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**SUSTAINING EXPRESSIVE RIGHTS**

**Legislative Threats to Academic Freedom**

**Ann H. Franke, Esq.  
President, Wise Results, LLC  
Washington, DC**

**Introduction**

This paper addresses threats to academic freedom that arise from federal and state legislatures. The history of legislative threats to the academy is long, discouraging, and on-going. The paper's primary goal is to prepare readers to recognize and respond to future legislative threats to academic freedom. Forums for response include public expression and the ballot box. The courts may also be an avenue for attacking legislative threats to academic freedom. Yet in many of the illustrations that follow, the courts have played no role.

As you consider your own experience with legislation affecting colleges and universities, you may think first about budget matters. Proposals for funding cuts can throw an institution into great disarray. Implementation of cuts can change its very character. At both the federal and state levels, most dialogue between higher education and legislatures does concern money. It centers on funding for institutions, student aid, and related expenditures. It is typically unrelated to the content of academic research or teaching. Yet sometimes the debate enters the realm of academic affairs. When it does, academic freedom may be at risk.<sup>1</sup>

As a useful introduction, look at the hierarchy of sources of law in our American legal system. Professor Bill Kaplin offered this graphic at the 2005 Stetson conference:<sup>2</sup>

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<sup>1</sup> An excellent overview of the general impact of legislation on higher education may be found in William A. Kaplin and Barbara A. Lee, The Law of Higher Education (3<sup>rd</sup> ed. 1995)(4<sup>th</sup> ed. forthcoming 2006). Useful chapters explore the relationship between universities and the state and the federal governments.

<sup>2</sup> "Revisiting Constitutional Law and Higher Education," PowerPoint by Professor William A. Kaplin, Stetson University College of Law 26<sup>th</sup> Annual Conference on Law and Higher Education.

## **The Hierarchy of Law**

Federal Constitution  
Federal Statutes\*  
Federal Administration Regulations  
State Constitution  
State and Local Statutes and Ordinances\*  
State and Local Administrative Regulations  
State Common Law  
Internal Law of the University

The two starred items are the statutes – federal, state, and local. Working up the hierarchy, a statute is invalid when it runs afoul of protections found in a constitution. Courts are the final interpreters of constitutions. Most lawsuits challenging statutes on grounds of academic freedom come to the *federal* courts for application of the *federal* Constitution. While the federal Constitution does not use the words “academic freedom,” the courts have essentially written them in.

The constitutional dimensions of academic freedom are still in development. Among scholars there is an on-going debate, for example, about where academic freedom resides. Does it ultimately belong to the faculty, the institution, or both? Where is the central kernel of freedom? Surely the professor enjoys the right, within limits, to teach her subject as she deems most appropriate. Similarly, the institution enjoys the right, within limits, to run its own affairs. Students also have important rights to be free from intrusions into their studies and from biased grading. The courts are slowly defining contours for these respective positions. We will leave the debate over “ownership” for another day and use the term academic freedom in a general sense.<sup>3</sup>

This paper extends slightly beyond statutes to other legislative activity. For purposes of analysis, it groups legislative threats to academic freedom into four main categories:

- Oaths for faculty
- Investigations into teaching, research, or faculty political beliefs
- Cuts or delays in government funding for the institution
- Regulation of the free exchange of ideas

The chart below offers illustrations, some real and some invented, of each category. It also suggests the harms to teaching and research that can flow from legislative activity.

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<sup>3</sup> To learn more about the debate over academic freedom’s ownership, see, e.g., Donna Euben, “Academic Freedom: Whose Right?”, 42<sup>nd</sup> annual conference, National Association of College and University Attorneys, June 26, 2002; J. Peter Byrne, “Constitutional Academic Freedom in Scholarship and in Court,” *Chronicle of Higher Education*, January 5, 2001.

<b>Type of Threat</b>	<b>Example of Legislative Action</b>	<b>Potential Harms</b>
Oath	“Before joining the faculty of the public university, swear that you’ve never been a communist.”	<ul style="list-style-type: none"> <li>• Restricts on an irrelevant basis the pool of potential faculty candidates</li> <li>• Inhibits free inquiry into study of communism</li> <li>• Inhibits free association to join groups</li> </ul>
Investigation	“You are hereby subpoenaed to testify on Feb. 24 before my legislative committee. We will be inquiring into the subversive conference you recently attended on higher education legal issues.”	<ul style="list-style-type: none"> <li>• Disrupts current academic activity</li> <li>• Inhibits exploration of controversial topics</li> <li>• Broadens administrative control over academic activities</li> </ul>
Funding cut or delay	“We are cutting the state university’s \$300 million budget by \$70,000, which represents the salary of that outspoken professor whose outlandish opinions we don’t like.”	<ul style="list-style-type: none"> <li>• Punishes a given point of view</li> <li>• Inhibits the targeted individual and others from exploring and expressing controversial ideas</li> </ul>
Regulation of the exchange of ideas	“No state employee, including faculty, may view legal cases on a state computer without advance permission from his or her supervisor.”	<ul style="list-style-type: none"> <li>• Marks legal cases as a disfavored topic for research and teaching</li> <li>• Raises concern over acceptability of other controversial research topics</li> <li>• Impairs research by requiring advance clearance and encouraging control</li> </ul>

The following discussion will offer real examples of each type of legislative incursion and, in relevant instances, how the courts responded.<sup>4</sup> Readers will see that the courts have been involved in some disputes but far from all. Battles may be more political than legal, yet all involve the fundamental constitutional value of academic freedom. The examples collected here are merely illustrative and not, alas, exhaustive. Many others can be found in history and in the newspapers of today and tomorrow.

## **Oaths**

Oaths are a good starting place to explore legislative threats to academic freedom. The typical state law requiring an oath applies broadly to employees of state agencies, including public colleges and universities. Sometimes the legislature will require only state-employed professors or teachers, rather than all public employees, to swear an oath. An oath may be required annually or just upon initial appointment. The courts have found certain oaths unconstitutional, with a special nod to the concerns of the academy. The courts have upheld other oaths, some of which remain in use today.

*Oath disclaiming membership in subversive groups.* During the McCarthy era, some states adopted provisions requiring state employees to disclaim membership in subversive organizations. In a painful episode in 1950, 31 professors from the Berkeley and Los Angeles campuses of the University of California declined to sign an oath required by the university's regents. The 31 were dismissed, not for membership in any subversive groups but merely for refusing to sign the oath. Later reinstated, one eventually rose to become the president of UCLA.

The New York statute, passed in 1949 and known as the Feinberg Law, listed subversive organizations and disqualified from public employment any person who was a member of those groups. The law required state employees to swear annually to a disclaimer oath.

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<sup>4</sup> A superb historical review of the Supreme Court's academic freedom rulings may be found in "Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review," by William W. Van Alstyne, 53 J. of Law and Contemporary Problems 79 (Summer 1990).

The law also spelled out investigative steps and enforcement methods. The Supreme Court considered the constitutionality of the Feinberg law twice, reaching different results. The Court upheld the law in a 1952 case,<sup>5</sup> then 15 years later reversed itself and struck the law down on First Amendment grounds as applied to teachers and professors.

In its 1967 decision, Keyishian v. Board of Regents,<sup>6</sup> the Court used language that has been quoted innumerable times in the succeeding decades:

Academic freedom...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....The classroom is peculiarly the marketplace of ideas. 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.

*Oath not to seek the violent overthrow of government.* Again in 1967, the Court considered a Maryland law requiring teachers to swear that they were not engaged “in acts seeking the overthrow of the state or national government by force or violence.”<sup>7</sup> The oath was a condition of public employment in the state. The Court invalidated the law on First Amendment grounds for imposing continuing surveillance on teachers. Justice Douglas, writing for the majority, described the law’s inhibiting effects. He used the example of a professor who would be reluctant to attend an international conference without knowing the full intentions of the sponsors and the complete scope of discourse. Without such information, he might inadvertently find himself associating with others whose actions were incompatible with the oath.

The violent overthrow of government might seem to be drastic and highly undesirable. Bear in mind, though, that our forebearers used precisely that tactic in creating the United States.

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<sup>5</sup> Adler v. Board of Education of the City of New York, 342 U.S. 485 (1952).

<sup>6</sup> 385 U.S. 589, 603 (1967).

<sup>7</sup> Whitehill v. Elkins, 389 U.S. 54 (1967).

*Oath to uphold the Constitution.* Today in some states public employees must pledge their allegiance to the Constitution. The oath in California, for example, states:<sup>8</sup>

I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.

Falsely swearing the oath is subject to a felony perjury charge, with a penalty of imprisonment from 1 to 14 years. Oaths of this type have passed constitutional muster as “forward-looking promissory” pledges.<sup>9</sup>

*Pledge of commitment to diversity.* The group Foundation for Individual Rights in Education (FIRE) has taken upon itself to call attention to what it believes are loyalty oaths at public institutions that violate academic freedom. These are typically requirements that the institutions themselves set, rather than legislative enactments. In 2001 FIRE publicly chastised Bucks County Community College for a question on its employment application asking job candidates to explain their commitment to diversity.<sup>10</sup> It also criticized Monterey Peninsula College for requiring professors, in proposing new courses, to explain how the course would address race, class, and gender issues.<sup>11</sup> Note that both situations involved questions, not oaths, and neither question appeared to be a condition of employment. As a legal matter, such mandates probably resemble forward-looking, permissible oaths to uphold the Constitution more closely than impermissible ones. The matter, though, is open to debate.

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<sup>8</sup> For the California State University’s oath form, see [www.calstate.edu/HRAdm/Policies/std689.pdf](http://www.calstate.edu/HRAdm/Policies/std689.pdf).

<sup>9</sup> See *Connell v. Higginbotham*, 403 U.S. 207 (1971) upholding a Florida oath.

<sup>10</sup> “Diversity Question on College’s Job Application Amounts to ‘Loyalty Oath,’ Group Contends,” by Robin Wilson, *Chronicle of Higher Education*, Feb. 21, 2001.

<sup>11</sup> “College Drops Rule Calling for Multicultural Component in All New Courses,” by Courtney Leatherman, *Chronicle of Higher Education*, September 18, 2000.

## Investigations

On occasion a legislator or legislative committee will seek to investigate conditions at a college or university. The scrutiny might cover a conference or course, the work of an individual professor, or other activities. The power of subpoena can enforce requirements to attend and produce materials. Investigations at the state or federal level may implicate academic freedom interests, as the following examples show.

*“Professor, testify at our legislative hearing about those lectures you gave.”* The 1951 New Hampshire Subversive Activities Act broadly directed the state attorney general to investigate whether there were any “subversive persons” in the state and to recommend further legislation. Under this legislative grant of power, the attorney general subpoenaed Professor Paul Sweezy to answer questions, including questions about an invited lecture he had delivered to a 100-student humanities class at the University of New Hampshire. Sweezy testified that he was a “classical Marxist” and said he had never advocated violent overthrow of the government. He declined, however, on First Amendment grounds to provide details about the lecture, which he had given in three successive years. He refused to answer these questions:

What was the subject of your lecture?

Didn't you tell the class at the University of New Hampshire on Monday, March 22, 1954, that Socialism was inevitable in this country?

Did you advocate Marxism at that time?

Did you express the opinion, or did you make the statement at that time that Socialism was inevitable in America?

Did you in this last lecture on March 22 or in any of the former lectures espouse the theory of dialectical materialism?

The state courts found Sweezy in contempt and jailed him. The controversy made its way to the U.S. Supreme Court, which began its opinion by observing that the case posed the question of the constitutional limits on a state’s legislative inquiry.<sup>12</sup> New Hampshire had, in effect, made its attorney general a standing committee of the legislature authorized to investigate subversive activities. The Court threw out the contempt

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<sup>12</sup> Sweezy v. New Hampshire, 354 U.S. 234 (1957).

conviction on rather narrow procedural grounds but, in doing so, emphasized the value of academic freedom:

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 strait 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.

In a concurring opinion, Justice Frankfurter proposed a stringent standard for reviewing legislative inquiries into academic matters. He stressed the strong value of academic endeavors to our whole society. Although the Court's majority did not endorse his proposal, Frankfurter would have required legislatures to

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 obviously compelling.

Frankfurter justified this strict approach on the basis that legislative forays into academic matters tend "to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor."<sup>13</sup>

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<sup>13</sup> Professor Sweezy made an inspiring statement to the attorney general, reprinted in the Supreme Court opinion. Here is an excerpt: "Our reasons for opposing these investigations are not captious or trivial. They have deep roots in principle and conscience. Let me explain with reference to the present New Hampshire investigation. The official purpose of the inquiry is to uncover and lay the basis for the prosecution of persons who in one way or another promote the forcible overthrow of constitutional forms of government. Leaving aside the question of the constitutionality of the investigation, which is now before the courts, I think it must be plain to any reasonable person who is at all well informed about conditions in New Hampshire today that strict adherence to this purpose would leave little room for investigation. It is obvious enough that there are few radicals or dissenters of any kind in New Hampshire; and if there are any who advocate use of force and violence, they must be isolated crackpots who are no danger to anyone, least of all to the constitutional form of government of state and nation. The Attorney General should be able to check these facts quickly and issue a report satisfying the mandate laid upon him by the legislature.

*Provide information on all courses that address homosexuality or bisexuality.* In 1998, the Kansas public university regents received a legislative inquiry seeking identification of all courses in the six state universities that related to homosexuality or bisexuality. The regents shared the request with the six institutions. The request came from the legislature's research branch, which declined to identify the legislator seeking the information. A brief press account described the provost of the University of Kansas as calling the request unusual but offering the hope that it was well motivated.<sup>14</sup> Similar legislative inquiries arose in Iowa, Minnesota, and Nebraska, leading some observers to suspect a coordinated effort at suppressing such courses.<sup>15</sup> In Kansas several universities complied with the request, at least one refused, and several offered no courses using the words "homosexuality" or "bisexuality" in their titles or course descriptions.

*"We're investigating political bias in the classroom."* In 2005 the Pennsylvania House of Representatives voted to establish a select committee to investigate whether political bias exists in public university classrooms.<sup>16</sup> The select committee is the Subcommittee on Higher Education of the Education Committee and two additional members, picked by the Republican and Democratic house leaders. The select committee must report its

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We do not know the whole story, but enough has come out to show that the Attorney General has issued a considerable number of subpoenas and has held hearings in various parts of the state. And so far as the available information allows us to judge, most of those subpoenaed have fallen into one or both of two groups: first, professors at Dartmouth and the University of New Hampshire who have gained a reputation for liberal or otherwise unorthodox views, and, second, people who have been active in the Progressive Party. It should be specially noted that whatever may be thought of the Progressive Party in any other respect, it was certainly not devoted to violent overthrow of constitutional forms of government but on the contrary to effecting reforms through the very democratic procedures which are the essence of constitutional forms of government.

The pattern I have described is no accident. Whatever their official purpose, these investigations always end up by inquiring into the politics, ideas, and beliefs of people who hold what are, for the time being, unpopular views."

<sup>14</sup> "Kansas Colleges Queries About Homosexuality," Jeffrey Selingo, *Chronicle of Higher Education*, March 6, 1998.

<sup>15</sup> "Kansas Legislature Targets Sexuality Issues in University Courses," by Christine Robinson, *University of Kansas, The Touchstone*, vol. 8, no. 2 (April/May 1998), available at [www.rtis.com/reg/bcs/pol/touchstone/april98/robinson.htm](http://www.rtis.com/reg/bcs/pol/touchstone/april98/robinson.htm). See articles collected at [www.turnleft.com/witchhunt/](http://www.turnleft.com/witchhunt/)

<sup>16</sup> "Pennsylvania Lawmakers Hold Hearings on Political Bias in College Classrooms," Jennifer Jacobson, *Chronicle of Higher Education*, November 25, 2005.

findings by November 30, 2006. It is holding hearings around the state and has met in Harrisburg, at the University of Pittsburgh, and in Philadelphia at Temple University.<sup>17</sup>

*“Professors Bradley, Hughes, and Mann, I demand records of all your research.”* This legislative edict for all research reports and computer data came by letter dated June 23, 2005, to three professors who have worked on global warming at the Universities of Arizona, Virginia, and Massachusetts at Amherst. The requester was Texas Congressman Joe Barton, who chairs the U.S. House of Representatives Committee on Energy and Commerce. Barton, nicknamed “Smokey Joe,” is a long-standing critic of international efforts to control greenhouse gases.<sup>18</sup> Basing his letter on a Wall Street Journal article, he took a tone that was far from neutral:

Questions have been raised, according to a February 14, 2005, article in *The Wall Street Journal* about the significance of methodological flaws and data errors in your studies of the historical record of temperatures and climate change... We open this review because this dispute surrounding your studies bears directly on important questions about the federally funded work upon which climate studies rely and the quality and transparency of analyses used to support the International Panel on Climate Change assessment process.

Barton sought detailed information on all studies on which the professors were authors or co-authors and demanded production of computer programs. Professor Mann, an assistant professor at the University of Virginia, replied that all his papers were publicly available and that he had posted his computer programs as well. Rep. Barton’s inquiry led to sharp objections from both Republicans and Democrats in the House. Articles and editorials appeared in major newspapers, as well as the scientific journal *Nature*. The *Nature*

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<sup>17</sup> For additional information, visit [www.aaup.org](http://www.aaup.org) and [www.studentsforacademicfreedom.org](http://www.studentsforacademicfreedom.org).

<sup>18</sup> See “Global Warming Heats Up Congressman,” *Censorship News: The National Coalition Against Censorship Newsletter*, Fall 2005; “GOP Congressman Rebukes Colleague for Investigation of Climate Scientists,” Richard Monastersky, *Chronicle of Higher Education*, July 29, 2005.

editors called on scientists to speak out on contentious issues, so that policymakers will hear their voices.<sup>19</sup>

### **Funding Delays and Cuts**

Legislators may seek to punish public colleges and universities by cutting or delaying their funding. The controversies usually involve professors, publications, conferences, or performances that explore unpopular ideas. Below are some brief illustrations of this legislative device, which appears to be most common during tight budget periods.

*Faculty salary.* Displeased that the University of New Mexico had not terminated a professor who made a controversial statement about the September 11<sup>th</sup> terrorist attacks, a state legislator sought to delete the professor's salary from the university's appropriation. The New Mexico House of Representatives defeated the proposal in early 2002.<sup>20</sup>

*Reading assignment for all incoming students.* The North Carolina house appropriations committee voted to cut the university system's budget to block the assignment of a book to all 4,000 incoming freshmen and transfer students at the University of North Carolina at Chapel Hill. The book was Approaching the Qur'an: The Early Revelations, and the university successfully surmounted the appropriations problem and a lawsuit challenging the book as establishing religion.<sup>21</sup>

*Book publishing.* In Minnesota, a legislator proposed to delete from the University of Minnesota Press's budget the cost of the book Harmful to Minors: The Perils of Protecting Children from Sex. Published by the university press, the book explores issues of childhood sexuality. It came under political attack from not only the legislature but

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<sup>19</sup> "Climate of Distrust: Six Months Into President George W. Bush's Second Term of Office, Partisan Politics Continues to Widen the Gulf Between Researchers and the Administration," editorial, *Nature*, vol. 436, # 7047 (July 7, 2005). See materials on the controversy at [www.geo.umass.edu/climate](http://www.geo.umass.edu/climate).

<sup>20</sup> "UNM Prof's Wages Stay in Budget," *Oliver Uyttebrouck*, *Albuquerque Journal*, January 29, 2002.

<sup>21</sup> "Unfazed (and Unconverted) by Book on the Koran: Freshmen at Chapel Hill, puzzled by uproar, find value in their first assignment," by Eric Hoover, *Chronicle of Higher Education*, September 6, 2002.

also media commentators. The controversy boosted sales and led to a large second printing.<sup>22</sup>

*A trio of concerns.* In Missouri, the legislature cut the University of Missouri's \$412 million budget by \$200,000 in 2002 in response to three concerns: (a) the public television station director's decision to prohibit on-camera personnel from wearing flag pins; (b) the work of Professor Harris Mirkin on pedophilia, which he continued over legislative objections; and (c) allegations of illegal campaigning by an assistant to the chancellor. The press quoted a state legislator as declaring that public universities "can say and do whatever they want, but we don't have to pay for it."<sup>23</sup> Although this matter never reached the courts, the U.S. Supreme Court has rejected a similar argument in defending the First Amendment rights of public employees.

*Sex education course.* The Nassau County (NY) board of supervisors stalled in 1989 in approving the \$89 million budget for Nassau County Community Colleges over community protests to a popular sex education course. The college assured the supervisors that instructors had altered the course content, which broke the logjam. The course was also the subject of extended litigation brought by members of the community who alleged that it amounted to state establishment of a religion.<sup>24</sup>

*Marxism.* Arizona State University harbored concern back in 1972 that the legislature might seek to cut its appropriation as punishment for the outspoken views of a Marxist professor.<sup>25</sup>

The power of the purse focuses institutional attention very quickly. Budget pressures put campus administrators to the test of defending of controversial research.

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<sup>22</sup> "Book on Childhood Sexuality Arouses Controversy," Chronicle of Higher Education, April 19, 2002.

<sup>23</sup> "Missouri Lawmakers Get Mad and Get Even," Chronicle of Higher Education, May 31, 2002.

<sup>24</sup> "Community College's Sex Education Course Triggers Dispute Over Academic Freedom," Denise Magner, Chronicle of Higher Education, September 13, 1989.

<sup>25</sup> *Starsky v. Williams*, 353 F.Supp. 900, 915 (D.Ariz. 1972).

## **Regulation of the Exchange of Ideas**

Some legislative threats to academic freedom target specific ideas, constraining public colleges and universities from addressing controversial subjects. The threats may take the form of legislation that is proposed, legislation that is enacted, or simply pointed requests from legislators. The subject-matter threats may be coupled with budget threats.

In primary and secondary education, legislative mandates for curriculum are fairly common and typically unremarkable. They make news, though, when they involve a controversial issue such as an intelligent design disclaimer before class study of evolution.

*Don't use state computers for certain purposes without permission.* Many employers have grappled in recent years with policies on computer use. How can one differentiate legitimate from illegitimate computer research? In Virginia, the legislature took the approach in a 1996 law that no public employee could access sexually explicit material on a state-owned computer without advance approval from his or her supervisor. While this law might sensibly regulate, say, the state highway department, its application to public universities posed a difficult challenge. The statute created the risk of complicating or suppressing research and teaching on sexual matters. Researchers studying indecency laws, for example, might seek computer access to pornography. Must a scholar go to the department chair daily for permission? Hourly? Before every mouse click? What about research on sexual harassment? The legislature later amended the law to prevent access only to lascivious material.

Six faculty members from Virginia public colleges and universities filed suit challenging the law. After a protracted legal battle, the federal court of appeals decided that the law was constitutional. Applying the relevant legal tests, it concluded that the content of lascivious material is not a matter of public concern and that the state could regulate public employees' access to it. The court also concluded that the institution, not the faculty, "owned" academic freedom.<sup>26</sup> An assistant attorney general who defended the

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<sup>26</sup> *Urofsky v. Gilmore*, 216 F.3d 401 (4<sup>th</sup> Cir. en banc, 2000)(cert. denied 2001).

statute has described the decision as reflecting “power to the people, not necessarily the professoriate.”<sup>27</sup>

*You must teach the Constitution on a specific day.* Congress decided that institutions receiving federal funds must provide instruction about the Constitution on September 17<sup>th</sup> of every year. See sec. 111(b) of the Consolidated Appropriations Act of 2005. While critics view the requirement as a heavy-handed intrusion into the curriculum, the law has apparently not been challenged in court. Some institutions devoted considerable effort to compliance, others contended that regular courses satisfied the requirement, and probably others were unaware of the law.

*Don't litigate cases in your law school clinic that challenge vested commercial or political interests.* Litigation clinical programs in law schools provide an opportunity for students, under the supervision of practicing lawyers, to represent clients in court. The choice of cases often comes under political scrutiny. In 1968, for example, state legislators objected to the involvement of University of Mississippi faculty in desegregation cases. In other places, lawsuits to protect the environment or challenge commercial development have attracted political concern. Legislators may use their influence behind the scenes or threaten public funding for the clinic or the university. A given dispute can involve a mix of budgetary and direct suppression efforts.<sup>28</sup>

*Do not discuss homosexuality.* A raft of problems in the 1990's arose over the academic discussion of homosexuality.<sup>29</sup> Here are some examples. An Alabama law, passed in 1992, prohibited public universities from supporting gay and lesbian student organizations. A state senator led a 1996 fight to prevent the University of Alabama from

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<sup>27</sup> “Professorial Speech and Academic Freedom: Implications of the Fourth Circuit’s decision in *Urofsky v. Gilmore*,” by Alison Paige Landry, Stetson University College of Law 22<sup>nd</sup> Annual National Conference on Law and Higher Education (Feb. 18-20, 2001). The case has sparked much analysis and controversy. See, e.g., “Constitutional Academic Freedom in Scholarship and in Court,” J. Peter Byrne, *Chronicle of Higher Education*, January 5, 2001; “The Demise of Academic Freedom: *Urofsky v. Gilmore*,” Steven G. Olswang, Stetson University College of Law 22<sup>nd</sup> Annual National Conference on Law and Higher Education (Feb. 18-20, 2001).

<sup>28</sup> See “Legal Pressure,” David Epstein, *Inside Higher Education*, January 5, 2006, available at [www.insidehighered.com](http://www.insidehighered.com).

<sup>29</sup> “State Lawmakers Try to Punish Colleges That Back Gay Rights,” Jennifer Shecter, *Chronicle of Higher Education*, April 26, 1996. *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11<sup>th</sup> Cir. 1997).

hosting a student conference on homosexuality. A federal court overturned the law and allowed the conference to proceed. In a similar vein, 63 West Virginia legislators asked the president of West Virginia State College to cancel a gay-themed film festival. The president declined to cancel the event. A legislator who objected to Gay Pride Week announcements on sidewalks at West Virginia University introduced legislation, never passed, to evict a gay student group from its campus office. In Iowa, a legislator criticized the University of Iowa for hosting the North American Lesbian, Gay, and Bisexual Studies Conference. He proposed an amendment declaring that “no taxpayers’ dollars could be used by the public universities to promote homosexuality as a positive alternative lifestyle.” The Iowa house approved the amendment but the senate rejected it. On the Bloomington campus of the University of Indiana, the president supported development of a gay and lesbian student resource center. Following pressure from a state senator, the president chose to raise private funds for the initiative.

*Mandate “balance” on campus.* The most recent initiative to target campus expression through legislation is the academic bill of rights. Developed by conservative activist David Horowitz, the proposal would require colleges and universities to promote intellectual diversity on campus. Horowitz and his supporters believe that faculty members unfairly punish students who espouse conservative opinions and theories. Bills inspired by the academic bill of rights have been introduced in 17 state legislatures and the federal Congress. The proposals typically require, among other features, the presentation of a “plurality of serious scholarly methodologies and perspectives.” While this proposal may seem unremarkable on its face, the problems of interpretation and enforcement are enormous. When, if ever, can a chemistry professor teach a single methodology for laboratory safety? Who decides whether a lecturer has presented an insufficient number of alternative perspectives?

The academic bill of rights has sparked strong opposition from the American Association of University Professors and other groups, which argue that the academic bill of rights is a solution in search of a problem. Existing mechanisms protect student rights to be free from biased evaluation. In the United States, they observe, “neither teachers nor students

are responsible to government for the content of their speech or learning.”<sup>30</sup> The Association of American Colleges and Universities, explaining that college students are already exposed to many viewpoints, argues that the academic bill of rights distracts attention from the critical issue of improving the academic achievements of all students.<sup>31</sup> In Colorado and Ohio, the public institutions of higher education have agreed informally with their legislatures to publicize student rights and existing grievance avenues. Horowitz conceded in January 2006 that he could not substantiate several examples of faculty heavy-handed mistreatment of conservative students that he regularly cited.<sup>32</sup> Debate over the proposals will continue.

## **Conclusion**

In light of the long and continuing history of legislative efforts to regulate campus academic affairs, what can be done? We cannot rely solely on judges to protect academic freedom from legislative intrusion. Individual attention is necessary. Here are some modest suggestions for legislators, faculty, and administrators.

### **SUGGESTIONS FOR LEGISLATORS**

- Articulate the value of open-mindedness. Support the free speech rights of your political opponents and critics.
- Inform yourself about the contributions of your state’s public colleges and universities.
- Be suspicious of efforts to impose any type of orthodoxy on higher education.
- Be loathe to support proposals that seek to regulate academic matters at colleges and universities or to suppress speech.

### **SUGGESTIONS FOR FACULTY AND ADMINISTRATORS**

- Speak out on the social value of scholarly work and free expression.
- Get acquainted with your local elected representatives. Share with them the campus role of the free exploration of ideas. Remind them of the importance of dissent in a healthy democracy.

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<sup>30</sup> See [www.aaup.org](http://www.aaup.org), National Issues, Academic Bill of Rights.

<sup>31</sup> See AAC&U board statement and press release issued January 6, 2006, available at [http://www.aacu.org/press\\_room/press\\_releases/2006/AcadFreedom.cfm](http://www.aacu.org/press_room/press_releases/2006/AcadFreedom.cfm)

<sup>32</sup> “Retractions from David Horowitz,” Scott Jaschik, Inside Higher Ed, January 11, 2006, available at [www.insidehighered.com](http://www.insidehighered.com).

- Follow developments with the academic bill of rights and other legislative efforts to regulate university affairs. Use this paper as a rough guide in identifying such efforts.
- Should problems arise in your state, get involved. Work with your administration in shaping a solid position on the legislative proposals. Write to legislators, the newspaper, and other opinion leaders. Contact your representatives directly. Constituent letters and phone calls make a real difference.
- Support organizations that support academic freedom.
- Vote.

