POLITICAL AND RELIGIOUS BELIEF DISCRIMINATION ON CAMPUS: FACULTY AND STUDENT ACADEMIC FREEDOM AND THE FIRST AMENDMENT

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A group of private Christian high schools has recently sued the University of California over its faculty established academic standards for admission, alleging that its refusal to credit high school science courses taught with selected Christian religious texts violates students' freedom of religion**.** At LeMoyne College a student from the Masters of Education program alleges that he was expelled because of a paper he wrote advocating the use of corporal punishment in schools. At Columbia University some students allege that faculty in the Middle East and Asian Languages and Culture department violate students' rights by using the classroom as a platform to advocate for an anti-Israeli political agenda. These and other recent controversies highlight the sometimes uneasy tension between a professor's freedom to teach and a student's freedom to learn. These situations are complicated, fact sensitive, and often contentious, triggering legal and policy considerations, including academic freedom, free speech, peer review, and the right of colleges and universities to be free from political interference.

What follows is a brief overview of the principles and the law shaping faculty and student claims to academic freedom and free speech in the college and university classroom. This paper will also explore claims of so-called "political discrimination" in the judicial and legislative fora, such as those asserted in the "Academic Bill of Rights." The paper does not, cover, however, hate speech or other forms of discrimination in the classroom, or academic freedom issues outside the classroom.

I. Academic Freedom of Individual Professors

The academic freedom of individual professors is a longstanding concept, with its roots in the nineteenth century. It is both a professional standard and a legal definition. The professional standard of academic freedom is tied to custom and practice, and to the ideal environment for

freedom of thought, inquiry and teaching. The legal definition is related to the professional definition but with its own framework and rules. It involves both elements of constitutional and contract law, and reflects an attempt to reconcile basic constitutional principles with prevailing views of academic freedom's social and intellectual role in American life.[2]

The **professional standard** of academic freedom is defined by the *1940 Statement of Principles on Academic Freedom and Tenure*, which was developed by the American Association of University Professors (AAUP) and the American Association of Colleges and Universities. The *1940 Statement* strikes a balance between freedom of expression and thought and the role of the individual as a faculty member, providing that "teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter that has no relation to their subject . . . ." AAUP, POLICY DOCUMENTS & REPORTS 3-4 (9th ed. 2001) (hereafter "Redbook"). The *1940 Statement* is the fundamental statement on academic freedom for faculty in higher education, has been endorsed by more than 185 scholarly and professional organizations, and is incorporated into hundreds of college and university faculty handbooks. Courts, including the United States Supreme Court, have also relied on the *1940 Statement*'s definition of academic freedom. *See, e.g., Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 756 (1976); *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971).

This professional standard of academic freedom is often discussed in terms of free speech or **First Amendment** rights, and the U.S. Supreme Court has repeatedly held that academic freedom is a First Amendment right of professors. *See, e.g., Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985). Accordingly, speech by professors in the classroom at public institutions is often protected under both the First Amendment and the professional concept of academic freedom if the speech is "germane to the subject matter."[3]

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[1] With many thanks to former AAUP Staff Counsel Donna Euben, who created an earlier version of this presentation.

[2] For a thorough review of case law involving the academic freedom of individual professors, *see* Donna R. Euben, "Academic Freedom and Professorial Speech," 25th Annual Conference on Law & Higher Education, Stetson University College of Law (Feb. 2004), <http://www.aaup.org/ legal/info%20outlines/af&profspeech.htm> and "Academic Freedom of Individual Professors and Higher Education Institutions: The Current Legal Landscape," NACUA (May 2002), <http://www.aaup.org/Com-a/aeuben.htm>, which is also available in THE NACUA HANDBOOK FOR LAWYERS NEW TO HIGHER EDUCATION, <http://www.nacua.org/publications/pubs/compendia/ newlawyershandbook.html>.

[3] *See, e.g., Hardy v. Jefferson Community College*, 260 F.3d 671 (6th Cir. 2001), cert. denied, 535 U.S. 970 (2002) ("Reasonable school officials should have known that . . . speech, when it is germane to the classroom subject matter and advances an academic message, is protected by the First Amendment."); *Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir.), *cert. denied*, 534 U.S. 951 (2001) (concluding that, "[w]hile a professor's rights to academic freedom and

Yet while some courts have recognized a relationship between the two, the rights that flow from the professional concept of academic freedom are not coextensive with First Amendment rights. The First Amendment in general protects against regulation of expression by government. Thus it protects expression on all sorts of topics and in all sorts of settings from regulation by public institutions, which includes public colleges and universities. On the other hand, the professional (and often legal) definition of academic freedom addresses rights within the educational contexts of teaching, learning, and research both in and outside the classroom--for individuals at private as well as at public institutions.

Thus, although the U.S. Supreme Court has consistently recognized that academic freedom is a First Amendment right, the scope of that right remains unclear: is academic freedom a separate First Amendment right or does the First Amendment simply apply distinctively in the university context?

As if this weren't confusing enough, in addition to legal protections from constitutional law that apply to faculty at state colleges and universities, there are additional sources of legal protection for individual academic freedom for faculty at public and private institutions embodied in **contractual obligations**, such as institutional rules and regulations, letters of appointment, faculty handbooks, and, where applicable, collective bargaining agreements. These contractual obligations are also overlaid and informed by "**academic custom**" or "**academic common law**," *see, e.g., Greene v. Howard University*, 412 F.2d 1128, 1135 (D.C. Cir. 1969) ("Contracts are written, and are to be read, by reference to the norms of conduct and expectations founded upon them. This is especially true of contracts in and among a community of scholars, which is what a university is."). Thus the practices and written policies of an institution may be interpreted by courts in light of the common understanding of the profession. *See Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (just as there may be a "common law of a particular industry or of a particular plan," so there may be an "unwritten 'common law' in a particular university" so that even though no explicit tenure system exists, the college may "nonetheless . . . have created such a system in practice").[4]

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freedom of expression are paramount in the academic setting, they are not absolute to the point of compromising a student's right to learn in a hostile-free environment," and finding professor's use of vulgar language "not germane to the subject matter").

[4] *See also Browzin v. Catholic University of America*, 527 F.2d 843, 848 n. 8 (D.C. Cir. 1975) (finding that jointly issued statements of AAUP and other higher education organizations, such as the *1940 Statement*, "represent widely shared norms within the academic community" and, therefore, may be relied upon to interpret academic contracts).

II. Student Academic Freedom

A. AAUP Policy

AAUP's *1915 Declaration* recognizes that "[a]cademic freedom has traditionally had two applications—to the freedom of the teacher and to that of the student, *Lehrfreiheit* [to teach] and *Lernfreiheit* [to learn]," and the AAUP recognizes that "the freedom to teach and the freedom to learn are inseparable facets of academic freedom." 1967 *Joint Statement on Rights and Freedoms of Students*, Redbook at 262. However, what exactly the "freedom to learn" constitutes, and how that "learning" academic freedom meshes with "teaching" academic freedom, is an area of ongoing uncertainty and debate.

AAUP policy defines freedom to learn as "depend[ing] upon appropriate opportunities and conditions in the classroom, on the campus, and in the larger community." 1967 *Joint Statement on Rights and Freedoms of Students*, Redbook at 262. Like faculty, "students should exercise their freedom with responsibility." *Id.* This statement protects not only the free expression rights of students generally, but speaks specifically to student academic freedom in the classroom. It requires "[t]he professor … [to] encourage free discussion, inquiry, and expression, [and to evaluate students] solely on an academic basis, not on opinions or conduct in matters unrelated to academic standards. And it gives students protection of freedom of expression ("students should be free to take reasoned exception to the data or views offered in any course of study and to reserve judgment about matters of opinion, but they are responsible for learning the content of any course of study for which they are enrolled"), and protection against improper academic evaluation ("students should have protection through orderly procedures against prejudiced or capricious academic evaluation. At the same time, they are responsible for maintaining standards of academic performance established for each course in which they are enrolled"). Redbook at 261.

B. The Legal Status of Student Academic Freedom

The legal standard of student academic freedom is less clear. Like faculty academic freedom, student academic freedom is discussed most commonly by the courts as some type of First Amendment right, although few have addressed the issue directly. However, many courts have used language and reasoning that seems to support at least some kind of First Amendment

right of academic freedom for students. *See, e.g., Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("[T]eachers and *students* must always remain free to inquire, to study and to evaluate, and to gain maturity and understanding; otherwise our civilization will stagnate and die.") (emphasis added). *See also Healy v. James*, 408 U.S. at 181-82, where the administration denied recognition to a student group on the grounds that the group's philosophy was antithetical to the college's commitment to academic freedom on campus. The Court overturned the denial of recognition, believing instead that affirming students' right to freedom of association was "reaffirming . . . academic freedom." 408 U.S. 169, 181-82 (1972). The Court reasoned: "[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force [to students] on college campuses than in the community at large. Quite to the contrary, '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" [Cites omitted].

More recently, in *Rosenberger v. Rector & Visitors of the University of Virginia*, the Court spoke more directly to the legal concept of student academic freedom as related to, but separate from, the First Amendment right of free expression. 515 U.S. 819, 835-36 (1995). There the Court ruled that a university's refusal to provide student activity fees to a Christian student organization to publish its magazine constituted viewpoint discrimination that violated the students' First Amendment rights. In so ruling, the Court emphasized the distinctive application of the First Amendment for students in the academic context, noting that "[t]he quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses." *Id.* Thus a legal argument can be made for some concept of First Amendment academic freedom for students. However, we are far from consensus or clarity as to what that right and its parameters may be.

It is also important to remember that First Amendment protection is not the only basis of student academic freedom. Students may also be entitled to contractual rights, since many student handbooks include academic freedom provisions.[5] In addition, some states have enacted state statutory protections that apply to students.[6]

[5] For a more detailed discussion of student contract rights in the context of academic freedom, *see* Cheryl Cameron, Laura Meyers and Steven Olswang, *Academic Bills of Rights: Conflict in the Classroom* 31 J.C.& U.L. 243 (2005).

[6] See, e.g. Calif. Educ. Code §§ 66301 and 94367, forbidding any public or private institution from making or enforcing "any rule subjecting any student to disciplinary sanction solely on the basis of conduct that is speech or

III. The Relationship of Faculty and Student Academic Freedom

A. The Legal Context

The question remains, then, how to balance the rights of faculty and student academic freedom when those rights compete. While academic freedom rights guaranteed by the First Amendment protect the "freedom of teachers to teach and of students to learn,"[7] the legal academic freedom rights of faculty and students are not equally weighted. Faculty academic freedom, unlike that of students, is not only an individual but also a collective right, informed by professional expertise and peer review. Accordingly, when faculty are teaching material germane to their subject matter, which is a "genuinely academic decision . . . [judges] should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 226 (1985). Thus, for example, professors must surely be allowed to select readings to assign in their courses without having to provide "equal time" for every competing viewpoint. It is, indeed, this very educational judgment for which faculty are uniquely trained and relied upon to supply. A contrary rule would not only be counterintuitive, but would invite endless lawsuits in which dissatisfied citizens would seek judicial involvement in the determination of the content of every course.

It makes sense too then that students do not have the legal right to demand that classes be viewpoint neutral or "balanced." In *Edwards v. Aguillard* 482 U.S. 578, 586 n. 6 (1987), the U.S. Supreme Court rejected the argument that a student's academic freedom to be informed of both views (evolution and creationism) could justify the legislative requirement that both views be taught. The court reasoned in part that academic freedom meant academic freedom for teachers as well: "The Act [in question] actually serves to diminish academic freedom by removing the flexibility to teach evolution without also teaching creation-science even if teachers determine that such curriculum results in less effective and comprehensive science instruction."[8]

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other communication that, when engaged in outside [the institution], is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article 1 of the California Constitution."

[7] *Epperson v. Arkansas*, 393 U.S. 97, 105 (1968).

[8] *See also Brown v. Li*, 308 F.3d 939, 953 (9th Cir. 2002), *cert. denied*, 538 U.S. 908 (2003) ("[A] teacher may require a student to write a paper from a particular viewpoint, even if it is a viewpoint with which the student disagrees, so long as the requirement serves a legitimate pedagogical purpose. For example, a college history professor may demand a paper defining Prohibition, and a law-school professor may assign students to write "opinions" showing

Unfortunately, while courts use traditional First Amendment categories to analyze academic freedom claims of faculty and students in the university classroom, those categories have not been helpful because they don't provide special regard to the mission of colleges and universities. For example, in analyzing the First Amendment expression rights of faculty members at public institutions, courts often apply the **"matters of public concern"** balancing test. *See Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). Under *Pickering* and its progeny, courts first determine whether a professor is speaking on a matter of public concern and, if so, whether the professor's speech outweighs the state's interest in an efficient academic workplace. The "content, form, and context of a given statement" are examined by courts to determine whether a particular topic addresses a matter of public concern. *Connick v. Myers*, 461 U.S. 138, 147-48 (1983).

Many times, however, courts apply the matters-of-public-concern test without particular understanding of or sensitivity to higher education. Questions like the difference between a "matter of public concern" and a "matter of private interest" are much harder to determine in the higher education context. And how can a faculty member's speech be judged on whether it "disrupts" the educational environment when the mission of educational institutions is to create an intellectual marketplace where unpopular, controversial, and sometimes even offensive speech can be expressed?

In balancing the free speech rights of students and faculty in colleges and universities, courts have also applied the standard set forth in ***Hazelwood School Dist. v. Kuhlmeier***, 484 U.S. 260 (1988). The *Hazelwood* decision allows administrators to restrict the "school-sponsored" extracurricular speech of high school students so long as the regulations "are reasonably related to legitimate pedagogical concerns." Despite the fact that *Hazelwood* involved primary education, a few courts have applied *Hazelwood* to the curricular speech of college and university students[9] and even to faculty speech.[10] Many courts have also recognized, however, that applying *Hazelwood* to colleges and universities is inappropriate, given that the mission of colleges and

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how Justices Ginsberg and Scalia would analyze a particular Fourth Amendment question . . . Such requirements are part of the teachers' curricular mission to encourage critical thinking . . . and to conform to professional norms. . . .); *Linnemeir v. Board of Trustees, Indiana University-Purdue University, Fort Wayne*, 260 F.3d 757 (7th Cir. 2001) ("The contention that the First Amendment forbids a state university to provide a venue for expression of views antagonistic to conventional Christian beliefs is absurd. It would imply that teachers in state universities could not teach important works by Voltaire, Hobbes, Hume, Darwin, Mill, Marx, Nietzsche, Freud, Yeats, Heidegger, Sartre, Camus, John Dewey, and countless other staples of Western culture.").

[9] *See, e.g., Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004) (ruling that "at least as to curriculum issues . . . *Hazelwood* provides a good appropriate framework for evaluating free speech claims even at the college level").

[10] *See, e.g., Bishop v. Aronov*, 926 F.2d 1066, 1074-77 (11th Cir. 1991), *cert. denied sub nom., Bishop v. Delchamps*, 505 U.S. 1218 (1992).

universities is not only to disseminate information, but to develop critical thinking skills and new ideas "through a wide exposure of robust ideas," including diverse viewpoints. *See Keyishian*, 385 U.S. at 603. Even the *Hazelwood* Court recognized that the age, maturity, and sophistication level of students must be considered in determining whether a restriction is "reasonably related to legitimate pedagogical concerns": "[A] school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting." Moreover, unlike elementary and secondary school teachers, college and university professors are members of academic disciplines and have significantly more professional expertise to determine legitimate pedagogical concerns. Therefore such curricular speech demands more, not less, First Amendment protection. *See, e.g., Kincaid v. Gibson*, 236 F.3d 342, 352 (6th Cir. 2001) (en banc) (declining to apply *Hazelwood* because "[t]he university environment is the quintessential 'marketplace of ideas', which merits full, or indeed heightened, first Amendment protection").

Finally, courts and commentators have analyzed First Amendment clashes in the college classroom based on whether the classroom is a **traditional, limited or nonpublic forum**, and then what types of time, place and manner restrictions are permissible. *See, e.g., Hazelwood*, 484 U.S. at 267. In a traditional public forum, like a public park, only government restrictions that are narrowly drawn and serve a compelling state interest pass First Amendment muster. Limited (or designated) public forums are treated like traditional public forums if the government has opened up the public property forum for expressive use. In contrast, in a nonpublic forum, which is "not held open to the general public" (like a classroom), content-neutral restrictions need only be reasonable and unrelated to suppressing the speakers' views.[11] In an academic speech restriction, case then, the question of what is a reasonable restriction should be analyzed based on the university's primary purpose—educating students. Robert Post, CONSTITUTIONAL DOMAINS (Harvard University Press, 1995) at 324. Unfortunately, the public forum doctrine does not work well for colleges and universities because its elastic nature seems only to invite probing of educational decisions.[12]

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[11] *Perry Education Association v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). *See also Rosenberger*, 515 U.S. at 819 (drawing distinction between public forum created by university resources and speech of the university itself). *See, e.g., Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993) ("The classroom is not a public forum, and therefore is subject to reasonable speech regulation."); *Bishop*, 926 F.2d at 1071 (holding that a university classroom was not an "open forum" for First Amendment purposes).

[12] *See, e.g., Widmar*, 454 U.S. at 278-79 (Stevens, J., concurring) (noting that "public forum" analysis "may needlessly undermine the academic freedom of public universities," and reasoning that a university should be free to

B. Recent Cases and Controversies

Academic freedom for both faculty and students can be mutually reinforcing and advance the search for knowledge and truth in higher education. Accordingly, in many cases the First Amendment concerns of faculty and students are aligned.[13] From time to time, however, cases arise that involve competition between the First Amendment interests of faculty and students.[14] One of the more recent examples was the case of ***Axson-Flynn v. Johnson*** (University of Utah), 151 F. Supp. 2d 1326 (D. Utah 2001), *rev'd*, 356 F.3d 1277 (10th Cir. 2004). University of Utah student Christina Axson-Flynn, a member of the Church of Jesus Christ of Latter-Day Saints, sued theater department faculty for violating her rights to free speech and free exercise of religion under the First Amendment. She objected to their curricular requirement that students perform in-class plays, regardless of students' possible religious objections to the content of those plays. The professors asserted that "it is an essential part of an actor's training to take on difficult roles, roles which sometime[s] make actors uncomfortable and challenge their perspective." Axson-Flynn dropped out of the special theater program and sued her professors, arguing that the university violated her free speech (by compelling her to say offensive words) and her religion (by forcing her to say words that she considers sinful).

The university argued that the court had to balance "Axson-Flynn's allegations that the . . . curriculum violated her constitutional rights . . . against the backdrop of the University's freedom to determine its curriculum and how to instruct the students in the curriculum." It contended that Axson-Flynn's claims failed because constitutional academic freedom allowed the "university and its departments to make academic judgments to determine for itself, on academic grounds, what to teach and how to teach it." In 2001 the district court ruled against Axson-Flynn, reasoning that if the curriculum requirements were to constitute a First Amendment violation, "then a

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decide for itself whether to prefer a student rehearsal of "Hamlet" or the showing of Mickey Mouse cartoons because "[j]udgments of this kind should be made by academicians, not federal judges").

[13] *See, e.g., Crue v. Aiken*, 370 F.3d 668 (7th Cir. 2004) (ruling that the University of Illinois-Urbana Champaign administration violated the First Amendment rights of faculty and students by prohibiting them from communicating with prospective student athletes about the school's use of the Chief Illiniwek mascot); *Southern Christian Leadership Conference v. Louisiana Supreme Court*, 252 F.3d 781 (5th Cir.), *cert. denied*, 534 U.S. 995 (2001) (upholding state supreme court rule, which was challenged by students and faculty, that restricted the types of community groups that may be represented and "solicited" by law clinics).

[14] *See, e.g., Bishop*, 926 F.2d at 1066 (upholding the University of Alabama administration's restriction of an exercise physiology professor's in-class curricular speech, in which he expressed his Christian beliefs and invited students to point out "deviations" between his lifestyle and Christianity, as not reasonably related to legitimate pedagogical goals); *Salehpour v. University of Tennessee*, 159 F.3d 199 (6th Cir. 1998) (ruling that speech of a dentistry student who violated a professor's "last row rule," which barred first year students from sitting in the last row of his classes,

believer in 'creationism' could not be required to discuss and master the theory of evolution in a science class; a neo-Nazi could refuse to discuss, write or consider the Holocaust in a critical manner in a history class." The student appealed, and the Tenth Circuit reversed and remanded the lower court decision. The unanimous three-judge panel clearly embraced the notion that courts should defer to the professional judgment of faculty to determine what is pedagogically appropriate in the college classroom so long as such academic decisions are not pretextual. Nevertheless, the court ultimately concluded that "[v]iewing the evidence in a light most favorable to Axson-Flynn, . . . there is a genuine issue of material fact as to whether [the professors'] justification for the script adherence requirement was truly pedagogical or whether it was pretext for religious discrimination."

To reach this conclusion, the court first reasoned that the classroom is a non-public forum for free speech purposes. It then applied *Hazelwood* and ruled that Axson-Flynn's speech could be restricted so long as it was "reasonably related to pedagogical concerns." Nevertheless, however, the court concluded that it "may override an educator's judgment where the proffered goal or methodology was a sham pretext for an impermissible ulterior motive" such as religious bias. While the court did not recognize a separate right of academic freedom under the First Amendment, it did apply the First Amendment with a sense of the distinctiveness of the university, reaffirming that it would "not second-guess the pedagogical wisdom or efficacy of an educator's goal."

Following the court's decision, the parties entered into a settlement agreement, in which the university agreed to adopt and implement "a comprehensive religious accommodation policy." The administration appointed "a seven-member ad hoc committee . . . consisting of three faculty members, three students, and one at-large representative," which was charged with drafting such a policy "and other recommendations it deems appropriate to the continued reduction of insensitive and inappropriate behavior, and to the elimination of illegal discrimination." The faculty eventually implemented a context accommodations policy, which holds that "consistent with principles of academic freedom, the faculty, individually and collectively, has the responsibility for determining the content of the curriculum." However, the policy then recognizes that "students' sincerely held core beliefs may make it difficult for students to fulfill some requirements of some courses or majors," and encourages students to drop courses without penalty when such a conflict arises. In addition, "[a] student who finds this

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was not protected, because the student's speech was to disrupt "the classroom milieu for the sole purpose of advancing and pursuing his admitted 'power struggle' with the University").

solution impracticable may request a content accommodation from the instructor," and "[t]he student's request must articulate the burden the requirement would place on the student beliefs."

In another case using religion in a unique way to challenge the faculty's right to set curriculum, students and individual taxpayers backed by a self-described Christian conservative organization sued the University of North Carolina at Chapel Hill for its scheduled freshmen orientation discussion on *Approaching the Qur'an: The Early Revelations*, by Michael Sells. ***Yacovelli v. Moeser*** (University of North Carolina, Chapel Hill), Case No. 02-CV-596 (U.S. Dist. Ct., Middle District of N.C., Aug. 15, 2002), *aff'd*, Case No. 02-1889 (4th Cir., Aug. 19, 2002); 324 F.Supp.2d 760 (M.D.N.C. 2004). The students sought to halt the summer program, arguing that the assignment of the book amounted to an endorsement of religion and violated the Free Exercise Clause of the Constitution. They objected to the university's "guise of academic freedom, which is often nothing other than political correctness in the university setting," and contended that because "the Qur'an is not fully presented, . . . the University is producing only half-educated students who may well believe they are fully educated on this important matter."

The university argued that the reading program was not endorsing or promoting a particular religion, and an injunction to stop the program would chill academic freedom because "the decision was entirely secular, academic, and pedagogical." The program's purpose, the university noted, was "to educate, not to indoctrinate," and to hold otherwise would be to subject all future pedagogical decisions to a bizarre level of review. As Robert Galloway Kirkpatrick, UNC professor of English, stated in his affidavit in support of the university's motion for summary judgment: "Would next year's committee be forbidden to require incoming students to read *The Iliad*, on the grounds that it could encourage worship of strange, disgraceful gods and encourage pillage and rape?"

The federal district court ruled in favor of the university, finding that "there is obviously a secular purpose with regard to developing critical thinking, [and] enhancing the intellectual atmosphere of a school for incoming students." The court noted the potential harm to the university, which it considered "not just the harm to faculty members or staff, but incoming students and the deprivation of an opportunity to participate in academic discussions, in critical thinking, in expressing opinion and perhaps engaging in argument in framing dissent . . .."

In a rather dramatic contrast to the religious cases, one of the other few recent cases involving student's claims of academic freedom involved a student's demand that he be able to add a special "fuck you section" to his thesis. In ***Brown v. Li*** (University of California, Santa Barbara), 308 F.3d 939 (9th Cir. 2002), *cert. denied*, 538 U.S. 908 (2003), a master's degree

candidate added the section after his thesis was initially approved, and then sued the administration, faculty members and the library director on First Amendment grounds for rejecting the altered thesis and declining to place it in the university's thesis library.[15] Brown pursued internal grievances over the thesis committee's decisions, including filing an appeal on academic freedom grounds with the "Academic Affairs Committee." The committee unanimously rejected Brown's appeal, finding that the acknowledgement section's style did not unfairly limit the student's academic freedom.

In a fractured decision, the Ninth Circuit three-judge panel upheld the trial court's ruling in favor of the university. Judge Graber's majority opinion found no First Amendment violation because a court must defer "to the university's expertise in defining academic standards and teaching students to meet them," although she clearly recognized that students have, at least to some degree, First Amendment rights involving curriculum. The opinion considered the many interests at stake, including the "university's interest in academic freedom," the faculty members' "First Amendment rights," and the student's "First Amendment rights." After recognizing that there existed "no precedent precisely on point," the majority analyzed the case under *Hazelwood*, and explained that the university would prevail if their rejection of Brown's thesis "was reasonably related to a legitimate pedagogical objective." The court opined: "The Supreme Court's jurisprudence does not hold that an institution's interest in mandating its curriculum and in limiting a students' speech to that which is germane to a particular academic assignment diminishes as students age. Indeed, arguably the need for academic discipline and editorial rigor increases as student's learning progresses." The court found the faculty decision legitimate because it was reasonably related to the pedagogical goal of "teaching the proper format for a scientific paper."

In reading this result, the majority explored the relationship between the student's First Amendment rights and the faculty members' academic freedom. The court described a faculty member as having "a right to . . . evaluate students as determined by his or her independent professional judgment" and, therefore, the court found that "the committee members had an affirmative First Amendment right not to approve Plaintiff's thesis," which, in turn, "underscores [the student's] lack of a First Amendment right to have his nonconforming thesis approved."

[15] The "Disacknowledgements" section read: "I would like to offer special Fuck Yous to the following degenerates for of [sic] being an ever-present hindrance during my graduate career . . . ," and then listed the culprits, including faculty, the governor, and "Science." For more detailed discussion of the case, see Adam R. Gardner, Comment: "Giving Credit Where It is Due? An 'Acknowledgement' of Higher Education in America," 37 Loy. L.A. L. Rev. 69, 73 (2003) (hereafter "Giving Credit").

Accordingly, under the First Amendment faculty members may (1) "require that a student comply with the terms of an academic assignment," (2) decline to "approve the work of a student that, in [a professor's] judgment, fails to meet a legitimate academic standard"; (3) limit a "student's speech to that which is germane to a particular academic assignment"; and (4) "require a student to write a paper from a particular viewpoint, even if it is a viewpoint with which the student disagrees, so long as the requirement serves a legitimate pedagogical purpose."

Finally, a controversy that arose at the University of California highlights the tension between student and faculty academic freedom as it plays out for graduate students who serve as both teachers and students. In 2002 a graduate student instructor posted to the university website the description of his English Department course in basic reading and writing skills. The course was entitled "The Politics and Poetics of Palestinian Resistance," and it was to discuss the Palestinian Intifada and its relationship to Palestinian writing. The course description closed with notice that "conservative thinkers are encouraged to seek other sections." The course description quickly attracted public attention, including an editorial in the *Wall Street Journal* that pointed to the "Intifada curriculum" as further support that American universities are "beholden to leftist ideologies."

Fortunately, the faculty managed to resolve the matter in a way designed to both educate the graduate student and address the undergraduate students concerns. To do so, the faculty senate eventually approved a revised course description, and the English Department faculty and the graduate student instructor discussed why the original course description was inappropriate. Also, faculty in the English Department advised students enrolled in the course of the right to express their opinions, and the Chair of the English Department informed students in the course that he would handle any complaints about bias arising from the course. Finally, a tenured faculty member in the English Department was assigned to observe the course to be sure that full discussion by students was encouraged.[16]

In the end, courts are clearly struggling with the law governing the tensions between faculty and student free speech rights in the classroom, and the results are murky at best. There is no current clear precedent as to the standards to be applied to students, or the level of actual deference that will be given to educational decisions. While courts continue to pay lip service to the "deference" owed academic decisions within colleges and universities, the application of the law to the facts suggests otherwise, and the difficulty of applying traditional First Amendment

[16] For a thorough examination of the academic freedom interests implicated in this dispute, see Robert M. Post, "Academic Freedom and the 'Intifada Curriculum'," Academe (May-June 2003) at 16.

legal standards to the unusual situation presented by higher education will continue. Courts will continue to struggle with the question of how to balance the academic freedom rights of students against the academic freedom rights of institutions and faculty members, and will hopefully continue to recognize that the curricular speech of faculty in the classroom, assuming its germaneness to the subject matter, must be deferred to as professional judgments unless substantial evidence suggests otherwise.

IV. "Political" Discrimination in the Classroom?

A. The Legislative Arena: The Academic Bill of Rights

The so-called "Academic Bill of Rights" is another example of possible tensions between student and faculty academic freedom. It is the creation of self-identified "conservatives," who are claiming a need for greater "political diversity" in the classroom and calling for student monitoring of college and university teachers for perceived "liberal bias." A group calling itself "Students for Academic Freedom" (hereafter "SAF"), sponsored by conservative activist David Horowitz, is now on dozens of campuses, and its members campaign in state legislatures for legislation based on their model "Academic Bill of Rights" (hereafter "ABR"). Horowitz argues that the ABR is necessary because "faculty and administration" are "ideologically conformist in their liberalism."[17]

The proposed "Bill of Rights" is cast in language that appears – at first – almost unexceptionable. In application, however, its provisions could be very damaging to the academic freedom of faculty and institutions. For example, while the ABR expresses the view that faculty should be appointed, granted tenure, and promoted on the basis of competence and knowledge of their subject, it calls for these decisions to "foster a plurality of methodologies and perspectives" within a discipline. Such requirements would override professional judgments, arguably requiring

[17] Despite Horowitz's rhetoric, however, this political interference with the autonomy of higher education institutions is not an alignment of conservative versus liberal, but rather individuals for and against institutional autonomy. An outspoken critic of this legislative effort, for example, is Daniel L. Anderson, president of Appalachian Bible College in West Virginia, also a self-identified conservative, who is "outraged" by the ABR. He fears such legislation "would inhibit his college's efforts to provide a faith-based education and would put pressure on the college to hire professors . . . to the campus who espouse views contrary to those of the institution." Andersen states that there is always "a potential risk once the government starts defining academic freedom." Alyson Klein, "Worried on the Right and the Left," The Chronicle of Higher Education (July 9, 2004). Similarly another conservative, Jesse Walker, the associate editor of the libertarian Reason magazine, has said that "what Horowitz either doesn't realize or won't acknowledge is that he would introduce yet more intrusions, pushing far beyond restraints on obvious malpractice." "Horowitz and the Academic Bill of Rights," <www.campusspeech.org>.

methodologies and perspectives to be included even when scholarly analysis of the subject has found them to be inaccurate or invalid. The same is true of the ABR requirement that curricula and readings in the humanities and social sciences provide "dissenting viewpoints." (Academic disciplines, according to the ABR, should welcome a "diversity of approaches to unsettled questions.") On its face this requirement seems reasonable, yet again the problem is in who defines the range of diversity and who declares a question "unsettled." The proposals advise disciplinary and learned societies, where peer judgments supposedly "settle" what is considered scholarship within a discipline, to "maintain a posture of neutrality" with respect to the substantive disagreements among scholars in or outside of their field. Yet adherence to such tenets would override professional judgment, requiring the inclusion of inaccurate, unsound and outdated arguments in any discussion of a subject. (For a copy of the proposed ABR provisions, see http://www.studentsforacademic freedom.org).

In the last 2 years, the ABR has reached the level of active legislation in at least 18 states. While most have rejected the legislation, as of January 2006 Massachusetts, Minnesota, New York, Tennessee and Washington all had some version of ABR legislation alive in their state, although several are only technically still active, and Pennsylvania passed a bill to set up a select committee to consider the issue. (For an updated listing of the current status of ABR legislation in different states, see AAUP's Government Relations website at http://www.aaup.org/Issues/ABOR/statelegislation.htm).

Legislative action on the ABR has also not been limited to the states. In October 2003, U.S. Congressman Kingston (R-Ga.) introduced a resolution providing that "American colleges and universities should adopt an Academic Bill of Rights to secure the intellectual independence of faculty members and students." According to Representative Kingston, the measure was introduced to "protect students from one-sided liberal propaganda" and to "safeguard a student's right to get an education rather than an indoctrination." While the House education committee at the time did not act on the Kingston resolution, different versions of the resolution were included in the bill intended to serve as the main legislative vehicle for the reauthorization of the Higher Education Act in both 2004 and 2005. The language proposed provides that it is the right of students to be "presented diverse approaches and dissenting sources and viewpoints within the institutional setting."

The Higher Education Community Response

The education community has been increasingly vocal in responding to this attack on its autonomy. The AAUP issued a statement on the ABR in 2003, noting that "[w]hen carefully analyzed, . . . the Academic Bill of Rights undermines the very academic freedom it claims to support. It threatens to impose administrative and legislative oversight on the professional judgment of faculty, to deprive professors of the authority necessary for teaching, and to prohibit academic institutions from making the decisions that are necessary for the advancement of knowledge." Other higher education organizations have also spoken out about the threat of the ABR. For example, the American Council on Education, the AAUP and over 20 other higher education organizations recently issued a joint statement on academic rights and responsibilities, recognizing, among other principles, that "the validity of academic ideas, theories, arguments and views should be measured against the intellectual standards of relevant academic and professional disciplines. Application of these intellectual standards does not mean that all ideas have equal merit." http://www.aaup.org/statements/SpchState/Statements/joint%20statement%20on%20ABOR.pdf. Similarly, more than 20 presidents from prestigious research universities from around the world met in the first "Global Colloquium of University Presidents" and issued a statement on the world-wide importance of academic freedom and peer review systems as a means of maintaining that academic freedom. http://www.columbia.edu/cu/president/communications%20files/global colloquium.htm.

Issues to Consider

The ABR debate makes clear that educators are not doing as good a job as they need to of explaining what exactly we do. Faculty and administrations alike must become increasingly aware of and sensitive to the issues ABR raises in the eyes of legislators, funders and the general public. We must consider how we in the academic community can more clearly explain distinctions between "political balance" and "academic balance" and the necessity for professional standards, without appearing simply arrogant. We must find ways to explain to the public more clearly the ways in which student freedoms are already protected, and make clear the harms involved if legislators attempt to dictate curriculum.

B. Classroom Cases and Controversies Involving "Political Discrimination"

While the ABR is the legislative battlefront for issues of so called political "indoctrination" and "discrimination," administrators and faculty are also seeing increasing controversies on this issue arise on their campuses. At Metropolitan College in Colorado, for example, a professor of political science threatened a lawsuit alleging hostile work environment after she had allegedly been targeted by conservative students for her course content and teaching style. In August 2004 the college president issued a statement affirming the professor's academic freedom in light of student and legislative attacks on her pedagogy. Jennifer Jacobson, "A Liberal Professor Fights a Label," Chronicle of Higher Education (Nov. 26, 2004). Or, at the University of Montana law school, Robert B. Natelson, a tenured full professor, claims that he has been prevented from teaching constitutional law by his faculty peers because of his politics. A mediator did not reach the issue of whether the professor had been a victim of political discrimination, finding "only that the professor had been treated unfairly and decided he should be permitted to teach constitutional law, on a trial basis." Jennifer Jacobson, "Mediator's Ruling Favors Conservative Professor in Dispute Over Teaching Duties at University of Montana," *The Chronicle of Higher Education* (Aug. 27, 2004).

These allegations of political or ideological discrimination raise, once again, the issue of how education differs from "indoctrination," and the role of the professional expertise of faculty. Horowitz asserts that "[c]ourses of indoctrination masquerading as education have spread through the curriculum." Similarly, in the UNC Qur'an case, discussed above, what the student plaintiffs saw as "forced Islamic indoctrination," the court saw as "developing critical thinking, [and] enhancing the intellectual atmosphere of a school for incoming students." All seem to agree that faculty must educate, not indoctrinate, their students. But what is "indoctrination" in higher education?

The AAUP's *1915 Declaration* defines the purpose of a university education as "not to provide . . . students with ready-made conclusions, but to train them to think for themselves, and to provide them access to those materials which they need if they are to think intelligently." Accordingly, faculty must not indoctrinate students, but "arouse in them a keen desire to reach personally verified conclusions upon all questions of general concern to mankind." [18]

[18] *See* Walter P. Metzger, ACADEMIC FREEDOM IN THE AGE OF THE UNIVERSITY (Columbia University Press, 1955) at 128-29 (emphasizing that the American view of faculty responsibility rejected the "German idea of 'convincing' one's students, of winning them over to the personal system and philosophic views of the professor"); *Joint Statement on Rights and Freedoms of Students*, Redbook at 261 ("Student performance should be evaluated solely on an

Professor Robert Post has examined this question of education versus indoctrination in the classroom, concluding that "[t]he line between education and indoctrination cannot be drawn without reference to applicable professional norms." Contrasting a mathematics student who refuses to internalize and apply proper rules for solving differential equations with an English student who refuses to agree with his professor's interpretation of *Paradise Lost*, Post notes that while it is easy to conclude that the former is "not exercising a mature independence of mind, but is instead displaying a stubborn refusal to learn," such an analysis of the latter "will depend upon our appraisal of the quality of the student's own countervailing interpretation of *Paradise Lost*, an appraisal that is impossible without the framework of relevant professional norms of literary criticism." "This suggests that the distinction between education and indoctrination does not depend upon anything so simple as whether a student is required to learn or use specific information or facts or theories. This distinction follows instead from a normative account of the kind and nature of relevant professional knowledge. Robert Post, "The Structure of Academic Freedom" *in* ACADEMIC FREEDOM AFTER SEPTEMBER 11 (Beshara Doumani, Ed.) (Zone Books, 2006).

Courts too have weighed in on question of teaching versus indoctrination, coming down in support of the need for professors to teach—even passionately—but to avoid indoctrinating. In Justice Frankfurter's *Sweezy* concurrence he observed: "A university is characterized by the spirit of free inquiry, its ideal being the ideal of Socrates—'to follow the argument where it leads.' This implies the right to examine, question, modify or reject traditional ideas and beliefs. Dogma and hypothesis are incompatible, and the concept of an immutable doctrine is repugnant to the spirit of a university." 354 U.S. at 234. Similarly, in *James v. Board of Education of Central School District*, 461 F.2d 566, 573-74 (2d Cir. 1972), the Second Circuit defended advocacy by faculty in the classroom: "It would be foolhardy to shield our children from political debate and issues until the eve of their first venture into the voting booth. Schools must play a central role in preparing students to think, and analyze, and to recognize the demagogue." At the same time, the court condemned indoctrination, concluding that "although sound discussions of ideas are the beams and the buttresses of the first amendment, teachers cannot be allowed to patrol the precincts of radical thought with the unrelenting goal of indoctrination, a goal compatible with totalitarianism and not democracy."

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academic basis, not on opinions or conduct in matters unrelated to academic standards," and while students may be "responsible for learning the content of any course of study," they "should be free to take reasoned exception to the data or views offered in any course of study.").

C. Ideological Hiring?

Supporters of the ABR also allege that conservative faculty are being denied appointments because of their political or ideological views, and demand that colleges and universities appoint faculty "with a view toward fostering a plurality of methodologies and perspectives." The danger of such guidelines, of course, "is that they invite diversity to be measured by political standards that diverge from the academic criteria of the scholarly profession." AAUP Statement on Academic Bill of Rights. http://www.aaup.org/statements/SpchState/Statements/billofrights.htm. "Measured in this way, diversity can easily become contradictory to academic ends. So, for example, no department of political theory ought to be obligated to establish "a plurality of methodologies and perspectives" by appointing a professor of Nazi political philosophy, if that philosophy is not deemed a reasonable scholarly option within the discipline of political theory. No department of chemistry ought to be obligated to pursue 'a plurality of methodologies and perspectives' by appointing a professor who teaches the phlogiston theory of heat, if that theory is not deemed a reasonable perspective within the discipline of chemistry." *Id.*

Legally, faculty at public institutions, like other public employees, cannot be appointed or dismissed based on their political affiliations. *See O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 718-19 (1996) *Elrod v. Burns*, 427 US 347 (1976). However, few recent cases raise the direct issue of political affiliation as a motivating factor in an academic appointment or nonreappointment. *See, e.g., Ramos-Biaggi v. Martinez*, 98 F. Supp. 2d 171 (D.P.R. 2000) (ruling that chancellor's First Amendment rights not violated because he could not establish that a motivating factor for his dismissal was his refusal to appoint faculty based on their political party affiliations). Nevertheless, some earlier cases did involve the appointment and nonreappointment of faculty with a particular political and ideological perspective—Marxism. In *Cooper v. Ross*, 472 F. Supp. 802 (E.D. Ark. 1979), Grant Cooper, an untenured history professor at the University of Arkansas at Little Rock, sued the administration on the claim that it decided not to reappoint him because he was a member of the Communist Party. The district court ruled in Cooper's favor, finding that the administration's decision was substantially motivated by his political conduct. The court concluded that "at least in the context of a university classroom, Cooper had a constitutionally protected right simply to inform his students of his personal political and philosophical views," and noted that Cooper "encouraged students to challenge and dispute his views." At the same time, the court "emphasize[d] that its holding is strictly limited to a teacher's right simply to inform his students of his views and does not imply that a teacher has

the right to proselytize students or to devote so much class time to such matters that his coverage of the prescribed subject matter is impaired." Similarly, in *Ollman v. Toll*, 518 F. Supp. 1196 (D. Md. 1981), *aff'd*, 704 F.2d 139 (4th Cir. 1983), Bertell Ollman sued the University of Maryland, claiming that he had been rejected for the position of chair of the political science department at the College Park campus because of his "political beliefs and associations." The district court ruled that Ollman failed to establish that his Marxism was a substantial or motivating factor in the president's decision not to appoint him as chair. The court recognized that "[n]o more direct assault on academic freedom can be imagined than for school authorities to refuse to hire a teacher because of his or her political, philosophical, or ideological beliefs." In this case, however, the court found that the university president had made his decision not based on Ollman's political beliefs or ideological commitment, but on "legitimate academic considerations," including the fact that Ollman lacked administrative experience. The Fourth Circuit affirmed.

V. Conclusion

Faculty and administration need to work together to better articulate to the public, including parents, students, and state legislators, what we do, how we do it, and why it is important, not just for higher education, but the nation. We offer a "product" which, when done well, is difficult to quantity in the concrete terms that make the best media sound bites. Those who would attack higher education are adept at using the language of rights and "fairness" to open the door to increasing oversight and control of academic judgments—administrative and pedagogical—to the legislature and the public. Our current system of liberal education cannot flourish under such interference, and thus we must continue to identify and push concrete, nonarrogant ways of explaining and advocating the value of a so-called "liberal," challenging, controversial education, guided by educators and advocating true freedom of thought and learning.

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