ACADEMIC LIBERTY

Scott R. Bauries*

The idea that individual academics—particularly those who teach and engage in scholarship in higher education institutions—possess a First Amendment right to make decisions concerning the focus and the content of such teaching and scholarship is canonical. Since the 1950s, the Supreme Court has again and again referenced the importance of “academic freedom” and has even stated several times that it is a “special concern of the First Amendment.” However, examining the cases reveals that the Court has rarely used the concept of academic freedom in the First Amendment context as more than an “aside”—a classic statement of dicta—and that much of the most lofty—and most quoted—rhetoric on individual academic freedom does not even appear in the Court’s majority opinions.

This tepid treatment illustrates that the First Amendment simply lacks sufficient tools to protect academic teaching and scholarship. First Amendment jurisprudence and theory have for some time coalesced around the principled idea of viewpoint and content neutrality—what Kenneth Karst terms the “equality principle.” First Amendment speech rights are best understood to be largely about equality of treatment among speakers (at least within defined categories), and carving out special rights for some speakers and not others works against this very defensible conception. Because of this equality orientation, and the categorical approach to speakers that it has spawned, First Amendment jurisprudence has developed strong tools suited to the protection of academic work against extramural political suppression, but for the same reasons, it lacks tools suited to policing intramural public employer suppression, especially after the Supreme Court’s recent decision in Garcetti v. Ceballos.

This Article makes the case that a foundation for the constitutional protection of academic work nevertheless exists, and urges the construction of a new and more defensible right to academic freedom on such foundation, rather than on the very shaky First Amendment foundation on which current conceptions of academic freedom rest. The proper foundation for academic freedom lies not in the First Amendment, or even in the Bill of Rights—it lies in the Due Process Clause of the Fourteenth Amendment. This Article will show that a substantive due process-based individual right to academic freedom, which this Article more appropriately terms “academic liberty,” has existed since the now-maligned Lochner Era,

* Assistant Professor of Law, University of Kentucky.
and even has roots pre-dating the adoption of the Fourteenth Amendment. This right is grounded in the essential functions of the academic profession, and it draws its support and legitimacy from the reciprocal rights of learners and other users of academic work. In its post-New Deal obsession with leaving *Lochner* behind, the Supreme Court improperly and unproductively converted this conception of academic liberty into a First Amendment concern so weak and incoherent that it has yet to act as more than an incidental justification for a single Supreme Court holding in a First Amendment case protecting individual speech or associational rights. This Article seeks to revive the due process-based conception of academic liberty as a principled basis for the protection of the essential functions of academic work, functions newly imperiled in the post-*Garcetti* world.