Study: First Amendment offers scant protection for professors

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When academics choose to litigate speech disputes with colleges and universities, they end up losing nearly three-quarters of the time -- a finding that points to the growing tension between academic freedom and campus speech codes, says U. of I. labor and employment relations professor Michael LeRoy. Credit: L. Brian Stauffer

A new study by a University of Illinois employment law expert determined that the First Amendment often fails to protect the most controversial ideas expressed by faculty in higher education.

When academics choose to litigate speech disputes with colleges and universities, they end up losing nearly three-quarters of the time - a finding that points to the growing tension between academic freedom and campus speech codes, said Michael LeRoy, a professor of labor and employment relations at Illinois and author of the paper.

The paper's findings suggest that the First Amendment doesn't adequately protect academic freedom as fully as faculty "understand the concept of constitutionally protected speech," LeRoy said.

"There have been a variety of recent controversies dealing with academic freedom, and it's really striking to see faculty members speak up and very sincerely believe that they are absolutely protected in their speech," he said. "The First Amendment is not synonymous with academic freedom, and my research shows that courts and faculty are essentially on two different pages regarding constitutional rights."

The study, which analyzed 210 lawsuits involving First Amendment claims by professors and college instructors against public colleges and universities from 1964-2014, found that educational institutions won more than 73 percent of cases in federal and state courts. Faculty members lost most First Amendment cases involving publishing, classroom activities, protests, social commentary and campus criticism, according to the research.

"If you look at the trend lines, the speech rights of public employees are narrowing - and, coincidentally, this is occurring when public speech via social media has become so much more prevalent," LeRoy said.

The study also found that win rates varied by the geographic boundaries of the federal circuits. Courts located in the 7th Circuit, which encompasses Illinois, Indiana and Wisconsin, overwhelmingly ruled in favor of colleges and universities (88.9 percent) while schools won less frequently (63.6 percent) in the 2nd Circuit, which spans Connecticut, New York and Vermont.

According to LeRoy, the Supreme Court's 1968 decision in Pickering v. Board of Education was the tipping point in favoring an employer's constitutional right to regulate the speech of its workers.

"The Pickering case created a balancing test that later court decisions have since refined," he said. "After Pickering, courts were compelled to weigh the competing interests of public employees and employers on a case-by-case basis. While the precedent recognizes that public employees do not relinquish their First Amendment rights on the job, it does enable a government employer to regulate the speech of its employees differently from citizens. And as the data from my study show, courts usually weigh those interests in favor of universities and colleges."

Another case - 1994's Waters v. Churchill - gave institutions an additional advantage by allowing them, as public employers, to limit speech that administrators deemed "disruptive" to a public school.

"In the first court rulings after Waters, the faculty win-rate plummeted from 22.6 percent to 13.1 percent, and in appellate rulings, the rate dropped even more precipitously, from 14.5 percent to 3.3 percent," LeRoy said.

Although his dataset only considered public colleges and universities, LeRoy said private schools aren't immune to speech controversies, either.

"Faculty at private colleges and universities lack the constitutional protection of free expression in their workplace because the First Amendment doesn't cover speech at work for private institutions," he said. "If you work at a public university, then you are protected under the First Amendment. To that point, it's important to remember that slightly more than one-fourth of the plaintiffs in my dataset won their First Amendment claim. We shouldn't lose sight of that number.

"My own sense is that private institutions have been more proactive about defining academic freedom and faculty rights pertaining to them. We have an ironic situation in which private universities are not protected and, knowing that, have provided more robust protections for faculty speech and academic freedom."

The practical implications of LeRoy's research is that the First Amendment isn't the shield that most academics believe it to be, "which means that professors and academics must think much more deeply about strategies to preserve academic freedom," he said. "In their employment relationships, they should rely less on the First Amendment and negotiate stronger assurances of free expression in their contracts."

LeRoy said it's incumbent for faculty leaders and prominent university presidents to craft principles of academic freedom that deal with 21st-century issues such as extramural speech in social media, academic freedom for research that has political implications, and professional speech that is tied to corporate and foundation funding.

"As politicians take aim at tenure while attacking intellectual culture in higher education, faculty should mobilize for an academic bill of rights," he said. "If nothing else, my research shows that the alternative to these proactive measures are court rulings that treat higher education more like a government agency rather than what it is - a laboratory of thought, experimentation and speech."

The study was published in the *Journal of College and University Law*.

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