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The First Amendment and Professorial Classroom Speech

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Keith E. Whittington, [*Professorial Speech, The First Amendment, and Legislative Restrictions on Classroom Discussions*](#), 58 **Wake Forest L. Rev.** 463 (2023).

Keith Whittington's new article, *Professorial Speech, The First Amendment, and Legislative Restrictions on Classroom Discussions*, is a timely response to the growing body of "anti-woke/anti-Critical Race Theory" legislation and legislative proposals that aim to drive certain types of discussions of race, gender, and other controversial topics out of state university classrooms. The clarity of Whittington's style makes complex doctrines easy to understand for educated, non-expert readers, and his careful extrapolation from existing First Amendment doctrines and principles fills an important gap in the law. Overall, the article meets the high bar it sets for itself by staking out "a new argument for protecting from legislative interference how faculty at state universities teach their courses."

The article has five important components. First, Whittington identifies the threat recent legislative proposals pose to academic freedom, especially to freedom in state university classrooms. For readers well-versed in an area of study, the "backdrop" section of an article is usually its least valuable contribution. Here, however, the article's "backdrop" section makes an important contribution by demonstrating the scope and scale of current legislative efforts to suppress curricular speech in state universities. Whittington is not exaggerating when he calls these new proposals an "unprecedented wave of legislative proposals aimed at curtailing teaching and discussing controversial topics relating to race and gender in state university classrooms." It is impossible to read this section without being struck by the sheer number of laws proposed and passed to drive certain ideas out of college classrooms. These laws are the product of concerted efforts to "restrict[] the topics and perspectives that a professor may discuss or advance while performing his or her instructional duties." These concerted efforts have already induced universities "to curtail programmatic and instructional activities that might incense state politicians." And this is just the beginning.

Second, Whittington moves from this backdrop to the lessons of history. Drawing on McCarthy-era history and legal precedents, Whittington shows the genesis of the Supreme Court's underdeveloped First Amendment academic freedom doctrines. In the McCarthy era, campuses restricted speech by refusing to hire or removing members of "subversive" organizations, and states imposed loyalty oaths as conditions of employment. This historical account serves as a pointed comparison to today's controversies and a "what-could-go-wrong" klaxon about government targeting of professorial speech.

Third, Whittington provides a good analysis of the existing constitutional dimensions of academic freedom as it stands today. As he rightly points out, the Supreme Court has provided only ill-defined contours for any First Amendment right to "academic freedom." Most Supreme Court pronouncements on the topic are merely dicta. He does an excellent job of assembling and scrutinizing them to discern foundational principles that might help resolve current academic freedom controversies.

His careful reading of [*Keyishian v. Board of Regents*](#), which involved professors forced to avow they had never been Communists to work for a state university, provides a principled argument for extending constitutional academic freedom to professorial speech in state university classrooms. *Keyishian* labeled academic freedom "a special concern of the First Amendment" and emphasized the chilling effect on

professors who fear being terminated for speaking on important matters. Justice Brennan recognized that legislative targeting of “subversive” speech *outside* the classroom risked casting “a pall of orthodoxy over the classroom”; therefore, such laws required drafting with “narrow specificity” in order to satisfy the First Amendment.

These principles should apply equally or even more forcefully to professorial speech within the classroom. Whittington quotes Justice Abe Fortas, who wrote, “It is much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of constitutional guarantees.” Although Whittington’s analysis here is convincing about the uncertainty regarding what might be called curricular speech in university classrooms, I expected him to give a nod to the Supreme Court’s [Hazelwood v. Kuhlmeier](#) decision. *Hazelwood* is distinguishable because it deals with the curricular speech of student journalists and their teacher at the high school level. But it deserves to be explicitly discussed and distinguished, since it gave great deference to school administrators in limiting the topics that could be discussed in the high school classrooms—simply because the topics were deemed too controversial. *Hazelwood* appears to have generated a split in the lower courts as to its applicability to higher ed. The key point, though, is that *Hazelwood* deserves consideration because anti-CRT laws don’t just target professorial speech; they target the contents of the curriculum within the college classroom. Moreover, the paucity of direct legal authority applicable to professorial speech within the classroom requires reasoning from analogous bodies of cases, as Whittington does in his analysis of government employee speech doctrines and government speech cases.

Fourth, Whittington analyzes the Supreme Court’s “government employee” speech cases—[Pickering](#), [Connick](#), and [Garcetti](#)—to discern how one might “extend the principles” of academic freedom cases to cases involving professorial speech within the classroom. In the government employee speech cases, the Supreme Court asks whether a government employee is speaking in her capacity as a *citizen on a matter of public concern*, in which case her speech receives considerable First Amendment protection, or as an *employee*, in which case it doesn’t. Of particular note is *Garcetti*, in which the Court refused to extend First Amendment protection to a prosecutor who was punished for writing an internal memo accusing the police of misconduct. Because the memo was “made pursuant to his duties” and “owe[d] its existence to a public employee’s professional responsibilities,” he was not speaking as a citizen and his speech was deemed “commissioned or created” by the employer. “On its face,” Whittington writes, “*Garcetti* is debilitating to many academic freedom claims in state universities, but the Court added an important proviso.” That “proviso” turns out to be dicta in a dissenting opinion arguing that the Court can’t possibly mean to apply *Garcetti* in the university context.

Applying the principles from the Court’s academic freedom cases, Whittington argues that we must distinguish professorial speech in the classroom from other kinds of government employee speech. He does a nice job of making caveats to allow for necessary regulations of professorial speech. He argues that academic classroom speech rights must be qualified by considerations of competence and germaneness. Whittington makes a persuasive case that “[p]rofessorial classroom speech that is neither germane to the class nor professionally competent is deserving of little constitutional protection.”

This section is probably the strongest part of the article. Drawing from legal doctrine and history, Whittington establishes that the anti-CRT bills are the very essence of censorship. I especially appreciated his application of the academic freedom principles he sets out to a set of difficult hypotheticals. There’s room for even more pushback against *Garcetti*’s overly simplistic distinction between speech-as-citizen versus speech-as-employee, and I would be interested in his future exploration of the “professional speech regulation cases,” such as [Gentile](#). After all, the key question in academic freedom cases is whether professors may, *in the exercise of their professional expertise*,

choose how to handle classroom discussions on controversial topics. Professor Claudia Haupt's work on "[knowledge communities](#)" emphasizes this aspect of professional speech. I hope also that Whittington will eventually discuss students' right to receive information, and perhaps the public interest in the discovery of truth, as an aspect of the First Amendment liberty infringed by broad anti-CRT bills.

Anticipating potential counter-arguments, Whittington explores whether professorial speech is government speech, under the Supreme Court's government speech doctrine. This somewhat ill-defined doctrine posits that the First Amendment does not constrain the government when it "speaks with its own voice." Government must speak in order to govern, and when it does so, it may participate in the marketplace of ideas just like any other speaker. The government, as speaker, "necessarily must make decisions based on the content and viewpoint of the substantive issues on which it chooses to speak."

Whittington begins his analysis of whether professorial speech is government speech by throwing public-school teachers to the wolves. He argues that public school curricula, and the use of those curricula by individual classroom teachers, "might readily be understood to be an example of [] government speech," because the government has such a dominant role: it "creates the public school, determines the curriculum, chooses the textbooks, and employs the teachers." Because the government's role is so dominant, one could plausibly argue that, "the government necessarily has the right to determine what [teachers] will say." This concession may—or may not be—pragmatic if one's goal is to protect professorial speech. Clearly it is easier to justify treating professorial speech as a form of "private" (that is, non-governmental) speech than it is to justify treating the speech of public-school teachers as "private," given the high degree of control the State currently exercises over curricular speech in public schools. The fact that the doctrine forces this binary choice upon us suggests that perhaps something is amiss with the doctrine. But that's an article for another day.

Finally, Whittington makes a strong case for treating professorial classroom speech as "private" speech, to use the Court's odd terminology, which is not subject to government control. Within the frame of government speech doctrine, the Court has found the existence of government speech when "the government established the message; maintained control of its content; and controlled its dissemination to the public." Whittington's argument for why professorial speech lacks these characteristics hinges on the traditional independence of state universities from legislative dominance.

State universities have instead generally been understood to be peculiar institutions within the state government that operate with a high degree of autonomy from state political leaders. . . . If state university professors were engaged in government speech when in the classroom, then we would expect government officials to comprehensively direct what it is that professors say. Instead, state officials have contented themselves to intervene only to prohibit the discussion of certain ideas in the classroom, which looks far less like using classroom lectures as vehicles for communicating messages from the government and far more like the government censoring ideas that it does not like.

This argument is true but scary. Just because states haven't previously controlled curricula at state universities doesn't mean they can't start. Would this turn previously "private" professorial speech into government speech subject to state control?

That question is what makes Whittington's elucidation and extrapolation of First Amendment principles governing curricular speech so important. One can only hope courts will take Whittington's analysis as a guide when asked to safeguard the curricula of state universities from state domination.

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