

site—referring to World Trade Center victims as “Little Eichmanns” and praising the hijackers for having “the courage of their convictions”—Churchill was eventually dismissed from his tenured post on the basis of substantial and serious misconduct on a separate research project. He brought suit in state court, initially seeking damages for wrongful dismissal; the jury agreed he had been fired improperly, but awarded him only nominal damages of one dollar. Churchill then returned to court, asking to be reinstated in his faculty position. He claimed that the research inquiry had been triggered solely (and in his view unconstitutionally) by the protected statements in the “Little Eichmanns” essay.

In midsummer 2009, a Colorado judge rejected these claims, deferring to the university's judgment and the process it had followed in the ultimately dispositive review of Churchill's research methodology. That ruling seems sound, though far from obvious, and it has been appealed to a higher court. Meanwhile, the lesson seems clear: If a subsequent inquiry about a totally different aspect of a professor's activity (research methodology versus extramural statements) were placed permanently off limits solely because controversial views might have helped trigger that inquiry, the institution could be left without recourse against a serious and wholly separate transgression. Such a result would be stretching academic freedom beyond its properly protective scope.

CONCLUSION

All three cases are extremely complicated and are very close to the elusive line that separates academic freedom from punishable misconduct. Quite some years have passed since our understanding of academic freedom has been so sharply tested. Yet the experiences recounted here should prepare us better for the inevitable next round of challenges. ■

Academic Freedom at the Crossroads in the United States

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Academic freedom in the United States has long been associated with the values inherent in the First Amendment free-speech clause of the US Constitution. Indeed, in 1967 the United States Supreme Court definitively stated that academic freedom is “a special concern of the First Amendment.” Despite the fact that the First Amendment applies only to public institutions, academic freedom has been widely espoused as

a highly protected value of academia in almost all universities in the United States. In private universities, academic freedom protection is usually stated in a faculty contract or in university policy.

In recent years a deterioration of academic freedom has occurred in higher education institutions in the United States. Exacerbating this trend is that US courts, longstanding protectors of the value of free speech, have whittled away some of the traditional academic freedom protection afforded to faculty at public colleges and universities. Several factors have contributed to a general decline in protection of academic freedom. These factors threaten the future viability of academic freedom and the advantages to higher education and society.

EVENTS OF 9/11

The terrorist attack of 9/11 has resulted in an increased attention on national security, resulting in a scrutiny of views different from the official position of the US government. Faculty speech criticizing the US government resulted in demands by some groups and state legislatures for restricting “unpatriotic” faculty speech, especially in public universities, where some argued that taxpayers should not pay to support “anti-American” faculty. These instances directly affect academic freedom by their chilling effect on faculty speech. Before making statements critical of the US government or that could be construed as defending other countries or cultures deemed antagonistic to the United States, professors must consider the possible repercussions to that speech by students, administrators, legislatures, and the public. This movement has subsided to some extent, but the damage has weakened academic freedom through its disturbing effect on faculty speech.

(MIS-)APPLICATION OF THE BUSINESS MODEL

Many higher education institutions in the United States are now attempting to apply a business model of hierarchical management. Power and control are more centralized, resulting in a dramatic decrease in faculty autonomy. Shared governance is disappearing. Instead of providing oversight and overall coordination, administrators are making the decisions (even academic decisions) with less input from faculty. Faculty who openly disagree with the administration can be subjected to retaliatory action. These actions are generally supported by the courts. Courts used to dealing with centralized hierarchical organizations are deferring more to university administration on matters that under traditional academic freedom were decided by shared governance with the faculty.

US COURT DECISIONS

Although the US Supreme Court has stated that academic freedom is a special concern of the First Amendment, it has never precisely defined the protections provided by academic freedom. This has left it to the lower courts to determine how to analyze First Amendment faculty speech (academic freedom) issues. The results have been mixed, with some courts giving

great deference to the institution. Without a clear legal definition of academic freedom by the Supreme Court, faculty are hesitant to subject themselves to the expense and time to challenge an institution.

The most recent decision by the Supreme Court has created further ambiguity that some courts have used to reduce academic freedom protection. In *Garcetti v. Ceballos* (2006), the Supreme Court held that speech made by a public employee pursuant to that employee's official duties is not protected by the First Amendment. Justice Souter stated in his dissent that he hoped "that today's majority does 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." In response, the majority opinion of the Court reserved the issue of whether this decision would apply in the same manner to a case involving speech related to scholarship and teaching by faculty at public universities. The result is that lower courts have the discretion as to whether to apply *Garcetti* to faculty speech cases or not.

Some courts have already applied *Garcetti's* holding to college faculty. In *Renken v. Gregory* (2008), a professor alleged that the university had reduced his pay and terminated his grant in retaliation for his criticism about the university's handling of a grant. The US Court of Appeals for the Seventh Circuit ruled that the situation in the case was pursuant to his job duties and not protected speech. In *Hong v. Grant* (2007), a professor alleged that he was denied a merit-salary increase because of his critical statements regarding hiring and promotion policies. US District Court for the Central District of

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California ruled that the case involved his job duties as a faculty member and not protected speech. Because faculty duties generally encompass more than teaching and research, this expansive definition of "official duties" threatens to make much faculty speech unprotected under the First Amendment, thereby causing important ramification for academic freedom.

The deterioration of academic freedom is not inevitable, and this trend can be reversed. Nevertheless, this approach has been supported by factors affecting the academy, which must be addressed. The Supreme Court could go far to restore the traditional protections afforded by academic freedom for the benefit of higher education and society. ■

Is Greater Financial Independence Ahead for Universities?

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Moody's Investors Service is a leading credit-rating agency, providing credit and financial strength analysis of a wide range of organizations and securities. Moody's rates the credit quality and financial strength of over 500 universities and 250 other not-for-profit organizations. Our analysis of public universities is driven both by the structural policy environment of the country or locality the university works within as well as the particular market position, management and governance structure, operating performance, and balance-sheet strength of the university.

The financial effects of recessions are typically not felt immediately by leading global public universities because tough fiscal policy decisions often must funnel through a lengthy government budget process before impacting university funding. The government budgeting process, therefore, often renders university financial performance a lagging indicator of economic activity. This delayed impact is even more pronounced in the current recession due to the prevalence of short-term government stimulus spending, which often may postpone or soften funding reductions for universities. However, when stimulus spending expires and governments seek to achieve better budget balance, many universities are likely to experience substantial funding reductions or, at best, an extended period of limited funding growth. At the same time, universities face demand to enroll additional students as alternatives to education (i.e., employment) are weakened by economic contraction, forcing many people to seek opportunities in higher education to enhance skills and credentials. With policies of limiting enrollment places and tuition fees, market pressure to add capacity, and government funding unlikely to increase, Moody's expects unprecedented pressure on the current financial model of public universities.

WILL THE FINANCIAL MODEL OF UNIVERSITIES EVOLVE?

For many nations, resolution of these countervailing fiscal and policy choices will be among the more significant public policy developments in the next decade, given the importance of creating a skilled labor force. One solution, with obvious economic and policy implications, would be for universities and policymakers to simply manage within the existing constraints of the system by scaling back enrollments, delaying access for underserved populations, seeking out cost efficiencies, and