

ACADEMIC FREEDOM AND INSTITUTIONAL AUTONOMY IN AMERICAN AND AUSTRALIAN UNIVERSITIES: A TWENTY-FIRST CENTURY DIALOGUE AND A CALL TO LEADERS

PATRICK D. PAUKEN[†]

BOWLING GREEN STATE UNIVERSITY, USA

Within the context of academic freedom and institutional autonomy, and ultimately with respect to the important roles played by university leaders, this article explores the current dialogue among American and Australian university players, both individual and institutional, as those players search for, develop, define, modify, and proclaim their respective voices and messages, particularly in a world where the role and position of universities are changing.

I INTRODUCTION

In 1964, Marvin L. Pickering, a public school teacher in Illinois, wrote a letter to the editor of a local newspaper criticising his board of education for the board's appropriation of funds and its handling of two failed tax levy campaigns. The board countered with accusations that the statements in the letter were false and had a negative impact on the efficient operation of the schools. The board of education then fired Pickering.¹ Meanwhile, in Australia, administrators at the University of Sydney vetoed the appointment of philosophy professor Frank Knopfelmacher after he exposed Communist infiltration in some of the academic units at the University of Melbourne.²

Fast forward to 2005. Ward Churchill, faculty member in the University of Colorado's ethnic studies department, came under significant fire on campus and throughout the United States for his written and spoken arguments that, among other comments, the victims of the terrorist attacks of September 11, 2001, were 'little Eichmanns' and presumably deserved their fate. In a July 6, 2005, letter to a suburban Sydney, Australia, newspaper, Andrew Fraser asserted that the influx of black Africans and other migrants to the Parramatta-Bankstown area had resulted in a steady erosion of the 'distinctive national identity' of Anglo-Australians. According to Fraser, an expanding black population is a 'sure-fire recipe' for increases in crime, violence, and a wide range of other social problems. He then signed the letter as 'Associate Professor' in the Department of Public Law at Macquarie University.³ Fraser's letter was met with understandable outrage from the university and a request for an early retirement. Fraser declined the university's request to buy out the final year of his contract (he was due to retire at the end of June 2006). Subsequently, the university cancelled his teaching assignments for the entire year. In March 2006, the president of the Australian Human Rights and Equal Opportunity Commission (HREOC) declared Fraser's

[†]*Address for correspondence:* Associate Professor Patrick Pauken, Educational Administration and Leadership Studies, Bowling Green State University, Bowling Green, Ohio, 43403-0250, USA. Email: paukenp@bgsu.edu

letter unlawful, in violation of Australia's Racial Discrimination Act. And on 26 June 2006, Fraser lodged a formal complaint with the HREOC alleging political discrimination and 'anti-white racial vilification'. According to a media release from Fraser, in the same July 2005 issue of the *Parramatta Sun* that published Fraser's letter was an editorial by the paper's editor that claimed it was 'mere fantasy' to worry about 'black crime' in light of the record of crime perpetrated by white Europeans throughout the world. Suffice it to say that such incidents, whether 50 years ago or this week, spark fiery debates over the role of academic freedom in today's universities.

To date, only one of the four cases presented above has been decided by a court. Pickering appealed his termination and, ultimately, the United States Supreme Court held in his favor, rejecting the argument that public employees give up their constitutional rights as citizens, to speak on matters of public importance, when they accept public employment. The ruling in *Pickering* has been reiterated countless times over the past few decades. However, the weight given to it has varied, depending on the context, content, and effect of the speech, as well as the personal and professional role played by the speaker. Moving to higher education, we start with a US Supreme Court statement from 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. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. ... 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.⁴

Grand statements like this one set quite an inviting scene for dialogue among university leaders, faculty, students, and community members. The issues at the discussion tables in academic settings have varied widely in their specifics over the years. In the 1950s and 1960s, there were investigations of faculty members who may have been members of alleged 'subversive organizations' and disciplinary actions taken against students and faculty who engaged in allegedly disruptive political protests and rallies.⁵ In the 1990s and 2000s, there are cases of faculty members accessing questionable information on World Wide Web sites (*Urofsky v Gilmore*),⁶ controversial classroom discussions (*Bishop v Aronov*),⁷ and the production of highly controversial plays (*Linnemeir v Board of Trustees of Purdue Univ.*).⁸ Despite the variation in factual contexts, the sentiment remains: 'The classroom is peculiarly the marketplace of ideas' (*Keyishian v Board of Regents*).⁹

The resolution of legal conflict in free speech and expression cases in institutions of higher education typically involves the interplay of individual and institutional voices. On one hand, there is the *individual* right to exercise important freedoms such as the freedom of speech, freedom of association or assembly, and freedom of religious worship. In the heart of educational settings, the asserted right is to academic freedom — the procedural and substantive freedom of both faculty and students to teach and engage in scholarship free of unreasonable institutional intrusion. On the other hand, there is the *institutional right* to restrict or suppress an individual's exercise of freedoms, where this exercise may hamper the efficient, effective, well guided, and well-defined operation of a government-supported university. There is also the institutional right of a university to form its own voice as an institution, to share with its community its own message and its own mission and vision — in effect, the institution's academic freedom to guide and direct the teaching and scholarship of its students and faculty. It is the balance between and the

combined effect of these individual and institutional voices that forms the concept of academic freedom explored in this article.

The landmark case from New Zealand, *Rigg v University of Waikato*,¹⁰ offers a fine example of this individual/institutional balance. In *Rigg*, the university terminated the faculty contract of a professor of German who wrote a letter to a university newspaper claiming that the cancer-related deaths of students were due to inadequate supervision of the university's biology isotope laboratory. Sir David Beattie, in his opinion as Visitor of the University of Waikato, recommended that the termination stand. However, he was not unsympathetic to Rigg's claims of academic freedom. 'We ... support the view that university authorities ought not to use their legal powers to discipline a member of academic staff for conduct which truly falls within the scope of academic freedom of thought and expression'.¹¹ He simply argued that academic and intellectual freedom rights have their limits, that the academic freedom granted to the individual does not carry with it the right to publish unfounded accusations against university officials, when those accusations have not been properly investigated. According to the judgment, "Freedom" is not to be interpreted as uninhibited licence'.¹² The letter was ruled a 'grossly irresponsible' act on the part of Rigg.

In similar regard to the individual/institutional balance, universities will often include, in their policies, statements supporting individual academic freedom, with recognition of larger university goals. For example, consider the following, from Bowling Green State University in the United States, likely typical of most university pronouncements on academic freedom and also reflective of the exchange between individual rights and institutional interests:

Essential to the atmosphere of a University is academic freedom, the full freedom of speech, freedom to teach, to learn, and to conduct inquiry in a spirit of openness necessary to the acceptance of criticism, the expression of differing opinions, and the pursuit of truth. The exercise of academic freedom by faculty and students carries with it responsibilities for the good of the academic community and society. (Article I.A., Bowling Green State University Academic Charter)¹³

Within this context and ultimately with respect to the important roles played by university leaders, this article explores the current dialogue among American and Australian university players, both individual and institutional, as those players search for, develop, define, modify, and proclaim their respective voices and messages, particularly in a world where the role and position of universities is changing.

II ACADEMIC FREEDOM: THE UNITED STATES CONTRIBUTION

According to Hofstadter and Metzger,¹⁴ the traditional notion of academic freedom was composed of two concepts. *Lehrfreiheit* is the freedom to teach for teachers. *Lernfreiheit* belongs to students as their right to determine the course of their own studies. In 1940, the American Association of University Professors (AAUP) adopted, in part, the following statement of principles declaring academic freedom as a right that belonged to professors:

Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition. ... Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is

fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning.¹⁵

In practice, naturally, academic freedom is not without its limits. Moreover, the amount of American case law on the asserted academic freedom rights is high, particularly in cases involving personnel, and the developing judicial standards applied to academic freedom claims are not without their controversy. From the faculty member's perspective, early cases involved conduct and content in the classroom (*Clark v Holmes*, *Riggin v Board of Trustees of Ball State Univ.*).¹⁶ Recent applications expand on those traditional scenarios and discuss the rights of faculty members to develop their own grading policies (*Brown v Armenti*, *Wozniak v Conry*)¹⁷ and to conduct controversial research in cyberspace on university-provided computer systems (*Urofsky*).¹⁸ From the students' perspective, early cases involved the right to engage in protests (*Cox v Louisiana*)¹⁹ and form student organisations (*Healy v James*).²⁰ More recently, students have been embroiled in cases involving student publications (*Rosenberger v University of Virginia*, *Kincaid v Gibson*, *Hosty v Carter*)²¹ and the right to direct their classroom activities (*Axson-Flynn v Johnson*).²² Along with the judicially active conversation on the contributions of faculty and students has come a most significant development — the increasing role of the institution as a contributor, a speaker, in the dialogue. Sections III, IV, and V of the article addresses the balance American courts attempt to strike among these central contributors.

III STUDENTS

While the ultimate emphasis in this article is on the academic freedom rights of the contributors to university dialogue, in order to fully illustrate the state of academic freedom today, some foundational points must be made on the broader speech rights of students in other academic contexts — student protests, student organisations, and student publications.

A review of the case law in the area reveals that very few student protests involve genuinely violent or disruptive behavior on the part of the protestors themselves. In the end, though, a 'disruption' standard applies, where a college or a university may restrict the expressive activity of students if that activity is substantially interfering or materially disruptive to the rights of others or the operation of the college or university (*Tinker v Des Moines Indep. Comm. Sch. Dist.*).²³ In *Cox v Louisiana*,²⁴ the United States Supreme Court overturned the convictions of several university students who engaged in a peaceful march and sit-in at racially segregated lunch counters in Baton Rouge, Louisiana. According to the Court, one of the very functions of free speech is to invite dispute. Speech 'may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger'.²⁵

While the convictions in *Cox* were overturned, the Court did give university administrators valuable policy making guidance. Colleges and universities have the inherent power to make and enforce rules and regulations for the discipline of their students and the protection of their property. As such, restrictions on disruptive protests and obstruction of public passages are acceptable. Reasonable time, place, and manner restrictions, even in a marketplace of ideas, must be respected, so long as they are content-neutral, narrowly-tailored to serve significant governmental interests, and leave open alternative channels of communication.

The concerns over content-neutrality and viewpoint-neutrality are important ones, as they form the heart of today's greatest disputes about academic freedom. Administrator disagreement over the views expressed by students in nonviolent expressive activities and/or in student

organisations is not enough to suppress the speech. In *Healy v James*,²⁶ for example, the Supreme Court struck down a university's decision to deny a student petition to form a chapter of Students for a Democratic Society (SDS). 'As repugnant as [the students'] views may have been, especially to one with [University] President James' responsibility, the mere expression of them would not justify the denial of First Amendment rights'.²⁷ When a university opens up a forum for debate — public expression and peaceful protest — it must maintain that forum neutrally. Recently, religious speech on public university campuses has been met with controversy (*Bowman v White, Pro-Life Cougars v University of Houston, Orin v Barclay*).²⁸ Campus policies forbidding the disruption of university operation and the individual rights of others are legal as content-neutral restrictions narrowly tailored to meet the college's legitimate governmental and pedagogical interests. But in a 'limited public forum' established by the university, a policy that disallows expression on the basis of religious viewpoint will most often be struck down. Similar viewpoint-neutrality and limited public forum arguments apply to student publications (*Rosenberger v Rector and Visitors of the University of Virginia*)²⁹ and student organisations (*Christian Legal Society v Walker*).³⁰

The student publication arguments get trickier when the university formally sponsors and funds the publication. The students argue that the publication is a limited public forum and viewpoint neutrality standards apply; the university argues the publication is produced under agreements with the administration, under the aegis of student codes of conduct and, therefore, stricter speech rules apply. With that argument comes the possibility that the landmark US K-12 student newspaper case, *Hazelwood Independent School District v Kuhlmeier*,³¹ is applicable to public university publications as well. In *Hazelwood*, the Supreme Court held that a public school newspaper and the school classrooms were not open forums and that the school may exercise editorial control over the content and style of student speech in school-sponsored expressive activities so long as the controls are based on legitimate pedagogical concerns. The applicability of *Hazelwood* to higher education was challenged in *Kincaid v Gibson*,³² a case involving a disagreement between students and administrators over the style and content of the university-sponsored yearbook (edited by students). Rejecting the trial court's application of *Hazelwood's* nonpublic forum analysis, the full panel of the Court of Appeals for the Sixth Circuit held that the university yearbook was a limited public forum (or a 'designated public forum') and subjected the Vice President's decision to stricter scrutiny. The Seventh Circuit, in *Hosty v Carter*,³³ also held that a college-sponsored newspaper was a designated public forum, but it applied a *Hazelwood* analysis to get there. In other words, according to the Seventh Circuit, *Hazelwood* does apply to university-sponsored publications, but the particular paper at issue was supported in a slightly more open forum.

Hazelwood does not apply consistently in the context of university-sponsored publications; but its application to students' academic speech in the classroom is likely a different story. In *Brown v Li*,³⁴ for example, Christopher Brown added a 'Disacknowledgments' section at the end of his master's thesis, insulting the dean and staff of the university's graduate school, the staff at the university library, and a former California governor. His thesis committee did not accept the thesis, withheld the degree, and placed Brown on academic probation. After several months of probation, the university relented and granted the degree when Brown agreed to submit the thesis without the offending section. Brown, however, filed suit alleging a violation of free speech. The trial court found for the defendants and, in a sharply divided opinion, the Ninth Circuit Court of Appeals affirmed. The appellate court's lead opinion applied *Hazelwood* and held that the decisions made by the staff and faculty were reasonably related to legitimate educational concerns:

... [A]n educator can, consistent with the First Amendment, require that a student comply with the terms of an academic assignment. ... [T]he First Amendment does not require an educator to change the assignment to suit the student's opinion or to approve the work of a student that, in his or her judgment, fails to meet a legitimate academic standard.³⁵

Factually, the result in *Brown* may be satisfactory to college and university personnel, in that some level of professional discipline and academic standard must be met — standards established under the discretionary authority of college and university academic leaders. However, on the level of student free speech in the higher education context, the right and opportunity of a student to direct learning or to contribute to learning outcomes or the overall knowledge base in a classroom setting may be hampered by the extensive application of *Hazelwood* in the university classroom. The lead opinion in *Brown* deferred to the curricular missions and the syllabi of faculty members and their necessary inclusion of material that enhances the critical thinking abilities of students. The partial dissent in *Brown*, on the other hand, disagreed vigorously and argued the point that college and university students are typically more mature and independent than are their K-12 counterparts, and that the courts have regularly afforded them more speech rights. The dissent argued that, perhaps, a limited public forum analysis would better suit the college and university classroom, where reasonable time, place, and manner restrictions are permissible, viewpoint discrimination is impermissible, and where content-based restrictions are subject to strict judicial scrutiny.

One post-*Brown* decision, however, seems to indicate the comfort level courts have in applying *Hazelwood* to higher education classrooms. In *Axson-Flynn v Johnson*,³⁶ a former student in the University of Utah's Actor Training Program (ATP) filed suit against the program faculty alleging that the faculty violated her rights to free speech and free exercise of religion when they required her to perform monologues and other scenes that contained what the student (Axson-Flynn) argued were offensive words. Axson-Flynn, a Mormon, told the faculty as early as her audition for the program that there were things she felt uncomfortable doing as an actor, including nude scenes, taking the name of God or Christ in vain, and saying 'the four-letter expletive beginning with the letter F'. Once admitted to the program, Axson-Flynn reiterated her discomforts. While she received very good grades on assignments, instructors told her that she would have to 'get over' her misgivings if she wished to grow as an actor. The faculty members said that Axson-Flynn would have to modify her values or consider leaving the program. Axson-Flynn was never explicitly asked to leave the program; but she did, indeed, leave the university after only one semester. The court found factual disputes and remanded the case. However, on the substantive legal merits, the Tenth Circuit explicitly held that *Hazelwood* applied, in that the University of Utah's classrooms were nonpublic forums and the associated speech by students and faculty was university-sponsored. 'Few activities bear a school's imprimatur and involve pedagogical interests more significantly than speech that occurs within a classroom setting as part of a school's curriculum'.³⁷ While admitting that the ATP compelled Axson-Flynn to speak, an action that would be scrutinised heavily in a more public forum, the court held that some compulsion to speak is expected in academic work at all levels of education and often reasonably related to legitimate pedagogical concerns (e.g., acting class).

IV FACULTY AND STAFF

Similar to the discussion of speech issues affecting students, a discussion of the expression rights of faculty and staff involves the balance between the rights and responsibilities of employees and the institutions themselves. This balance is best met through an analysis of the capacities the

speakers have taken to express their views. On one end of the balance, we must ask whether the faculty or staff member is speaking as a citizen, an employee, or as an educator. On the other end, we must ask whether the college or university's interest is inspired by its role as sovereign, employer, educator, or patron.

A discussion of the expression rights of public college and university employees as citizens finds much of its foundation in the freedom to associate and the freedom to speak on matters of public concern (*Pickering*, *Keyishian*, *Sweezy*).³⁸ The Court in *Pickering*, discussed earlier, stated that the 'problem in any case is to arrive at a balance between the interests of the teachers, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees'. In favoring the teacher, the Court in *Pickering* found that the teacher was speaking as a citizen on a matter of public importance and such speech did not hamper his job performance or materially and substantially interfere with the operation of the school district as a whole.

While the 'marketplace of ideas' sentiment of *Keyishian* remains alive and well, the faculty/staff member's status as 'employee' adds a well-litigated wrinkle to the balance, beginning with *Pickering* and continuing with *Connick v Myers*³⁹ and, most recently, *Garcetti v Ceballos*.⁴⁰ According to the decision in *Connick*, the determination of whether the citizen/public employee's speech is related to a matter of public concern is an important one. If it is related to a matter of public concern, then the courts may favor the speaker as a citizen and restrict employer suppression of the expressive activity as in *Pickering*. If it is not, then the courts will generally find in favor of the employer and allow the employer some control over internal matters:

When employee expression cannot be fairly considered as relating to any other matter of political, social, or other public concern, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.⁴¹

Garcetti extends the argument against excessive judicial intrusion into governmental affairs and emphasises the role the employee/citizen was playing when he or she made the disputed statements. In *Garcetti*, a deputy district attorney examined an affidavit used to obtain a search warrant in a pending criminal case. The attorney determined that the affidavit was flawed and wrote a report outlining the misrepresentations and suggested that the case be dismissed. The prosecutor's office proceeded with the case, despite the recommendation. The attorney then claimed that he was subjected to a series of retaliatory employment decisions in violation of his First Amendment rights. A tight 5-4 majority of the Supreme Court disagreed and found that the controlling factor in such a case is that employee was making his statements as part of his regular job responsibilities. The Court held that 'when 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'.⁴²

The Court in *Garcetti* explicitly recognised *Pickering* as good law and reaffirmed that public employees do not lose their status as citizens merely because they are public employees. Therefore, almost regardless of any post-*Garcetti* applications to higher education, it seems a critical question remains whether the speech at issue relates to a matter of public concern. To answer this question, a court looks at the content, context, and form of the speech, as well as the motive of the speaker. Is the speech calculated to redress personal grievances, or does it have a broader public purpose? Does the employee wish to move the public to speak out on the matter as well? To make these points, each case in the *Pickering-Connick* line does not need full

discussion here. Examples of public concerns in college and university speech include arguments by a department chair over the proposed move of part of the department's operations to another city nearby (*Schrier v Univ. of Colorado*);⁴³ a faculty member joining a student protest over the international meeting of the World Trade Organization in Seattle in 1999 (*Hudson v Craven*);⁴⁴ a grievance over the abrupt cancellation of a military history exhibit (*Burnham v Ianni*);⁴⁵ criticism of curriculum, inadequate facilities, low faculty-to-student ratio, poor performance of graduates on a licensing exams, the ability of the department to prepare students for professional careers, and the status of accreditation (*Maples v Martin*);⁴⁶ criticism by a tenured professor of the current president and board of trustees based on financial management and accreditation concerns (*Bauer v Sampson*);⁴⁷ statements made by a college program administrator to an investigating committee regarding the money management and program funding decisions of the university's central administration (*Hamer v Brown*);⁴⁸ participation in a faculty vote of 'no confidence' for their dean (*Honore v Douglas*);⁴⁹ an assistant dean's public criticism over the university's budgetary decisions and minority student recruitment efforts (*Roberts v Broski*, 1999); a law school professor's speech advocating the legalisation of marijuana, criticising national drug policy, and debating civil disobedience on its face (*Blum v Schlegel*);⁵⁰ classroom statements about diversity (*Scallett v Rosenblum*);⁵¹ and a professor's discussion of pornography in class (*Cohen v San Bernardino Valley College*).⁵²

In *Burnham v Ianni*, students in the history club at the University of Minnesota-Duluth decided to use the history department's display case to display photographs of history professors in costumes and props related to teaching and research interests. Two of the eleven professors who participated posed with weapons. The popular photographs and the accompanying written material also placed in the display case were thought to communicate matters of public interest to the many students, staff, faculty, and campus visitors who passed by the display case every day. In response to a complaint over the photos with weapons, Chancellor Ianni ordered campus police to remove the pictures. The two professors filed suit. The Eighth Circuit Court of Appeals held that the posting of the photos was constitutionally protected speech. The dispute over the abrupt cancellation of the military history exhibit was more than just an internal employee grievance. It involved a content-based cancellation of a history department's public display.

A determination that faculty speech is related to a matter of public concern does not guarantee a victory for the speaker. If the speech is detrimental to the work of the speaker or the work of the organisation, the court will find in favor of the organisation (*Schrier*).⁵³ In *Hudson v Craven*,⁵⁴ for example, an economics instructor was nonrenewed after she joined an organised protest of the World Trade Organisation's meeting in Seattle in 1999. Noticeably, her participation in the rally became a 'field trip' for the class. The court held that her personal participation was a matter of public concern, but ultimately sided with the college's decision to nonrenew, as the instructor should not have helped organise the protest under the auspices of the college as a whole.

Examples of non-public concerns in faculty and staff expression include speech on obtaining priority funds from the College to supplement the budget of an academic department (*Boyett v Troy State Univ.*);⁵⁵ personal grievances about the Dean or chair of an academic department (*Boyett*); speech on the policy for evaluation of tenure and promotion applications (*Boyett*); a professor's in-house criticism of a particular English text (*Williams v Alabama State Univ.*);⁵⁶ a psychology professor's casual, sexually-charged conversations with graduate students and colleagues from other universities at an international research conference (*Trejo v Shoben*);⁵⁷ a professor's memo to departmental graduate students disparaging one of his colleagues over comments the colleague made about the termination of two university employees (*Simons v West*

Va. Univ.),⁵⁸ and faculty disputes with central administration over grading policies (*Wozniak v Conry*, *Brown v Armenti*).⁵⁹ With this list of cases, it is important to note that the mere fact that the speech occurs in connection with a public university does not make the speech related to a matter of public concern, even if the speech may have a small effect on the overall work of the university. In *Trejo v Shoben*,⁶⁰ for example, the University of Illinois Urbana-Champaign terminated the contract of an untenured assistant professor of psychology after investigating the professor's conduct at a research conference, where he and several graduate students engaged in casual conversations that were decidedly sexual in nature, with Trejo advocating extramarital affairs, making several sexual comments, and soliciting female companionship. Trejo argued that the conversations were intellectual in nature, based in human sexuality. The court supported the university's decision. What makes this case important is not the groundbreaking rule of law, but rather the slippery slope that comes from idle conversation among colleagues and students while on the job, albeit often in social situations. What may have started as an academic conversation related to the subject matter of the participants' teaching and research agendas (though the Court of Appeals in *Trejo* doubted this) turned quickly into a conversation jeopardising a faculty member's job.

Related to both *Pickering* and *Connick* are two other landmark decisions by the Supreme Court in the area of public employees and free expression. First, in *Mount Healthy City School Board of Education v Doyle*,⁶¹ the Supreme Court adopted a burden-shifting test, to be applied in cases where an employee challenges an adverse employment decision with evidence of engagement in free speech. First, the employee must show that his or her conduct was protected under the Constitution and that the protected conduct was the substantial motivating factor in the employer's decision. If the employee satisfies this burden, then the employer must show that the employee would have been disciplined (e.g., nonrenewed, terminated, etc.) anyway.

Second, in *Waters v Churchill*,⁶² a plurality of the Court supported the view that even when an adverse employment decision is predicated on a government employee's exercise of free speech, the public institution's interest may outweigh the employee's free speech rights, particularly when the speech itself can reasonably be forecast to create a substantial disruption or material interference with workplace efficiency. The case law applying *Waters* explicitly in higher education contexts is sparse, but the legal leeway granted to employers is rather substantial. In *Jeffries v Harleston*,⁶³ the longtime chair of the Black Studies department at the City University of New York delivered an off-campus speech, in which he made several derogatory comments about Jews. Despite favorable job performance reviews, university president Harleston recommended that Jeffries' current three-year term as chair be limited to one year. The board of trustees agreed, and Jeffries sued. The Second Circuit upheld the defendants' decision to demote Jeffries. The Court of Appeals found the expectation of harm resulting from the speech to be reasonable and held that Jeffries' academic freedom rights were not violated, as the detriment he suffered came in the form of a lost administrative position and not a faculty position.

There are no Supreme Court decisions specifically addressing academic freedom rights of faculty members in the classroom. But among the crowded and conflicting federal appeals court opinions, the Eleventh Circuit Court of Appeals set the dialogue in motion with its decision in *Bishop v Aronov*.⁶⁴ Bishop, a professor of health, physical education, and recreation, occasionally made comments to his classes about his Christian religious bias and its relationship to the subject he taught. Bishop told his students that his relationship with Jesus Christ was much more important than the production of papers and articles for tenure and promotion. He did not require his students to believe as he did, but he did say that everything he did and said in the classroom

traveled through a Christian lens. Bishop also organized special discussion sessions on these topics with any interested students and staff members. After receiving several complaints from students, Bishop's department chair wrote him a letter asking that he refrain from interjecting his religious beliefs in classes and from scheduling the optional class sessions. Bishop filed suit. The district court held for Bishop, but the court of appeals reversed, explicitly adopting *Hazelwood* as its analytical frame. First, the court noted that, during instructional time, a university classroom is not an open forum. Second, the court considered the university's mission and its authority to control the content of its curriculum, particularly during class time. Finally, the court considered Bishop's claims of academic freedom. The court interpreted the department chair's letter narrowly. According to the court, there are some topics that produce more apprehension than comfort. The letter did not say that Bishop could not hold these views, speak on these views, or even publish and present on them. He simply was not permitted to discuss his religious views under the guise of university courses. The court then made a rather groundbreaking statement on the nature of academic freedom:

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. And in any event, we cannot supplant our discretion for that of the University. . . . In this regard, we trust that the University will serve its own interests as well as those of its professors in pursuit of academic freedom. University officials are undoubtedly aware that quality faculty members will be hard to attract and retain if they are to be shackled in much of what they do.⁶⁵

One year following *Bishop*, the Second Circuit heard a claim from another contentious professor. This time, the court held in favor of the professor, disfavoring the university's actions designed to shield students from the professor's controversial views. In *Levin v Harleston*,⁶⁶ Levin, a tenured professor at the City University of New York had published several controversial writings containing a number of denigrating comments concerning the intelligence and social characteristics of African Americans. The Dean of the College of Humanities then created alternate or 'shadow' sections of Levin's courses for any of Levin's students who wished to transfer. A faculty committee found Levin's writings to be inappropriate, unprofessional, and harmful to the College's educational process. The Court of Appeals held that the creation of alternate sections of Levin's courses for students who did not like his ideas violated the professor's free speech and due process liberty rights. Instead of applying *Hazelwood*, as the *Bishop* court had, the court applied *Doyle* and held that Levin's protected speech was the motivating factor in the university's decision to discipline him. The court held that the notion of tenure is lost without the opportunity to freely explore and write and speak on topics of scholarly interest, even if those topics are controversial.

Further complicating the legal state of affairs for the classroom speech of teachers is a set of appellate decisions applying *Pickering* and the question of whether classroom speech is related to a matter of public concern. First, in *Bonnell v Lorenzo*,⁶⁷ the Sixth Circuit Court of Appeals held that a faculty member's profane language and vulgar conduct in class did not relate to a matter of public concern. The University had directed him to refrain from such conduct after students complained, citing a potential violation of college policy and possible liability for sexual harassment. Bonnell then wrote an essay on the allegations of sexual harassment and circulated it to his students and over 200 faculty members. The court found the essay to be related to a matter of public concern, but held that the university's concerns over the classroom conduct outweighed the speech contained in the letter. Second, in a divergent decision, another panel of the Sixth Circuit

held that ‘[b]ecause the essence of a teacher’s role is to prepare students for their place in society as responsible citizens, classroom instruction will often fall within the Supreme Court’s broad conception of “public concern”’. In *Hardy v Jefferson Community College*,⁶⁸ an adjunct instructor was nonrenewed after he led a classroom discussion on the impact of oppressive and disparaging words, including ‘girl’, ‘lady’, ‘faggot’, ‘nigger’ and ‘bitch’. Hardy was a teacher in the college’s communications program, teaching a class on Introduction to Interpersonal Communication. In the discussion, students examined how language is used to marginalise minorities and other oppressed groups in society. Like Bonnell, Hardy argued that the use of such words was germane to the discussion on language and social constructivism and to the course on communications. This time, the court agreed with the faculty member, emphasising the point that the classroom discussions were germane to the subject matter of the course.

V UNIVERSITY AUTONOMY AND ACADEMIC FREEDOM AS AN INSTITUTIONAL RIGHT

The notion of academic freedom is mired in a battle of ownership. In other words, is academic freedom an individual right or and an institutional one? Despite the volume of earlier claims and discussions to the contrary, an emergent trend seems to favor academic freedom as an *institutional* right. The plaintiffs in *Urofsky v Gilmore*⁶⁹ were faculty members who challenged a university policy and a state statute that made it illegal for state employees to access sexually explicit material on computers that are owned or leased by the state. The district court held for the professors, but the Court of Appeals reversed. According to the appellate court, the state law did not restrict government employees from accessing sexually explicit sites on computers that are *not* owned or leased by the government; nor did it attempt to restrict speech engaged by the speakers in their roles as citizens. The law only restricted speech in the role of employee. To make the point, the court stated:⁷⁰

This focus on the capacity of the speaker recognises the basic truth that speech by public employees undertaken in the course of their job duties will frequently involve matters of vital concern to the public, without giving those employees a First Amendment right to dictate to the state how they will do their jobs.

The appeals court concluded that ‘any right of academic freedom above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors’⁷¹.

Cases such as *Urofsky* and *Bishop* indicate broadening judicial support for public college and university policies and decisions controlling the teaching and classroom activities of faculty members. In each of these cases and several more like them, courts have held that it is the academic institution that has control over what curriculum is taught, how it is taught, and who may teach it. Beyond application to traditional classroom activity, the notion of academic freedom as an institutional right has been applied to a range of university decision-making, including student admissions (*Regents of the Univ. of Calif. v Bakke*),⁷² tenure review (*University of Pennsylvania v EEOC*),⁷³ student activity fees (*Rosenberger*),⁷⁴ ethics codes (*Webb v Board of Trustees of Ball State Univ.*),⁷⁵ the production of plays (*Linnemeir*),⁷⁶ the display of artwork (*O’Connor v Washburn Univ.*),⁷⁷ required reading lists for freshman orientation (*Yacovelli v Moeser*),⁷⁸ and acceptable use policies for university-sponsored computers and Internet technology.

The authority of a state university to make content-based choices regarding school-sponsored curricular and extracurricular activities and events has been addressed recently in a few controversial cases involving alleged hostility toward Christianity. In each of these cases,

the university's authority prevailed (*Linnemeir, O'Connor, Yacovelli*). The court in *Linnemeir*, for example, rejected community members' demands that a state university be prevented from producing the controversial play *Corpus Christi*. According to the court, to hold otherwise would 'imply that teachers in state universities could not teach important works like Voltaire, Hobbes, Hume, Darwin, Mill, Marx, Nietzsche, Freud, Yeats, Heidegger, Sartre, Camus, John Dewey, and countless other staples of Western culture'.⁷⁹

The college or university itself is a speaker — a contributor to the dialogue along with students and faculty. Many judicial pronouncements make this point, including an excerpt from the Supreme Court's opinion in *Rosenberger v The University of Virginia*,⁸⁰ which states it succinctly and avoids, strenuously, excess judicial oversight into the curricular decisions of universities:

When 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.⁸¹

With respect to institutional speech and content-based restrictions, the impact of the recent decision in *Garcetti* on academic freedom remains to be seen. Justice Souter, in dissent, made explicit reference to the damage the majority decision may do to the academic freedom of faculty members. The majority opinion, led by new Chief Justice Roberts, largely avoided the concern and responded that 'expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by the Court's customary employee-speech jurisprudence'.⁸²

Nevertheless, it is true, after *Garcetti*, that a government employer retains wide latitude in the management of its internal affairs, including the statements made by employees performing the tasks they are paid to perform. If the term 'official duties' is interpreted widely, however, then the academic speech of university faculty members, who necessarily speak and write pursuant to their professional responsibilities and official duties, may be subject to restriction by the university employer. According to the Court in *Garcetti*, restricting the speech of government employees in their capacities as employees does not infringe any liberties they may enjoy as citizens. The restriction 'simply reflects the exercise of employer control over what the employer itself has commissioned or created' — its institutional message.⁸³

VI ACADEMIC FREEDOM: THE AUSTRALIAN CONTRIBUTION

Freedom of expression in Australian law does not carry with it the litigious history that freedom of expression in the United States does. There is not a large set of case law emanating from Australian schools and universities on the topic of academic freedom.⁸⁴ Nonetheless, there are some important points to be shared in sections VII, VIII, and IX. First is a brief discussion of the Australian Constitution to parallel the discussion above on the American First Amendment. Second is a necessary recognition of the power that comes from faculty employment contracts and codes of conduct in Australian universities. Finally, to parallel the American notion of institutional academic freedom is an important note on the autonomy of the Australian university and the institutional message that follows.

VII ACADEMIC FREEDOM AND THE IMPLIED RIGHT TO POLITICAL COMMUNICATION

According to Jackson,⁸⁵ Australian courts have not taken the opportunity to develop academic freedom as a judicially recognised right. However, some court cases make explicit mention of academic freedom. For example, in *Burns v Australian National University*,⁸⁶ Ellicott J argued, in an opinion reminiscent of the powerful words in *Sweezy v New Hampshire*,⁸⁷ that public universities must respect the principle of academic freedom and the obligation of professors to engage in teaching and research free of arbitrary attack.

The Australian Constitution makes no explicit grant or protection of free speech. The constitutional right to ‘free speech’ is found, instead, in an implied right to ‘political communication’ – in effect, a judicially imposed limitation on legislatures and executives (*Australian Capital Television Pty Ltd v Commonwealth (ACTV)*, *Nationwide News Pty Ltd v Wills*).⁸⁸ In *Nationwide*, the High Court struck down a statutory provision of the *Industrial Relations Act of 1988*, which prohibited the use of words calculated to bring the Australian Industrial Relations Commission or one of its members into disrepute, regardless of whether the words used were true or false or could be characterised as fair comment. The Court in *Nationwide* unanimously agreed that the Act exceeded legislative power, but four of the seven Justices cited the right to political communication as the rationale. *ACTV* concerned the *Political Broadcasts and Political Disclosures Act of 1991*, which prohibited broadcasting of political advertisements on radio or television during federal, territory, state, and local elections. Five of the seven Justices agreed that the Act violated an implied right to political communication. In his opinion, Mason CJ made the following statement:

Only by enforcing [freedom of communication] can the citizen communicate his or her views on the wide range of matters that may call for, or are relevant to, political action or decision. Only by exercising that freedom can the citizen criticize government decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence the elected representatives. ...⁸⁹

The philosophies of the Justices on the breadth or narrowness of the right to political communication have varied greatly. As a result, the arguments among commentators and authors have varied as well.⁹⁰ Some argue that speech should be protected in the name of a marketplace of ideas and the search for truth; others argue that the right exists for the promotion of individual autonomy; and, finally, others contend that free expression is necessary to maintain democracy and self-government.⁹¹ In any case, all contributors to the dialogue agree that the freedom is not absolute and must be tempered by larger governmental interests.

A unanimous High Court, in *Lange v Australian Broadcasting Corp. (1997)*, effectively narrowed the scope of the right to communication on ‘political or governmental matters’ compatible with the maintenance of a representative and responsible government.⁹² In *Lange*, the Court outlined the following test:

- (1) Does the law effectively burden freedom of communication about government or political matters either in its terms, operation, or effect?
- (2) If the law effectively burdens that freedom, then is the law reasonably appropriate and adapted to serve a legitimate end, the fulfillment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by § 128 for submitting a proposed amendment to the Constitution to the informed decision of the people?⁹³

Federal case law involving Australian university students and faculty is sparse, indeed. However, one example should suffice to illustrate the narrow application of *Lange* and the principles of the implied right to political communication in higher education. In *Brown v The Members of the Classification Review Board of the Office of Film and Literature*,⁹⁴ a federal appellate court dismissed the appeal of several students whose newspaper *Rabelais* was denied classification and withheld from distribution. The newspaper contained an article entitled ‘The Art of Shoplifting’. While the students argued that the article was an anti-capitalist critique and satire, the classification board disagreed and argued that the article acted as a ‘how-to’ for thieves. The lower court and appellate court agreed with the classification board. Each of the three appellate judges supported the implied right to political communication, but held that the speech contained in the article did not concern matters relevant to the system of representative and responsible government.

VIII IMPLIED AND EXPRESS CONTRACTUAL RIGHTS TO ACADEMIC FREEDOM

In two recent articles for the *Southern Cross University Law Review*, Professor Jim Jackson presents an excellent review of the law with respect to express and implied rights to academic freedom for Australian university employees. In his article on express rights, Jackson⁹⁵ argues that employment contracts, enterprise bargaining agreements, codes of conduct, and other university policies may grant academic freedom rights to faculty. Several universities explicitly present and define academic freedom for their faculty and students. However, the existence of express academic freedom rights does depend on the particular language used and how broad or restrictive it is. For example, universities may impose a duty on professors to advance knowledge in their respective disciplines through research and teaching. On one hand, this is arguably an express grant of academic freedom because such freedom would be necessary to carry out the duty to discover and disseminate knowledge. Further protecting those rights are contract or code provisions covering due process in cases of nonrenewal, termination, tenure, or promotion. On the other hand, depending on the wording of the provisions, a university can limit academic freedom by arguing that the duty to teach, research, and make public comments exists only in that professor’s narrow specialty. While the enforceability of such provisions may depend on where the language is housed, a strong argument can be made that language appearing in university codes of conduct or other university-wide policies is incorporated by reference into the employment contract anyway. There may be some question, though, of how those codes and policies are drafted and amended, and how faculty are involved in the process.

In his article on implied contractual rights to academic freedom, Jackson⁹⁶ presents three categories of such rights: (1) implied contractual right at common law, (2) implied for business efficacy, and (3) implied through custom or usage. Academic freedom is implied by common law through two particular paths. First, university faculty members are generally considered professionals with obligations to fulfill traditional duties of care and to act in good faith. Second, legislation incorporating Australian universities generally makes specific reference to the university’s teaching and research function. It would follow, then, that in order to fulfill this legislative function, universities must respect the academic freedom of faculty to teach and conduct research. A contract term is implied for business efficacy when implied terms are necessary to give effect to a known employment duty in cases where the employer’s express terms are not precise enough. For example, if teaching and research are necessary for the required goals of discovery and dissemination of knowledge, then it makes sense that there exists an implied contract provision respecting academic freedom of those required to teach and conduct

research. Finally, a tradition of teaching and research could allow a right to academic freedom to attach to faculty by mere custom or usage over time. Readers are encouraged to consult Jackson's work for a deeper discussion of these points.

IX INSTITUTIONAL AUTONOMY, ACADEMIC FREEDOM, CORPORATISM, AND THE 'WELL-MANAGED UNIVERSITY'

Turning to the Andrew Fraser case from Macquarie University and its effect on institutional authority, the reaction was mixed and vocal for at least a year-and-a-half after Fraser's letter was published. Whether or not they agree with Fraser's opinions, many subscribe to a 'marketplace/search for truth' theory of academic freedom and disagree with the university's attempts to silence Fraser.⁹⁷ McConvill argues that institutional reactions such as Macquarie's will do more harm than good, effectively perpetuating a culture of 'mediocrity'. According to McConvill, universities should combat bad speech with good speech rather than with censorship: 'Universities are meant to be places where academics can raise ideas freely as a means of fostering discourse, engendering debate and enriching the community. But in Australia, many of our universities are full of academics that lack intellectual rigour and creativity...'. McConvill makes the argument that universities have become places for the provision of consumer-based politically correct services. James⁹⁸ expresses similar fears, not with respect to political correctness, but with the university's temptation to allow financial and political pressures to dictate curricular and personnel choices.

On the other side of argument, however, is the very real concern over the university's reputation. To allow public speech such as Fraser's, signed in the name of the university, could do more damage to the academic credibility of the university than to prohibit or punish such speech would. Dr. Peter West,⁹⁹ head of the Research Group on Men and Families at the University of Western Sydney, agrees with Macquarie's decision to ask for Fraser's early retirement, arguing that Fraser's comments are dangerous to Macquarie's reputation as an institution of higher learning — a university, like all others, that needs a high reputation to continue to gather the tuition and other revenue that come from a positive relationship with its community:

I am normally a strong supporter of academic freedom. But I think reasonable people will agree with me that, in the present circumstances, universities are better off without people who make comments which seem very likely to cause more trouble than we have already.

Similar to West, and invoking a spirit that seems to support academic freedom as an institutional right, the *Sydney Morning Herald*,¹⁰⁰ in an editorial condemning Fraser's public speech and praising the response of the university, agreed that university faculty have the right to express their views on matters of public interest, but must do so as private citizens and not in the name of their employers: 'These days, universities receive funding from the Government and private sources. Academics, who are paid by universities, should be expected to behave professionally and act in accordance with their contracts of employment. Just like everyone else'. Accordingly, when the issue is not related to the employee's area of expertise, the speech should not include references to his or her employer. At the very least, professionalism would obligate Professor Fraser to admit that his comments were made in his role as a citizen and not as a university employee, particularly if the content of his speech is outside of his teaching and research expertise and outside of his contractual expectations. The newspaper's editorial proceeded to compare Fraser to University of Colorado faculty member Ward Churchill and then compared and praised the respective university communities for their reactions. 'The concept that

the existence of modern democracies depends on the unfettered right of academics free speech is a myth. It is also a myth to suggest that universities were ever a sanctuary for pure intellectual freedom’.

Whether or not individual rights to academic freedom are a myth, James¹⁰¹ argues that state demands for accountability, efficiency, and marketability have led universities to change their mentality, potentially to the detriment of teaching and learning. According to James, this shift in mentality, whether institutional or individual, stands to harm teaching and learning at the post-secondary level. With increasing dictation of policy from private external constituents, university leaders will be more politically cautious in the face of controversy; and with decreasing support from governments, students will pay more for their education and will expect a consumer-based product. According to James, employers, business and industry, and the government are forcing universities to give up traditional discourses and to adopt economic, corporatist dialogues. James’ theory proceeds as follows: Discourse produces knowledge, but power dictates who gets to join the discourse. Perhaps silencing controversy is against today’s corporatist mentality. However James appears to hold that it is the mentality itself that is against the grain.

Lauchlan Chipman¹⁰² would likely disagree with James. It is true that universities and their leaders run a risk by either tolerating and accepting or denouncing and silencing allegedly improper and illegal speech. The risk, however, is not merely philosophical. It is multi-layered and complicated by politics, economics, and the very real need for universities to adapt to society’s knowledge-based needs in order to continue contributing to them. In Chipman’s eyes, the freedom to pursue and promulgate outcomes of research and scholarship exists just as strongly today as ever, even when the findings challenge academic orthodoxy, prevailing wisdom, or even the university community’s most cherished beliefs and values. He simply follows that statement by asserting that the failure of external authorities to support academics whose published views run contrary to their own is not a violation of academic freedom. University leaders may have to be accountable and responsive to these authorities if an institutional voice is to be heard from higher education.

X CONCLUSION: A CALL TO UNIVERSITY LEADERS

The academic dialogue invites all speakers to the table: administrators, faculty and staff, students, university community members, and the institutions themselves. However, in the end — in both the United States and Australia — the balance tends to favor the institution as the primary speaker, for two important and related reasons. First, courts today, particularly those in the United States, tend to make the argument that academic freedom is not inherently an individual right, that it is the university as a whole that directs the curriculum and holds academic freedom. Add to that the long-held sentiment that courts and legislatures prefer to leave curricular decision-making to those more properly entrusted to it — the university administrators and faculty — and the institutional right is even stronger. It is important to note, however, that implied and express contractual provisions can be particularly favorable to university employees and more protective of individual academic freedom rights than courts have been. This, of course, is partially dependent on the academic discretion universities and their leaders offer their employees in the form of contractual rights. Contractual academic freedom rights are well-regarded in Australian law¹⁰³ and are articulated in some form in many contracts and academic charters in American universities such as the Bowling Green State University Academic Charter.¹⁰⁴ Not surprisingly, however, American universities’ charter provisions and codes of conduct on academic freedom may reflect the current judicial balance between individual and institution and could remind

university community members that the institution itself has academic freedom rights and is a powerful contributor to the dialogue. In light of recent judicial developments in the United States, more study on the potential power of contractual and policy-based academic freedom rights in that country is encouraged.¹⁰⁵

Second, and likely more intimidating to the traditional contributors to the dialogue, is the trend that sees universities favoring external entities, governments, businesses, and students as consumer-minded ‘customers’ to form their institutional messages instead of looking to the content-based discoveries and contributions of teachers and scholars. In the name of economics, accountability, efficiency, and marketability,¹⁰⁶ universities are defining and communicating their messages – exercising their institutional academic freedom – like they never have before. On the plus side, they are more responsive to their publics, perhaps more relevant to societal needs. Curriculum design and implementation can favor practical application and advanced technology, and can involve segments of the community outside the traditional walls of a university. On the minus side, the ‘external dependency’ causes universities to favor only those areas of study which are financially lucrative in terms of enrollment, research dollars, or political or religious favor.¹⁰⁷

So, politically and legally, the academic freedom dialogue tends to favor the institution as a whole. The institution, then, has to answer to all voices at the table: The traditional academics who fear corporate buy-outs and curricular shut-outs as alleged extremes are silenced and knowledge arguably regresses to the mean; *and* the external voices – governments, businesses, and student-consumers – who threaten pull-outs and walk-outs if the university product is not offered in the quickness, form, and/or content they demand. How is this balance achieved? In the twenty-first century, what will be done with the university’s institutional academic freedom and institutional autonomy? How will it be managed? How will it be shared? Will the university support the individual contributions of students and faculty and celebrate the diverse collection of messages that results? Most fundamentally, what will university leaders do with the power they have been given?

Chipman¹⁰⁸ argues that universities must now link public accountability and academic responsibility. Accordingly, an ‘unmanaged university’ will not survive long in the current environment. With a ‘well-managed university’, on the other hand, a university’s freedom to determine its areas of study, teaching, and research is furthered, not diminished. Universities today seek to broaden and diversify their funding base and reduce dependency on one or only a few sources. With these activities, Chipman asserts that the traditionalists need not depend on a traditional organisational structure or even on individual academic freedom rights to satisfy both traditional and new ways of teaching and learning. Faculty, staff, students, alumni, benefactors, and other contributors should, instead, look to university leaders – ‘much turns on the moral calibre and institutional strength of those individuals who occupy the relevant key positions in the organisation’¹⁰⁹ — the senior academic managers, deans, and vice chancellors to ensure that truth is uncovered and that those who expose it enjoy the institution’s protection. In response to Fraser’s controversial speech and in the context of Fraser’s employment contract, Macquarie University Vice-Chancellor Di Yerbury refrained from firing Fraser, but made the important statement that Fraser’s views were not welcome at Macquarie: ‘What he said is abhorrent to most of us at the university and has caused a great deal of distress and concern to the communities concerned. . . . It’s very much against our policy; we’re a multicultural university that rejects racism and discrimination’.¹¹⁰ Continuing, Yerbury asserted that Fraser has the right to seek channels for his views; ‘[h]owever, we do not want his views to be identified with the policies and views of Macquarie University and the University community’.¹¹¹

An arguable contrast to Macquarie Vice Chancellor Yerbury's response to Professor Fraser is the statement of Washburn University President, Jerry B. Farley, in response to a controversial sculpture chosen for a campus beautification project (*O'Connor v Washburn University*).¹¹² The sculpture, entitled 'Holier Than Thou', was assailed as anti-Catholic and hostile toward religion in general. On its base, the artist included the following message:

I was brought up Catholic. I remember being 7 and going into the dark confessional booth for the first time. I knelt down, and my face was only inches from the thin screen that separated me and the one who had the power to condemn me for my evil ways. I was scared to death, for on the other side of that screen was the persona you see before you.¹¹³

In response to an early round of local and national complaints, Farley made an important statement regarding the speech rights of the institution as a whole and the opportunities such events present to the individual members of a university community:

One of the purposes of art is to engage us intellectually and emotionally. This work apparently has fulfilled that function as there is a wide variety of commentary on the piece, ranging from support to opposition. ... As a university, we should take this opportunity to create a positive educational experience. Seminars can be organized surrounding this work of art and its symbolism. Speakers could address the aesthetic elements, religious perspectives and issues facing contemporary religions. Different points of view must and can be represented. ...¹¹⁴

A federal trial court and the United States Court of Appeals for the Tenth Circuit Court of Appeals rejected a claim that the sculpture violated the Establishment Clause of the United States Constitution, as overly hostile to religion.

What do we look for in this balance among student, faculty, institution, and community contributors? Perhaps it is the moral courage of Macquarie Vice Chancellor Yerbury to publicly condemn the controversial statements made by university professor Andrew Fraser, while simultaneously accepting his personal right to make them. Perhaps it is the similar courage of Washburn President Farley who, against political and religious pressure, would rather engage all sides of an artistic dialogue at a public university than to silence even one of them. In the end, Hamilton¹¹⁵ confirms:

Universities cannot separate themselves from the community around them; to that extent they are not autonomous. They are dependent on many forces external to themselves; but those forces will be equally dependent on the work of a good university. The challenge is to bring into a workable balance the legitimate ideals of the university with the legitimate needs and concerns of the community.¹¹⁶

The challenge belongs to the *institutions* of higher learning – those 'speakers' with the legally recognised academic freedom. However, most especially, the challenge belongs to the *leaders* of those institutions — the speakers with the recognised academic, economic, and political credentials and abilities to set curricular course; to strike positive relationships; to delegate the discovery, creation and dissemination of knowledge to those we most trust to find and share it — the faculty and students; and to open up a dialogue inviting all speakers to the ever-changing table.

ENDNOTES

1. *Pickering v Board of Educ.*, 391 US 563 (1968).
2. F. Knopfelmacher, 'The Threat to Academic Freedom' in I. Salusinszky (ed), *The Oxford Book of Australian Essays* (1958/1997) 150-155; Lauchlan Chipman, 'Academic Freedom and the Well-Managed University' (2000) *Autumn Policy*, 22.
3. Gerard Henderson, 'Speaking Out of Turn is Not Free Speech' (2 August 2005). *Sydney Morning Herald* (Sydney) <<http://www.smh.com.au/news/opinion/speaking-out-of-turn-is-not-free-speech/2005/08/01/1122748579322.html>> at 21 May 2007.
4. *Sweezy v New Hampshire*, 354 US 234, 250 (1957).
5. For example, *Dixon v Alabama State Bd. of Educ.*, 294 F 2d 150 (5th Cir, 1961).
6. *Urofsky v Gilmore*, 216 F 3d 401 (4th Cir, 2000).
7. *Bishop v Aronov*, 926 F 2d 1066 (11th Cir, 1991).
8. *Linnemeir v Board of Trustees of Purdue Univ.*, 260 F 3d 757 (7th Cir, 2001).
9. *Keyishian v Board of Regents*, 385 US 589, 603 (1967).
10. *Rigg v University of Waikato* (1984) 1 NZLR 149.
11. *Ibid* 181-182.
12. *Ibid* 182.
13. *Bowling Green State University Academic Charter* 'Article I: The Basic Principles' (n.d.) <<http://www.bgsu.edu/offices/facsenate/page471.html>> at 18 November 2006.
14. R. Hofstadter and W.P. Metzger, *The Development of Academic Freedom in the United States* (1955).
15. American Association of University Professors, *1940 Statement of Principles on Academic Freedom and Tenure* <<http://www.aaup.org/AAUP/pubsres/policydocs/1940statement.htm>> at 17 May 2007.
16. *Clark v Holmes*, 474 F 2d 928 (7th Cir, 1972), *Riggin v Board of Trustees of Ball State Univ.*, 489 NE 2d 616 (Ind Ct App 1986).
17. *Brown v Armenti*, 247 F 3d 69 (3d Cir, 2001), *Wozniak v Conry*, 236 F3d 888 (7th Cir, 2001).
18. *Urofsky v Gilmore*, 216 F 3d 401 (4th Cir, 2000).
19. *Cox v Louisiana*, 379 US 503 (1965).
20. *Healy v James*, 408 US 169 (1972).
21. *Rosenberger v University of Virginia*, 515 US 819 (1995); *Kincaid v Gibson*, 191 F 3d 719, *rev'd en banc*, 236 F 3d 342 (6th Cir, 2001), *Hosty v Carter*, 412 F 3d 731 (7th Cir, 2005).
22. *Axson-Flynn v Johnson*, 356 F 3d 1277 (10th Cir, 2004).
23. *Tinker v Des Moines Indep. Comm. Sch. Dist.*, 393 US 503 (1969).
24. *Cox v Louisiana*, 379 US 503 (1965).
25. *Ibid* 551-552.
26. *Healy v James*, 408 US 169 (1972).
27. *Ibid* 187.
28. *Bowman v White*, 444 F 3d 867 (8th Cir, 2006), *Pro-Life Cougars v University of Houston*, 259 F Supp 2d 575 (SD Tex, 2003), *Orin v Barclay*, 272 F 3d 1207 (9th Cir, 2001).
29. *Rosenberger v University of Virginia*, 515 US 819 (1995).
30. *Christian Legal Society v Walker*, No. 05-3239, 2006 US App LEXIS 17103 (7th Cir, 10 July 2006).
31. *Hazelwood Indep. Sch. Dist. v Kuhlmeier*, 484 US 260 (1988).
32. *Kincaid v Gibson*, 191 F 3d 719, *rev'd en banc*, 236 F 3d 342 (6th Cir, 2001).
33. *Hosty v Carter*, 412 F 3d 731 (7th Cir, 2005).
34. *Brown v Li*, 308 F 3d 939 (9th Cir, 2002), *cert. denied*, 538 US 908 (2003).
35. *Brown v Li*, 308 F 3d 939, 949 (9th Cir, 2002).
36. *Axson-Flynn v Johnson*, 356 F 3d 1277 (10th Cir, 2004).
37. *Ibid* 1289.
38. *Pickering v Board of Educ.*, 391 US 563 (1968), *Keyishian v Board of Regents*, 385 US 589, 603 (1967), *Sweezy v New Hampshire*, 354 US 234, 250 (1957).
39. *Connick v Myers*, 461 US 138 (1983).
40. *Garcetti v Ceballos*, 126 S Ct 1951 (2006).

41. *Connick v Myers*, 461 US 138, 146 (1983).
42. *Garcetti v Ceballos*, 126 S Ct 1951, 1960 (2006).
43. *Schrier v University of Colorado*, 427 F 3d 1253 (10th Cir, 2005).
44. *Hudson v Craven*, 403 F 3d 691 (9th Cir, 2005).
45. *Burnham v Ianni*, 119 F 3d 668 (8th Cir, 1997) (en banc).
46. *Maples v Martin*, 858 F 2d 1546 (11th Cir, 1988).
47. *Bauer v Sampson*, 261 F 3d 775 (9th Cir, 2001).
48. *Hamer v Brown*, 831 F 2d 1398 (8th Cir, 1987).
49. *Honore v Douglas*, 833 F 2d 565 (5th Cir, 1987).
50. *Blum v Schlegel*, 18 F 3d 1005, 1012 (2d Cir, 1994).
51. *Scallett v Rosenblum*, 911 F Supp 999 (WD Va, 1996).
52. *Cohen v San Bernardino Valley College*, 92 F 3d 968 (9th Cir, 1996).
53. *Schrier v University of Colorado*, 427 F 3d 1253 (10th Cir, 2005).
54. *Hudson v Craven*, 403 F 3d 691 (9th Cir, 2005).
55. *Boyett v Troy State Univ.*, 971 F Supp 1403 (MD Ala, 1997).
56. *Williams v Alabama State Univ.*, 102 F 3d 1179 (11th Cir, 1997).
57. *Trejo v Shoben*, 319 F 3d 878 (7th Cir, 2003).
58. *Simons v West Virginia Univ.*, No. 95-1712, 1996 US App LEXIS 10425 (4th Cir, 7 May 1996).
59. *Wozniak v Conry*, 236 F 3d 888 (7th Cir, 2001), *Brown v Armenti*, 247 F 3d 69 (3d Cir, 2001).
60. *Trejo v Shoben*, 319 F 3d 878 (7th Cir, 2003).
61. *Mount Healthy City School Board of Education v Doyle*, 429 US 274 (1977).
62. *Waters v Churchill*, 511 US 661 (1994).
63. *Jeffries v Harleston*, 21 F 3d 1238 (2d Cir, 1994).
64. *Bishop v Aronov*, 926 F 2d 1066 (11th Cir, 1991).
65. *Ibid* 1075.
66. *Levin v Harleston*, 966 F 2d 85 (2d Cir, 1992).
67. *Bonnell v Lorenzo*, 241 F 3d 800 (6th Cir, 2001).
68. *Hardy v Jefferson Community College and Kentucky Comm. and Tech. College Sys.*, 260 F 3d 671, 679 (6th Cir, 2001).
69. *Urofsky v Gilmore*, 216 F 3d 401 (4th Cir, 2000).
70. *Ibid* 409.
71. *Ibid* 410.
72. *Regents of the Univ. of California v Bakke*, 438 US 235 (1978).
73. *University of Pennsylvania v EEOC*, 493 US 182 (1990).
74. *Rosenberger v University of Virginia*, 515 US 819 (1995).
75. *Webb v Board of Trustees of Ball State University*, 167 F 3d 1146 (7th Cir, 1999).
76. *Linnemeir v Board of Trustees of Purdue Univ.*, 260 F 3d 757 (7th Cir, 2001).
77. *O'Connor v Washburn University*, 416 F 3d 1216 (10th Cir, 2005).
78. *Yacovelli v Moeser*, No. 1:02CV596, 2004 US Dist LEXIS 9152 (MDNC, 20 May 2004).
79. *Linnemeir v Board of Trustees of Purdue Univ.*, 260 F 3d 757, 759 (7th Cir, 2001).
80. *Rosenberger v University of Virginia*, 515 US 819 (1995).
81. *Ibid* 833.
82. *Garcetti v Ceballos*, 126 S Ct 1951, 1962 (2006).
83. *Garcetti v Ceballos*, 126 S Ct 1951, 1960 (2006).
84. Jim Jackson, 'Implied Contractual Rights to Academic Freedom' (2006) 10 *Southern Cross University Law Review* 139.
85. *Ibid*.
86. *Burns v Australian National University* (1982) 40 ALR 707.
87. *Sweezy v New Hampshire*, 354 US 234 (1957).
88. *Australian Capital Television Pty Ltd v Commonwealth of Australia (ACTV)* (1992) 177 CLR 106, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

89. *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 138.
90. M. Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (2000).
91. D. Meagher, 'What is Political Communication? The Rationale and Scope of the Implied Freedom of Political Communication' (2004) 28 *Melbourne University Law Review* 438; A. Stone, 'Rights, Personal Rights, and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25 *Melbourne University Law Review* 374.
92. Chesterman, above n 90.
93. *Lange v Australian Broadcasting Corp.* (1997) 189 CLR 520, 567-568.
94. *Brown v The Members of the Classification Review Board of the Office of Film and Literature* (1998) 50 ALD 765
95. Jim Jackson, 'Express Rights to Academic Freedom in Australian Public University Employment' (2005) 9 *Southern Cross University Law Review* 107.
96. Jackson, above n 84.
97. For example, J. McConville, 'Academic Martyrdom Highlights University Brain Drain' (27 July 2005) *On line opinion: Australia's e-journal of social and political debate*. <<http://www.onlineopinion.com.au/print.asp?article=3720>> at 13 August 2005; E. O'Connor, *Campus Speech Down Under* (26 July 2005). <[http:// http://www.erinoconnor.org/archives/2005/07/](http://http://www.erinoconnor.org/archives/2005/07/)> at 21 May 2007.
98. N.J. James, 'Power-knowledge in Australian Legal Education: Corporatism's Reign' (2004) 26 *Sydney Law Review* 587.
99. Peter West, 'The Role of Academics in a Time of Troubles' (27 July 2005) *On Line Opinion: Australia's E-Journal Of Social And Political Debate* <www.onlineopinion.com.au/print.asp?article=3718> at 13 August 2005.
100. Henderson, above n 3.
101. James, above n 98.
102. Chipman, above n 2.
103. See Jackson, above n 84, n 95.
104. See, for example, Article I.A., *Bowling Green State University Academic Charter*, (n.d.) <<http://www.bgsu.edu/offices/facsenate/page471.html>> at 18 November 2006.
105. Jim Jackson, 'Express and Implied Contractual Rights to Academic Freedom in the United States' (1999) 22 *Hamline Law Review*, 467.
106. James, above n 98.
107. S. Hamilton, 'University Autonomy and External Dependencies' in G. Neave (ed), *The Universities' Responsibilities to Society: International Perspectives* (2000) 209.
108. Chipman, above n 2
109. Chipman, above n 2.
110. *Uni Asks Controversial Academic to Retire Early* (26 July 2005) <<http://abc.net.au/news/items/200507/1422785.htm?sydney>> at 21 May 2001.
111. Ibid.
112. *O'Connor v Washburn University*, 416 F 3d 1216 (10th Cir, 2005).
113. Ibid 1219.
114. Ibid 1220.
115. Hamilton, above n 107.
116. Ibid 214.

