THE FIRST AMENDMENT AND ACADEMIC FREEDOM: FACULTY AS EMPLOYEES AND CITIZENS

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ABSTRACT

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The events of recent years have caused increased concern over the First Amendment free speech rights of faculty, often referred to as academic freedom. In addition to individual schools’ contract and policy terms, it has been asserted that faculty speech is also protected by the First Amendment of the United States Constitution. There is continuing debate over the extent of First Amendment protection and to what extent, if any, faculty should be treated differently from other public employees for First Amendment analysis. Although the United States Supreme Court has stated that the academic freedom is a “special concern” of the First Amendment, the Court has not defined First Amendment academic freedom or the extent of its protections. The United States Supreme Court has recently declined to address the issue of the extent of First Amendment protection for academic freedom, continuing to leave it to lower courts to decide these issues on a case-by-case basis. However, faculty at state colleges and universities are also public employees and the Supreme Court has decided First Amendment cases dealing with public employee speech. Thus, the Court’s public employee speech doctrine must be examined and analyzed with regard to its application to faculty speech. By examining and analyzing the current Supreme Court guidance relating to academic freedom being considered a special concern of the First Amendment and the Court’s public employee speech doctrine, higher education administration can have a better idea of how to apply the concept of academic freedom in policy and
practice.
This dissertation is dedicated to my wife, Mary Ellen Benedict, Ph.D. Without her inspiration, encouragement, and support, I would never have begun nor finished. (Now that I have finished, I no longer have a good excuse for not doing work around the house.)
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CHAPTER I. INTRODUCTION

Statement of the Problem and Purpose of the Study

The events of recent years have caused increased concern over the First Amendment free speech rights of faculty. The free speech rights of faculty are often referred to as academic freedom. “Conservative activists were urging states to adopt an ‘Academic Bill of Rights’ aimed not at protecting academic speech but at ridding colleges of left-leaning faculty” (Baron, 2006). A website was devoted to identifying professors accused of harassing conservative students in their classrooms (Hamilton, 2004). Critics claimed that Middle East studies programs are anti-American and demanded a review board (Jacobson, 2004). The North Carolina state legislature blocked an assignment of a book on the Koran to all freshman and transfer students at the University of North Carolina at Chapel Hill (Burgan, 2002). Students were being approached by conservative activists to get them to spy on their professors (Denvir, 2003). The Ohio Senate had introduced legislation that would have required every state and private institution of higher education to adopt a grievance procedure to allow students and faculty to seek redress from a faculty member who presents only their own viewpoints on an issue, where other “serious scholarly viewpoints” exist (S.B. 24, 2005). Although this proposed legislation did not make it out of committee for a full vote, it is possible that it could emerge again in the future. However, Ohio did pass its own version of the Patriot Act. Beginning in the summer of 2006, all new employees of Ohio public universities, including those accepting teaching positions, were required to sign an oath that they have not provided material assistance or support to a list of proscribed organizations. A Republican state representative in Pennsylvania introduced legislation
that established a special investigative committee (the Pennsylvania House of Representatives Select Committee on Academic Freedom in Higher Education) to determine whether Pennsylvania colleges discriminated against conservative students (Jacobson, 2006).

The heightened concern about national security after “9/11” has resulted in opposition to speech from anyone who espouses a different view from the official position of the executive branch of the United States government. Liberal college professors are especially vulnerable, as they have traditionally relied on the principles of academic freedom to discuss and question the actions of those in power. Often framed in terms of academic freedom, it is important to determine the extent of First Amendment protection regarding faculty speech in light of increasing threats to professorial speech. The opponents of academic freedom have taken advantage of the concern over terrorism to curtail faculty speech in the name of national security. According to a statement from the American Studies Association, the climate for academic freedom in the United States has drastically worsened since September 11, 2001 (Fuller, 2003). However, it is not just liberals who are complaining about the attack on academic freedom. Republican Colorado State Senator John Andrews expressed concern that conservative faculty and students faced hostile academic environments (Hebel, 2003). These events stress the increased importance of researching the extent of the First Amendment free speech rights of faculty.

Faculty at public colleges and universities are government employees and are, therefore, subject to the protection of the free speech clause of First Amendment. The purpose of this study is to explore the extent of the law as it relates to the First
Amendment and academic freedom. It is unclear whether the First Amendment does provide protection of academic freedom, and if it does, the extent of its protection and application.

Research Questions

The central research question for this study is: What is the nature, application, and extent of the First Amendment free speech rights of faculty (or First Amendment academic freedom) at public colleges and universities? In focusing this query, the following question will be explored: What is the current applicable law with regard to faculty speech and academic freedom at public colleges and universities? To fully answer this inquiry, the following questions will be explored:

- What are the key issues in the legal analysis of faculty speech under the First Amendment?
- What are the seminal Supreme Court cases that are applicable to faculty speech at public colleges and universities?
- What legal issues regarding academic freedom and the First Amendment remain unresolved?

Significance of the Study

This research is important because it will make a significant contribution to the knowledge and understanding of the relationship of the First Amendment and academic freedom. Disputes over the extent of academic freedom protection have intensified since 9/11. Colleges and universities are under pressure from some members of the public, boards of trustees, and government officials to restrict faculty speech. In addition to individual schools’ contract and policy terms, it has been asserted that faculty speech is
also protected by the First Amendment of the United States Constitution. Faculty at public colleges and universities are state employees and, therefore, receive the protection of the First Amendment (through the Fourteenth Amendment). There is continuing debate over the extent of First Amendment protection and to what extent, if any, faculty should be treated differently from other public employees for First Amendment analysis.

Although the United States Supreme Court has stated that the academic freedom is a “special concern” of the First Amendment (*Keyshian v. Board of Regents*, 1967, p. 603), the Court has not defined First Amendment academic freedom or the extent of its protections. The United States Supreme Court has recently declined to address the issue of the extent of First Amendment protection for academic freedom, continuing to leave it to lower courts to decide these issues on a case-by-case basis. However, faculty at state colleges and universities are also public employees and the Supreme Court has decided First Amendment cases dealing with public employee speech. Thus, the Court’s public employee speech doctrine must be examined and analyzed with regard to its application to faculty speech. By examining and analyzing the current Supreme Court guidance relating to academic freedom being considered a special concern of the First Amendment and the Court’s public employee speech doctrine, higher education administration can have a better idea of how to apply the concept of academic freedom in policy and practice.

**Organization of the Dissertation**

The dissertation is organized into five chapters. The first chapter is the introduction which provides the reader with the purpose of the study and the research questions that will be explored. The second chapter provides a review of the historical
foundations of the professionalization of faculty in the modern United States university. The purpose of this chapter is to provide a background for the assertion of this dissertation that free speech has become an integral part of the development and important to the purpose of higher education in the United States. This chapter helps to understand and put into perspective the Supreme Court’s discussion of academic freedom.

The third chapter explains the methodology that was used to collect, analyze, and interpret data. This chapter not only discusses legal research methodology generally, but also specific legal research dealing with constitutional law. The federal courts, especially the United States Supreme Court, have the overall authority for interpreting the United States Constitution. The fourth chapter identifies and analyzes the seminal Supreme Court First Amendment jurisprudence with respect to academic freedom and the First Amendment. Because faculty at state colleges and universities are public employees, the Supreme Court’s jurisprudence with regard to public employee speech is also analyzed. This chapter also incorporates analysis from other legal scholars in discussing the problems, limits, and issues for constitutional academic freedom. The final chapter discusses the recommendations for higher education administration policy and practice. This chapter utilizes the analysis in chapter four with consideration of the foundational history in chapter three to recommend academic freedom policy and practice based on the Supreme Court’s First Amendment jurisprudence.
CHAPTER II. LITERATURE REVIEW

Introduction

The purpose of this literature review will be to provide a background for the primary assertion of this dissertation that free speech has been an integral part of the development of higher education in the United States. Academic freedom has been an essential component of the purpose of intellectual inquiry that forms the basis of higher education.

Even though it might be supposed that the practice of free speech by the professorate is directly linked to the United States Constitution, this would not explain why higher education has been provided a special standing for faculty autonomy among the other professions. The literature review will reveal that its antecedent is grounded in the evolution of the practice of teaching and research within the academy itself. This will help explain why freedom of speech has been so important to the practice of higher education. The autonomy of inquiry as well as the expression of the results of this inquiry should not be viewed as an entitlement of privilege. Rather, the need for such inquiry has evolved from that of espousing prescribed curriculum in support of theological canon to constructing new knowledge through answering the challenges of scientific experimentation, critical thinking and social justice that are the hallmarks of the modern American university.

Emergence of the University

The major purpose of the colonial college was to preserve the moral and civil order. Duryea (1981) found that “a prescribed curriculum of the early colleges in the Renaissance tradition accompanied a sectarian commitment to Christian morality, within
which the teachers had limited freedom for pursuit of personal interests in instructions or scholarly interests” (p. 25). The curriculum of the colonial college was stultifying and almost certain to keep the student and his world at a standstill (Rudolph, 1990). Classical scholarship was important and reading of ancient Latin and Greek was often the only requirement for admission (Rudolph, 1990; Thelin, 2004). It was not until the after the Revolutionary War, when the United States began to expand its horizons into commercial trade and commerce that a more utilitarian curriculum began to emerge. The founding, in 1824, of both the Rensselaer Politechnic Institute, dedicated to the mechanical arts that was to become engineering, and the University of Virginia, dedicated to advancing knowledge as well as diffusing it, can be said to mark the beginning of the transition from colonial college to modern university. The Rensselaer Institute (as it was first known) incorporated new methods and new subjects into the curriculum (Rudolph, 1990). Rensselaer provided the first systematic field work for college students (Rudolph, 1990). Rensselaer created the first curriculum and awarded the first engineering degree in 1835 (Rudolph, 1990). The University of Virginia, as envisioned by Thomas Jefferson, combined new practical subjects with an intellectual orientation of advancing and diffusing knowledge (Rudolph, 1990). The University of Virginia thought of itself as a graduate institution (Rudolph, 1990). However, not everyone in higher education favored this transition. In 1828, the Yale Report came out as a defense of the old course of study (Rudolph, 1990). In the Yale Report, the faculty at Yale met the higher education reformers head on (Rudolph, 1990). They argued that the object of a college was to lay a foundation for learning, which was best served by adherence to the ancient subjects (Rudolph, 1990). The Yale Report eschewed utilitarian courses and asserted that men
needed a classical course more than they needed a practical course (Rudolph, 1990). The Yale report provided convincing support for those who wanted the colleges to stay as they were (Rudolph, 1990). It took nothing less than a civil war to reinvigorate the movement to change higher education.

The decades after the United States Civil War produced what some scholars have called a revolution in educational reform (Metzger, 1964; Veysey, 1965). The old-time college made major advancements toward becoming the modern university in the United States. “The age of the college had passed, and the age of the university was dawning” (Hofstadter & Hardy, 1952). The emergence of the modern university in post-Civil War America had been described as a phenomenon of revolutionary proportions (Gruber, 1997). Hofstadter and Metzger (1955) concluded that the emergence of the modern university was nothing less than an educational revolution in the United States. Hoeveler (1997) found that “a notable fact of American life in the late nineteenth century was the remarkable transformation of the American college and its emergence as the new university” (p. 234). Metzger (1964) found that “between the years 1865 and 1890 a revolution in American higher education had taken place” (p. 3). Gruber (1997) concluded:

The decades from the late 1860s to the turn of the century saw the rise of new universities, the construction of universities on the base of existing colleges, the founding of centers of professional, technical, and graduate training, and the invasion and profound alteration of the curriculum of the college itself. (p. 203)

Some scholars have noted that this educational revolution should not be viewed as a totally new concept of what higher education should become in America. Changes in
American higher education had been brewing before the Civil War, but the Civil War clarified the dimensions and proportions of changes in higher education (Rudolph, 1990). Thelin (2004) found that the period from 1860 to 1890 showed a continuation of many of the innovations started earlier. Metzger (1964) found that ideas that had been debated before the Civil War, such as the elective system, graduate education, and scientific courses, had become realities after the war. Thelin (1982) noted that the period from 1820 to 1850 has been called the “False Dawn of the State University” (p. 92) because there were a number of progressive experiments in higher education whose relatively brief spurts of expanded educational vision were not accompanied by public, community, or state support or loyalty. Veysey (1965) found that “before 1865 the dream of an American university on par with that of Europe had been a vague but increasingly insistent urge” (p. 12). The Civil War was the catalyst that invigorated this movement for change. Rudolph (1990) concluded that “in a world remade by the Civil War, the American college found that it could not avoid the questions that it had for so long avoided” (p. 243). Hofstadter and Smith (1961) explained this movement:

The old college system did not just suddenly give way to the university era in the decades following the Civil War. Years before, the demand for a true university was being pressed by a great many educators, and the modern American university was the final outcome of two generations of agitation, criticism, and hard work. (p. 475)

The modern university took shape in this period. The result was the culmination of a number of events that were going on for some time in America. Nevertheless, Gruber (1997) found that granting the legitimacy of this admonition, the modern university
emerged in the 1890s as fundamentally different in character and purpose from the pre-
Civil War college it superseded. This great educational change in higher education had
been accomplished by 1900 (Gruber, 1997). Veysey (1965) found that “the American
University of 1900 was all but unrecognizable in comparison with the college of 1860”
(p. 2).

Veysey (1965) found that three specific conceptions of academic reform appeared
in the period from 1865 to 1890. “These centered, respectively, in the aim of practical
public service, in the goal of abstract research on what was believed to be the pure
German model, and finally in an attempt to diffuse standards of cultivated taste” (Veysey,
1965, p. 12). These original conceptions of academic reform involved service, research,
and culture (Veysey, 1965). Veysey (1965) noted that culture basically derived from
British attitudes with additional inputs from Romantic Germany, the Renaissance, and
classical civilization. Culture was no longer only something for the rich. Hoeveler (1997)
found that the emergence of the modern university in the late nineteenth century was
derived from three major factors:

A new concern for practicality and utility in the colleges’ curricular program; a
democratic effort to extend benefits of education to a wider portion of the
community and to repay the public by servicing its needs; and a new academic
interest in research—that is, the advancement of knowledge instead of the mere
passing-on of an acquired cultural tradition. (p. 234)

Lucas (2006) found that the restructuring of American higher education outside of the
South was driven by the combination of social, political, cultural, and economic factors.
Thelin (2004) concluded that “between 1860 and 1890, American institutions of higher
education responded pragmatically, albeit imperfectly, to the challenge of competing with the attractions of a commercial and industrial economy” (p. 108). The philosophy of higher education moved away from the strict emphasis on piety and toward an emphasis on intellect (Thelin, 2004). Although church-related colleges generally maintained their denominational affiliation, they reduced their strict sectarian emphasis (Thelin, 2004).

Veysey (1965) found that during the initial ten years after 1865 every major change in higher education was in the direction of practical and utilitarian reform. Hofstadter and Smith (1961) found that one of the major stimuli to higher education after the Civil War was the technological needs of agriculture and business. Interest in vocational training was growing and “during the last quarter of the nineteenth century the number of students going to college more than doubled—which was both a consequence and a cause of the changes in curricula” (Hofstadter & Hardy, 1952, p. 48). Hofstadter and Hardy (1952) concluded that “the practical, technical, and scientific emphases of the new higher education were facilitated by two related developments after the Civil War—the emergence of the state universities and the creation of land-grant colleges” (p. 38).

Rudolph (1990) noted that the state universities, which had fallen into neglect before the Civil War, became increasingly popular and useful. Duryea (1981) found that the “the initiative for a system of public colleges and universities came largely after the Morrill Act of 1862 provided for the land-grant colleges” (p. 29). Hofstadter and Hardy (1952) found that “the state universities which shared with the land-grant colleges in the movement to bring higher education closer to the needs of the people, began to flourish in the period following the Civil War” (pp. 43-44). The American state university system did not manifest its modern form in the South, the home of the state university
movement, or the Northeast, where old private institutions dominated (Rudolph, 1990).

“The American state university would be defined in the great Midwest and West, where frontier democracy and frontier materialism would help to support a practical-oriented popular institution” (Rudolph, 1990, p. 277). State universities also helped to transfer higher education institutions from the exclusive domain of a particular religious purpose and sect to the people at large (Rudolph, 1990). The state college movement gave expression to the democratic movement in higher education, with its belief that society as a whole benefits from an educated populace (Rudolph, 1990). Access to higher education was not to be limited to the upper class. Foerster (1937) found that social democracy demanded an educational democracy.

Rudolph (1990) found that no innovation in higher education in the United States after the Civil War came closer to representing the fundamental developments in American social and intellectual life than did the land-grant movement. Hofstadter and Smith (1961) found that the passing in 1862 of the Morrill Land Grant Act, giving federal aid to agricultural and mechanical colleges, was recognition of these practical needs, for agricultural education had come to be regarded as a partial answer to the farmers’ problems. As early as 1848, Congressman Justin Smith Morrill of Vermont suggested that American colleges get rid of a portion of European scholarship of the past and replace the vacancy with scholarship of a less antique and more practical value (Rudolph, 1990). By 1857, it had become apparent to Morrill that the old foundations were not likely to change in any significant way (Rudolph, 1990). Morrill stated that the purpose of his bill was to promote the liberal and practical education of the industrial classes in their pursuits and professions in life (Rudolph, 1990). The bill was first introduced into
Congress in 1857, but it did not become law until it was resubmitted in 1862, after the South had withdrawn from the Union and Lincoln was President (Hofstadter & Hardy, 1952; Rudolph, 1990). The Morrill Act provided for the support of at least one college in every state, to teach subjects related to agriculture and the mechanical arts (Rudolph, 1990).

The 1862 Morrill Act has been described as an influential piece of federal legislation that fostered access to useful public education (Thelin, 2004). Rudolph (1990) found that “the Morrill Act of 1862 put federal largess at the disposal of every state government, and thereby helped to develop a whole network of institutions with popular and practical orientation” (p. 244). However, Thelin (2004) noted that although this legislation has been hailed as the source of affordable, practical higher education offered by state colleges and universities, it was not the first time land grants had been used by national or state governments to foster college-building. Johnson (1997) found that “the land-granting technique had become so pervasive before 1862 that turning to the federal government for educational help, instead of to the states, had become a dominant fashion” (p. 223). Nevertheless, the Morrill Act provided the framework for continued support of colleges and universities by the state. Federal support for higher education encouraged more state support for higher education. Williams (1997) found that “through two acts of Congress, the Hatch Act of 1887 and the second Morrill Act in 1890, continuous federal appropriations began to flow, and the national government encouraged state governments to begin or renew their support” (p. 268). Rudolph (1990) found that by 1961, “sixty-nine American colleges were being supported by this legislation and by subsequent legislation of a related nature” (p. 253). Because the Morrill Act did not
provide for supervision, and because agricultural and mechanical education were not precisely defined at the time of the Act, the founding of the new colleges resulted in a great variety of forms (Rudolph, 1990). Thus, some of the land-grant colleges ended up competing directly with the existing state universities (Rudolph, 1990).

Research and Specialization

Rudolph (1990) concluded that the fundamental movement that destroyed the old college was the persistent rise of science, which had already begun before the Civil War. However, the rise of science in post-Civil War institutions of higher education was accompanied by the establishment of advanced education and research in the modern university movement. Although American colleges were always very receptive to science, research was not a mission of early American colleges (Metzger, 1964). Geiger (1997) found that overshadowing all of the changes in higher education after the Civil War “was the long-awaited establishment of graduate education and research within American higher education” (p. 273). Veysey (1965) found that in the mid-nineteenth century, experimentation in laboratories became a prominent feature of European scientific efforts, while at the same time a philosophical point of view based upon the scientific method became widely recognized. The combination of laboratory techniques and science set in motion a new intellectual movement (Veysey, 1965). “It was this tendency toward empirical inquiry which began to appear more notably in American universities in the 1870’s” (Veysey, 1965, p. 126).

Hofstadter and Hardy (1952) found that the difference between college and university also lay in the university’s enlarged conception of the social role of higher education. Hofstadter and Hardy (1952) found that the university’s essential contribution
was research. They explained that “both the college and the university existed to teach, to

treasure, and transmit knowledge; but for the university the task of adding to knowledge

was primary” (Hofstadter & Hardy, 1952, p. 57). The factors that created the movement

from old-time college to modern university in the United States after the Civil War

helped foster the movement toward the research university. In antebellum America,

research was pursued outside of the colleges, mostly by individuals where information

was exchanged at meetings and publications of learned societies (Geiger, 1997).

Research and the advancement of knowledge became an internal mission of the modern

university after the Civil War. Metzger (1964) described the conditions that brought the

modern research university to American higher education:

The adoption of research as an academic function awaited changes in the

conditions of inquiry—the vast expansion of empirical knowledge and the

refinement of investigation; the overcoming of academic resistance; and, very

important, a greater familiarity with the German university which, in the

nineteenth century, was a model for reformers and a spur. (p. 95)

Metzger (1964) found that conception of a university as a research institution was

primarily a German contribution. Some American scholars had studied in Germany and

returned to the United States (Thelin, 1982). This increased dramatically after the Civil

War, partly because many American universities in the mid-nineteenth century were

eager to employ German-trained scholars (Metzger, 1964). Metzger (1964) found that

roughly 200 Americans went to study in Germany before 1850, but this went up to 2,000

in the peak decade of the 1880s. Veysey (1965) found that throughout the 1870s, an

increasing number of articles began informing Americans about the German university.
However, Veysey (1965) found that the event which fixed the image of a research-oriented German higher educational institution was the establishment of the Johns Hopkins University in Baltimore in 1876. Rudolph (1990) found that the Hopkins’ trustees concluded that the time was ripe for the development of a great graduate university based on the German model. Johns Hopkins was an institution in which the emphasis was on graduate education and research (Geiger, 1997). Hofstadter and Hardy (1952) concluded that it was the first American institution to be founded as a university and not as a college. Although Yale awarded the first Ph.D. from an American university in 1861, Johns Hopkins was strikingly different because it developed a faculty-centered institution (Rudolph, 1990). Rudolph (1990) found that Johns Hopkins University saw the faculty, its needs, and its work, as so central to its purpose that the university’s first president, Daniel Coit Gilman (a Yale graduate), insisted that faculty be given only students sufficiently well prepared to provide the faculty with challenging and rewarding stimulation. Gilman assembled a small but eminent faculty and gave them time and freedom to research and assembled a scholarly group of graduate students (Metzger, 1964). Metzger (1964) found that of the 53 professors and lecturers on the roster at Johns Hopkins in 1884, nearly all had studied at German universities and thirteen had been awarded doctoral degrees. Veysey (1965) asserted that “it is probable that one of the most important early effects of the Hopkins was to send many more students to Germany from the United States than might otherwise have gone” (p. 129).

However, Gruber (1997) cautioned against viewing the modern university that emerged in the 1870s, 1880s, and 1890s as a totally new type of institution based on foreign models. Although the American university movement owed more to the German
than to the English or French examples, the American university was not just a reflection of the German university (Rudolph, 1990). “America took from German sources only that which fitted her needs, only that which was in harmony with her history” (Metzger, 1964, p. 93). The German model of the research university was interpreted and adapted to the American environment (Gruber, 1975). The German ideal of pure learning was largely unaffected by utilitarian demands (Veysey, 1965). Gruber (1975) summarized this view:

Americans transported the organizational structure of German scholarship—the graduate school and instructional techniques and research devices associated with it, the professional publications—and the new scientific methodology almost intact; but they eschewed the idealist context in which these operated in Germany.

(p. 20)

The increased focus on science was not confined to the natural sciences but also became infused into other areas of higher education. The scientific method was applied to other disciplines in the modern university movement. Hofstadter and Hardy (1952) explained that “since the emergence of the university coincided with the period of industrialism, corporate business, urbanism, growing social complexity, and the advancement and heightening prestige of science, the new graduate and professional schools that proliferated in the university revolution were naturally molded by these developments” (p. 57). The attempt to be scientific spread from the natural sciences into all areas of academic and intellectual life (Hofstadter & Hardy, 1952). The researcher outside of the natural sciences was also to be independent with regard to conclusions (Metzger, 1964). Academic inquiry involved filling in the gaps in knowledge that continuing inquiry revealed, to conduct investigations as the discipline directed (Metzger,
Ross (1997) found that the social sciences began to take root as separate, academic, and scientific disciplines in the 1870s. Psychology, sociology, economics, political science, and anthropology began to forge separate intellectual and social identities in the 1870s and 1880s (Ross, 1997). Haskell (2000) found that when the American Social Science Association (ASSA) was founded in 1865, there were no professional social scientists, but by the twentieth century, each of the specialized social sciences had developed the now familiar apparatus of journals and associations and more or less uniform training and curricula at the university level. This specialization into departments defined the structure and organization of the modern university in the United States. Veysey (1965) found that “scientific Americans, unlike most scientific Germans, identified scientific specialization with the entire purpose of the university” (p. 127). Specialization also helped foster the growth of graduate and professional education.

Graduate education was practically non-existent in the United States before the Civil War (Hofstadter & Hardy, 1952). Hofstadter and Hardy (1952) found that in the academic year beginning in 1871, graduate enrollment was 198, but by 1890 it was 2,382, and by 1910, graduate enrollment was 9,370. Gumport (1999) noted that the founding of Hopkins in 1876 and Clark in 1889 were not long to remain isolated experiments dominated by the ideals of scientific research and graduate education. “Other graduate schools emerged in the 1890s as parts of larger universities whose undergraduate missions and size offered a broad and stable base of support in endowment funds and tuition” (Gumport, 1999, p. 437). Hofstadter and Hardy (1952) found that graduate school fostered a high degree of professionalism in intellectual life, and organizations of
those engaged in various academic specialties spread from the natural sciences to other
disciplines. Hofstadter and Hardy (1952) found that “law schools tried to teach
‘scientific’ law, historians to write ‘scientific’ history, and even classicists trying to be
scientific, turned to philology” (p. 57). Rudolph (1990) found a blurring of the ancient
distinction between the college, which had been considered pre-professional, and the
separate or attached divinity, law, and medical schools, which had been considered
professional.

The primary method of legal education up to the time of the Civil War was the
apprenticeship system in which the law student read law in a lawyer’s office and
performed (mostly clerical) work under the supervision of the lawyer (Hofstadter &
Hardy, 1952). When Christopher C. Landgdell was elected dean of Harvard’s law school
in 1870, he applied the scientific method to the study of law (Hofstadter & Hardy, 1952).
The case method of scientific legal inquiry was thereby begun and slowly replaced the
older system.

Medical education changed more slowly, but was radically different by the
twentieth century. Hofstadter and Hardy (1952) found that the last of the major
professions in which education was thoroughly affected by the scientific revolution of the
last half of the nineteenth century was medicine. The practice of the early schools of
medicine was to combine the features of general education, apprenticeship, and a lecture
curriculum with attendance at a hospital practice (Hofstadter & Hardy, 1952). Hofstadter
and Hardy (1952) found that medical schools sprang up before and after the Civil War,
which were essentially profit-making institutions, devoid of laboratories and hospital
connections. Because of the potential income of physicians, these schools could make a
quick and easy profit with little standards. Nevertheless, Hofstadter and Hardy (1952) found that reforms began to be made to medical schools. Harvard began reforms in the 1871-1872 academic year to bring the medical school under the close administration and financial control of the university (Hofstadter & Hardy, 1952). A three year course of study was required, students were required to pass an examination each year to move ahead, and students were required to pass all subjects before receiving their degrees (Hofstadter & Hardy, 1952). The medical school at Johns Hopkins, which opened in 1893, required a bachelor’s degree for admission.

Hofstadter and Hardy (1952) found that business was one of the last areas of life to have specialized higher education. Hofstadter and Hardy (1952) found that the first collegiate school of business was the Wharton School at the University of Pennsylvania established in 1881 as a department in the liberal arts college. Following the University of Pennsylvania were the business schools at the University of Chicago and the University of California, both founded in 1898 (Hofstadter & Hardy, 1952). However, Hofstadter & Hardy (1952) found that only at the turn of the twentieth century after the bureaucratization of American business did business schools begin to flourish as centers of specialized training. The large corporations gave rise to the specialization of business functions and the development of economics and social sciences provided substantive material for business school curriculum (Hofstadter & Hardy, 1952).

The establishment of normal schools for teacher education also was slow in developing. Hofstadter and Hardy (1952) found that although the first private normal school was established in 1823 at Concord, Vermont, and the first state-supported normal school was established in 1839 at Lexington, Massachusetts, the standards did not make
real educational improvements until the period between 1889 and 1920. Hofstadter and Hardy (1952) found that “by 1890, 92 state-supported normal schools had been established, offering courses of two to three years and in some cases four years” (p. 96).

Emergence of the Academic Profession

Rudolph (1990) found that “it became one function of the university movement in America to blur the distinction that had long existed between the connotation of profession and that of vocation” (p. 339). Coming into this period, divinity, law, medicine, and (perhaps) the military were considered professions, while farmers, merchants, and manufacturers pursued vocations (Rudolph, 1990). Thus, the graduates of theological seminaries, law schools, and medical schools pursued professions, but college faculty did not. Rudolph (1990) explained the changed status of college professors after the university movement:

College professors had long been in a kind of ambiguous no-man’s land, in which specific preparation was not necessary but in which many practitioners had studied and been certified as professional clergymen. The university movement, however, contained a respect for the changing world beyond campus which recognized the rigorous professional training in engineering and many other phases of applied science; in its pursuit of scholarship and learning the movement created a profession of college and university teachers; it accepted the democratic argument that what had been the unlearned vocations could and should be learned professions. (pp. 339-340)

An important relationship between the acquisition of knowledge and the dissemination of it that emerged within the academic profession in this country can be
traced back to the German model. Hofstadter & Metzger (1955) concluded that the
German university philosophies of *Lehrfreiheit* (freedom to learn) and *Lehrfreiheit*
(freedom to teach) were introduced into our university culture by the increasing numbers
of American scholars educated in Germany.

Haskell (2000) found that social scientists were not professionals before the Civil
War. However, Haskell (2000) noted that this is not to conclude that the scholarly work
of social inquirers (as he referred to socialists scientists prior to 1865) was unintelligent, but
that it was not decisively directed to any ongoing, disciplined community of inquiry.
Haskell (2000) explained why the social scientists were not true professionals before
1865:

Whatever intellectual authority a non-professional social scientist possessed was a
highly individualized and even idiosyncratic achievement that depended on an
audience whose members were difficult to identify, whose criteria of judgment
were ill defined, and whose qualifications as judges were not intrinsically
dependent upon the subject area of the scholarship they judged. (p. 24)

The founding of the American Social Science Association (ASSA) in 1865 signaled the
beginning of professional social scientists (Haskell, 2000). Groups of scholars were
dedicated to research in their particular discipline. Social scientists continued to become
more specialized and by the beginning of the twentieth century each of the individual
disciplines had its own formal professional organization under the shadow of the mother
organization (Haskell, 2000). Thus, the American Historical Association (AHA) was
founded under the auspices of the ASSA in 1884 and the American Economic
Association (AEA) in 1885. The purpose of these organizations was to provide a more
specialized community of inquiry.

The university movement also resulted in administrators becoming more professionalized. Bledstein (1978) found that a professional faculty stimulated the appearance of professional administrators. Bledstein (1978) found that “the American university developed a sizable bureaucracy that grew in response to the professional service orientation of the institution as well as to the size of the enrollment” (p. 303). Thus, university presidents were no longer members of the clergy. “Unlike the presidents of the old colleges, the pioneers of the new education were not clergymen, but secular and scientific men with wide experience and cosmopolitan interests” (Hofstadter & Hardy, 1952, p. 33). The development of complex university organizations required increased administrative skill (Hofstadter & Hardy, 1952). Hofstadter and Hardy (1952) found that although the presidents and trustees of the new university movement were not consciously anticlerical, their bent toward the practical considerations of life caused them to foster those aspects of university work which slowly eroded religious and sectarian influences in higher education. The new universities accommodated science and secularism and freed themselves from the religious orientation which had been so fundamental in the old colleges (Rudolph, 1990). The university movement embraced curiosity as a value and enshrined intellect as the moving force of the university (Rudolph, 1990). Rudolph (1990) found that the great academic leaders of the period readily accepted Darwinism. Hofstadter and Hardy (1952) found that by the 1870s thinkers in almost all fields accepted the implications of evolution. Thus, faculty research to expand knowledge was not stifled by leading administrators during this period.

Specialization of faculty resulted in increased autonomy. Professors’ research was
subject to scrutiny by their discipline rather than the university administration. The university was organized as a community of scholars, but scholarship was based on the specialty of the discipline and the individual faculty member’s particular research interests. “Science became an increasingly specialized activity that professors could pursue autonomously yet with the security of support, personal advancement, and even prominence, within (and extending beyond local loyalty to) an academic institution” (Gumport, 1999, p. 437). Successful research was measured by disciplinary peers and, in America, the contribution of the knowledge discovered through autonomous research by society. “The practice of research became elevated into an all-encompassing ideal, while emphasis on professorial autonomy—always somewhat grand and hollow on German lips—became translated into a much more down-to-earth, hard-hitting American campaign for academic freedom” (Veysey, 1965, pp. 127-128). Faculty became professional experts and the public relied on faculty research for improvements in society. Thelin (2004) described the characteristics of the great modern American university with respect to the faculty as professional experts:

The professionalization of the faculty was a conspicuous and important trend, with professors increasingly known as experts in a field. This expertise included membership and participation in disciplinary groups and publications—national associations and journals such as the American Historical Association, the American Economic Association, and the American Psychological Association. . . Each group sponsored a national conference and a national journal. (pp. 127-128)

Professionalization of faculty was also incorporated into the internal organization and
administration of higher education institutions. Faculty were to be evaluated and protected as autonomous professionals. Thelin (2004) summarized this new academic administrative structure:

A new concept of academic professionalism was essential to the creation of a university professoriate. The gradations of rank and promotion—instructor, assistant professor, associate professor, and full professor—became conventional. Most important, the ranks were tied to the institution conferring tenure and privileges of academic freedom to professors who gained promotion and passed muster. (p. 128)

“Specialization of knowledge had its counterpart in specialization of departments” (Duryea, 1991, p. 11). However, Duryea (1991) found that “more than this it has led to what amounts to be a monopoly of the expert” (p. 11). Departments exercised a major influence in matters related to teaching, curriculum, scheduling, and promotions (Duryea, 1991). Duryea (1991) found that this downward shift of academic power also resulted in a downward shift in governing power. Governing boards selected the president and helped the president develop and determine broad general principles, but left the administration and academic processes to the administration and faculty (Duryea, 1991). Duryea (1991) concluded that “pressing up from the departmental base, faculty members have moved into governmental affairs via the formalization of a structure of senates, councils, and associated committees” (p. 12). Thus, the basis for shared governance was strongly rooted.

The emergence of the modern university set the stage for future conflict over faculty autonomy. The result of this educational revolution was that college and
university faculty were dramatically different coming out of this period. With the emergence of the modern university, the role of faculty was also radically altered. Faculty autonomy and academic freedom were essential to the continued success of the modern United States university. Thelin (2004) concluded that the “incremental gains in the scope of scholarly pursuits and expanded notions of research and teaching during the period of 1860 to 1890 laid the groundwork for later, larger battles in the faculty’s campaign for academic freedom” (p. 106). Because the role of faculty was no longer limited to serving a single institution, these later battles were taken out of the individual institutions. “Academic freedom was institutionalized beyond the individual campus with the creation of the American Association of University Professors, intended to provide assurance and redress for faculty members who claimed to have their rights violated by irate presidents or cantankerous board members.” (Thelin, 2004, p. 128)

Conclusion

This historical review of the emergence of the professorate within the modern American University provides a point of reference for the cultural values that have developed within the practice of higher education today. Organizational culture can be defined as the deeply shared values, assumptions, beliefs, or ideologies of an organization’s members (Peterson & Spencer, 1991). “These conceptions are so ingrained that they are by definition taken for granted” (Kuh & Whitt, 2000, p. 169). Kuh and Whitt (2000) found that these assumptions and beliefs “guide decision making and shape major events and activities” (p. 169). Peterson and Spencer (1991) found that “organizational culture focuses on the values and beliefs that members share about their organization” (p. 146). Thus, culture provides stability for a college or university during turbulent periods
and contributes to the effectiveness of the institution (Kuh & Whitt, 2000). Cultural influences are not limited to the organization, but can also influence the beliefs of those outside of the organization (Tierney, 1991).

Academic freedom is an accepted part of the organizational culture of higher education institutions in the United States. Academic freedom is not only valued, believed, and shared by faculty, but also by the administration, students, and the public. It is inherent in the culture of higher education organizations and is taken for granted as an integral part of higher education. Academic freedom is so esteemed that Horowitz (2006) utilized the term to evoke positive feelings and approval of his actions that were in reality designed to curtail academic freedom.

The question for this dissertation is whether the future practice of academic freedom, best exemplified through the writing and professing of faculty in higher education, is to be preserved. Kuh and Whitt (2000) found that “although culture is fairly stable, it is always evolving, continually created and recreated by ongoing patterns of interactions between individuals, groups, and an institution’s internal and external environments” (p. 163). It is safe to say that external pressure is on the ascendance from social and political forces that favor security of values over debate of ideas.

Based on this review, it is asserted that the cultural value of academic freedom has increased in recent times with the growing threats to faculty speech since 9/11. Now, more than ever, academic freedom is vital to higher education institutions. Academic freedom provides the necessary support for colleges and universities to pursue their societal responsibility in accord with the values inherent in the First Amendment. Where academic freedom exists, faculty at colleges and universities are not subject to speech
control that would hinder their discussion of new or controversial ideas. Faculty at public colleges and universities have the right, indeed a special duty, to speak freely about issues and concerns affecting society and the country without regard to the makeup of the administration or the current political climate.

This researcher conducted the legal research explained in Chapter III in order to explore the current applicable law with regard to the key issues of faculty speech and academic freedom at public colleges and universities.
CHAPTER III. METHODOLOGY

Legal Research

The purpose of this study is to explore and better understand the application of the First Amendment of the United States Constitution to faculty speech (academic freedom) at state colleges and universities. The methodology used in this study is legal research, which has also been called historical legal research or traditional legal research (Russo, 2006). Jacobstein and Mersky (1990) provided the following definition of legal research:

Legal research is the investigation for information necessary to support legal decision-making. In its broadest sense, legal research includes each step of a process that begins with analyzing the facts of a problem and concludes with applying and communicating the results of the investigation. (p. 1)

Russo (2006) defined legal research as “a systematic investigation involving the interpretation and explanation of the law” (p. 6). Because the “the purpose of researching the law is to ascertain the legal consequences of a specific set of actual or potential facts” (Wren & Wren, 1986, p. 29), the researcher must first define the legal issue that is to be studied. In my study, the legal issue to be interpreted and explained is defined as the purpose of my research. The primary purpose of this study is to determine and explore the current applicability of the First Amendment free speech clause of the United States Constitution with regard to faculty speech and academic freedom at state colleges and universities as determined by the United States Supreme Court as the ultimate authority on the interpretation of the Constitution. My research identifies and analyzes the current applicable law with regard to faculty speech and academic freedom at public colleges and universities. To accomplish this purpose this study answers two questions: (1) What are
the key issues in the legal analysis of faculty speech under the First Amendment?; and (2) What are the seminal Supreme Court cases that are applicable to faculty speech at public colleges and universities?

After defining the legal issue to be studied, the next step is to find the law. This involves collecting and reviewing all primary and, in some instances, secondary sources that relate to the issue and purpose of the research. The final step is to analyze the legal sources to interpret and evaluate the applicability to the legal issue being studied. Legal analysis and application is a determination of how the law applies to the issue being studied (Putnam, 2004). This analysis involves interpreting and explaining the law (Russo, 2006) as applied to the issue or purpose of the study.

Finding the Law

In finding the law, there are two categories of sources for legal information, primary sources and secondary sources. Primary sources constitute the law and are issued by a branch of the government or a government body acting in its lawmaking capacity (Kunz, Schmedemann, Erlinder, Downs, & Catterall, 1989). Primary sources include federal and state constitutions, federal and state statutes, judicial opinions, and administrative regulations. Primary sources are the law itself. Secondary sources are all sources that are not primary sources (Redfield, 2002; Wren & Wren, 1986). Secondary sources include books, restatements of the law, law reviews, treatises, hornbooks, legal encyclopedias, and uniform and model statutes.

Primary and secondary sources are sometimes also referred to as primary and secondary authority (Jacobstein & Mersky, 1990; Kunz et al., 1989; Wren & Wren, 1986), but this may be somewhat confusing. “The term authority is used to refer both to
the types of information and to the degree of persuasiveness of legal information” (Jacobstein & Mersky, 1990, p. 2). Although the primary sources (or authorities) are the law, not all primary authority bears equal weight. A distinction must be made between mandatory or binding authority and persuasive authority. Mandatory or binding authority is law that must be applied to the issue that is being addressed in that jurisdiction. Persuasive authority is not law that must be applied in that jurisdiction, but contains interpretations or opinions that a court may consider (persuasive) in applying or interpreting the law. Primary authority (sources) may be binding (or mandatory) or persuasive, but secondary authority (sources) may only be persuasive.

Although court opinions are primary sources (authority), court opinions can be mandatory (or binding) authority or may be only persuasive authority depending on their level and jurisdiction. For example, the United States federal court system is divided into a hierarchy of courts. The federal trial level courts are called the United States District Courts. Each of the fifty states is divided into one or more districts, which are based on geographic region (Murray & DeSanctis, 2006). For example, the federal trial court located in Pittsburgh, Pennsylvania, is the United States District Court for the Western District of Pennsylvania. An opinion by one federal district court is not binding (or mandatory) authority for any other federal court except that specific district court. The intermediate levels of appellate courts in the federal system are known as the United States Courts of Appeals (Murray & DeSanctis, 2006). The federal courts of appeal are divided into what is known as circuits. Each federal court of appeals (excluding special courts) has jurisdiction for several states. For example, the United States Court of Appeals for the Third Circuit has primary authority (or binding) authority over legal
issues involving the United States Constitution in the states of Pennsylvania, New Jersey, Delaware, and the Virgin Islands (Murray & DeSanctis, 2006). The United States Court of Appeals for the Sixth Circuit has primary authority (or binding) authority over legal issues involving the United States Constitution in the states of Michigan, Ohio, Kentucky, and Tennessee (Murray & DeSanctis, 2006). Thus, all opinions (unless overruled by the United States Supreme Court) of the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) are binding (or mandatory) authority for all federal courts in Ohio. On the other hand, an opinion by the United States Court of Appeals for the Third Circuit (Third Circuit) is not binding (or mandatory) authority for the Sixth Circuit. Consequently, although the Sixth Circuit is under no obligation to apply the opinion of the Third Circuit in a similar case involving the United States Constitution, in the absence of an opinion addressing the same issue, the Sixth Circuit may view the Third Circuit’s opinion as very persuasive and apply it directly to arrive at its decision. The ultimate federal court of final appeal is the United States Supreme Court. An opinion of the United States Supreme Court interpreting the United States Constitution is binding on all courts, federal or state.

All secondary authority is only persuasive authority, and the degree of persuasiveness may vary depending on the nature of the law and how the courts view the secondary source. In the absence of mandatory (or binding) authority, courts may place various weights (if any) on secondary authority. Secondary authority is valuable where there is no mandatory or binding authority on a specific issue. Secondary authority is also valuable where courts in different jurisdictions may have conflicting opinions over the same issue.
In finding the law, the ultimate goal is to locate mandatory primary authorities bearing on the legal problem or issue (Wren & Wren, 1986). My study will focus on the primary sources of the United States Constitution and the opinions of the United States Supreme Court. The United States Constitution is the ultimate law of the land. The United States Supreme Court is the ultimate interpreter of the Constitution. Therefore, the Supreme Court’s interpretation is the ultimate authority on the meaning and application of the First Amendment. Russo (2006) summarized the supremacy of the United States Constitution as interpreted by the United States Supreme Court:

The United States Constitution is the law of the land. As the primary source of American law, the Constitution provides the framework within which the entire legal system operates. To this end, all actions taken by federal and state governments including state constitutions, which are supreme within their states as long as they do not contradict or limit the rights protected under their federal counterpart, statutes, regulations, and common law, are subject to the Constitution as interpreted by the Supreme Court. (p. 8)

Thus, the opinions of the United States Supreme Court are the best mandatory primary authority regarding the interpretation of the First Amendment. Consequently, an experienced researcher should go directly to the Supreme Court opinions in cases involving a legal issue based on the United States Constitution (Russo, 2006).

Wren and Wren (1986) found that there are three generally accepted types of law-finding techniques: (a) descriptive word or fact, (b) known authority, and (c) known topic. Wren and Wren (1986) noted that all three have their advantages and disadvantages. The descriptive word search is used most (Wren & Wren, 1986). Russo
(2006) found that a descriptive word search can be done manually without an electronic database, such as Lexis or Westlaw, by utilizing the words and phrases legal encyclopedia published by West. Wren and Wren (1986) advised performing the descriptive word or fact approach first unless the researcher already knows the citation of a case, statute, or constitutional provision relevant to the researcher’s problem. However, Wren and Wren (1986) found that occasionally an experienced legal researcher may already know the citation of at least one relevant legal authority—a case, statute, or regulation—that may be applicable to the issue. Wren and Wren (1986) concluded that this known authority method, referred to as known case if it is a case, is the best method to use, but should be followed-up with a descriptive word search to help ensure the researcher identifies all of the relevant primary authority. Russo (2006) advised that if a researcher has a relevant case, then the researcher could begin to find other cases from that case. The third approach, the known topic approach, involves going directly to the appropriate case digest topic and searching the table listings until finding the appropriate sub-topic that relates to the research problem (Wren & Wren, 1986). Russo (2006) found that a variety of topical search tools can be used, including the Index to Legal Periodicals, the Current Law Index. Russo (2006) found that “a topical approach to finding cases can also be of great value to novice legal researchers” (p. 21).

Russo (2006) found that “an experienced researcher should be able to go right away to a primary source, such as a Supreme Court opinion” (p. 8). Wren and Wren (1986) cautioned that if a researcher had little or no knowledge of the law, the researcher may want to begin by reading one or more secondary sources. Because of my legal research experience, I began my search with primary sources. In finding the appropriate
Supreme Court cases, I relied upon my own knowledge to obtain known cases. I reviewed those cases, which led me to other cases to review. This process continued until all of the possible relevant cases were reviewed and either eliminated (as not applicable to my legal issue) or used for my analysis. I also performed a descriptive word search in an electronic legal database to help ensure that I did not miss any relevant primary source. After performing a primary (case) search, I also performed descriptive word searches to locate relevant secondary sources, focusing on law review articles. Neacsu (2005) found that typically secondary sources are used as a tool to identify the law as stated in its primary sources. I reviewed secondary sources to help ensure that I located all of the relevant court opinions for my study.

Additionally, my study drew on secondary legal sources, especially law journals and reviews which represent the expert opinions of legal scholars, for additional and alternative interpretation and analysis of the primary sources utilized in my study. These law review articles led not only to primary authority but to other law review articles that were also reviewed for relevancy. Many times a law review would cite the same law review articles and, therefore, helped to ensure that I was obtaining the key secondary sources for review and analysis. These scholarly legal articles were also utilized to help ensure that all of the important relevant case law and issues were examined. I did not rely on non-legal sources except to the limited extent that these sources indicated the legal issue in my study was important and had implications for faculty and higher education administration.

Analyzing the Law

In analyzing court opinions, individual documents are discussed in depth. The
specific circumstances are important in the analysis. Each case or document may provide different information. The context of the court’s decision is vital. The specific facts of the case are important to the analysis and interpretation. As a result, the legal researcher quotes textual passages to a large extent to attempt to provide the reader with evidence that the researcher’s interpretation accurately reflects the data. In analyzing the law, once a case, statute, regulation, or constitutional provision is located, it must be evaluated for its usefulness to the researcher (Wren & Wren, 1986). Wren and Wren (1986) found that legal analysis involves both internal and external evaluation.

An internal evaluation and analysis involves reading the particular legal authority the researcher has found and determining whether it applies to the research problem (Wren & Wren, 1986). Wren and Wren (1986) described the internal evaluation process:

The process consists of two overlapping elements: first, an analysis of the facts of the authority to determine how similar they are to the research problem; and second, a determination of the authority’s intended legal significance and impact with respect to the research problem. (pp. 79-80)

In regard to Supreme Court opinions, “the need for internal evaluation of judicial decisions is tied to the doctrine of stare decisis” (Wren & Wren, 1986, p. 80) or precedent. This doctrine states that when a court applies a rule of law to a set of facts, that legal rule will apply whenever the same set of facts is again presented to the court (Wren & Wren, 1986). “The fundamental goal of case law research is to find binding precedent” (Kunz et al., 1989, p. 67). This analysis involves both the identification of the law that governs the issue and the determination of how the rule of law applies to the issue (Putnam, 2004). However, one problem is that the facts are almost never exactly the same
in each case. Therefore, legal researchers often have to compare and contrast the facts of each case to determine the similarities and differences. The more similarities in your problem to the decided case, the more that decided case will determine (or mandate) your problem’s outcome (Wren & Wren, 1986). “Conversely, the more factual distinctions, the less likely the decided case will control” (Wren & Wren, 1986, p. 80). This analysis involves the technique of using analogy to evaluate the applicability of existing court decisions to new sets of facts, which lies at the core of legal research analysis (Wren & Wren, 1986). Whether the legal researcher feels the facts of a particular court decision are analogous to that of the researcher’s problem will often depend on the level of generalizations in which a researcher operates and the degree of insight and creativity a researcher brings to the research and analysis of the decided cases (Wren & Wren, 1986).

In internally evaluating the Supreme Court cases that I identified as relevant, I first had to determine if the facts of the cases were similar to my research problem involving the application of the First Amendment to public college and university faculty speech or academic freedom. This was not an easy task. This issue has never been decided explicitly by the Supreme Court. Thus, the intended legal significance was also not defined. However, Supreme Court cases did involve speech issues of public employees. Faculty at state colleges and universities are public employees. Thus, these cases were reviewed for direct and analogous application to my research problem.

If the researcher’s internal evaluation and analysis reveals that a legal authority the researcher has uncovered is applicable to the researcher’s problem, the researcher will then need to conduct an external evaluation and analysis of that authority (Wren & Wren, 1986). This analysis requires the researcher to determine the current status or validity of
the authority (Wren & Wren, 1986). The researcher must determine the current status of court decisions that research indicated may be relevant to the research problem. Wren and Wren (1986) explained this process, which they referred to as external evaluation:

Here, the external evaluation initially focuses on how subsequent court decisions have interpreted and applied your principal cases. Even well-settled cases of long-standing may be overruled or limited by subsequent court decisions; case reporters are full of such modifications and reversals. That’s why, even when decided cases may appear (because of *stare decisis*) to dictate the result of your problem, you always need to do an external evaluation of the status of all your relevant cases. (pp. 89-90)

This step of external evaluation overlaps with the final step, which is updating the law (Wren & Wren, 1986). The final step involves tracing the subsequent treatment of the cases reviewed and analyzed. This is to ensure that recent court decisions have not overturned or modified the application of the court cases the researcher has already evaluated and analyzed. The conclusion summarizes the results of the legal analysis (Putnam, 2004).

In my external evaluation of the relevant Supreme Court cases, I analyzed each opinion to determine whether it modified or altered a previous opinion. If so, I indicated how this modification or alteration changed the law and my analysis and findings. I also updated my research with the most recent Supreme Court opinion that discussed faculty speech and academic freedom. I completed my research by summarizing the results of my legal analysis.
CHAPTER IV. THE FIRST AMENDMENT AND FACULTY SPEECH:
IDENTIFICATION AND ANALYSIS OF APPLICABLE LAW

This chapter will identify and analyze the law as related to the First Amendment free speech clause and higher education with regard to faculty, focusing specifically on the United States Supreme Court because it is the ultimate authority on the interpretation of the Constitution. In doing so, I will also address four questions: (a) What are the key issues?; (b) What are the seminal U.S. Supreme Court cases?; (c) What remains unresolved?; and (d) What can be said with confidence about the health and vitality of the First Amendment on college campuses today? This chapter will also discuss the concept of academic freedom in higher education, as this has particular relevance for the application of the First Amendment in higher education institutions.

In an effort to better understand the nature and extent of the First Amendment free speech rights of faculty, I will review First Amendment free speech law as it is currently applicable to faculty by the Supreme Court. The First Amendment free speech clause of the United States Constitution provides little guidance in determining the limits and extent of its protection for faculty speech. The First Amendment of the Constitution states:

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Therefore, it is left to the courts, especially the United States Supreme Court as the ultimate interpreter of the Constitution, to determine the parameters of the First
Amendment. Although the First Amendment applies only to federal government action, it was made applicable to state government through the Fourteenth Amendment (Gitlow v. New York, 1925). Because the First Amendment is not directly applicable to private colleges and universities, this research will be limited to the application of the First Amendment at public colleges and universities. This is not to conclude that the benefits of the First Amendment are entirely denied to private colleges and universities. In Prune Yard Shipping v. Robins (1980), the Supreme Court held that the states are free to provide more extensive rights than the United States Constitution. Thus, individual states may extend the free speech protection embodied in the First Amendment to private colleges and universities within those states. For example, California has passed legislation that limits the ability of private colleges and universities to regulate speech (O’Neil, 1997). Additionally, many schools, both public and private, provide additional protection for faculty speech under their internal academic freedom policies, faculty contracts, and employee handbooks. Moreover, at least one scholar has argued that academic freedom at religious colleges and universities is protected by the free speech and free exercise clauses of the First Amendment (Gordon, 2003). Because the rights of academic freedom are never unlimited or absolute, there is support for academic freedom by administrators in many religious colleges and universities (Diekema, 2000). The American Association of University Professors’ definition of academic freedom at religious institutions only requires that “limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of appointment” (American Association of University Professors, 2001, p. 3).

My dissertation will analyze the application of the First Amendment free speech
clause to faculty at public colleges and universities. Faculty at public colleges and universities are public employees and as such the Supreme Court’s jurisprudence with respect to public employee speech is applicable. However, faculty speech is somewhat unique and differs from other public employee speech to some extent. Faculty have a great deal of autonomy in the classroom, in research, and in intramural and extramural speech. Faculty design their own lectures (within course limits) and are not given a script that must be followed. Faculty are also free to pursue research and write articles that do not follow a certain opinion or belief. The term “academic freedom” is often used to describe these unique rights of faculty. Thus, there are two key issues that are important to analyze and understand. First, to what extent, if any, does the concept of academic freedom apply to the constitutional (First Amendment) rights of faculty at public colleges and universities as determined by the Supreme Court? Second, to what extent, if any, does the public employee speech doctrine apply to public college and university faculty speech (or academic freedom) as determined by the Supreme Court?

Academic Freedom and the First Amendment

In examining academic freedom and its relationship to the First Amendment, it is important to begin with an examination of the definition of academic freedom. The concept of academic freedom draws its meaning from both the world of education and the world of law (Kaplin & Lee, 1995). However, there is no universal definition of academic freedom either in education or, especially, in law. “Academic freedom is largely unanalyzed, undefined, and unguided by principled application, leading to its inconsistent and skeptical or questioned invocation” (Wright, 2006, p. 794).
Academic freedom is a term that has great meaning and history in higher education, but has little meaning and history in United States jurisprudence. Several areas of the law have applicability to academic freedom in the United States. Constitutional law is not the primary area of the law used in examining controversies over faculty speech. Academic freedom disputes are primarily decided through the application of contract law (Kaplin & Lee, 1995) and quasi-contract law, including faculty handbooks (Finkin, 1988). In determining whether faculty speech in or out of the classroom is protected from administrative interference, courts initially look to the specific terms of the faculty contract. However, the extent of a faculty member’s academic freedom is rarely stated in an individual employment contract. Moreover, the extent of academic freedom usually appears in faculty handbooks or other official university documents, some of which may expressly incorporate the definition of academic freedom contained in the American Association of University Professors (AAUP) Statement of Principles by reference (Bird & Brandt, 2002). The interpretations of these agreements are dependent on contract law, which involves examining the specific language of the document or handbook. Courts have also based a legal right of academic freedom on the custom and tradition of a particular university (Bird & Brandt, 2002). Custom and tradition are mainly utilized to supplement written documents or to establish the institution’s actual practice where an agreement does not exist. Rather than providing the full and extensive protection of academic freedom to the faculty, the extent of academic freedom can be set and modified by individual institutions. What might constitute permissible faculty speech at one university may not be protected at another university, depending on the terms of each
school’s agreement. The concept of academic freedom has meaning only as delineated in the agreement.

The United States Supreme Court has also pronounced that academic freedom is a “special concern” of the First Amendment (Keyishian v. Board of Regents, 1967, p. 603). However, the Supreme Court has not defined First Amendment (or “constitutional”) academic freedom. Academic freedom has existed in most colleges and universities to some extent regardless of the Supreme Court’s recognition of it as a special concern of the First Amendment. Thus, the Supreme Court was aware of its general meaning before it pronounced it a special concern of the First Amendment. Consequently, it is important to first examine the non-legal definition of academic freedom as it has developed in higher education in the United States before reviewing how the concept of “constitutional academic freedom” has been developed by the Supreme Court. This is especially important because the Supreme Court has not precisely defined constitutional academic freedom. Thus, I will begin by providing an overview of academic freedom as it developed in the United States.

Academic freedom is often separated into two categories by scholars. The concept of academic freedom as it developed historically in higher education to protect faculty freedom in teaching and research had been referred to as classical academic freedom (Rabban, 1988), professional academic freedom (Lynch, 2003; Metzger, 1988), traditional academic freedom (Rabban, 1988), historical academic freedom (Rabban, 1988), or, where contrasted with the concept of “institutional” academic freedom, individual academic freedom (Schauer, 2006). Byrne (1989) referred to the traditional non-constitutional academic freedom simply as academic freedom. The concept of
academic freedom as protected by the First Amendment is generally referred to as constitutional academic freedom (Byrne, 1988; Metzger, 1988) to distinguish it from traditional academic freedom. I will refer to the traditional concept of academic freedom as faculty (individual) academic freedom, or where there might be little confusion with constitutional academic freedom, simply as academic freedom.

*Overview of Faculty Academic Freedom in the United States*

“Academic Freedom” is actually a “modern term for an ancient idea” (Hofstadter & Metzger, 1955, p. 3). “Although the struggle for freedom in teaching can be traced at least as far back as Socrates’ eloquent defense of himself against the charge of corrupting the youth of Athens, its continuous history is concurrent with the history of universities since the twelfth century” (Hofstadter & Metzger, 1955, p. 3). Medieval professors were given the freedom to explore and contribute new knowledge as long as they did not cross into the authority of the church (Poch, 1993). Even though the faculty were restricted by religious beliefs, the faculty “exerted considerable power in the selection of institutional leaders, the establishment of the institution’s mission, the content of the curriculum, and the definition of academic standards” (Poch, 1993, p. 3).

Traditional conceptions of academic freedom emphasized that faculty autonomy in research, teaching, and publication was essential to the search for knowledge (Rabban, 1988) and truth. Some scholars have noted that classical academic freedom was subject only to scholarly standards and professional ethics (Rabban, 1988; Weidner, 2003). The reason for these and only these limits was because the quest for knowledge was thought to require objectivity (Rabban, 1988). Anything more would restrict the search for
knowledge and anything less would affect the scholarly (academic) integrity of the search for knowledge.

The initial American universities were based on the ancient and medieval universities of England, which had this rich tradition of freedom (Poch, 1993). However, the American system of collegiate education differed not only from the familiar English models but also from all other university models (Hofstadter & Metzger, 1955). Hofstadter and Metzger (1955) provided three reasons for the uniqueness of American universities. First, although American collegiate education was founded by religious organizations, similar to that of Europe, it was essentially private denominational sponsorship with limited state religious supervision. Second, the American colleges, unlike European universities, had no connection with advanced professional faculties. Third, American colleges developed a system of external governance that did not include the teachers of the college (Hofstadter & Metzger, 1955). Hofstadter and Metzger (1955) traced the introduction of the concept of academic freedom into the United States from the German universities in the later half of the nineteenth century. Hofstadter & Metzger (1955) concluded that the German university philosophies of Lehrfreiheit (freedom to learn) and Lehrlfreiheit (freedom to teach) were introduced into our university culture by the increasing numbers of American scholars educated in Germany. Poch (1993) finds this point debatable, but concedes that “German conceptions of academic freedom played a major role in framing modern notions of academic freedom in the United States” (p. 6). Metzger (1988) noted that Lehrfreiheit, or teaching freedom, also referred to the statutory right of associate and full professors in Germany (who were civil servants) to perform their professional duties outside the chain of command that encompassed other
government officials. In Germany, the concept of Lernfreiheit or learning freedom “amounted to a disclaimer by the university of any control over the students’ course of study save that which they needed for state professional exams or to qualify them for an academic teaching license” (Metzger, 1988, p. 1270). This amounted to no more freedom of speech than absence of required courses for students (Metzger, 1988). It did not provide students with any special speech protection. This concept did not make the transition to the United States (Metzger, 1988). Thus, students obtain the benefits of academic freedom through the freedom of their professors to teach, research, and publish. Consequently, in its analysis of academic freedom as it relates to the First Amendment, the Supreme Court has not included any specific discussion of student academic freedom. Byrne (1989) found that “no recognized student rights of free speech are properly part of constitutional academic freedom, because none of them has anything to do with scholarship or systematic learning” (p. 262).

Despite this formidable beginning, there was no authoritative attempt to clearly define the concept of academic freedom in the United States until the American Association of University Professors (AAUP) published the 1915 Declaration of Principles (later revised as the 1940 Statement of Principles) (Bird & Brandt, 2002; Hofstadter & Metzger, 1955; Lynch, 2003). Tierney (2004) found that academic freedom only became a transcendent value in the United States in the last century. McGuinness (2002) found that the development of academic freedom in the United States made little progress until the foundation of American Association of University Professors in 1915. The 1915 Declaration of Principles on Academic Freedom and Tenure defined academic freedom under the caption, “General Declaration of Principles,” as the following:
The term “academic freedom” has traditionally had two applications—to the freedom of the teacher and to that of the student, *Lehrfreiheit* and *Lernfreiheit*. It need scarcely be pointed out that the freedom which is the subject of this report is that of the teacher. Academic freedom in this sense comprises three elements: freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action. (American Association of University Professors, 2001, p. 292)

The AAUP refined this definition in its 1940 Statement of Principles on Tenure and Academic Freedom. Under the caption, “Academic Freedom,” the document, in relevant part, states:

(a) Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based on an understanding with the authorities of the institution.

(b) Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of appointment.

(c) College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As
scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence, they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinion of others, and should make every effort to indicate that they are not speaking for the institution. (American Association of University Professors, 2001, pp. 3-4)

The 1940 definition is retained today by the AAUP, with some additional interpretive comments included (American Association of University Professors, 2001). This definition has been endorsed by numerous organizations, including the American Association of Colleges and Universities and the Association of American Law Schools (American Association of University Professors, 2001). Many college and university faculty handbooks or other official documents have expressly referenced or incorporated the 1940 Statement of Principles (Bird & Brandt, 2002). However, unless a college or university agrees to be bound by the AAUP definition, or somehow incorporates it into its custom or tradition, this definition is generally not legally enforceable.

Nevertheless, the AAUP definition is the most utilized definition in the United States. However, the United States Supreme Court has never specifically accepted the term academic freedom as defined by the AAUP as a constitutional right. The Supreme Court has recognized that faculty have some legal protection for speech that is related to the concept of academic freedom, but how much and to what extent remains open to debate (Daly, 2001).

Constitutional Academic Freedom and the Supreme Court

As noted earlier, academic freedom is recognized by the Supreme Court (Poch,
1993). However, despite the widespread usage of the American Association of University Professors’ definition of academic freedom, the seminal Supreme Court cases have not directly referred to the AAUP definition in analyzing constitutional protection for academic freedom. Nevertheless, the Court had referred to the concept of academic freedom as engrained in constitutional law and had solidly linked the First Amendment to academic freedom by 1967 (Lynch, 2003). Although the Supreme Court has extolled the important virtues of academic freedom, there is no clear Supreme Court approved constitutional doctrine of academic freedom as such (Chen, 2006; Schauer, 2006).

“Lacking definition or guiding principle, the doctrine floats in law, picking up decisions as a hull does barnacles” (Byrne, 1989, p. 253). The legal definition of constitutional academic freedom has been described as ambiguous (Bird & Brandt, 2002; Hiers, 2004), equivocal (Kaplin & Lee, 1995), controversially and judicially unsettled (Wright, 2007), and frustratingly uncertain and paradoxical (Byrne, 2004). “Unlike other aspects of the constitutional law of free expression, academic freedom represents not a doctrine, but a multitude of analytical approaches that vary widely across the spectrum of academic speech” (Chen, 2006, p. 958).

Some legal scholars believed that academic freedom is not the same as freedom of speech and is therefore not guaranteed by the First Amendment (De George, 2003; Weidner, 2003). The basis of this argument is that the free speech clause of the First Amendment applies to all United States citizens, whereas academic freedom is applicable only to college and university faculty (Finkin, 1988). Schauer (2006) concluded that it was doubtful, except in a small number of instances, that the Supreme Court’s references to academic freedom recognized a distinct individual academic freedom right instead of
simply pointing out the general individual right to freedom of speech. This view finds that although academic freedom was discussed by the Court, it was used only to indicate that it was academic speech and not to provide an additional doctrine of First Amendment protection. However, Schauer (2006) noted that a trace of the individual right of academic freedom does appear to exist in lower court doctrine, especially in regard to selection of classroom content and methodology by professors and this right does not appear to exist with other public employees.

Many of the scholars ascribing to this belief are not implying that academic freedom is not important to higher education (Rabban, 1988), but instead that academic freedom and free speech are different concepts and should be kept separate (Alexander, 2006). Menand (1996) found that First Amendment “freedom of expression and academic freedom are not the same freedoms; each is designed in furtherance of different goals” (p. 6). Finkin (1988) warned that if professional and constitutional academic freedom were not kept separate that academic freedom would be limited to only constitutional academic freedom. This is an argument against academic freedom being regarded as a subset of the First Amendment. Finkin (1988) explained that the argument that academic freedom is a subset of the First Amendment “wrongly assumes that all of academic freedom is encompassed by the first amendment and, therefore, that what the first amendment does not encompass is not academic freedom” (p. 1348). These scholars contend that academic freedom provides much more protection for faculty speech than the First Amendment.

However, some scholars have argued that the First Amendment is broader in its protections of speech, whereas academic freedom is much more limited in its protections. The Seventh Circuit Court of Appeals noted that academic freedom is subsumed by the
broader free speech claim because First Amendment guarantees are sufficiently broad to provide some protection for what has been called academic freedom (Trejo v. Shoben, 2003). Thus, academic freedom is a subset of the First Amendment. The First Amendment provides citizens with the right to criticize the government and to state their opinions on any matters, whereas academic freedom is much more limited. Academic freedom only protects those faculty at the university that are pursuing knowledge or truth in their area of expertise (De George, 2003). Academic freedom is not a license to state one’s opinions on any topic in any way (De George, 2003). This (subset) theory would provide protection for faculty in teaching and publishing, the core activities of academic freedom, as long as it was related to their area of expertise. However, drawing the line could be difficult in some situations. For example, many government policies have implications for various disciplines. Additionally, much scholarship is cross-disciplinary and not confined to a single narrow subject matter.

Limiting academic freedom to a faculty member’s expertise would advance the concept of professional autonomy (Finkin, 1988). However, Yudof (1988) has criticized those scholars for equating academic freedom with a broad conception of professional autonomy. Yudof (1988) argued that making academic freedom coextensive with the concept of the autonomous professional would mean that academic freedom would not only apply to teachers and researchers, but to all professionals. Some scholars believe that academic freedom risks corruption by placing all speech by professors and teachers under the umbrella of academic freedom (Yudof, 1988). Speech not directly related to teaching and scholarship does not warrant a higher degree of liberty (Yudof, 1988).

Rabban (1988) found even further constraints. He concluded that although the autonomy
of the individual professor to disseminate research lies at the core of the traditional concept of academic freedom, this conception has never reduced academic freedom to an unfettered individual right to teach and research (Rabban, 1988). Rabban (1988) argued that traditional academic freedom makes faculty peers primarily responsible for applying limiting standards, but administrators and governing boards have the right to overrule these peer decisions where peers have departed from professional standards.

The decision of what comprises professional standards is determined to some extent by the discipline. It is the obligation of those in a field to decide what constitutes knowledge in that field (De George, 2003). De George (2003) asserted that only those who have the appropriate knowledge are qualified to decide what constitutes knowledge in the field and disputes cannot be settled by those outside of the field. Byrne (1989) asserted that the First Amendment academic freedom protects commitment to the search for truth, with truth being determined in part by the discipline. Because knowledge transcends any given institution (De George, 2003), disputes over academic freedom cannot be decided solely within a given institution. Calhoun (2006) asserted that academic disciplines have historically played a major role in academic freedom, which has largely been ignored in recent debates. Calhoun (2006) contended that the debate on academic freedom tends to focus, incorrectly, on either free-standing individual liberty or institutional autonomy; consequently, the role of the discipline in academic freedom has been largely ignored. She argued that a discipline-based academic freedom argument would help in applying the concept of academic freedom and sorting through the debate between individual and university autonomy. Calhoun (2006) concluded:
If academic freedom debates continue on their present course, in which the disciplinary focus is muted or obscured by arguments that rest on appeals to institutional autonomy or individual freedom, we can expect to see continued categorical confusion in constitutional doctrine. (p. 880)

All of these often conflicting views demonstrate the need for specific guidance from the Supreme Court on the parameters of constitutional academic freedom. Moreover without specific authoritative guidance by the Supreme Court, lower courts have been almost completely free to interpret what constitutional role academic freedom plays on a case-by-case basis. Many have done so using a multitude of different legal concepts (Chen, 2006). “Although the Supreme Court has expressed much eloquent respect for the freedom of professors and universities, it has set forth no explicit standard or mechanism for analysis of cases implicating this value” (Lynch, 2003, p. 1064). Thus, it is no surprise lower courts that have faced cases involving academic freedom have produced a “quagmire of conflicting standards” (Lynch, 2003, p. 1064). Some courts have even proclaimed that academic freedom is held by the institution and not individual faculty (Strauss, 2004). This has been a subject of continuing debate by legal commentators (Rabban, 2001).

The issue is further complicated by the fact that some are arguing that academic freedom is being used as a shield by professors for activities such as sexual harassment (Smith, 1998; Woodward, 1999). The key legal issue here is how do courts decide when sexual-related remarks, comments, or discussions rise to the level of sexual harassment or create a hostile educational environment in light of constitutional academic freedom? Does academic freedom provide any protection for sexual remarks by a professor, and, if
so, how do courts (and administrators) determine where to draw the line? Sexual-related remarks by a professor in an academic setting may implicate a school’s internal policy, statutory law, or tort-based claims (Matejkovic & Redle, 2006). Additionally, we have the issue of whether there is a difference where the professorial speech is inside of the classroom or outside of the classroom. Professors do much of their work outside of class and outside of their offices. They often discuss their research informally, as well as formally at conferences. Thus, it is difficult to determine when a professor is speaking strictly as a private citizen and when a professor is speaking as an employee. The Seventh Circuit has even declined to find free speech protection for a faculty member who alleged he was fired for casual speech about sex-related topics in a bar at a conference (Trejo v. Shoben, 2003). A key issue involves whether administrators should be given the discretion to decide to what extent a professor’s speech inside and outside the classroom is protected by academic freedom.

Because the concept of academic freedom being grounded in the First Amendment of the Constitution has only been acknowledged by the United States Supreme Court in the later half of the last century, and then only in a general manner, it is important to examine the development of “constitutional academic freedom” by the Court. The Supreme Court first mentioned the term “academic freedom” in Adler v. Board of Education (1952), albeit in the dissent of Justice Douglas. This case involved a New York statute (the “Feinberg Law”), which provided that a person who teaches or advocates, or is knowingly a member of an organization which teaches or advocates the overthrow of the government by force or violence shall be disqualified from employment in the public school system. The plaintiffs in Adler included several teachers in New
York City schools. They requested a declaratory judgment that the statute violated the constitutional rights of free speech and assembly and also the guarantee of due process. The Supreme Court held that the statute did not violate the constitutional right of free speech. However, in his dissent, Justice Douglas discussed the role of public school teachers and free speech. Justice Douglas stated:

I have not been able to accept the recent doctrine that a citizen who enters the public service can be forced to sacrifice his civil rights. I cannot for example find in our constitutional scheme the power of a state to place its employees in the category of second class citizens by denying them freedom of thought and expression. The Constitution guarantees freedom of thought and expression to everyone in our society. All are entitled to it; and none needs it more than the teacher. (*Adler v. Board of Education*, 1952, p. 508)

Justice Douglas explained the special importance of constitutional free speech protection for teachers:

What happens under this law [the Feinberg Act] is typical of what happens in a police state. Teachers are under constant surveillance; their pasts are combed for signs of disloyalty; their utterances are watched for clues to dangerous thoughts. A pall is cast over the classrooms. There can be no real academic freedom in that environment. Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of free intellect. Supineness and dogmatism take the place of inquiry. (*Adler v. Board of Education*, 1952, p. 510)

Justice Douglas’ dissent promulgated the belief that free speech for all public employees should not be denied, but in the case of teachers, this right of free speech or academic
freedom is especially vital to our society.

In the same year as Adler, the Supreme Court decided a case that involved the faculty of the Oklahoma Agricultural and Mechanical College. In Wieman v. Updegraff (1952), the faculty and staff of the college challenged an Oklahoma statute that required state employees, as a condition of continued employment, to take a loyalty oath regarding their membership in or affiliation with certain proscribed organizations. These organizations included the Communist party and any other association or group that the government determined to be subversive. The majority of the Court invalidated the act as a violation of the Fourteenth Amendment on the ground that it created a conclusive presumption of disloyalty based solely on membership in a proscribed organization, regardless of the person’s knowledge at the time of membership of the purpose and nature of such organization. However, a concurring opinion by Justice Frankfurter, joined by Justice Douglas, advanced the view that the rights of teachers to freedom of speech should be especially safeguarded by the Constitution. Justice Frankfurter stated:

By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher’s relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. (Wieman v. Updegraff, 1952, p. 194)

Justice Frankfurter did not stop there, but also noted that teachers have a special role that entails distinctive First Amendment protection:
To regard teachers—in our entire educational system, from primary to 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. Teachers must fulfill their function by precept and by practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by National or State government. *(Wieman v. Updegraff, 1952, pp. 196-197)*

Although Justice Frankfurter did not use the term academic freedom in *Wieman*, in his subsequent dissenting opinion in *Shelton v. Tucker* (1960), Justice Frankfurter referred to *Wieman* as example of an academic freedom case. The Supreme Court advanced its discussion of the concept of academic freedom from a dissenting opinion to a concurring opinion. In *Sweezy v. New Hampshire* (1957), a plurality of the Court expressly connected academic freedom with free speech protected by the First Amendment. *Sweezy* involved an investigation conducted by the New
Hampshire Attorney General, acting on behalf of a state legislative resolution, to determine whether there were subversive persons present in the state. Paul Sweezy had delivered a lecture to a humanities class at the University of New Hampshire on March 22, 1954, at the request of a faculty member teaching that course. Mr. Sweezy had also addressed the class upon such invitation in the two preceding years as well. Sweezy was summoned to appear before the State Attorney General on several occasions. He answered a number of questions but refused to answer other questions as not pertinent to the subject matter and violative of his First Amendment rights. Sweezy was held in contempt of court for not answering questions regarding the content of his classroom lectures and his association with the Progressive Party. Upon appeal to the Supreme Court, the majority opinion did not address his First Amendment claims, but found that Sweezy’s due process rights were violated. However, in the plurality opinion of Chief Justice Warren, and joined by Justice Black, Justice Douglas, and Justice Brennan, the concept of academic freedom and the First Amendment were discussed. Chief Justice Warren wrote:

The State Supreme Court thus conceded without extended discussion that petitioner’s right to lecture and associate with others were constitutionally protected freedoms which had been abridged through this investigation. These conclusions cannot be seriously debated. Merely to summon a witness and compel him, against his will, to disclose the nature of his past expressions and associations is a measure of government interference in these matters. These are rights which are safeguarded by the Bill of Rights and the Fourteenth Amendment. We believe that there unquestionably was an invasion of the
petitioner’s liberties in the areas of academic freedom and political expression—
areas in which government should be extremely reticent to tread. (*Sweezy v. New
Hampshire*, 1957, pp. 249-250)

Although Chief Justice Warren’s statement was made in a plurality opinion, a
concurring opinion of two other Justices in *Sweezy* also recognized the constitutional
importance of academic freedom. Justice Frankfurter, joined by Justice Harlan, in a
concurring opinion found that “when weighed against the grave harm resulting from
government intrusion into the intellectual life of a university, such justification for
compelling a witness to discuss the contents of a lecture appears grossly inadequate”
concluded that government must have a compelling reason to regulate faculty speech. He
stated that “political power must abstain from intrusion into this activity of freedom,
pursued in the interest of wise government and the people’s well-being, except for
reasons that are exigent and compelling” (*Sweezy v. New Hampshire*, 1957, p. 262).

In *Shelton v. Tucker* (1960), the Supreme Court opinion restated Chief Justice
Warren’s statements in *Sweezy v. New Hampshire* (1957) and Justice Frankfurter’s
concurring opinion in *Wieman v. Updegraff* (1952) regarding the special constitutional
importance of freedom of speech to teachers. *Shelton v. Tucker* (1960) concerned the
constitutional validity of an Arkansas statute that compelled every teacher, as a condition
of employment, to annually file an affidavit listing every organization to which the
teacher belonged or regularly contributed within the preceding five years. The Supreme
Court found that in view of its unlimited and indiscriminate sweep, the statute was
invalid. However, the Court took the occasion to re-emphasize the special value of free
speech to educators. Writing for the Court, Justice Stewart held that “the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools” (Shelton v. Tucker, 1960, p. 487). Justice Stewart concluded that “the statute’s comprehensive interference with associational freedom goes beyond what might be justified in the exercise of the State’s legitimate inquiry into the fitness and competency of its teachers (Shelton v. Tucker, 1960, p. 490).

In Keyishian v. Board of Regents (1967), the majority opinion definitively recognized academic freedom as having a special relationship with the First Amendment. Keyishian involved another challenge to the constitutionality of New York’s Feinberg Law. But, this time the Supreme Court struck down the Feinberg Law as unconstitutional. Under the statute every state teacher, including college and university faculty, were to be reviewed “to determine whether any utterance or act of his, inside the classroom or out, came within the sanctions of the laws” (Keyishian v. Board of Regents, 1967, p. 602). The Court found that the provision of the statute authorizing removal of faculty members for seditious utterances was unconstitutionally vague because teachers could not know the extent to which the utterances must transcend mere abstract statements. However, the Court went on to discuss academic freedom, incorporating some of its previous opinions, including dissenting and concurring opinions into its now majority opinion. The majority opinion of Justice Brennan contained the now famous statement providing constitutional support for academic freedom:

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. (*Keyishian v. Board of Regents*, 1967, p. 603)

The Court also reiterated Justice Warren’s statements in *Sweezy v. New Hampshire* (1957) in its discussion:

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 straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. 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. (*Keyishian v. Board of Regents*, 1967, p. 603)

Thus, *Keyishian v. Board of Regents* (1967) was the culmination of Supreme Court jurisprudence leading to the clear recognition that academic freedom is a “special concern” of the First Amendment. Despite this development, the Court has not gone so far as to provide a clear legal definition of constitutional academic freedom.

Some scholars believe that protection of institutional autonomy (institutional academic freedom) is the appropriate concern of constitutional academic freedom (Byrne, 1989; Schauer, 2006). Some lower courts and scholars have asserted that constitutional academic freedom inures to the college or university instead of, or, in addition to (Chen,
2006; Petroski, 2006), the faculty. Some of the opinions of the Supreme Court have provided support for this belief and, therefore, should be reviewed. The most commonly cited source--almost the only source (Hiers, 2002)--for the idea of institutional academic freedom is a statement made by Justice Frankfurter in his concurring opinion in *Sweezy v. New Hampshire* (1957). In attempting to justify the dependence of a free society on free universities, Justice Frankfurter quoted from several sources, including the recently published statement of a conference of senior scholars from the University of Cape Town and the University of the Witwatersrand in South Africa, entitled *The Open Universities in South Africa* (*Sweezy v. New Hampshire*, 1957, pp. 262-263). Part of this quotation included the statement:

> It is the business of a university to provide an atmosphere which is most conducive to speculation, experiment, and creation. It is an atmosphere in which there prevail ‘the four essential freedoms’ of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study. (*Sweezy v. New Hampshire*, 1957, p. 263)

Although Justice Frankfurter’s quote was part of his overall discussion about academic freedom, it was imbedded in a section that discussed the values of a free university but failed to mention academic freedom. Thus, it is debatable whether Justice Frankfurter was defining academic freedom in terms of the “four essential freedoms” of a university or merely making an additional statement about the importance of limiting government interference in academic decisions. Hiers (2002) argued that Justice Frankfurter was not defining institutional academic freedom, but was characterizing universities as places where faculty scholars could pursue research without government intervention.
Although the four essential freedoms quote was not essential to Justice Frankfurter’s concurring opinion in *Sweezy*, the four essential freedoms were later utilized in opinions to support the right of university autonomy in these areas. These four freedoms were also later connected to the concept of academic freedom by the Court and scholars (Byrne, 1989). It is important to discuss these cases as they have fueled the debate of individual (faculty) academic freedom versus institutional academic freedom.

The first Supreme Court case to take Justice Frankfurter’s four essential freedoms of a university and interpret those as concepts of academic freedom was a case that appeared to have nothing to do with academic freedom. In *Regents of the University of California v. Bakke* (1978), a white medical school applicant, Allan Bakke, was denied admission to the University of California at Davis. The Supreme Court faced the issue of whether a dual track admissions program reserving a certain number of seats for minority candidates violated Title VI of the Civil Rights Act as proscribed by the equal protection clause of the Fourteenth Amendment. The Court found that the special admissions policy was facially unlawful and violated Bakke’s constitutional rights. Justice Powell expressed the opinion of the Court, in which some Justices joined, with none joining in all of his opinion and some writing separate concurring and dissenting opinions. However, in expressing his own views, Justice Powell incorporated the concept of academic freedom to conclude that universities must have the right to select their own students. He also connected constitutional academic freedom to the concept of university autonomy. In regard to constitutional academic freedom, Justice Powell stated:

> Academic Freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom
of a university to make its own judgments as to education includes the selection of its student body. (*Regents of the University of California v. Bakke*, 1978, p. 312)

Justice Powell immediately followed this statement by quoting part of Justice Frankfurter’s quote from *The Open Universities in South Africa* that referred to the four essential freedoms of a university---to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study (*Regents of the University of California v. Bakke*, 1978, p. 312). Justice Powell referred to these four items as “the ‘four essential freedoms’ that constitute academic freedom” (*Regents of the University of California v. Bakke*, 1978, p. 312). Justice Powell next stated that “our national commitment to safeguarding these freedoms within our educational communities was emphasized in *Keyishian v. Board of Regents*” (*Regents of the University of California v. Bakke*, 1978, p. 312). Immediately following this statement, Justice Powell completed the connection between the four essential freedoms of a university and academic freedom, which he stated was a special concern of the First Amendment. The connection was later used as clear authority for the constitutional support of the concept of institutional academic freedom. In *Bakke*, Justice Powell relied on the fourth freedom, the right of the university to decide who may be admitted to study, to justify allowing a university to take race or national origin into account in admissions decisions. It is possible that Justice Powell postulated this institutional academic freedom argument to preserve affirmative action while condemning racial preferences (Byrne, 1989). Nevertheless, subsequent Supreme Court cases suggest that this theory has more vitality than *Bakke* suggested (Byrne, 1989).

The Supreme Court subsequently discussed the concept of institutional academic
freedom in another case that involved the application of academic standards to a student. In *Regents of the University of Michigan v. Ewing* (1985), Ewing was enrolled in a special 6-year medical study program, the Interflex program, which was offered jointly by the undergraduate college and the Medical School. Ewing was dismissed after failing the National Board of Medical Examiners test, with the lowest score ever made by a student in the Interflex program. The question presented to the Supreme Court was whether the University of Michigan deprived Ewing of property without due process of law because it refused to allow him to retake the exam. The Court concluded there was no constitutional violation. The Supreme Court found that the record showed that the student’s dismissal was made conscientiously and with careful deliberation, which included an evaluation of his entire academic career at the university. Furthermore, in its decision, the Supreme Court advanced the proposition that courts should be extremely reluctant to interfere with the professional academic judgment of the faculty. Writing for a unanimous Court, Justice Stevens stated:

> When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty’s professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment. (*Regents of the University of Michigan v. Ewing*, 1985, p. 225)

The Supreme Court in *Ewing* also explained this deference to the institution in terms of academic freedom. The Court connected institutional academic freedom to *Keyishian’s* special concern declaration. The *Ewing* Court stated: “Added to our concern
for lack of standards is a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, ‘a special concern of the First Amendment’” (Regents of the University of Michigan v. Ewing, 1985, p. 226). The Court noted that there is some inconsistency between this institutional academic freedom and individual academic freedom. In a footnote, the Court stated that “academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, . . . but also, and somewhat inconsistently, on autonomous decisionmaking of the academy itself” (Regents of the University of Michigan v. Ewing, 1985, p. 226). The Court appeared to acknowledge the existence of both individual faculty academic freedom and institutional academic freedom. This statement also set the stage for the acceptance of a conflict between institutional and individual academic freedom. However, the Court did not provide any specific guidance on how to resolve this conflict. Some scholars have interpreted Ewing as only protecting faculty who act on behalf of the university (Hiers, 2002), whereas others found that the Court had used the decision to interpret a constitutional provision to protect institutional decision-making (Byrne, 1989).

Institutional academic freedom has been defined in terms of deference to college and university decisions. The concept that courts should be extremely reluctant to interfere with the professional judgment of faculty or the institution in academic decisions is often termed “academic abstention” (Byrne, 1989) or “academic deference” (Moss, 2006). The extent of deference is often found to be limited to academic decisions, but what is considered an academic decision could be debatable. Poskanzer (2002) defined academic freedom as “conscious deference by judicial or governmental authority
to a college or university (or to individual faculty) on decisions that are fundamentally academic in content” (p. 65). Academic abstention has long preserved university freedom from state regulation (Byrne, 1989). Byrne (1989) found that the constitutional right of institutional academic freedom appeared to be a collateral descendant of the common law notion of academic abstention. Byrne (2004) claimed:

By about 1990, something like a scholarly consensus emerged that protected the ‘intellectual life of a university’ from outside political interference, that this protection extended to institutional decision making on academic grounds, and that this institutional interest qualified whatever individual speech rights any member of the academic community might have against college and university officials. (p. 83)

Institutional academic freedom can be viewed as academic abstention that has been raised to constitutional status (Byrne, 1989).

However, the academic deference doctrine has drawn criticism with regard to college and university employment disputes (Moss, 2006). Some legal scholars believe that the persistence of gender discrimination and inequality in academia make judicial deference to university administration in faculty employment actions inappropriate (Moss, 2006). Most cases where courts have made use of academic abstention, especially the Supreme Court cases, have involved complaints by students (Byrne, 1989). In many of these cases students or student applicants questioned decisions that have involved specific academic standards and internal rules and policies. Although courts can review procedures and proffered reasons for these internal decisions, it is very difficult for courts to determine the appropriateness of specific academic standards in a certain institution.
Thus, courts will often defer to the faculty and administration for their expertise in these purely academic decisions.

Courts are generally reticent to become involved in academic freedom disputes concerning course, content, teaching methods, grading, or classroom behavior, viewing these matters as best left to the competence of the administration and educators who have primary responsibility over academic affairs. (Kaplin & Lee, 1995, p. 306)

However, in the case of labor and employment decisions, courts have substantial experience and statutory guidance in deciding these matters. It has been claimed that in deferring to the administration, courts may be abrogating federal and state statutes (Moss, 2006). Moreover, even when courts do not abstain from employment decisions involving faculty, faculty employment discrimination claims rarely succeed. One author (Moss, 2006) found that faculty plaintiffs prevail on the merits only about one quarter of the time.

Proponents of the superiority of institutional academic freedom have found that the Supreme Court’s opinion in *Grutter v. Bollinger* (2003) represented a momentous deference to the institution based on the First Amendment (Byrne, 2004; Schauer, 2006). Byrne (2004) asserted that *Grutter* represented “the most important victory to date for institutional academic freedom” (p. 116). The issue facing the Supreme Court in *Grutter* was whether the use of race as a factor in student admissions by the University of Michigan Law School was unlawful. The Court held that the narrowly-tailored use by a public law school of race in admissions decisions, to further a compelling interest in educational benefits of a diverse student body, did not violate the Fourteenth
Amendment’s equal protection clause. In the majority opinion, Justice O’Connor, citing *Regents of the University of Michigan v. Ewing* (1985) and Justice Powell’s opinion in *Regents of the University of California v. Bakke* (1978), stated that the Court’s holding “is in keeping with our tradition of giving deference to a university’s academic decisions, within constitutionally prescribed limits” (*Grutter v. Bollinger*, 2003, p. 328). Although Justice O’Connor’s opinion did not specifically reference academic freedom, the opinion cited *Sweezy v. New Hampshire* (1957), *Shelton v. Tucker* (1960), *Keyishian v. Board of Regents* (1967), and Justice Frankfurter’s concurring opinion in *Wieman v. Uptegraft* (1952), for support of the following:

We have 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. . . . In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: “The freedoms of a university to make its own judgments as to education includes the selection of its student body.” . . . From this premise, Justice Powell reasoned that by claiming the “right to select those students who will contribute most to the ‘robust exchange of ideas,’” a university “seeks to achieve a goal that is of paramount importance in the fulfillment of its mission.” . . . Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School’s proper institutional mission, and that “good faith” on the part of a university is
“presumed” absent “a showing to the contrary.” (Grutter v. Bollinger, 2003, p. 330)

Some scholars have concluded from this statement that choosing students on academic grounds comes within a university’s First Amendment rights and that creating a diverse student body is a compelling state interest because institutional academic freedom requires deference to the college’s judgment (Byrne, 2004; Schauer, 2006). However, Byrne (2004) noted that because the Court went on to describe other amicus arguments from businesses and the military as to the value of diversity, an argument could be made against this interpretation. The Court discussed the value of diversity to many organizations in business and government, and, therefore, it could be argued that the Court did not defer solely to the college’s judgment that diversity was important. However, Byrne (2006) claimed the Grutter clarified that academic freedom is a constitutional right that protects the autonomy of university governance on issues related to scholarship and teaching, which especially includes those values and practices that make up the non-legal system of academic freedom.

In addition to those scholars who believe that either institutional academic freedom or individual academic freedom are or should be protected (Byrne, 2006; Schauer, 2006) as constitutional academic freedom, many believe that both individual and institutional academic freedom are protected (Petroski, 2005; Wright, 2007) or should be protected (Chen, 2006) under the concept of constitutional academic freedom. It appears that those who support the concept of individual academic freedom as protected by the Constitution also have no problem with institutional academic freedom being protected by the First Amendment. However, those scholars preferring the concept
of individual academic freedom have often concluded that institutional academic freedom exists to protect faculty academic freedom (Petroski, 2005) and that individual academic freedom may be under-protected by sole reliance on institutional academic freedom (Chen, 2006).

The Supreme Court cases that have appeared to support institutional autonomy as relating to constitutional academic freedom primarily involved students or student applicants and not faculty, so any review of those cases must take this fact into account. This is especially the instance where the action of the university could be imputed to defend the action of the faculty. Acceptance into or dismissal from a program may be initiated by faculty action with administrators defending that action against a legal challenge. Nevertheless, Grutter v. Bollinger (2003) appeared to support both individual faculty academic freedom and institutional academic freedom as constitutional academic freedom and noted that the potential for conflict exists.

One non-student case that Byrne (1989) predicted (prior to its decision by the Supreme Court) would clarify the significance and strength of institutional academic freedom was University of Pennsylvania v. EEOC (1990). This case involved the issue of whether a university responding to an EEOC subpoena had a privilege against disclosure of peer review materials relevant to the charges of racial or sexual discrimination. A unanimous Supreme Court held that a university did not have a special privilege. This clarification does not appear to be what Byrne (1989) had in mind. Had the Supreme Court held that there was privilege, this would have gone far to support the primacy of institutional academic freedom. Schauer (2006) also believed this decision was a setback for the concept of institutional academic freedom. Schauer (2006) asserted that the right
to institutional academic freedom is structurally similar to the claimed privilege against
discovery of promotion and tenure records and that the Supreme Court decided this case
incorrectly, to the extent his argument for institutional academic freedom was sound.

However, the institutional versus individual academic freedom debate was again
brought to the forefront of attention when the Fourth Circuit Court of Appeals released its
opinion in Urofsky v. Gilmore (2000). In Urofsky, six professors of various public
colleges and universities in Virginia brought suit challenging the constitutionality of a
Virginia law restricting state employees from accessing sexually explicit material on
computers that are owned or leased by the state. The Fourth Circuit held that this
regulation was consistent with the First Amendment. The court found that this regulation
does not affect the speech rights of state employees as citizens but only in their capacity
as employees. However, the professors also maintained that even if the statute was valid
as to the majority of state employees, it violated the First Amendment academic free
speech rights of the professors at state colleges and universities. In response to this
allegation, the Fourth Circuit concluded “that to the extent the Constitution recognizes
any right of ‘academic freedom’ above and beyond the First Amendment rights to which
every citizen is entitled, the right inheres in the University, not in individual professors”
(Urofsky v. Gilmore, 2000, p. 412). Thus, the Fourth Circuit chose the side of institutional
academic freedom in the debate. Professors at state colleges and universities had the same
First Amendment rights and no more than all other state employees. But, if there were to
be any additional First Amendment rights associated with the concept of academic
freedom, these rights would vest in the institution and not individual professors. The
Urofsky decision came at a good time for institutional academic freedom advocates. Not
long after *Urofsky*, the events of 9/11 unfolded and anti-Bush administration comments by professors were considered by some to be anti-American, resulting in calls for dismissal of those professors by their institutions (Horowitz, 2006).

*The Future of Academic Freedom and the First Amendment*

Much remains unresolved in regard to academic freedom and the First Amendment. As discussed above, the definition of constitutional academic freedom remains unresolved. Until the Supreme Court articulates a clear legal definition that establishes the extent of faculty speech rights and protections under the First Amendment and the criteria for analyzing disputes over faculty speech, lower courts will continue to analyze faculty speech cases under various standards and methods.

Nevertheless, as some scholars have concluded, there are also major drawbacks to the Supreme Court’s establishment of a specific definition of constitutional academic freedom. The definition may provide for much narrower speech rights for faculty than they may already have under a public university’s existing contractual promise of academic freedom. If the Supreme Court would define academic freedom narrowly, then public colleges and universities may thereafter eliminate any contractual academic freedom and rely solely on the (possibly lower) free speech protection of the Court’s academic freedom definition. Individual public colleges and universities would be hard-pressed to exceed the level of First Amendment protection for faculty speech as determined by the Supreme Court.

Of course, the Supreme Court could provide expansive protection for faculty speech in its definition of constitutional academic freedom. It is also possible that the Court could adopt the American Association of University Professors’ definition of
academic freedom. However, even if this were to occur, the AAUP definition is sufficiently vague that courts could interpret and apply it in a variety of ways. For example, article (b) of the AAUP’s definition of academic freedom states that “teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject.” (American Association of University Professors, 2001, p. 3). The definition of what material is controversial or what matter is related to the subject can be subjective. For example, can a professor in an introductory economics course comment on how the President’s actions in Iraq are unnecessarily increasing the deficit? Is that matter related to the subject? Is it controversial? If the annual conference of the American Economic Association presented the same theme, does this legitimize the discussion? Can a professor of higher education administration make negative comments in a higher education administration class on that institution’s specific hiring policies? Can a professor of higher education administration make negative comments in a higher education governance class on that institution’s selection of board members? Can a history professor teaching Western Civilization refer to American action as imperialism and compare it to past civilizations? Who is to decide what material is controversial or what controversial matter has no relation to the subject? Does the administration decide? Does the department decide? If the department, does it need to be a majority of the tenured faculty? Could a court make this determination or would the court defer to the institution or the faculty?

Additionally, resolving the conflict between individual (faculty) academic freedom and institutional academic freedom cannot be accomplished until the Supreme
Court provides a clear definition of constitutional academic freedom. Although the Court noted that faculty academic freedom and institutional academic freedom may conflict, it did not provide any methodology for resolving a conflict. A functional legal definition of constitutional academic freedom should clarify how any conflict is to be resolved. The relationship between institutional and individual academic freedom requires some resolution as to how they can be reconciled with each other. Inherent in the resolution of this issue is the issue of academic deference or abstention. What issues should courts defer to the institutions’ judgment and expertise? Because of the unique higher education concept of shared governance and highly decentralized decision-making, when courts defer to the higher education institution does that mean deference to the faculty or to the administration? If there is deference to both, then would a conflict between faculty and administration be decided?

Faculty and the Public Employee Speech Doctrine

*The Supreme Court and the Public Employee Speech Doctrine*

Faculty are both educators and employees at state institutions of higher education. Therefore, the law related to public employee speech is also applicable to faculty speech unless or until the Supreme Court recognizes a specific exception to the public employee speech doctrine for academic freedom. Public employee speech only obtained specific constitutional protection in recent years. The Supreme Court noted in 1983 that “for most of this century, the unchallenged dogma was that a public employee had no right to object to conditions placed on his terms of employment—even those restricting the exercise of constitutional rights” (*Connick v. Myers*, 1983, p. 143). The Court referred to several cases, such as *Adler v. Board of Education* (1952), discussed earlier, that expressed the
epigram of Justice Holmes, when he sat on the Massachusetts Supreme Court. In *McAuliffe v. Mayor of New Bedford* (1892), Justice Holmes stated that a policeman “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman” (p. 219). This case was found to state the rule that continued to be followed until *Pickering v. Board of Education* was decided by the Supreme Court in 1968 (Elrod, 2003), although the doctrine appeared to have been eroding before 1968 as the cases discussed earlier demonstrate.

Professors at public colleges and universities fared no better than other government employees. Tierney (2004) found that academic freedom and tenure only became transcendent in the United States in the last century and prior to the twentieth century professors could be fired without cause much more easily than today. Because the Supreme Court has not defined the parameters or provided specific guidance in analyzing academic freedom cases, public employee speech doctrine is often utilized in First Amendment faculty speech cases (Byrne, 2004; Daly, 2001; Elrod, 2003; Sherman, 1999). Thus, it is important to review the public employee speech doctrine as developed by the Supreme Court’s seminal cases.

The principle that public employees surrendered their constitutional free speech rights when accepting a position in the public sector remained the general rule until 1968 (Elrod, 2003). In that year, the Supreme Court decided the case of *Pickering v. Board of Education* (1968). Marvin Pickering was a public high school teacher in Illinois. Pickering was dismissed for writing and publishing a letter to the editor of a local newspaper criticizing the way the board of education and the superintendent of schools handled proposals to raise new revenue. Pickering filed suit claiming his First and
Fourteenth Amendment rights were violated. His dismissal was upheld by the Illinois Supreme Court, who rejected his contention that his remarks and comments in the letter were protected by the constitutional right of free speech. However, the United States Supreme Court reversed this decision.

Citing its previous opinions in *Wieman v. Uptegraff* (1952), *Shelton v. Tucker* (1960), and *Keyishian v. Board of Regents* (1967), the Supreme Court in *Pickering* held:

To the extent the Illinois Supreme Court’s opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court. (*Pickering v. Board of Education*, 1968, p. 568)

Despite this auspicious beginning that appeared to provide the Court with an opportunity to clarify academic freedom, at least with regard to extramural speech, the Court chose not to do so. Instead, the Court limited its discussion to teachers as both citizens and public employees speaking on matters of public concern and whether that speech interfered with maintaining efficiency in the workplace. The Court proffered a balancing test for public employee speech. The *Pickering* Court explained this balancing test:

The State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in
promoting the efficiency of the public services it performs thorough its employees. (*Pickering v. Board of Education*, 1968, p. 568)

Thus, some scholars believed that Pickering’s speech implicated free speech rights not because he was a teacher, but simply because he was a public employee (Elrod, 2003; Sherman, 1999). The fact that Pickering was a teacher was of little consequence in determining the First Amendment protection afforded to public employees. This belief is consistent with the Court’s opinion. The Court’s analysis of speech on issues of public concern referred to public employees generally and not only to teachers. Justice Marshall, in his opinion for the Court, held that “statements made by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at nominal superiors” (*Pickering v. Board of Education*, 1968, p. 578). The Court indicated its concern with protecting the First Amendment rights of all government employees as citizens and not only teachers by virtue of their unique status:

It is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech. We have already noted our disinclination to make an across-the-board equation of dismissal from public employment for remarks critical of superiors . . . . However, in a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communications made by a teacher, we conclude that it is necessary to regard the teacher as a member of the general public he seeks to be. (*Pickering v. Board of Education*, 1968, p. 574)

Nevertheless, the job of teacher would be important in analyzing how workplace efficiency could be impacted. Sherman (1999) found that “while the Court did not
completely ignore the nature of Pickering’s particular public sector job, the analysis suggests that it was not determinative either” (p. 654). Once it was established that the public employee was speaking on a matter of public concern, the nature of workplace efficiency would have to take into consideration the nature of the employee’s job. One commentator found that “Pickering’s position as an employee of the school district, rather than justifying the repression of his speech, provided additional impetus for its protection” (Daly, 2001, p. 8). Indeed, the Court stated that “teachers are, as a class, the members of the community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent” (*Pickering v. Board of Education*, 1968, p. 572).

Moreover, the unique characteristics of the job of a college or university professor would have to be taken into consideration to some extent once it was found that the faculty member was speaking on a matter of public concern. Nevertheless, the *Pickering* Court did not discuss the role, if any, that the concept of academic freedom may play in this analysis. However, teaching and research are the main focus of academic freedom. The relevance of *Pickering* to a faculty member’s classroom speech is limited. The Court discussed the First Amendment protection of public school teachers as citizens and not as teachers. One explanation of why the Court did not make a distinction based on whether Pickering’s speech was made off-hours or off-campus was because the state’s managerial realm over faculty is not easily determined by reference to geographical or temporal boundaries that often define organizational authority (Lynch, 2003). Additionally, the issue of whether a teacher discussing a subject in a classroom as part of a course qualifies as a matter of public concern is debatable. *Pickering* focused on teachers as citizens and
not teachers as educators, which may have largely limited its application as precedent to core First Amendment activities (Daly, 2001). Daly (2001) found that lower courts tended to narrowly define issues that qualified as matters of public concern with the result that “Pickering could lead to a full and robust protection of a teacher’s speech outside the classroom, while leaving speech within wholly unprotected” (p. 10). Therefore, *Pickering* appears to be more helpful in analyzing the extramural speech of college and university faculty as it relates to matters that could conceivably be considered matters of public concern.

In *Pickering v. Board of Education* (1968), it was not disputed by the school district that Pickering was fired solely because of his letter to the editor. In *Mt. Healthy School District v. Doyle* (1977), the Court was faced with a case where a teacher’s speech was only one factor in his non-renewal. Fred Doyle, a high school teacher, had made statements regarding school policy to a radio broadcaster, who broadcast the statements as news. The next month the teacher was informed he would not be re-hired and the radio broadcast was given as one reason among several others. Although the Supreme Court determined that the radio communication was a substantial factor in his non-renewal and was protected by the First Amendment, it held that the non-renewal was nevertheless valid if the school board could prove that it would have not re-hired the teacher even if the radio incident had not happened.

The Court articulated its burden-shifting test in mixed motives cases involving public employees (*Mt. Healthy School District v. Doyle*, 1977). Initially the burden was placed upon the teacher to demonstrate that his speech was constitutionally protected and that this speech was a substantial motivating factor in the board’s decision not to re-hire
him. The teacher having carried the burden, the board must then show by preponderance of the evidence that it would have reached the same decision not to re-employ him even in the absence of the protected speech. Additionally, in accord with *Pickering v. Board of Education* (1968), even if the school board was retaliating against the teacher, its decision may still be upheld if the speech created undue tension within the workplace.

In *Givhan v. Western Line Consolidated School District* (1979), the Supreme Court faced the issue of whether a public employee’s speech on matters of public concern was protected in a private conversation between a public employee and her immediate supervisor. Bessie Givhan was a public school teacher who was dismissed from her employment as a junior high English teacher. Givhan contended that the non-renewal of her contract was in violation of her free speech rights under the First and Fourteenth Amendments. She had privately expressed her criticism of certain policies and practices of the school district regarding discrimination to her school principal. The Fifth Circuit found that although she was speaking on matters of public concern, because she privately expressed her complaints and opinions to the principal, her speech was not constitutionally protected. A unanimous Supreme Court reversed and held that a public employee does not forfeit “his protection against government abridgement of freedom of speech if he decides to present his views privately rather than publicly” (*Givhan v. Western Line Consolidated School District*, 1979, p. 414). This decision appears to be beneficial to faculty, who may often discuss faculty recruitment policies, admissions decisions, and grading policies in private rather than take these issues public. However, subsequent cases cast doubt on drawing this conclusion.

The most significant Supreme Court alteration of the doctrine of public employee
speech (Elrod, 2003) since Pickering v. Board of Education (1968) occurred in Connick v. Myers (1983). Myers was an Assistant District Attorney in New Orleans, who tried criminal cases. When the District Attorney, Harry Connick, Sr., proposed to transfer Myers to prosecute cases in a different section of the criminal court, she expressed her opposition to the transfer to several of her supervisors, including Connick. Shortly after expressing those views, Myers prepared a questionnaire that she distributed to other Assistant District Attorneys in the office. The questionnaire concerned office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressure to work in political campaigns. The District Attorney found out about her actions and informed Myers that she was being terminated for refusal to accept the transfer and that her distribution of the questionnaire was considered an act of insubordination. Myers filed suit alleging that she was wrongfully discharged in violation of her constitutionally protected right of free speech. The federal district court agreed and the Fifth Circuit affirmed. However, the Supreme Court, in a five to four decision, reversed and upheld the discharge.

The Connick Court focused on the issue of whether Myers’ speech was a matter of public concern. The Court stated that “if Myers’ questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge” (Connick v. Myers, 1983, p. 146). The Court went on to state a doctrine of abstention or deference to the public employer. The Court held:

When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of a personal interest, absent the most
unusual circumstances, a federal court is not the appropriate forum in which to
review the wisdom of a personnel decision taken by a public agency allegedly in
reaction to the employee’s behavior (Connick v. Myers, 1983, p. 147).

The Court’s opinion in Connick radically shifted the Pickering balancing test strongly in
favor of the employer (Elrod. 2003).

To determine whether an employee’s speech addressed a matter of public concern
the Court determined that the content, form, and context of a given statement, as revealed
by the record as a whole, must be examined. The Court found that this inquiry into the
protected status of speech is one of law and not fact and, consequently, it is for the court
and not the jury to determine in each circumstance. In applying this new balancing test
guidance to Myers’ speech, the Court found that “with but one exception, the questions
posed by Myers to her co-workers do not fall under the rubric of matters of ‘public
concern’” (Connick v. Myers, 1983, p. 148). The Connick Court found that Myers’
questionnaire only touched upon matters of public concern in a very limited sense and
was more accurately characterized as an employee grievance concerning internal office
policy. Elrod (2003) found that once labeled as personal, the questionnaire was not a
matter of public concern and was, therefore, devoid of constitutional protection

Next, to complete the other side of the balancing test, the Court considered the
government’s interest in the effective and efficient fulfillment of its responsibilities to the
public. Although the Supreme Court agreed with the district court that there was no
demonstration here that Myers’ questionnaire impeded Myers’ ability to perform her
responsibilities, the Supreme Court concluded that actual proof of disruption or loss of
efficiency was not required in the balancing test. The Court stated that it did “not see the
necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action” (*Connick v. Myers*, 1983, p. 152). The Court concluded that “the limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships” (*Connick v. Myers*, 1983, p. 154). However, the Court did caution that if the employee’s speech more substantially involved matters of public concern that a stronger showing of its effects on the workplace may be required.

Lynch (2003) found that the Court’s opinion in *Connick* demonstrated “that the Court has not been utilizing the balancing scales but rather has engaged in the instrumental calculation of whether speech is functionally necessary to the state institution’s goals” (p. 1077). Lynch (2003) concluded that in applying this to academic freedom:

> Where the university’s goals are primarily either critical democratic education or fostering of new discoveries, academic freedom is a necessary condition for accomplishing these goals. It is in these cases that academic freedom must be vindicated as a First Amendment right in an institutional context. Where the university’s goals are incompatible with the professor’s expression, however, regulation of the speech is found to be functionally necessary and the professor’s claim of academic freedom fails. (p. 1081)

Elrod (2003) found that the Supreme Court’s approach in *Connick* creates at least two problems. First, it ignores the fact that most public employees who raise concerns usually intertwine matters of public and personal importance (Elrod, 2003). This is especially a
concern of professorial speech in teaching and research, and, it could be argued, in the functioning of the college or university. When teachers are speaking in a classroom the speech is often a matter of both public and personal importance. Faculty research also often involves both issues of public and personal importance. Second, Elrod (2003) found that Connick overestimates the skills of public employers in assessing whether a statement is a matter of public concern or one of a personal nature (Elrod, 2003). This would appear to especially be the case in a higher education environment, where professors are supposed to discuss issues and topics that are matters of public concern and are paid to provide their personal professional insight into these topics.

In Rankin v. McPherson (1987), the Supreme Court held that a private conversation between two employees in a non-public area of the workplace was protected by the First Amendment. Ardith McPherson was a data-entry employee in the county constable’s office. After hearing on the office radio that there had been an attempt on President Reagan’s life, McPherson commented to a co-worker in an area not open to the public that if they go for Reagan again, she hopes they get him. McPherson’s remarks were overheard by another Deputy Constable, who McPherson did not know was in the room at the time. The remark was reported to Constable Rankin. McPherson admitted to Rankin that she made the remark and was promptly fired. McPherson brought suit, alleging that Rankin had violated her constitutional rights under color of state law. The Fifth Circuit found that however ill-conceived McPherson’s opinion was, it did not make her unfit for her job in the Constable’s office. The Supreme Court affirmed.

The Supreme Court found McPherson’s speech, considered in context, plainly dealt with a matter of public concern (Rankin v. McPherson, 1987). The Court found that
the inappropriate or controversial character of speech is irrelevant to the question of whether speech deals with a matter of public concern. In applying the public employee speech balancing test, the Court found that the manner, time, place, and context of the employee’s expression weighed for McPherson. Her remark was made in a private conversation in an area where there was ordinarily no public access. She did not discredit the office by making the statement in public. She was a clerical employee and did not serve a policymaking or public contact role. There was no evidence that interference with the functions of the office had been a consideration in her firing. Much is made of the specific facts used in McPherson for the balancing test and, therefore, its protections may be much more limited. Nevertheless, facts relating to manner, time, place, and context may be important to courts in deciding issues of faculty speech. Faculty speech takes place in a variety of places and contexts.

Although McPherson provided some additional protection for public employee speech, the Supreme Court further reduced that protection (Elrod, 2003) in Waters v. Churchill (1994). In Waters, a public hospital nurse, Cynthia Waters, was fired for a conversation with another nurse at the hospital in which Waters had allegedly criticized the hospital’s cross-training policy and the staffing policies of the hospital’s vice president of nursing. Waters brought suit, alleging that her speech had been protected under the First Amendment and her firing had violated her rights under the First Amendment. The federal district court granted summary judgment to the defendants on the free speech claim, but the Seventh Circuit reversed and remanded the case. The court of appeals concluded that (a) material facts were in dispute about the content of Water’s speech; (b) when a public employer fires an employee in engaging in speech which is
later found to be protected under the First Amendment, the employer is liable for violating the employee’s free speech rights regardless of what the employer knew about the speech at the time of termination; and (c) if, on remand, the jury was to determine that the point of Water’s conversation was to raise the issue of inadequate nurse staffing because of the cross-training policy (a matter of public concern), rather than simply to complain, then the fired nurse was engaged in protected conduct.

The Supreme Court vacated the decision and remanded the case. Although unable to agree on an opinion, seven Justices agreed that the court of appeals’ judgment should be remanded for determination of the actual motivation for the firing (Waters v. Churchill, 1994). Justice O’Connor’s plurality opinion, joined by Justices Rehnquist, Soutar, and Ginsburg, concluded that the Connick test should be applied to what the government employer reasonably thought was said and not to what the trier of fact ultimately determines to have been said by the employee (Waters v. Churchill, 1994). Sherman (1999) found that the plurality opinion would give the employer a substantial amount of leeway in making these determinations. Elrod (2003) found that “the result of Waters is the elevation of the government employer’s interest in efficiency over any value, including expression by public employees” (p. 47). Indeed, Justice O’Connor concluded that in performing the balancing test the court of appeals gave insufficient weight to the government’s interest in efficient employment decisionmaking. Justice O’Connor found that government employers’ reasonable predictions of workplace disruptions should be given substantial weight, even when the speech is on a matter of public concern. Sherman (1999) concluded that even if Water’s speech was on a matter of public concern—which the plurality did not decide—her firing was within the range of
reasonable behavior because the potential disruption outweighed her free speech rights.

This decision was found to be especially problematic for faculty speech (Daly, 2001; Elrod, 2003; Shearman, 1999). Elrod (2003) argued that academic speech of teachers must be afforded a greater degree of protection because its benefits outweigh the costs viewed in terms of the goals of higher education. Similarly, Sherman (1999) argued that the nature of academic jobs requires heightened First Amendment protection, but this heightened protection should not extend to administrative positions. Daly (2001) noted that unlike the assistant district attorney in *Connick v. Myers* (1983) or the nurse in *Waters v. Churchill* (1994), “teachers are expected to engage in semi-public speech on a variety of topics on a daily basis in the course of classroom lectures and responses to student questions” (p. 10). Thus, some scholars believed that the Supreme Court’s public employee doctrine of *Pickering* and its progeny are especially inapplicable to college and university faculty speech (Daly, 2001; Elrod, 2003; Sherman, 1999; Wright, 2007).

The concern over the inapplicability of the public employee speech doctrine to college and university faculty was reflected by the Supreme Court in its recent opinion in *Garcetti v. Ceballos* (2006). The question presented for review in *Garcetti* was whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee’s official duties. Thus, this issue potentially had major implications for professorial speech in the classroom or in publications, which could arguably be considered speech made pursuant to a faculty member’s official duties.

In *Garcetti v. Ceballos* (2006), Richard Ceballos, a deputy assistant district attorney, was asked by defense counsel to review a case in which defense counsel claimed the affidavit the police used to obtain a critical search warrant was inaccurate.
Ceballos concluded that the affidavit made serious misrepresentations and he relayed his findings to his supervisors and followed up with a memorandum recommending dismissal. At a hearing on a defense motion to challenge the warrant, Ceballos recounted his observations, but the trial court rejected the challenge. Ceballos claimed that he was subjected to a series of retaliatory employment actions in the aftermath of the events surrounding this incident. The actions included reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion. Ceballos filed suit alleging violations of his First and Fourteenth Amendment rights by the retaliation based on his memo. The district court granted the defendants’ motion for summary judgment against Ceballos, noting that Ceballos wrote his memo pursuant to his employment duties. However, the Court of Appeals for the Ninth Circuit reversed, holding that Ceballos’ allegations of wrongdoing in the memorandum constituted protected speech under the First Amendment.

Upon review, the Supreme Court in *Garcetti* found that *Pickering* and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections of public employee speech. First, the court must determine whether the employee spoke as a citizen on a matter of public concern. “If the answer is no, the employee has no First Amendment claim based on his or her employer’s reaction to the speech” (*Garcetti v. Ceballos*, 2006, p. 1958). If the answer is yes, the Court stated that the possibility of a First Amendment claim arises. “The question then becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public” (*Garcetti v. Ceballos*, 2006, p. 1958). The Court explained that “a government entity has broader discretion to restrict
speech when it acts in its role as employer, but the restriction it imposes must be directed at speech that has some potential to affect the entity’s operation” (*Garcetti v. Ceballos*, 2006, p. 1958). This statement appears to indicate the possibility that any level of potential disruption could justify restricting employee speech. Moreover, the Court did not elaborate on how courts were to determine whether an entity’s operation could potentially be disrupted. The Court noted that although there are an enormous variety of factual situations, the overarching objectives are evident, “when a citizen enters government service, the citizen must accept certain limitations on his or her freedom” (*Garcetti v. Ceballos*, 2006, p. 1958). The Court explained that “government employers, like private employers, need a significant degree of control over their employees’ words and actions; without it, there would be little chance for efficient provision of public services” (*Garcetti v. Ceballos*, 2006, p. 1958). In applying this guidance to the facts, the Supreme Court found that “the controlling factor in Ceballos’ case is that his expressions were made pursuant to his duties as a calendar deputy” (*Garcetti v. Ceballos*, 2006, pp. 1959-1960). The Court, therefore, held “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 them from employer discipline” (*Garcetti v. Ceballos*, 2006, p. 1960).

However, 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’” (*Garcetti v. Ceballos*, 2006, p. 1969). In response to this concern, the majority opinion of Justice Kennedy, which was joined by Justices Roberts, Scalia, Thomas, and
Alito, reserved that question. The Court stated:

Justice Souter suggests today’s decision may have important ramifications for academic freedom, at least as a constitutional value. . . . 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 of conduct today would apply in the same manner to a case involving speech related to scholarship and teaching.

*(Garcetti v. Ceballos, 2006, p. 1962)*

Despite the Supreme Court’s opinion to reserve its decision of the application of its holding in *Garcetti v. Ceballos* (2006) with regard to faculty speech in the classroom and in scholarship, the *Garcetti* opinion appears to add further problems to application of the public employee speech doctrine to college and university faculty. Wright (2007) argued that the Pickering-Connick-Garcetti test as it stands is poorly adapted to college and university academic freedom issues with First Amendment applications. Until the Supreme Court confronts this First Amendment issue directly, lower courts are free to apply the myriad of tests and analyses in decisions relating to speech by faculty.

*The Future of the Public Employee Speech Doctrine’s Application to Faculty at Public Colleges and Universities*

Although the Supreme Court has issued several significant decisions discussing the public employee doctrine, it has left unresolved the question of whether the Court’s holding in *Garcetti v. Ceballos* (2006) is applicable to the teaching and scholarship by professors at public colleges and universities. *Garcetti* held that speech made by a public
employee pursuant to that employee’s official duties is not protected by the First Amendment. Teaching and scholarship clearly appear to be part of a college professor’s official duties. Consequently, if the Court were to hold that \textit{Garcetti} applied directly to college and university faculty, this would result in a significant amount of professorial speech having no First Amendment protection. This holding would also produce a strange outcome. Professorial speech would not be protected if that speech was on a subject area in which a professor taught or did research, because then it would probably be held pursuant to his official job duties. On the other hand, if the professor spoke on a matter in which he did not do research or teach, it would likely not be considered pursuant to his official duties and his speech would be protected by the First Amendment. The effect would be that professors could not speak on matters of public concern related to their education and expertise, but could speak on matters of public concern where they did not teach or perform research in that area, areas where they may have little knowledge and insight. This seems a strange result and contrary to the purpose of academia. Professors make a major contribution to society by performing research and publishing in their field of expertise. The public, as well as the legislative, executive, and judicial branches of government, are provided with expert information on matters of public concern by professors who have studied in that specific area. Society benefits from the education and expertise of college and university faculty.

Additionally, as discussed above, it is evident that in regard to professorial speech, the question of how to define what is a matter of public concern is problematic. College and university professors are supposed to discuss matters of public concern, which include issues such as government spending, global warming, or United States
economic or social policy. Even a professor’s criticism of the running of a public university could be considered a matter of public concern as well as it being considered an internal dispute. The selection of faculty, the creation of a new program, the hiring of more part-time faculty and the establishment of academic standards could all be considered matters of public concern. The issue of what is a matter of public concern in a public college or university remains unresolved.

Current Health and Vitality of the First Amendment’s Protections for Faculty Speech

As this chapter demonstrates, the overall health and vitality of the First Amendment with regard to faculty speech is currently poor. The climate for faculty speech has not been this unfavorable since the McCarthy era, and faculty can expect their speech to be challenged, “whether they are outspoken liberals or conservatives, or they go about their teaching and research without making any waves” (Baron, 2006). The Supreme Court has not defined constitutional academic freedom and it has reserved the question of whether faculty scholarship and teaching implicates additional constitutional protection not fully considered in the Court’s public employee speech doctrine. Thus, lower courts are free to use a variety of analytical methods (and have utilized different analytical methods) on a case-by-case basis, which confuses the issue further and leads to inconsistent results.

Moreover, this is a time where faculty speech (academic freedom) and the First Amendment are at a pivotal point. The Court could rule in numerous directions on these issues. Because past decisions of the Court have found that academic freedom is a special concern of the First Amendment, the Court will have to take this statement into account in any decision. Nevertheless, there is very little other guiding precedent that would limit
the Court should it choose to limit free speech protection for professors.

The current federal administration and the events of 9/11 have exacerbated the perceived harm that could result from professorial speech. Added to this is the belief by many that higher education needs to be subject to more control and oversight by the state. The public is also more likely to scrutinize decisions of higher education institutions. Byrne (2004) argued that increased distrust of academic decision making, along with a confusing academic freedom doctrine, imperils the future of constitutional academic freedom. With the governing boards of these institutions often composed of political appointees, senior administrators tend to be more responsive to external political pressures than internal constituencies. Therefore, the potential conflict between faculty speech and administrative control is exacerbated. In the absence of a clarifying decision by the Supreme Court, the extent of First Amendment protection for faculty speech will continue to be in flux. Moreover, the Supreme Court faces a difficult and complex decision in determining the nature and extent of First Amendment protection for faculty speech or constitutional academic freedom.
CHAPTER V. RECOMMENDATIONS

Recommendations for Higher Education Administration Policy and Practice

Despite the fact that the United States Supreme Court reserved the legal issue of whether the First Amendment free speech clause of the Constitution provides protection for academic freedom, the Supreme Court’s jurisprudence has important implications for current higher education administration. Additionally, taking into consideration the reason why faculty members are different from other employees, and how the organization, governance, and administration of higher education reflects this difference, there are several recommendations that can be made for the administration of higher education. These implications and recommendations reflect the fact that faculty at public colleges and universities are unique state employees, yet are still public employees that have a responsibility and are accountable to the public they serve. Therefore, these recommendations not only utilize the existing Supreme Court opinions, but also take into consideration that the Court may carve out a specific academic freedom doctrine.

Additionally, if public college and university administrations demonstrate that they are already providing sufficient protection for the concept of academic freedom, the Court will be reluctant to proffer a specific academic freedom doctrine. Thus, it is imperative to higher education administration they provide sufficient institutional protection for academic freedom so as to avoid court involvement. This protection should consider that faculty are both citizens and public employees and also take into consideration that academic freedom is necessary for faculty to perform their unique role to society.

Although I will examine specific categories of faculty speech to offer
recommendations, there are several general recommendations that can be made for higher education administration. First, higher education administration should provide an academic freedom policy for faculty speech. This policy should be based on the role of faculty in the university as well as the institution’s educational mission. In light of the Supreme Court’s decision in *Garcetti v. Ceballos* (2006), discussed in the previous chapter, it is important that the parameters of academic freedom be specifically addressed and defined in regard to teaching and research that are part of the official job-related duties of faculty. The policy does not have to be overly detailed, but as much direction as possible should be provided to give notice to faculty of what speech will not be protected under the institution’s academic freedom policy. The policy should be somewhat general because it cannot cover every possible faculty speech issue that may arise. However, in evaluating disciplinary action based on speech, courts consider whether notice of what represents unacceptable behavior is provided prior to the disciplinary action. As seen by the cases discussed in this research, many public employee speech claims have arisen when there is no specific policy for employees and administrators to know when employees have crossed the line into unprotected speech. Thus, because the academic freedom policy cannot cover every possible faculty speech issue that may arise, it is also recommended that college and university administrators first provide warnings to faculty that their speech is unacceptable unless the speech is clearly an egregious violation of the academic freedom policy.

In the case of an institution’s academic freedom policy, faculty should take part in the formulation of the policy. Faculty input is necessary because they are the best source for information as to the level of academic freedom protection that is necessary to
perform their duties. Different disciplines may have specific speech issues that relate to their areas. Biology faculty, for example, may have speech concerns that are different from those in higher education administration or political science. It is also necessary because of the shared governance that is inherent in higher education institutions. Faculty are more likely to accept and follow policy where they have been involved in the decision. Additionally, the policy should be in agreement with and in furtherance of the educational mission of the college or university.

The establishment of policy with respect to faculty speech and academic freedom is important, but how this policy is applied and enforced is vital. Rules must be enforced uniformly and consistently. Kaplin and Lee (2000) warned that “educational institutions must be on the alert for situations where discipline is selectively imposed upon some disputing faculty members, but not on others, based on the sides taken or particular viewpoints expressed in the dispute” (p. 206). As discussed in the previous chapter, courts look at viewpoint discrimination with particular suspicion. The actual application of policy must be examined with consideration of the legitimate purpose of the university’s policy. Thus, any apparent inconsistency in application must be tied to a legitimate rationale and not be merely a pretext to punish faculty with unacceptable views.

In addition to these general recommendations for higher education administration, this chapter will discuss these recommendations in the context of some general categories of faculty speech. The application of academic freedom policy depends to a large extent on the nature and circumstances of the faculty speech at issue. The American Association of University Professors (AAUP) definition of academic freedom, as discussed in the
previous chapter, concluded that academic freedom “comprises three elements: freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action” (American Association of University Professors, 2001, p. 292).

The AAUP was begun by faculty efforts and first promulgated its definition of academic freedom in 1915. The organization has been intimately involved with academic freedom disputes from that time. Because of the extensive current acceptance of the AAUP statement, these classifications provide a good starting point to make recommendations as to what higher education administration should consider in determining whether to protect specific faculty speech under academic freedom.

The American Association of University Professor’s first academic freedom definition classification concerned the “full freedom of the teacher in the research and publication of the results” (American Association of University Professors, 2001, p. 3). The AAUP definition qualified this full freedom only by stating that it is subject to the adequate performance of the faculty member’s other duties and that research for pecuniary return should be based on an understanding with the university (American Association of University Professors, 2001).

The second category of faculty speech defined by the AAUP concerned the freedom of the teacher in the classroom in discussing the subject (American Association of University Professors, 2001). The AAUP qualified this statement by cautioning that faculty “should be careful not to introduce into their teaching controversial matter which has no relation to their subject” (American Association of University Professors, 2001, p. 3). The AAUP also noted here that “limitations of academic freedom because of religious
or other aims of the institution should be clearly stated in writing at the time of appointment” (American Association of University Professors, 2001, p. 3).

The third category of academic freedom involved the freedom of the teacher to speak or write as a citizen (American Association of University Professors, 2001). The AAUP stated that when faculty “speak or write as citizens, they should be free from institutional censorship or discipline” (American Association of University Professors, 2001, p. 4). However, the AAUP qualified this statement by adding that faculty’s “special position in the community imposes special obligations” (American Association of University Professors, 2001, p. 4). The AAUP cautioned that faculty as scholars and educational officers “should remember that the public may judge their profession and their institution by their utterances” (American Association of University Professors, 2001, p. 4). Thus, the AAUP stated that faculty “should at all times be accurate, should exercise appropriate restraint, should show respect for the opinion of others, and should make every effort to indicate that they are not speaking for the institution” (American Association of University Professors, 2001, p. 4).

However, because the AAUP definition of academic freedom is somewhat vague, as noted in the previous chapter, higher education administrators should consider the rationale underlying the concept of academic freedom. Thus, the unique role of higher education faculty and institutions in society should be considered in promulgating an academic freedom policy. This rationale was utilized in the Supreme Court cases that discussed academic freedom. Although the Supreme Court has never precisely defined academic freedom, the Court’s discussion of why academic freedom is of special concern is very enlightening in providing the rationale for protection of academic freedom.
Added to these factors, state college and university administration should also consider the Supreme Court’s jurisprudence with regard to public employee speech for additional guidance. State college and university faculty are both public employees and citizens. Thus, the Supreme Court’s public employee speech doctrine is also applicable. Under its public employee speech jurisprudence, the Supreme Court’s initial threshold question for determining whether a public employee speech is protected under the First Amendment involves whether the speech touches upon a matter of public concern. If the speech does involve a matter of public concern, the inquiry requires consideration of whether the government employer’s interest in the effective and efficient fulfillment of its responsibilities to the public outweighs the employee’s right to speak on a matter of public concern. This part of the test also involves determining whether the speech in question is potentially sufficiently disruptive to the government institution and destructive to the working relationships within the institution.

When these factors are considered together, higher education administration can act in the best interests of the institution and society. Higher education administrators will provide protection to faculty speech to allow faculty to perform their duties, while requiring that faculty as public employees supported by taxpayers are accountable to the public.

In combining these factors, this research indicates that the three classification elements of academic freedom as used in the AAUP’s definition did not reflect the Supreme Court’s jurisprudence related to public employee speech. Thus, the AAUP classification elements are changed to incorporate the current state of the law with regard to academic freedom and the public employee speech doctrine. This new classification
will assist public colleges and universities in promulgating an academic freedom policy that can also be used to evaluate faculty speech under the Supreme Court’s First Amendment jurisprudence relating to public employee speech. The new classification elements proposed are: (a) extracurricular speech involving faculty research and professional expertise, (b) classroom faculty speech, and (c) extracurricular speech not involving faculty research or disciplinary expertise.

*Extracurricular Speech Involving Faculty Research and Professional Expertise*

This classification element of academic freedom includes all faculty speech outside of class that is related, directly or indirectly, to faculty research and results irregardless of whether that speech is made in academic media or conferences. Although the AAUP classifications divide faculty speech into research and publication of the results and have a separate category for faculty speech as citizens, it is not easy to definitively separate these classifications. In utilizing the term extracurricular speech, I am recognizing and acknowledging that faculty often perform research and publish or discuss their results in non-traditional academic forums. Faculty not only research and publish their results in academic journals and discuss their results at academic conferences, but also publish their results in non-academic media and discuss their results in gatherings of non-academics. Faculty also publish and speak on topics related to their research in media and conferences that are devoted to non-academic practitioners in the field. Thus, economists may have their expert opinions written in general financial publications or may speak on a local television news show about issues that affect the economy. Higher education administration professors may speak to practitioners at conferences and publish in general education-related newspapers. Additionally, with the
interdisciplinary nature of academia today, the faculty member’s expertise is not confined to a narrow disciplinary area of study. Faculty may combine their expertise and knowledge of scientific research methods to societal problems not in their narrow field of study.

Consequently, faculty research and publication (orally or in writing) not only entails faculty speaking as researchers, but also entails faculty speaking as citizens. Even if faculty only present their results at a strictly academic conference or in an academic journal, these results emanate out of the conferences and journals and into the mainstream of society. Faculty research involves issues that affect society. This is the purpose of university research, to effectively produce and transfer knowledge.

In the Supreme Court’s academic freedom cases, the Court explained the importance of free inquiry that challenges the existing beliefs. The Court described the value of this role to our democracy in justifying the special protection afforded to educators by academic freedom. The Supreme Court explained the special importance to the country of academic freedom in free and open inquiry and the dissemination of new ideas:

No field of education is thoroughly comprehended by man that new discoveries cannot be made. Particularly is that true in the social sciences, where few, if any, principles are absolutes. Scholarship cannot flourish in an atmosphere of suspicion and mistrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise civilization will stagnate and die. (*Keyishian v. Board of Regents*, 1967, p. 603)

Disseminating academic knowledge to society is vital and is not confined to strictly
academic publications and conferences. Faculty research and professional expertise should benefit society. That is the purpose of the modern university in the United States. Faculty should not have to worry that something they state based on their research might result in disciplinary action by their institution. The fear of losing their job will result in a chilling effect on faculty who challenge the existing beliefs. Justice Douglas warned that where teachers are under surveillance for their external utterances and are in fear of losing their jobs, there cannot be any exercise of free intellect or real academic freedom (Adler v. Board of Education, 1952). Justice Douglas found that under these circumstances hesitancy and dogmatism take the place of inquiry (Adler v. Board of Education, 1952).

Under its public employee speech jurisprudence, the Supreme Court’s initial threshold question for determining whether a public employee speech is protected under the First Amendment is whether the speech touches upon a matter of public concern. To have value, faculty research must touch upon something that is a matter of some public concern. Indeed, the most controversial of research, and the most likely to result in discipline by the institution when faculty discuss their results, directly touches upon matters of public concern or it would not be very controversial. Thus, faculty speech related to their research or field of study (interpreted broadly) could be considered speech on a matter of public concern. Consequently, when faculty discuss their research with anyone or in any media, they are speaking on a matter of public concern.

Once it is found that the public employee is speaking on a matter of public concern, the next part of the public employee speech balancing test requires consideration of whether the government employer’s interest in the effective and efficient fulfillment of
its responsibilities to the public outweighs the employee’s right to speak on a matter of
public concern. This part of the test also involves determining whether the speech in
question is potentially sufficiently disruptive to the institution and destructive to the
working relationships inside the institution. Regarding this part of the test, faculty speech
that takes different viewpoints or questions accepted knowledge or existing theories is a
goal of academic research. Although the results of academic research could confirm
existing beliefs, the discovery of new knowledge is vital to the advancement of society
and an important role of academic research. Because faculty research is expected to
challenge and test existing beliefs and theories, it can hardly be disruptive to the
institution or the working relationship. The dissemination of new theories or findings
actually enhances the reputation of the higher education institution. Many higher
education institutions make huge efforts to disseminate this research to the media.

Therefore, this element of faculty speech could be fully protected under First
Amendment academic freedom. It is recommended that public college and university
administration should not discipline faculty for this type or category of speech.
Administrators may disclaim this speech as the views of the faculty and not the
university, but should protect the faculty member’s rights under its academic freedom
policy. However, in these times when much of the public has attended college and has
been subject to the research findings of faculty on a regular basis in the general news
media, it is unlikely that most of the public believes that a faculty member is speaking for
the university. A higher education institution may even take the opportunity to make a
public statement regarding its commitment to free speech and openness to new ideas and
concepts as part of its educational mission. Nevertheless, administrators who are also
faculty members should make every effort to indicate they are not speaking for the university.

Faculty speech that involves research and publication of results in academic journals is subject to the full protection of academic freedom. This type of faculty speech is to be evaluated through the standards of the discipline through the process of peer review. Thus, faculty are accountable as employees for research and publication, but this is done through the reward system of tenure, promotion, and merit raises. Peer review by faculty in the relevant department is performed based on the standards of the faculty’s discipline and that of the institution. It is recommended that higher education administrators ensure that the evaluation process is fair and personal biases or prejudices do not enter the evaluation process.

It is also recommended that faculty speech that involves writing, research, or presentations in non-academic settings should be protected both as faculty speaking as citizens and as faculty performing research and publication of the results. This is a primary role of faculty research, to disseminate knowledge to the public. Faculty may utilize this speech as part of their vita for promotion, tenure, or merit evaluation depending on its value in the individual institution’s evaluation process. However, similarly to academic publishing and presentations, faculty should not be subject to censorship or viewpoint discrimination.

Nevertheless, the AAUP’s caution concerning interference with the faculty member’s other duties are important here. Publication in non-academic media or presenting at non-academic conferences may be done for pecuniary gain by faculty. Faculty must not neglect their duties in the pursuit of external financial remuneration.
Additionally, the use of faculty research in non-academic publications and presentations provides the temptation to faculty using these other sources for pecuniary gain to have their research and findings influenced by the lure of financial reward for supporting certain results in their research. Thus, it is recommended that this type of speech be subject to adequate performance of the faculty member’s other duties and that research for pecuniary gain should be based on the policy of the institution, including the appropriate ethical standards in research and publication. Consequently, faculty who are disciplined for neglecting their primary duties or for violations of ethical integrity at the institution cannot claim a First Amendment academic freedom violation unless the reason for the discipline is a pretext to stifle faculty speech. Additionally, public university faculty may have an equal protection claim if the reason for the discipline is not applied to others (in actual practice).

*Classroom Faculty Speech*

Teaching is a primary function of public colleges and universities. This category consists of faculty speech in the classroom and corresponds directly to the classification of the AAUP in its definition of academic freedom. College and university faculty exercise a higher degree of control over speech in this forum (Benedict, 2007). Both higher education administrators and faculty bear the joint responsibility for ensuring that students receive the proper education. However, despite the fact that higher education administration has the final approval over degree requirements and course offerings, it is the faculty that determine the academic requirements and course content. Higher education administrators are ill-equipped to determine the content of each course or prepare course syllabi for each course. Instead, they defer to those faculty in each
disciplinary field, whose duties include researching and attending conferences in their respective fields of study. Their advanced education in that discipline and the need to keep up with current academic developments in their field make the disciplinary faculty uniquely qualified to determine the material that students need to learn. Departmental faculty also determine what courses should be taught. They determine what courses are mandatory (required) and what courses are optional (elective). Although this is subject to approval by appropriate curriculum committees and the higher education administration, it is an area in which disciplinary faculty are the professional experts and their opinions carry the most weight. Higher education administrators do need to review the arguments and rationale for the course offerings to ensure that these reasons are valid and are in accordance with the mission of the institution.

College and university faculty, as professional experts in their disciplines, have a great deal of autonomy in teaching. Faculty are generally not given a script or even a specific syllabus to follow in teaching a class. Faculty provide their educated opinions as part of their jobs. As part of the culture of higher education, faculty are not told what to say or what opinion to take. It would be a violation of their unique role in society if the institution dictated what opinion faculty should take in teaching their subjects. The organization, governance, and administration enforces faculty’s role. Higher education institutions choose not to provide a specific course requirement detailing what subject material must be covered and when it must be covered in class. Thus, faculty are treated as autonomous professionals.

The Supreme Court has recognized that both faculty and the higher education institution are involved in the decision of what courses to teach and what is to be taught.
However, the Court has also recognized that faculty speech needs to be free from government control. The Court asserted that teachers play a special role in the exercise of democracy. Teachers train students to protect and continue our democracy. Justice Frankfurter found that “to regard teachers—in our entire educational system, from primary to university—as the priests of our democracy is therefore not to indulge in hyperbole” (*Wieman v. Uptegraft*, 1952, p. 196). Teachers pass on the values inherent in our Constitution. Thus, Justice Frankfurter cautioned that government must have a compelling reason to regulate faculty speech in a classroom lecture (*Sweezy v. New Hampshire*, 1957). Justice Frankfurter noted that teachers have a special role that entails distinctive First Amendment protection (*Wieman v. Uptegraft*, 1952). Justice Frankfurter explained:

> In view of the nature of the teacher’s relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation.

(*Wieman v. Uptegraft*, 1952, p. 194)

The justifications offered by the Supreme Court in recognizing academic freedom as a special concern of the First Amendment recognized the unique role of teachers in American society. Probably the most often quoted statement relating to the value of academic freedom to society was made by Justice Brennan:

> 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 which cast a pall of orthodoxy over the classroom. (*Keyishian v. Board of Regents*, 1967, p. 603)

In examining faculty speech in the classroom under the Supreme Court’s public employee speech jurisprudence, the threshold question is whether the teacher is speaking on a matter of public concern. When faculty speak on a matter of public concern that relates to the course being taught, academic freedom is implicated. For example, when an economics professor criticizes the Bush administration for its economic policy in an economics class, this speech is on a matter of public concern. When a higher education administration professor teaching a higher education administration class in a state university criticizes the institution’s board of directors for its admissions policies, this speech would involve a matter of public concern. Punishment of the teacher for this type of speech would involve viewpoint discrimination and would clearly implicate First Amendment concerns.

Two courts of appeals have even examined whether the assignment of a letter grade represents a professor’s protected viewpoint. In *Parate v. Isibor* (1989), the Sixth Circuit Court of Appeals held that the assignment of a letter grade by a professor is a symbolic message and is entitled to some First Amendment protection (*Parate v. Isibor*, 1989). The court found that the professor’s assignment of grades is central to the professor’s teaching methods and therefore a professor should retain wide discretion over the evaluation of students (*Parate v. Isibor*, 1989). However, demonstrating the need for guidance by the Supreme Court on academic freedom, a different court of appeals ruled the opposite. In *Brown v. Armenti* (2001), the United States Court of Appeals for the Third Circuit upheld the suspension of a professor for refusing to follow an order to
change the grade of a student. Professor Brown had been teaching at California University of Pennsylvania for almost three decades and had been tenured since 1972 (*Brown v. Armenti*, 2001). Brown had refused to follow an order to change the grade of a student in a practicum class after the student attended only three of the fifteen required meetings. Armenti, the president of the university, ordered that the grade be changed to an incomplete (*Brown v. Armenti*, 2001). Brown refused to change the grade and wrote a letter to the board of trustees criticizing the president.

Brown claimed that he had been suspended in retaliation for refusing to change the grade (*Brown v. Armenti*, 2001). The Third Circuit held for the university. The court discussed in some detail those aspects of academic freedom that belong to the institution and found that the professor was acting as a proxy for the university (*Brown v. Armenti*, 2001). Therefore, the professor has to follow the directions of the university with regard to what is to be taught, which included how courses will be graded. However, the court noted that had the professor been speaking generally on the issue of grade inflation, the speech might have been protected as a matter of public interest (*Brown v. Armenti*, 2001).

These conflicting opinions reiterate the point that constitutional academic freedom is recognized, but without the Supreme Court promulgating a specific doctrine, courts can apply different analyses in deciding similar issues. Many of these conflicts involve areas where the institution and the faculty have joint responsibility. Higher education institutions are not hierarchical, and much of the authority is decentralized and given to the faculty. However, the governance, organization, and administration of higher education function well with this joint authority and responsibility in most cases. Although conflicts are rare, when the administration and faculty disagree in areas where
the faculty are given the primary responsibility, the faculty member’s judgment should be
given a great degree of deference. However, higher education administrators have the
responsibility of ensuring that faculty’s decisions are in accordance with the institutions
policies and procedures and that the faculty decision is fair and justified and not the result
of bias. Regarding the issue of grade assignment, it is recommended that the professor
have academic freedom to determine the grade of the students as a part of academic
freedom and free speech. Administrators must ensure the decision is fair and unbiased
and is justified in accord with the faculty member’s grading criteria. If the faculty
member’s grade passes this scrutiny and the administration still insists upon changing a
student’s grade for some legitimate reason, the administration can do this directly and not
require the faculty member to change the grade personally.

The next part of the public employee speech test involves balancing the
government employer’s interest in the effective and efficient fulfillment of its
responsibilities to the public with the employee’s right to speak on a matter of public
concern. This part of the test also involves determining whether the speech in question is
potentially sufficiently disruptive to the institution and destructive to the working
relationship of the institution. The outcome would depend on the nature and characteristic
of the faculty speech. If the faculty speech was directly related to the subject matter of the
class, as in the above examples, it would be likely that a balancing test would weigh in
favor of the teacher. Nevertheless, the Supreme Court has upheld time, place, and manner
regulation of public employee speech. Faculty are not free to say whatever they want in
class. Thus, a faculty member’s speech that creates a hostile environment may be
prohibited unless it is directly related to teaching the subject matter. For example, the use
of lewd or vulgar language by a professor in teaching a class may or may not be considered protected under the First Amendment and academic freedom. Two court of appeals decisions from the same court can show how the similar type of language can result in whether the First Amendment provides for protection of speech depending on the circumstances. The United States Court of Appeals for the Sixth Circuit was faced with two cases of allegedly vulgar and offensive faculty speech in the classroom. In *Bonnell v. Lorenzo* (2001), a student filed a complaint at Macomb Community College, alleging that Professor Bonnell had consistently engaged in profanity and other vulgar conduct in class. Because the college had received similar complaints in the past, the administration informed Bonnell of the complaint and ordered him to stop engaging in such conduct as it was a potential violation of college policy and could render the college liable under Title IX (*Bonnell v. Lorenzo*, 2001). Bonnell claimed that the language was relevant to the content and discussion in his English classes. Eight months later, the college received another letter with similar complaints. In the letter, the complaining student asked for an apology and wanted Bonnell terminated. In response, Bonnell wrote an eight-page satirical essay (*Bonnell v. Lorenzo*, 2001). Bonnell circulated a copy of the complaint (with the names blacked out) and his essay to all of his students, to numerous faculty members, and to television and the newspapers. Bonnell was subsequently suspended with pay pending investigation.

Bonnell was speaking both as a citizen and as an employee (Bonnell v. Lorenzo, 2001). This was a case of mixed speech that related to both public and private concerns.

Bonnell’s essay on academic freedom in higher education that was circulated to students, faculty, and the media was a matter of public concern (Bonnell v. Lorenzo, 2001). However, Bonnell’ classroom speech that gave rise to the sexual harassment complaint and disciplinary measures did not relate to a matter of public concern (Bonnell v. Lorenzo, 2001). The court of appeals found that if any part of the speech involved an issue of public concern that the court should apply the Pickering balancing test (Bonnell v. Lorenzo, 2001). However, the court held that the institution’s interest in maintaining the confidentiality of sexual harassment complaints, avoiding institutional liability for allowing harassment to continue, and providing a safe and hostility-free classrooms for its students outweighed Bonnell’s interests in academic freedom (Bonnell v. Lorenzo, 2001).

The Sixth Circuit Court of Appeals decided another case dealing with vulgar faculty speech in the classroom later that same year (Hardy v. Jefferson Community College, 2001). However, in Hardy v. Jefferson Community College (2001), the faculty member prevailed. In this case, an adjunct instructor was not renewed after he led a classroom discussion on the impact of oppressive and disparaging words, including “girl,” “faggot,” and “bitch” (Hardy v. Jefferson Community College, 2001). Hardy taught in the college’s communications program, teaching a class on introductory personal communication. As part of his classroom discussion, students examined how language is used to marginalize minorities and other oppressed groups in society (Hardy v. Jefferson Community College, 2001). One student complained that the discussion was
Similar to Bonnell, Hardy argued that the use of such words was related to the discussion on language and society (Hardy v. Jefferson Community College, 2001). In this case the Sixth Circuit Court of Appeals applied the Pickering/Connick balancing test and agreed with Hardy (Hardy v. Jefferson Community College, 2001). This case may be distinguished from Bonnell v. Lorenzo (2001) because the court found that the use of vulgar and profane language by Hardy was directly related to the topic of discussion. On the other hand, Bonnell appeared to continue to interject his vulgar speech regarding sex into discussions that had no connection to that topic. Additionally, in Bonnell v. Lorenzo (2001), the Sixth Circuit based its holding on the fact that Bonnell had disclosed the contents of an internal complaint of sexual harassment, which was contrary to the confidentiality policy of the university.

Despite the fact that higher education administrators can impose time, place, and manner restrictions on teacher speech in the classroom, administrators should not discipline faculty solely for expressing a viewpoint with which it disagrees. Viewpoint discrimination is particularly suspect in First Amendment cases. Content regulations are less suspect, but caution is recommended in regulating content. Content regulations are also problematic because the detailed content of each class is not prescribed for the teacher to follow exactly. The governance, administration, and organization of higher education administration provides faculty with this autonomy and authority as faculty are professionals who best know the subject matter. Nevertheless, teachers should not be able to utilize substantial class time for discussion of matters not related to the subject matter of the class. Where the dispute over faculty speech is not based on the viewpoint of the
faculty speech, but only with the teacher’s speech not being related to the subject matter of the class, administrators can require that the faculty member teach the subject matter of the course. However, higher education administration must be careful to balance the constitutional (academic freedom) rights of the professor with a legitimate educational concern of the institution. A good example of this can be found in the case of *Bishop v. Aronov* (1991). In this case the university asserted its rights to regulate course content against that of the faculty member’s classroom right in a case involving religious speech. Bishop was a professor of health, physical education, and recreation at the University of Alabama, and taught exercise physiology to undergraduates and graduates (*Bishop v. Aronov*, 1991). Bishop occasionally made comments in class about his Christian faith and its relationship to human physiology. Bishop also told his students that his relationship with Jesus Christ influenced everything he did in life. Bishop also organized special discussion sessions after class and invited any students and faculty who were interested in exploring the Christian relationship with exercise physiology (*Bishop v. Aronov*, 1991).

After receiving several complaints from students, the university wrote him a letter asking that he refrain from interjecting his religious beliefs in classes and from scheduling the optional class to discuss religion (*Bishop v. Aronov*, 1991). The letter noted Bishop’s right of academic freedom and his right to hold and speak about his religious views, but asked that he not subject his students to his religious views in class. Bishop filed suit alleging that the letter violated his First Amendment rights. The district court held for Bishop, but the Eleventh Circuit Court of Appeals reversed (*Bishop v. Aronov*, 1991). The court of appeals recognized the right of the university to control the content of its curriculum. The court found that as long as the institution does so
reasonably, a college or university has the authority to direct curriculum based conduct of teachers (Bishop v. Aronov, 1991). The court interpreted the contents of the letter narrowly to include no more of Bishop’s speech than was necessary to restrict employee speech. The court found that the university had a legitimate interest in not subjecting students to religious proselytizing in an official university class.

The court of appeals did find that Bishop could continue to conduct Christian discussion group meetings for those interested (Bishop v. Aronov, 1991). However, the court also held that in doing so, Bishop must clearly state to his classes that these religious meetings are not required and that they will not affect his grading. To further ensure that students do not feel coerced into attending these optional sessions, the court mandated that Bishop must institute a blind grading system for his regular classes (Bishop v. Aronov, 1991). In its decision, the Eleventh Circuit Court of Appeals noted that academic freedom is not an independent First Amendment right, but the university must serve its own interests and that of the professors in pursuit of academic freedom (Bishop v. Aronov, 1991).

The Bishop case provides good guidance for higher education administration in balancing faculty academic freedom with the effective and efficient performance of the higher education institution’s public function. Thus, the content of professorial speech in the classroom can be regulated generally to ensure that it relates to the subject of the course. The AAUP’s caution that faculty “should be careful not to introduce into their teaching controversial matter which has no relation to the subject” (American Association of University Professors, 2001, p. 3) is somewhat helpful, but is too vague and ambiguous to provide sufficient guidance for higher education administration. The
major problem is the word “controversial.” Who is to determine what material is controversial? This could lead to content or viewpoint discrimination where some subjects or viewpoints are deemed controversial while others that agree with the administration are deemed non-controversial. Controversial can be interpreted to mean material with which there are opposing views. Higher education should not avoid material where there are opposing views. Society is always faced with opposing views and people who disagree on various issues. Higher education should teach students how to critically think about opposing views, not avoid the issue entirely. Thus, college or university teaching should be the place where students are exposed to views and opinions that are different from their own. Students should be encouraged and taught to question their own views and those of others in a disciplined manner. Therefore, for academic freedom purposes, it is recommended that the term “controversial” not be utilized in higher education institutions’ academic freedom policy definition.

Instead of the AAUP caution regarding the introduction of “controversial” matter into the classroom, a better caveat to add to the academic freedom policy of teachers in the classroom would be that teachers should be careful not to introduce matter into the classroom that has no pedagogical relationship to the subject. This does not mean that every statement by a teacher in class must relate directly to the subject, but when teachers stray from the subject matter that speech may lose its academic freedom protection. The analysis would depend on the extent the speech touches upon a matter of public concern and the extent of this speech interferes with the mission of the institution in performing its public function or potential disruption to the institution in fulfilling its educational purpose. For example, a statement from a professor in an economics class that criticizes
the Bush administration’s reasons for entering Iraq may be protected even if it did not relate to the a discussion of economics. The issue is clearly one of public concern. If the administration does not mandate that teachers cannot discuss any topic except those directly related to the subject matter of the course (content) or if the institution does not prohibit statements supporting the President’s actions (viewpoint), then content or viewpoint discrimination may implicate a First Amendment violation.

In summary, the First Amendment appears to support the concept of faculty academic freedom in the classroom with some regulation being acceptable as long as it has some legitimate public or educational purpose. However, the higher education institution has more control over faculty speech in the classroom than it has over faculty speech in research and publication of the results. Nevertheless, this control is limited and it is recommended that any restriction of faculty speech in the classroom be based on the accomplishment of the institution’s mission and be related to its specific educational goals. Where faculty speech is related to the subject matter of the class, it is recommended that higher education provide the protection of academic freedom for this speech unless there are other issues that do not implicate the First Amendment. Viewpoint discrimination should be avoided and content restrictions should be limited to subject matter of the course.

*Extracurricular Speech Not Involving Faculty Research or Disciplinary Expertise*

This classification element includes all faculty speech outside of the classroom that is not related to faculty research or disciplinary expertise. This classification covers a broad range of faculty speech. Unlike the AAUP classification, it includes speech that may or may not be considered faculty speaking as citizens. The AAUP defined this
element of academic freedom as the freedom of faculty to write or speak as citizens, whereas the Supreme Court’s public employee speech jurisprudence does not find that all faculty speech that does not involve research publication or classroom teaching is faculty speaking as citizens for First Amendment purposes. Consequently, courts may find that some faculty speech in this category may not implicate faculty speaking as citizens on matters of public concern, but may involve a purely internal employee dispute and thereby fail the first prong of the public employee speech test and not involve a First Amendment speech violation (Connick v. Myers, 1983).

Nevertheless, this element of faculty speech bears the closest relationship to the public employee speech doctrine. It includes faculty speaking out publicly about issues related to the administration of a higher education institution that is supported by public financing. The Supreme Court’s public employee speech jurisprudence found that some matters, especially those dealing with public education, may appear to be purely internal administrative issues, but in actuality may be issues of public concern because they affect the use of public taxpayer money. Pickering v. Board of Education (1968) recognized the role of teachers in conveying to the public information about how their tax dollars are being spent. The Supreme Court, in Pickering, explained that “teachers are, as a class, the members of the community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent” (Pickering v. Board of Education, 1968, p. 572). Teachers in a school are in the best position to see how that school is spending taxpayer dollars. Teachers also have the expertise to analyze whether taxpayer money is being wasted. Although Pickering was a local high school teacher, this inside knowledge and expertise is even more important in bringing college and university
practices to the public. Because of the proximity and organization of higher education institutions and the complication of its funding and spending, faculty in public colleges and universities may be more important sources for conveying information to the public than that of a high school teacher.

However, there are some aspects of the unique relationship of faculty that need to be considered in the application of this doctrine. The governance, administration, and organization of higher education institutions directly involve faculty input into institutional decision making. Under shared governance, faculty speech on issues of administration and governance of higher education institutions are mandated by the institution and an important part of the history and culture of higher education administration. Internal speech by faculty is not just a cultural expectation of shared governance, but is a professional requirement of faculty at an institution of higher education. The requirement for tenure usually involves teaching, research, and service. The obligation of faculty is not only to teach and research, but faculty also have an obligation to actively take part in the governance of the institution. This is part of the service obligation of faculty. It is especially important that senior faculty help formulate and implement policy. The future of the institution requires faculty input in its governance and policy decisions. Thus, faculty speech on what might on the surface appear as purely internal employment issues may be a required functional role of faculty in higher education administration. When faculty speak on these issues, not to the public, but to some internal parties, this speech may be nonetheless protected by the Supreme Court’s public employee speech jurisprudence as long as it is related to a matter of public concern. The Supreme Court found that a public employee’s speech on a matter of public
concern was protected in a private conversation between a public employee and her immediate supervisor (Givhan v. Western Line Consolidated School District, 1979). Consequently, faculty speech that affects a matter of public concern does not have to be communicated to the public, but could merely be communicated internally to be protected. Thus, faculty expressing their views in private to administrators on issues such as teaching load, admissions policies, grading, course offerings, elimination of majors, and other issues that appear to be of public concern may invoke First Amendment protection. Additionally, the Supreme Court has found that a private conversation between two employees in a non-public area of a workplace that discussed a matter of public concern was protected under the First Amendment (Rankin v. McPherson, 1987).

Once it is determined that an issue is one of public concern, the next step is to determine whether the faculty speech interferes with the effective and efficient functioning of the public entity. The unique role of faculty in the governance, administration, and organization of higher education institutions must be considered in this analysis. Because faculty are autonomous and share governance with the administration, faculty disagreement with the administration over numerous issues is common and faculty speech on these issues rarely affects the efficient and effective operation of the higher education institution. Faculty in some of the most revered higher education institutions have differed openly with the administration on matters that appear to be purely internal governance and administration. For example, faculty votes of no confidence for an institution’s president or dean are common and do not have the same disruptive effect as would lesser protests in other areas of public employment. In Connick v. Myers (1983), the firing of an assistant district attorney for circulating a questionnaire
about office policies was upheld by the Supreme Court as disruptive to the working relationship of the government entity. Faculty speech opposing administrative policies and actions is normal and usually not disruptive to the extent it would affect the effective and efficient operations of the higher education institution. Moreover, faculty speech is important to ensure the effective and efficient administration of higher education institutions.

The nature of faculty work presents several problems in applying the public employee speech doctrine. Professors do much of their work outside of class and outside of their offices. They often discuss their research informally, as well as formally at conferences. Faculty often interact with students, administrators, and peers outside of their offices and classrooms. Additionally, unlike other government offices, many areas of college and university campuses are open to the public. There is no clear delineation of what comprises the workplace. Thus, it is difficult to determine when a professor is speaking strictly as a private citizen and when a professor is speaking as an employee based only on the location of the speech. For example, in Trejo v. Shoben (2003), the United States Court of Appeals for the Seventh Circuit found that the mere fact that speech occurs among university personnel does not transform that speech into speech related to matters of public concern. The University of Illinois Urbana-Champaign terminated the contract of an untenured assistant professor after receiving several complaints about his conduct at a research conference in Canada (Trejo v. Shoben, 2003). Several professors from different universities and several graduate students from the University of Illinois engaged in casual conversations over dinner and drinks. The discussions were sexual in nature and Trejo made several sexual comments and solicited
female companionship (*Trejo v. Shoben*, 2003). Trejo appealed his dismissal and argued that the conversations were intellectual in nature and based upon a television documentary about primates. The district court dismissed Trejo’s suit and the Seventh Circuit Court of Appeals affirmed (*Trejo v. Shoben*, 2003). The Seventh Circuit held that Trejo’s speech was related to matters of only private concern.

Faculty autonomy with regard to where work is performed also results in some on-campus speech having First Amendment protection. For example, it is common for faculty to post and display material on their office doors and other departmental office locations. Although the institution could totally prohibit postings and displays (as many government agencies do), once the institution allows these postings it cannot allow only certain viewpoints and not others. Thus, even in limited public forums viewpoint discrimination is not allowed under the First Amendment (Benedict & McMillen, 2005). For example, *Burnham v. Ianni* (1997) involved a history department photographic display. The history department’s display case was used to display photographs of history professors in costumes and props related to their teaching and research interests. Two of the eleven professors posed with weapons. One professor posed with a .45 caliber military pistol and the other posed with a Roman sword (*Burnham v. Ianni*, 1997). There was a complaint relayed from the university’s affirmative action officer who claimed the two photos of professors with weapons was related to a threat sent to an unrelated professor several weeks earlier. The affirmative action officer also claimed the display constituted sexual harassment and demanded the two photos be removed (*Burnham v. Ianni*, 1997). The history department refused to remove the photos. However, after the faculty had several meetings with Chancellor Ianni, the chancellor ordered the police to
remove the photos.

The two professors filed suit, alleging a constitutional violation of their free speech rights (*Burnham v. Ianni*, 1997). The United States Court of Appeals for the Eighth Circuit held that the photographs were expressive conduct by the professors (*Burnham v. Ianni*, 1997). The court found that the dispute was more than merely an internal employee grievance. It involved a content-based decision regarding the history department’s public display. Chancellor Ianni also attempted to apply a *Pickering* balancing test, stating that the removal of the photos was necessary to promote an efficient and harmonious workplace. However, the court of appeals found that there was no evidence that the photos were linked to any threats or exacerbated an atmosphere of fear on the campus (*Burnham v. Ianni*, 1997). The professor who was threatened did not even consider those photos a threat (*Burnham v. Ianni*, 1997).

Thus, the court examined the nature of the faculty speech and the reasons for the university’s curtailment of faculty speech. This case demonstrates that faculty speech on campus does not have to take place in a classroom to be protected. The expressive activity does not even have to consist of verbal speech. Expressive behavior that conveys an educationally related message may be protected. Many faculty hang political or other cartoons on their doors. This case indicates that this form of faculty expression (or speech) may be protected by the courts.

Consequently, higher education administration has to examine the specific nature of the faculty speech and ensure that curtailment has a legitimate educational rationale. Faculty speech must not be curtailed simply because the administration does not like the message. Higher education administrators must also ensure that policy and practice
supports any decision to regulate this type of speech.

Future Research Directions

More research is needed to examine the historical basis for a connection between the concept of faculty speech and the First Amendment in the United States. Research has been done regarding the general history of academic freedom, but that research only traces the concept of academic freedom into the United States beginning in the late nineteenth century, culminating with the AAUP statement of 1915. However, institutions of higher education existed in America from colonial times and, although not referred to as academic freedom, the concept of professorial speech rights might have had some early relationship to First Amendment, at least in terms of the parallel free speech values of the times. Free speech was greatly valued by the Founding Fathers and this value might have had some comparable manifestation in higher educational institutions. Likewise, constitutional academic freedom has been traced to the Supreme Court opinions in the latter half of the twentieth century. Research into whether there were any legal controversies over professorial speech in the early history of the United States is needed. Legal scholars often attempt to examine the “original intent” of the Constitution, particularly in regard to the Bill of Rights. Because the term academic freedom has only been used in legal discussions in more recent times, the original intent in regard to academic freedom does not appear to be traceable to the early history of the United States. However, free speech was an issue that was important to the drafters of the Constitution. The issue of academic freedom, albeit in terms of faculty free speech, might have arisen as an issue in the history of early American higher education.

More research is also needed into the relationship between academic freedom and
university governance, administration, and management. What role did academic freedom play, if any, in the development of higher education administration and management? Does academic freedom provide advantages or disadvantages in the administration and management of higher education institutions? It is sometimes recommended that universities should be managed as for-profit corporations. Employees of private corporations do not have the same speech protection as faculty members. To what extent did academic freedom contribute to the unique development of higher education management, administration, and governance in contrast to that of private corporations? How was this good or bad? Is this relationship changing with the recent growth of for-profit educational institutions? Does the existence of academic freedom provide positive benefits that have enhanced the value of higher education institutions and helped institutions accomplish their missions?

Because the Supreme Court has not provided a functional definition of academic freedom, there is little discussion of whether constitutional academic freedom should be limited only to faculty at public colleges and universities and not to K-12 public school teachers. Byrne (1989) argued that the protections offered by academic freedom make sense only for teachers who are also scholars or researchers, work not generally expected of elementary and secondary school teachers. Additionally, the management of K-12 schools and, to an extent, community colleges is generally more hierarchical than at four-year colleges and universities. The management of colleges and universities usually involves a degree of shared management with the faculty, as well as highly decentralized management. Elementary and secondary schools involve less shared management. More research is needed to determine whether the protections of constitutional academic
freedom should be more applicable to college and university faculty than to K-12 teachers.

Future research is needed to determine if faculty at public colleges and universities are significantly different from other government employees to warrant a distinct analysis of their First Amendment free speech rights. In *Garcetti v. Ceballos* (2006), the Supreme Court reserved the question of whether college professors should be afforded additional constitutional protection as compared to other government employees. However, before the Court can resolve this issue some rationale must be advanced to establish that professors are sufficiently different from other public employees generally so as to justify this additional First Amendment protection. Why should college and university faculty speech be afforded special or additional First Amendment protection from that of other public employees? Public colleges and universities must be significantly different from other public institutions and/or the role of college faculty must be shown to be significantly different from that of other public employees to support excepting faculty from the applicability of the general public employee speech doctrine.

Additionally, if it is resolved to the Court’s satisfaction that college and university faculty are sufficiently different from other public employees, the Court must determine how the public employee speech doctrine would apply to faculty, if at all. The Court must carve out an explicit faculty employee speech doctrine or it must modify the existing public employee speech doctrine. Research is needed to determine how to balance the interests of the university administration in performing its public duties with the rights of the faculty in the free speech protection provided by the First Amendment. This research
should consider that university administration involves shared governance and management. Unlike other public sector organizations, universities involve the faculty in the management and governance of the organization. Most other government organizations involve hierarchical governance and management.

Conclusion

The general concept of academic freedom is recognized, but the parameters are not fully established. The legal application of academic freedom in public colleges and universities is subject to the law relating to public employees as employees and as citizens. However, college professors in state universities are unique public employees and citizens. They are employed to express their views related to their expertise of the subject matter in the classroom, in publications, and at conferences. They are also citizens who, as the AAUP and the courts recognize, should be free to speak on matters of public concern. However, both the courts and the AAUP recognize that this right has special obligations. Thus, it is difficult to determine when faculty speech exceeds the boundaries of academic freedom. The AAUP definition provides some general guidance and cautions, but as the court cases discussed above indicate, there is a grey line that is often difficult to determine without examining the specific circumstances.

The court cases provide some guidance for institutions and faculty in determining the extent of protection provided by academic freedom. Higher education administrators that have legitimate concerns and make efforts to ensure that no more faculty speech is restricted than is necessary have a better chance of success against a First Amendment suit by a faculty member. Additionally, courts will attempt to decide the case on issues unrelated to faculty speech on matters of public concern. Courts will also balance the
interests of institutional academic freedom and faculty academic freedom in making a
decision. Nevertheless, academic freedom remains an amorphous right where
determining the boundaries remains an extremely difficult task for both faculty and
administrators.
REFERENCES


Bishop v. Aronov, 926 F.2d (11th Cir. 1991).


Bonnell v. Lorenzo, 241 F.3d 800 (6th Cir. 2001).

Brown v. Armenti, 247 F.3d 69 (3rd Cir. 2001).

Burnham v. Ianni, 119 F.3d 668 (8th Cir. 1997).


Hoeveler, J. D., Jr. (1997). The university and the social gospel: The intellectual origins


Parate v. Isibor, 868 F.2d 821 (6th Cir. 1989).


Trejo v. Shoben, 319 F.3d 878 (7th Cir. 2003).

U.S. Const. amend. I.

U.S. Const. amend. XIV.


Veysey, L. R. (1965). *The emergence of the American university*. Chicago: University of
Chicago Press.


