The Tenuous Legal Status of First Amendment Protection for Individual Academic Freedom

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Abstract: *The First Amendment is commonly assumed to protect various forms of faculty speech in public higher education. In reality, considerable legal uncertainty exists regarding constitutional protection for professors' speech at public colleges and universities. While far from a recent issue, a 2006 decision from the U.S. Supreme Court, Garcetti v. Ceballos, only created additional doubts concerning First Amendment protection for faculty speech in public higher education. In Garcetti, the Supreme Court curtailed the First Amendment speech rights of public employees generally, but the decision left open whether the standards announced in the case also apply to public college and university professors. State and lower federal courts have reached conflicting conclusions regarding whether the Garcetti standards extend to faculty speech. This article examines how courts in post-Garcetti decisions have responded to ongoing legal questions regarding the extent to which First Amendment safeguards apply to faculty speech in public higher education.*

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Academic freedom for the individual faculty member represents a condition widely recognized as a necessary prerequisite to promote open intellectual discourse and discovery in our nation's colleges and universities (O'Neil, 2005, 2008). But the traditional legal arrangements relied upon to protect faculty academic freedom and other forms of professionally based speech face an increasingly precarious future. Tenure—an arrangement grounded in contract law and developed as the predominant means to safeguard faculty independence—faces difficult questions regarding its long-term viability (e.g., O'Neil, 2005; Stainburn, 2010; Wilson, 2010). In the context of public higher education, tenure's erosion dovetails with legal debate and uncertainty over the extent of First Amendment protection for professors' speech and expression.

Just as tenure faces an increasingly hazy future, the status of First Amendment protection for individual academic freedom and other forms of professionally based professorial speech, such as participation in institutional governance matters, is characterized by legal uncertainty (Areen, 2009; Hutchens, 2009; O'Neil, 2008). That is, does a college professor have First Amendment protection to express matters related to his or her professional work? Legal questions over constitutional safeguards for faculty speech intensified in the wake of a 2006 U.S. Supreme Court decision, *Garcetti v. Ceballos.* In the case, the Court held that when a public employee engages in speech in fulfilliing his or her official job duties, then such speech is ineligible for First Amendment protection. The *Garcetti* opinion explicitly left open the issue of whether the decision's standards also apply to professors at public colleges and universities based on their status as public employees.

Faculty members in public higher education have a notably different role than most public employees. Professors are responsible for educating students to analyze and critique matters in one's field or discipline; this process may include challenging social conventions or presenting information in an argumentative manner. Also, professors often participate in the internal governance of the institution, which may, for well-reasoned purposes and through the exercise of professional judgment, conflict with perspectives asserted by administrators, legislators, or students. In light of a professor's role, the *Garcetti* standards, if applied to public higher education faculty, would significantly curtail or eliminate First Amendment protection for professors' speech at public colleges and universities (Areen, 2009;

Hutchens, 2009; Jorgensen & Helms, 2008; O'Neil, 2008). More specifically, multiple types of professorial speech—such as comments made in class, views offered in scholarship, or intramural communications at departmental meetings—face a loss of First Amendment protection. Courts considering the issue have thus far reached conflicting results; and even those courts declining to apply the *Garcetti* standards to faculty speech have shown a lack of coherency regarding the legal rules that should apply to such speech claims.

Relying on methods associated with public policymaking and legal analysis, the purpose of this article is to draw attention to the uncertainty of First Amendment protection for faculty academic freedom and professionally based speech more broadly. To achieve the paper's purpose, this study examines the evolutionary process of academic freedom policymaking with a focus on judicial decisions addressing the issue of whether the *Garcetti* standards apply to faculty speech. Discussion and analysis is framed within the context of judicial policymaking to highlight the general legal debate and uncertainty that exists over First Amendment protection for professorial speech at public colleges and universities. By doing so, the article aims to inform (1) scholars conducting research on issues involving faculty speech and academic freedom and (2) higher education stakeholders and policymakers seeking a greater understanding of the endangered legal status of First Amendment protection for professors in fulfilling their professional roles.

Role of Tenure in Safeguarding Faculty Speech

In the United States, protection for individual academic freedom has largely stemmed from the development of professional standards and contractual arrangements in the form of tenure to protect the scholarly independence of professors. Tenure represents a special kind of contractual relationship between a faculty member and his or her employer institution and exists at both public and private colleges and universities. Following a probationary period, a faculty member granted tenure enjoys a continuing employment relationship with his or her institution that may not be dissolved by the college or university absent extraordinary circumstances. This section briefly introduces the development of tenure and presents some of the challenges to its ongoing viability.

Development of Faculty Tenure

Professional standards and legal mechanisms (i.e., tenure) to protect the intellectual freedom of faculty members in American higher education largely represent a twentieth century development. As a leading academic freedom legal scholar has stated, "the establishment of clear principles protecting the expression of unpopular views within or outside the classroom occurred surprisingly late in our history" (O'Neil, 2005, p. 92). During the nineteenth century, American colleges and universities began to be influenced by ideas emanating from German higher education regarding the need for faculty members to possess intellectual independence to pursue their scholarly and teaching duties (Brubacher & Rudy, 1997; Cohen & Kisker, 2010; Thelin 2004). But even as these ideas were beginning to emerge and take root in American higher education, colleges would routinely dismiss faculty who espoused unpopular or unorthodox views.

An important development in efforts to establish standards for scholarly independence occurred in 1915, when Arthur Lovejoy of Johns Hopkins and John Dewey of Columbia organized a meeting to promote the cause of academic freedom (Brubacher & Rudy, 1997; Cohen & Kisker, 2010; Thelin 2004). These efforts would lead to the establishment of the American Association of University Professors (AAUP) and to the 1915 Declaration of Principles on Academic Freedom and Tenure. The AAUP worked to foster the establishment of tenure and related professional standards to safeguard academic freedom and to promote a shared role for faculty in institutional governance matters. The AAUP's 1940 Statement of Principles on Academic Freedom and Tenure served as a guiding document in articulating the need for and the importance of tenure in protecting academic freedom. The principles established in this and later AAUP documents and interpretive statements on academic freedom and tenure have served important roles in helping to promote tenure as an integral part of the professional standards and employment arrangements developed in the United States to protect academic freedom and scholarly independence.

Declining Eligibility

While tenure developed as the dominate means to safeguard individual academic freedom through professional employment arrangements, the legal protections afforded by tenure increasingly extend to a smaller

portion of the faculty (Hutchens & Sun, 2011). According to the AAUP (n.d.), in 1975, professors employed in tenure-line positions accounted for about 56% of all faculty positions. The AAUP reported that this percentage declined to around 42% in 1995 and dropped to approximately 30% in 2007. Similarly, the American Federation of Teachers (AFT) (2009) stated that tenure-line faculty members accounted for about 27% of the professoriate in 2007. Demonstrating a continuation of the downward trend, the AAUP reported in 2011 that tenure-line positions accounted for less than a quarter of faculty (Curtis & Thornton, 2013). In some fields and disciplines particularly, such as the humanities, commentators now openly question the viability of tenure as a continuing employment arrangement (e.g., Donoghue, 2008). Increasingly, faculty members including those at public colleges and universities are excluded from tenure and its legal safeguards for faculty speech.

Rather than being employed in tenure-line positions, the majority of faculty members in the United States now serve in part-time positions (AFT, 2009). Unlike their tenure-line counterparts, this group of faculty members is often employed as at-will employees (Baldwin & Chronister, 2005). With an at-will employment arrangement, either party may end the employment relationship at any time. In general, a college or university is not required to justify a decision to dismiss an at-will faculty employee in the same way that it would be with a tenured faculty member. Some non-tenure track faculty members are employed as full-time employees on a contract basis, but these individuals generally do not enjoy the same kinds of legal employment protections possessed by tenured faculty members. While employment arrangements for a minority of non-tenure track faculty members may be for multiple years and with an expectation of renewal, the contractual arrangements for many non-tenure track faculty members are often for, at most, a single academic year, with the renewal decision likely left largely to the discretion of one individual such as a department chair or dean.

The threats facing the long-term viability of tenure and the composition of the faculty majority as off the tenure track highlight the need for First Amendment standards to provide at least some degree of alternative legal protection to faculty speech, including in relation to academic freedom concerns (Hutchens & Sun, 2011). There exists an important caveat. The First Amendment applies only to actions by governmental actors but not

to private entities. Thus, in the context of higher education, faculty members at public colleges and universities, as compared to private ones, are in a legal position to challenge institutional restrictions on their speech rights on First Amendment grounds. As the article discusses, however, considerable legal ambiguity exists regarding the extent to which the First Amendment protects the professionally based speech of faculty at public colleges and universities, including when such speech raises academic freedom concerns.

Conceptual Framework and Method of Analysis

As Jorgensen and Helms (2008) point out, other than scholars specifically focused on higher education law, the issue of evolving legal standards related to individual academic freedom and the First Amendment has received limited consideration in the higher education literature. This lack of attention stands in contrast to the coverage and analysis the issue has received from legal scholars (e.g., Areen, 2009; Horwitz, 2007; O'Neil, 2008; Tepper & White, 2009) and from organizations, such as the AAUP (2009). Thus, while a topic recognized as a critical area of concern to higher education in other contexts, scholarship in the field of higher education has moved slowly in considering issues related to the ongoing legal doubt and disagreement over First Amendment protection for faculty speech in public higher education.

In their study of legal decisions related to academic freedom, Jorgensen and Helms (2008) employed the concepts of path dependence and policy space from the public policy literature to help explain how previous legal decisions (precedent) impact how new legal controversies are decided. These concepts help make clear how past decisions serve to structure and confine the ways in which courts decide future legal disputes. Using a tree analogy to explain path dependence in relation to legal decisions, the authors described how the "trunk of precedent" generates "branches, twigs, and leaves" as courts decide new cases by looking heavily to the outcomes, interpretations, and standards developed in earlier decisions (Jorgensen & Helms, 2008, p. 3). The authors also applied the concept of policy space—which deals with the "crowding and interdependence between policies that evolve in the same domain" or "common interest area"—to help explain how the grouping together of cases dealing with a particular issue or topic, such as academic freedom or faculty speech,

helps to define and limit the choices available to courts in future cases (Jorgensen & Helms, 2008, p. 3).

Path dependence and policy space provide useful conceptual tools to describe how courts forge legal standards and rules by looking heavily to precedent in deciding new legal disputes. The cases undergo a series of movements typically involving replication, differentiation, and proliferation. Accordingly, legal analysis seeks "to make sense of the evolving reality known as the law" by employing a time line that "looks to the past, present, and future" (Russo, 1996, p. 35). The reliance by courts on precedent to guide in the disposition of new cases requires those interested in the current and future state of the law to consult previous decisions for legal authority relevant to the issue under consideration.

Understanding the contemporary status of legal standards related to faculty speech and academic freedom necessitates familiarity with how courts have decided previous cases because of the importance of precedent. Yet, part of this inquiry poses the question: which cases serve as precedent and how does that determination lead to further development of the judicial policy at issue? Responding to the question, this study provides a legal analysis of how state and lower federal courts have thus far responded to the issue of whether the *Garcetti* standards should apply to faculty members at public colleges and universities. The study seeks to build upon the analysis of Jorgensen and Helms (2008) and contributes to their study and the extant literature in two ways. First, this study expands the research conducted by Jorgensen and Helms (2008) as a body of case law has now begun to emerge since their study involving the application of the *Garcetti* rules to faculty speech in public higher education. Second, the issuance of additional legal opinions provides additional data to test the evolutionary intersection of path dependence and policy space.

Constitutional Academic Freedom Cases Characterized by Ambiguity and Disagreement

To provide context and perspective for the cases examined, the section provides a general overview of the legal developments regarding academic freedom and academic deference. Then, the section presents questions raised about academic freedom and First Amendment

protections. Finally, this section discusses *Garcetti v. Ceballos* (2006) and its potential implications for faculty speech rights under the First Amendment. Collectively, the discussion in this section explains the evolution and the nuances regarding the debate and uncertainty surrounding the issue of First Amendment protection for faculty speech.

Judicial Recognition of Academic Freedom

A review of U.S. Supreme Court academic freedom cases reveals a line of precedent long on rhetoric but short on specific legal principles or standards for courts to follow when faced with a faculty speech claim (Hutchens, 2009; Jorgensen & Helms, 2008; Tepper & White, 2009). Academic freedom entered discussion in Supreme Court opinions as part of the judiciary's reaction to excessive governmental efforts during the McCarthy era to root out perceived Communist plots to infiltrate American society during the Cold War (Tepper & White, 2009). It was within this context that academic freedom first received attention in a Supreme Court decision in a dissenting opinion in *Adler v. Board of Education* (1952). The case dealt with a New York law that prohibited employment in public education by individuals belonging to organizations deemed subversive. A majority of the Court upheld the law, but Justice William O. Douglas argued in a dissenting opinion that academic freedom must be protected in the nation's schools in order for them to operate with the required intellectual vigor and honesty to support a democratic society.

Academic freedom garnered mention in a well-known concurring opinion five years later in *Sweezy v. New Hampshire* (1957). The case dealt with an individual refusing to answer questions from the New Hampshire attorney general's office about activities that included lectures given by him at the University of New Hampshire and his scholarly activities. Justice Felix Frankfurter wrote in a concurring opinion about the importance of protecting intellectual independence at the nation's colleges and universities. He looked to a statement by South African scholars in support of the proposition that higher education institutions should possess the authority to decide "who may teach, what may be taught, how it shall be taught, and who may be admitted to study" (*Sweezy v. New Hampshire*, 1957, p. 263).

It was not until 1967 in *Keyishian v. Board of Regents* that discussion of academic freedom appeared in a majority opinion. Once again considering the New York law at issue in *Adler* (1952), this time the Supreme Court struck down provisions in the law. The Court's opinion discussed the importance of protecting free speech and inquiry in the nation's educational institutions:

> Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom therefore is a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. (*Keyishian v. Board of Regents*, 1967, p. 603)

Despite such impassioned language in *Keyishian* and professed support for academic freedom in subsequent decisions (e.g, *Grutter v. Bollinger*, 2003), the Supreme Court has failed to articulate clear constitutional standards regarding the contours of First Amendment protection for individual academic freedom and other types of faculty speech.

In *Regents of the University of Michigan v. Ewing* (1985), the Supreme Court briefly acknowledged in a footnote the legal ambiguity that existed in relation to constitutional protection for academic freedom, stating: "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students . . . but also, and somewhat inconsistently, on autonomous decision making by the academy itself" (p. 226). The Court, however, has never reconciled this potential conflict over institutional versus individual rights related to academic freedom or articulated specific legal standards based on principles of academic freedom for state and lower federal courts to readily apply in cases involving the speech rights of faculty members in public higher education in relation to their institutional employers.

Current Legal Debates over First Amendment Protection for Academic Freedom

An important facet that has developed in the debate over academic freedom involves arguments that constitutional protection for academic freedom does not even encompass individual faculty members but, instead, accrues at most only at the institutional level (e.g., Byrne, 1989, 2009; Finkin, 1983; Horwitz, 2007; Rabban, 1990). *Urofsky v. Gilmore*

(2000), a decision from the U.S. Court of Appeals for the Fourth Circuit, highlights the legal debate over this issue. In *Urofsky*, the court considered whether the First Amendment prohibited applying a Virginia law regulating computer use by state employees to faculty members at public colleges and universities. The opinion stated that any special protection afforded by the First Amendment for academic freedom, if existing at all, applies only to institutions and not to individual professors. The decision demonstrates the serious legal challenges and doubts that exist regarding judicial recognition of constitutional protection for individual academic freedom and other types of professionally based faculty speech.

Even for courts not ready to adopt the *Urofsky* (2000) position that First Amendment academic freedom protections represent at most an institutional concern, considerable legal ambiguity exists. Rather than looking directly to the academic freedom cases, these courts have often relied on decisions dealing with the legal rules of public employees generally when considering First Amendment claims involving college faculty members (Areen, 2009; Hutchens, 2009; Jorgensen & Helms, 2008; Tepper & White, 2009). Jorgensen and Helms' (2008) tree analogy generated from the concepts of path dependence and policy space provides a useful way to conceptualize how courts have not looked to the academic freedom legal decisions in guiding their analysis. Instead, courts have tended to rely on twigs and branches sprouting from other lines of precedent in deciding faculty speech claims, especially those cases dealing with the speech rights of public employees generally.

Garcetti v. Ceballos: Recharting the Constitutional Standards

Holding aside for a moment the additional restrictions on public employee speech rights announced in *Garcetti* (2006), it is worth noting the legal standards in force prior to that decision used to determine if a public employee's expressions qualified for First Amendment protection. Previously, the legal rule was that a public employee's speech could receive First Amendment protection if: (1) the speech addressed an issue deemed to constitute a matter of public concern; and (2) the governmental employer proved unable to offer a legitimate justification to restrict the speech based on managerial concerns (*Connick v. Meyers*, 1983). The *Garcetti* decision left in doubt whether these or any other

legal standards continue to provide some level of First Amendment protection for faculty speech at public colleges and universities.

Garcetti v. Ceballos (2006) involved a deputy district attorney, Richard Ceballos, who recommended the dismissal of a case based on his belief that law enforcement officials made certain misrepresentations in order to obtain a search warrant. Ceballos discussed his concerns with supervisors and also wrote a memorandum recommending the case's dismissal. His superiors refused to accept his recommendation, and Ceballos eventually revealed his views at a hearing during questioning by the defense. Ceballos claimed in a lawsuit that he suffered retaliation from his superiors because he expressed his views, specifically those contained in the memorandum. He argued the treatment he received on the basis of his speech violated his First Amendment speech rights. The trial court ruled against Ceballos, but the U.S. Court of Appeals for the Ninth Circuit held that Ceballos had engaged in protected First Amendment expression.

The Supreme Court, reversing the Ninth Circuit, held that the memorandum failed to constitute speech protected by the First Amendment. The Court created a seemingly bright-line test for when public employees are potentially eligible to receive First Amendment protection for their speech. According to the majority opinion in *Garcetti*, communications made by a public employee pursuant to fulfilling his or her official job duties do not represent speech for First Amendment purposes.

In a dissenting opinion, Justice David Souter stated that he hoped the majority did not intend to diminish First Amendment protection for individual academic freedom. Justice Anthony Kennedy's majority opinion responded that Justice Souter raised potentially significant constitutional issues but ones not before the Court in the current case. Accordingly, *Garcetti* explicitly left unanswered the extent to which it applies to speech claims by professors at public colleges and universities.

Lower Courts Consider *Garcetti*'s Applicability to Faculty Speech

Applying the path dependence and policy space framework to post-*Garcetti* cases reveals differing responses from courts as to whether the decision's standards apply to faculty speech. Illustrating the differences,

this section first reviews several cases in which courts concluded the *Garcetti* standards should apply to faculty speech. It then examines cases where courts declined to impose the *Garcetti* requirements on faculty in public higher education.

Decisions Determining *Garcetti* Standards Should Apply to Faculty Speech

In one group of cases, courts have applied the *Garcetti* rules to faculty speech claims in an almost reflexive manner. *Renken v. Gregory* (2008) illustrates this approach. In the case, a tenured professor, Renken, argued that his employer university violated his First Amendment rights by reducing his pay and ending a National Science Foundation (NSF) grant because he criticized institutional conditions imposed on the grant. Renken and another faculty member asserted that several institutional requirements violated NSF regulations. In the course of the dispute, Renken filed grievances against a dean and also emailed the institution's board of regents concerning his complaints. Eventually, the university opted to terminate the grant after Renken and his research partner refused to accept a compromise to settle the dispute.

Renken sued the university, claiming that the school reduced his pay and terminated the grant in retaliation for his complaints, which he argued violated his First Amendment rights. The university countered that Renken was speaking pursuant to his official duties, so he had no First Amendment rights related to that speech. Renken disagreed, contending that the *Garcetti* standards did not apply because any communications made by him related to the grant constituted discretionary activities on his part and did not represent employment duties that he was required to fulfill. The U.S. Court of Appeals for the Seventh Circuit rejected his arguments, determining that the communications dealt with Renken's official employment responsibilities because he was expected to engage in research activities as a faculty member.

Striking a similar legal cord, in a case involving the dismissal of an untenured assistant professor, *Miller v. University of South Alabama* (2010), a federal district court considered whether the First Amendment could serve as a basis to invalidate the institution's actions against the faculty member. The professor, Miller, argued that one of the reasons for her dismissal stemmed from comments she made that were critical of the

university's hiring procedures in relation to diversity concerns. The court, as in *Renken* (2008), applied the *Garcetti* standards without consideration of whether First Amendment principles related to academic freedom should alter its analysis.

Similar to the events in *Renken* (2008), the professor in *Miller* offered her comments at a faculty meeting where applicants for a faculty position were discussed. The court stated that the context of the comments meant that the professor spoke pursuant to fulfilling her official employment duties and also emphasized that the professor expressed a belief that she needed to raise her concerns as part of helping to promote sound institutional governance. The court determined that because the comments were made in conjunction with Miller carrying out her employment duties rather than speaking as a private citizen, her speech did not qualify for First Amendment protection.

Another federal district court reached a similar result in *Hong v. Grant* (2007), where a tenured faculty member, Hong, contended that he was denied a merit salary increase because of his criticism of several institutional hiring and promotion decisions and complaints about reliance on adjuncts to teach certain courses. The court determined that participation in institutional governance and administrative decisions constituted part of Hong's employment duties. As such, the court held that *Garcetti* applied and that the professor's speech fell outside the purview of the First Amendment.

One of the most striking examples to date of the application of the *Garcetti* standards to faculty speech occurred in *Sadid v. Idaho State University* (2009). A full professor, Sadid, alleged that his university retaliated against him for communications made in connection with his opposition to a merger plan for two colleges at the institution. Specifically, he pointed to a letter he circulated to the school's faculty and administrators and to letters sent to a newspaper regarding the proposed merger.

While later partially overruled (*Sadid v. Idaho State University*, 2011, 2013), in relation to the First Amendment arguments made by Sadid, the court determined that the professor's communications regarding the merger proposal failed to address a matter of public concern. According to the opinion, Sadid's speech dealt with nothing more than "personal

grievances" against the university in relation to the professor's interest in his employment with the institution (*Sadid v. Idaho State University*, 2009, p. 11). The trial court also decided that even if it had categorized the speech as representing a matter of public concern, the professor was not speaking as a private citizen but, rather, as a university employee in writing letters to the newspaper. According to the court, this meant that Sadid's speech was ineligible for First Amendment protection. The professor argued that his job duties did not encompass the writing of such letters, but the court disagreed, stating that the "tone" of the letters was that of an employee and stressing that Sadid identified himself in the letters as a university employee (*Sadid v. Idaho State University*, 2009, p. 12). In drawing this conclusion, the court seemingly extended the concept of acting pursuant to one's employment duties well beyond the confines of even cases like *Miller* (2010), *Hong* (2007), and *Renken* (2008).

Not All Courts Accept That *Garcetti* Should Unquestionably Extend to Faculty Speech

In contrast to the ready acceptance in some legal decisions regarding *Garcetti*'s applicability to faculty speech, other courts have taken a different approach. In *Adams v. Trustees of the University of North Carolina–Wilmington* (2011), a tenured associate professor, Adams, claimed that he was denied promotion to full professor at least in part because of his religious beliefs and activities and authorship of non-refereed publications advancing conservative political and social critiques of higher education. The faculty member had referred to his religious and political activism in his application for promotion to full professor as evidence of his service activities. The lower court determined that when Adams listed such activities and materials in his promotion packet, he implicitly included them under the ambit of his professional duties. On this basis, the court ruled that the *Garcetti* standards should apply to the professor's First Amendment retaliation claim.

The U.S. Court of Appeals for the Fourth Circuit reversed the trial court. The court—pointing out the undoubtedly protected status of the professor's speech prior to its mention in the promotion dossier—held that Adams did not forfeit such First Amendment protection simply by referring to such speech and expression in his promotion materials. The

court also discussed that the Supreme Court left unresolved whether the *Garcetti* standards should apply to faculty speech. While acknowledging that *Garcetti* might extend to some forms of professorial speech, the opinion stated that it did not believe that the Supreme Court intended for the decision's standards to apply to speech "intended for and directed at a national or international audiences on issues of public importance unrelated to any of Adams' assigned teaching duties" (*Adams v. Trustees of the University of North Carolina–Wilmington*, 2011, p. 564). The court described the university as improperly attempting to rely on *Garcetti* when "Adams' speech was not tied to any more specific or direct employee duty than the general concept that professors will engage in writing, public appearances, and service within their respective fields" (*Adams v. Trustees of the University of North Carolina–Wilmington*, 2011, p. 564).

In another appellate court case, *Gorum v. Sessoms* (2009), the U.S. Court of Appeals for the Third Circuit, though determining that a tenured professor did not engage in protected expression, questioned the applicability of *Garcetti* in the context of professorial speech. Along with an example of a court declining to apply the *Garcetti* standards to faculty speech, the *Gorum* decision highlights more broadly the issue of inchoate legal rules under the academic freedom line of cases to assess faculty speech claims. In *Gorum*, the court did not turn to the Supreme Court's academic freedom cases in declining to apply the *Garcetti* standards; instead, it relied on the legal rules for when a public employee's speech is potentially eligible to receive constitutional protection articulated in pre-*Garcetti* cases.

Several federal district courts have also declined to extend *Garcetti*'s reach to faculty speech claims. In *Sheldon v. Dhillon* (2009), which involved an adjunct biology instructor, the court considered what constitutional protection exists for speech arising from classroom instruction. The instructor was an at-will (non-contract) employee whose offer to teach a course was withdrawn before the semester began. While the parties disputed the actual version of events, the retraction of the offer stemmed from student complaints regarding comments made by the instructor in relation to the determinants of sexual orientation in a class dealing with human heredity. The court treated the version of facts offered by the instructor in her complaint as true in deciding whether the case should be dismissed or permitted to proceed. Under this version of

the facts, the instructor stated that she answered a student's question concerning the biological basis of sexual orientation by responding that it was a complex issue and that both genes and environment may play a part. The instructor also stated that she referred to the work of a particular scientist but was careful to point out that multiple theories exist in relation to the development of sexual orientation.

Looking to this account of the facts to determine if the case should proceed, the court rejected the defendants' reliance on *Garcetti*. According to the opinion, in *Garcetti* the Supreme Court did not address the issue of "teaching-related speech" (*Sheldon v. Dhillon*, 2009, p. 5). In looking for controlling precedent at the circuit court level, the court stated that, while not well defined, the U.S. Court of Appeals for the Ninth Circuit had recognized some degree of legal protection for a teacher's classroom instructional speech. This constitutional protection required officials to act reasonably and with a legitimate pedagogical interest in regulating such speech. Based on this determination, the court held that with too many facts still in dispute it was inappropriate to dismiss the case.

This case, like *Gorum* (2009), is informative in the court's refusal to apply the *Garcetti* standards, but not directly on the basis of principles derived from the academic freedom legal decisions. Instead, the court discussed that cases in the Ninth Circuit had relied on the Supreme Court's decision in *Hazelwood School District v. Kuhlmeier* (1988) to decide claims involving instructional speech. Rather than an academic freedom case arising in higher education, *Hazelwood* involved a First Amendment conflict over a student newspaper produced by high school students as part of a journalism class. Thus, while not applying the *Garcetti* standards to the biology instructor's speech, the case highlights how academic freedom cases have not resulted in legal criteria easily discernible or routinely applied by courts to speech claims involving faculty members. The legal standards applied in *Sheldon* came from precedent involving high school students that made no distinction between elementary and secondary students or teachers as compared to faculty members in higher education.

At least one case has emerged, however, in which a court determined that academic freedom principles should directly limit application of *Garcetti* to faculty speech, *Kerr v. Hurd* (2010). In the case, Kerr, a medical

faculty member specializing in obstetrics and gynecology, claimed that he was impermissibly retaliated against for advocating certain delivery procedures. A medical school official named in the lawsuit claimed that Kerr failed to engage in protected speech because of *Garcetti*.
In rejecting the defendant's position, the court noted that the Supreme Court explicitly stated in *Garcetti* that the standards might not apply to faculty speech. The court's opinion also pointed out that decisions from the U.S. Court of Appeals for the Sixth Circuit, which provided controlling precedent for the district court deciding *Kerr* (2010), also had not made such a determination. The court in *Kerr* then discussed the need for recognizing an "academic freedom exception" to *Garcetti* in order to protect "the active trading floors in the marketplace of ideas" (*Kerr v. Hurd*, 2010, p. 20). According to the court, the views expressed by the faculty member fell "well within the range of accepted medical opinion" and were thus deserving of First Amendment protection (*Kerr v. Hurd*, 2010, p. 20).

The *Kerr* (2010) case stands in stark contrast to several of the other post-*Garcetti* decisions in the court's explicit determination that First Amendment protection exists for individual academic freedom. *Kerr* is also of note in highlighting the intersection between the public employee speech cases and the lack of standards under the academic freedom cases. The court, in its analysis, addressed as important whether Kerr engaged in speech addressing a matter of public concern. Accordingly, while invoking academic freedom concerns, the court still looked to the concept of public concern developed in the public employee speech cases (see, e.g., *Connick v. Myers*, 1983).

Another district court case, *Savage v. Gee* (2010), while acknowledging the potential for an academic freedom exception under the *Garcetti* standards, also underscores that courts may decide to interpret any such exception narrowly. In the case, a university librarian, Savage, argued that his employer university violated his First Amendment rights in relation to a dispute that arose as part of his membership on a university committee charged with selecting a common reading book for all incoming freshmen. The librarian became embroiled in a controversy involving the common reading book selection when he suggested several books deemed by other individuals on the committee and members of the campus community to be homophobic in nature.

The controversy over Savage's actions and his book recommendations became campus-wide in nature and included consideration by the faculty assembly. Several campus members indicated that Savage's communications made them fearful and filed complaints with the institution against him. Savage responded by filing his own harassment complaints against several individuals and alleging that they filed false charges of sexual harassment against him. Savage resigned his position and eventually initiated a lawsuit against the university. In his suit, he alleged that he was left unable to function in his job because of a lack of institutional support and as a result of continuing harassment stemming from his stances involving the book selection.

In assessing First Amendment claims raised by Savage in the lawsuit, the court stated that the case turned "largely on the correct interpretation" of *Garcetti* (*Savage v. Gee*, 2010, p. 6). The opinion discussed that while matters "involving curriculum, scheduling and routine academic matters" generally do not rise to the level of public concern, the speech at issue in this case met such a standard as it dealt with sexual orientation and also became a campus-wide issue (*Savage v. Gee*, 2010, p. 7). Next, the court determined that Savage's communications regarding the book selection involved his official employment duties, which meant that the *Garcetti* standards applied unless some exception existed.

The court then turned to how the Supreme Court in *Garectti* left open the question of the existence of some type of academic freedom exception under the decision's standards. The opinion considered how *Kerr v. Hurd* (2010) and another decision involving a high school teacher had recognized an academic freedom exception, but it distinguished both of them from the present case because those decisions directly involved matters related to teaching or scholarship. According to the court, Savage's communications did not qualify for such an academic freedom exception as his speech bore too little of a connection with teaching or scholarship. Absent "exceptional circumstances," stated the opinion, speech taking place pursuant to fulfilling the type of employment duties engaged in by Savage would not fall under an academic freedom exception (*Savage v. Gee*, 2010, p. 9).

The *Savage* (2010) case highlights the possibility of recognition of a potential academic freedom exception under *Garcetti*. At the same time, the decision demonstrates continued reliance on the public employee

speech standards as well as the possibility of courts recognizing a narrowly interpreted academic freedom exception. Under a more narrowly recognized exception, some types of faculty speech, such as that arising from serving on institutional committees or making comments at faculty meetings, might not qualify for First Amendment protection. As with several other decisions, the *Savage* case also shows that even among courts willing to interpret some type of academic freedom exception to the *Garcetti* standards, they are still likely to turn to the public employee speech cases in articulating the specific legal rules that should apply instead of the academic freedom precedent.

Reflections on Post-*Garcetti* Cases

Analysis of post-*Garcetti* cases reveals continuing legal uncertainty and disagreement over First Amendment protection for individual academic freedom and other forms of professionally based faculty speech. Some courts have readily applied the *Garcetti* standards to faculty speech claims. Even courts sympathetic to First Amendment protection for faculty speech have demonstrated continued reliance on standards largely derived from the public employee speech cases rather than looking to the academic freedom cases. The academic freedom decisions, if considered by courts at all, remain in the legal background in terms of what legal rules should govern faculty speech claims in public higher education. While several cases indicate the possibility of some degree of constitutional protection for faculty speech, these decisions also show how continued reliance by courts on standards under the public employee speech cases presents challenges in providing sufficient First Amendment protection for faculty speech in public higher education. A significant issue involves how the concept of public concern is not connected to whether a faculty member is addressing a topic within the realm of his or her area of scholarly competency or assigned teaching duties. Rather, the legal inquiry into public concern typically focuses on the extent to which the issue under consideration touches on matters of general interest or importance to the public. Such an inquiry fails to take into account critical aspects regarding faculty work for First Amendment purposes.

One difficulty with the concept of public concern involves the constrained view by some courts of what issues and topics would satisfy such a standard. For instance, some courts might be reluctant to classify

topics related to specialized academic matters in teaching or scholarship as rising to a level of public concern. Along similar lines, the public concern exception, if restricted to only issues involving scholarship and teaching, could leave important areas of faculty speech outside the realm of First Amendment protection. The decision, for instance, to hire or not hire a particular faculty candidate may not easily reach the level of public concern usually presented in the public employee speech cases, but professors are routinely expected to participate as independent voices in such matters as part of their professional employment obligations.

The conflicting approaches taken by courts (i.e., in terms of what extent, if any, the *Garcetti* standards should apply to professors' speech in public higher education) reveal how First Amendment protection for faculty speech rests at a legal crossroads. Under one scenario, *Garcetti* provides an opportunity for courts to fashion First Amendment standards more appropriate to evaluate faculty speech claims at public colleges and universities than those previously used. Alternatively, the decision may serve as the basis for judicial rejection of First Amendment protection for individual academic freedom and professionally based faculty speech more generally. Given the disagreement among lower courts, the Supreme Court will at some point likely have to address the important questions related to constitutional protection for faculty speech left unanswered in *Garcetti*.

Implications for Future Scholarship

The shaky legal status of constitutional protection for various forms of professorial speech, especially when considered alongside challenges facing tenure, suggests a need for scholarship that helps to illuminate issues affected by the erosion of legal protections safeguarding academic freedom and faculty independence overall. One area of research ripe for examination deals with understanding employment actions based on policies that purport to have protections for faculty speech. For example, a study might investigate how the presence or absence of legally enforceable standards that safeguard faculty speech affect institutional policies and practices. Further, a study might extend that inquiry to examine individual faculty members' limits or inhibitions regarding expressions related to teaching, research, and service. These questions could also examine differences in relation to those individuals employed off the tenure track. Such research could address the basic, but

significant, question of what kinds of legally enforceable protections for faculty employment need to exist for professors to fulfill their professional obligations with an appropriate level of independence. Studies could also evaluate claims that other employment arrangements, such as long-term contracts, suffice to provide the same kinds of protections for academic freedom and faculty speech afforded through tenure. Additionally, distinctions between unionized versus non-unionized faculty environments merit examination (Aby & Witt, 2012).

More specifically in relation to issues involving the First Amendment and faculty speech, research could consider the extent to which commonly held assumptions associated with constitutional protection for faculty speech have helped to shape institutional policies and practices. Such a line of inquiry could examine whether awareness of the *Garcetti* decision has resulted in any alterations in how senior administrators and others on campus have come to view faculty speech rights. This area of study might focus specifically on the perceived impact, if any, on college and university practices and policies in jurisdictions where state or lower federal courts have applied the *Garcetti* standards to faculty speech claims

Another line of research could explore similarities and differences between public employees generally and professors at public colleges and universities. These studies might investigate the degree to which employment policies and workplace norms are similar and what reported justifications exist to distinguish them. Further, research could compare public employees with certain professional independence (e.g., scientists, accountants, lawyers, and examiners/auditors) and professors at public colleges and universities. The former class of employees is arguably faced with challenges when their professional independence is constrained, and a review may lead to identifying the intended and unintended consequences of the *Garcetti* opinion on these professional employees, who work for public agencies.

Finally, an investigation of the term “pursuant to official duties” with respect to the professoriate is an open area. This study would assist courts and members of the higher education community in determining the boundaries of the profession. A study might examine the functional limits of attempting to apply that seemingly all-inclusive phrase to faculty work.

Conclusion

Considerable legal uncertainty and disagreement exist regarding the issue of constitutional protection for individual academic freedom and other forms of professionally based faculty speech. This situation arguably takes on even more significance when considered alongside increasing institutional reliance on faculty members employed without the legal protections provided by tenure. Post-*Garcetti* cases indicate conflicting responses on the part of courts in relation to the decision's applicability to professors' speech in public higher education. Some courts have not hesitated to conclude that the *Garcetti* standards encompass faculty speech. Even among courts declining to apply the *Garcetti* standards to faculty speech, the legal decisions demonstrate ongoing reliance on the public employee speech cases rather than looking to the academic freedom precedent. Given the disagreement among lower federal courts over the issue of the applicability of the *Garcetti* standards to faculty speech, it appears likely that at some point the Supreme Court will take up the issue. As with challenges facing tenure, the future resonates with uncertainty regarding the extent to which the First Amendment will continue to serve as a legal source to help protect faculty speech at public colleges and universities.

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Post develops a theory of First Amendment rights that seeks to explain both the need for the free formation of public opinion and the need for the distribution and creation of expertise. Along the way he offers a new and useful account of constitutional doctrines of academic freedom. These doctrines depend both upon free expression and the necessity of the kinds of professional judgment that universities exercise when they grant or deny tenure, or that professional journals exercise when they accept or reject submissions. Realization of rights and freedoms of an individual is a procedural and legal mechanism for their implementation that is revealed through the order, structure (subjects, objects, the nature of. connections between them), a variety of social and legal factors, forms, methods, conditions and guarantees for the implementation of the constitutional provisions in accordance with the democratic procedures, principles of legality and social justice1.Â Moreover, in a state of emergency in order to ensure safety of citizens and protection of the constitutional system in accordance with the federal constitutional law specific restrictions on rights and freedoms with indication of the extent and term of their action may be established (Art.Â Academic legal journal. 2013. No. 3. P. 14. For many, academic freedom and professorial academic freedom are synonymous. But there are other types of academic freedom, of courseâ€”at least two other types, namely, institutional academic freedom (the subject of this chapter) and student academic freedom (the subject of the next one). View. Show abstract.Â Intramural Speech, Academic Freedom, and the First Amendment. Jan 1988. 1337-1375. W Matthew. Finkin. Matthew W. Finkin, Intramural Speech, Academic Freedom, and the First Amendment, 66 Tex L Rev 1323, 1337-38 (1988)Â Rebecca S. Eisenberg, Academic Freedom and Academic Values in Sponsored Research She directs. Keywords: universitiesâ€™ autonomy, academic freedom, human dignity, individual academic freedom, the right individual to development. Save to Library. Download.Â This paper deals with the legal basis for establishing Islamic theological studies at the University of Vienna and the corresponding conflict of norms between academic freedom and the right to (religious) self-determination. The authorâ€™s central claim is that the relevant legal provision is in accordance with neither the constitutional principle of equality nor the constitutional guarantees on the status of legally recognised churches and religious societies.