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Titles and Pronouns in the Academy: Academic Freedom and In-Class Speech Pursuant to Classroom Management

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**TITLES AND PRONOUNS IN THE ACADEMY: ACADEMIC
FREEDOM AND IN-CLASS SPEECH PURSUANT TO
CLASSROOM MANAGEMENT**

MICHAEL K. PARK

ABSTRACT

Recent controversies involving in-class speech have sparked fierce debate over the use (or refusal to use) pronouns and titles to address students, pitting the academic freedom of educators against the academic interests of the institution. The breadth and scope of academic freedom, however, remains an unsettled question. This article offers both a doctrinal critique of academic freedom with regard to institutional attempts to regulate faculty speech and some normative arguments on how courts should approach the regulation of faculty speech related to classroom management. The article reviews the current public employee speech framework and then surveys case law to draw out observations regarding the regulation of faculty in-class or class-related speech. This article will then situate these observations with the public employee framework to offer a critique of the framework's application in two recent cases: *Kluge v. Brownsburg Community* and *Meriwether v. Hartop*. Ultimately, the balancing of interests between the individual academic and the university is a matter of law, and this article will interject some normative arguments in favor of considerable judicial deference to university nondiscrimination policies that are designed to promote equality and prevent disruptions to students' education.

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INTRODUCTION

Esteemed jurist and legal scholar, Richard Posner, explained that academic freedom “is used to denote both the freedom of the academy to pursue its end 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.”¹ Several recent controversies involving campus speech and academic freedom rights underscored this conflict, from a state governor’s proposal to ban programs in diversity, equity, and inclusion in public colleges,² to a public university banning professors from offering expert testimony in a lawsuit opposing a state’s new voting rights law.³ Additionally, recent controversies involving in-class speech sparked fierce debate over the use of—or refusal to use—pronouns and titles to address students, and the institution’s attempt to regulate such methods. In *Kluge v. Brownsburg Community*, the Seventh Circuit recently affirmed that a public teacher’s refusal to address transgender students by their preferred names and pronouns was not protected under the First Amendment because the practice of addressing students was pursuant to his official duties as a public employee.⁴ However, in *Meriwether v. Hartop*, the Sixth Circuit held that a public university professor plausibly alleged that the university had violated his First Amendment rights when it reprimanded the professor for refusing to address transgender students by their preferred pronouns.⁵

Although these decisions conflict in outcome, they share similar facts and address the similar issue of whether—and to what degree—academic, in-class speech is protected by the First Amendment.

¹ Piarowski v. Illinois Community College Dist., 759 F.2d 625, 629 (7th Cir. 1985).

² Anthony Izaguirre, *DeSantis Pushes Ban on Diversity Programs in State Colleges*, AP NEWS, Feb. 1, 2023, <https://apnews.com/article/ron-desantis-florida-state-government-race-and-ethnicity-b1d847ddc5e1f136b17f254f71fd15dc>.

³ Michael Wines, *Florida Bars State Professors from Testifying in Voting Rights Case*, N.Y. TIMES, Oct. 29, 2021, <https://www.nytimes.com/2021/10/29/us/florida-professors-voting-rights-lawsuit.html>.

⁴ 64 F.4th 861, 892 (7th Cir. 2023).

⁵ 992 F.3d 492 (6th Cir. 2021)

More specifically: is a professor's speech pursuant to classroom management constitutionally protected, even if such speech addresses a minority of students differently from what they prefer to be called? Previous legal scholarship has privileged the autonomy of the university and has promoted the theory that certain institutions in our society hold a preferred or sui generis status under the First Amendment doctrine.⁶ Early Supreme Court jurisprudence appears to align, at least rhetorically, with such sentiment,⁷ yet the Court has never enumerated it as a constitutional right. This article surveys federal case law that addresses university regulation of class-related speech and attempts to contextualize and draw out the academic freedom privileges that underpin the court decisions. While legal challenges addressing academic freedom have recently made national headlines, the framework of the doctrine remains murky, leaving academics, university administrators, and the courts without clear guidance as to the doctrine's application.

This article offers both a doctrinal critique of academic freedom with regard to institutional attempts to regulate faculty speech and some normative arguments on how universities and courts should approach the regulation of faculty speech related to classroom management. It begins with a modest review of the professional origins of academic freedom before addressing Supreme Court jurisprudence addressing academic freedom. Next, this article reviews the current public employee speech framework by surveying case law to draw out observations regarding the regulation of faculty in-class or class-related speech. It will then situate these observations within the public employee framework to offer a critique of the framework's application in *Kluge* and *Meriwether*. Furthermore, this article interjects normative arguments in favor of considerable judicial deference to university policies that are enacted pursuant to the academy's interest in preventing discrimination and disruptions to student learning.

⁶ See Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 U.C.L.A. L. REV. 1497 (2006); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005); Rory Thomas Gray, *Academic Freedom on the Rack: Stretching Academic Freedom Beyond Its Constitutional Limits in FAIR v. Rumsfeld*, 63 WASH. & LEE L. REV. 1131 (2006); Michael K. Park, *Sovereignty and First Amendment Rights of Higher Education Institutions: An Affirmative and Institutional Approach*, 54(1) FIRST AMENDMENT STUDIES 110 (2020); Michael K. Park, *Stick to Sports: First Amendment Values and Limitations to Student-Athlete Expression*, 99(2) JOUR. & MASS COMM. 515 (2022).

⁷ See *infra* notes 17-35 and accompanying discussion.

FREEDOMS IN CONFLICT: ACADEMIC FREEDOM OF THE INDIVIDUAL
ACADEMIC AND THE ACADEMY

Prior to the 1950s, academic freedom for faculty primarily accorded with professional custom and ideology.⁸ The origins of academic freedom in the United States traces back to the earliest colleges' adoption of a corporate structure, whereby colleges were governed by outside boards of non-academics.⁹ These early colleges considered the faculty as employees of a corporation who could be dismissed for any non-contractual reason, and had no decision-making authority regarding the policies of the institution.¹⁰ However, structural changes, including the widespread adoption of the scientific method and changes to the purpose of higher education, elevated the importance of research and the freedom of inquiry by faculty.¹¹ Academics subsequently argued for greater professional freedom, including competent peer-review of their scholarly endeavors.¹²

In 1915, the American Association of University Professors (AAUP) drafted the 1915 General Declaration of Principles which defined the principles of academic freedom—including the freedom to teach, research, and the freedom of extramural speech—and outlined that any restraints on such freedoms should be determined by professional members of the academic discipline.¹³ With regard to teaching, the 1915 Declaration states that: “The claim to freedom of teaching is made in the interest of the integrity and of the progress of scientific inquiry; it is, therefore, only those who carry on their work in the temper of the scientific inquirer who may justly assert this claim.”¹⁴ In the AAUP's 1940 restatement of its “Statement of Academic Freedom and Tenure,” the AAUP reiterated academic freedom for professors as the entitlement to “full freedom in the classroom in discussing their subject.”¹⁵ The concept of academic freedom incorporated in the AAUP's 1940 restatement has been endorsed by over 180 educational organizations,¹⁶ but they nonetheless represent professional norms in accordance with custom

⁸ See J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251 (1989).

⁹ *Id.* at 268.

¹⁰ *Id.*

¹¹ *Id.* at 269-273.

¹² *Id.*

¹³ *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, American Association of University Professors, available at <https://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf>. See also Byrne, *supra* note 8, at 278. The author notes that the AAUP committee never argued that speech should be immune from adverse consequences, rather “it contended only that the consequences be determined by competent professionals within the same discipline.”

¹⁴ *Id.*

¹⁵ *1940 Statement of Principles on Academic Freedom and Tenure*, American Association of University Professors, available at <https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure>.

¹⁶ Robert C. Post, *Democracy, Expertise, and Academic Freedom* 65 (2012).

and tradition, and therefore carry no legal authority.

Although the Supreme Court has made references to academic freedom since the 1950s,¹⁷ it is questionable as to whether these references were meant to establish an individual constitutional right to academic freedom.¹⁸ As legal scholar Peter Byrne notes, “[t]he Court has been far more generous in its praise of academic freedom than in providing a precise analysis of its meaning.”¹⁹ Even assuming *arguendo*, the constitutional recognition of an individual academic freedom right, such a right is much easier to conceptualize than it is to apply in practice; First Amendment complications arise when individual academics assert an academic freedom right against institutions that serve as both employer and educator. Suppose a professor asserts during class lecture that the Supreme Court decision in *Bostock v. Clayton County*²⁰—which held that firing an individual for being gay or transgender violates Title VII of the Civil Rights Act—was the product of “woke” judicial activism. Such views would invariably be used against the

¹⁷ See *Wieman v. Updegraff*, 344 U.S. 183, 195-98 (1952) (“By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher’s relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation”); *Sweezy v. New Hampshire*, 354 U.S. 234, 250-51 (1957) (“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 ... 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”); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (“The right of freedom of speech and press includes not only the right to utter or to print, but the right to read ... and freedom of inquiry, freedom of thought, and freedom to teach ...-indeed the freedom of the entire university community”); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (“Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom”); *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978) (“Academic freedom, though not a specifically enumerated constitutional right, has long been viewed as a special concern of the First Amendment”).

¹⁸ See Byrne, *supra* note 8; Frederick Schauer, *Is There a Right to Academic Freedom*, 77 U. COLO. L. REV. 907 (2006); Vikram David Amar & Alan E. Brownstein, *A Close-up, Modern Look at First Amendment Academic Freedom Rights of Public College Students and Faculty*, 101 MINN. L. REV. 1941 (2017); Michael K. Park, *A Matter of Public Concern: The Case for Academic Freedom Rights of Public University Faculty*, 26 COMM. L. & POL’Y 32 (2021).

¹⁹ Byrne, *supra* note 8, at 257.

²⁰ 140 S. Ct. 1731 (2020).

professor to make the case for non-promotion and perhaps even termination. But how should constitutional academic freedom reconcile the professor's right to academic freedom with the institution's right to govern course curriculum and evaluate scholarship? Granting faculty these academic freedom rights to assert against their academic chairs and administrators "would inevitably restrict the academic autonomy of the *institution* itself."²¹

Legal scholar, Frederick Schauer, contends that certain social institutions, including academic institutions, "serve functions that the First Amendment deems especially important."²² Early Supreme Court jurisprudence echoes this sentiment, but it also reveals the recognition of institutional autonomy and the deference to institutional governance. In *Sweezy v. New Hampshire*, an economist was held in contempt for his refusal to answer questions regarding his political affiliations and the contents of a lecture he gave at a university.²³ The Supreme Court held that the conviction was a violation of due process and an invasion of the lecturer's academic freedom and political expression.²⁴ Although the Court implied rhetorically that academic freedom is essential for the maintenance of our democracy, the Court did not articulate the scope of that freedom. However, the Court's majority included Felix Frankfurter, a former Harvard professor, whose concurrence noted that universities are charged with providing "an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."²⁵

In *Keyishian v. Board of Regents of the University of the State of New York*, several university faculty members challenged the constitutionality of New York regulations requiring signature confirmation that they were not, nor had ever been, Communists.²⁶ The Supreme Court noted the special importance of academic freedom under our constitutional principles, holding that such freedom is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."²⁷ Yet the Court referred to this special First Amendment concern more generally, and was concerned with the government's intrusion into the academy's right to decide which faculty to select and retain.²⁸ Academic freedom of the

²¹ Schauer, *supra* note 18, at 919 (emphasis added).

²² Schauer, *supra* note 6, at 1274 (the author contends that institutions, such as universities, may reflect one or more of the core principles and values of the First Amendment).

²³ 354 U.S. 234, 257-60 (1957).

²⁴ *Id.* at 250-54.

²⁵ *Id.* at 263 (Frankfurter, J., concurring).

²⁶ 385 U.S. 589, 591-92 (1967).

²⁷ *Id.* at 603.

²⁸ *Id.* at 593-609. *See also* *University of Pa. v. E.E.O.C.*, 493 U.S. 182, 198 (1990) (observing that *Keyishian* was a case centered on government infringement on the university's right to determine "who may teach").

academy is also implicated with regard to an institution's right to set its own rules concerning academic standards and discharges.²⁹ In *Regents of the University of Michigan v. Ewing*, the Supreme Court addressed a university's decision to discharge a student for failing a medical school exam.³⁰ The Court concluded that judges should be deferential to such academic decisions, noting "a reluctance to trench on the prerogatives of state and local educational institutions."³¹ Supreme Court decisions that have addressed university admissions have also recognized that academic freedom resides in institutional governance.³²

Yet as the Court recently pointed out, judicial deference afforded to university academic decisions comes with constitutional limits.³³ In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, Harvard College and the University of North Carolina argued that university admissions decisions that used race to benefit some applicants over others were "owed deference."³⁴ The Supreme Court, acknowledging that its cases have recognized a "tradition of giving a degree of deference to a university's academic decisions," nonetheless asserted that "deference does not imply abandonment or abdication of judicial review."³⁵

However, with regard to academic freedom tied to curriculum and pedagogy, several circuit courts suggested that broad deference should be afforded to the institution's interest in ensuring that instructors limit their speech to topics germane to the educational mission.³⁶ In *Edwards v. California University of Pennsylvania*, a public university professor claimed

²⁹ *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 225-26 (1985).

³⁰ *Id.*

³¹ *Id.* at 226 (citing *Keyishian*, 385 U.S. at 603).

³² See *Bakke*, 438 U.S. at 312 (the Court asserted that the academic freedom of a university includes the right "to make its own judgments as to education," and includes "the selection of its student body"); *Fisher v. University of Texas*, 136 S. Ct. 2198, 2214 (2016) (the Court noted that "[c]onsiderable deference is owed to a university" in defining such characteristics "like student body diversity, that are central to its identity and educational mission").

³³ See *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 S. Ct. 2141 (2023).

³⁴ *Id.* at 2168.

³⁵ *Id.*

³⁶ See generally *Brown v. Armenti*, 247 F.3d 69 (3d Cir. 2001); *Piggee v. Carl Sandburg College*, 464 F.3d 667 (7th Cir. 2006); *Johnson-Kurek v. Abu-Absi*, 423 F.3d 590 (6th Cir. 2005); see also *Vanderhurst v. Colorado Mountain College Dist.*, 208 F.3d 908, 914-15 (10th Cir. 2000) (applying the analytical framework established in *Hazelwood School Dist. v. Kuhlmeier* to determine if a university's dismissal of a professor based on his in-class speech was "reasonably related to legitimate pedagogical interests." However, the court did not decide definitively if such a framework governs public universities' control over classroom speech).

that the university deprived him of his rights to free speech by restricting his choice of classroom materials, including the prohibition of publications that advanced religious beliefs.³⁷ The Third Circuit concluded that a public university professor “does not have a First Amendment right to decide what will be taught in the classroom,” nor do they have the right to determine which curriculum materials or classroom management techniques may be used in the classroom.³⁸

In *Bishop v. Aronov*, the Eleventh Circuit held that while academic freedom plays an “invaluable role” at the post-secondary level, academic freedom is not “an independent First Amendment right.”⁴⁰ The court ruled against a professor who had challenged university prohibitions on the professor’s interjection of personal religious beliefs during class and optional after-class meetings.⁴¹ Suggesting that academic freedom resides with the autonomy of the institution, the court concluded: “we cannot supplant our discretion for that of the University. Federal judges should not be ersatz deans or educators . . . we trust that the University will serve its own interests as well as those of its professors in pursuit of academic freedom.”⁴²

In *Dambrot v. Central Michigan University*, a college basketball coach was discharged after using the “N-word” during locker room sessions with his student-athletes; the coach argued that his use of the “N-word” was protected expression because it was intended to motivate and was used in a “‘positive and reinforcing’ manner.”⁴³ The Sixth Circuit held that the First Amendment does not require the government as both employer and educator to accept this view as a valid means of motivating student-athletes, concluding that “[a]n instructor’s choice of teaching methods does not rise to the level of

³⁷ 156 F.3d 488, 489-90 (3rd Cir. 1998).

³⁸ *Id.* at 491.

³⁹ *Id.* at 492 (citing *Bakke*, 428 U.S. at 312. *See also Brown*, 247 F.3d at 75 (“Because grading is pedagogic, the assignment of the grade is subsumed under the *university’s* freedom to determine how a course to be taught. We therefore conclude that a public university professor does not have a First Amendment right to express via the school’s grade assignment procedures”) (emphasis added).

⁴⁰ 926 F.2d 1066, 1075 (11th Cir. 1991).

⁴¹ *Id.* at 1076.

⁴² *Id.* at 1075.

⁴³ 55 F.3d. 1177, 1180-81 (6th Cir. 1995) (the coach stated he used the word in the same manner that his student-athletes did amongst themselves, “to connote a person who is fearless, mentally strong and tough”).

protected expression.”⁴⁴ The court further noted that the coach’s speech did not advance an academic message, but rather was solely used to motivate or humiliate his student-athletes.⁴⁵

The judicial deference afforded to universities by courts regarding academic decision-making suggests that the autonomy of the institution enjoys a strong foothold with academic freedom in matters related to faculty hiring, retention, curriculum, and teaching methods. Furthermore, prior research on court rulings that address academic freedom reveal that the current academic freedom legal framework overwhelmingly benefits the academy over individual public academics.⁴⁶ According to legal scholar Michael LeRoy, public colleges and universities have won more than two-thirds of cases against faculty over issues such as classroom speech, campus criticism, social commentary, and retaliation.⁴⁷ LeRoy points out that after the Supreme Court struck down the constitutionality of loyalty oaths during the Red Scare era, academic speech issues merged into a general public employee speech doctrine, resulting in a “one-size-fits-all First Amendment jurisprudence.”⁴⁸

ACADEMIC SPEECH AND THE PUBLIC EMPLOYEE SPEECH FRAMEWORK

As public employees, speech by public academics is governed by the public employee speech framework outlined by the Supreme Court.⁴⁹ Prior to the Court’s decision in *Garcetti v. Ceballos*,⁵⁰ a public employee’s First Amendment speech claims were governed by the *Pickering* balancing test.⁵¹ In *Pickering*, the Court elucidated that the government “has interests as an

⁴⁴ *Id.* at 1190 (citing *Hetrick v. Martin*, 480 F.2d 705, 708-09 (6th Cir. 1973)).

⁴⁵ *Id.* *But see* *Parate v. Isibor*, 868 F.2d 821, 828-29 (6th Cir. 1989) (the court held that an individual professor’s assignment of a letter grade *is* protected under a First Amendment right to academic freedom after university officials compelled a professor to change a student’s grade. The court noted that if university officials had changed the student’s course grade (as opposed to compelling the professor to change the grade), the professor’s First Amendment rights would not be implicated) (emphasis added).

⁴⁶ Michael H. LeRoy, *How Courts View Academic Freedom*, 42 J.C. & U.L. 1, 24-28 (2016).

⁴⁷ *Id.* at 25-26.

⁴⁸ *Id.* at 14.

⁴⁹ *See, e.g.*, *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983); *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

⁵⁰ 547 U.S. 410 (2006).

⁵¹ This test refers to the framework set forth in *Pickering*, 391 U.S. at 563; *see also Connick*, 461 U.S. at 147-48 (1983) (the Court refined the *Pickering* analysis, requiring courts to look to the “content, form and context of a given statement, as revealed by the whole record” to determine whether speech addresses a matter of public concern).

employer in regulating speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.”⁵² The *Pickering* balancing test includes two elements: (1) the employee must show that his speech addresses a matter of public concern, and if it does (2) the employee’s interest in commenting upon a matter of public concern must outweigh the employer’s interest in operational effectiveness.⁵³ The Supreme Court’s subsequent ruling in *Garcetti* cemented a threshold question to the *Pickering* balancing test, distinguishing speech *qua* employee versus speech *qua* citizen.

In *Garcetti*, the Supreme Court considered the case of a deputy district attorney who wrote a memo to his supervisors informing them that a police affidavit supporting a search warrant contained serious misrepresentations.⁵⁴ After the prosecutor was reassigned and denied a promotion, the prosecutor claimed that his employer retaliated against him for writing the memo.⁵⁵ Ruling for the employer, the Court held that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”⁵⁶ The Court subsequently elaborated on what constitutes speech made pursuant to official job duties: “The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee’s duties, not whether it merely concerns those duties.”⁵⁷ Moreover, other relevant factors, although not dispositive, help determine whether speech is made pursuant to official duties, including whether the speech occurs in the workplace, whether it concerns the subject matter of the employee’s job,⁵⁸ and whether the speech owes its existence to a public employee’s responsibilities based on the timing and circumstances of the speech.⁵⁹

In sum, a public employee’s speech is not protected if it is made to fulfill their job duties, even if they are speaking on matters of public concern.⁶⁰ However, public employee speech is governed by the *Pickering* balancing

⁵² 391 U.S. at 568.

⁵³ *Id.*

⁵⁴ 547 U.S. 410, 413-15 (2006).

⁵⁵ *Id.*

⁵⁶ *Id.* at 421 (the Court defined speech made pursuant to a public employee’s job duties as “speech that owes its existence to a public employee’s professional responsibilities”).

⁵⁷ *Lane v. Franks*, 573 U.S. 228, 240 (2014); *see also Kennedy v. Bremerton Sch. Dist.*, 142 S.Ct. 2407, 2425 (2022) (the Court pointed to the timing and circumstances of a public employee’s speech in its determination that a football coach’s postgame prayers were not made while acting within the scope of his duties).

⁵⁸ *Garcetti*, 547 U.S. at 420-21.

⁵⁹ *Kennedy*, 142 S.Ct. at 2425.

⁶⁰ *Garcetti*, 547 U.S. at 423.

test when public employees speak as citizens (i.e., their speech does not fall within the scope of their official job duties). In dissent, Justice David Souter expressed concern that this new framework conflicted with academic freedom: “I have to hope that today’s majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write ‘pursuant to official duties.’”⁶¹ Prior to *Garcetti*, a few federal appellate courts already concluded that instructional speech was not entitled to constitutional protection because teachers do not speak on matters of public concern when their speech is pursuant to a school-mandated curriculum.⁶² The Supreme Court however, declined to decide whether this limitation would apply to public universities, raising questions as to *Garcetti*’s application to speech pursuant to teaching and scholarship.⁶³

As several scholars note, if *Garcetti* were to apply to the core duties of academics (namely teaching, scholarship, and service) very few speech activities would be subject to constitutional limitations.⁶⁴ Legal scholars Vikram Amar and Alan Brownstein point out that if courts find scholarship and service-based expression as part of the job’s duties—such as speaking to the press, professional associations, publishing articles and books—“then university professors may be punished for speaking in situations where they would have the most impact . . . [f]ar from having *greater* protection for their speech than the average citizen . . . [they] would have much, much *less*.”⁶⁵ Post-*Garcetti*, circuit courts have not uniformly applied *Garcetti* to academic speech, nor have they defined the limits of academic freedom.⁶⁶

⁶¹ *Id.* at 438 (Souter, J., dissenting).

⁶² See *Kirkland v. Northside Independent Sch. Dist.*, 890 F.2d 794,798-99 (5th Cir. 1989) (“Thus, issues do not rise to a level of ‘public concern’ by virtue of the speaker’s interest in the subject matter; rather, they achieve that protected status if the words or conduct are conveyed by the teacher in his *role as a citizen* and not in his *role as an employee* of the school district”); *Edwards v. California Univ. of Pa.*, 156 F.3d 488, 491 (3rd Cir. 1998) (“we conclude that a public university professor does not have a First Amendment right to decide what will be taught in the classroom”); *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 368 (4th Cir. 1998) (holding that a teacher’s selection of a school play, as part of the school curriculum, “does not present a matter of public concern and is nothing more than an ordinary employment dispute. That being so, plaintiff has no First Amendment rights derived from her selection of the play *Independence*.”).

⁶³ *Id.* at 425.

⁶⁴ See, e.g., Vikram David Amar & Alan E. Brownstein, *A Close-Up, Modern Look at First Amendment Academic Freedom Rights of Public College Students and Faculty*, 101 MINN. L. REV. 1943 (2017); Michael K. Park, *A Matter of Public Concern: The Case for Academic Freedom Rights of Public University Faculty*, 26 COMM. L. & POL’Y 32 (2021).

⁶⁵ Amar, *supra* note 64, at 1974.

⁶⁶ See *Gorum v. Sessoms*, 561 F.3d 179, 186 (3d Cir. 2009) (recognizing that the Court in *Garcetti* did not answer whether “official duty” analysis applied in the same manner to speech related to “scholarship and teaching”); *Emergency Coal. to Defend Educ. Travel v. U.S. Dept. of Treasury*, 545 F.3d 4, 12 (D.C. Cir. 2008) (“Assuming that the right to

Some circuits post-*Garcetti* have explicitly concluded that in-class curricular speech at the primary and secondary school level is not protected by the First Amendment.⁶⁷ The Sixth Circuit extended this rationale by applying *Garcetti* to in-class speech in public universities, asserting that academic institutions have the autonomy to determine in-class curricular speech.⁶⁸ Furthermore, in *Piggee v. Carl Sandburg College*, the Seventh Circuit pointed out that *Ceballos* signals the Supreme Court's concern that courts give appropriate weight to a public employer's interest, and that a university has a reasonable interest in ensuring that its instructors "stay on message" (i.e. lead germane discussions in class) with regard to the subject matter of their courses.⁶⁹ The court recognized the binary aspect of academic freedom before asserting that classroom or instructional speech "is inevitably speech that is part of the instructor's official duties"⁷⁰

Prior to *Meriwether*, the Ninth and Fourth Circuits determined that *Garcetti* does not govern First Amendment claims involving speech pursuant to teaching and scholarship.⁷¹ In *Adams v. Trustees of the University of N.C.-Wilmington*, the Fourth Circuit declined to apply *Garcetti* to a professor's claims for alleged speech-based discrimination that resulted in non-promotion.⁷² The court was particularly concerned with the broad concept of

academic freedom exists and that it can be asserted by an individual professor, its contours in this case are certainly similar to those of the right of free speech. Namely, the right can be invoked only to a governmental effort to regulate the *content* of a professor's academic speech" (citing *University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182 (1990)); *Mayer v. Monroe City Sch. Corp.*, 474 F.3d 477, 480 (7th Cir. 2007) (acknowledging the uncertainty regarding the constitutional protection of scholarly viewpoints that was "left open" in *Garcetti* and *Piggee*, 464 F.3d 667).

⁶⁷ See *Mayer*, *supra* note 66, at 480 (7th Cir. 2007) (invoking *Garcetti*, the Seventh Circuit concluded that the pedagogical choices of primary and secondary school teachers exceed the reach of the First Amendment); *Evans-Marshall v. Board of Educ. of Tipp Cty. Exempted Vill. Sch. Dist.*, 624 F.3d 332, 342 (6th Cir. 2010) ("A teacher's curricular and pedagogical choices are categorically unprotected, whether under *Connick* or *Garcetti*").

⁶⁸ *Evans-Marshall*, 624 F.3d at 344.

⁶⁹ *Piggee*, 464 F.3d at 672.

⁷⁰ *Id.* at 671. See also *Lyons v. Vaught*, 875 F.3d 1168, 1174 (8th Cir. 2017) (the Eighth Circuit ruled that a lecturer's defense of his original assigned letter grade during the university appeals process was made "pursuant to his duties" under *Garcetti*); *Foraker v. Chaffinch*, 501 F.3d 231, 240 (3rd Cir. 2007) (the Third Circuit held that a school athletic director's speech might be considered part of his official duties if it relates to "special knowledge" or "experience" acquired through his job).

⁷¹ See generally, *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014); *Adams v. Trustees of Univ. of N.C.-Wilmington*, 640 F.3d 550 (4th Cir. 2011).

⁷² *Adams*, 640 F.3d at 561-63.

employee speech that *Garcetti* imposes on university faculty speech, noting:

Applying *Garcetti* to the academic work of a public university faculty member ... could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment. That would not appear to be what *Garcetti* intended ...⁷³

In *Demers v. Austin*, the Ninth Circuit cited Justice Souter’s dissent in *Garcetti* to recognize an exception for “teaching and academic writing,” tasks that “are at the core of the official duties of teachers and professors.”⁷⁴ The court explicitly held that *Garcetti* does not apply to public university faculty speech related to scholarship and teaching.⁷⁵

In sum, in circuits that apply *Garcetti*’s framework to teaching and scholarship, statements made by academics pursuant to official job duties are not shielded by the First Amendment. If the statements made were not pursuant to official duties, then the *Pickering* test applies. Yet in circuits that have recognized a teaching and scholarship carve-out to *Garcetti*, there are three possibilities: (1) if an academic’s statements were made pursuant to official job duties, but did not constitute teaching and scholarship, *Garcetti* applies; (2) if the statements were made pursuant to official job duties and constituted teaching and scholarship, the *Pickering* test applies; (3) if the statements made were not pursuant to official job duties, then *Pickering* applies.

FACULTY USE AND CHOICE OF PRONOUNS AND TITLES

Speech Pursuant to Official Job Duties?

While there is a circuit court split as to whether the rule announced in *Garcetti* applies to speech related to scholarship and teaching, one issue that will be addressed in this section is whether an instructor’s in-class use of titles and pronouns to address students constitutes speech pursuant to official duties – and whether it should be categorized under teaching. While faculty teaching and scholarship represent core academic duties, not all faculty speech made pursuant to official duties falls under teaching or scholarship. Courts have nonetheless articulated a wide scope of speech that falls within the “core duties” of academic faculty.⁷⁶ In *Bhattacharya v. SUNY Rockland Community College*, a college professor alleged a violation of his

⁷³ *Id.* at 564.

⁷⁴ 746 F.3d 402, 411 (9th Cir. 2014). The court noted that *Garcetti*’s application to teaching and academic writing would directly conflict with First Amendment values articulated by the Supreme Court.

⁷⁵ *Id.* at 412.

⁷⁶ See *Demers*, 746 F.3d at 412 (9th Cir. 2014) (“teaching and academic

First Amendment rights in connection with student complaints about the professor's teaching methods when the professor refused demands by students to allow them to cheat on an exam.⁷⁷ The court held that the professor's speech in question—refusing to permit cheating—is “‘part and parcel’ of his official duties” as a professor.⁷⁸ The Second Circuit further explained that “maintaining class discipline” is one of the “core duties” of a faculty member, and that the professor's speech “involved neither scholarship nor teaching.”

In *Wozniak v. Adesida*, the Seventh Circuit held that a university's decision to terminate a tenured professor after he disclosed identifying information about students involved in a dispute regarding a teaching award was not a violation of the First Amendment.⁷⁹ The court pointed out that the professor's “core academic duties” included “how he ran his classroom, grad[ing] exams, assist[ing] students in conducting experiments or writing papers, or conduct[ing] his own research and scholarship.”⁸⁰ Furthermore, the court noted that how faculty members relate to their students “is part of their jobs, which makes *Ceballos* applicable.”⁸¹ Interestingly, the court made a point of how faculty relatability affects student learning and is integral to a university's ability to “fulfill its educational functions.”⁸²

Courts have also articulated that the scope of a public employee's official job duties include duties that are not explicitly included in the employee's job description.⁸³ In *Weintraub v. Board of Educ. of City School Dist. of City of*

writing are at the core of the official duties of teachers and professors”); *Piggee*, 464 F.3d at 671 (“Classroom or instructional speech, in short, is inevitably speech that is part of the instructor's official duties, even though at the same time the instructor's freedom to express her views on the assigned course is protected”); *Adams*, 640 F.3d at 563 (“There may be instances in which a public university faculty member's assigned duties include a specific role in declaring or administering university policy, as opposed to scholarship or teaching”); *infra* notes 77-86 and accompany discussion.

⁷⁷ 719 Fed. Appx. 26 (2nd Cir. 2017).

⁷⁸ *Id.* at 27.

⁷⁹ 932 F.3d 1008 (7th Cir. 2019).

⁸⁰ *Id.* at 1010.

⁸¹ *Id.*

⁸² *Id.* (“Professors who harass and humiliate students cannot successfully teach them, and a shell-shocked student may have difficulty learning in other professors' classes. A university that permits professors to degrade students and commit torts against them cannot fulfill its educational functions”).

⁸³ See *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1204 (10th Cir. 2007) (holding that speech could be considered within the scope of official duties even if “the speech concerns an unusual aspect of an employee's job that is not part of his everyday functions.” The Tenth Circuit held that teachers spoke pursuant to their jobs duties when they discussed the school's expectations regarding student behavior, curriculum, and

New York, a teacher alleged First Amendment retaliation after the teacher complained to administrators and filed a grievance over concerns that administrators were not adequately disciplining a student.⁸⁴ The Second Circuit held that the teacher’s grievance was speech pursuant to his official job duties and further asserted that speech can be pursuant to an employee’s job duties “even though it is not required by, or included in, the employee’s job description, or in response to a request by the employer.”⁸⁵ The court further noted that the teacher’s speech was tied to the maintenance of “classroom discipline, which is an indispensable prerequisite to effective teaching and classroom learning.”⁸⁶

In *Kluge v. Brownsburg Community School Corporation*, the court concluded that the way in which an educator addresses students is part of their official duties as a teacher.⁸⁷ The court noted that while addressing students may not be part of formal department curriculum, it is an indispensable academic duty: “it is difficult to imagine how a teacher could perform his teaching duties on any subject without a method by which to address individual students.”⁸⁸ Thus, the court tied in the act of addressing students as a necessary condition to communicate and teach students course material. In *Meriwether*, the Sixth Circuit noted that the professor (Meriwether) addressed students as “Mr.” or “Ms.” in order to foster “an atmosphere of seriousness and mutual respect” and was therefore “an important *pedagogical* tool in all of his classes[.]”⁸⁹ Undoubtedly, the use of honorifics and titles to address students correlates with a method for the maintenance of class behavior and discipline; in fact, the professor in *Meriwether* used honorifics to instill the view of the pursuit of higher education “as a serious, weighty endeavor.”⁹⁰ Moreover, the university administration in *Meriwether*⁹¹ and *Kluge*⁹² had also instructed faculty that they had to refer to students by their preferred pronouns. Thus, the mandated use of in-class honorifics and names that align with a student’s self-asserted

pedagogy); *Battle v. Board of Regents*, 468 F.3d 755, 761 (11th Cir. 2006) (holding that a university employee speaks pursuant to her job duties when she reports alleged improprieties with her supervisor’s handling of federal financial aid funds).

⁸⁴ 593 F.3d 196, 199 (2nd Cir. 2010).

⁸⁵ *Id.* at 203.

⁸⁶ *Id.*

⁸⁷ 432 F.Supp.3d 823, 839 (citing *Wozniak*, 932 F.3d at 1010).

⁸⁸ *Id.* (“Indeed, addressing students is necessary to communicate with them and teach them the material—as the Seventh Circuit has stated, how teachers relate to students *is* part of their jobs, and running a classroom is a ‘core academic dut[y]’”).

⁸⁹ *Meriwether*, 992 F.3d at 499.

⁹⁰ *Id.*

⁹¹ *Id.* at 498.

⁹² *Kluge*, 432 F.Supp.3d at 833-34.

gender identity is speech pursuant to state university policy; it can therefore be construed as a form of government speech because the state commissioned such speech and faculty members were expected to deliver such speech in the course of their jobs.⁹³ Moreover, professors also address students with titles and honorifics in an academic setting, and apart from occupying the position as an academic instructor would have no reason to address the students in class.

Irrespective of a formal directive from the administration regarding the use of preferred titles and names, the choice and use of titles and particular names to address students is oriented with how an instructor governs the classroom; classroom management and discipline fall within the scope of a faculty member's core duties. The formal use of honorifics and titles can also be construed as a pedagogical method to foster mutual respect and a sense of seriousness in the academy. Addressing students in such a manner also aligns with a teaching method professors adopt to relate to their students, given the issue of relatability is an important factor affecting student learning. While an instructor may not share the view of a state-directed message that is conveyed with the use of names and pronouns that reflect a student's self-asserted identity, their use in the academy owes their existence to a professor's class responsibilities. In sum, a professor's method to address students, including the in-class use of titles or honorifics, clearly fits within the scope of core academic duties—under teaching—and should therefore be subject to *Garcetti*. For circuits that apply *Garcetti* to teaching and scholarship, such in-class speech pursuant to official job duties should not be constitutionally insulated from university regulation.

Academic Speech on a Matter of Public Concern v. University Interests in Preventing Discrimination and Disruption to Student Learning

If public university professors carry their threshold burden under the *Garcetti* framework, or if the circuit has determined that *Garcetti* does not apply to speech pursuant to teaching and scholarship, then the *Pickering* balancing test applies. The university must then prove that its interests as employer in regulating speech outweigh the professor's speech on a matter of public concern.⁹⁴ Of course, not all speech in the classroom implicates matters of public concern. Speech is considered a matter of public concern "when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the

⁹³ Issues involving the government speech doctrine will not be analyzed in this article, as both the *Kluge* and *Meriwether* case did not address the doctrine.

⁹⁴ *Id.*

⁹⁵ See *supra* notes 51-53 and accompany discussion.

public.”⁹⁵ Issues of public concern matter because such issues lie at the core of the First Amendment and the theory of self-government. For the late Alexander Meiklejohn, fundamental to the Free Speech Clause was the citizenry’s political freedom “to govern themselves, rather than to be governed.”⁹⁶ Legal scholar Robert Post notes that the theory of the First Amendment espoused by Meiklejohn developed from the idea that freedom of speech is necessary to produce educated and informed public opinion.⁹⁷ Under the theory of self-government, the interest of the public in receiving information necessary to fulfill its sovereign function is paramount. Therefore, this civic conception of the First Amendment requires a judicial application of free speech principles that considers whether speech promotes public discourse to maintain a self-governing republic.⁹⁸

Thus, a determination must first be made as to whether a faculty member’s choice and use (or non-use) of titles and honorifics to address students is speech involving a matter of public concern and not merely speech pursuant to personal interest.⁹⁹ Both of the educators in *Meriwether* and *Kluge* refused to follow institutional directives mandating that instructors use pronouns and names that reflected students’ self-asserted gender identity; instead, they addressed students by their last name only.¹⁰⁰ At first glance, this points to the furtherance of a purely private (religious) interest. However,

⁹⁶ *Lane*, 573 U.S. at 241 (quoting *Snyder v. Phelps*, 462 U.S. 443, 453 (2011)); see also Clay Calvert, *Defining “Public Concern” After Snyder v. Phelps: A Pliable Standard Mingles with News Media Complicity*, 19 VILL. SPORTS & ENT. L.J. 19 (2012) for a further discussion on the “public concern” standard after the Supreme Court’s ruling in *Snyder v. Phelps*.

⁹⁷ Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 263.

⁹⁸ Post, *supra* note 18.

⁹⁹ See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005) (arguing that constitutional interpretation and application should take greater account of the Constitution’s democratic nature—participatory self-government and democratic deliberation—when courts interpret the Constitution). See also CASS SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1995); Mark Lloyd and Michael Park, *The Constitutional Case for Addressing Critical Information Needs*, in *THE COMMUNICATION CRISIS IN AMERICA, AND HOW TO FIX IT* 235-47 (Mark Lloyd & Lewis A. Friedland eds., 2016).

¹⁰⁰ See *Connick*, 461 U.S. at 147. See also *Milwaukee Deputy Sheriff’s Ass’n v. Clarke*, 574 F.3d 370, 377 (7th Cir. 2009) (The court notes that motive for speaking is a relevant consideration. Motive “matters to the extent that even speech on a subject that would otherwise be of interest to the public will not be protected if the expression addresses only the personal effect upon the employee, or if the *only* point of the speech was to further some purely private interest”); *Morris v. City of Colo. Springs*, 666 F.3d 654, 661 (10th Cir. 2012) (“[S]peech relating to internal personnel disputes and working conditions ordinarily will not be viewed as addressing matters of public concern”).

¹⁰¹ See *Meriwether*, 992 F.3d at 499; *Kluge*, 432 F.Supp.3d at 839.

the speech act of referring to students by titles and honorifics can serve both a pedagogical and personal interest, along with mixed questions of private and public concern. For instance, in *Meriwether*, the professor's use of titles and honorifics to address students was pursuant to a pedagogical purpose, but his refusal to address a student by her preferred name and pronoun stemmed from a personal religious interest;¹⁰¹ nonetheless, if any part of the speech relates to a matter of public concern, then the *Pickering* balancing test applies. The inquiry into whether speech is a matter of public concern ultimately “turns on the ‘content, form and context’ of the speech.”¹⁰²

In light of this framework, the Sixth Circuit in *Meriwether* noted that the professor's refusal to use names and titles that refer to a student's self-asserted gender identity was to convey a message; in other words, *the medium was the message* and it “reflected his conviction that one's sex cannot be changed”¹⁰³ Similarly, in *Kluge*, the instructor argued that the school administration threatened to punish him “for refusing to communicate a school corporation-mandated ideological message regarding gender dysphoria.”¹⁰⁴ With regard to content, issues of gender identity, including the treatment of individuals based on their gender identity, are unquestionably a matter of public concern.¹⁰⁵ An intent to convey a message, however, must be coupled with a great likelihood, based on the surrounding circumstances, that the message will be understood by those exposed to it.¹⁰⁶

Yet in the context of a classroom, the refusal to use students' preferred names, and instead refer to students by their last name alone, is not inherently expressive. It is difficult to see how broader political and social concerns are implicated if it is never explained to the recipients of the purported message—students in the class—the motivations behind the use or non-use of particular titles, let alone an intent to convey a particular message. Within the academy, students rarely question an instructor's method to address students, especially since students are subject to communication formalities (between professor and student) and are expected to show deference to

¹⁰² 992 F.3d at 499.

¹⁰³ *Lane*, 573 U.S. at 241 (quoting *Connick*, 461 U.S. at 147-48). As legal scholar Clay Calvert points out, the Supreme Court has failed to articulate effective specificity as to what constitutes a matter of public concern, leaving “multiple unresolved questions” under this legal framework. See Calvert, *supra* note 95, at 53-54.

¹⁰⁴ *Meriwether*, 992 F.3d at 508.

¹⁰⁵ *Kluge*, 432 F.Supp.3d at 836.

¹⁰⁶ *Janus v. American Fed'n of State, Cnty, and Mun. Emps. Council 31*, 138 S. Ct. 2448, 2476 (2018) (recognizing that “gender identity” is a “sensitive political topic[]” and a matter of “profound value and concern to the public”).

¹⁰⁷ *Spence v. Washington*, 418 U.S. 405, 410-11(1974); *Rumsfeld v. Forum for Acad. and Institutional Rts., Inc.*, 547 U.S. 47, 64-66 (2006).

faculty decisions regarding class management. If matters of public concern sit at the core of the First Amendment, it is because such speech is tied to the value of *informed* decision makers in a self-governing society.¹⁰⁷ Neither educator in *Meriwether* and *Kluge* publicly conveyed their views about gender identity nor invited a class discussion about transgender issues. Furthermore, the choice to use a particular name or refer to students by last name may even be interpreted as gratuitous, and thus incidental to any underlying message conveyed.¹⁰⁸ In sum, the conveyance of a message (and viewpoint) through the choice and use of titles and names must be understood by the recipients exposed to it, otherwise such speech neither advances public discourse nor deliberation pursuant to democratic self-governance.

Even assuming such speech qualifies as speech on a matter of public concern, the interests of the educator to comment upon matters of public concern must be weighed against the university's interest in promoting efficiency of the public services it performs through its employees.¹⁰⁹ The Sixth Circuit in *Meriwether* held that the professor's academic freedom interests outweighed the university's interests in stopping discrimination against transgender students.¹¹⁰ While the court devoted little consideration to the university's interests in mitigating discrimination,¹¹¹ the fact is that universities also enjoy institutional academic freedom¹¹² and have a strong interest in preventing disruptions to the institution's educational mission.¹¹³ This point was made clear in *Kluge*, where school authorities produced ample

¹⁰⁸ See *infra* notes 96-98 and accompanying discussion.

¹⁰⁹ See *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1187-89 (6th Cir. 1995) (holding that a college coach's use of the N-word toward his student-athletes "was intended to be motivational and was incidental to the message conveyed." The coach's argument that his speech was protected by academic freedom was rejected because it failed to "advance[] an idea transcending personal interest or opinion which impacts our social and/or political lives"); *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 678-79 (6th Cir. 2001) (holding that the use of racially explicit words in a college class addressing "socially controversial words" was germane to the class lecture and related to matters of public concern—and thus distinguishable from *Dambrot*).

¹¹⁰ *Pickering*, 391 U.S. at 568.

¹¹¹ 992 F.3d 498, 509-11.

¹¹² *Id.* at 511 (the court noted that the original compromise between *Meriwether* and the university that allowed *Meriwether* to refer to students using their last name only resulted in Doe actively participating in class, and that *Meriwether*'s speech did not "hamper[] the operation of the school or den[y] Doe any educational benefits").

¹¹³ See *infra* notes 22-48 and accompanying discussion.

¹¹⁴ See *Piggee*, 464 F.3d at 672 (noting that the college had an interest in ensuring that its instructors stay on message, and that the instructor's discussions on religion disrupted the students' education and impeded the school's educational mission); *Bishop*, 926 F.2d at 1074 (the court grounded its analysis to determine the university's interests in restricting a professor's in-class speech with the "basic educational mission" of the school).

evidence that the educator’s last-names-only practice made transgender students feel “insulted and disrespected . . . isolated and targeted.”¹¹⁴ As the Seventh Circuit noted, “[a] practice that indisputably caused emotional harm to students and disruptions to the learning environment is an undue hardship to a school as a matter of law.”¹¹⁵

Moreover, courts have historically been deferential to the pedagogical decisions of the academy, and have recognized the need to tread cautiously when considering the constitutionality of a university’s pedagogical approaches.¹¹⁶ In *Christian Legal Soc. Chapter of the University of California Hastings College of the Law v. Martinez*, the Supreme Court reviewed the constitutionality of a law school’s nondiscrimination policy and noted the need to review school pedagogical decisions carefully: “Cognizant that judges lack the on-the-ground expertise and experience of school administrators . . . we have cautioned courts in various contexts to resist ‘substitut[ing] their own notions of sound educational policy for those of the school authorities which they review.’”¹¹⁷ Such deference to institutional decision-making is perhaps the tacit recognition that academic freedom resides—if not primarily—in the educational institution.¹¹⁸

Prior to the Sixth Circuit’s decision in *Meriwether*, the Sixth Circuit even recognized academic freedom as a right that “inheres in the University, not in individual professors.”¹¹⁹ In *Johnson-Kurek v. Abu-Absi*, a university professor argued that the university violated her First Amendment rights when she refused to comply with an administrator’s request to articulate clearer course guidelines, resulting in the subsequent denial to teach an additional course.¹²⁰ The court concluded that while the First Amendment may protect the professor’s right to express her ideas about pedagogy:

[I]t 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

¹¹⁵ *Kluge*, 64 F.4th at 885.

¹¹⁶ *Id.* at 886.

¹¹⁷ *Christian Legal Soc. Chapter v. Martinez*, 130 S. Ct. 2971, 2988 (2010). See *infra* notes 22-48 and accompanying discussion; see also *Widmar v. Vincent*, 454 U.S. 263, 268, n. 5 (1981) (the Court held that First Amendment rights “must be analyzed in light of the special characteristics of the school environment”).

¹¹⁸ *Christian Legal Soc.*, 130 S. Ct. at 2988 (citing *Board of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 206 (1982)).

¹¹⁹ See *infra* notes 22-48 and accompanying discussion.

¹²⁰ *Johnson-Kurek*, 423 F.3d at 593 (citing *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000)).

¹²¹ *Id.* at 595.

whenever they conflict with his or her teaching philosophy.¹²¹

Accordingly, university nondiscrimination policies are enacted pursuant to the university's freedom in preventing disruptions to student learning, which helps to preserve the school's educational mission. The Supreme Court has even held that university viewpoint-neutral nondiscrimination policies that reasonably restrict speech rights may "survive constitutional review."¹²² Thus, in consideration of a university's interest in efficient pedagogical operations, the judicial review of a professor's choice and use of titles and particular names should consider whether a professor's speech disrupts, or threatens to disrupt, the successful operation of the academy, fosters disharmony with students and faculty, or otherwise impedes effective student learning. Treating similarly situated students differently based on their self-asserted gender identity, not only elicits a dynamic of marginalization, but negatively affects faculty reliability—which could lead to disruptions to the educational enterprise.¹²³ The tradition of deference showed to public university academic decision-making evinces the critical importance of institutional autonomy. Courts should therefore afford considerable leeway to university decisions regarding its nondiscrimination policies that are pursuant to preventing disruptions to student learning.

CONCLUSION

Recent court decisions addressing policies that require educators to address students by their preferred names and pronouns reflect the intense debate regarding campus speech pitting the academic freedom of educators against the academic interests of the institution. The breadth and scope of constitutional academic freedom, however, remains an unsettled question. Yet courts have recognized a wide scope of speech that encompasses the "core duties" of academic faculty.¹²⁴ An educator's choice and use (or refusal to use) a student's pronoun or name aligns with how an instructor governs the classroom, and class management and discipline are within the scope of a faculty member's job duties and should therefore be subject to *Garcetti*. For most legal disputes, the analysis should end there, diffusing an educator's academic freedom claim against the university.

But for a minority of circuits—including the Sixth Circuit after *Meriwether*—*Garcetti* does not apply to teaching and scholarship, and courts

¹²² *Id.* at 595.

¹²³ *Christian Legal Soc.*, 561 U.S. at 687-690.

¹²⁴ See *infra* notes 79-82 and accompanying discussion.

¹²⁵ See *infra* notes 76-90 and accompanying discussion.

must determine if an educator's speech (or refusal to use preferred names) addresses a matter of public concern. Courts should tread carefully when prescribing honorifics and titles with content-based speech, particularly since referring to students by a particular name alone does not inherently communicate a message beyond the salutation. Furthermore, a decision like *Meriwether* underscores concerns related to a lack of due consideration to strong university academic interests centered on preventing discrimination and disruptions to student learning. Ultimately, the balancing of interests between the individual academic and the university is a matter of law, and courts should proceed judiciously when faced with strong university interests in promoting equality and preventing disruptions to students' education. Nonetheless, academic freedom is a critically important concept for the maintenance of a democratic society, irrespective of any constitutional foothold it may enjoy.

* * *