

Restoring the Marketplace of Ideas: Protections for Faculty Speech



FAITH HAS A VOICE.

Mr. Travis C. Barham
Legal Counsel

Alliance Defending Freedom



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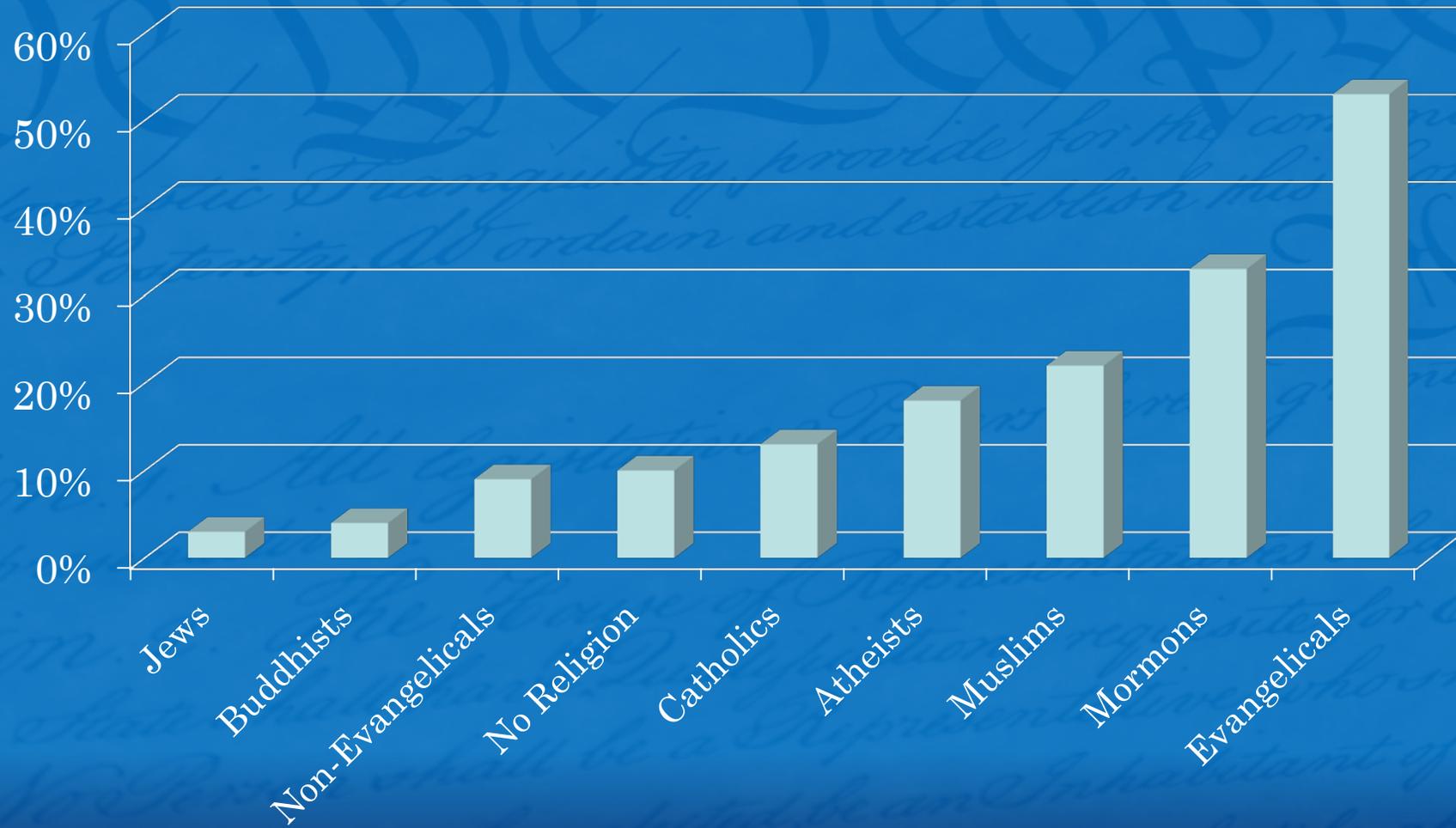
FOR FAITH. FOR JUSTICE.



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Unfavorable Feelings from Faculty



“There are credentials for admission to our democratic society, credentials which we liberals have been making more stringent.... You have to be *educated* in order to be a citizen of our society.... So we are going to go right on trying to discredit you in the eyes of your children, trying to strip your fundamentalist religious community of dignity, *trying to make your views seem silly rather than discussable*. We are not so inclusivist as to tolerate intolerance such as yours.”

~*Richard Rorty*

Richard Rorty, *Universality and Truth*, in RORTY & HIS CRITICS 21–22 (Robert B. Brandom ed., 2000)

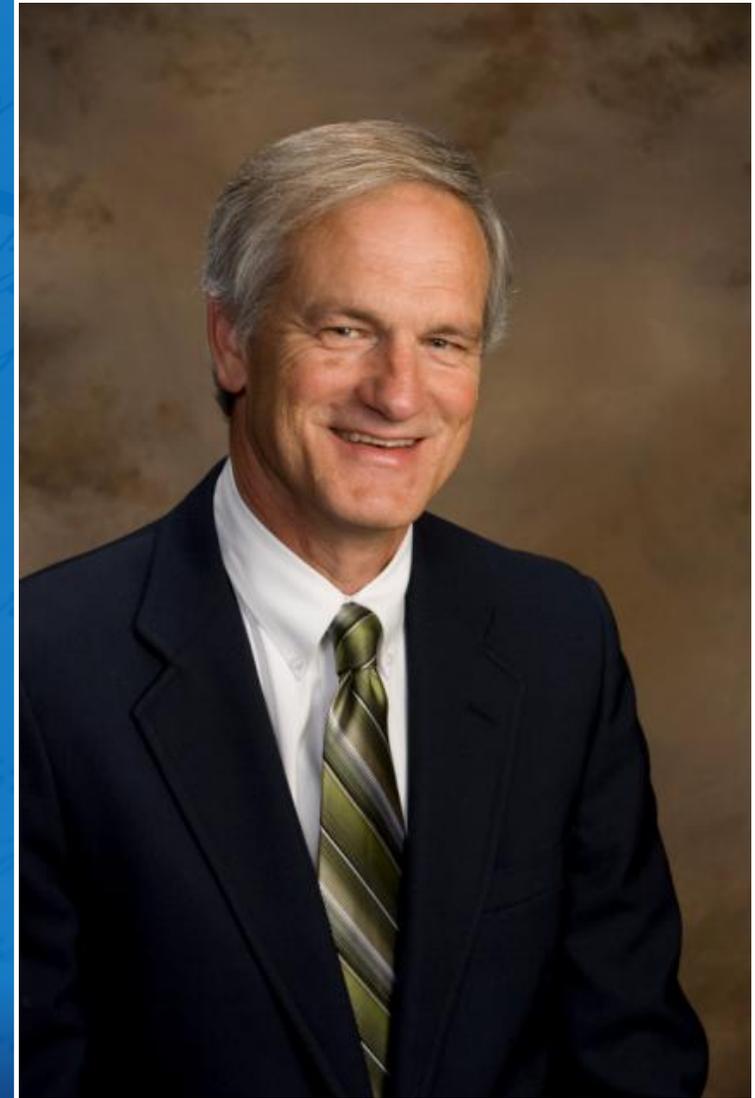




Failure to Hire



Termination



Harassment & Investigation



Lost Promotions



Right-Privilege Doctrine

“It is clear that [persons employed or seeking employment in the public schools] have the right under our law to assemble, speak, think and believe as they will. It is equally clear that they have no right to work for the State in the school system on their own terms. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not.”

Adler v. Bd. of Educ., 342 U.S. 485, 492 (1952).

Unconstitutional Conditions Doctrine

“It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.”

Sherbert v. Verner, 374 U.S. 398, 404 (1963).

“[T]his Court has made clear that even though a person has no ‘right’ to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.”

Perry v. Sindermann, 408 U.S. 593, 597 (1972).

Government Employee Cases

- *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968) (speaking as a citizen on a matter of public concern).
- *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979) (protecting privately expressed opinions).
- *Connick v. Myers*, 461 U.S. 138 (1983) (no protection for matters of personal interest).
- *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (no protection for speech involved in “official duties”).

Faculty Speech Protections

“To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion.”

Weimann v. Updegraff, 344 U.S. 183 (1952).

Faculty Speech Protections

“The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”

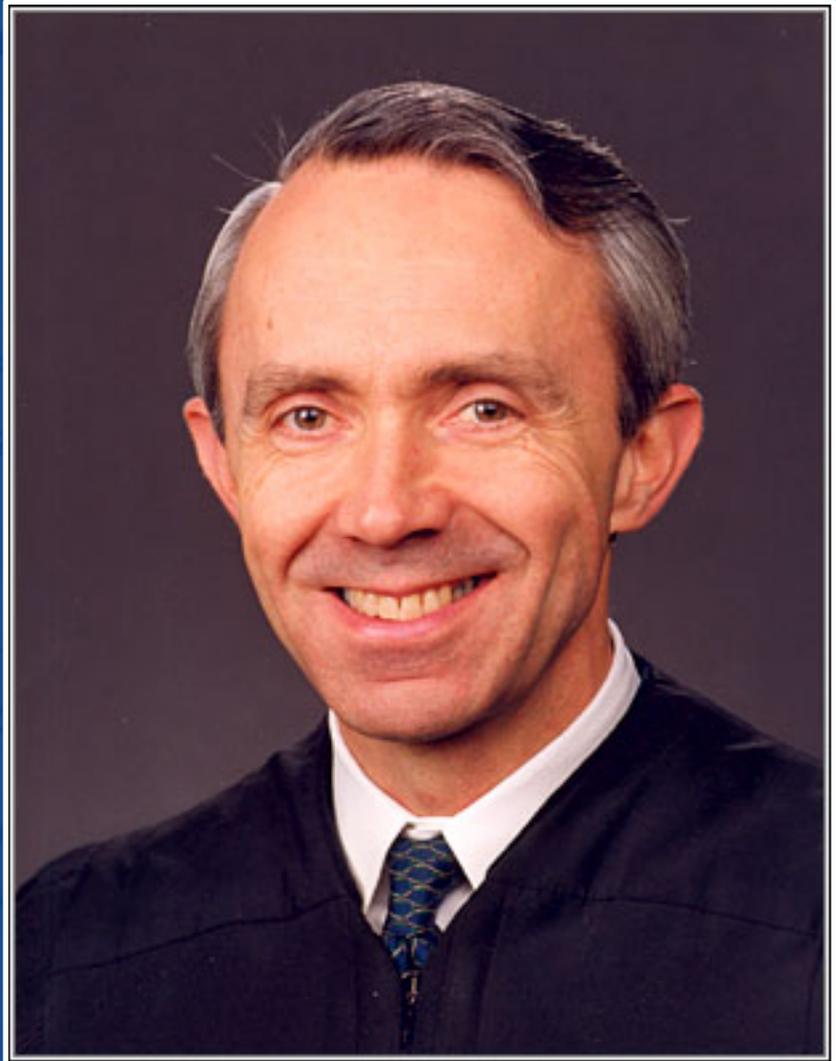
Sweezy v. New Hampshire, 354 U.S. 234 (1957).

Faculty Speech Protections

“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. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. ‘The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’ The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.’”

Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589 (1967).

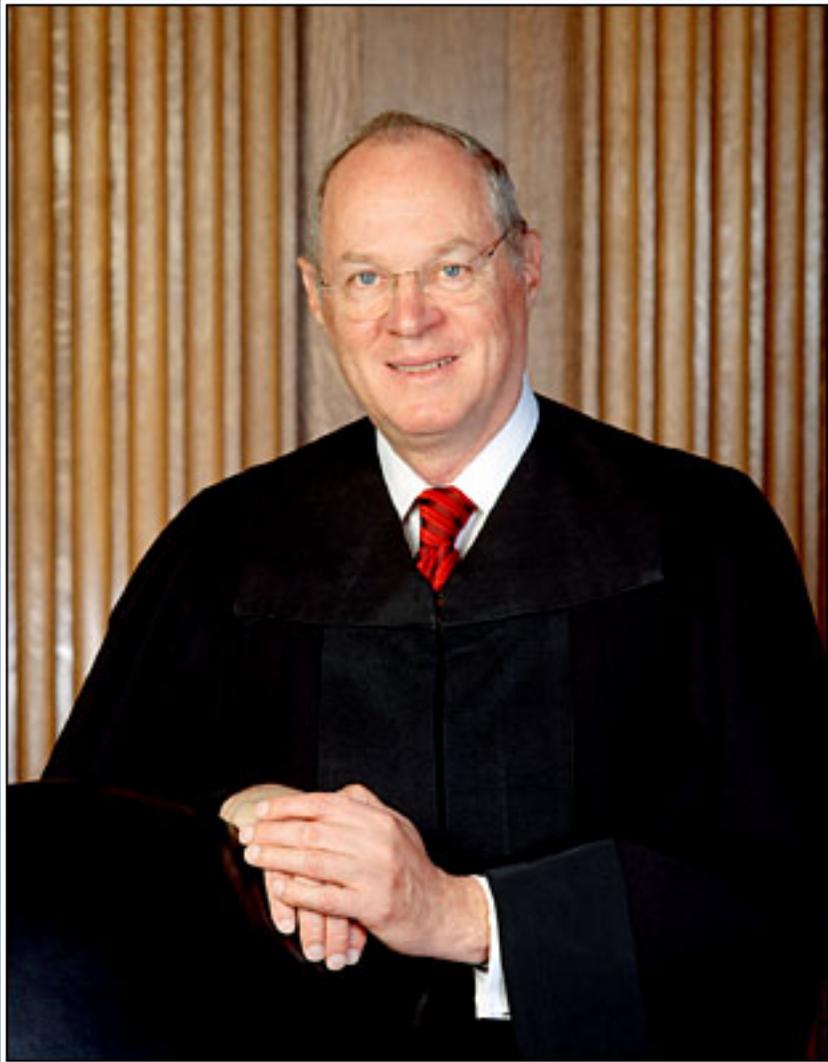
Garcetti v. Faculty



- The “official duties” test would “imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write pursuant to . . . official duties.”
- The Supreme Court has “long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”

Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

Garcetti v. 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.”

Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

Garcetti v. Faculty



“Applying *Garcetti* to the academic work of a public university faculty member under the facts of this case could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment. That would not appear to be what *Garcetti* intended, nor is it consistent with our longstanding recognition that no individual loses his ability to speak as a private citizen by virtue of public employment. In light of the above factors, we will not apply *Garcetti* to the circumstances of this case.”

Adams v. Trs. of Univ. of N.C.-Wilmington, 640 F.3d 550 (4th Cir. 2011).

Current Framework

- **Speaking as a private citizen.**
 - For scholarship & teaching, *Garcetti's* “official duties” test does not apply.
 - The First Amendment protects in-class speech.
 - Professors must still stay within the curriculum.

Current Framework

- **Speaking on a matter of public concern.**

- Public concern = “an issue of social, political, or other interest to a community.”
- Public concern \neq matters of purely personal concern (narrow spectrum).
- Examples from *Adams*: academic freedom, civil rights, campus culture, sex, feminism, abortion, homosexuality, religion, and morality.

Current Framework

- **Balancing university's & professor's interests**
 - Professor's interest = speaking on a matter of public concern.
 - University's interest = “efficient provision of public services.”
 - Factors: (1) disrupted harmony among co-workers; (2) close working relationship that required trust and respect; (3) whether speech interfered with performance of professor's duties; (4) whether the speech was directed to the public or media; and (5) whether the statements were true or false.
 - The balance favors the professor as universities are less likely to suffer disruption due to conflict.

Current Framework

- **Proving causation**
 - Causation = substantial factor.
 - Causation \neq sole factor.
 - Causation \neq primary factor.

How can I remember all this?

1. Be like Abigail.
2. Follow Abigail's advice.



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daddy and



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