A Brief Outline of the Constitutional Rules Related to Academic Freedom, as They Affect the University of California

University Committee on Academic Freedom
July 2008

UC’s APM-010 policy and President Emeritus Atkinson’s statement on Academic Freedom and the Research University do an excellent job of laying out the general theory of academic freedom. Here, we try to supplement these works by sketching some of the constitutional rules that also help protect academic freedom.

The rules we describe are, of course, only a constitutionally mandated minimum. Principles of professional ethics and wise administration often counsel in favor of protecting academic freedom far beyond what constitutional rules require. (Thus, for instance, professors in private universities should also have academic freedom protections, even though the First Amendment covers only government-run institutions.) But understanding the constitutional minimum remains important.

Naturally, this is only a guide to help people who are interested in the subject, and those who want to research it further; it is not specific legal advice.

1. First Amendment protections of academic freedom. Public universities are bound by the First Amendment. Thus, both public university students and public university teachers are entitled to some protection from discipline, firing, and other retaliation for their speech. In some areas, this protection is clear and broad. In others, it is relatively vague.

a. Student speech outside the classroom and outside academic assignments. Most clearly, students generally may not be expelled, suspended, or otherwise disciplined for what they say in student newspapers, at demonstrations, in out-of-class conversations, and the like. The Supreme Court made this clear in Papish v. Board of Curators, 410 U.S. 667 (1973), and Healy v. James, 408 U.S. 169 (1972). Lower courts have followed suit, especially in the late 1980s and 1990s cases that have struck down student speech codes. See, e.g., Dambrot v. Central Michigan Univ., 55 F.3d 1177 (6th Cir. 1995); Iota Xi v. George Mason Univ., 993 F.2d 386 (4th Cir. 1993); UWM Post v. Univ. of Wisc., 74 F. Supp. 1163 (E.D. Wis. 1991); Doe v. Univ. of Mich., 721 F. Supp. 852 (E.D. Mich. 1989).

Of course, student speech may be restricted if it falls within the narrow categories of speech that is generally unprotected (e.g., threats of violence, personal face-to-face insults likely to cause a fight, or intentional incitement of imminent and likely unlawful conduct). Likewise, the university may impose a substantial range of content-neutral time, place, and manner restrictions, such as bans on the use of sound amplification that would be audible from classrooms. And the university may impose reasonable and viewpoint-neutral limits on student speech on “nonpublic forum” property, such as building corridors and the like.

Still, generally speaking, student speech outside the classroom and outside academic assignments is protected from university punishment, even if it is offensive, wrongheaded, racist,
contemptuous, anti-government, or anti-administration. Of course, it is not protected from university criticism. The university is itself free to publicly speak to condemn student statements that university officials find to be unsound or improper.

b. Student speech within the classroom. The Supreme Court has never faced this question expressly, but the logic of the Court’s cases strongly suggests that university professors have broad authority to refuse to call on students, to punish students for talking out of turn, and to stop calling on students who insult other students. Purely passive speech, such as speech on T-shirts, may still be protected, see Tinker v. Des Moines Indep. School Dist., 393 U.S. 503 (1969). But oral statements, which can easily disrupt the class discussion, are within the professor’s authority.

c. Student speech in academic assignments. Evaluating students’ academic performance necessarily involves making content-based, and often even viewpoint-based, judgments. Did the student give the correct answer? Do the student’s arguments make sense? Is a student essay well-written, well-reasoned, calm, and rhetorically effective?

There are no Supreme Court cases squarely on the subject, and very few lower court cases, but First Amendment principles generally suggest that universities must have very broad authority to judge such student speech. This is especially so because judges often lack the competence to evaluate the quality of work in various disciplines; they therefore rightly defer to the judgments of academics who are better able to distinguish good from bad student work.

Naturally, academic freedom requires tolerance of a broad range of student viewpoints, so long as they are thoughtfully argued and pay attention to counterarguments. But judges generally stay out of such grading decisions, and leave their limits to professional ethics rather than to First Amendment law.

d. Faculty speech outside teaching and scholarship. Government employers have considerable authority over the speech of their employees, much more than public universities have over the speech of their students. Generally speaking, an employer may fire an employee for the employee’s speech when (1) the speech is on a matter of private concern, such as general small-talk, or the employee’s concern about his own job conditions, or (2) the speech is so likely to disrupt the employer’s functioning that the likely disruption outweighs the value of the speech to the employee and his listeners, or (3) the speech is made as part of the employee’s official duties. See Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Board of Ed., 391 U.S. 563 (1968); Garcetti v. Ceballos, 126 S. Ct. 1951 (2006).

Nonetheless, the Supreme Court has repeatedly stressed, including in university professor speech cases, that “our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned,” Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957). The Court may well ultimately conclude that the role of university professors is such that the normal government employee speech rules do not quite apply to them. As the Court pointed out in Garcetti (which held that speech made as part of an employee’s duties is not constitutionally protected), “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;” the Court therefore expressly declined to decide whether the Garcetti limitation on employee speech “would apply in the same manner to a case involving speech related to scholarship or teaching.” See also Jeffries v. Harleston, 52 F.3d 9, 14 (2d Cir. 1995) (likewise leaving open the possibility that a faculty member in a public university deserves greater protection from state interference with his speech than [do other government employees].

Lower court cases have generally concluded that faculty speech outside teaching and scholarship is indeed quite broadly protected by the First Amendment from employer retaliation, so long as it is on matters of public concern. See, e.g., Levin v. Harleston, 966 F.2d 85 (2d Cir. 1992). The courts seem to take the view that a considerable degree of debate, controversy, and even disruption caused by offensive ideas is an inherent part of the interchange of ideas in which universities must engage. See, e.g., Mabey v. Reagan, 537 F.2d 1036, 1050 (9th Cir. 1976); Adamian v. Jacobsen, 539 F.2d 929, 934 (9th Cir. 1975). Therefore, while normal employers are generally entitled to fire employees who have (for instance) offended customers or members of the public, universities are probably bound by the First Amendment to tolerate similarly offensive speech by teachers, at least outside the classroom.

Note that this applies to professors facing discipline that might affect their academic posts. Professors who double as administrators—deans, chairs, heads of institutes—may be stripped of their administrative positions whenever they say something that higher administrations reasonable see as likely to be disruptive. See Jeffries v. Harleston, 52 F.3d 9, 14 (2d Cir. 1995). Academic freedom may mandate that the professor keep his academic post, but not that he keep related administrative posts.

e. Faculty scholarship. There is virtually no case law having to do with discipline based on faculty scholarship. Just as student academic assignments must be evaluated by the university based on its content and sometimes even its viewpoint, so faculty scholarship must be evaluated, when candidates are hired or not hired, when professors are tenured or not tenured, and when other promotion decisions are made. It seems likely that here too the constraints on university action will stem from professional norms of academic freedom, and not from judicially enforced First Amendment principles.

Firing of a tenured professor for the viewpoints expressed in his scholarship, on the other hand, would violate the tenure contract and probably violate the First Amendment as well, since the university could not defend the firing as just a normal employment decision that is routinely made on the basis of the professor’s scholarship.

f. Faculty teaching. A public university professor’s First Amendment rights are likely at their narrowest when it comes to teaching. The professor teaches at the behest of and on behalf of his academic department; and both the university and the public have an interest in making sure that certain materials are taught, and taught effectively. For example, scholarship often aims at upsetting conventional wisdom, but in most undergraduate classes, the conventional wisdom is precisely what must be taught. Likewise, professors usually have broad flexibility in choosing their scholarship topics, but may not have the same flexibility in choosing what to cover in
particular courses.

Most universities give professors substantial flexibility in their choice of syllabus and teaching techniques, and this may generally make sense. But no court cases suggest that the First Amendment secures the same flexibility. The Supreme Court has never expressly considered the question, and lower courts have generally not faced it at the college or university level. Nonetheless, it seems likely that courts would hold that the administration is constitutionally allowed to dictate what matters a professor teaches, to require a professor to use a certain teaching method, and even to require the professor to teach certain viewpoints (e.g., the view that the Earth is much older than 6000 years) as true.

On the other hand, before a university disciplines a professor for supposedly improper teaching, the university likely has to make clear to the professor what is allowed and what is not. A professor cannot, for instance, be punished for using allegedly excessive sexual humor and metaphor as a teaching tool under a general “sexual harassment” policy that never made clear that such sexual allusions are forbidden. See *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996); *Silva v. University of N.H.*, 888 F. Supp. 293 (D.N.H. 1994).

Finally, note that under the First Amendment, what one level of supervisor (the dean) may do, higher-level supervisors—such as college administrators, The Regents, or even the legislature—likely may do as well. Broader academic freedom principles, and (usually) simple good sense, may suggest that the curriculum or teaching styles in public university classes should be dictated chiefly by fellow academics. But the First Amendment draws no such line; if the speech of a professor as university employee can be regulated, it can be regulated by the university’s ultimate controllers (the Regents or the legislature, representing the people) as well as by university officials.

Members of the faculty are entitled as University employees to the full protections of the Constitutions of the United States and of California. These protections are in addition to whatever rights, privileges and responsibilities attach to the academic freedom of university faculty.

2. Constitutional autonomy of the University of California from legislative interference.
The California Constitution protects the University from the California Legislature. Article IX, Section 9 delegates to the Regents “full powers of organization and government of the University” and declares the University independent of all political influence. See Harold W. Horowitz, *The Autonomy of the University of California Under the State Constitution*, 25 UCLA L. Rev. 23 (1978) The University’s autonomy does not extend to the budget and appropriations process. However, the governor and the legislature cannot place conditions on the use of appropriated funds that would impair the Regents’ governance powers. The California Supreme Court has indicated that the Legislature lacks power to interfere with matters that are “exclusively University affairs.” *Toney v. Underhill*, 249 P.2d 280 (Cal. 1952).

---

1 In addition, the due process clauses of the state and federal constitutions protect professors who by statute or contract is entitled to keep their job unless the University has good cause to discharge them. In the case of an attempted discharge, professors are entitled to adequate notice and a fair hearing. See *Bd. of Regents v. Roth*, 408 U.S. 564 (1972).
The central functions of the University that make up the “university affairs” and are protected from state legislative interference encompass at least the following nine areas (see Horowitz, cited above):

1. Determination of course content
2. Determination of curriculum
3. Requirements for degrees
4. Conduct of research
5. Conditions determining selection, retention and conditions of employment of academic personnel
6. Internal allocation of resources
7. Commencing, administering, revising and terminating academic programs
8. Patterns of internal governance
9. Admissions criteria, subject to state and federal constitutional rules and federal statutes

We hope this rough analysis proves to be a helpful starting point for our colleagues’ further investigation.