not abiding by or living up to professional standards, but it is inconceivable that the government speech doctrine gives the government the power to compel—using the threat of termination—a public defender to profess the guilt of his innocent client at trial or a psychologist to tell a patient to harm himself.

Accordingly, courts should reconsider *Garcetti*'s approach when dealing with professional speech.[222] The government speech doctrine is not a natural fit in these scenarios, as professionals employed by the government are often not responsible for just conveying a governmental message. However, with the exception of higher education and academic freedom,[223] I will leave the question of how to evaluate government employees' professional speech for another day.[224]

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With it being a relatively young doctrine, all three of the lines of government speech cases require more development. I have offered a high-level theory that will allow courts to better define the contours of the doctrine and resolve at least some of the existing inconsistencies.[225] On the plus side, courts seem to be recognizing the dangers inherent in this doctrine becoming too vigorous. They are properly "exercise[ing] great caution before extending . . . government-speech precedents," as "it is a doctrine . . . susceptible to dangerous misuse."[226] A question that remains unresolved is whether government speech

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power to punish an employee's speech when it will undermine on-the-job performance. Thus, the *Pickering* framework is a good compromise, one that provides some free speech protections to employees while also respecting the government's managerial authority.

[221] *See* Heidi Kitrosser, *The Special Value of Public Employee Speech*, 2015 Sup. Ct. Rev. 301, 326 (2015) (criticizing "courts [for] conflat[ing] speech that purports to deliver professional expertise with speech that transparently conveys the government's policy preferences"); *infra* Part III.

[222] *See* Claudia E. Haupt, *Unprofessional Advice*, 19 U. Pa. J. Const. L. 671, 687 (2017) ("[I] f professionals are hired primarily to render professional advice, no matter the institutional setting, they are members of the profession first. As such, they are bound together by the knowledge community and its shared ways of knowing and reasoning, serving as the conduit between the knowledge community and the client. Irrespective of the institutional setting, the First Amendment should therefore protect defensible professional advice.").

[223] *See infra* Part III.

[224] *See generally* Claudia E. Haupt, *Professional Speech*, 125 Yale L.J. 1238, 1241 (2016) (seeking to lay the groundwork for a "comprehensive theory of professional speech").

[225] *But see* G. Alex Sinha, *The End of Government Speech*, 44 Cardozo L. Rev. 1899, 1904 (2023) (noting the incoherence of the government speech doctrine and concluding that it cannot be saved).

[226] Matal v. Tam, 582 U.S. 218, 235 (2017).

and academic freedom can coexist. Before reaching that question, though, it is necessary to understand what the constitutional academic freedom doctrine is, where it came from, and the state of its case law today.

II. An Overview of Constitutional Academic Freedom

The constitutional academic freedom doctrine rapidly developed during the 1950s and 60s in response to the Red Scare. But before getting to those cases, it is necessary to offer background on how the concept of academic freedom emerged in the United States because it served as a major influence on the constitutional doctrine. Thus, this Part will first cover the history of academic freedom in America and the general principles of the constitutional doctrine. It will next examine how courts have applied the doctrine to institutions of higher education. The short answer is that they have taken a very deferential tack when asked to decide constitutional questions that involve a university's academic programs. Finally, it will discuss how the doctrine applies to individual members of the faculty—observing that courts have most often relied on the *Pickering* framework to assess claims of academic freedom under the First Amendment.

A. The History and Principles of Constitutional Academic Freedom

The emergence of academic freedom as an ideal in America largely ran parallel to the transformation of the country's institutions of higher education. During the Antebellum Period, higher education in this country largely revolved around rote memorization of classical works and instilling discipline and religious piety in young minds.[227] It bore little resemblance to the centers of research, scholarship, critical thinking, and free inquiry we have today. The transformation of our system largely began after the Civil War, inspired by the leading German universities.[228] After pursuing their studies in Germany, American scholars returned home, yearning to implement reforms.[229] These reformers were especially inspired by two concepts of academic freedom in

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[227] Urofsky v. Gilmore, 216 F.3d 401, 410 (4th Cir. 2000) (en banc); Byrne, *supra* note 10 at 268; Hofstadter & Metzger, *supra* note 1, at 278–81; *id.* at 283 ("The college in America could not be a market place of ideas so long as it regarded its students as both gullible and perverse. For the conclusion is inescapable: if students are both iron and clay, it is wasteful or it is rash to treat them to controversy."). Hofstadter and Metzger referred to this period as the "great retrogression" because the expansion of local and regional denominational colleges put societal pressures on the leading institutions of the time to not upset the apple cart, lest it lead to their financial ruin, resulting in the regression of the nine colonial colleges coming out of the Enlightenment era. *See, e.g.*, *id.* at 210–17.

[228] In 1876, Johns Hopkins became the first American university founded on the German model, boasting an impressive group of scholars including Woodrow Wilson, John Dewey, and Richard T. Ely. *Id.* at 377. Notably, the leading German universities of the 19th century were heavily influenced by Immanuel Kant's writings on academic freedom. *See* Areen, *supra* note 10, at 950.

[229] *See* Hofstadter & Metzger, *supra* note 1, at 367–39.

Germany, *Lehrfreiheit* and *Lernfreiheit*.[230] *Lehrfreiheit* meant that scholars enjoyed "freedom of teaching and freedom of inquiry."[231] *Lernfreiheit*, on the other hand, referred to the academic freedom rights of students to determine the substance of their education without "administrative coercions."[232] While the tenets of *Lernfreiheit* never truly took hold in America, *Lehrfreiheit* served as a major influence on the development of constitutional academic freedom. Even as these reformers transformed American universities in the late-19th and early-20th centuries, progress on academic freedom was not linear or without adversity.[233]

These adversities—namely, attacks on academic freedom at universities in the early-20th century—influenced the founding of the American Association of University Professors (AAUP) in 1915.[234] That year, the AAUP released what Robert Post has called "[t]he first and arguably greatest articulation of the logic and structure of academic freedom in America," the 1915 Declaration of Principles on Academic Freedom and Academic Tenure.[235] This declaration covered a number of important topics, but its stance on academic freedom proved quite influential and enduring. The 1915 Declaration held that universities exist for three general purposes: (1) "to promote inquiry and advance the sum of human knowledge"; (2) "to provide general instruction to students"; and (3) "to develop experts for various branches of the public service."[236] Thus, "[a]cademic freedom . . . comprises three elements: freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action."[237] But the AAUP was clear that these freedoms were not unqualified. In addressing the freedom of research, the Declaration noted that a scholar's conclusions "must be the fruits of competent and patient and sincere inquiry, and they should be set forth

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[230] *See id.* at 384–97; Finkin & Post, *supra* note 6, at 22–24.

[231] Hofstadter & Metzger, *supra* note 1, at 386–87.

[232] *Id.* at 386 (describing *Lernfreiheit* as "the fact that German students were free to roam from place to place, sampling academic wares; that wherever they lighted, they were free to determine the choice and sequences of courses, and were responsible to no one for regular attendance; that they were exempted from all tests save the final examination; that they lived in private quarters and controlled their private lives").

[233] *See, e.g.*, *id.* at 392–95; Finkin & Post, *supra* note 6, at 24–27.

[234] *See Timeline of the First 100 Years*, Am. Ass'n of Univ. Professors (last visited Sept. 11, 2023), https://www.aaup.org/about/history/timeline-first-100-years [https://perma.cc/35B3-AR27]; Areen, *supra* note 10, at 953–54.

[235] Post, *supra* note 13, at 65. Peter Byrne described it as "the single most important document relating to American academic freedom." Byrne, *supra* note 10, at 276. *See also* Areen, supra note 10, at 954 ("[M]odern scholars consider it the seminal statement of American academic freedom.").

[236] Committee on Academic Freedom and Academic Tenure, *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, Am. Ass'n of Univ. Professors 295 (last visited Jan. 15, 2024), https://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf [https://perma.cc/5H99-3UJF] [*hereinafter* 1915 Declaration on Academic Freedom]. The Committee paid homage to its German influences by explicitly mentioning *Lehrfreiheit* and *Lernfreiheit* in the Declaration. *Id.* at 292.

[237] *Id.* at 292. Interestingly, the third aspect of academic freedom—protection of extramural speech—radically differed from the German conception of the ideal, as professors in Germany were considered public servants and were expected to remain loyal to the state in their extramural speech. *See* Hofstadter & Metzger, *supra* note 1, at 385–90, 411–12.

with dignity, courtesy, and temperateness of language."[238] As for the freedom of teaching, the Declaration advised:

> The university teacher, in giving instruction upon controversial matters, while he is under no obligation to hide his own opinion under a mountain of equivocal verbiage, should, if he is fit for his position, be a person of a fair and judicial mind; he should, in dealing with such subjects, set forth justly, without suppression or innuendo, the divergent opinions of other investigators; he should cause his students to become familiar with the best published expressions of the great historic types of doctrine upon the questions at issue; and he should, above all, remember that his business is not to provide his students with ready-made conclusions, but to train them to think for themselves, and to provide them access to those materials which they need if they are to think intelligently.[239]

But the AAUP's main concern was that members of the profession, not laypersons on boards of trustees, should determine when faculty had breached their professional duties.[240]

In 1940, the AAUP and Association of American Colleges issued a restatement of principles on academic freedom. This statement reaffirmed the three freedoms from the 1915 Declaration, "freedom of teaching and research and of extramural activities."[241] With regard to these three freedoms, the 1940 Statement specifically held that "[t]eachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties"; "[t]eachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject"; and "[w]hen [teachers] speak or write as citizens, they should be free from institutional censorship or discipline."[242] Leading commentators have described the 1940 Statement as laying out "the general norm of academic practice in the United States."[243]

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[238] 1915 Declaration on Academic Freedom, *supra* note 236, at 298.

[239] *Id.*

[240] *Id.* at 300 ("It is, it will be seen, in no sense the contention of this committee 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. Such restraints as are necessary should in the main, your committee holds, be self-imposed, or enforced by the public opinion of the profession. But there may, undoubtedly, arise occasional cases in which the aberrations of individuals may require to be checked by definite disciplinary action. What this report chiefly maintains is that such action cannot with safety be taken by bodies not composed of members of the academic profession.").

[241] *1940 Statement of Principles on Academic Freedom and Tenure*, Am. Ass'n of Univ. Professors & Am. Ass'n of Colleges, 14 (last visited Jan. 15, 2024), https://www.aaup.org/file/1940%20Statement.pdf [https://perma.cc/9ADK-ACZ8].

[242] *Id.* The statement did note that as members of a "learned profession," professors' "special position in the community imposes special obligations" when engaging in extramural speech such that they "should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution." *Id.*

[243] *See, e.g.*, Post, *supra* note 13, at 65; Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 Law &

In the 1950s, in response to the Red Scare, the constitutional academic freedom doctrine began to emerge, guided by the ideals of the 1915 Declaration and 1940 Statement.[244] The concept of academic freedom got off to an inauspicious start in the judiciary in 1940 when a New York court issued an order revoking the appointment of Bertrand Russell—an academic who later won a Nobel Prize—from the position of Professor of Philosophy at City College of New York.[245] The court rejected claims that it should defer to the college on the decision to appoint Russell out of respect for academic freedom, explaining that academic freedom "is the freedom to do good and not to teach evil."[246] Of course, the court claimed that it "would not interfere with any action of the board in so far as a pure question of 'valid' academic freedom is concerned," but in its view, "academic freedom" did not protect Russell or his writings on sexual morality because the court found them distasteful.[247] This conception of academic freedom thankfully did not last long.

The first reference to academic freedom in the U.S. Supreme Court came in 1952. In a fiery dissent to a decision upholding a statute that barred so-called "subversives" (communists) from working in New York public schools,[248] Justice Douglas observed that "[t]here can be no real academic freedom in [an] environment" where "[a] pall is cast over the classrooms."[249] He continued:

> A problem can no longer be pursued with impunity to its edges. Fear stalks the classroom. The teacher is no longer a stimulant to adventurous thinking; she becomes instead a pipe line for safe and sound information. A deadening dogma takes the place of free inquiry. Instruction tends to become sterile; pursuit of knowledge is discouraged; discussion often leaves off where it should begin.[250]

As we shall soon see, Justice Douglas's view of academic freedom eventually won the day. The next major reference to academic freedom in the Supreme Court appeared in *Wieman v. Updegraff*, also a decision from 1952. There, the Supreme Court struck down a loyalty oath required for public employees in Oklahoma.[251] In his concurrence, Justice Frankfurter, while not explicitly using the phrase "academic freedom," called teachers "the priests of our democracy" and extolled the virtue of protecting their ability to promote

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Contemp. Probs. 79, 79 (1990). *See also* Urofsky v. Gilmore, 216 F.3d 401, 411 (4th Cir. 2000) (en banc); Browzin v. Cath. Univ. of Am., 527 F.2d 843, 848 n.8 (D.C. Cir. 1975); Areen, *supra* note 10, at 962 ("The Statement also has been adopted by most colleges and universities in the United States, and it is widely incorporated or referenced in faculty contracts.").

[244] *See* Whittington, *supra* note 4, at 477–82, 485–91.

[245] Kay v. Bd. of Higher Ed. of City of N.Y., 18 N.Y.S.2d 821, 831 (N.Y. Sup. Ct. 1940). The court pulled no punches, calling his appointment "an insult to the people of the City of New York and to the thousands of teachers who were obligated upon their appointment to establish good moral character and to maintain it in order to keep their positions." *Id.*

[246] *Id.* at 829.

[247] *Id.*

[248] Adler v. Bd. of Educ. of City of N.Y., 342 U.S. 485, 489–90 (1952), *overruled by* Keyishian v. Bd. of Regents of Univ. of State of N. Y., 385 U.S. 589 (1967).

[249] *Id.* at 510 (Douglas, J., dissenting).

[250] *Id.*

[251] Wieman v. Updegraff, 344 U.S. 183, 186, 191 (1952).

"open-mindedness and free inquiry."[252] These two opinions set the stage for the doctrinal transformation that soon followed.

This transformation occurred chiefly through two decisions, *Sweezy* and *Keyishian*,[253] the lodestars of constitutional academic freedom. *Sweezy* came first in 1957. There, the attorney general of New Hampshire sought to question Paul Sweezy, a Marxian economist, about a guest lecture he gave at the University of New Hampshire; Sweezy refused to answer the questions, and thereafter he was held in contempt and confined by court order until he was willing to answer.[254] The Supreme Court reversed the order of contempt, finding that it violated due process. But most significantly, Chief Justice Warren's plurality opinion and Justice Frankfurter's concurrence laid out the foundations for two different aspects of the constitutional academic freedom doctrine—the academic freedom rights of faculty and the academic freedom protections for institutions. The plurality opinion, offering the theoretical underpinnings for faculty's rights, noted that the attorney general's summons and questioning "was an invasion of petitioner's liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread."[255] Most significantly, Chief Justice Warren, like Justices Douglas and Frankfurter before him, recognized the need to protect free inquiry and the search for truth in our nation's universities. Specifically, he held:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[256]

His emphatic words remain as true today as they were in 1957. To muzzle the thought leaders in our higher-education institutions is to sentence our democracy to death.

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[252] *Id.* at 196 (Frankfurter, J., concurring); *see also id.* at 196–97 ("[Teachers] 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.").

[253] Keyishian, 385 U.S. at 589; Sweezy v. New Hampshire, 354 U.S. 234 (1957) (plurality opinion).

[254] *Id.* at 236–45.

[255] *Id.* at 250.

[256] *Id.*

Justice Frankfurter too was forceful in his concurrence. He spoke eloquently "of the dependence of a free society on free universities"; the importance of giving universities breathing space to examine and solve the great problems of the past, present, and future;[257] and the need for "the exclusion of governmental intervention in the intellectual life of a university."[258] But Justice Frankfurter's greatest contribution was his listing of the four essential freedoms of a university. Drawing upon a statement from leading scholars in South Africa, he explained that the four essential freedoms are for the university "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[259] These freedoms came to define the institutional academic freedom protections courts have often provided universities.

Keyishian followed *Sweezy*, further clarifying the nature of academic freedom protections for faculty.[260] In *Keyishian*, the Supreme Court yet again dealt with New York's attempt to prevent so-called "subversives" from obtaining state employment. After the University of Buffalo—previously a private institution—merged into the State University of New York, some members of its faculty refused to sign certificates saying they were not and had never been communists.[261] New York moved to remove all of them from the university, and they challenged the constitutionality of that action. The Supreme Court held that the state's law and actions were unconstitutional.[262] In the course of judging the merits, the Court held what it had previously implied: Academic freedom is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[263] It noted that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."[264] Interestingly, the Court premised the need to protect academic freedom on the idea that the classroom is a "marketplace of ideas."[265]

While the "marketplace of ideas" theory undergirds the Supreme Court's modern free speech jurisprudence,[266] Robert Post has offered persuasive

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[257] Justice Frankfurter specifically proclaimed that, in the academic realm, "thought and action are presumptively immune from inquisition by political authority." *Id.* at 266 (Frankfurter, J., concurring in judgment). It is unsurprising that Justice Frankfurter was an ardent supporter of academic freedom after his time serving as a professor of law at Harvard, where he had run-ins with both the administration and influential alumni. *See* Matthew W. Finkin, *On "Institutional" Academic Freedom*, 61 Tex. L. Rev. 817, 847 n.121 (1983).

[258] *Sweezy*, 354 U.S. at 261–62.

[259] *Id.* at 263 (citation omitted).

[260] Keyishian v. Bd. of Regents of Univ. of State of N. Y., 385 U.S. 589 (1967).

[261] *Id.* at 591–92.

[262] *Id.* at 604, 609–10.

[263] *Id.* at 603. One can see the influence of Justice Douglas's dissent in *Adler*, as the Court borrowed his language. *See* Adler v. Bd. of Educ. of City of N.Y., 342 U.S. 485, 510 (1952) (Douglas, J., dissenting).

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

[265] *Id.* ("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." (cleaned up)).

[266] *See, e.g.*, Post, *supra* note 13; Red Lion Broad. Co. v. F.C.C., 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail"). This view of the First Amendment emerged from Justice

critiques of its application to academic freedom. Universities are not providing a true marketplace of ideas—as they hire professors to focus on specific disciplines and teach specific courses, do not allow just anybody to walk in and teach a course, and do not allow students to discuss whatever interests them when taking classes—rather, they are expected to stick to discussing the lesson of the day. Universities have a different function, something Post calls "democratic competence," which posits that in order for our democracy to function, there must be some source of authority or expertise out there that "distinguishes good ideas from bad ones."[267] He contrasts this with "democratic legitimation," the normally predominant concept in free speech doctrine that our society should treat the speech of all persons equally.[268]

Post's basic point is that academic freedom jurisprudence would become more coherent if the doctrine was structured around the idea that universities need this freedom to pursue truth, regardless of its popularity, in order to provide the knowledge needed for our society to judge what ideas in the marketplace are good and what ideas are bad. Essentially, universities arm our society with the expertise needed to decide for ourselves which ideas in the marketplace should win out. That knowledge is critical if our goal is to have an effective marketplace of ideas.

But regardless of which rationale best supports academic freedom, it is clear after *Sweezy* and *Keyishian* that the First Amendment provides academic freedom protections for universities and professors. This safeguard exists to ensure that universities can pursue truth and discovery uninhibited by popular opinion. The First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom."[269] It also offers some form of protection against the government seeking to punish a professor or the university for what is being taught.[270]

Holmes's famed dissent in *Abrams v. United States*. *See* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[W]hen 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.").

[267] Post, *supra* note 13, at 34, 62–68. Peter Byrne has made a similar argument—that the point of academic freedom is to protect the truth-seeking role universities serve in our democracy, not just promote a marketplace of ideas. *See* Byrne, *supra* note 10, at 260–61, 293, 296–98, 306, 309–10 ("It is of the essence that worthy ideas be distinguished from dull, and an unobjectionable corollary is that some speakers will be valued more highly and given more prominent positions.").

[268] Post, *supra* note 13, at 34.

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

[270] *See* Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion); Barenblatt v. United States, 360 U.S. 109, 112 (1959) ("[B]roadly viewed, inquires cannot be made into the teaching that is pursued in any of our educational institutions. When academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain."). Of course, *Barenblatt* qualified this protection, holding that the government could properly question a professor on the extent to which the Communist Party had infiltrated universities and sought to overthrow the government. *See id.* at 112, 129–34.

However, the Supreme Court has offered minimal clarity on the exact scope and nature of these protections since the Red Scare era. There remain many lingering questions as to how the First Amendment protects institutional and individual academic freedom rights.[271] This Article will explore these two—sometimes separate, sometimes intersecting[272]—domains next.

B. Institutional Academic Freedom

Based on the four essential freedoms first discussed in Justice Frankfurter's concurrence in *Sweezy*, the judiciary has extended academic freedom protections to universities as institutions. This has resulted in courts often taking a hands-off approach when asked to scrutinize universities' academic decisions.[273] However, uncertainties abound when the question becomes to what extent universities are protected from the meddling of the executive and legislative branches.

The current state of the law in the Supreme Court is that universities have the "freedom . . . to make [their] own judgments as to education[al]" matters.[274] In *Regents of the University of California v. Bakke*, the Supreme Court endorsed Justice Frankfurter's four essential freedoms of the university—the university's right to determine who may teach, what may be taught, how it shall be taught, and who may be admitted to study.[275] *Bakke* specifically dealt with the question of who may be admitted to study, as the challenge there was to the university's affirmative action program. Relying again on the "marketplace of ideas" rationale, the Supreme Court sanctioned the university's use of affirmative action in admissions for the interest of achieving diversity, as long as it

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[271] Interestingly, some scholars have suggested that academic freedom should become its own right under the First Amendment, like freedom of association. *See, e.g.*, Shaundra K. Lewis, *Bullets and Books by Legislative Fiat: Why Academic Freedom and Public Policy Permit Higher Education Institutions to Say No to Guns*, 48 Idaho L. Rev. 1, 17 (2011); John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government, the Academy, and the Mccarran-Walter Act*, 66 Tex. L. Rev. 1481, 1483 (1988); William W. Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, 404 Annals Am. Acad. Pol. & Soc. Sci. 140, 143, 146 (1972). But this theory has not gained traction in the courts. *See, e.g.*, Urofsky v. Gilmore, 216 F.3d 401, 409–15 (4th Cir. 2000) (en banc) (rejecting the idea that professors have First Amendment academic freedom rights above beyond the First Amendment rights that protect other public employees); Bishop v. Aronov, 926 F.2d 1066, 1075 (11th Cir. 1991) ("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.").

[272] As Judge Michael McConnell put it, these two distinct areas of academic freedom "are sometimes in harmony and sometimes in discord." Michael W. McConnell, *Academic Freedom in Religious Colleges and Universities*, 53 L. & Contemp. Probs. 303, 305 (1990) ("[Academic freedom] refers both to the freedom of the individual scholar to teach and research without interference (except for the requirement of adherence to professional norms, which is judged by fellow scholars in the discipline) and to the freedom of the academic institution from outside control. Academic freedom thus has two faces: one individual, the other institutional.").

[273] *See, e.g.*, Osteen v. Henley, 13 F.3d 221, 225–26 (7th Cir. 1993) (Posner, J.) ("[O]ne dimension of academic freedom is the right of academic institutions to operate free of heavy-handed governmental, including judicial, interference.").

[274] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978).

[275] *Id. See also* Widmar v. Vincent, 454 U.S. 263, 276 (1981) (reaffirming these four essential freedoms).

did not use racial quotas.[276] It noted that universities would be given "wide discretion in making the sensitive judgments as to who should be admitted" as long as they did not disregard "constitutional limitations protecting individual rights."[277] The Court has repeatedly reaffirmed this principle in subsequent affirmative-action cases.[278] But the Supreme Court's recent ruling, *Students for Fair Admissions v. President and Fellows of Harvard College*,[279] draws into question the continuing vitality of *Bakke*. While Chief Justice Roberts attempted to square his decision with *Bakke*,[280] it is hard to read the case and conclude that it is showing any deference to universities. Still, the Court did not claim it was overturning *Bakke*, so it remains good law, at least for now.

Outside of the affirmative-action context, questions of institutional academic freedom have most often arisen when a member of the faculty or a student has sought judicial intervention on some issue that pertains to a university's academic programs. The two most significant Supreme Court cases in this area are *Regents of the University of Michigan v. Ewing* and *University of Pennsylvania v. Equal Employment Opportunity Commission*.[281] In *Ewing*, the Supreme Court considered a student's due process challenge to his dismissal from the University of Michigan on the basis of his failure of an important examination.[282] Justice Stevens, writing for the unanimous Court, acknowledged that Ewing had a constitutionally protected right to his continued enrollment.[283] Yet, Justice Stevens still ruled against Ewing, recognizing that "[w]hen judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment."[284] The Supreme Court chose this tack out of respect for academic freedom[285] and the recognition that the courts are not well suited "to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions."[286] Justice Stevens's

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[276] *Bakke*, 438 U.S. at 311–15, 316–20.

[277] *Id.* at 314.

[278] *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 388 (2016) ("Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission."); Grutter v. Bollinger, 539 U.S. 306, 328 (2003) ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer.").

[279] 600 U.S. 181 (2023).

[280] *Id.* at 208–209.

[281] 493 U.S. 182 (1990); 474 U.S. 214 (1985).

[282] 474 U.S. at 215–21.

[283] *Id.* at 222–23.

[284] *Id.* at 225 (holding that judges may not override the decision "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").

[285] Interestingly, Justice Stevens recognized the tension between academic freedom's protection of faculty interests and its protection of the university's institutional interests. *See id.* at 226 n.12 ("Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself." (internal citations omitted)).

[286] *Id.* at 226.

approach in *Ewing* echoed his concurrence in *Widmar v. Vincent*—where he counseled the Court to defer to the academic decisions of universities.[287]

The Supreme Court took a different, but reconcilable, approach in *University of Pennsylvania v. Equal Employment Opportunity Commission*. There, the Court considered the question of whether to recognize a privilege that would shield peer review materials from an EEOC investigation into discrimination on the basis of race, sex, and national origin in the tenure decision of an associate professor.[288] The university asserted that academic freedom justified the privilege and invoked the four essential freedoms of a university discussed by Justice Frankfurter and recognized by *Bakke*.[289] The Supreme Court's opinion reaffirmed its commitment to those freedoms, but distinguished the circumstances before it. It noted that the academic freedom cases arose out of situations where "government was attempting to control or direct the *content* of the speech engaged in by the university or those affiliated with it."[290] Here, conversely, the government was not seeking to regulate what ideas the university could teach through direct speech codes or restrictions on whom they could hire. Instead, it merely was requiring it to comply with a generally applicable anti-discrimination law, which did not infringe on the university's academic freedom interests.[291] The takeaway from these cases is that courts will defer to universities' academic decisions, but they will not let universities hide behind academic freedom to shield illegal discrimination.

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[287] 454 U.S. 263, 278–79 (1981) (Stevens, J., concurring in judgment) ("In my opinion, a university should be allowed to decide for itself whether a program that illuminates the genius of Walt Disney should be given precedence over one that may duplicate material adequately covered in the classroom. Judgments of this kind should be made by academicians, not by federal judges, and their standards for decision should not be encumbered with ambiguous phrases like 'compelling state interest.'").

[288] Univ. of Penn. v. E.E.O.C., 493 U.S. 182, 184–85 (1990).

[289] *Id.* at 195–96.

[290] *Id.* at 197 ("When, in [*Sweezy* and *Keyishian*], the Court spoke of 'academic freedom' and the right to determine on 'academic grounds who may teach' the Court was speaking in reaction to content-based regulation."). However, there is a rather significant quote for the purposes of the government speech doctrine in dicta in the case: "Where, as was the situation in the academic-freedom cases, government attempts to direct the content of speech at public educational institutions, complicated First Amendment issues are presented because government is simultaneously both speaker and regulator." *Id.* at 198 n.6. The issue is that *University of Pennsylvania* was decided in 1990, before the emergence of the government speech doctrine, so it is unlikely the Court meant that no First Amendment protections attached to the speech, as that would contradict the holdings of the academic freedom cases it was seeking to accommodate.

[291] *See id.* at 198–201. One particular sentence from the decision is worth highlighting: "Nothing we say today should be understood as a retreat from this principle of respect for *legitimate* academic decisionmaking." *Id.* at 199. It is interesting because it sounds a lot like the rationale used by the New York court to justify its decision to block the appointment of Betrand Russell in 1940. *See* Kay v. Bd. of Higher Ed. of City of N.Y., 18 N.Y.S.2d 821, 829 (N.Y. Sup. Ct. 1940). Of course, there is far more basis for a court to conclude that race or sex discrimination is not a legitimate basis for academic decision making than there is for a court to conclude that a professor's controversial scholarship should disqualify him from teaching at a public university. *See* Gray v. Bd. of Higher Educ., City of N.Y., 692 F.2d 901, 909 (2d Cir. 1982) ("[A]cademic freedom is illusory when it does not protect faculty from censurious practices but rather serves as a veil for those who might act as censors. Because our decision today inhibits capricious nonrenewal of employment based on race rather than academic grounds, we believe it to be basically consistent with the goals of academic freedom.").

The federal appellate courts have largely followed the Supreme Court's instruction to defer to universities on academic decisions.[292] In *Feldman v. Ho*, Judge Easterbrook reversed a jury award for a professor who asserted that the university's decision not to extend his contract was retaliation for him accusing a colleague of academic dishonesty in her scholarship.[293] Judge Easterbrook's reasoning was that universities, not juries, "must be able to decide which members of its faculty are productive scholars and which are not."[294] Even if the university errs in that assessment, "the only way to preserve academic freedom is to keep claims of academic error out of the legal maw."[295] The Fifth Circuit has offered an even stronger opinion, noting in dicta that "the government should stay out of academic affairs."[296] The Eleventh Circuit, in considering the case of a professor admonished by his university for lecturing on personal views that the university found irrelevant to his assigned course, has noted that "[f]ederal judges should not be ersatz deans or educators."[297] And the Third Circuit has held that a disagreement between the university president and a professor over a student's grade did not warrant judicial oversight.[298] Deference therefore has been the hallmark of the circuits' review of universities' academic decisions.

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[292] To the extent they have not, it has usually occurred when the university's academic freedom interests were in conflict with a professor's academic freedom interests. *See infra* Part II.C.

[293] 171 F.3d 494, 495, 498 (7th Cir. 1999).

[294] *Id.* at 497. In a previous interlocutory appeal in the case, Judge Easterbrook provided further context to his views on academic freedom:

> [Teachers] speak and write for a living . . . . Yet they also *evaluate* speech for a living . . . . They grade their students' papers and performance in class. They edit journals, which reject scholarly papers of poor quality. They evaluate their colleagues' academic writing, and they deny continuing employment to professors whose speech does not meet their institution's standards of quality. "The government" as an abstraction could not penalize any citizen for misunderstanding the views of Karl Marx or misrepresenting the political philosophy of James Madison, but a Department of Political Science can and should show such a person the door—and a public university may sack a professor of chemistry who insists on instructing his students in moral philosophy or publishes only romance novels. Every university evaluates *and acts* on the basis of speech by members of the faculty; indeed, Feldman proposed that Ho do just this on the basis of his colleague's speech. Lack of originality is a standard reason for denying tenure; Feldman accused his colleague of an extreme version of this defect. Feldman therefore does not deny that speech in a university may be the basis of adverse action; he believes, rather, that the penalty should have fallen on the accused colleague rather than himself. Yet an unsupported charge of plagiarism reflects poorly on the accuser; the first amendment does not ensure that a faculty member whose assessment of a colleague's work reveals bad judgment will escape the consequences of that revelation.

Feldman v. Bahn, 12 F.3d 730, 732–33 (7th Cir. 1993) (internal citation omitted).

[295] *Ho*, 171 F.3d at 497.

[296] In re Dinnan, 661 F.2d 426, 430 (5th Cir. 1981).

[297] Bishop v. Aronov, 926 F.2d 1066, 1075 (11th Cir. 1991).

[298] Brown v. Armenti, 247 F.3d 69, 75 (3d Cir. 2001). *See also* Lovelace v. Se. Mass. Univ., 793 F.2d 419, 426 (1st Cir. 1986) ("To accept plaintiff's contention that an untenured teacher's grading policy is constitutionally protected and insulates him from discharge when his standards conflict with those of the university would be to constrict the university in defining and performing its educational mission. The first amendment does not require that each nontenured professor be made a sovereign unto himself."); Hillis v. Stephen F. Austin State Univ., 665 F.2d 547, 552 (5th Cir. 1982). *But see* Parate v. Isibor, 868 F.2d 821, 830 (6th Cir. 1989) ("We conclude that by forcing Parate to change, against his professional judgment, Student 'Y's' grade, the

There is one final point worth making on institutional academic freedom because of its relevance to the government speech doctrine. The Supreme Court has suggested in a handful of cases that universities have the "right" to "make academic judgments as to how best to allocate scarce resources."[299] The Court has also noted that universities get to make content-based decisions in determining their academic programming.[300] It would seem an uncontroversial proposition to say that universities get to choose what courses they offer and what programs they will support. However, what is not clear is how the government speech doctrine factors into this analysis. The Supreme Court's dicta on this point comes in cases either decided before the emergence of the doctrine or cases decided when the doctrine was still in its infancy and did not carry with it all the same implications it does today. There is still much to be resolved in determining how the First Amendment can best accommodate both doctrines. But there do appear to be instances where the government speech doctrine and institutional academic freedom could proceed hand in hand.

C. Constitutional Academic Freedom Protections for Faculty

It remains an open question as to whether the First Amendment provides individual academic freedom rights to faculty at public universities or if faculty are solely protected by the university being insulated from extramural governmental institutions.[301] That said, based on the Supreme Court's statements in *Sweezy* and *Keyishian*, there is little doubt in my mind that these protections extend to individual members of the faculty. The circuits have overwhelmingly come to the same conclusion. Yet, the differing levels of protections in the various circuits is characteristic of the doctrinal disarray.

First, we look again to our polestars—*Sweezy* and *Keyishian*. Both cases dealt with extramural governmental institutions seeking to punish individual academics. In *Sweezy*, Chief Justice Warren held that "there unquestionably was an invasion of [Sweezy's] liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread."[302] As for *Keyishian*, the Supreme Court also spoke of academic

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defendants unconstitutionally compelled Parate's speech and chose a means to accomplish their supervisory goals that was unduly burdensome and constitutionally infirm.").

[299] Widmar v. Vincent, 454 U.S. 263, 276 (1981) (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in judgment)). *See also, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 832 (1995).

[300] *Id.* at 833 ("When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message."); *see also* Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000) ("In the instant case, the speech is not that of the University or its agents. It is not, furthermore, speech by an instructor or a professor in the academic context, where principles applicable to government speech would have to be considered.").

[301] *See, e.g.*, Byrne, *supra* note 10, at 255 ("I believe that constitutional academic freedom should primarily insulate the university in core academic affairs from interference by the state.").

[302] Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion). In his concurrence, Justice Frankfurter did not quibble with the New Hampshire Supreme Court's conclusion

freedom there in individual terms.[303] It is difficult to see how one could read these cases as only guaranteeing institutional academic freedom protections.

Looking to circuit decisions, only the Third and Fourth Circuits have held that academic freedom is an institutional protection, not an individual right or interest held by professors. In the Third Circuit case, *Edwards v. California University of Pennsylvania*, then-Judge Alito rejected a professor's constitutional challenge to his university sanctioning him for deviating from its prescribed curriculum in a course he taught.[304] Judge Alito held that "a public university professor does not have a First Amendment right to decide what will be taught in the classroom,"[305] reasoning "that the University was acting as speaker and was entitled to make content-based choices in restricting Edwards's syllabus."[306] In the Fourth Circuit, the *en banc* majority in *Urofsky v. Gilmore* observed that to the extent the Supreme Court "has constitutionalized a right of academic freedom at all, [it] appears to have recognized only an institutional right of self-governance in academic affairs."[307] The core conclusion of the Fourth Circuit in *Urofsky* was that university professors have the same First Amendment rights as any other public employee.[308]

The main issue the circuits have dealt with of late in academic freedom cases is how to apply *Garcetti v. Ceballos*.[309] It is an open question whether *Urofsky*'s conclusions on academic freedom and public employee speech have

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that Sweezy had a "constitutionally guaranteed right to lecture." *Id.* at 261 (Frankfurter, J., concurring in judgment).

[303] Keyishian v. Bd. of Regents of Univ. of State of N. Y., 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the *teachers* concerned." (emphasis added)).

[304] Edwards v. California Univ. of Penn., 156 F.3d 488, 489–92 (3d Cir. 1998).

[305] *Id.* at 491. To be fair to Justice Alito, even other circuits that have concluded that the First Amendment protects professors' academic freedom have wrestled with how to balance these competing interests. *See, e.g.*, Johnson-Kurek v. Abu-Absi, 423 F.3d 590, 595 (6th Cir. 2005) ("While the First Amendment may protect Johnson-Kurek's right to express her ideas about pedagogy, it does not require that the university permit her to teach her classes in accordance with those ideas. The freedom of a university to decide what may be taught and how it shall be taught would be meaningless if a professor were entitled to refuse to comply with university requirements whenever they conflict with his or her teaching philosophy."); Webb v. Bd. of Trustees of Ball State Univ., 167 F.3d 1146, 1149 (7th Cir. 1999) (Easterbrook, J.) ("An injunction restoring Webb to certain classes imposes costs on other scholars—and on the University, whose ability to set a curriculum is as much an element of academic freedom as any scholar's right to express a point of view. … A university's academic freedoms are qualified by the need to respect faculty members' civil rights—no university could have a policy of closing leadership positions to blacks or women, for example—but when deciding who to appoint as a leader or teacher of a particular class, every university considers speech (that's what teaching and scholarship consists in) without violating the Constitution."); Bishop v. Aronov, 926 F.2d 1066, 1077 (11th Cir. 1991) ("The University's conclusions about course content must be allowed to hold sway over an individual professor's judgments.").

[306] *Edwards*, 156 F.3d at 492. *See also id.* at 492 ("In sum, caselaw from the Supreme Court and this court on academic freedom and the First Amendment compel the conclusion that Edwards does not have a constitutional right to choose curriculum materials in contravention of the University's dictates."). It is rather significant to state that the government is speaking when determining what concepts a professor can discuss in their course. This case was decided when the government speech doctrine was still in its infancy and is very much an anomaly in terms of its outlook on whether the government is speaking when professors teach a course.

[307] 216 F.3d 401, 412 (4th Cir. 2000) (en banc).

[308] *Id.* at 415 (majority opinion).

[309] *See supra* notes 202–218 and the accompanying *Garcetti* discussion.

survived *Garcetti*. For example, in *Adams*, the Fourth Circuit rejected the application of *Garcetti* to "the academic context of a public university."[310] This holding is consistent with *Garcetti*'s carve out of "expression related to academic scholarship or classroom instruction,"[311] but it could seem inconsistent with *Urofsky*'s conclusion that professors have the same rights as any other public employees.[312] The Second,[313] Fifth,[314] Sixth,[315] Seventh,[316] and Ninth Circuits[317] have all joined the Fourth Circuit in rejecting *Garcetti*'s application to core academic speech—i.e., speech related to classroom instruction or research.[318] An interesting aspect of the Supreme Court's carve-out in *Garcetti* is that it protects the freedom to teach and research, which are ideas rooted in *Lehrfreiheit*, the AAUP's 1915 Declaration, and the subsequent 1940 Statement.[319] This demonstrates the role these sources have continued to play in shaping the constitutional academic freedom doctrine.

Moving past the question of *Garcetti*'s application, we have seen courts employ varying approaches to cases featuring academic freedom issues. Courts have most commonly utilized the *Pickering* framework.[320] But the Eleventh Circuit has departed from the majority view by applying a balancing test that uses *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), as its polestar.[321] *Hazelwood* is a case from the K-12 context featuring a deferential test in light of the educational realities of schooling minor children, making it a curious fit for higher-education cases.[322] The results from these various balancing tests could most generously be summed up as inconsistent.[323]

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[310] Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550, 561–64 (4th Cir. 2011)

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

[312] This Article will offer perspective in Part III on why these two stances are potentially reconcilable. *See infra* Part III.B.

[313] Heim v. Daniel, 81 F.4th 212, 226–28 (2d Cir. 2023).

[314] Buchanan v. Alexander, 919 F.3d 847, 852–54 (5th Cir. 2019) (analyzing a professor's First Amendment claim under *Pickering* framework without discussing *Garcetti*).

[315] Meriwether v. Hartop, 992 F.3d 492, 505–06 (6th Cir. 2021) (Thapar, J.).

[316] Piggee v. Carl Sandburg Coll., 464 F.3d 667, 670–71 (7th Cir. 2006).

[317] Demers v. Austin, 746 F.3d 402, 406 (9th Cir. 2014).

[318] The Eleventh Circuit is currently considering an appeal to Pernell v. Fla. Bd. of Governors of State Univ. Sys., 641 F. Supp. 3d 1218 (N.D. Fla. 2022), where a Florida district court rejected *Garcetti*'s application to classroom instruction in the state's public universities. *Id.* at 1243. *See also* Pernell v. Lamb, No. 22-13992 (11th Cir.). The district court followed *Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991), which stated that professors have a First Amendment interest in academic freedom.

[319] *See supra* notes 230–243 and accompanying discussion.

[320] *See, e.g.*, *Heim*, 81 F.4th at 228; *Meriwether*, 992 F.3d at 507; *Buchanan*, 919 F.3d at 852–54; *Demers*, 746 F.3d at 406; *Piggee*, 464 F.3d at 670; *Adams*, 640 F.3d at 564.

[321] *Bishop*, 926 F.2d at 1074–75 (balancing context, the university's position as a public employer, and "the strong predilection for academic freedom as an adjunct of the free speech rights of the First Amendment").

[322] *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (applying a test that only required a school's restrictions on speech to be "reasonably related to legitimate pedagogical concerns").

[323] *Compare* Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 678–82 (6th Cir. 2001) (professor's use of vulgar language, including racial slurs, during instruction was protected under *Pickering*), *with* Bonnell v. Lorenzo, 241 F.3d 800, 818–21 (6th Cir. 2001) (professor's use of vulgar language during classroom instruction was unprotected speech under *Pickering*). *See also* W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 Neb. L. Rev. 301, 303–04 (1998). *See generally* Strasser, Pickering, Garcetti, *& Academic Freedom*, *supra* note 187.

Outside of classroom instruction and research, the circuits have generally held professors' intramural speech on other aspects of their employment to be unprotected.[324] Early cases relied on the theory that this speech was not on matters of public concern under the *Pickering* framework.[325] Now, courts are generally holding that *Garcetti* applies to this speech because it does not fall within the classroom instruction or research exceptions.[326]

While the Supreme Court has not yet definitively resolved whether constitutional academic freedom safeguards the rights of individual professors, irrespective of the university's own protections, and whether there is an exception to *Garcetti* for classroom instruction and research, the circuits have overwhelmingly held in the affirmative on both questions. They are correct in that approach, as it is the best reading of the Supreme Court's academic freedom precedents. Still, due to the circuits' divergent approaches in applying First Amendment protections to academic freedom, the doctrine remains in a state of disarray, and many vital questions remain unanswered. This Article will seek to resolve some of the biggest questions—including how the government speech doctrine applies—in the next part.

III. Squaring Government Speech with Constitutional Academic Freedom

The Supreme Court avoided answering in *Garcetti* the question of how constitutional academic freedom interacts with the government speech doctrine.[327] That issue is now ripe for resolution. In this part, I will offer a framework for accommodating the government speech doctrine without eviscerating academic freedom protections. First, I will explain why we must distinguish between public universities and extramural governments when evaluating a restriction on academic speech. Then, in the next two Sections, I will offer the modes of analysis for analyzing speech restrictions from these different governmental entities and apply the government speech doctrine.

A. Distinguishing Public Universities from Extramural Governments

In evaluating cases presenting academic freedom issues, the first question a court must ask is whether the decision is coming from within the university

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[324] This result would seem consistent with the Supreme Court's conclusion that faculty have no First Amendment right to shared governance of a public university. *See* Minn. State Bd. for Cmty. Colleges v. Knight, 465 U.S. 271, 282–90 (1984). *But see id.* at 1072 (Brennan, J., dissenting) (arguing that academic freedom protects intramural speech relevant to university governance).

[325] *See* Matthew W. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 Tex. L. Rev. 1323, 1326–32 (1988).

[326] *See, e.g.*, Porter v. Bd. of Trustees of N.C. State Univ., 72 F.4th 573, 582–84 (4th Cir. 2023); Wozniak v. Adesida, 932 F.3d 1008, 1010 (7th Cir. 2019); Gorum v. Sessoms, 561 F.3d 179, 185 (3d Cir. 2009); Renken v. Gregory, 541 F.3d 769, 773–75 (7th Cir. 2008).

[327] *See* Garcetti v. Ceballos, 547 U.S. 410, 425 (2006) (reserving the resolution of this issue for another day).

or from an extramural governmental entity.[328] Collapsing universities into the general category of government or treating them merely as an alter ego of a state or local government threatens to undermine crucial academic freedom protections. The continued vitality of constitutional academic freedom requires that courts zealously adhere to the established principle that "universities occupy a special niche in our constitutional tradition,"[329] so courts should not treat them as merely another organ of the government.

The first reason why this is so important is because it properly accommodates the two faces of constitutional academic freedom—institutional academic freedom and individual academic freedom.[330] Sometimes, these different aspects of academic freedom come into conflict—such as when a professor sues the university for restricting their academic expression in some way.[331] In that scenario, the university's suppression of the professor's academic speech may be an infringement of their academic freedom protections, but the judiciary's review of the university's decision on an academic matter may also infringe upon the university's academic freedom protections.[332] Yet, these rights are not always in conflict. In the two seminal academic freedom cases, the universities and instructors were aligned in opposition to the state government's attempts to interfere with who could teach in their classrooms and what ideas could be taught.[333] It is in these cases of alignment where the refusal to recognize the distinction between the university and an extramural government would do the most harm. Instead of upholding the university's institutional academic freedom interests, the judiciary would be disregarding them or subordinating them to the interests of another governmental entity.[334]

For example, say a state passed a law that required the removal from the curriculum of all public universities in the state certain theories the legislature

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[328] There might be cases where drawing this line proves difficult. For example, if a university promulgates a regulation in response to a state statute, was the regulation the university's own choice or something compelled by state law? Courts should consider whether the statute made such a regulation mandatory, coerced it through funding conditions or other threats of punishment, or if the university did it of its own accord.

[329] Grutter v. Bollinger, 539 U.S. 306, 329 (2003).

[330] *See, e.g.*, Regents of Univ. of Mich. 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, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself." (citations omitted)).

[331] *See, e.g.*, Piarowski v. Ill. Cmty. Coll. Dist. 515, 759 F.2d 625, 629 (7th Cir. 1985) ("[Academic freedom] is used to denote both the freedom of the academy to pursue its ends without interference from the government . . . and the freedom of the individual teacher . . . to pursue his ends without interference from the academy; and these two freedoms are in conflict, as in this case.").

[332] The Supreme Court has recognized "the right of the University to make academic judgments as to how best to allocate scarce resources or to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." Widmar v. Vincent, 454 U.S. 263, 276 (1981) (citation omitted).

[333] *See* Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 591–92 (1967) (state board of education sought to dismiss professors for refusing to sign a document swearing that they were not communists); Sweezy v. New Hampshire, 354 U.S. 234, 236–45 (1957) (plurality opinion) (state attorney general sought to punish a guest lecturer who refused to disclose the contents of his lecture).

[334] *Cf.* Rabban, *supra* note 10, at 271–80 (considering whether institutional academic freedom protects public universities from other governmental branches).

and governor disfavored.[335] Precedent recognizes that universities have the right to choose on academic grounds "what may be taught" and "how it shall be taught."[336] The Supreme Court has also noted in dicta that universities are allowed to choose the content of their curriculums and determine how to allocate scarce resources.[337] So this law would undoubtedly implicate the academic freedom protections for the public universities in that state by infringing on their right to determine what they teach and how to teach it. It would also infringe upon the academic freedom protections for the individual professors who taught the viewpoints that the state was now mandating they remove from their courses.[338] This is an obvious case where the universities' academic freedom interests are aligned with those of their professors'. Yet, if a court treated the universities as just an alter ego of the state government and extended the right to determine the content of the curriculum to the extramural government, it would contravene both the universities' and professors' academic freedom protections.

Collapsing public universities into the general category of government would also fly in the face of the purpose of constitutional academic freedom. Broadly stated, its purpose is the uninhibited search for knowledge and truth.[339] Whether you agree with Robert Post that the value of academic freedom is democratic competence—giving us the tools to distinguish "good ideas from bad ones"[340]—or with Justice Brennan that academic freedom ensures classrooms remain the "marketplace of ideas,"[341] academic freedom is necessary to maintaining a healthy democracy, and therefore is "of transcendent value to all of us."[342] As Ronald Dworkin aptly put it, academic freedom promotes a "culture of independence," rather than a "culture of conformity," warding off "totalitarian epistemology"—"tyranny's most frightening feature."[343] It allows professors to push provocative ideas and pursue new discoveries and

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[335] *See* Fla. Senate Bill 266, §§ 1, 4, 9 (2023).

[336] See *Widmar*, 454 U.S. at 276; Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978).

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

[338] *Cf.* Pernell v. Fla. Bd. of Governors of State Univ. Sys., 641 F. Supp. 3d 1218, 1278 (N.D. Fla. 2022).

[339] *Sweezy*, 354 U.S. at 250 ("To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."); Brian Leiter, *supra* note 28, at 33 ("The central rationale for academic freedom . . . has always been that such freedom makes discovery of truth more likely, and that knowledge of truth contributes to the well-being of individuals and society at large."); *id.* at 42 ("In sum, we protect academic freedom to protect the discovery and dissemination of truths about the world.").

[340] Post, *supra* note 13, at 34.

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

[342] *Id.*

[343] Ronald Dworkin, *We Need a New Interpretation of Academic Freedom*, *in* The Future of Academic Freedom 189 (Louis Menand ed., 1996). What Dworkin meant when he referred to "totalitarian epistemology" was the environment created by authoritarian regimes where government propaganda is the undeniable truth and dissent is treason. *Id.* Judge Amul Thapar echoed this sentiment when he spoke of academic freedom's value in preventing compelled "ideological conformity." Meriwether v. Hartop, 992 F.3d 492, 505 (6th Cir. 2021).

truths, regardless of their popularity.[344] And it enables students to become critical thinkers.[345] We must give free inquiry the "breathing space" it needs to thrive.[346] Doing so is critical to the survival of our democracy.[347]

The best approach to accomplishing this is to build a proverbial wall around public universities via the constitutional academic freedom doctrine—separating the university from extramural governmental institutions. There is, of course, a valid criticism to be lodged at that approach on the ground that the Court might be hesitant to distinguish between governmental institutions in its free speech doctrine.[348] But the Supreme Court has already embraced that approach when the circumstances justified it, such as in schools, prisons, and the military.[349] In *Hazelwood*, school officials deleted two pages of articles from a high school newspaper.[350] In *Murphy*, prison officials punished an incarcerated person for sending a letter to another prisoner offering legal insights.[351] In *Glines*, the Air Force punished a serviceman for circulating a petition within his base without permission from the base commander.[352]

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[344] *Sweezy*, 354 U.S. at 261–62 (Frankfurter, J., concurring in judgment) ("Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible."); Urofsky v. Gilmore, 216 F.3d 401, 428 (4th Cir. 2000) (en banc) (Wilkinson, J., concurring in judgment) ("A faculty is employed professionally to test ideas and to propose solutions, to deepen knowledge and refresh perspectives. Provocative comment is endemic to the work of a university faculty whose function is primarily one of critical review." (citation omitted)).

[345] *See* Speech First, Inc. v. Cartwright, 32 F.4th 1110, 1128 (11th Cir. 2022) ("Colleges and universities serve as the founts of—and the testing grounds for—new ideas. Their chief mission is to equip students to examine arguments critically and, perhaps even more importantly, to prepare young citizens to participate in the civic and political life of our democratic republic.").

[346] *Keyishian*, 385 U.S. at 604.

[347] *See Sweezy*, 354 U.S. at 250; Leiter, *supra* note 28, at 42–43.

[348] *See* Areen, *supra* note 10, at 988; Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 Harv. L. Rev. 84, 84, 106–13 (1998) ("American free speech doctrine has never been comfortable distinguishing among institutions. Throughout its history, the doctrine has been persistently reluctant to develop its principles in an institution-specific manner, and thus to take account of the cultural, political, and economic differences among the differentiated institutions that together comprise a society."). Of course, Schauer ultimately concluded that such an approach might be necessary for "government enterprises that are themselves in the business of supplying speech because of its content." *Id.* at 120.

[349] *See* Rabban, *supra* note 10, at 231 ("Universities are not the only institutions to which special first amendment rules apply. Courts have increasingly observed that the level of first amendment protection varies with the functions of institutions. Newspapers and libraries, for example, are subject to very different first amendment standards than military bases and prisons.").

[350] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262 (1988). The Supreme Court sanctioned using a deferential First Amendment test on the basis that schools must be able to exercise greater control over their minor students to ensure lessons accomplish their goals, students are not exposed to inappropriate material, and to be able to take into account the emotional maturity of their students. *See id.* at 271–72.

[351] Shaw v. Murphy, 532 U.S. 223, 225 (2001). The Supreme Court held the punishment must be evaluated under the deferential standard from *Turner v. Safley*, 482 U.S. 78, 89 (1987). *Id.* at 232.

[352] Brown v. Glines, 444 U.S. 348, 349–51 (1980). The Court noted that the military and its bases are governed by special rules under the First Amendment because "[t]he military is, by

Could a state government prohibit a regular citizen from circulating a petition around his neighborhood or sending an email to a friend offering opinions on the law? Could it require a newspaper to remove certain articles? No. But the special circumstances of prisons, schools, and the military justified departing from the ordinary First Amendment analysis and employing a more-deferential approach. The special circumstances of public universities also warrant a unique approach.[353]

Robert Post's scholarship on managerial and governance authority makes clear why this is a sensible proposal. Our mode of analysis must differ when the government is acting from its managerial authority versus its governance authority.[354] The government has more power to regulate speech when using its managerial authority than it does when using its governance authority.[355] When an extramural government acts to limit the theories that a professor can teach or research, it is acting in a governance capacity, not a managerial one.[356] Conversely, if a university sanctions a professor for teaching discredited ideas, not adhering to the curriculum, or engaging in research outside their area of expertise, it is likely acting in a managerial capacity.[357]

Thus, because of institutional academic freedom and these separate sources of authority, it is necessary to distinguish between extramural governments using their governance authority and public universities using their managerial authority.[358] Of course, that does not necessarily mean that the government speech doctrine always applies to university decisions. Recall that my theory requires that the government exercise control over the message. Rather, this distinction between sources of authority merely recognizes that when public universities use their managerial authority, courts should offer more deference to their decisions. Contrarily, when extramural governments use their governance authority, courts should apply normal First Amendment principles via the forum analysis.

I admit that this approach may reflect my perspective that extramural governments pose the greatest threat to academic freedom. Some leading scholars share that point of view.[359] That said, the AAUP's 1915 Declaration was most concerned about lay citizens on boards of trustees micromanaging

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necessity, a specialized society separate from civilian society." *Id.* at 354 (citation omitted).

[353] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 329 (2003) ("[G]iven the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."); Speech First, Inc. v. Cartwright, 32 F.4th 1110, 1128 (11th Cir. 2022) ("Nowhere is free speech more important than in our leading institutions of higher learning.").

[354] *See generally* Post, *supra* note 31, at 199–267.

[355] *Id.* at 200. Indeed, this reasoning is fully consistent with the rationale behind the public employee speech doctrine. *See* Garcetti v. Ceballos, 547 U.S. 410, 418–20 (2006).

[356] *See* Whittington, *supra* note 4, at 513 (explaining that when the government acts in this role, it is doing so as a regulator, not an employer).

[357] *Cf.* Whittington, *supra* note 4, at 501–07.

[358] *See* Minn. State Bd. for Cmty. Colleges v. Knight, 465 U.S. 271, 294 (1984) (Marshall, J., concurring) ("[T]here are good reasons to be more suspicious when a state legislature instructs college administrators to listen to some faculty members but not others than when administrators decide on their own to listen to some faculty members but not others.").

[359] *See, e.g.*, Whittington, *supra* note 4, at 512–13; Post, *supra* note 13, at 32–33; Byrne, *supra* note 10, at 255.

academic life at the university and disregarding academic freedom.[360] This is understandable, as that was a major issue university professors faced in those days.[361] But the Red Scare amply demonstrated the greater danger extramural governments could present.[362] Certainly, boards of trustees are still capable of doing damage and undermining academic freedom.[363] Yet, until recently, infringements on academic freedom had not approached the attacks of the Red Scare era. Unfortunately, those sorts of assaults are returning, overwhelmingly from extramural governments.[364] I believe the line I have drawn in the sand here is compatible with our modern First Amendment doctrines, consistent with both institutional and individual academic freedom protections, and capable of warding off the most significant attacks on our universities. The question now becomes how courts should implement this framework. I will spend the next two Sections providing a solution.

B. Protections for Faculty from University Decisions

The first question we confront is how much constitutional academic freedom protects professors from their own university's decisions—whether those decisions come from administrators, the board of trustees, or other members of the faculty. My conclusion is that the best answer is that academic freedom provides limited protection in this domain. This most effectively resolves the tension between institutional and individual academic freedom. The main objective in this Section will be laying out a coherent framework for applying the constitutional academic freedom doctrine when professors and universities are at odds.

The first major question we must consider is how to implement *Garcetti* and the government speech doctrine. Applying my theory of government speech, expression related to teaching or research[365] is not government speech

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[360] *See 1915 Declaration*, *supra* note 236, at 300 (warning that the intervention of "[l]ay governing boards" in academic decisions risks "destroying . . . the essential nature of a university").

[361] *See, e.g.*, Hofstadter & Metzger, *supra* note 1, 236–39, 409–10; Areen, *supra* note 10, at 952–54.

[362] *See* Whittington, *supra* note 4, at 477–82, 485–91.

[363] We have lamentably seen too much of that happening in recent years. *See, e.g.*, Divya Kumar, *New College of Florida Trustees Move to End Gender Studies Major*, Tampa Bay Times (Aug. 11, 2023), https://www.tampabay.com/news/education/2023/08/10/new-college-florida-trustees-move-end-gender-studies/ [https://perma.cc/AJJ7-TZ69]; Kate McGee, *Texas A&M Leaders' Text Messages Show Desire to Counteract Perceived Liberal Agenda in Higher Education*, Tex. Tribune (Aug. 4, 2023), https://www.texastribune.org/2023/08/04/texas-am-mcelroy-texts/ [https://perma.cc/9MAY-BD5S]; David Folkenflik, *UNC Journalism School Tried To Give Nikole Hannah-Jones Tenure. A Top Donor Objected*, Nat'l Pub. Radio (June 21, 2021), https://www.npr.org/2021/06/21/1007778651/journalism-race-and-the-fight-over-nikole-hannah-jones-tenure-at-unc [https://perma.cc/X9QW-2PP5].

[364] *See supra* note 12.

[365] Intramural speech that is not related to teaching or research is a more difficult question. Certainly, some of this speech does fall within *Garcetti*'s ambit and is properly considered government speech. Otherwise, we would risk "constitutionaliz[ing] the employee grievance." Garcetti v. Ceballos, 547 U.S. 410, 420 (2006) (quoting Connick v. Myers, 461 U.S. 138, 154 (1983)). However, the question of whether academic freedom should protect at least some intramural speech on university governance is a complex and nuanced one. Leading commentators have made compelling arguments that it should fall under academic freedom's umbrella. *See, e.g.*,

and falls outside the scope of *Garcetti*. This is because public universities do not exercise sufficient control over the viewpoints professors espouse in the classroom or in their research to credibly claim that professors are merely conveying the government's message.[366] Certainly, universities can and do impose content restrictions, requiring professors to stick the topic of the courses they're teaching and focus their research on issues within their disciplines.[367] But universities do not closely control the viewpoints professors convey on the relevant topics in their instruction and research.[368] Thus, when professors are engaged in teaching or research, they are not tasked with merely being "state mouthpieces."[369] They are instead "speak[ing] mainly for themselves"[370] and for the betterment of society.[371] Their job is not to just deliver the government's message.[372] Accordingly, the government speech doctrine is a poor fit for this expression.

To the degree one might protest that it is unfair to exempt only certain public employees from *Garcetti*, that is not what is happening here.[373] The reason *Garcetti* is inapplicable to faculty when they are engaging in speech related to teaching or research is because of the nature of the expression, not their profession. Indeed, courts have recognized this distinction in other contexts too. For example, the Supreme Court has held that attorneys being paid by the government to provide free legal assistance to indigent persons were engaged in private speech, not government speech, when they represented those persons in proceedings against the government.[374] It has also held that public defenders speaking on behalf of clients in court were not engaged in

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Areen, *supra* note 10, at 984–85; Finkin & Post, *supra* note 6, at 7; Rabban, *supra* note 10, at 294–97. Giving this issue the attention it deserves would likely require an article of its own, so I will reserve this discussion for another day.

[366] *Cf.* Shurtleff v. City of Boston, 596 U.S. 243, 256–58 (2022) (explaining that Boston's failure to actively control the message conveyed by the flag raisings made the expression at issue private speech, not government speech).

[367] *See, e.g.*, *supra* notes 299–300 and accompanying discussion.

[368] *Cf.* Matal v. Tam, 582 U.S. 218, 236 (2017) ("If the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously and incoherently . . . . [and] expressing contradictory views.").

[369] Urofsky v. Gilmore, 216 F.3d 401, 428 (4th Cir. 2000) (en banc) (Wilkinson, J., concurring in judgment).

[370] *Id.*

[371] *See* Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

[372] *See* Whittington, *supra* note 4, at 496–501. *See also* Meriwether v. Hartop, 992 F.3d 492, 507 (6th Cir. 2021) ("[I]n the college classroom there are three critical interests at stake (all supporting robust speech protection): (1) the students' interest in receiving informed opinion, (2) the professor's right to disseminate his own opinion, and (3) the public's interest in exposing our future leaders to different viewpoints.").

[373] *See* Lawrence White, *Fifty Years of Academic Freedom Jurisprudence*, 36 J.C. & U.L. 791, 820 (2010) ("[E]fforts by faculty members to invoke academic freedom by virtue of their status as members of the professoriate collide out of the box with one of the fundamental precepts of constitutional law: that constitutional rights are not profession-specific and membership in a particular profession does not bestow constitutional privileges unavailable to citizens at large.").

[374] Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542–43 (2001) ("The advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept."); *see also supra* notes 163–176 and accompanying discussion.

state action.[375] Based on these precedents, a district court has concluded that *Garcetti* does not cover a criminal defense attorney's in-court speech on behalf of his indigent clients, despite the fact that the government was contracting with him to provide that defense.[376]

Of course, it is a very different situation when an assistant public defender is punished by his boss for spreading rumors in the workplace.[377] The government should be able to control its workplaces to ensure "the efficient provision of public services."[378] But it should not be able to control private speech—even private speech it is funding—in order to "compel ideological conformity"[379] or undermine the legal representation of indigent persons.

Judith Areen offered a great analogy to drive this point home: "We might not want the state bureau of motor vehicles to be a hotbed of independent thought, but colleges and universities need to be if they are to produce new knowledge for the benefit of students and the nation."[380] Applying *Garcetti* to speech related to instruction or research, even strictly in the context of university decisions, would defeat many of the purposes of constitutional academic freedom. After all, "professors at public universities are paid—if perhaps not exclusively, then predominantly—to speak, and to speak *freely*, guided by their own professional expertise, on subjects within their academic disciplines."[381] We must give them the space to do that when they are acting as advocates for the betterment of society.[382]

That brings us to the next important question: What test should courts apply when evaluating a university's decision to punish a professor for speech related to teaching or research? This is a difficult question.[383] A number of leading scholars have criticized the use of the *Pickering* framework to resolve these issues.[384] The trouble is that courts have applied *Pickering* for decades and are comfortable using it. Offering a completely new test could cause problems, as we have recently seen with the Supreme Court's *Bruen* decision.[385] If we wanted to take a more deferential approach, we could use the

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[375] Polk County v. Dodson, 454 U.S. 312, 319–20 (1981). Based on *Dodson*, the Eighth Circuit held that a prison chaplain "engage[d] in inherently ecclesiastical functions" did not qualify as a state actor, either. Montano v. Hedgepeth, 120 F.3d 844, 851 (8th Cir. 1997).

[376] *See* L. Off. of Samuel P. Newton v. Weber County, 491 F. Supp. 3d 1047, 1068–69 (D. Utah 2020).

[377] *See* De Ritis v. McGarrigle, 861 F.3d 444, 453–54 (3d Cir. 2017).

[378] Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

[379] Meriwether v. Hartop, 992 F.3d 492, 506 (6th Cir. 2021).

[380] Areen, *supra* note 10, at 970.

[381] Heim v. Daniel, 81 F.4th 212, 226–27 (2d Cir. 2023) (emphasis added).

[382] *See* Keyishian v. Bd. of Regents of Univ. of State of N. Y., 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.").

[383] *See* Rebecca Gose Lynch, *Pawns of the State or Priests of Democracy? Analyzing Professors' Academic Freedom Rights Within the State's Managerial Realm*, 91 Cal. L. Rev. 1061, 1070–71 (2003) (noting the "myriad approaches" recommended by scholars).

[384] *See, e.g.*, Whittington, *supra* note 4, at 512; Post, *supra* note 14, 81–84; Areen, *supra* note 10, at 975. *But see* Nick Cordova, *An Academic Freedom Exception to Government Control of Employee Speech*, 22 Federalist Soc' Rev. 284, 290, 295–96 (2021) (concluding that *Pickering* provides an appropriate standard).

[385] *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 24 (2022) ("When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively

test from *Hazelwood*; of course, that test was developed for K-12 schools.[386] Cass Sunstein, meanwhile, has argued for the principle that a "university can impose subject-matter or other restrictions on speech only to the extent that the restrictions are closely related to its educational mission."[387] I am skeptical that any of these tests alone will provide a workable approach.

Instead, because of institutional academic freedom, courts should take a very deferential tack when considering university decisions relating to teaching, research, or scholarship.[388] I agree the most with the approach David Rabban has recommended.[389] Out of respect for institutional academic freedom, courts should defer to universities' academic decisions.[390] I therefore recommend that courts apply the professional judgment standard articulated in *Ewing*: To override the university's decision, a court must find that "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."[391] Practically speaking, a professor should only prevail under this standard if they show that the university decision was not "a genuinely academic decision."[392] They could demonstrate, for example, that the university

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protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."); *see also* United States v. Bullock, No. 3:18-CR-165-CWR-FKB, 2023 WL 4232309 (S.D. Miss. June 28, 2023) (raising concerns about the *Bruen* analytical framework); Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 Duke L.J. 67 (2023) (describing the unworkability of the *Bruen* test); Cordova, *supra* note 384, at 290 ("Using an existing test would promote clarity by applying well-established concepts rather than contribute to doctrinal clutter with yet another balancing test.").

[386] *Hazelwood* allows speech restrictions if they "are reasonably related to legitimate pedagogical concerns." Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

[387] Cass R. Sunstein, *Academic Freedom and Law: Liberalism, Speech Codes, and Related Problems*, The Future of Academic Freedom 107 (Louis Menand ed., 1996).

[388] Whether speech is "related to" teaching or research can sometimes be a hard line to draw. Courts should take care not to construe this too narrowly. A recent Fourth Circuit decision held that a professor's comments during a department meeting about the proposal to add a question to student course evaluations was not speech related to teaching under *Garcetti*. Porter v. Bd. of Trustees of N.C. State Univ., 72 F.4th 573, 578, 583 (4th Cir. 2023). That case presented an admittedly tough question because it is not clear from the facts whether the question sought to evaluate his teaching or merely collect data. If it was just the latter, I think there is a strong argument that the court was correct. If it involved the former, I would hold that it is speech related to teaching, as the student course evaluations are used in part to evaluate a professor's instruction.

[389] *See* Rabban, *supra* note 10, at 287–94, 300–01. *See also* Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 Fordham L. Rev. 33, 105 (2008) ("[T]he First Amendment law of managerial prerogative tolerates regulation of speech within the university as long as that regulation represents a bona fide professional judgment of academic merit consistent with scholarly norms.").

[390] *See* Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. Rev. 1497, 1516–23 (2007) (articulating the different ways courts could defer to universities). *But see* Finkin, *supra* note 257, at 851 (objecting to institutional academic freedom insulating the decisions of administrators and boards of trustees).

[391] Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985). One would expect if a rogue board of trustees and president are making decisions to suppress speech, there would be ample evidence of pretext.

[392] *Id.* My approach aligns most closely with Paul Horwitz's "medium-form approach." Horwitz, *supra* note 390, at 1518.

was attempting to suppress unpopular ideas at the core of the their discipline[393] or was engaging in a legally impermissible form of discrimination.[394]

The wisdom of this approach is that, in addition to accommodating institutional academic freedom, it also recognizes that universities are acting in their managerial capacity when restricting the expression of faculty. Because of that, courts should give universities more leeway in regulating the expression of its employees.[395] By embracing the unique circumstances that universities and the two faces of academic freedom present,[396] this deferential approach balances giving universities the space needed to manage their academic programs with not bartering away faculty's academic freedom protections entirely.

Finally, I must offer one additional point of clarification. The Supreme Court has observed in dicta that when universities make academic judgments about how best to allocate scarce resources, it is government speech, and the university may make content-based choices.[397] What this means is courts should not entertain First Amendment challenges from professors who are aggrieved over a university's decision not to offer a course or program. While my approach may lead to undesirable results in some circumstances,[398] there are other ways to push back on university leadership when they go rogue, such as collective bargaining, tenure protections, AAUP investigations, protests, and the democratic process.[399] There is a danger in courts closely scrutinizing every university decision—as Bertrand Russell found out in 1940.[400] Institutional academic freedom requires a lighter touch.[401]

C. Shielding Instruction and Research from Extramural Governments

Of course, when extramural governments are restricting instructional speech or research at public universities, we do not face a situation where institutional academic freedom and individual academic freedom are at odds.[402] Because both the institution and the faculty are aligned in their academic freedom interests, the courts should not defer to the government's decision to

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[393] *See* Byrne, *supra* note 10, at 306 (describing "a state university penalize[ing] a scholar against his department's recommendation on grounds clearly linked to the political direction of his scholarship" as one of the "easy cases").

[394] *See* Gutzwiller v. Fenik, 860 F.2d 1317, 1329 (6th Cir. 1988) ("Certainly, a decision to deny tenure on the basis of a candidate's sex is, as a matter of law, such a substantial departure from accepted academic norms as to demonstrate that Fenik and Cohen did not exercise professional judgment."); *see also* Univ. of Penn. v. EEOC, 493 U.S. 182, 198–201 (1990).

[395] *See* Post, *supra* note 31, at 200.

[396] *Cf. supra* notes 349–353 and accompanying discussion.

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

[398] *See* Kumar, *supra* note 363 (discussing the New College Board of Trustees' decision to end its Gender Studies program).

[399] *Cf.* J. Peter Byrne, *Neo-Orthodoxy in Academic Freedom*, 88 Tex. L. Rev. 143, 167 (2009). *See also* Robert J. Tepper & Craig G. White, *Speak No Evil: Academic Freedom and the Application of* Garcetti v. Ceballos *to Public University Faculty*, 59 Cath. U. L. Rev. 125, 172–79 (2009).

[400] *See supra* notes 245–247 and accompanying discussion.

[401] After all, it guarantees universities the right to determine "what may be taught" and "how it shall be taught." Widmar v. Vincent, 454 U.S. 263, 276 (1981) (citation omitted).

[402] *See supra* notes 330–338 and accompanying discussion.

limit speech or suppress ideas. Instead, courts should apply the ordinary First Amendment principles.[403]

Applying these ordinary free speech principles, courts must first ask whether speech related to teaching or research is government speech. Looking to my theory of government speech, neither research nor classroom instruction are government speech. In fact, extramural governments cannot satisfy either aspects of the definition, as they are not conveying the government's message or acting through their managerial authority. First, with regard to message, extramural governments do not actively control the viewpoints expressed in university classrooms.[404] Instead, their speech restrictions usually take the form of excluding certain disfavored viewpoints,[405] rather than dictating a specific message.[406] That is garden-variety unconstitutional censorship.[407] As the Second Circuit put it, a "university's governmental function is to provide [professors] a forum" to "speak freely, guided by their own professional expertise, on subjects within their academic disciplines."[408] None of this is characteristic of government speech.

At first glance, the managerial versus governance authority question might seem a tougher one. But there is a clear answer here too. In explaining managerial authority, Robert Post noted that "within a government organization expression may be controlled so as to achieve institutional ends."[409] Yet, when extramural governments impose speech restrictions on teaching or research, they are seeking to take decisions regarding expression out of the hands of the institution constitutionally empowered to make those very decisions—public universities.[410] Indeed, Post's elaboration on governance authority makes the answer here obvious: "In a democracy like our own, the public realm coincides with the arena in which common values are forged through public discussion and exchange."[411] The Supreme Court has made it

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[403] *See supra* notes 354–358 and accompanying discussion. *See also* Emergency Coal. to Defend Educ. Travel v. U.S. Dep't of the Treasury, 545 F.3d 4, 12 (D.C. Cir. 2008) (applying ordinary First Amendment principles to lawsuit over federal restrictions on American universities teaching courses in Cuba).

[404] Shurtleff v. City of Boston, 596 U.S. 243, 256 (2022).

[405] *See generally* Pernell v. Fla. Bd. of Governors of State Univ. Sys., 641 F. Supp. 3d 1218 (N.D. Fla. 2022); Fla. Senate Bill 266 §§ 1, 4, 9 (2023).

[406] However, even if an extramural government compelled teaching a specific viewpoint, such as requiring instruction on creationism in a course on evolution, this would not satisfy the control element of my government speech test. Courts should not conduct the government speech inquiry by focusing on one or two specific viewpoints in a course. That is too narrow of a view. They must focus on the totality of the course. Is the extramural government controlling every aspect of the message delivered during course instruction? That is highly unlikely. But even in that extraordinarily rare scenario, it is still not the extramural government's role to dictate what is said in a college classroom. That power inheres in the university. *See* Widmar v. Vincent, 454 U.S. 263, 276 (1981). So in that scenario, the extramural government would be acting through its governance authority, not its managerial authority, which means the expression would not qualify as government speech.

[407] *See* Meriwether v. Hartop, 992 F.3d 492, 507 (6th Cir. 2021) ("Without sufficient justification, the state cannot wield its authority to categorically silence dissenting viewpoints.").

[408] Heim v. Daniel, 81 F.4th 212, 227 (2d Cir. 2023) (cleaned up).

[409] Post, *supra* note 49, at 1788.

[410] *See Widmar*, 454 U.S. at 276.

[411] Post, *supra* note 49, at 1788.

quite clear that university classrooms are exactly that sort of arena.[412] Thus, when an extramural government seeks to restrict speech in university classrooms, it is acting through its governance authority, making the government speech doctrine inapplicable.

But even if we were to apply the Supreme Court's "holistic approach,"[413] we get the same result. The three factors commonly examined by courts are "the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression."[414] Looking first to history, as I noted earlier in this Article, this factor almost always favors the government because courts take too general of an approach to it.[415] A court would likely conclude that governments since ancient times have used teachers to express governmental messages. The other two factors, however, would support the professor. A reasonable person would not interpret professors as delivering the government's message in their lectures. After all, within the same university, professors may "express[] contradictory views" on the same subject, so if their lectures constitute government speech, the government "is babbling prodigiously and incoherently."[416] Finally, on control, as mentioned earlier, extramural governments do not "actively control[]"[417] the message conveyed by instructors in their lectures. They are generally not involved at all in that process. The Supreme Court has observed that our universities train students through the "robust exchange of ideas" and has forbidden extramural governments from "cast[ing] a pall of orthodoxy over the classroom."[418] The balance of the factors would therefore tip in favor of the instructors, just as

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[412] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 329 (2003) ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 835 (1995) (noting the "danger . . . to speech from the chilling of individual thought and expression," particularly "in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition"); Rust v. Sullivan, 500 U.S. 173, 200 (1991) ("[T]he university is a traditional sphere of free expression . . . fundamental to the functioning of our society"); Healy v. James, 408 U.S. 169, 180 (1972) ("The college classroom with its surrounding environs is peculiarly the marketplace of ideas" (citation omitted)). *See also Meriwether*, 992 F.3d at 507 ("The need for the free exchange of ideas in the college classroom is unlike that in other public workplace settings."). This is also true of research. *See* Urofsky v. Gilmore, 216 F.3d 401, 429 (4th Cir. 2000) (Wilkinson, J., concurring in judgment) ("A faculty is employed professionally to test ideas and to propose solutions, to deepen knowledge and refresh perspectives."); *id.* at 430 ("Speech in the social and physical sciences, the learned professions, and the humanities is central to our democratic discourse and social progress.").

[413] Shurtleff v. City of Bos., 596 U.S. 243, 251 (2022).

[414] *Id.* at 251–53. *See also Walker*, 576 U.S. at 209–13; *Summum*, 555 U.S. at 470–72.

[415] *See supra* note 118.

[416] Matal v. Tam, 582 U.S. 218, 236 (2017).

[417] *Shurtleff*, 596 U.S. at 256.

[418] Keyishian v. Bd. of Regents of Univ. of State of N. Y., 385 U.S. 589, 603 (1967). *See also* Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1985) ("Academic freedom thrives . . . on the independent and uninhibited exchange of ideas among teachers and students"); Widmar v. Vincent, 454 U.S. 263, 268 n.5 (1981) ("This Court has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum. The college classroom with its surrounding environs is peculiarly the marketplace of ideas." (citations omitted)).

they did the religious group in *Shurtleff* when the city failed to exercise active control over the messages its flagpole conveyed.[419] This analysis applies just as strongly to research and scholarship. Neither is government speech.[420]

Thus, in assessing extramural restrictions on teaching or research, courts should apply the forum analysis.[421] It is clear that these aspects of a university are neither traditional public forums nor nonpublic forums.[422] The question then becomes whether they qualify as limited public forums or designated public forums. A limited public forum is created when the government opens up property for expressive purposes that is "limited to use by certain groups or dedicated solely to the discussion of certain subjects."[423] A designated public forum is a nontraditional forum that has been intentionally opened up for the purpose of serving as a public forum, but it "can be limited to a particular class of speakers instead of being opened to the general public."[424] The differences between these two types of forums are significant because they dictate the standard applied to any speech restrictions. In a designated public forum, any content or viewpoint restrictions are examined under strict scrutiny.[425] In a limited public forum, the government cannot engage in viewpoint discrimination, but it can impose content-based restrictions so long as the restrictions are "reasonable in light of the purpose served by the forum."[426]

At first blush, instruction and research at universities would seem to fit comfortably in the limited public forum analysis because they are limited to

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[419] *See Shurtleff*, 596 U.S. at 256–58. Leading First Amendment scholar Keith Whittington engaged in a similar analysis in a recent article and came to the same conclusion. *See* Whittington, *supra* note 4, at 516–22.

[420] *See* Urofsky v. Gilmore, 216 F.3d 401, 428 (4th Cir. 2000) (en banc) (Wilkinson, J., concurring in judgment) ("[I]n their research and writing university professors are not state mouthpieces—they speak mainly for themselves."). *Cf. Matal*, 582 U.S. at 235 ("If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints.").

[421] "The Supreme Court has referred to four categories of government fora: the traditional public forum, the designated public forum, the limited public forum, and the nonpublic forum." Barrett v. Walker Cnty. Sch. Dist., 872 F.3d 1209, 1224 (11th Cir. 2017). The courts have not always been the model of clarity when it comes to differentiating between these four categories of government fora. *See id.* at 1225; Bowman v. White, 444 F.3d 967, 975–76 (8th Cir. 2006).

[422] When applying the forum analysis to a university, courts look to the part of the university implicated. *See* Bloedorn v. Grube, 631 F.3d 1218, 1232 (11th Cir. 2011) ("A university campus will surely contain a wide variety of fora on its grounds."); Just. For All v. Faulkner, 410 F.3d 760, 767 (5th Cir. 2005) ("We are not called upon in this case to decide whether the University of Texas at Austin has opened its entire campus to unfettered expression by the general public. Instead, our task is simply to determine whether outdoor open areas of the University's campus, accessible to students generally, have been designated as a forum for *student* expression."). "Traditional public fora are public areas such as streets and parks that, since 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Bloedorn*, 631 F.3d at 1231 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)). University classrooms would not fit neatly into that category because they are not open to the general public. A nonpublic forum is property at which the government acts as a proprietor and manages its internal operations. *See Barrett*, 872 F.3d at 1225. While the president's office at a university would qualify as a nonpublic forum, its classrooms certainly do not.

[423] Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661, 679 n.11 (2010) (citation omitted).

[424] *Barrett*, 872 F.3d at 1225; *see also Faulkner*, 410 F.3d at 766–67.

[425] *See* Minn. Voters All. v. Mansky, 585 U.S. 1, 11 (2018).

[426] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 107 (2001) (citation omitted).

use by certain groups, require university permission to participate,[427] and are dedicated solely to the discussion of certain subjects, which the university determines.[428] But this rationale makes the mistake of collapsing universities and extramural governments into a single entity for the purposes of the analysis. Because institutional academic freedom gives universities the right to determine "on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study,"[429] these are not choices the extramural government itself gets to make. Instead, from its governance perspective, it is opening a forum for professors and students to engage in a "robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection."[430] That makes the "college classroom . . . peculiarly [a] marketplace of ideas,"[431] at least from the extramural government's perspective.

Indeed, in *Widmar*, the Supreme Court observed that the "the campus of a public university, at least for its students, possesses many of the characteristics of a public forum."[432] While the Court did recognize that *universities* have the "authority to impose reasonable regulations compatible with [their educational] mission upon the use of [their] campus[es] and facilities,"[433] that power does not extend to extramural governmental entities. In light of this distinction, courts should treat the university classroom as a designated public forum when analyzing extramural governmental attempts to regulate it. The university itself certainly has more power to regulate in that sphere,[434] but institutional academic freedom requires imposition of a standard that largely prohibits extramural governments from foisting content-based restrictions on the robust exchange of ideas in the classroom.[435] This prevents extramural governments from trampling upon universities' turf.

This is a sensible approach because institutional academic freedom grants those content-based choices to universities. It allows them to choose the

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[427] *See Barrett*, 872 F.3d at 1225 (observing that in a limited public forum, "each individual member [of a designated class] must obtain permission from the governmental proprietor of the forum, who in turn has discretion to grant or deny permission").

[428] *Cf.* Wayne Batchis, *The Government Speech-Forum Continuum: A New First Amendment Paradigm and Its Application to Academic Freedom*, 75 N.Y.U. Ann. Surv. Am. L. 33, 81 (2020) ("When a professor speaks to his class or publishes the results of his research, the venue for his expression is a limited public forum—implicitly established by the state for certain limited purposes.").

[429] Widmar v. Vincent, 454 U.S. 263, 276 (1981) (citation omitted).

[430] Keyishian v. Bd. of Regents of Univ. of State of N. Y., 385 U.S. 589, 603 (1967) (cleaned up).

[431] Healy v. James, 408 U.S. 169, 180 (1972) (citation omitted); Speech First, Inc. v. Cartwright, 32 F.4th 1110, 1128 (11th Cir. 2022) ("Colleges and universities serve as the founts of—and the testing grounds for—new ideas. Their chief mission is to equip students to examine arguments critically and, perhaps even more importantly, to prepare young citizens to participate in the civic and political life of our democratic republic.").

[432] 454 U.S. at 268 n.5.

[433] *Id.*

[434] *See generally supra* Part III.B.

[435] When an extramural government regulates speech at a university, there is a "danger" that it will chill "individual thought and expression," which is especially suspect in that setting because the government is "act[ing] against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 835 (1995).

instructors and students, what programs are offered, what courses are taught, and gives them pedagogical oversight.[436] Because the extramural government does not possess that authority, courts must evaluate its opening of the forum from a big-picture point of view: It created the university to allow instructors to teach a wide range of disciplines and for students to study an even wider range of ideas.[437]

Much of the same is true from the standpoint of research. Extramural governments open universities to allow the faculty to examine a broad assortment of theories, pursue knowledge and truth, and engage in discovery through free inquiry.[438] While research is limited to a class of persons (faculty), it is still generally available to them,[439] at least from the perspective of the extramural government. Thus, when extramural governments impose a content- or viewpoint-based restriction on what professors can research, it too should be evaluated under the designated public forum analysis and subjected to strict scrutiny.[440]

Applying this mode of analysis to extramural governments' speech restrictions successfully protects universities from the "tyranny of public opinion."[441] Because the exchange of ideas in university classrooms is what Cass Sunstein terms "high value speech,"[442] it lies at the heart of what our free speech doctrines are designed to protect.[443] Universities arm students with the knowledge and tools "to examine arguments critically and . . . participate in the civic and political life of our democratic republic."[444] Allowing extramural governments to obstruct these channels in an attempt to create a "culture of conformity" imperils our democracy.[445] While I fully agree with the Fifth Circuit "that [extramural] government[s] should stay out of academic affairs,"[446] if they are to involve themselves in regulating speech in the university classroom, courts must impose onerous standards to give our "First Amendment freedoms [the] breathing space to survive."[447]

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[436] *See Widmar*, 454 U.S. at 276.

[437] *See supra* notes 339–347 and accompanying discussion.

[438] *See* Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion); Urofsky v. Gilmore, 216 F.3d 401, 428–29 (4th Cir. 2000) (en banc) (Wilkinson, J., concurring in judgment).

[439] *See* Barrett v. Walker Cnty. Sch. Dist., 872 F.3d 1209, 1224 (11th Cir. 2017).

[440] *See* Minn. Voters All. v. Mansky, 585 U.S. 1, 11 (2018).

[441] *See 1915 Declaration*, *supra* note 236, at 297 ("In a political autocracy there is no effective public opinion, and all are subject to the tyranny of the ruler; in a democracy there is political freedom, but there is likely to be a tyranny of public opinion. An inviolable refuge from such tyranny should be found in the university."); Areen, *supra* note 10, at 954.

[442] *See* Sunstein, *supra* note 387, at 96–100 (defining "political speech" and observing that it is "high value speech" at the "core" of the First Amendment).

[443] Lane v. Franks, 573 U.S. 228, 235–36 (2014) ("Speech by citizens on matters of public concern lies at the heart of the First Amendment, which was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." (citation omitted)); Nat'l Ass'n for Gun Rts., Inc. v. Mangan, 933 F.3d 1102, 1111 (9th Cir. 2019) ("Political speech lies at the core of speech protected by the First Amendment, as it is the means by which citizens disseminate information, debate issues of public importance, and hold officials to account for their decisions in our democracy.").

[444] Speech First, Inc. v. Cartwright, 32 F.4th 1110, 1128 (11th Cir. 2022).

[445] *See* Dworkin, *supra* note 343, at 189.

[446] In re Dinnan, 661 F.2d 426, 430 (5th Cir. 1981).

[447] Keyishian v. Bd. of Regents of Univ. of State of N. Y., 385 U.S. 589, 604 (1967).

Extramural governments involving themselves in academic affairs also puts faculty in untenable positions. Professors have to abide by professional standards created and enforced by governing bodies.[448] When state laws conflict with these standards, faculty get stuck between a rock and a hard place.[449] While universities themselves place restrictions on classroom speech, they are more likely to approach these issues in a deliberate, thoughtful manner and tread carefully because they have to answer to accrediting bodies.[450] But extramural governments answer to public opinion, leaving them prone to enacting poorly thought out, reactionary policies.[451] Courts should regard these sorts of policies with suspicion.[452]

However, in the research context, it is necessary to depart from the designated public forum analysis when evaluating selective government programs that provide research grants. Because this is government-subsidized speech, courts should apply the government speech analysis I have articulated.[453] As *National Endowment for the Arts v. Finley* recognized, these programs have "limited resources," must reject "the majority of the grant applications" they receive, and therefore cannot possibly maintain "absolute neutrality" on content.[454] As I noted earlier in this Article, the government uses its editorial discretion in managing these selective grant programs and must by necessity separate the good ideas from the bad. Thus, these funding decisions are government speech,[455] and courts should not entertain challenges to them.

In assessing the doctrinal approach I have recommended for extramural governments' restrictions on speech, a state legislator might complain that it puts universities beyond their regulatory grasp. There is some truth to this criticism, but state governments remain free to show their displeasure by cutting university funding or even closing public universities. Nothing prevents a legislator from researching how much a university has budgeted to a program they oppose and then argue for slashing that funding from the state's spending

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[448] *See, e.g.*, Pernell v. Lamb, No. 4:22-cv-00304-MW-MF, ECF No. 13-6 at ¶¶ 24, 26–27 (N.D. Fla.) (declaration from Dr. Russell Almond documenting how Florida's Stop W.O.K.E. Act forces him to choose between his duty to teach his students the governing standards of his profession and his obligation to follow state law).

[449] *Id.*; *see also* Pernell v. Lamb, No. 4:22-cv-00304-MW-MF, ECF No. 13-4 at ¶ 29 (N.D. Fla.) (declaration from Dr. Shelley Park explaining that the Stop W.O.K.E. Act puts her in an "impossible bind" because it prohibits her from teaching the "foundational principles of [her] discipline").

[450] *See* Landon Wade Magnusson, *Adopted Speech:* Summum*'s Implications on Government-Sponsored, Student Speech*, 2010 B.Y.U. Educ. & L.J. 407, 431 (2010) ("[F]or a public university to receive the accreditation that it desires, it is critical that it give the appearance of preserving the freedom of speech and refraining from speech adoption and censorship.").

[451] *See 1915 Declaration*, *supra* note 236, at 297 (warning that "[p]ublic opinion is at once the chief safeguard of a democracy, and the chief menace to the real liberty of the individual").

[452] *Cf.* Minn. State Bd. for Cmty. Colleges v. Knight, 465 U.S. 271, 294 (1984) (Marshall, J., concurring in judgment) ("[T]here are good reasons to be more suspicious when a state legislature instructs college administrators to listen to some faculty members but not others than when administrators decide on their own to listen to some faculty members but not others."). *See also* In re Dinnan, 661 F.2d 426, 430 (5th Cir. 1981) ("Time after time the Supreme Court has upheld academic freedom in the face of government pressure . . . . [I]n all those cases there was an attempt to suppress ideas by the government.").

[453] *See supra* Part I.B.

[454] 524 U.S. 569, 585 (1998).

[455] *See supra* notes 182–184 and accompanying discussion.

bill.[456] The university would then be in the position of having to make a decision on how best to allocate its resources. It might keep the program and make cuts elsewhere, or it may opt to itself cut the program. Either way, due to institutional academic freedom, that decision inheres in the university.

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"Nowhere is free speech more important than in our leading institutions of higher learning."[457] Our constitutional academic freedom doctrine should reflect that reality. The framework laid out in this Article accommodates both institutional and individual academic freedom by providing deference to universities' genuine academic decisions and exacting scrutiny to the intermeddling of extramural governments. It succeeds in insulating universities and professors alike from the tyranny of public opinion. This is the best way to ensure that universities continue to foster a "culture of independence"[458] and engage in the "robust exchange of ideas."[459]

Conclusion

Our society stands on a precipice. Academic freedom, despite being as important as ever, finds itself in a precarious position. If government speech prevails in the impending clash of the doctrines, it will enable shortsighted politicians to turn our public institutions of higher learning into Orwellian Ministries of Truth, mere peddlers of the dominant party's "deadening dogma."[460] Yet, the need to protect academic freedom should not goad courts into closely scrutinizing every academic decision made at public universities. That approach would only succeed in smothering academic freedom, as we saw in the case of Bertrand Russell.[461] To accommodate both institutional and individual academic freedom, courts must give universities the breathing space to make academic decisions without entirely disclaiming their duty to ensure that rogue university leaders are not suppressing ideas merely because they are unpopular. This admittedly is a difficult balance to strike, but I am confident the framework I have offered can thread that needle.

Conversely, when dealing with extramural governments, Justice Brandeis's immortal words come to mind: "[T]he remedy . . . is more speech, not enforced silence."[462] If we want colleges and universities to

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[456] The legislator could not, however, put a condition in the spending bill prohibiting any state or federal funding from being used on that that program unless their condition, as a content-based restriction on speech, satisfies strict scrutiny. *See* Minn. Voters All. v. Mansky, 585 U.S. 1, 11 (2018).

[457] Speech First, Inc. v. Cartwright, 32 F.4th 1110, 1128 (11th Cir. 2022).

[458] Dworkin, *supra* note 343, at 189.

[459] Keyishian v. Bd. of Regents of Univ. of State of N. Y., 385 U.S. 589, 603 (1967).

[460] Adler v. Bd. of Educ. of City of N.Y., 342 U.S. 485, 510 (1952) (Douglas, J., dissenting), *overruled by Keyishian*, 385 U.S. 589.

[461] *See supra* notes 245–247 and accompanying discussion.

[462] Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

remain "the founts of—and the testing grounds for—new ideas,"[463] we must insulate them from the "tyranny of public opinion."[464] Theories that challenge our societal norms often are controversial and unpopular. Yet, "[t]he absence of such [ideas] would be a symptom of grave illness in our society."[465] We must maintain academic freedom to preserve our institutions of higher learning as sanctuaries where "[t]eachers and students . . . remain free to inquire, to study and to evaluate, to gain new maturity and understanding."[466] For the critical thinking, uninhibited search for truth, and discovery that blossom in such refuges serve as the lifeblood to our democracy. My framework preserves universities' and professors' autonomy by strictly scrutinizing extramural attempts to suppress ideas. That is the tack we must take if we are to empower our system of higher education to continue to stand as a bulwark against tyranny.

[463] Speech First, Inc. v. Cartwright, 32 F.4th 1110, 1128 (11th Cir. 2022).
[464] *1915 Declaration*, *supra* note 236, at 297.
[465] Sweezy v. New Hampshire, 354 U.S. 234, 251 (1957) (plurality opinion).
[466] *Id.* at 250.