

**THE ROBERTS COURT AND FREE SPEECH ON CAMPUS:
EXAMINING CLS, WESTBORO, CITIZENS UNITED, AND MORE**

SOME KEY RECENT FIRST AMENDMENT CASES

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Introduction

The U.S. Supreme Court has issued a number of recent decisions interpreting the First Amendment of the U.S. Constitution with potential implications for free speech in the context of higher education. These decisions reveal a Court that is generally fiercely protective of free expression as balanced against other interests, even when such expression may be deeply offensive or hurtful to some individuals. The decisions are summarized below, followed by observations regarding their possible impact on colleges and universities. Public institutions of higher education are bound by the Constitution and must therefore observe First Amendment protections and principles vis-à-vis their faculty, staff and students, but most private institutions also have protections for academic freedom in their own policies. (Note: The case of *Christian Legal Society v. Martinez* will be discussed in a separate outline.)

Public Employee Speech

Garcetti v. Ceballos, 126 S.Ct. 1951 (2006)

Facts: A deputy district attorney alleged that he was subject to adverse employment actions in retaliation for writing a disposition memorandum in which he recommended dismissal of a case on the basis of purported governmental misconduct.

Holding: Justice Kennedy wrote an opinion for the Court holding that “when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” 126 S.Ct. at 1960. In this case, the district attorney was acting in his capacity as a government employee in writing the memo in question, and the Court thus held that this speech was not protected by the First Amendment. The Court said that this decision merely reflects a government employer’s control over expression that “the employer itself has commissioned or created.”

In response to a concern expressed in a strong dissent by Justice Souter, the majority opinion by Justice Kennedy took pains to indicate that the decision was not intended to foreclose arguments about academic freedom protections for faculty:

There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

Id. at 1962. In his dissent, Justice Souter stated that he hoped that the majority opinion would not “mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write ‘pursuant to ... official duties’” (citations omitted). *Id.* at 1969-70.

Subsequent Cases: Subsequent decisions by lower federal courts applying the *Garcetti* holding bear out Justice Souter's concern about the implications for the expression of faculty members in higher education. In one prominent recent case at the University of California-Irvine, for example, an emeritus professor named Juan Hong alleged that he was denied a merit salary increase after criticizing hiring and promotion decisions within his department and voicing concern about its reliance on part-time lecturers to teach lower-division classes. A federal district court ruled against Professor Hong on the basis that he had made his statements in his capacity as a state employee. *Hong v. Grant*, 516 F. Supp.2d 1158 (C.D. Cal. (2007)). The 9th Circuit Court of Appeals also ruled against Professor Hong based on qualified immunity for the defendants, but did not address the *Garcetti* free speech issue as applied to a faculty member. *Hong v. Grant*, 2010 WL 4561419 (Nov. 12, 2010); *see also* Peter Schmidt, *U.S. Court Ducks Academic-Freedom Debate in Ruling Against California Professor*, *The Chronicle of Higher Education* (Nov. 12, 2010). Several other lower federal courts have likewise issued rulings that the First Amendment does not protect faculty complaints about institutional policies and decisions (e.g., on a lack of diversity in hiring decisions, or management of an academic department). *See, e.g.*, Peter Schmidt, *Professors Try to Shore Up Speech Protections Undermined by Courts*, *The Chronicle of Higher Education* (June 21, 2010).

Given the Supreme Court's fierce protection of free speech in other cases noted in this outline, it is interesting to note in this instance that the Court is protecting the expression rights of government entities when they perform their official functions, rather than the individual rights of the employees who work for those entities. The Court's recognition of institutional rights in the free expression context (as echoed in the *Citizens United* case below with regard to corporations) is striking when compared against protections for individuals who work for, or otherwise interact with, those institutions.

Policy Response: In response to the *Garcetti* decision and the trend of other courts applying its reasoning to faculty speech, the American Association of University Professors (AAUP) began a campaign aimed at protecting academic freedom at public

colleges and universities through other means. The campaign urges public colleges and universities “to adopt policies broadly protecting faculty speech dealing with academic matters, institutional governance, teaching, research, and issues outside the workplace.” See Peter Schmidt, *AAUP Announces Effort to Shore Up Academic Freedom at Public Colleges*, *The Chronicle of Higher Education* (Nov. 10, 2009). As part of its campaign, the AAUP issued a report on “Protecting an Independent Faculty Voice: Academic Freedom After *Garcetti v. Ceballos*,” *Academe* 67-88 (Nov.-Dec. 2009). The report calls upon public colleges and universities to adopt policy language making clear that the reasoning of *Garcetti* will not be used to abridge the free speech rights of faculty members within the academic setting, and called attention to what the AAUP considers a model policy adopted by the University of Minnesota’s Board of Regents in June 2009. The Minnesota policy (called “Academic Freedom and Responsibility”) defines academic freedom as follows:

Academic freedom is the freedom to discuss all relevant matters in the classroom, to explore all avenues of scholarship, research, and creative expression, and to speak or write without institutional discipline or restraint on matters of public concern as well as on matters related to professional duties and the functioning of the University.

Like The 1940 Statement of Principles on Academic Freedom and Tenure, this definition of academic freedom is paired with a statement about academic responsibility:

Academic responsibility implies the faithful performance of professional duties and obligations, the recognition of the demands of the scholarly enterprise, and the candor to make it clear that when one is speaking on matters of public interest, one is not speaking for the institution.

This approach of protecting academic freedom through institutional policy is consistent with the views of some scholars who argue that academic freedom is more firmly rooted in professional norms than in legal decisions, and that courts are ill-equipped to serve as the protectors of academic freedom. See, e.g., Joan DelFattore, *To Protect Academic Freedom, Look Beyond the First Amendment*, *The Chronicle of Higher Education* (Oct. 31, 2010). The policy-based approach also provides a way for faculty members at private colleges and universities to gain academic freedom protections. The Ford Foundation-funded “Difficult Dialogues” project is working with national higher education organizations to produce information for colleges and universities on how to protect academic freedom at a time of legal uncertainty.

Controversial and Outrageous Speech

United States v. Stevens, 130 S.Ct. 1577 (2010)

Facts: In 1999, Congress enacted a law making it a crime to sell and market videos showing dogfighting and other acts of animal cruelty, including videotaped depictions of the intentional mutilation, torture, and killing of animals. The law was a

response in part to so-called “crush videos,” a form of sexual fetishism in which helpless animals such as rabbits are stomped to death by people (usually women, whose faces are not shown) with spiked-heel shoes or bare feet.

Holding: In an 8-1 decision authored by Chief Justice Roberts, the Supreme Court struck down the federal law as being “substantially overbroad” because it could apply to hunting and fishing videos and other legitimate depictions. The majority decision asserted that “the First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.” 130 S.Ct. at 1585.

Aftermath: President Obama recently signed into law a narrower version of this federal legislation aimed at complying with the Supreme Court’s guidance.

Possible Implications for Higher Education: In *Stevens*, the Court rejected an argument made by then-Solicitor General Elena Kagan that whether a given category of speech should be protected under the First Amendment “depends upon a categorical balancing of the value of the speech against its societal costs.” See Lawrence White, *Free-Speech Ruling’s Impact on Colleges*, *The Chronicle of Higher Education* (Apr. 27, 2010). One university attorney has suggested that this decision

may mark the beginning of something big: a categorical, unqualified hostility on the part of the Supreme Court to any legislative or regulatory effort to curtail freedom of expression based on either subjective distaste for the words uttered or concern for the welfare of the listener.

Id. White argues that higher education administrators must therefore avoid any hint of “cost-benefit analysis” in deciding how and whether to regulate expression on campuses. *Id.*

Snyder v. Phelps, 580 F.3d 206 (4th Cir. 2009), No. 09-751 (currently pending before U.S. Supreme Court)

Facts: The father (Snyder) of a soldier killed in Iraq sued the pastor (Rev. Phelps) and other representatives of the Westboro Baptist Church for invasion of privacy and intentional infliction of emotional distress after they picketed near the son’s funeral and posted an “epic” on the Internet several weeks thereafter. The church practices a “fire and brimstone” fundamentalist religious faith, and the picketing publicized their message of God’s hatred of America for its tolerance of homosexuality. The Westboro Baptists complied with local ordinances and police directions with respect to being a certain distance from the church. The Internet posting on the church’s website (www.godhatesfags.com) made specific mention of the deceased soldier and his family, stating that his parents had taught him to “defy his creator” and “raised him for the devil.”

Holding (4th Circuit Court of Appeals): The 4th Circuit overturned a jury verdict in favor of Snyder on three tort claims, for which he had been awarded \$2.9 million in compensatory damages and \$8 million in punitive damages. The 4th Circuit noted that tort law is circumscribed by the First Amendment, and that therefore “the First Amendment applies when a plaintiff seeks damages for reputational, mental, or emotional injury allegedly resulting from the defendant’s speech.” 580 F.3d at 218 (citation omitted). The 4th Circuit declared that the First Amendment protects “statements on matters of public concern that fail to contain a ‘provably false factual connotation.’” *Id.* at 219. In this instance, the court found that the speech of the Westboro Baptists involved matters of public concern (e.g., the issue of homosexuals in the military).

The court also held that:

[R]hetorical statements employing ‘loose, figurative, or hyperbolic language’ are entitled to First Amendment protection to ensure that ‘public debate will not suffer for lack of ‘imaginative expression’ or the ‘rhetorical hyperbole’ which has traditionally added much to the discourse of our nation. . . . The general tenor of rhetorical speech, as well as the use of ‘loose, figurative, or hyperbolic language’ sufficiently negates any impression that the speaker is asserting actual facts.

Id. at 220 (citations omitted). In this case, the court found that the language of the signs do not assert provable facts about an individual, and “clearly contain imaginative and hyperbolic rhetoric intended to spark debate about issues with which the Defendants are concerned.” *Id.* at 223.

While governmental entities can place reasonable and content-neutral time, place and manner restrictions on activities that are otherwise constitutionally protected, the 4th Circuit pointed out that “some ‘breathing space’ for contentious speech is essential” under the Free Speech Clause. *Id.* at 226.

Supreme Court Arguments: Mr. Snyder argued in the Supreme Court that he was a “captive audience” to the Westboro Baptists’ speech because he was at his son’s funeral. He also argued that he was a private figure, and should therefore not be required to prove that the Westboro Baptists’ statements could reasonably be interpreted to state actual facts. The Westboro Baptists argued that Snyder essentially became a public figure because of the media attention directed at his son’s death and funeral, which was publicly funded and a public event.

Possible Implications for Higher Education: This case has important implications for college and university regulations addressing hate speech and harassment. If the Supreme Court upholds the 4th Circuit decision (as seems likely), then hate speech cloaked in religious expression may be especially protected (as such speech might inherently be categorized as involving matters that are difficult to prove). The line between conduct that can be prohibited as discrimination and free expression may become even harder to draw. In one amicus brief, several First Amendment scholars

asserted that tort liability must include some external indicia of harm and cannot be based solely on the emotional impact of speech. The speech/conduct distinction that has been at the heart of many cases regarding anti-harassment and discrimination policies has been premised largely on the notion that discrimination/harassment must include some demonstration of actual interference with educational benefits or participation in educational programs. *See, e.g.,* Arthur L. Coleman & Jonathan R. Alger, *Beyond Speech Codes: Harmonizing Rights of Free Speech and Freedom from Discrimination on University Campuses*, 23 J.C.U.L. 91 (Summer 1996).

In a brief supporting the Westboro Baptists, the Foundation for Individual Rights in Education (FIRE) argued that the Supreme Court should not recognize a new “outrageous and distressing” speech exception based on the tort of intentional infliction of emotional distress. FIRE argued that such an exception would threaten student speech in newspapers, web pages, demonstrations, leaflets and conversations. FIRE further stated that any such exception would put pressure on colleges and universities to ban a wide range of speech out of fear of possible litigation, and that a broad interpretation of the “captive audience” exception could easily be applied to college students in an institutional setting.

The case also seems likely to reinforce the idea that speech that is clearly outrageous and hyperbolic so as to make a point is protected, even if it is tied to some extent to identifiable individuals or groups.

Obscenity

Schwarzenegger v. Entertainment Merchants Association, No. 07-16620

Facts: Associations of companies that create, publish, distribute, sell and/or rent video games brought a declaratory judgment action against the state of California under the First and Fourteenth Amendments seeking to invalidate a newly-enacted law imposing restrictions and labeling requirements on the sale or rental of “violent video games” to minors. The Court of Appeals for the 9th Circuit held that violent video games did not fall within the legal definition of “obscenity” under the First Amendment, and that the state did not have a compelling interest in preventing psychological or neurological harm allegedly caused to minors by violent video games (and that even if it had such an interest, the law was not narrowly tailored to serve that interest because less restrictive alternatives were available). *Video Software Dealers Association v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009).

Question: Whether the First Amendment’s Free Speech Clause prevents California from fining anyone who sells “violent” video games to minors, or whether such video games may be treated like obscenity (which is a special category under the First Amendment).

Possible Implications for Higher Education: Colleges and universities often have minors on campus (sometimes in their enrolled student populations), and may need

to pay attention to the ways in which they make violent video games or other similar resources available or accessible to such minors.

Corporate Speech

Citizens United v. Federal Election Commission, 130 S.Ct. 876 (2010)

Facts: A nonprofit corporation brought an action against the Federal Election Commission for declaratory and injunctive relief under a federal law regulating corporate and union electioneering speech, asserting that it feared it could be subject to civil and criminal penalties if it made available a documentary on cable television about Hillary Clinton (who was then a candidate seeking the Democratic Party presidential nomination), within 30 days of primary elections.

Holding: With Justice Kennedy writing the majority opinion, the Court held that government may not, under the First Amendment, suppress political speech on the basis of the speaker's corporate identity, overruling a previous decision to the contrary.

Reasoning: The Court was critical of federal election law that it found to be unduly complex and cumbersome and therefore vague. It also indicated that courts cannot draw "constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker." 130 S.Ct. at 891.

The Court indicated that "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." *Id.* at 899. The Court took note of the fact that the statute made an exception for media corporations, even though their expression reflects their own self-interests and could therefore present some of the same potential distortions as other corporate entities. *Id.* at 906. The Court has upheld narrow restrictions in the past to allow government entities to perform their functions, but found that no such interference with necessary government activity existed to justify this statute's restriction on corporate speech.

The statute was premised in part on an "antidistortion principle" that was aimed to prevent speech backed by significant corporate funding that may "have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 884. The Court dismissed the notion that the law was necessary to protect dissenting shareholders, finding instead that corporate democracy could adequately protect such interests. *Id.* at 911. The Court indicated that the law was antithetical to First Amendment values because its purpose and effect "is to prevent corporations, including small and nonprofit corporations, from presenting both facts and opinions to the public." *Id.* at 907. The Court said that "[a]ll speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech." *Id.* at 905. The Court did uphold disclaimer and disclosure requirements as ways to ensure that others could evaluate the source of speech, and found no evidence of retaliation against individual funders of corporate speech in this instance that would have necessitated the protection of their anonymity.

The decision demonstrated a willingness to overturn well-established Supreme Court precedent where the current Justices believe there was an error made in one or more past cases. It also showed that the Court is willing to entertain a “facial” challenge to strike down a statute, rather than simply an “as applied” challenge to a particular application of a federal law, when the Court believes that the statute presents fundamental constitutional infirmities.

Possible Implications for Higher Education: Some commentators have argued that this decision demonstrates that the delicate balance between equality and liberty is sliding dangerously in one direction under the current Supreme Court. *See, e.g., Sarah Kellogg, In the Wake of Citizens United: Where Liberty and Equality Meet*, Washington Lawyer 19 (Nov. 2010). It appears that the line between how corporations and individuals are treated may be disappearing, at least with regard to matters of free expression.

The decision could affect the ability of public colleges and universities to restrict “corporate speech” on their own campuses. Content-neutral time, place and manner regulations can still be valid means to regulate expression, but institutions cannot single out certain types of speakers from expressing themselves. Restrictions on “conduct” (e.g., commercial activity on campus) are also permissible, but such restrictions must not be directed at the content or viewpoint of expression. These principles could also apply to campus publications and their policies on advertising.

The decision might also make it easier for colleges and universities that are incorporated to defend speech on behalf of themselves as institutions.

In a related vein, other legal experts have pointed out that large, private Internet corporations (such as Google and Facebook) are making decisions on a daily basis about whether and how to regulate expression. *See, e.g., Tim Wu, The Future of Free Speech*, The Chronicle of Higher Education (Nov. 19, 2010). These entities are not subject to the First Amendment, but using new technology they control access to information and expression in significant ways that may not have been contemplated by the Founding Fathers. As a society, we may need to consider the implications of the new marketplace for free expression insofar as that marketplace is controlled substantially by private entities rather than government bodies.

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