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I. INTRODUCTION

The period from approximately 1945 to 1970 represented a time of unprecedented expansion in U.S. higher education.[1] It also marked the professional ascendency of college and university faculty, of an "academic revolution" as characterized by Christopher Jencks and David Riesman.[2] Contemporary faculty, however, face the unraveling of this academic revolution. A key trend involves a shift away from tenure-stream appointments and growing reliance on non-tenure-track faculty, including part-time adjuncts, now often referred to as the new faculty majority.[3] With many faculty increasingly lacking the protections of tenure, questions and debate abound over the future prospects of faculty independence and academic freedom. Issues related to faculty speech and academic freedom also entail a constitutional dimension—one especially relevant for public higher education faculty—that provides the focus for this article. Akin to the unclear prospects for tenure, First Amendment protection for faculty speech, including that related to research and teaching, faces an uncertain and contested future.

Despite periodic lofty rhetoric from the U.S. Supreme Court, First Amendment protection for faculty academic freedom—for professors' professionally-based speech in general—represents something of a

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1. *See* JOHN R. THELIN, A HISTORY OF AMERICAN HIGHER EDUCATION 260–316 (2d ed. 2011).

2. *See generally* CHRISTOPHER JENCKS & DAVID RIESMAN, THE ACADEMIC REVOLUTION (1968).

3. *See, e.g.*, NEW FACULTY MAJORITY, http://www.newfacultymajority.info (last visited July 12, 2016).

constitutional morass.[4] Some commentators and courts contend that public college and university faculty possess no First Amendment speech rights except those afforded to any other public employees.[5] Alternatively, the argument goes that if any special constitutional protection exists for academic freedom, it accrues only to institutions and not to individual scholars.[6]

Legal debates over faculty speech and the First Amendment entered a new phase with the 2006 decision by the U.S. Supreme Court in *Garcetti v. Ceballos*.[7] While not a case involving professorial speech, *Garcetti* proved potentially significant to faculty because it brought to the fore problems associated with relying on the First Amendment speech rights of public employees in general in the context of faculty speech. Before *Garcetti*, in public employee speech cases, courts followed an inquiry that largely turned on whether a public employee's speech constituted a matter of public or private concern.[8] Speech determined to address an issue of public concern qualified for First Amendment protection, absent a sufficient countervailing justification by the employer to restrict the speech. In *Garcetti*, the Supreme Court introduced an additional stage in the inquiry. Now, courts must consider whether the public employee's speech in question took place pursuant to the carrying out of official employment duties. If a public employee's speech occurred as part of carrying out such official duties, then it does not qualify for First Amendment protection under *Garcetti*.[9]

Dissenting in *Garcetti*, now retired Justice David Souter raised concerns over the extension of the official duties requirement to public higher education faculty.[10] He warned that doing so seemingly eliminated First Amendment protection for multiple instances of faculty speech, notably in areas related to scholarship and teaching.[11] The justices in the majority responded that Justice Souter raised a potentially salient issue,

4. ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 62 (2012).

5. *See, e.g.*, Urofsky v. Gilmore, 216 F.3d 401, 411–15 (4th Cir. 2000); Scott R. Bauries, *Individual Academic Freedom: An Ordinary Concern of the First Amendment*, 83 MISS. L.J. 677, 679 (2014) ("[T]he Supreme Court has never recognized academic freedom as a unique or 'special' individual right under the First Amendment that inheres only in academics.").

6. *See, e.g.*, *Urofsky*, 216 F.3d at 412 ("The Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs.").

7. Garcetti v. Ceballos, 547 U.S. 410 (2006).

8. *See generally* Connick v. Myers, 461 U.S. 138 (1983).

9. *Garcetti*, 547 U.S at 421.

10. *Id.* at 438–39 (Souter, J., dissenting).

11. *Id.*

but not one before the Court.[12] Since then, legal decisions reflect disagreement among courts regarding the applicability of the *Garcetti* official duties standard to public higher education faculty.[13]

Garcetti initiated a new chapter in longstanding debate and uncertainty over the First Amendment and faculty speech. Along with providing context regarding ongoing issues related to faculty speech and the First Amendment in Parts II and III, this essay examines post-*Garcetti* cases involving professorial speech in Part IV. A survey of these post-*Garcetti* legal decisions reveals disparate responses by courts over how to apply First Amendment standards in the realm of professionally-based faculty speech. Following discussion of post-*Garcetti* cases implicating faculty speech, the authors contend in Part V that compelling reasons exist to provide First Amendment protection for faculty speech made pursuant to the carrying out of professional duties (e.g., teaching, research, and institutional service). In this section, and following the lead provided by the U.S. Court of Appeals for the Ninth Circuit in *Demers v. Austin*,[14] the authors also contend that the concept of public concern provides a workable legal standard to evaluate faculty speech claims when appropriately calibrated to a collegiate setting.

II. PROFESSIONAL STANDARDS AND FACULTY ACADEMIC FREEDOM

For most of the history of American higher education, faculty members were not considered to be autonomous professionals, and they did not have job security or speech rights that were protected by tenure or the First Amendment.[15] For several centuries, American colleges had small enrollments and educated students in religious and classical curricula. After the Civil War, Americans were inspired by the German model of research-oriented universities.[16] Post-bellum college and university presidents sought to build institutions that would produce knowledge, and they came to see faculty members not only as teachers, but also as expert researchers.[17] American universities began awarding PhDs in the late nineteenth century, and the doctorate became a more popular credential for certifying faculty members as experts in their fields. In the late 1800s, professors also banded together to create disciplinary

12. *Id.* at 425.

13. *See infra* Part IV.

14. Demers v. Austin, 746 F.3d 402 (9th Cir. 2014). For a discussion of *Demers*, see *infra* Parts IV, V.

15. *See generally* TIMOTHY REESE CAINE, ESTABLISHING ACADEMIC FREEDOM: POLITICS, PRINCIPLES, AND THE DEVELOPMENT OF CORE VALUES (2012).

16. *Id.* at 12–13.

17. *See generally* CAINE, *supra* note 15; ROGER L. GEIGER, TO ADVANCE KNOWLEDGE: THE GROWTH OF AMERICAN RESEARCH UNIVERSITIES (2009).

associations and academic journals to facilitate the review and dissemination of new knowledge. Together, these changes formed the basis for faculty members to work as professionals. However, even as the professoriate became more professionalized, individual faculty members were still subject to arbitrary dismissal at the whims of strong university presidents and influential trustees or alumni.[18]

Early in the 20th century, professors at some of the nation's leading universities founded the American Association of University Professors (AAUP), as a means to advocate for (a) the professionalization of faculty work; (b) faculty autonomy from overzealous presidents and trustees; and (c) some measure of job security.[19] The organization published a Declaration of Principles in its founding year, which introduced the idea of academic freedom and argued that it should be a ubiquitous professional norm in American higher education.[20] The authors of the Declaration contended that professors were more akin to "appointees" as opposed to "employees . . . in any proper sense."[21] The AAUP's conception of the nature of faculty work built on ideas that were previously espoused by disciplinary associations; those associations argued that faculty members were hired to their positions in public trust—something that was distinct from the typical dynamic between employers and employees.[22] Walter Metzger explained that the AAUP understood that the "expressional freedoms of academics" were necessary for universities to meet their public missions of increasing "the sum of human knowledge and furnish[ing] experts for public service—new functions that had been added to the time-honored one of qualifying students for degrees."[23]

Building on the ideas articulated in the 1915 Declaration of Principles, in 1940, the AAUP published a Statement of Principles on Academic Freedom and Tenure, which expanded on the notions that faculty should have professional autonomy and academic free speech rights.[24] The AAUP secured the cooperation of the American Association of Colleges (AAC) in producing its 1940 Statement,[25] which meant that the Statement had support from national organizations representing both

18. CAINE, *supra* note 15, at 12–28.
19. *Id.* at 34.
20. *Id.* at 38–41.
21. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *1915 Declaration of Principles on Academic Freedom and Academic Tenure, in* AAUP: POLICY DOCUMENTS AND REPORTS 3, 6 (11th ed. 2015).
22. *See generally* Robert P. Ludlum, *Academic Freedom and Tenure: A History*, 10 ANTIOCH REV 3 (1950).
23. Walter P. Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, 53 L. & CONTEMP. PROBS. 3, 13 (1990).
24. *Id.* at 3.
25. *Id.* at 12.

faculty and institutional interests. Together, the AAUP and AAC argued that faculty members were simultaneously "citizens, members of a learned profession, and officers of an educational institution."[26] Moreover, the 1940 Statement outlined three pillars of academic freedom and professional autonomy including the freedom to pursue and publish research, freedom over instruction, and freedom to publicly communicate as citizens of a democratic society.[27]

Tenure, and its protections of employment security, would serve as the dominant mechanism for realizing the aims espoused in the 1915 Declaration and 1940 Statement. Following the years after World War II, American higher education underwent a significant expansion.[28] The era also marked the widespread adoption of tenure and the assumption of a prime role for faculty in institutional affairs, particularly the curriculum, under principles of shared governance.[29]

Today, the academic revolution increasingly faces an unraveling in which the professional arrangement—tenure— arrived at to secure faculty academic freedom and independence applies increasingly to a shrinking slice of the professoriate. Currently, only around a quarter of higher education instructors occupy tenure-stream appointments, while around half of faculty are in part-time adjunct positions.[30] Another group of the professoriate holds full-time positions with varying appointment arrangements, with some individuals employed on a yearly basis and others on multi-year appointments with more substantial employment protections.[31] The erosion of tenure-stream faculty appointments provides important context to our examination of professors' First Amendment rights for their professionally-based speech. Simply put, if not tenure, then what other legally enforceable mechanisms are available to faculty in carrying out their professional roles as teachers, researchers, and participants in institutional governance and administrative matters?[32]

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26. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments, in* AAUP: POLICY DOCUMENTS AND REPORTS, *supra* note 21, at 13, 14.

27. *Id.*

28. THELIN, *supra* note 1, at 260–316.

29. *See generally* Metzger, *supra* note 23.

30. John Barnshaw, *Status of the Academic Labor Force, 2013,* AAUP (Mar. 2015), http://www.aaup.org/sites/default/files/Status-2013.pdf.

31. *Id.*

32. While not the focus of this article, collective bargaining has played an important role for non-tenure-track faculty seeking employment protections and improved compensation. *See generally, e.g.*, Neal H. Hutchens, *Using a Legal Lens to Better Understand and Frame Issues Shaping the Employment Environment of Non–Tenure Track Faculty Members*, 55 AM. BEHAV. SCIENTIST 1443 (2011).

III. THE FIRST AMENDMENT AND FACULTY SPEECH

Judges and scholars did not conceive of academic freedom as a constitutional concept until after it came to be viewed as a professional norm—protected through tenure—in American higher education. Academic freedom became viewed as possessing a constitutional dimension during the Cold War era, when McCarthyism inspired government officials to inject themselves in public education for the purpose of identifying and expelling communist sympathizers.[33] In this climate, academic freedom first received attention in a Supreme Court dissenting opinion in *Adler v. Board of Education*.[34] The case dealt with the dismissal of a New York City school teacher, Irving Adler, under a state law that prohibited employment in public education by individuals belonging to organizations deemed subversive.[35] The Supreme Court upheld the law in *Adler*, but Justice William O. Douglas argued in dissent that this law represented a threat to academic freedom, which must be protected in the nation's schools.[36] He contended that the law at issue threatened to turn "the school system into a spying project" and subverted the First Amendment purposes of promoting free inquiry and preventing censorship.[37]

A well-known concurring opinion in 1957 in *Sweezy v. New Hampshire*[38] added an important contribution to recognition of a First Amendment dimension to academic freedom. The case dealt with the economist Paul Sweezy refusing to answer questions that the New Hampshire Attorney General's office posed about his activities, including his lectures at the University of New Hampshire and his scholarly activities.[39] Indicative of pushback against the excesses of McCarthyism, the Supreme Court determined that holding the individual in contempt for refusing to answer questions under the circumstances violated due process protections.[40] Justice Felix Frankfurter, in a separate opinion agreeing with the judgment, quoted from a group of South African scholars for the proposition that colleges and universities 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."[41]

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33. Robert J. Tepper & Craig G. White, *Speak No Evil: Academic Freedom and the Application of* Garcetti v. Ceballos *to Public University Faculty*, 59 CATH. U. L. REV. 125, 132 (2009).
34. Adler v. Bd. of Educ., 342 U.S. 485 (1952).
35. *Id.* at 488–89.
36. *Id.* at 508.
37. *Id.* at 509.
38. Sweezy v. New Hampshire, 354 U.S. 234 (1957).
39. *Id.* at 238–39.
40. *Id.* at 254–55.
41. *Id.* at 263.

In *Keyishian v. Board of Regents of University of State of New York*,[42] the Supreme Court struck down New York's loyalty provision for educators previously upheld in *Adler*.[43] Writing for the majority, Justice William Brennan declared that the United States was "deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That [academic] freedom is therefore a *special concern* [italics added] of the First Amendment . . . ."[44] Despite this seemingly strong judicial endorsement of First Amendment protection for academic freedom, later precedent failed to produce a coherent legal framework to delineate First Amendment academic freedom protections for faculty.[45]

In current constitutional academic freedom debates, some commentators contend public college and university faculty possess no First Amendment speech rights beyond those afforded to any other public employees, while others advocate that specific constitutional protections exist for at least some forms of professorial speech and expression. A cause and symptom of this legal uncertainty stem from a failure by courts to articulate a set of legal standards based on a constitutional conception of academic freedom to adjudicate faculty speech claims. Instead, legal standards governing the speech rights of public employees in general have provided the dominant legal framework when public higher education faculty assert First Amendment speech and academic freedom claims against their institutions.[46]

The contrasting opinions in *Emergency Coalition to Defend Educational Travel v. U.S. Department of Treasury*[47] illustrate competing judicial notions over how to interpret faculty speech rights in relation to constitutional academic freedom concerns. The case centers on the federal government's authority to impose restrictions on academic study programs in Cuba.[48] Several claimants challenged the restrictions as a violation of individual academic freedom rights.[49] As such, the case raised questions regarding the contours of academic freedom as a constitutionally protected right in a post-*Garcetti* context.

In response to constitutional academic freedom arguments, the federal government contended that "even if there is a component of the

42. Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).
43. *Id.* at 605.
44. *Id.* at 603.
45. *See, e.g.*, Tepper & White, *supra* note 33, at 132; Lawrence White, *Fifty Years of Academic Freedom Jurisprudence*, 36 J.C. & U.L. 791, 792–93 (2010).
46. *See generally* Tepper & White, *supra* note 33.
47. Emergency Coal. to Defend Educ. Travel v. U.S. Dep't of Treasury, 545 F.3d 4 (D.C. Cir. 2008).
48. *Id.* at 6.
49. *Id.* at 8.

First Amendment that protects academic freedom—separate and apart from the Amendment's coverage of free speech—it is a right that inheres in the universities, not individual professors."[50] The judges hearing the case concluded that the restriction was permissible as a content-neutral regulation, thus not requiring the court to address directly the constitutional academic freedom issue in the opinion representing the judgment of the court.[51]

Two judges participating as part of the panel deciding the case authored concurring opinions in which they sought to elaborate on issues related to faculty academic freedom and the First Amendment. One of these judges stated 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."[52] Additionally, and looking to an article written by legal scholar Judith Areen,[53] the judge noted that academic freedom potentially involved a shared governance dimension as well.[54] Thus, the judge took the position that along with teaching and scholarship, constitutional academic freedom for individual faculty ostensibly included the right to speak on "academic matters" such as "student academic standards."[55]

The other concurring opinion in *Emergency Coalition* provided a fundamentally different view of the First Amendment and academic freedom. The judge stated that uncertainty existed over whether any additional First Amendment protections exist for academic freedom beyond those generally afforded to any claimants asserting constitutional speech rights.[56] Furthermore, contended the judge, "it is doubtful that a professor could assert an individual constitutional right of academic freedom against his university employer, whether state or private."[57] Rather than decided on distinct academic freedom grounds, the judge interpreted cases such as *Sweezy* and *Keyishian* as determined on the basis of constitutional protections generally applicable to speech.[58] Echoing the sentiment contained in several of the other post-*Garcetti* opinions

50. *Id.* at 12. Alternatively, the government argued that even if an individual academic freedom right existed, the travel restriction did not interfere with it. *Id.*

51. *Id.* at 12–14.

52. *Id.* at 15.

53. Judith C. Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945 (2009). When discussed in the opinion, the article was forthcoming. *Emergency Coal.*, 545 F.3d at 15.

54. *Emergency Coal.*, 545 F.3d at 15.

55. *Id.* at 16.

56. *Id.* at 19–20.

57. *Id.* at 18.

58. *Id.* at 18–19.

discussed in this essay, the judge contended that the "state can be said to 'speak' through its employees."[59] According to the judge, this view of employee speech "suggests 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."[60]

In summary, judicial reliance on public employee standards to decide faculty speech claims became even more problematic with the *Garcetti* decision. In *Garcetti*, the Supreme Court introduced an additional step in the public employee speech inquiry, one in which courts must consider whether the speech at issue took place pursuant to the performance of official employment duties.[61] As noted, Justice Souter's dissent in *Garcetti* raised concerns that application of this requirement to faculty in public higher education would eliminate important First Amendment protections for many forms of professorial speech, including in the areas of teaching and scholarship.[62] The case initiated a new chapter in longstanding scholarly and judicial discourse over the extent of First Amendment speech rights for faculty in carrying out their professional roles. As discussed in the next section, some courts have interpreted *Garcetti* as extending to professorial speech made as a part of carrying out official duties. In contrast, other courts have resisted its application to at least certain types of faculty speech.

IV. CONFLICTING RESPONSES BY COURTS IN POST-*GARCETTI* FACULTY CASES

A. Faculty as Institutional Mouthpieces under Garcetti

In multiple post-*Garcetti* cases, courts determined that public higher education faculty do not carry out professional roles distinctive from any other public employees for First Amendment purposes. Under this interpretive approach, faculty serve as speech conduits for their institutions in the fulfillment of employment rather than engaging in independent speech potentially eligible for constitutional protection. Often, judicial interpretations also cast faculty service and administrative work as distinct from teaching or scholarship, thus strengthening the justification to treat faculty speech, at least in some contexts, as similar to that of other public employees.

59. *Id.* at 19.
60. *Id.*
61. Garcetti v. Ceballos, 547 U.S. 410, 424 (2006).
62. *Id.* at 438–39 (Souter, J., dissenting).

In one illustrative case, *Gorum v. Sessoms*,[63] a professor claimed that he suffered retaliation for assisting a student in a disciplinary hearing and for revoking an invitation to the university's president to speak at a campus event.[64] A federal appeals court and district court both concluded that the intramural speech—or speech made internal to campus—at issue in both instances entailed the faculty member carrying out official employment duties subject to the *Garcetti* standards.[65] The appeals court did entertain the idea that speech implicating scholarship or teaching might not be subject to the *Garcetti* standards, but stated in its opinion that such speech was not under consideration in the case.[66]

In another representative decision, *Hong v. Grant*,[67] a faculty member asserted that he was subjected to retaliation for making comments critical of the use of adjuncts and for offering a negative evaluation of a colleague in a promotion and tenure context.[68] A federal district court held that because the speech occurred in the course of the professor carrying out his employment duties it failed to qualify for First Amendment protection based on *Garcetti*.[69] As such, the university could "regulate [the] statements . . . without judicial interference."[70] Similar to aspects of the decision in *Hong*, in *Miller v. University of South Alabama*,[71] an assistant professor (Miller) claimed that her nonrenewal to a tenure-track faculty appointment stemmed from her criticism of a hiring committee on which she served for failing to adequately consider diversity-related factors in assembling a candidate list.[72] For the court, the veracity of Miller's assertions did not matter for its analysis.[73] Instead, the dispositive issue turned on the fact that the speech arose from Miller's participation as a member of the hiring committee. Serving on such committees, according to the court, constituted an official employment duty for Miller, which made the speech ineligible for First Amendment protection under *Garcetti*.[74]

63. Gorum v. Sessoms, 561 F.3d 179 (3d Cir. 2009).
64. *Id.* at 183–84.
65. *Id.* at 184–86, 188.
66. *Id.* at 186.
67. Hong v. Grant, 516 F. Supp. 2d 1158 (C.D. Cal. 2007), *aff'd*, 403 F. App'x 236 (9th Cir. 2010).
68. *Id.* at 1160, 1162–64.
69. *Id.* at 1168.
70. *Id.* at 1167–68.
71. Miller v. Univ. of S. Ala., No. 09-0146-KD-B, 2010 WL 1994910 (S.D. Ala. May 17, 2010).
72. *Id.* at *1.
73. *Id.* at *10.
74. *Id.* at *10–11.

In another case, *Huang v. Rector and Visitors of University of Virginia*,[75] a faculty member contended that he suffered retaliation for speaking out against the misappropriation of grant funds.[76] The court determined that the speech dealt with matters involving his official employment duties, thus making it ineligible for First Amendment protection.[77] In a similar case involving faculty speech connected to the administration of a grant, the U.S. Court of Appeals for the Seventh Circuit affirmed a federal district court's determination that such speech fell under the auspices of official duties and did not receive First Amendment protection based on *Garcetti*.[78] A federal district court arrived at a comparable conclusion in a case involving a clinical veterinarian employed in a faculty research position who alleged that she was retaliated against for expressing concerns about animal treatment.[79] The court determined that the clinical veterinarian spoke on matters dealing with her official employment duties, thus excluding the possibility of First Amendment protection for the speech.[80]

When Justice Souter dissented from the majority opinion in *Garcetti,* he questioned whether the new public employee speech standards might be applied to higher education faculty teaching and research.[81] Justice Souter's concerns were not unfounded. Since *Garcetti*, several lower courts have concluded that faculty members' speech in the arenas of scholarship and instruction should not be subject to First Amendment protections—although the lower court decisions were later reversed by superior courts as discussed in Part IV-B. In one of these cases, *Demers v. Austin*, a federal district court determined that a proposal (the "Plan") written by a professor to reorganize journalism education at Washington State University fell under the *Garcetti* standards.[82] According to the court, the professor "was not speaking as a citizen when he initially presented the *Plan* to his fellow faculty members and to the university administration."[83] Instead, the court determined that the professor

75. Huang v. Rector & Visitors of the Univ. of Va., 896 F. Supp. 2d 524 (W.D. Va. 2012).

76. *Id.* at 529.

77. *Id.* at 543.

78. Renken v. Gregory, 541 F.3d 769, 773–74 (7th Cir. 2008).

79. Hrapkiewicz v. Bd. of Governors of Wayne State Univ., No. 11–13418, 2012 WL 393133, at *8 (E.D. Mich. Feb. 6, 2012).

80. *Id.* at *8.

81. Garcetti v. Ceballos, 547 U.S. 410, 438–39 (2006) (Souter, J., dissenting).

82. Demers v. Austin, No. CV–09–334–RHW, 2011 WL 2182100 (E.D. Wash. June 2, 2011). *See infra* Part IV-B for discussion of the Ninth Circuit's decision overturning the district court's decision.

83. *Id.* at *4. Alternatively, the court determined the speech at issue did not address a matter of public concern. *Id.*

prepared the publication as part of carrying out his official duties.[84] Furthermore, these "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."[85] Thus, the federal district court sought to implement a broad interpretation of official duties in relation to public higher education faculty, one that emphasized managerial authority and control over professional autonomy.

Along with the plan to reorganize journalism education, the federal district court in *Demers* also considered First Amendment claims related to a writing project undertaken by the faculty member while on sabbatical.[86] The court decided that this work too was subject to *Garcetti*.[87] It noted in its opinion that the faculty member listed the work-in-progress in faculty performance reviews. According to the court, the "book does not represent speech made by a private citizen; rather the book represents speech made in the course of Plaintiff's employment as a college professor."[88]

Another case with a scholarship facet, *Adams v. Trustees of the University of North Carolina-Wilmington*,[89] centered on items submitted by a tenured faculty member for promotion to full professor.[90] The professor claimed that he was denied promotion because of bias against him over conservative political and religious views he had expressed in these materials.[91] A federal district court held that "columns, publications, and presentations" submitted by the professor "constituted—in the context of the promotion evaluation—expressions made pursuant to plaintiff's professional duties," which excluded them from First Amendment protection.[92] The decision is notable in clearly designating speech held out as pertaining to scholarship as within the purview of the *Garcetti* standards.

The opinions discussed in this part reflected a judicial interpretation of faculty speech made as part of carrying out professional responsibilities as subject to managerial authority for First Amendment considerations. Rather than conceptualizing faculty as independent voices in such circumstances, the courts viewed them as equivalent to any other group of

84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. Adams v. Trs. of Univ. of N.C.-Wilmington, No. 7:07-CV–64-H, 2010 WL 10991020 (E.D. N.C. Mar. 15, 2010). *See infra* Part IV-B for discussion of the Fourth Circuit's decision overturning the district court's decision.
90. *Id.* at *4–9.
91. *Id.* at *1.
92. *Id.* at *14.

public employees in terms of the First Amendment. Notably, even though reversed on appeal, the lower court opinions in *Demers v. Austin* and *Adams v. Trustees of the University of North Carolina-Wilmington* sought to extend such managerial authority to faculty speech dealing with teaching and scholarship. The judges who wrote the *Demers* and *Adams* opinions concluded that institutions of higher education were "owning" speech made by faculty members who were performing their professional job duties such as advising students, developing course content, publishing scholarly work, participating in university governance, and writing for public media. Thus, some courts interpret faculty to serve as speech conduits of their institutions from a First Amendment perspective.

B. Faculty as Independent Speakers under First Amendment Despite Garcetti

In contrast to the lower court opinions in cases such as *Demers* and *Adams*, other judges have determined that faculty members possess First Amendment protections for speech they make in the course of completing their work. Courts that ruled in favor of academic freedom did so, in part, because they found that when professors carry out their professional responsibilities they fulfill important social and institutional roles. In a prominent opinion, *Demers v. Austin*, the U.S. Court of Appeals for the Ninth Circuit, reversed the district court decision discussed in Part IV-A and reached a fundamentally different conclusion about the nature of faculty speech rights.[93] The case involved a journalism professor, Demers, at Washington State University who claimed that he was subjected to retaliation on the basis of two forms of communication.[94] One dealt with a plan proposed by Demers that called for the reorganization of journalism education at the university.[95] The other involved an in-progress book, which Demers worked on during a sabbatical.[96] According to the Ninth Circuit, the *Demers* case presented exactly the kind of scenario that "worried" Justice Souter in his *Garcetti* dissent.[97] The court determined that an exception existed for teaching and scholarship under *Garcetti* that applied to the curricular plan proposed by Demers.[98] The Ninth Circuit described "teaching and academic writing" as constituting core faculty duties and meriting First Amendment protection.[99] The court stated: "[w]e

93. Demers v. Austin, 746 F.3d 402 (9th Cir. 2014).
94. *Id.* at 406.
95. *Id.* at 406–407.
96. *Id.* at 408.
97. *Id.* at 411.
98. *Id.* at 406. The court determined that there existed insufficient evidence to demonstrate that the proposed book resulted in retaliation. *Id.*
99. *Id.*

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."[100]

As with *Demers,* in *Adams v. Trustees of the University of North Carolina-Wilmington,*[101] the U.S. Court of Appeals for the Fourth Circuit also reached a much different interpretation of faculty rights than that reached by the lower court. While the court decided in favor of the faculty member on a more limited basis than the Ninth Circuit in *Demers*, it articulated that restrictions should exist on institutional authority to regulate faculty speech.[102] The Fourth Circuit determined that the faculty member's inclusion of materials in a promotion dossier did not automatically divest them of First Amendment protection.[103] It held that since the professor was not explicitly required to undertake the writings under review, their inclusion in promotion materials did not transform them into speech made pursuant to official duties and subject to *Garcetti.*[104] While this decision represented a less far-reaching interpretation of faculty autonomy under the First Amendment than in *Demers*, the *Adams* court decided that, at least in certain instances, faculty speech and expression, even if generally fulfilling the duties expected of professors, did not automatically become subject to managerial control.

In two cases, federal courts excluded teaching-related speech from the reach of *Garcetti.* In one case, *Kerr v. Hurd,*[105] a medical school faculty member specializing in obstetrics and gynecology claimed that he was retaliated against for advocating in his teaching a certain childbirth procedure.[106] A medical school official named as a party in the lawsuit claimed that the professor failed to engage in First Amendment protected speech based on *Garcetti.*[107] Rejecting this argument and finding the speech protected, the court discussed that the Supreme Court explicitly noted in *Garcetti* that the standards might not apply to faculty speech.[108] Additionally, it stated that an "academic freedom exception" should exist in relation to *Garcetti* to protect "the active trading floors in the marketplace of ideas."[109] According to the court, the views expressed by

100. *Id.*
101. Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550 (4th Cir. 2011).
102. *Id.* at 560–64.
103. *Id.* at 565–66.
104. *Id.* at 562–63.
105. Kerr v. Hurd, 694 F. Supp. 2d 817 (S.D. Ohio 2010).
106. *Id.* at 828, 834–35.
107. *Id.* at 843.
108. *Id.* at 843–44.
109. *Id.* at 844.

the faculty member fell "well within the range of accepted medical opinion" and were thus deserving of First Amendment protection.[110]

In another case involving speech arising in an instructional setting, *Sheldon v. Dhillon*,[111] an adjunct instructor in a course on human heredity alleged that she suffered retaliation based on the answer she gave to a student regarding connections between sexual orientation and heredity.[112] In its legal response to these allegations, the community college contended that the professor's speech fell under the *Garcetti* standards, thereby negating any viable First Amendment claim.[113]

Sheldon is important as it reflects a court's refusal to apply the *Garcetti* standards, but it also illustrates continuing ambiguity over the appropriate legal standards to assess faculty speech claims. Instead of looking to the academic freedom decisions or the public employee speech cases, the *Sheldon* court discussed that cases in the Ninth Circuit relied on the Supreme Court's decision in *Hazelwood School District v. Kuhlmeier*[114] when assessing speech claims involving instructional speech. Rather than an academic freedom case arising in higher education, *Hazelwood* involved a group of secondary students claiming First Amendment rights in relation to a student newspaper produced as part of a journalism class.[115] Thus, while not applying the *Garcetti* standards to the biology instructor's speech, the *Sheldon* case highlights how academic freedom cases have not resulted in consistent legal criteria for speech claims involving faculty, even among courts sympathetic to First Amendment protection for professorial speech. The legal standards applied in *Sheldon* came from precedent involving secondary students and also made no distinction between elementary and secondary teachers and faculty members in higher education.

V. THE CASE FOR FIRST AMENDMENT PROTECTION OF PROFESSIONALLY-BASED FACULTY SPEECH

In *Urofsky v. Gilmore* the U.S. Court of Appeals for the Fourth Circuit, sitting en banc, concluded that public higher education faculty possess no other First Amendment rights for their professionally-based speech than those generally available to other public employees.[116] This determination, while potentially sensible at a cursory level (i.e., the idea

110. *Id.*
111. Sheldon v. Dhillon, No. C-08-03438 RMW, 2009 WL 4282086 (N.D. Cal. Nov. 25, 2009).
112. *Id.* at *1–2.
113. *Id.* at *3.
114. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).
115. *Id.* at 262–64.
116. Urofsky v. Gilmore, 216 F.3d 401, 410 (4th Cir. 2000).

of not carving out special exceptions for classes of individuals under the First Amendment), falls apart under more careful scrutiny. One justification[117] to ground these First Amendment rights is to focus on how voluntary actions by public colleges and universities—such as adoption of academic freedom policies— in defining faculty roles and autonomy should serve to permit constitutional protection for faculty speech made pursuant to carrying out professional duties. That is, institutional actions regarding how to define faculty roles and independence in intellectual and service matters should result in First Amendment rights for faculty speech made as part of carrying out professional duties.

The Supreme Court has recognized that some kinds of speech obligations undertaken by colleges and universities in the student speech realm trigger First Amendment protection for such speech, even if an institution was not otherwise required by the First Amendment to support such speech or expressive activity. Such has been the case in the context of officially recognized student groups[118] and student publications.[119] The First Amendment does not require public colleges and universities to have officially recognized student groups or to subsidize independent student publications, but, as these cases have shown, once an institution opts to do so, it must exercise viewpoint neutrality in the rules placed on such groups or publications.

While the issue of faculty professional speech differs from student groups in important respects and applicable First Amendment tests, the shared principle relates to the fact that voluntary action on the part of a college or university can result in institutional First Amendment obligations. Once an institution elects to empower faculty to engage in independent speech for purposes of carrying out their professional roles, it should not, under the First Amendment, then be able to renege on that grant of professional independence based on the public employee speech cases. Importantly, this is not a view of First Amendment employee speech rights necessarily limited only to faculty, as it could form a basis to extend professionally-based speech rights to other classes of public employees explicitly authorized by their employer to exercise independence in their speech and professional pronouncements, or required to do so by law. Simply put, if a public college or university

117. Other justifications certainly exist, and the authors are not foreclosing these other possibilities in making the arguments presented in this relatively brief essay.

118. *See* Bd. of Regents of Univ. of Wis. v. Southworth, 529 U.S. 217, 223 (2000) (holding that a university may operate a mandatory fee system to subsidize student organizations if such fees are distributed in a viewpoint neutral manner).

119. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829–33 (1995) (determining the standards of viewpoint neutrality applicable to a university system of funding independent student publications).

chooses to authorize explicitly a set of employees (i.e., professors) to exercise independence in their professional speech, then such voluntary institutional acknowledgement and endorsement of freedom of speech should have First Amendment consequences in relation to how courts apply the public employee speech standards to faculty speech under such circumstances.

The Supreme Court has also recognized that First Amendment standards should be adjusted when appropriate to account for the collegiate setting. *Board of Regents of the University of Wisconsin v. Southworth* dealt with the imposition of a mandatory fee program by a university to support the activities of student organizations.[120] Challengers to the program looked to cases involving collection of dues in union contexts where courts had held that use of required fees to further political speech by the unions constituted impermissible compelled speech under the First Amendment.[121] In *Southworth*, the Supreme Court discussed the different considerations present in a higher education setting in applying constitutional standards governing compelled speech.[122] As such, unlike the issue of compelled speech in a union context, the university could impose the mandatory fee to support student organizations representing a variety of viewpoints, even if students found the views or activities of particular groups offensive. In a similar fashion, different First Amendment considerations should apply in collegiate contexts when it comes to faculty speech, especially when considered alongside the proactive steps taken by institutions to espouse support for faculty independence—notably the adoption of AAUP standards of academic freedom—that reflect principles not applied by most other public employers to their employees' work-related speech.

In terms of First Amendment analysis, public colleges and universities should not be allowed to have it both ways when it comes to their faculty. Adopting and holding out academic freedom statements but then attempting to rely on *Garcetti* when faculty exercise this institutionally backed independence is incongruous. Taking into consideration institutional actions and policies dealing with faculty speech and autonomy does not preclude other theories on which to base First Amendment protection for faculty speech. At the same time, it permits voluntary institutional recognition of faculty speech rights to be taken into account for First Amendment analysis under the public employee speech standards. Courts should give the appropriate recognition to and

120. *Southworth*, 529 U.S. at 221.

121. *Id.*

122. *Id.* at 230 (stating previous cases involving compelled speech in union contexts "neither applicable nor workable in the context of extracurricular student speech at a university").

consideration of such academic freedom standards and policies in determining faculty First Amendment rights for their professionally-based speech.

Colleges and universities hire faculty on the premise that they will offer independent views and expertise rather than simply serve as institutional spokespersons. These expectations shift (or they should) the First Amendment analysis otherwise applied to public employees. In sum, courts should take seriously the intellectual freedom commitments made by colleges and universities when interpreting faculty First Amendment speech rights.

Adjustment to the public employee speech standards to account for institutions authorizing faculty to engage in independent professionally-based speech would not leave courts without a workable legal test to evaluate professorial speech claims. The tests already applied to employee speech present a pragmatic, ready alternative if appropriately calibrated to the collegiate setting. As discussed, under the public employee speech standards, a public employer may still offer a sufficient justification to restrict otherwise protected speech. Established professional standards and norms in higher education prove instructive in charting the types of institutional interests at play to appropriately regulate faculty speech in particular instances.

The U.S. Court of Appeals for the Ninth Circuit in *Demers v. Austin* demonstrated perhaps the most nuanced approach thus far among courts in terms of seeking to align the public employee speech standards with the idea of academic freedom as a constitutional concern. In *Demers*, the Ninth Circuit decided that academic and teaching-related writing qualified for First Amendment protection.[123] In making this determination, the court looked for support to the Supreme Court's academic freedom precedent.[124] But, in operationalizing the available constitutional protection for faculty speech, it turned more specifically to the public employee speech cases as providing the legal framework to evaluate faculty speech claims in such circumstances.[125]

Under these standards, speech by a public employee must address a matter of public concern to qualify for First Amendment protection. Still, the court discussed that unique circumstances encompass the idea of public concern in a college or university, meaning that the "balancing process in cases involving academic speech is likely to be particularly subtle and 'difficult.'" [126] This judicial stance is markedly different than

123. Demers v. Austin, 746 F.3d 402, 406 (9th Cir. 2014).
124. *Id.* at 411–12.
125. *Id.* at 412.
126. *Id.* at 413.

that taken by courts in several cases discussed in Part IV-A where courts used a more generalized conception of public concern as a basis to curtail First Amendment speech rights for faculty. The appeals court in *Demers* rejected a generic notion of public concern as inappropriate to a higher education context. To illustrate, the court discussed that debates in an English department over a literary canon might appear "trivial to some," but that such a view fails to take into account the "importance to our culture not only of the study of literature, but also of the choice of the literature to be studied."[127] Similar circumstances, noted the court, could exist in other disciplines. It cautioned against judges being too quick to disregard such academic considerations: "[r]ecognizing 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."[128]

In general, courts could tailor the public employee speech standards to a higher education context. In applying the concept of public concern in a manner appropriate to a college or university, courts could take into account the legitimate interests of institutions to restrict faculty speech at certain points, such as ensuring that a professor demonstrates competency in her or his subject area. Recognition of faculty First Amendment rights would not leave colleges and universities without recourse to restrict professorial speech in some (appropriate) instances, but it would take away unfettered institutional authority to regulate professionally-based faculty speech—at least in terms of the First Amendment—in all instances based on *Garcetti*.

VI. CONCLUSION—WHAT NEXT FOR FACULTY SPEECH?

While advocating for a continued First Amendment role for safeguarding professionally-based faculty speech, the authors acknowledge that limitations exist on any constitutional protections afforded. The lack of tenure for increasing numbers of faculty raises serious concerns regarding intellectual freedom in our nation's colleges and universities. Alongside constitutional protections, a need exists for other mechanisms, such as those provided through tenure or, alternatively, long-term contracts or collective bargaining, to provide meaningful legal protections for faculty autonomy and academic freedom. Rather than some kind of welcome disruptive innovation to higher education, we contend a lack of legal safeguards for faculty speech and independence degrades the higher education enterprise in crucial ways. Instead of continuing to follow a haphazard and risky approach in which we

127. *Id.*
128. *Id.*

increasingly de-professionalize the faculty role, policymakers, elected officials, courts, and institutional leaders should consider carefully the costs to our students, institutions, and society of dismantling, as opposed to revitalizing, faculty professional independence and academic freedom, including through the First Amendment.