Examining Judicial Interpretations of Academic Freedom after *Garcetti v. Ceballo*

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Faculty increasingly function as managed professionals, subject to heightened administrative authority resulting from the increasing corporatization of higher education (e.g., Rhoades & Slaughter, 1997). A tilting of the academic balance of power toward administrative dominance is also manifested in the erosion of tenure-stream appointments and increased reliance on non-tenure-track faculty, including significant dependence on part-time adjuncts. While receiving limited attention in the higher education literature, issues connected to faculty independence and managerial control also entail a constitutional dimension, namely the judicial interpretations given to faculty speech rights under the First Amendment (e.g., Baez & Slaughter, 2001; Jorgensen & Helms, 2008). This study examines the legal status of faculty speech rights since a 2006 U.S. Supreme Court decision, *Garcetti v. Ceballos*, which prompted new debates over constitutional protections for speech and expression by public higher education faculty. While not a case arising in higher education, the *Garcetti* decision holds significance for public college and university professors because it dealt directly with the legal standards commonly relied upon by courts in adjudicating First Amendment speech claims by professors in public higher education.

In the *Garcetti* case, Richard Ceballos worked for the Los Angeles County District Attorney’s Office when he wrote a memo critical of a sheriff’s department investigation. Ceballos claimed that his employer took retaliatory actions against him based on the content of the memo, and he argued that the memo constituted speech protected by the First Amendment. However, the Supreme Court in *Garcetti* created a bright-line legal rule that classified speech made by public employees in carrying out their official employment duties as ineligible for First Amendment protection. Justice Anthony Kennedy wrote in the majority opinion that
“[e]mployers have heightened interests in controlling speech made by an employee in his or her professional capacity” (Garcetti v. Ceballos, 2006, p. 11).

In a dissenting opinion in Garcetti, now-retired Justice David Souter contended that applying the decision’s standards to public higher education faculty resulted in troubling implications for academic freedom. The justices comprising the majority in Garcetti acknowledged Souter’s point but responded that the Court did not need to determine at that time whether the standards “would apply in the same manner to a case involving speech related to scholarship or teaching” (Garcetti v. Ceballos, 2006, p. 13). Thus, the Garcetti decision explicitly left open whether the legal standards announced in the case also deprived public higher education faculty of First Amendment protection for their professionally-based speech in such areas as teaching, research, and institutional service.

With more than a decade elapsed since the Supreme Court handed down Garcetti, we analyze post-2006 legal opinions to understand how courts have construed faculty speech rights under the First Amendment. Specifically, the following research question guides our analysis: How have state and lower federal courts in post-Garcetti legal opinions interpreted the First Amendment speech rights available to public higher education faculty in carrying out their professional duties? Prior to presenting our analysis and findings, we contextualize our study within broader scholarly, legal, and historical currents related to faculty autonomy and academic freedom.

The Rise of Academic Freedom and Tenured Faculty

Until the twentieth century, a professionally autonomous faculty went largely unrealized in U.S. higher education. In the latter portion of the nineteenth century, however, several factors helped shift conceptions of faculty roles (Cain, 2012). The rise of German research institutions
represented one such key element. As the German model became influential in the United States and research universities emerged after the Civil War, faculty became increasingly viewed as integral to the creation of new knowledge (Cain, 2012; Geiger, 2014; Metzger, 1990). Faculty became more professionalized (earning PhDs and creating disciplinary associations), but professors still routinely faced dismissal for rankling presidents, trustees, influential individuals, or the public (Cain, 2012; Geiger, 2009).

In 1915, scholars from elite higher education institutions formed the American Association of University Professors (AAUP) to advocate for professional values, create arrangements to safeguard faculty independence, and shield professors from unfair treatment and dismissal. The AAUP’s 1915 Declaration of Principles served as a key document in the development and articulation of academic freedom as a professional norm in higher education (Brown & Kurland, 1990; Cain, 2012). Stressing a point especially pertinent for our study, the Declaration’s drafters asserted that professors functioned as “appointees” rather than “in any proper sense” as “employees” of their institutions (AAUP, 2015, p. 6).

The ideas of faculty professional independence and academic freedom articulated in the 1915 Declaration were strengthened as national norms in the 1940 Statement of Principles on Academic Freedom and Tenure (Metzger, 1990). The Statement was crafted and endorsed by the AAUP and the Association of American Colleges so it received both faculty and institutional backing. It described faculty existing concurrently as “citizens, members of a learned profession, and officers of an educational institution” (AAUP, 2015, p. 14). More specifically, the Statement specified three facets of academic freedom and faculty independence: (a) freedom in research and the publication of research findings; (b) freedom in the classroom; and (c) freedom to speak and write as citizens.
The Courts, the First Amendment, and Faculty Speech

Debates over First Amendment protection for faculty speech and academic freedom existed well before the *Garcetti* decision. Some legal scholars and courts have argued that public college and university faculty members possess speech rights equivalent to all other public employees but no more, yet other legal experts counter that faculty carry out their professional roles with additional deference under the constitution to speak and write without fear of retaliation (e.g., Byrne, 1989, 2009; Finkin, 1983; Horwitz, 2007; Rabban, 1990; Van Alstyne, 1972). At times, the U.S. Supreme Court has used forceful language in support of academic freedom, but the Court has failed thus far to articulate coherent legal standards setting out First Amendment safeguards for faculty speech. Federal and state courts adjudicating faculty speech claims have often turned to the constitutional speech standards that apply to the much larger class of public employees (Jorgensen & Helms, 2008). In the rest of this section, we review case law that created and complicated the legal uncertainty surrounding faculty speech under the First Amendment.

The Supreme Court contemplated a constitutional dimension to academic freedom only after it was accepted as a professionally-based part of higher education manifested predominately through tenure. The idea that academic freedom comprises a constitutional right gained traction in the McCarthy era when governmental actors interfered in educational domains in the name of rooting out communist influences, notably in the form of loyalty oaths (Tepper & White, 2009). For example, in the 1957 case *Sweezy v. New Hampshire* the Supreme Court ruled in favor of an individual’s right to refuse to answer questions from the New Hampshire attorney general’s office about his scholarly activities, including lectures given at the University of New Hampshire. In a concurring opinion to the *Sweezy* decision, Justice Felix Frankfurter adopted an
understanding of academic freedom previously espoused by South African scholars. He suggested that American universities should be given deference to determine “on academic grounds [emphasis added] who may teach, what may be taught, how it will be taught, and who may be admitted to study” (Sweezy v. New Hampshire, 1957, p. 263).

A decade after Sweezy, the idea of academic freedom as a constitutional concern appeared in a majority Supreme Court opinion, Keyishian v. Board of Regents (1967). In Keyishian, professors in New York argued that a requirement for them to take a loyalty oath violated their constitutional rights. The case ultimately reached the Supreme Court. The Court invalidated the state law at issue in the case and discussed the importance of protecting academic freedom. It described academic freedom as “of transcendent value to all of us and not merely to the teachers concerned” and a “special concern [emphasis added] of the First Amendment” (Keyishian v. Board of Regents, 1967, p. 603).

Despite seemingly strong endorsements of individual academic freedom in cases such as Sweezy and Keyishian, the Supreme Court failed to develop specific legal standards to delineate faculty speech rights under the First Amendment (see, e.g., Rabban, 1990; Tepper & White, 2009). For lower courts, this state of affairs resulted in legal ambiguity in deciding cases that implicated academic freedom considerations. Courts faced with legal disputes involving faculty members and their institutional employers often drew upon legal precedents dealing with the speech rights of public employees generally, as opposed to legal rules derived explicitly from the academic freedom precedent.

**Balancing Individual Speech and Employers’ Interests**

As Areen (2009) discussed, applying the legal rules from the public employee speech cases proves problematic in an academic environment. Judicial inquiry under the public
employee speech standards seeks to balance individual speech rights against the prerogatives of managerial authority and the need for conformity in the efficient administration of the workplace. Yet, in higher education open discourse and debate represent a “vital part of the continuing dialogue celebrated by Robert Hutchins—a dialogue that depends on the expression of different points of view” (Areen, 2009, 975). In Garcetti, the Supreme Court completely tilted the balance of interests at stake in the favor of public employers when an employee engages in speech pursuant to carrying out officials duties.

The Garcetti decision created an important limitation on the public employee speech rights first announced by the Supreme Court in Pickering v. Board of Education (1968). In Pickering, the Court held that speech made by public employees could qualify for First Amendment protection in relation to their employers. The case involved an Illinois school teacher, Marvin Pickering, who wrote an editorial letter to a local newspaper that criticized his employer school district’s leadership. Based on the letter, the school district fired Pickering, but the Supreme Court decided that the dismissal violated his First Amendment rights. In making this determination, the Court engaged in a “balancing test that weighed the interests of the employee as a citizen to comment against the interests of the government-as-employer” (Areen, 2009, p. 974). Pickering established a new judicial precedent that extended constitutional protections to public employees critical of the efficacy of their employers.

An important limitation on Pickering’s speech protections for public employees emerged in Connick v. Myers (1983), which added the stipulation that public employee speech protections applied in instances when speech addressed a matter of public concern, as opposed to only raising issues of a private nature. The case involved the distribution of an internal questionnaire by an assistant district attorney in New Orleans soliciting feedback on the leadership of the
district attorney’s office from other employees. The Supreme Court declared that “[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community” then “government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment” (*Connick v. Myers*, 1983, p. 460).

Prior to *Garcetti, Urofsky v. Gilmore* (2000) demonstrated application of the public employee speech standards to public higher education faculty and reinforced tensions between the legal standards for public employee speech and First Amendment protection for academic freedom. In *Urofsky*, faculty at public colleges and universities in Virginia claimed that a state law violated their First Amendment academic freedom rights. The law prohibited state employees from accessing sexually explicit materials on state-owned computers. The professors argued that the law potentially interfered with legitimate research endeavors and infringed on their First Amendment rights as faculty. The U.S. Court of Appeals for the Fourth Circuit rejected that the professors could claim any kind of special First Amendment rights distinct from those rights claimed by any other public employees. According to the court, rather than an individual constitutional right that attaches to the professor, the “Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right [emphasis added] of self-governance in academic affairs” (*Urofsky v. Gilmore*, 2000, p. 412). The *Urofsky* decision highlights an ongoing legal debate that preceded *Garcetti* regarding the extent to which the First Amendment shields faculty speech. Namely, lower federal and state courts have experienced legal uncertainty over the question: *Does the First Amendment safeguard public higher education faculty speech and academic freedom beyond those constitutional speech rights generally available to public employees?*
Garcetti’s New Legal Standard

The Garcia case added an additional criterion for how courts assess First Amendment claims by public employees and opened a new chapter in ongoing legal controversy over faculty speech and the First Amendment. Before Garcia, courts needed only to inquire whether a public employee’s speech dealt with a matter of public or private concern. If touching upon a matter of public concern, the speech in question qualified for First Amendment protection absent a legitimate countervailing justification by the public employer to restrict or regulate the speech in question. Following Garcia, courts must also inquire whether a public employee’s speech occurred pursuant to performing “official duties.” In such instances, “employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline” (Garcetti v. Ceballos, 2006, p. 9).

The Garcia decision added significant uncertainty to continuing legal debate regarding the First Amendment and faculty speech and academic freedom. Despite the fact that Garcia has received considerable coverage in legal scholarship (e.g., Areen, 2009; Bauries, 2014; Byrne, 2004, 2006; Fossey, 2007; Hiers, 2004; O’Neil, 2008; Tepper & White, 2009), it has received less attention from higher education scholars (but see Cain & Gump, 2011; Jorgensen & Helms, 2008). Additionally, the ever-evolving nature of legal standards and discourse based on the issuance of new case law has already made these previous studies somewhat outdated. The current study adds to our understanding of developing—and often competing—judicial conceptions of faculty speech rights via the First Amendment in post-Garcetti cases.

Data and Methods

In this study, we address our research question (How have state and lower federal courts in post-Garcetti legal opinions interpreted the First Amendment speech rights available to public
higher education faculty in carrying out their professional duties?) by conducting a legal analysis of court opinions to better understand how courts are applying the *Garcetti* standards to cases involving faculty speech. In seeking to analyze the state of the law, our focus was not on the assessing the veracity of the allegations or statements asserted by faculty or their institutions. Rather, we analyzed the opinions to ascertain the ways in which judges and courts did or did not apply the *Garcetti* standards (i.e., speech made pursuant to official duties is ineligible for First Amendment protection) to the domain of professionally-based faculty speech.

While we did not differentiate court hierarchy in our initial analysis of opinions, our discussion of resulting themes and cases reflects the importance of court level in the judicial system. In the federal court system, there exist thirteen U.S. Courts of Appeals (i.e., circuit courts) that are only secondary in authority to the U.S. Supreme Court. Below these Courts of Appeals are federal district courts that, based on their geographic location, fall under the authority of one of the Courts of Appeal and of the Supreme Court. State courts also have tiered judicial systems, though the structure in a particular state may deviate from the federal model. While not a part of the federal judiciary, interpretations of federal law by a state court (often coming from the state’s highest court) are subject to review by the U.S. Supreme Court.

**Clashing Judicial Views: Faculty as Independent Speakers or Speech Conduits**

A key theme emerging from our analysis dealt with contrasting judicial interpretations of faculty speech rights in relation to the First Amendment and the *Garcetti* standards. In one group of cases, courts applied *Garcetti* to faculty speech and expression, adopting a view that faculty serve as institutional speech conduits (i.e., professionally-based faculty speech was not their own). In contrast, in another set of opinions, courts concluded that faculty, based on their
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unique societal and organizational functions, merited First Amendment protection for at least some forms of their professionally-based speech or expression.

Faculty as Institutional Speech Conduits

Multiple courts adopted the legal stance that professors do not carry out professional roles distinctive from other public employees for First Amendment purposes. These courts adopted the position that under the First Amendment public higher education faculty serve as institutional speech conduits or mouthpieces and speak on behalf of the college or university—rather than as independent agents in fulfilling their professional duties. In several cases, courts extended this legal framework to speech related to teaching or scholarship.

A number of representative cases are summarized in Table 1; this list is not exhaustive, but nonetheless clearly shows the implications for academic freedom of treating faculty as speech conduits. These cases also demonstrate the cross-jurisdictional nature of rulings related to Garcetti (column 2), and the diversity of issues under consideration (column 3). [Insert Table 1 Here]

Courts applied the speech conduit approach in multiple cases that dealt with faculty speech in an intramural speech context. In one case a professor denounced a university’s use of adjuncts to teach particular courses and of a colleague’s promotion and tenure materials. The federal court held that the professor’s comments fell within the professor’s employment duties, thus triggering the Garcetti standards (Hong v. Grant, 2007). In another case, an assistant professor criticized a hiring committee for failing to pay sufficient attention to diversity-related factors. Again, a federal district court ruled that the critique of the hiring committee took place pursuant to the professor carrying out her employment duties (Miller v. University of South
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Alabama, 2010). In Miller, the speech was ruled ineligible for First Amendment protection under Garcetti because it occurred within the context of performing service to the university community.

A federal district court held that a faculty member’s speech that arose in her capacity as a faculty advisor to a student organization constituted official duties (Capeheart v. Hahs, 2011). The district court discussed a shift in the legal paradigm following Garcetti, stating that “courts have routinely held that even the speech of faculty members of public universities is not protected when made pursuant to their professional duties” (Capeheart v. Hahs, 2011, p. 4). Although a federal appeals court later held that the case did not need to turn on First Amendment considerations, Capeheart v. Hahs demonstrates how some lower courts are interpreting and applying Garcetti in ways that do not bode well for faculty speech and academic freedom under the First Amendment.

When a faculty member made comments asserting that grant funds were misappropriated, a court ruled that the speech constituted official duties based on his role in administrating the grant (Huang v. Rector and Visitors of University of Virginia, 2012). In another grant-related case, a federal appeals court upheld a federal district court’s ruling that a professor who challenged the way a university administered a grant was ineligible for First Amendment protection based on Garcetti (Renken v. Gregory, 2008). Lastly, in a case involving the treatment of animals at a lab facility, a federal district court held that a clinical veterinarian’s speech dealt with her official employment duties (Hrapkiewicz v. Board of Governors of Wayne State University, 2012). This meant the speech for which she claimed retaliation was unprotected by the First Amendment.
Some courts relied on the “official duties” categorization even in instances when the speech ostensibly fell outside the faculty member’s job duties. Two cases involved incidents where faculty expressed views antagonistic toward homosexuality. One case dealt with a part-time cosmetology instructor who gave students pamphlets that denounced homosexuality as immoral (Piggee v. Carl Sandburg College, 2006). In a second case, a voice professor expressed negative views to students on homosexuality (Nichols v. University of Southern Mississippi, 2009). A third case dealt with a faculty member’s speech in a classroom setting, in which the professor expressed religious sentiments that offended students (Payne v. University of Southern Mississippi, 2014). In all three cases, courts determined that, while not specifically made as a part of the professors’ official duties, the speech should not receive First Amendment protection because it was made in the course of the faculty members otherwise carrying out their professional roles in relation to working with students.

It is worth emphasizing that the courts in Piggee v. Carl Sandburg College (2006), Nichols v. University of Southern Mississippi (2009), and Payne v. University of Southern Mississippi (2014) were not weighing the appropriateness of institutional action based on the potential harm to students caused by the professors’ speech. Rather, the courts applied Garcetti’s “official duties” standard as a basis to exclude faculty speech from potential First Amendment protection. Under this interpretive framework, multiple types of faculty speech, no matter the viewpoints expressed, could be outside the the purview of the First Amendment.

A notable example of a court extending the concept of faculty as speech conduit beyond the “official duties” parameter occurred in litigation involving a professor at Idaho State University (Sadid v. Idaho State University, 2009). A lower state court initially determined that when a professor wrote an editorial to a newspaper and listed his university affiliation, he
triggered the *Garcetti* standards. The court stated that the “tone” of the letters was that of an employee (*Sadid v. Idaho State University*, 2009, p. 12). While this expansive interpretation of *Garcetti* was later rejected by the Idaho Supreme Court (*Sadid v. Idaho State University*, 2011), the lower court’s stance reflected a judicial stretching of *Garcetti* and an emphasis on administrative authority to regulate faculty speech.

Justice Souter’s dissent specifically raised concerns over application of the *Garcetti* standards in the areas of scholarship and teaching. Indicative of such worries, two lower court opinions interpreted speech related to scholarship and to curricular issues as subject to *Garcetti* (*Demers v. Austin*, 2011; *Adams v. Trustees of University of North Carolina-Wilmington*, 2010). While both of these decisions were reversed on appeal and are discussed in the next section, the lower court decisions are significant in applying the *Garcetti* standards to both scholarship and teaching. In *Demers* (2011), the lower court specified that “official duties are not limited to classroom instruction and research. Faculty members are expected to participate in a wide range of academic, administrative, and personnel functions” (*Demers v. Austin*, 2011, p. 4). This broad definition of official duties for faculty cast a wide net in relation to relegating faculty professionally-based speech to administrative authority. In the *Adams* case, a federal district court held that the inclusion of writings in a promotion dossier made the publications subject to the *Garcetti* standards.

The opinions discussed in this section represent judicial interpretations of faculty speech as subject to administrative authority when made as part of performing professional responsibilities. In these opinions, courts construed colleges and universities as “owning” faculty speech made in the course of carrying out professional duties (e.g., advising, grant administration, curriculum development, publishing, writing newspaper editorials, and serving
on hiring, promotion, and tenure committees). The cases present a view of public higher education faculty as indistinct from other public employees and serving as speech conduits for their higher education employers in carrying out professional duties in relation to the First Amendment.

Faculty as Independent Speakers

In another group of opinions, courts interpreted faculty speech and expression made as part of carrying out professional duties as eligible for First Amendment protection. Rather than conceptualizing professors as speech conduits for their colleges or universities, courts in these cases determined that faculty members, who were performing their professional obligations, fulfilled institutional and societal roles warranting First Amendment protection. Notably, this group of cases included several appellate court rulings that overturned lower court holdings that viewed faculty members as speech conduits under \textit{Garcetti}.

In one of the most prominent of these opinions, \textit{Demers v. Austin} (2014), a U.S. Court of Appeals reversed the previously discussed district court opinion and offered a decidedly different interpretation of faculty speech rights than the lower court. While the appeals court agreed that the faculty member produced the speech in question as part of his official duties, the court ruled that the \textit{Garcetti} standards did not apply. The appeals court stated in its opinion that the \textit{Demers} case dealt with “teaching and academic writing” and raised exactly the kinds of concerns that “worried” Justice Souter in his \textit{Garcetti} dissent (\textit{Demers v. Austin}, 2014, p. 411). Echoing similar sentiments expressed by Justice Souter, the court characterized “teaching and academic writing” as encompassing quintessential faculty roles deserving of First Amendment protection (\textit{Demers v. Austin}, 2014, p. 411). According to the court, “We conclude that if applied to
teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court” (*Demers*, 2014, p. 411).

While decided on more narrow grounds than *Demers* (2014), in *Adams v. Trustees of the University of North Carolina-Wilmington* (2011) a federal appeals court also overturned a lower court ruling applying *Garcetti* to faculty speech. Reversing the district court, the appeals court determined that a faculty member’s decision to include materials in a promotion dossier did not make them automatically subject to the *Garcetti* standards. The court discussed that before the writings were included in the dossier, they undoubtedly merited First Amendment protection. Additionally, the professor was not explicitly required to author the materials as part of his official job duties. The act of including them in the dossier, stated the court, did not then divest the speech of First Amendment protection under *Garcetti*.

In two cases, federal district courts decided that *Garcetti* did not apply to teaching-related speech. In one case, a medical school faculty member claimed he suffered retaliation because he advocated for a particular childbirth procedure while teaching courses. A university administrator claimed that the speech fell under the *Garcetti* standards. Rejecting this argument, the court noted that in *Garcetti* the Supreme Court left unresolved the issue of faculty speech. The federal district court held that an “academic freedom exception” should exist in relation to *Garcetti* to protect “the active trading floors in the marketplace of ideas” (*Kerr v. Hurd*, 2010, p. 20). In another case, a community college asserted that an instructor’s comments made while teaching a course were excluded from First Amendment protection based on *Garcetti* (*Sheldon v. Dhillon*, 2009). The court, refusing to dismiss the case, rejected the college’s argument, stating that *Garcetti* had explicitly left the issue undecided. Instead, the district court looked to
precedent from the controlling federal appeals court, which determined that professors possess certain First Amendment protection for their teaching-related speech.

As with opinions examined in the previous section, the opinions analyzed in this part did not represent final legal judgments in the particular cases considered. But, the courts in these cases determined that professionally-based faculty speech should not be categorically excluded from First Amendment protection based on *Garcetti*. Rather than institutional speech conduits, these cases presented a view that faculty serve as independent voices in relation to the First Amendment in carrying out their professional duties. As such, courts in these cases decided that the First Amendment, at least in certain instances, shields faculty members’ professionally-based speech.

**Continuing Legal Ambiguity: Academic Freedom and the First Amendment**

In analyzing post-*Garcetti* opinions, it is clear that legal uncertainty persists regarding academic freedom as a constitutional concept. Even when courts interpreted the *Garcetti* standards as inapplicable to some forms of faculty speech, they still predominately looked to public employee speech cases (relied on prior to *Garcetti*) to provide the guiding legal framework for faculty speech rights. This finding demonstrates a continuation of the pattern identified by Jorgensen and Helms (2008) in their analysis of faculty speech cases.

The court of appeals decision in *Demers v. Austin* (2014) provided the best example of a court calibrating the idea of academic freedom as a constitutional concern with the public employee speech standards. In *Demers*, the court determined that academic and teaching-related writing and speech merited First Amendment protection, despite the standards from *Garcetti*. To support the exclusion of such speech from *Garcetti*, the court referenced the Supreme Court’s academic freedom decisions such as *Keyishian* (1967), but it still turned to public employee
speech standards to provide the operative legal framework. The court, however, discussed the need to adjust the concept of public concern for a collegiate setting, stating that the “balancing process in cases involving academic speech is likely to be particularly subtle and ‘difficult’” (Demers v. Austin, 2014, p. 413). To illustrate, the court discussed how debates in an English department over a literary canon might appear “trivial to some,” but contended that such a view fails to account for the “importance to our culture not only of the study of literature, but also of the choice of the literature to be studied” (Demers v. Austin, 2014, p. 413). The court cautioned the judiciary not to minimize the nature of such academic debates under the public concern doctrine: “Recognizing our limitations as judges, we should hesitate before concluding that academic disagreements about what may appear to be esoteric topics are mere squabbles over jobs, turf, or ego” (Demers v. Austin, 2014, p. 413).

In deciding favorably for the faculty member in Adams v. Trustees of the University of North Carolina-Wilmington (2011), the U.S. Court of Appeals for the Fourth Circuit squarely relied upon the public employee speech standards. While the court discussed the possibility of an academic freedom exception to Garcetti, it categorized the faculty speech under review in the case as occurring outside the realm of any specifically designated employment duties. That is, the court interpreted the speech as initially arising in the faculty member’s capacity as a private citizen rather than as an employee. Classifying the speech this way allowed the court to sidestep the question of whether faculty speech clearly made as part of employment duties should fall under Garcetti. This approach of excluding the speech at issue from official duties was also adopted in a case in which a physician faculty member alleged that he was retaliated against by his university because he raised concerns about hospital practices and patient safety issues (Rehman v. State University of New York at Stony Brook, 2009). Another court sidestepped
*Garcetti* in a case involving a researcher at Louisiana State University who claimed that his contract was not renewed because he made public statements that were critical of the U.S. Army Corps of Engineers following Hurricane Katrina (*van Heerden v. Board of Supervisors of Louisiana State University*, 2011). The court characterized the comments as arising in the researcher’s role as a private citizen and not subject to the *Garcetti* standards.

In the context of teaching a federal district court did not rely on the public employee speech cases or the academic freedom cases (see earlier discussion of *Sheldon v. Dhillon*, 2009). Instead, the court turned to another Supreme Court case, *Hazelwood School District v. Kuhlmeir* (1988). *Hazelwood* did not involve public employee speech. Instead, *Hazelwood* dealt with student speech in a secondary education context. In looking to *Hazelwood*, the court in *Sheldon* sought to rely on precedent followed in the jurisdiction prior to *Garcetti* to decide faculty speech claims that dealt with classroom-related faculty speech. Thus, while the *Sheldon* court did not base its decision on the public employee speech standards, this case provides yet another example of judicial reluctance to apply academic freedom cases to define legal standards for faculty professionally-based speech.

*Emergency Coalition to Defend Educational Travel v. U.S. Department of Treasury* (2008) constitutes a case somewhat beyond the confines of this study, as the litigation did not pit a faculty member against an institution or official. But the decision provides insight into competing judicial notions over how to interpret faculty speech rights in relation to constitutional academic freedom concerns in a post-*Garcetti* era. The case centered on challenges to the federal government’s authority to impose restrictions on academic study programs in Cuba. The appeals court panel of judges that decided the case determined that the restriction represented a permissible regulation not implicating constitutional academic freedom questions.
Two judges on the panel authored separate opinions, called concurring opinions, in which they offered competing views of academic freedom and the First Amendment. One judge argued that academic freedom “has generally been understood to protect and foster the independent and uninhibited exchange of ideas among teacher and students and the serious pursuit of scholarship among members of the academy” (Emergency Coalition, 2008, p. 15). Additionally, and looking to an article written by legal scholar Judith Areen (2009), the judge discussed that constitutional academic freedom also potentially encompassed shared governance concerns that extended beyond teaching and research activities, with faculty possessing a First Amendment right to speak on “academic matters” such as “student academic standards” (Emergency Coalition, 2008, p. 16). The judge quoted at length from the Areen (2009) article, which expressed the view that constitutional academic freedom for faculty had been constrained by increased reliance on the legal standards from the public employee speech cases. In discussing Garcetti, the judge contended that the Supreme Court “neither refute[d] the existence of academic freedom as a part of the First Amendment, nor reject[ed] the suggestion that academic freedom may extend beyond the Court’s ‘customary employee-speech jurisprudence’” (Emergency Coalition, 2008, p. 18).

The other concurring opinion in Emergency Coalition expressed reservations over any First Amendment protection for faculty speech beyond those available for speech claims in general, such as by public employees. The judge stated that it is “doubtful that a professor could assert an individual constitutional right of academic freedom against his university employer, whether state or private” (Emergency Coalition, 2008, p. 18). Echoing the position adopted in several other post-Garcetti opinions analyzed in this study, the judge described faculty as institutional speech conduits or mouthpieces, writing that the “state can be said to “speak” through its employees” (Emergency Coalition, 2008, p. 19). Reflective of the views offered in
Urofsky v. Gilmore (2000), the judge wrote that the “Government may well be correct in asserting that academic freedom—if indeed it is a First Amendment concept warranting separate protection—inheres in the university, not in individual professors” (Emergency Coalition, 2008, p. 19).

Collectively, the legal opinions analyzed showed continued legal disagreement and ambiguity regarding faculty academic freedom as a constitutional concept. Previous academic freedom decisions at best played a secondary role to other legal standards to evaluate faculty speech claims, notably the public employee speech standards. Our analysis demonstrates how a set of definitive legal standards remains elusive in efforts to delineate academic freedom as a “special concern” of the First Amendment.

Discussion

Previous research has focused on challenges to faculty autonomy and the persistent rise of managerial control through the growth of non-faculty administration. In this context, faculty members have been said to function increasingly as managed professionals (e.g., Rhoades and Slaughter, 1997). However, the changing dynamics of faculty work have typically been studied within the organizational settings of colleges and universities (Baez & Slaughter, 2001; Rhoades, 2011; Rhoades & Slaughter, 1997; Rhoades & Sporn, 2002; Slaughter, 2011; Slaughter & Rhoades, 2004; Winter, 2009). This study contributes to the literatures dealing with faculty professional autonomy and the managerial authority of administrators by expanding consideration of these topics to a key social institution—the courts.

In Garcetti v. Ceballos, Justice Kennedy and the other justices in the majority declined to definitively state whether faculty members’ speech should be held to the same legal standards as other public employees. Our study shows that multiple lower courts decided that the Garcetti
standards should apply to public college and university faculty. In these cases, judges, through the public employee speech standards, emphasized administrative control (i.e., managerial authority) over faculty independence. Rather than independent voices, this constitutional view conceptualizes faculty members as communicating on behalf of their higher education institutions rather than as independent actors when carrying out professional duties and obligations. Put another way, these courts adopted the position that public colleges and universities—which employ the largest share of the professoriate (National Center for Education Statistics, 2016)—possess authority, for First Amendment purposes, to control and direct faculty speech because faculty are speaking as institutional speech conduits rather than in an independent capacity.

Our findings also suggest that some courts tended to adopt a broad definition of which areas of faculty work or speech constitute “professional duties.” This is not a semantic issue. The ways that courts define professional duties for faculty determine when professors are subject to heightened institutional control for their professionally-based speech and expression. In other words, judges not only make rulings that support or counter the idea that faculty members are managed professionals versus largely independent actors in relation to their professional speech—judges also help determine the areas in which faculty speech may be managed. In the cases we examined, multiple courts rejected claims that an academic freedom exception should exist for speech made for teaching and research purposes. Judges also interpreted faculty members’ professional duties to include advising student groups, participating in shared governance, serving on search or hiring committees, administering grants, and writing newspaper editorials.
When courts did not rely on *Garcetti*, judges often sidestepped the question of whether a First Amendment dimension exists to academic freedom by ruling that the faculty member engaged in speech as a private citizen—and not as a professional. When courts held that faculty members were speaking as professionals and that faculty speech should be protected, they typically relied on pre-*Garcetti* public employee speech standards. Even among courts that supported First Amendment protections for some forms of faculty speech, the opinions exhibited a lack of coherency regarding the legal basis and standards that should define constitutionally empowered faculty speech rights and autonomy.

Although our analysis focused on judicial interpretations, our study also raises questions about how colleges and universities use courts to enhance managerial prerogatives at the expense of faculty autonomy and independence. In the opinions reviewed, colleges and universities, or in some cases individual administrators, took the position (through their attorneys) that the faculty speech under consideration fell under the *Garcetti* standards. It is worth emphasizing that in making this legal argument, institutions or officials were not justifying their actions by arguing that the faculty speech at issue was discriminatory, untrue, or otherwise unprofessional. Instead, the legal arguments sought to place professionally-based faculty speech beyond the purview of the First Amendment, no matter its quality or veracity.

From one perspective, adoption of such legal stances by institutions or their officials is unsurprising. In litigation, attorneys routinely pursue credible legal arguments to provide competent representation. Beyond the realm of legal strategy, these officials and institutions advanced a legal position that privileged managerial authority over professionally-based speech by faculty. Our study raises questions related to under what circumstances institutions decide to pursue or forego opportunities to advance managerial authority through judicial action. Seeking
to blunt the potential curtailment of faculty speech rights under *Garcetti*, a select number of institutions and systems have adopted provisions that explicitly provide that faculty members possess independence in their professionally-based speech, including in relation to intramural speech dealing with shared governance concerns (e.g., Schmidt, 2010, 2014).

The post-*Garcetti* cases examined in our study have transpired within an overall environment marked by a weakening of faculty autonomy and the accretion of managerial authority. Within this context, future judicial pronouncements regarding faculty speech rights under the First Amendment will serve to either enhance or diminish legal protections for faculty autonomy, including in relation to academic freedom concerns. At the same time, the ambiguous and contested status of faculty speech rights under the First Amendment indicate the significant need for other legally enforceable mechanisms to support and protect faculty in the course of carrying out their professional duties. Given increased reliance on non-tenure stream faculty, our study serves to prompt inquiry and debate related to what kinds of speech protections—beyond institutional goodwill—are available (or should be available) to faculty in carrying out their professional responsibilities to students, to their institutions, and to society.
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