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New Challenges to Academic Freedom

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I. Introduction

A. The Significant Past and Intriguing Future of Academic Freedom in American Higher Education

Any discussion regarding academic freedom in American colleges and universities should begin with consideration of the joint 1940 *Statement of Principles on Academic Freedom and Tenure* issued by the American Association of University Professors (AAUP) and the Association of American Colleges and Universities. This statement, and its subsequent amendments, has sought to define the role of faculty in higher education beyond a typical master-servant relationship, acknowledging that academic freedom is essential for scholars to pursue truth and serve society.¹ While academic freedom may be generally understood as the discretion afforded faculty to pursue their scholarly research and teaching in a manner they deem appropriate, such a view does not capture the full scope of the concept. Academic freedom may be defined from the perspective of student learning objectives and institutional concerns.² Arguably however, the common thread weaved throughout the academic enterprise is the faculty

¹ Joan DelFattore, Knowledge in the Making: Academic Freedom and Free Speech in America's Schools and Universities 219 (2010).

² Id. at 2-5.

voice and the question surfaces whether recent Supreme Court decisions have challenged free speech and academic freedom in the university community.³

In *Hong v. Grant*, a Chemical Engineering professor at the University of California-Irvine filed a complaint in federal court alleging an academic freedom violation regarding critical remarks he made regarding hiring and promotion decisions within his department. In particular, Professor Hong objected to excessive use of lecturers, rather than full-time faculty, to teach undergraduate courses. The complaint was dismissed because the court found that the professor's statements did not constitute a matter of public concern and, therefore were not protected by the First Amendment.⁴ Does this decision invite the exclusion of the faculty voice to a wide array of topics within higher education? If so, what does this mean for academic free speech and faculty governance going forward?

B. Garcetti and its Lingering Impact on Higher Education

In *Garcetti v. Ceballos*⁵, Richard Ceballos a public employee, working as a deputy district attorney for the Los Angeles County District Attorney's Office became embroiled in a dispute with his supervisors regarding the content of an affidavit that was used to obtain a search warrant critical to a criminal prosecution. Ceballos believed that the search warrant included various inaccuracies and recommended dismissal of the criminal case. More specifically, Ceballos prepared and submitted a memorandum detailing his observations regarding the search warrant. Following heated discussions

³ In addition to the *Hong v. Grant*, 516 F. Supp.2d 1158 (C.D. Cal. 2007), see also *Renken v. Gregory*, 541 F.3d 769, 775 (7th Cir. 2008)(Professor's speech criticizing handling of a grant by university not protected by the First Amendment); *Gorum v. Sessoms*, No. 06-565, 2008 WL 399641 (D.Del. Feb. 12, 2008)Professor's statements regarding selection of university president not protected by First Amendment.)

⁴ *Hong v. Grant*, 516 F. Supp. 2d 1158 (C.D. Cal. 2007), aff'd, No. 07-56705, 2010 WL 4561419 (9th Cir, Nov. 12, 2010).

⁵ 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006)

with his superiors about the search warrant, a decision was reached to proceed with the prosecution despite Ceballos' recommendation. At a hearing on defendant's motion challenging the search warrant, Ceballos would be called by the defense to testify regarding the deficiencies within the search warrant.⁶ Subsequently, Ceballos claimed that he was subject to retaliatory employment action and sued the District Attorney's Office for violation of his First and Fourteenth Amendment based on his memo.

The District Attorney's Office argues, *inter alia*, that Ceballos' memo was not protected speech under the first Amendment because the memo was written pursuant to his employment duties.⁷ The district court agreed, granting defendant's motion for summary judgment. On appeal, the Ninth Circuit reversed, holding that Ceballos' memo was protected speech under the First Amendment pursuant to the reasoning set out in *Pickering v. Board of Ed. Of Township High School Dist. 205, Will Cty.*,⁸ because the memo concerned speech regarding a matter of public concern, i.e., alleged government misconduct. No consideration was given to whether the speech was made in Ceballos' capacity as a private citizen or public employee.⁹ On certiorari before the Supreme Court, Justice Kennedy writing for the majority in the 5-4 decision indicated the following:

We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.¹⁰

⁶ Id. at 415.

⁷ Id.

⁸ 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968)

⁹ *Garcetti*, 547 U.S. at 416.

¹⁰ *Id.* at 421

However, the majority did observe that some job related expressions were protected by the First Amendment such as informed opinions that may be offered by teachers on matters related to school operations.

Justice Souter, with whom Justice Stevens and Justice Ginsburg joined, offered a dissenting opinion that suggests the reach of the majority's holding may threaten academic freedom for the public university professor.¹¹ The *Garcetti* decision held that speech or written expression by public employees uttered in the course of performing their jobs are not protected by the First Amendment. For college and university professors at public institutions, the Court's decision left open the question whether academic freedom extended under the First Amendment protects faculty speech relative to teaching and scholarly activities, as well as assessments of administrative processes such as promotion, tenure, hiring, and the management of institutional resources.¹²

II. Academic Freedom and Institutional Decision-Making

A. Curriculum as Speech

The exchange between students and faculty is a fundamental component of the academic experience that is made possible by the curriculum standards set out by the university. Courts have acknowledged that academic freedom grants colleges and universities the authority to establish the curriculum. In *Webb v. Bd. of Trustees of Ball State University*, Professor Gary L. Webb, a tenured faculty member in the Criminology Department filed a complaint in federal court alleging, among other things, that changes to his teaching schedule were implemented in retaliation for complaints he made that

¹¹ Id. at 438

¹² Joan DelFattore, *To Protect Academic Freedom, Look Beyond the First Amendment*, The Chronicle of Higher Education, Commentary, October 31, 2010 .

another faculty sexually harassed a student. Construing Professor Webb's sexual harassment complaint and related complaints regarding the university's handling of the controversy arguably represented a matter of public concern. As such, Professor Webb argued that changing his teaching schedule violated his constitutional right to free expression.¹³ Further, the university's decision to change Professor Webb's teaching schedule followed a series of administrative disputes that resulted in his removal from the position of Chair in the Criminology Department, which Professor Webb deemed as retaliatory action by the new department chair. Professor Webb sought a preliminary injunction to restore his teaching schedule and remedy the alleged constitutional violation regarding his protected speech.

The Seventh Circuit was not persuaded by Professor Webb's contentions regarding the mangled dispute between faculty and administrators at the university, and affirmed a lower court decision denying the injunction. According to the court, a university's "ability to set a curriculum is as much an element of academic freedom as any scholar's right to express a point of view." Where the core functions of teaching and scholarship are at issue, the court stated the following:

Universities are entitled to insist that members of the faculty (and their administrative aides) devote their energies to promoting the goals such as research and teaching. When the bulk of a professor's time goes over to fraternal warfare, students and the scholarly community alike suffer, and the university may intervene to restore decorum and ease tensions.¹⁴

¹³ *Webb v. Bd. of Trustees of Ball State Univ.*, 167 F.3d 1146, 1148-1149 (7th Cir. 1999).

¹⁴ *Id.* at 1150.

In light of the foregoing rationale, the court expressed an unwillingness to intervene in curriculum matters, or set out when courts might interfere with a university's curriculum determinations or staffing decisions.¹⁵

The Seventh Circuit again examined a university's decision to take action regarding a faculty member involved in certain controversial acts of expression. In *Piggee v. Carl Sandburg College*, a part-time community college instructor gave a homosexual student enrolled in her cosmetology class religious pamphlets that espoused the sinfulness of homosexuality.¹⁶ The college admonished the instructor in writing and directed her to cease the behavior which was considered a violation of the college's sexual harassment policy. A year later the college notified the instructor that she would not be offered a teaching contract for the next year. The faculty member brought suit claiming violation of her free speech rights as well as other various constitutional violations.

The court dismissed the faculty member's case but took the opportunity to discuss the importance of the U.S. Supreme Court's decision in *Garcetti*. While acknowledging that the Supreme Court did not directly address concerns raised for the community college, the court was careful to point out that *Garcetti* highlights the weight to be extended to interests of public sector employers.¹⁷ Recognizing that the employer was a public community college, the court resolved that “. . . the college had an interest in ensuring that its instructors stay on message”¹⁸ While faculty views on assigned course subject matter are indeed protected speech, the instructor's speech, verbal and

¹⁵ Id.

¹⁶ 464 F.3d 667 (7th Cir. 2006)

¹⁷ Id. at 672

¹⁸ Id.

through the religious pamphlets, was not related to instructing the students in cosmetology. Hence, the speech was not constitutionally protected, and the college had the right to take remedial measures in response to the unprotected speech.

B. Admission Decision-making as Speech

The decisions that determine who may or may not be granted admission to a college or university, and the factors that may be considered to reach an admission decision have been an important debate within the higher education community in recent years. In *Coalition to Defend Affirmative Action v. Regents of the University of Michigan*,¹⁹ plaintiffs in a consolidated action challenged the constitutionality of an amendment to Michigan's state constitution – approved by the Michigan voters in November 2006 as Proposal 2 - which prohibited the use of affirmative action in making admissions decisions at Michigan's public universities.²⁰ More specifically, the Coalition plaintiffs argued, *inter alia*, that Proposal 2 violated the First Amendment in light of the Supreme Court's holding in *Grutter v. Bollinger*,²¹ which observed that institutions of higher education have a right to academic freedom and may consider race and gender in the selection of faculty and students in order to promote diversity.²² A mandatory injunction was sought by the Coalition plaintiffs as to the effect Proposal 2 would have on admission policies that considered race. The university defendants sought to dismiss the Coalition plaintiffs' action asserting that they had no standing “. . . because the right to academic freedom does not belong to any of the plaintiffs, but rather to the

¹⁹ 539 F. Supp. 2d 924 (2008) (the plaintiffs represented two groups referred to as the Coalition plaintiffs and the Cantrell plaintiffs)

²⁰ *Id.* at 930.

²¹ 539 U.S. 306, 314, 123 S.Ct. 2325, 156 L.Ed.2d. 304 (2003)

²² *Coalition*, at 935.

universities.”²³ In its analysis, the court noted that academic freedom includes the right of faculty and students to express views on autonomous decision-making within the institution. Further, the court made clear that discretion to determine who may be admitted was an essential freedom of a university.²⁴

The court’s academic freedom discussion relied on the rationale presented in *Sweezy v. New Hampshire*,²⁵ wherein Justice Frankfurter’s concurring opinion argued that a university shall provide an atmosphere conducive for learning that maintains four essential freedoms to determine, on academic grounds, who may teach, what may be taught, how it shall be taught, and who may be admitted to study.²⁶ With regard to freedom to determine who may study, the Coalition Plaintiffs contend that Proposal 2 is unconstitutional because it denies students right to a racially diverse educational environment by prohibiting university official to consider race in the course of making admission decisions.²⁷ However, the district court concluded that the Coalition Plaintiff simply had no standing – independently or as a third-party – to assert an academic freedom right that belonged to the university²⁸

Acknowledging that the First Amendment right to academic freedom in the area of admissions belongs to the universities, the court observed the special niche freedom of speech and thought within the university environment maintains in our constitutional

²³ *Id.* at 940.

²⁴ *Id.* at 942 citing *Regent of University of Michigan v. Ewing*, 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 253 (1985); *University of California Regents v. Bakke*, 438 U.S. 265, 312, 98 S.Ct. 2733, 57 L. Ed. 2d 750 (1978); *Sweezy v. New Hampshire*, 354 U.S. 234, 263, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957)

²⁵ *Sweezy v. New Hampshire*, 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957)

²⁶ *Sweezy v. New Hampshire*, 354 U.S. at 263.

²⁷ *Coalition*, 539 F.Supp. at 942-943.

²⁸ *Id.* at 943

tradition. In relationship to admission decisions, the freedom of the university to make its own judgments as to education includes the selection of its student body.²⁹

C. Textbook selection as Speech

Textbooks have been characterized as “. . . pedagogical tools essential not only to the teaching of substantive information, but also to the development of effective curricula”³⁰ In *Garcia Padilla*, a nonprofit private school association, acting on behalf of private schools in Puerto Rico (including post secondary schools), challenged, inter alia, Puerto Rico’s Law 116 (hereafter “Law 116”) that would permit parents to approve textbook budgets and require schools to inform parents if a textbook contained significant changes giving parents the right to purchase old textbook editions that were preferred. Finding that Law 116 violated the private schools’ First Amendment right to free speech and academic freedom, the court noted that educational institutions have the constitutional right to determine for themselves *what to teach* and *how to teach it*.³¹ The court recognized that academic freedom, while not articulated in the constitution, is viewed as a special concern in our First Amendment jurisprudence that extends a zone of protection for the educational process itself, which includes students, teachers and institution.³² As early as 1952, the U.S. Supreme Court defined academic freedom as placing limits on the extent that state law may impose certain requirements on public school teachers.³³ A few years later in *Sweezy v. New Hampshire*, the Supreme Court

²⁹ *University of California Regents v. Bakke*, 438 U.S. 265, 312, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.)

³⁰ *Asociacion de Educacion Privada de P.R., Inc. v. Garcia-Padilla*, 490 F.3d 1,12 (1st Cir. 2007)

³¹ *Id.* at 8

³² *Id.* at 8;(citing *Cuesnongle v. Ramos*, 713 F.2d 881, 884 (1st cir. 1983)(stating that the right to academic freedom establishes a zone of First Amendment protection for the educational process.)

³³ *Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952)(writing in opposition to an Oklahoma statute that would require teachers to take a loyalty oath, Justice Frankfurter concurring in the judgment observed that teachers in our entire educational system, from the primary grades to the university,

again addressed the role of academic freedom finding it an essential to the community of American universities, noting that scholarship could not flourish in an atmosphere of suspicion and distrust.³⁴

Law 116 restrained the academic freedom of the private schools to determine what shall be taught and how it shall be taught. By granting parents the power to set textbook budgets, Law 116 forces the private schools to select textbooks based on price, not content. As a consequence, imposing significantly on what may be taught and how it may be taught and interfering with the private schools' academic freedom.

Other examples of potential threats to academic freedom through the selection of textbooks include the Textbook Information provision of the Higher Education Opportunities Act (HEOA). The Textbook Information provision of the HEOA requires colleges and universities to implement new practices that provide students access to information about textbooks and course materials for scheduled classes. While the provision, which took effect July 10, 2010, provides that “[n]othing in this section shall be construed to supersede the institutional autonomy or academic freedom of the instructors involved in the selection of college textbooks, supplemental materials, and other classroom materials,” the provision’s stated intent to expand access to affordable course materials makes clear that cost concerns may exceed the importance of academic content.

D. Assessment as Speech

In *Stronach v. Virginia State University*,³⁵ Carey E. Stronach, a physics professor, claimed that in an act of retaliation his academic freedom to assigned student grades was

cannot carry out their noble task if the condition for the practice of a responsible and critical mind are denied to them.)

³⁴ *Sweezy*, 354 U.S. at 250.

violated. According to the facts, Stronach gave a student “D” for a semester grade when in actuality the student earned an “F.” The student disputed the grade and the matter was eventually brought before Ralph C. Gatrone, Chairman for the Department of Chemistry and Physics, who agreed with the student and elevated the grade to an “A.” Stronach disagreed with Department Chair’s decision which was support by the Dean and the Provost. Stronach believed that the actions of Gatrone was part of an overarching scheme to retaliate against him for assisting a fellow faculty member prosecute a Title VII claim against VSU which resulted in a jury verdict of \$ 1,000,000.³⁶ In its analysis of Stronach’s position, the district court indicated that the academic right to grading belongs to the university not the professor. Citing *Wozniak v. Conry*, 236 F.3d 888, 891 (7th Cir. 2001) the court noted the following:

"[I]t is the [u]niversity's name, not [the professor]'s, that appears on the diploma; the [u]niversity, not [the professor], certifies to employers and graduate schools a student's successful completion of a course of study. Universities are entitled to assure themselves that their evaluation systems have been followed; otherwise their credentials are meaningless."

In dismissing Stronach’s retaliation claim on academic freedom grounds, the court cites a series of cases noting academic freedom in areas of assessment such as grading extends to the university rather than the professor.³⁷

³⁵ Civil Action No. 3:07CV646-HEH, 2008 WL 161304 (E.D. Va. Jan. 15, 2008)

³⁶ Id. at *2

³⁷ *Urofsky V. Gilmore*, 216 F.3d 401, 415 (4th Cir. 2000)(Noting that the Supreme Court has never recognized that professors possess a First Amendment right of academic freedom to determine for themselves the content of courses and scholarship); *Edward v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3rd Cir. 1998)(the First Amendment does not allow a university professor to decide what is taught in the classroom but protects the university’s right to select the curriculum); *Brown v. Amenti*, 247 F.3d 69 (3^d Cir. 2001)(a public university professor does not have a First Amendment right to expression but through

III. Academic Freedom and the Challenges that Loom

Control and influence over certain areas essential to the operation of colleges and universities demand a new level of cooperation among various stakeholders - especially faculty and administrators. As institutions of higher education hope to advance programs that are competitive, and make efficient use of resources, the boundaries of academic freedom may be need to be well-defined. Certainly, the *Garcetti* decision has introduced troubling questions regarding the parameters for academic freedoms that have yet to be answers.

the institution's grading mechanisms); *see also*, *Lovelace v. S.E. Mass. Univ.*, 793 F.2d 419, 423 (1st Cir. 1986).