

**HUSCH BLACKWELL**

**Employee Speech and Religious Freedom**


Issues in Higher Education Webinar Series  
Presented by Derek Teeter and Claire Hawley  
Wednesday, November 8, 2023

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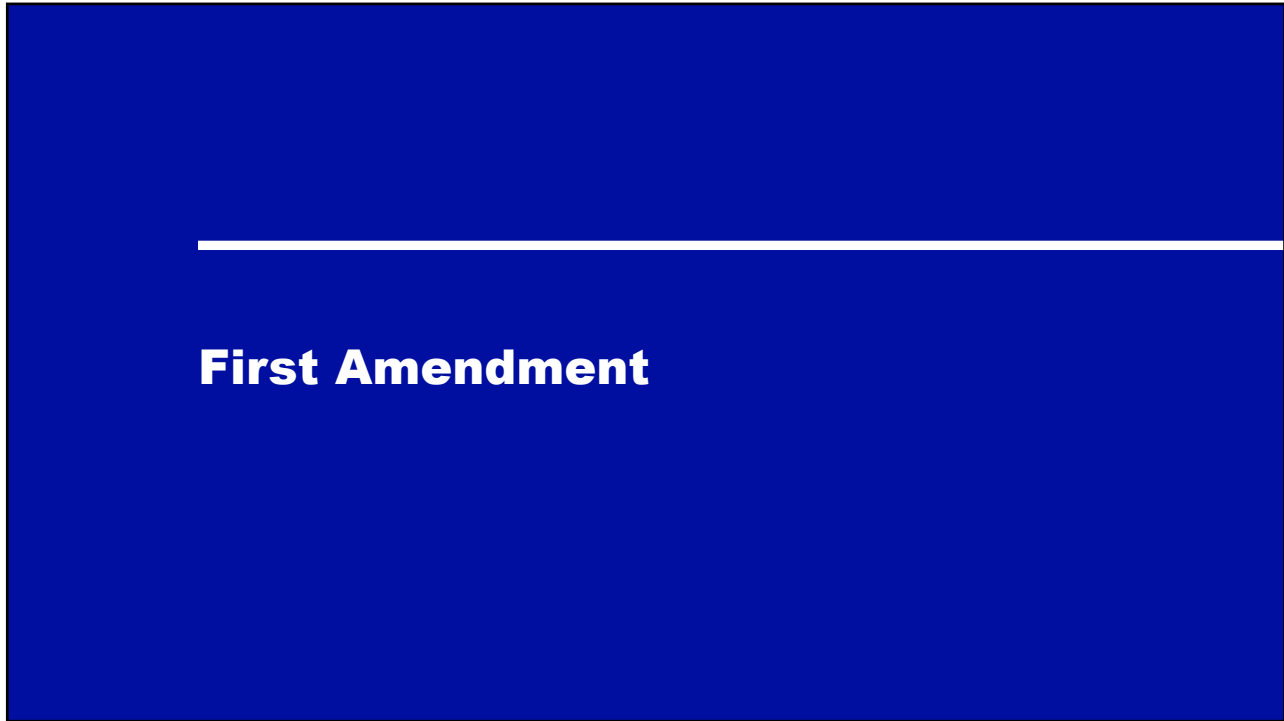
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**Agenda**

- **Freedom of Speech**
  - Key principles
  - Public employee speech and retaliation
  - Academic freedom
- **Religious Freedom**
  - Establishment Clause
  - Free Exercise Clause
  - RFRA
  - Title VII

A photograph showing a group of people at a protest. In the foreground, a woman is shouting into a megaphone. Behind her, several people are holding up a large American flag. The scene is outdoors and appears to be a public demonstration.

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## The First Amendment

Congress shall make no law respecting an 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.

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## Government Actors

- The First Amendment only restricts the actions of federal, state, and local governments, which include:
  - State universities
  - Municipal universities
  - Community colleges
  - State-operated career/technical schools
  - K-12 public school districts
- Private institutions are governed by their policies and contracts.

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## The First Amendment: Key Concepts

- The First Amendment reflects the values of truth, self-governance, individual freedom, and the marketplace of ideas.
- The First Amendment protects all forms of expressive conduct, not just verbal and written speech.
- Speech is only one protected category. The First Amendment also protects freedom of religion, assembly, press, and petition.



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## Hierarchy of Speech

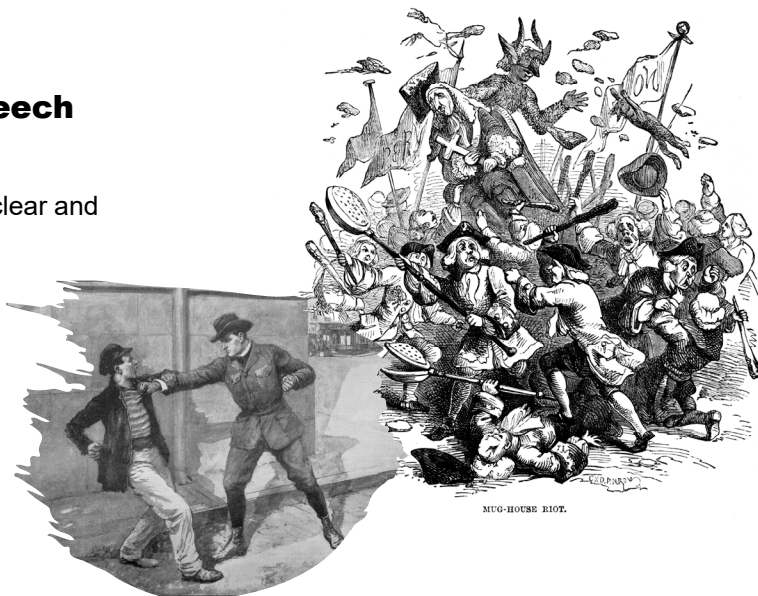
- **Most protected:** Political and religious speech.
- **Middle ground:** Speech on other matters of public concern
- **Less protected:** Petty speech on individualized grievances, speech of government/public employees, and commercial speech
- **Unprotected speech**



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## Unprotected Speech

- Incitement and the “clear and present danger” test
- Fighting words
- Criminal threats
- Defamation
- Obscenity



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## Government Regulation of Speech

- Whether government regulation of protected speech is constitutional depends on whether the regulation is content- and/or viewpoint-based.
- To regulate speech based on its content, the government must satisfy strict scrutiny.
- When regulation is not content-based, the government may restrict the time, place, and manner of speech, depending on the forum.



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## Government Employee Speech

- ***Pickering v. Board of Education***, 391 U.S. 563 (1968): Early test for balancing employee and government interests.
- ***Garcetti v. Ceballos***, 547 U.S. 410 (2006): “When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”

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## First Amendment Retaliation Claims by Public Employees

A public employee's speech will be **protected** from retaliation if...

- (1) it is on a matter of **public concern**;
- (2) it is not made **pursuant to** the employee's **official duties**; and
- (3) the employee's First Amendment interests outweigh the government employer's legitimate interests in efficient administration (*Pickering*)



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## *Kennedy v. Bremerton School District*



- School district violated the Free Exercise and Free Speech Clause when it declined to renew a high school football coach's contract after he refused to stop kneeling at midfield after games to pray. 142 S. Ct. 2407 (2022).
- Prayer was not pursuant to coach's official duties.

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***Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021)**

- Issue: Is a university-employer legally entitled to require a professor to refer to transgender students by their preferred pronoun(s)?
- Outcome: Lower court's dismissal of professor's First Amendment claim was reversed and remanded.
- Significance: Sixth Circuit clarifies the proper application of *Garcetti* when academic freedom is implicated.



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**Academic Freedom: Origins & Legal Foundations**

- Originated as a professional norm.
- Evolved into constitutional right?
  - "To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation... 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." *Sweezy v. N.H.*, 354 U.S. 234, 250 (1950) (plurality).
  - "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

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## Academic Freedom & *Garcetti*

- *Garcetti* did not clarify how its holding applies to faculty members and academic freedom.
- Justice Souter's dissent: "I have to hope 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.'" 547 U.S. at 438.
- Majority: "There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching." *Id.* at 425.

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## Academic Freedom: Official Duties

- Federal circuits are split on when faculty members are acting pursuant to their official duties.
  - Teaching
  - Academic writing and research
  - Media publications / op-eds
  - Curricular decisions
  - Internal memoranda and complaints
  - Participation in internal investigations



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## Scenario

Art history professor at private university shows images of the prophet Muhammad during Islamic Art unit. Aware that such images may offend some Muslims, the professor warned students in the syllabus. The professor showed two images in class and a Muslim student complained. The professor apologized privately to the student and to the class. The Muslim Student Association calls for the professor to resign. Administrators criticize the professor in media statements and university-wide emails. The professor's part-time instructor contract is not renewed.

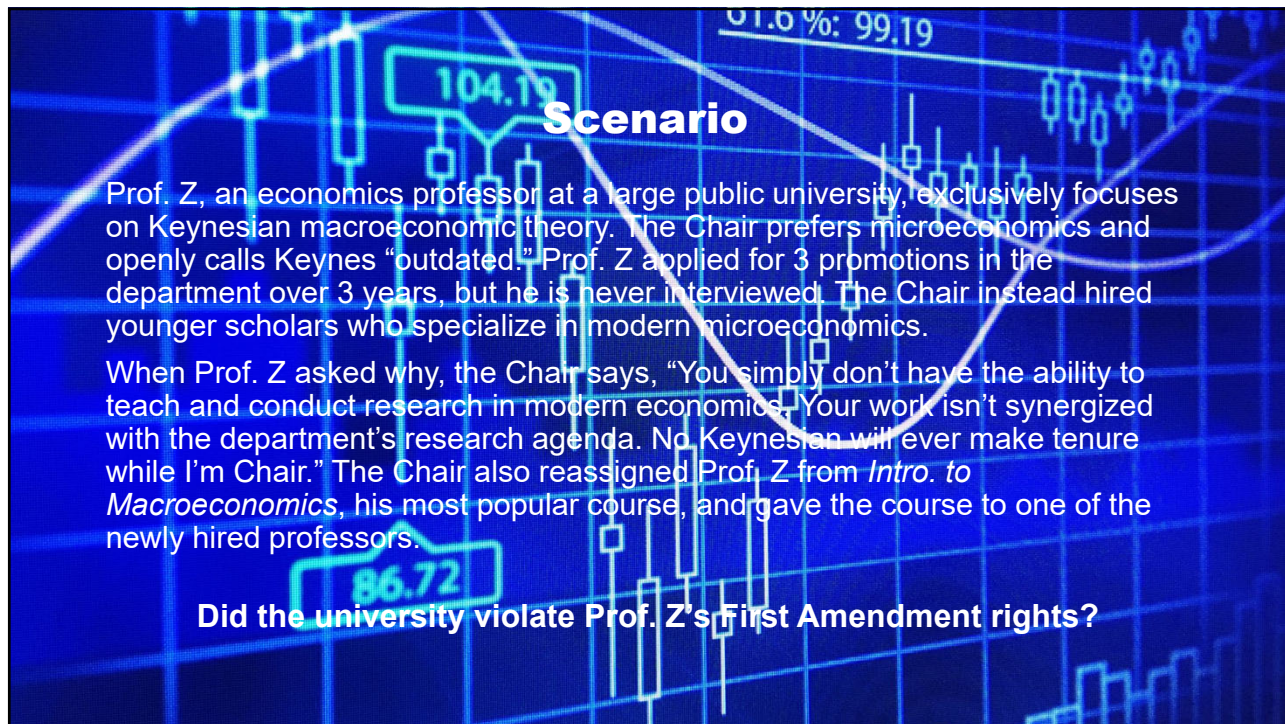
**Did the university violate the professor's First Amendment rights?**

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## ***Prater v. Trs. of Hamline Univ. of Minn.*, 2023 WL 6050277 (D. Minn. Sep. 15, 2023)**

- Professor plausibly stated claim of religious discrimination in violation of the Minnesota Human Rights Act under two novel theories:
  - Discrimination because she is not Muslim; and/or
  - Discrimination because she failed to conform to certain religious views of others (i.e., that it is improper to depict or view images of Muhammad).

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**Scenario**

Prof. Z, an economics professor at a large public university, exclusively focuses on Keynesian macroeconomic theory. The Chair prefers microeconomics and openly calls Keynes “outdated.” Prof. Z applied for 3 promotions in the department over 3 years, but he is never interviewed. The Chair instead hired younger scholars who specialize in modern microeconomics.

When Prof. Z asked why, the Chair says, “You simply don’t have the ability to teach and conduct research in modern economics. Your work isn’t synergized with the department’s research agenda. No Keynesian will ever make tenure while I’m Chair.” The Chair also reassigned Prof. Z from *Intro. to Macroeconomics*, his most popular course, and gave the course to one of the newly hired professors.

**Did the university violate Prof. Z’s First Amendment rights?**

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**Religious Freedom**

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**Where does the U.S. Constitution protect religious liberty?**

- First Amendment, Clause 1
- “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”
- Applies to the federal government, and state government and municipalities through “incorporation” by the Fourteenth Amendment.

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**What can we say about the establishment clause?**

- Government cannot take action for the sole purpose of advancing religion (unless rooted in a historical practice at the time of the founding).
- Government may not mandate or coerce participation in religious practice or exercise.
- Government cannot exercise preference for certain denominations.
- Religious entities can benefit from government programs
- Excessive entanglement is more narrowly focused on church governance and beliefs.

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## What does the free exercise clause protect?

- Government can take neutral action that incidentally burdens religion as long as there is a rational basis for the action. *Employment Division v. Smith*
- Government cannot take actions specifically targeting free exercise without satisfying “strict scrutiny.”
  - Compelling government interest
  - Least restricting means of satisfying that interest.
- If the government makes exceptions for non-religious actions, it needs to make exceptions for comparable religious actions too or strict scrutiny applies.

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## *Mirabelli v. Olson*



- School district policy prohibits teachers from disclosing student’s gender identity, and name and pronoun preferences, to parents without child’s consent.
- Teachers have sincere religious beliefs against deceptive communications with parents.
- Teachers assert free speech and freedom of religion claims.
- Court holds rule is not generally applicable.
- District cannot demonstrate a compelling governmental interest.

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## What is a RFRA?

- “Religious Freedom Restoration Act.”
- Enacted by federal government and many states in response to Supreme Court’s *Employment Division v. Smith* opinion that applied rational basis review to religion-neutral actions that incidentally burden religion.
- State versions prohibit state agencies (including public universities) from substantially burdening exercise of religion without meeting “strict scrutiny.”



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## Title VII

- Title VII prohibits employment discrimination based on “religion.”
- Prohibits classic discrimination by adverse treatment as well as failure to accommodate.
- Applies to both public and private institutions.



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### **What is adverse treatment discrimination?**

- Treating an employee adversely with respect to the terms and conditions of employment.
- Where religion is the “motivating factor” in the adverse treatment.

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### **What must an employer do to accommodate religious belief?**

- Employer must accommodate employee’s sincerely held religious beliefs or practices unless:
- The accommodation would impose an undue hardship
  - A burden that is “excessive” or “unjustifiable”
  - Substantial increases costs in relation to the conduct of its particular business.



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## ***Faulkner v. University of Cincinnati***



- Plaintiff was non-faculty administrator at public university.
- Asked to lead talk on servant leadership and referenced Biblical passages.
- A complaint prompted an investigation and corrective action.
- Investigation claimed administrator violated non-discrimination and harassment policy by bringing up religion.
- Administrator banned from making any Biblical references in future lectures or work-related interactions.
- Blanket ban unsupported under *Pickering* analysis.

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### **Questions?**

Thank you for attending!

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