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A GUIDE TO ACADEMIC FREEDOM

by

Frederick P. Schaffer*

Introduction

This brief introduction to the principles of academic freedom is intended for attorneys and other administrators who represent or work at colleges and universities. It has two purposes. The first is to introduce them to academic freedom as a set of professional principles regardless of whether or not they are legally enforceable. Attorneys and administrators need to understand the culture of the institutions they represent or serve. Nowhere is this more true than with colleges and universities, which have well established traditions and norms that influence the expectations and conduct of all those responsible for their governance, including faculty, administrators and trustees.

The second purpose is to introduce the law relating to academic freedom as it has evolved over the last half century. As will become apparent, it is not always clear where academic freedom as a set of professional principles ends and the law begins. Academic freedom has received some recognition by the Supreme Court and considerably more by the lower federal courts in connection with the application of the First Amendment to cases involving both universities as institutions and the individual rights of faculty. However, the meaning of academic freedom in the context of constitutional law is confused. Apart from its constitutional dimension, academic freedom as a legal principle results from its incorporation into contracts or collective bargaining agreements between

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universities and faculty or into policies, guidelines or handbooks adopted or issued by universities that may or may not create contractual rights. It is not possible in an introduction to the subject of academic freedom to cover these complex issues of contract law and interpretation. Rather, the goal of the present work is merely to present what principles are or are not part of the definition of academic freedom and how they may be fairly applied in some of the most common contexts in which they arise.

This guide was the outgrowth of several meetings over the course of two years sponsored by the Ford Foundation, as part of its “Difficult Dialogues Initiative,” and with the active support of the National Association of College and University Attorneys. I have benefitted greatly from the discussions at those meetings and from the comments of many of its participants on drafts of this guide.

The Origins of Academic Freedom in the United States – The 1915 Declaration

The principles of academic freedom in the United States were heavily influenced by the thinking and practice at German universities and the growth of nonsectarian American universities in the second half of the nineteenth century.¹ With the rise of ideological conflicts, especially relating to economic theory, faculty began to feel the need for protection against trustees and/or administrators who sought the dismissal of faculty whose views they found unpalatable.

In response to these conflicts, the American Association of University Professors was founded in 1915 and issued its Declaration of Principles on Academic Freedom and Academic Tenure (the “Declaration”).² The Declaration begins by stating that academic freedom of the teacher “comprises three elements: freedom of inquiry and research;

freedom of teaching within the university or college; and freedom of extramural utterance and action.” It then turns to three matters that it deems critical to understanding these principles.

First, the Declaration considers the basis of academic authority, arguing that except for proprietary and religious institutions, colleges and universities constitute a public trust. This is true not only for state universities, but also for private universities because they appeal to the general public for contributions and moral support in the maintenance of non-partisan institutions of learning, not propaganda. Accordingly, their trustees have no right to bind the reason or conscience of the faculty.

Second, the Declaration considers the nature of the academic calling, arguing that the function of the faculty “is to deal first hand, after prolonged and specialized technical training, with the sources of knowledge; and to impart the results of their own and of their fellow-specialists’ investigations and reflection, both to students and to the general public, without fear or favor.” This provides an important societal benefit by ensuring “that what purport to be the conclusions of men trained for, and dedicated to, the quest for truth, shall in fact be the conclusions of such men, and not echoes of the opinions of the lay public or the individuals who endow or manage universities.” This emphasis on the independence of faculty applies not only to their individual work as researchers and teachers, but also appears to have implications for the shared governance of the institution: “A university is a great and indispensable organ of higher life of a civilized community, in the work of which the trustees hold an essential and highly honorable place, but in which the faculties hold an independent place, with quite equal

responsibilities – and in relation to purely scientific and educational questions the primary responsibility.”

Third, the Declaration considers the functions of an academic institution, which are (a) to promote inquiry and advance the sum of knowledge; (b) to provide instruction to students; and (c) to develop experts for public service. It argues that performance of each of those functions requires faculty to have complete freedom to pursue their investigations and discuss and publish their results and to express themselves fully and frankly both to their students and to the public.

In short, the Declaration affirms that the university must provide an inviolable refuge from the tyranny of public opinion: “It should be an intellectual experiment station, where new ideas may germinate and where their fruit, though still distasteful to the community as a whole, may be allowed to ripen until finally, perchance, it may become a part of the accepted intellectual tool of the nation or of the world. Not less is it a distinctive duty of the university to be the conservator of all genuine elements of value in the past thought and life of mankind which are not in the fashion of the moment.”

Next, the Declaration counsels that the rights granted to university teachers by the principles of academic freedom come with corresponding obligations. In the case of scholarship, this means that “the liberty of the scholar within the university to set forth his conclusions, be they what they may, is conditioned on their being conclusions gained by a scholar’s methods and held in a scholar’s spirit; that is to say, they must be the fruits of competent and patient and sincere inquiry, and they should be set forth with dignity, courtesy, and temperateness of language.” In the case of teaching, this means that the teacher “in giving instruction upon controversial matters, while under no obligation to

hide his own opinion under a mountain of equivocal verbiage, should, if he is fit for his position, be a person of a fair judicial mind; he should, in dealing with such subjects, set forth justly, without suppression of innuendo, the divergent opinions of other investigators; he should cause his students to become familiar with the best published expressions of the great historic types of doctrine upon the questions at issue; and he should, above all, remember that his business is not to provide his 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.”

According to the Declaration, however, the power to determine when violations of those obligations have occurred should be vested in bodies composed of members of the academic profession. Other bodies do not possess full competence to judge concerning those requirements and may be viewed as acting on the basis of motives other than zeal for academic integrity and the maintenance of professional standards. At the same time, placing this authority exclusively in the hands of the faculty imposes a corresponding obligation to police the standards of their profession. As the 1915 Declaration states: “If this profession should prove itself unwilling to purge its ranks of the incompetent and the unworthy, or to prevent the freedom which it claims in the name of science from being used as a shelter for inefficiency, for superficiality, or for uncritical and intemperate partisanship, it is certain that the task will be performed by others . . . who lack . . . essential qualifications for performing it.”

The Declaration goes on to apply the same principles not only to scholarship and teaching, but also to “extramural utterances” – that is, the expression of judgments and opinions outside of the classroom – and political activities, even when they pertain to

questions falling outside the academic specialty of the faculty member. It notes that “academic teachers are under a peculiar obligation to avoid hasty or unverified or exaggerated statements, and to refrain from intemperate or sensational modes of expression.” However, as with speech within the university setting, the Declaration counsels that the enforcement of such restraints should be, for the most part, through the public opinion of the profession, or, if disciplinary action is appropriate, through bodies composed of members of the academic profession.

The Declaration ends its discussion of this topic with an important point that relates to all aspects of academic freedom: “It is, in short, not the absolute freedom of utterance of the individual scholar, but the absolute freedom of thought, of inquiry, of discussion and of teaching, of the academic profession, that is asserted by the declaration of principles.”

The Declaration concludes with several practical proposals. One involves the establishment of suitable judicial bodies relating to the dismissal or discipline of faculty and the determination of claims that academic freedom has been violated. Others relate to procedural protections that will safeguard academic freedom, including tenure, the right to notice and a hearing before dismissal and the formulation of clear standards for dismissal. Tenure is justified as providing assurance against interference with freedom in research and teaching, especially against improper pressure by trustees. However, the Declaration makes clear that tenure is not intended to immunize a faculty member against appropriate disciplinary proceedings as long as they are conducted at a hearing before the faculty or a committee of faculty.

The Reiteration of the Principles of Academic Freedom – The 1940 Statement

In 1940, the American Association of University Professors and the Association of American Colleges (today the Association of American Colleges and Universities) agreed to a shorter version of the Declaration, now known as the 1940 Statement of Principles on Academic Freedom and Tenure.³ The basic purpose of academic freedom remained the same:

Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.

Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.

The 1940 Statement, together with its 1970 Interpretive Comments, has been endorsed by almost 200 organizations and scholarly associations and adopted by many colleges and universities across the United States. It is often incorporated into or referenced in faculty contracts. Because the definition of academic freedom set forth in the 1940 Statement is used so widely, it is worth quoting in full:

- (a) Teachers are entitled to full freedom in research and in the publication of the results, subject to adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.
- (b) 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 which has no relation to their subject. Limitations of

academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

- (c) College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

The 1940 Statement goes on to deal with the subject of academic tenure. It provides:

“After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except . . . under extraordinary circumstances because of financial exigencies.”

The reason for tenure, and its protection, is to ensure both “freedom of teaching and research and of extramural activities” and “a sufficient degree of economic security to make the profession attractive to men and women of ability.”

Judicial Recognition of Academic Freedom

In the 1950’s and 1960’s the concept of academic freedom found its way into several opinions of the United States Supreme Court dealing with statutes barring the employment of faculty who had belonged to subversive organizations or who refused to take a loyalty oath. Those opinions connected academic freedom to the freedom of speech and association protected by the First Amendment; however, neither a complete

definition of academic freedom nor its legal basis was fully developed or firmly established.

In *Wieman v. Updegraff*⁴ the Court struck down an Oklahoma statute that disqualified persons from serving as faculty members of a state university if they had belonged at any time to a Communist or subversive organization. The Court ruled that the statute deprived state employees of due process by failing to afford them notice and an opportunity to demonstrate that they had joined such an organization without awareness of its subversive intent. In a concurring opinion, Justice Frankfurter, joined by Justice Douglas, laid out the case for protecting universities as centers of independent thought and criticism.⁵

In *Sweezy v. New Hampshire*⁶ the Court reversed on narrow procedural grounds a contempt citation issued to a professor who had refused to appear in response to a subpoena issued by the state attorney general to answer detailed questions about a lecture he had delivered on socialism as a guest of the University of New Hampshire. Writing for a four-Justice plurality, Chief Justice Warren described the following “liberties in the area of academic freedom” enjoyed by faculty:

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.⁷

In his concurring opinion, Justice Frankfurter, on behalf of himself and Justice Harlan, focused more directly on the intellectual life of the university, quoting at length from a conference report prepared by faculty, trustees and chancellors of non-segregated South African universities, of which the following excerpt is best known:

“It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail the four essential freedoms of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”⁸

In *Keyishian v. Board of Regents*⁹ the Court for the first time invoked the principle of academic freedom in a majority opinion in a case striking down a state law subjecting faculty members to removal for “treasonable or seditious utterances or acts.”

Quoting several lower court opinions, the Court wrote:

Our Nation is deeply committed to safeguarding academic freedom, which 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 vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” 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.”¹⁰

Through these decisions, and numerous decisions of lower courts, academic freedom was established as a legal principle, possibly with constitutional underpinnings, which protected faculty from termination based on ideological disagreement with their teaching, scholarship, political associations or extramural utterances.

Notwithstanding this development, the concept of academic freedom has fared less well in the courts in the ensuing decades. The reasons for this are complex and relate to issues that are best considered separately and more fully. It is sufficient to note at this point the comment of one scholar that the Supreme Court “has been far more generous in its praise of academic freedom than in providing a precise analysis of its meaning.”¹¹

Faculty Rights and Institutional Autonomy

As noted above, the impetus for the 1915 Declaration was primarily to protect faculty from ideologically motivated attacks by trustees and administrators – that is, from within the university. By contrast, the cases from the 1950’s and 1960’s tended to involve governmental intrusions on academic freedom. Not surprisingly, there developed an emphasis on the freedom or autonomy of the university as an institution. That emphasis has continued in more recent Supreme Court cases involving challenges to an action, practice or policy of the institution rather than the rights of an individual faculty member.¹²

One possible exception to that trend is *Regents of the University of Michigan v. Ewing*.¹³ In that case, the Supreme Court unanimously rejected a student’s challenge to his dismissal from a joint undergraduate and medical program on the ground that it violated his right to due process. The decision to dismiss the student had been made after careful review by the faculty Promotion and Review Board and affirmed by the Executive Committee of the Medical School. Writing for the Court, Justice Stevens emphasized not only the Court’s “reluctance to trench on the prerogatives of state and

local educational institutions and our responsibility to safeguard their academic freedom,”¹⁴ but specifically the role of the faculty:

The record unmistakably demonstrates, however, that the faculty's decision was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing's academic career. When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. [FN 11] 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.

* * *

FN 11. “University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation.” (Citations omitted)¹⁵

In sum, the Supreme Court has at various times recognized that both strands – the institutional autonomy of universities and the rights of faculty – are part of academic freedom.¹⁶ However, in none of these cases did the result turn on which strand of academic freedom was emphasized because in all of them the interests of the faculty and the institution were aligned to repel a common external threat.¹⁷ Some lower courts have recognized that the First Amendment protects the academic freedom of individual faculty members,¹⁸ while others have held that it protects only institutional autonomy.¹⁹ (Legal scholars are similarly divided on the issue.²⁰) Whether focusing on the faculty or the institution, however, lower courts have tended to give great deference to any decision concerning a matter of academic judgment, including not only judgments regarding students but also the tenure or promotion of faculty.²¹

What does not appear from reading the court decisions applying the principles of academic freedom to First Amendment claims is the important role of grievance procedures established by both university governance and collective bargaining in developing and protecting the principles of academic freedom. In such proceedings, faculty regularly assert their individual rights to academic freedom and, where appropriate, prevail in cases involving intrusions not only from outside the university, but also within the university.²²

Although the right of the faculty to free inquiry and the autonomy of the university are both critical to the meaning of academic freedom, they do not always mean the same thing or point in the same direction. As the Supreme Court noted in *Regents of the University of Michigan v. Ewing*: “Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, *and somewhat inconsistently*, on autonomous decisionmaking by the academy itself.”²³ The Supreme Court has provided no guidance as to what should happen when a faculty plaintiff invokes academic freedom as insulation against an adverse institutional decision while in the same case the institution invokes its academic freedom to be free from control, and lower court decisions are often inconsistent and unhelpful.²⁴ However, as a general matter, the correct approach should be apparent from the core principles of the doctrine of academic freedom: faculty members should be protected in their freedom to teach and conduct and publish scholarly research, subject only to academic judgment of their peers.²⁵ Where the adverse decision complained of is the result of such a judgment, expressed through the ordinary procedures of university governance, it is not a violation of academic freedom, and courts should refrain from intervening.²⁶

This conclusion flows from the fact that although academic freedom provides faculty with individual rights, they are far from absolute. Even the core principles of academic freedom in research and teaching are subject to the judgment of other faculty. It is the faculty collectively who decide on what constitutes original and valuable scholarship sufficient for promotion or tenure, what courses should be taught, what syllabus should be followed and what readings should be assigned, and even what grades should be awarded to students.²⁷ Individual faculty members have the right to participate in these decisions; and as a practical matter their recommendations are often followed although academic administrators, up to and including the president, generally have the final word. Nevertheless, the key point is that academic decisions are to be made by the academy as a body, not by any single individual. In short, all faculty members are subject to the judgment of their peers.

This principle, which is fundamental to the reasoning of both the 1915 Declaration and the 1940 Statement, may be criticized as hopelessly naïve, based as it is on the widespread belief of the Progressive Era that there existed such a thing as expertise, and that properly trained experts could be relied on to make fair and unbiased judgments that would lead to an objective truth. In the current era of Post-Modernism, that belief, at least outside the natural sciences, has been aggressively challenged. Academic politics may produce results based as much on ideology and intellectual fashion as any other sort of politics. However, if a space is to be preserved for the intellectual freedom necessary for critical inquiry, the final decision must generally rest with persons who share the training and traditions of the academy. The occasional errors and injustices thereby produced are a necessary price for that freedom. Otherwise, the

decisions will be made by others who have their own biases but share neither the intellectual training and discipline of academic discourse nor the tradition of free inquiry.²⁸

This is not to say that there is never any recourse from decisions made by faculty bodies or administrators on issues involving scholarship or teaching. Decisions relating to appointments, tenure and promotion are subject to laws prohibiting discrimination just like employment decisions in other contexts. Furthermore, where there is evidence that a decision was made on the basis of factors extraneous to the proper exercise of academic judgment, it does not violate the principles of academic freedom for such a decision to be reviewed, whether through the internal procedures of the university itself, or if such procedures do not exist, by the courts. However, the standard for review should be demanding. It should generally involve deference to the decision of the faculty unless there is clear evidence that the decision was not the result of academic judgment, bearing in mind that such judgment may appropriately include preferences for scholarly approaches or methodologies (as opposed to particular views or conclusions).

Another question concerning the two strands of academic freedom is whether the concept of institutional autonomy is necessarily derivative of the faculty's freedom of inquiry or whether universities have a zone of freedom from outside interference that belongs to them as institutions without reference to the role of the faculty. In the view of this author, the two strands of academic freedom are inextricably connected and both are essential. Institutional autonomy is justified because universities provide the collective setting in which scholars subject the work of their peers to review based on their expertise. Within that context, the advancement of the academic enterprise requires

individual faculty to be free to pursue the truth in their scholarship and teaching without adverse consequences unrelated to the quality of their work. Thus, academic freedom can serve the public good only if universities as institutions are free from outside pressures in the realm of their academic mission *and* individual faculty members are free to pursue their research and teaching subject only to the academic judgment of their peers.

Nevertheless, it is worth considering two contexts in which the institutional autonomy of the university may appear unrelated to the rights of faculty. One such context is student admissions. As noted above, Justice Frankfurter, in his concurring opinion in *Sweeny*, included the decision as to “who shall be admitted to study” as one of the “four essential freedoms of a university.” That view was echoed by Justice Powell in his concurring opinion in *Regents of the University of California v. Bakke*²⁹ and Justice O’Connor in the opinion of the Court in *Grutter v. Bollinger*³⁰ upholding the affirmative action plan adopted by the faculty of the University of Michigan Law School. Justice O’Connor’s opinion explicitly states that the Court’s conclusion that the racial diversity of the student body is a compelling state interest rests on the Court’s deference to the “Law School’s educational judgment that such diversity is essential to its educational mission”; such deference, the opinion continues, is consistent with its traditional recognition that “given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”³¹

However, the idea that admissions standards or policies are among the principles of academic freedom does not appear in either the 1915 Declaration or the 1940

Statement. Moreover, although the establishment and implementation of standards and policies concerning admissions may once have been a faculty prerogative, they are now often the responsibility of administrators and boards of trustees, at least at the undergraduate level. Thus, this is an area where the institutional autonomy of the university may be somewhat separate from the role of the faculty. However, it should be noted that the autonomy of a university over admissions has received only weak recognition. The Court in *Grutter* (by a bare majority) was willing to give weight to the academic decision of the University of Michigan Law School (and other educational institutions that filed briefs as *amicus curiae*) to the effect that racial diversity furthered the educational goals of such institutions. Nevertheless, it is doubtful that it would violate academic freedom (as opposed to some other value or principle) if a board of regents, a state legislature or the voters in a referendum impose a different set of admissions standards or policies upon a public university or professional school.³² Policies relating to admissions, especially in the area of affirmative action, involve less academic expertise and more of the kind of public policy choices usually decided by democratic means than such issues as the evaluation of scholarship or the proper content of the curriculum.³³

A second context in which institutional autonomy has recently been asserted involves the gathering of evidence from universities by government investigators or private parties in connection with litigation. In *University of Pennsylvania v. EEOC*³⁴ the Supreme Court held that the Equal Employment Opportunity Commission did not violate academic freedom in requiring a university to turn over confidential peer-review materials pursuant to a subpoena issued in its investigation of a Title VII claim filed by a

faculty member who had been denied tenure. Writing for a unanimous Court, Justice Blackmun distinguished earlier academic freedom cases that involved “direct” infringement regarding the content of academic speech or the right to determine who may teach.³⁵ By contrast, Justice Blackmun found that the burden imposed by the subpoena on the university’s ability to determine who may teach was at most indirect since the EEOC was not seeking to impose mandatory criteria on the university in selecting faculty.³⁶ One commentator has conjectured that “perhaps because the party invoking academic freedom was a university, the Court made no mention, even obliquely, to the interests a faculty member might have in engaging in peer review without external coercion.”³⁷ However, the Supreme Court clearly understood the claim that the confidentiality of the peer review process was important to the process of evaluating faculty even though the party invoking that claim was the university. It simply disagreed that this claim was sufficiently strong to overcome the government interest in obtaining relevant evidence in the investigation of a discrimination complaint.³⁸

That balance tends to shift when the government or private parties seek to use compulsory process to obtain the research or teaching materials of faculty. Where faculty members are expert witnesses, they are, of course, subject to the same scope of discovery as other similarly situated persons. Thus, for example, the publisher of a book by an expert witness may be compelled to produce the peer reviews obtained before publication, but an expert witness may not be required to turn over the draft of a book on which she is working.³⁹

When a faculty member is not serving as an expert witness, subpoenas for the research or teaching materials may require an especially strong justification where they

impinge on First Amendment rights that faculty share with all citizens.⁴⁰ Some courts have shown particular concern for academic freedom in this context.⁴¹ Indeed, in one case, the court provided to research scholars the same protection from discovery that it had previously afforded journalists insofar as the confidentiality of sources was implicated.⁴² In addition to the need for confidentiality, it might also be argued in this context that the academic freedom of scholars includes their right to decide when, where and how to present their research findings. Their research should not be commandeered into the service of others in cases or controversies in which they are not serving as expert witnesses.⁴³

A similar argument could be made in favor of protecting faculty materials and communications concerning their research or teaching against disclosure under open records or freedom of information laws applicable to public universities.⁴⁴ However, state courts have consistently rejected the argument for an academic freedom privilege or exemption in this context, although some state laws provide varying degrees of protection.⁴⁵

Such protection should be afforded whether the subpoenas or requests are issued to individual faculty members or to their universities or research institutes. The degree of and rationale for protection are the same in either case. Thus, in this area, as in almost every other, the individual's freedom of inquiry and the university's autonomy are two aspects of the same principle of academic freedom.

Academic Freedom and Free Speech

Of the three elements of academic freedom, the freedom of “extramural utterance and action” is surely the most problematic. Unlike freedom in research and teaching, it has no special connection to the university and no justification based on the special expertise of faculty members to judge the quality of the work of their peers based on academic standards. Indeed, both the 1915 Declaration and the 1940 Statement refer to the right of faculty to speak as citizens.⁴⁶ However, we do not ordinarily think of the right of citizens to speak and associate freely as a function of their professional or occupational status. Accordingly, in most contexts, the freedom of faculty “to speak publicly on matters of public concern reflects the permeation of the campus by general civil rights rather than an elaboration of a right unique to the university.”⁴⁷

This development has been a mixed blessing. The First Amendment limits the power only of government. Thus, private colleges and universities are not restrained by its terms, and their faculty members are not thereby protected.⁴⁸ Furthermore, the status of faculty at public universities subjects them to the narrower scope of free speech afforded to public employees generally. First, the protection afforded to a public employee’s free speech depends on the application of a balancing test between the employee’s interest in the expression and the interest of the employer in promoting efficiency of the public services it performs through its employees.⁴⁹ Second, the First Amendment protects the speech of a public employee only when he is speaking as a private citizen on a matter of public concern and not merely a matter of personal interest.⁵⁰ It is therefore doubtful under this test that constitutional protection exists for many aspects of faculty speech relating to internal university matters.⁵¹ Finally, as the

Supreme Court held in *Garcetti v. Ceballos*, public employees enjoy no freedom of speech when their speech or expression is made “pursuant to their official duties.”⁵²

In *Garcetti* the Supreme Court rejected the free speech claim of a prosecutor who had been fired allegedly in retaliation for his testimony on behalf of a criminal defendant to the effect that a sheriff’s deputy obtained a search warrant by means of a false affidavit. The Court held that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”⁵³ Since the parties stipulated that the speech in question was made pursuant to the employee’s duties, the Court dismissed the complaint.

The *Garcetti* case presented a context that was quite different from a public university, and the Court acknowledged that difference. In his dissenting opinion, Justice Souter expressed a concern that the decision might “imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write ‘pursuant to . . . official duties.’”⁵⁴ In response, Justice Kennedy wrote:

Justice Souter suggests today’s decision may have important ramifications for academic freedom, at least as a constitutional value. There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.⁵⁵

In subsequent decisions lower courts have wrestled with the application of *Garcetti* to free speech claims of faculty members in public universities.⁵⁶ First, there is the question of when are faculty members speaking pursuant to their official duties. Most

courts have interpreted this concept broadly, including speech related not only to activities that may be specified in a written job description or faculty handbook, but also to pretty much everything that faculty traditionally do within the university setting, at least where the speech was directed to others within that setting.⁵⁷ By contrast, speech by faculty members directed to audiences outside of the university, such as letters to the editor of a newspaper, articles for popular magazines or speeches in non-academic settings, have not been viewed as within their official duties.⁵⁸

Second, there is the question of what significance should be given to Justice Kennedy's caveat and whether to carve out an exception from the *Garcetti* analysis for speech relating to scholarship or teaching. Some courts appear to have ignored the issue of academic freedom but did so in cases that did not involve speech relating to scholarship or teaching.⁵⁹ Others have explicitly held that speech relating to scholarship or teaching is protected by the First Amendment.⁶⁰ So far only a few courts have addressed the meaning of "speech relating to scholarship or teaching." In one case, the court interpreted that category rather narrowly, holding that a librarian's recommendation of a book for freshman reading in connection with orientation is not speech relating to teaching.⁶¹ More recently, the Ninth Circuit held that a professor's plan concerning the faculty structure of a school of communications, written while he served on a committee that was debating some of the issues addressed by his plan, constituted speech related to scholarship or teaching because it was a proposal to implement a change "that, if implemented, could have substantially altered the nature of what was taught at the school, as well as the composition of the faculty that would teach it."⁶²

This broader definition of speech relating to scholarship or teaching seems appropriate. If academic freedom is to be adequately protected, it would seem at a minimum that the covered category of speech should include not only what is written in scholarly articles and spoken in the classroom, but also statements made in connection with such activities as the evaluation of the scholarship of others, the establishment of curricula and academic standards and structures and the academic advising of students. More generally, courts need to recognize that faculty participate in the governance of institutions of higher education in ways that are fundamentally different from other public agencies. Unlike other public employees, faculty are expected to exercise independent thought and judgment on university governance rather than carry out the mandate of their agency head.⁶³

Finally, courts will need to continue to refine the application of the balancing test to a university context. This involves primarily the determination of what constitutes a matter of public concern as opposed to a matter of merely personal interest.⁶⁴ Not everything a teacher might say deserves the protection of the principles of academic freedom.⁶⁵ This includes speech in a classroom that does not relate to the subject matter of the class and is profane, sexual or otherwise objectionable.⁶⁶ It also includes speech on issues of internal organization or personnel matters that are not of public concern.⁶⁷ However, at least one court has held that speech on an issue of academic organization may have wider implications about the future course of a public university and therefore may constitute a matter of public concern.⁶⁸

The courts eventually resolve these First Amendment questions concerning faculty speech at public universities by defining academic freedom as a concept

independent of constitutional law. The question therefore arises whether the principles of academic freedom should establish norms within universities that are more protective of extramural speech than the First Amendment, even if they cannot be enforced by courts. At both private and public institutions of higher education, academic freedom should continue to protect speech in which faculty speak as citizens on matters of public concern. Although not directly related to the primary rationale for academic freedom, such freedom of expression is part of a long and valued tradition of universities as places committed to wide-ranging debate on such matters.⁶⁹ There is no good reason why any faculty, whether at private or public universities, should be subject to reprisals because colleagues, administrators, alumni or politicians take umbrage at the expression of views on subjects of public concern.⁷⁰ Moreover, the boundaries of what constitutes matters of public concern should be interpreted broadly. At least some matters pertaining to university issues, such as presidential pay, conflicts of interest by trustees and significant change in general education requirements or academic standards, are of real and legitimate interest to the larger community.

In addition, if the Supreme Court does not eventually recognize the need for expanded protection for speech relating to scholarship or teaching, or interprets those categories narrowly, or does not also include speech relating to academic governance as deserving of similar protection, a strong argument can be made for continuing to protect such speech under the umbrella of academic freedom as applied within the setting of the university itself.

Some would argue further that academic freedom should also protect speech unrelated to matters of public concern or to scholarship, teaching or academic

governance.⁷¹ However, it is far from clear why such speech has value to the academic enterprise and should be protected by principles of academic freedom. Moreover, the recognition and enforcement of such a broad concept of academic freedom within universities would inevitably give rise to endless disputes and grievances as faculty claim retaliation for every adverse action. Internal procedures already exist at most universities to review decisions relating to reappointment, promotion and tenure on the ground that they were based on extraneous factors and not on the quality of scholarship, teaching and service. That seems not only appropriate but consistent with principles of academic freedom, which are premised upon the integrity of a system of academic judgment and peer review. However, academic freedom is in no way advanced by requiring the review of a morass of petty retaliation claims arising in contexts where there does not exist formal review procedures, such as departmental disagreements as to course content, class schedules or the selection of department chairs,⁷² and where there is no connection to the core values of scholarship or teaching.⁷³

Academic Freedom and University Governance

The 1915 Declaration is explicit that academic freedom requires the faculty to play the central role in making academic judgments about scholarship and teaching and in disciplining faculty for failure to meet appropriate standards. The 1940 Statement is silent on issues of governance. However, in 1966 the AAUP adopted a Statement on Government of Colleges and Universities (the “Statement on Government”), which it had jointly formulated with the American Council on Education and the Association of Governing Boards of Universities and Colleges.⁷⁴ The Statement on Government

emphasizes the need for shared responsibility by boards, faculties and administrators. It notes that the role of each group and the form of their cooperation will vary depending on the area in question. Like the 1915 Declaration, it gives the faculty primary responsibility for academic matters based on their expertise and goes on to define those matters as “curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life that relate to the educational process.”

In 1998 the Association of Governing Boards issued its own Statement on Institutional Governance.⁷⁵ The AGB Statement notes “a widespread perception that faculty members, especially in research universities, are divided in their loyalties between their academic disciplines and the welfare of their own institutions” and the belief of many governing boards, faculty and chief executives that “internal governance arrangements have become so cumbersome that timely decisions are difficult to make, and small factions often are able to impede the decision-making process.” While acknowledging the important role of faculty regarding academic matters, the AGB Statement emphasizes “the ultimate responsibility” of governing boards, the role of other constituencies, such as students, non-faculty staff and external stakeholders and the need for the fiscal and managerial affairs of universities to be “administered with appropriate attention to commonly accepted business standards.” The variations between the AAUP Statement and the AGB Statement reflect not only the different perspectives of the associations that issued them, but also the differing practices of the many universities and colleges within the United States. Nevertheless, as a matter of practice it is fair to say that faculty generally have strong but not dispositive authority over such critical academic matters as curriculum and appointments.⁷⁶

The Supreme Court has addressed the issue of university governance in two vastly different contexts. In *NLRB v. Yeshiva University*⁷⁷ it held that the faculty members of that institution did not have the right to organize under the National Labor Relations Act because they were “managerial employees.” The Court contrasted the “shared authority” of Yeshiva University, which had a fairly typical governance structure, with the “pyramidal hierarchies of private industry.”⁷⁸ Indeed, the Court went on to recognize the value of such shared authority by noting “[t]he university requires faculty participation in governance because professional expertise is indispensable to the formulation and implementation of academic policy.”⁷⁹ Notwithstanding its recognition of the policy arguments in favor of such shared authority, in *Minnesota State Board for Community Colleges v. Knight*⁸⁰ the Supreme Court held that faculty have no First Amendment right to participate in academic governance at a public institution of higher education.⁸¹

Where does this leave the idea of shared governance as a component of academic freedom? It seems clear that a substantial faculty role in the academic governance of the university is a *sine qua non* for academic freedom even if it is not a matter of constitutional right and may not be subject to judicial enforcement.⁸² However, there will continue to be considerable disagreement as to the exact contours of that role. The AAUP Statement on Government maintains that the president and the board should overrule the faculty “only in exceptional circumstances, and for reasons communicated to the faculty” and goes on to identify financial constraints or personnel limitations as the kinds of factors that might justify the rejection of a faculty recommendation.⁸³ Nevertheless, many university presidents are members of the faculty and have deep experience in exercising academic judgment. Moreover, even if one were to agree that

presidents should generally defer to the faculty on academic matters (and boards even more so), it seems entirely appropriate for them to review faculty decisions where there is evidence that they may not have rested on academic judgment.⁸⁴

Tenure and Other Procedural Safeguards

Tenure has been considered an essential component of academic freedom in the United States from the outset. It is based on the reasonable assumption that established scholars and teachers will feel and exercise greater independence of thought if they can be dismissed only for weighty reasons and with considerable difficulty.⁸⁵ There are, of course, policy arguments that can be made against tenure because it removes some incentives for greater scholarly effort and protects senior faculty who have ceased to be productive. It may be countered that tenured faculty remain motivated by their need for self-esteem and the recognition of their peers and that, in any event, any loss in productivity is outweighed by the gain in intellectual independence. Whatever the merits of the debate, tenure or the possibility of tenure remains a fact of life for a substantial portion of faculty positions at institutions of higher education. However, in an era of increasing fiscal constraints and oversupply of candidates, most faculty in the United States today are no longer in tenure-track positions, including a large number who work for long periods on a part-time basis.⁸⁶

Tenure was never intended to guarantee unconditional or lifetime job security to faculty. The 1915 Declaration recognizes that tenured faculty may be dismissed. As noted above, it does not attempt to set forth the legitimate grounds for such dismissal, but rather directs each institution to establish them “with reasonable definiteness.” The 1915

Declaration goes on to recommend certain procedural safeguards in cases of dismissal applicable to both tenured and untenured faculty. It provides that in cases not involving academic judgment (such as “habitual neglect of assigned duties”), lay boards may decide whether there is cause for dismissal, but that in cases involving the utterance of opinion or an issue of professional competence, only a body composed of faculty should be permitted to decide.⁸⁷ Furthermore, the 1915 Declaration provides that prior to dismissal or demotion, a faculty member should receive a specific, written statement of charges and be entitled to an evidentiary hearing at which they can present evidence, including reports from other teachers and scholars if the charges involve incompetence.⁸⁸ The 1940 Statement has similar provisions.⁸⁹ In both documents, these procedures are applicable only to the dismissal for cause of full-time faculty who are tenured or, if untenured, before the expiration of the term of their appointment.

Most universities provide these procedural safeguards in connection with proceedings to dismiss full-time faculty, whether or not they have received tenure. In addition, full-time faculty at public institutions enjoy the protection of the due process clause of the Fourteenth Amendment. To determine what process is constitutionally due, the Supreme Court generally balances three factors: “First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest.”⁹⁰

With respect to the first factor, the right to due process arises only when a person is deprived of a liberty or property interest. A liberty interest includes a person’s reputation or standing in the community. Thus, the right to due process would be

triggered if there are charges that might seriously damage such interests.⁹¹ A property interest arises when an individual has a legitimate claim of entitlement. Accordingly, the Supreme Court has held that public college faculty dismissed from a tenured position or during the terms of their contracts have interests in continued employment that are safeguarded by due process.⁹² By contrast, professors who are not reappointed after the expiration of the term of their appointment have not been deprived of any property interest and are not entitled to a statement of reasons or a hearing.⁹³ In a similar vein the Supreme Court has suggested, and several lower courts have held, that suspension of a faculty member with pay does not constitute a deprivation of a liberty or property interest and therefore does not implicate due process concerns.⁹⁴

In cases where “it is determined that due process applies, the question remains what process is due.”⁹⁵ This question is well settled as a matter of constitutional law (although many universities provide somewhat greater protection). In general, public employees who may be dismissed only for cause are entitled to a very limited hearing prior to their termination, to be followed by a more comprehensive post-termination hearing; the pre-termination process need only include oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity for the employee to tell his or her side of the story.⁹⁶ Moreover, there are circumstances, such as where an employee has been charged with a serious crime, where an employee may be suspended without pay without any hearing at all, especially where he occupies a position of great public trust and high public visibility or the suspension is necessary to maintain public confidence.⁹⁷

Since the 1940 Statement, the AAUP has issued several policy documents relating to the dismissal of faculty as well as the renewal or nonrenewal of faculty appointment. These include the 1958 Statement on Procedural Standards in Faculty Dismissal Proceedings, the Recommended Institutional Regulations on Academic Freedom and Tenure and the Statement of Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments.⁹⁸ Although some of their provisions resemble those in collective bargaining agreements and internal administrative procedures at many universities, these policy documents have not been widely endorsed or adopted by other organizations. Some universities have adapted portions of these policies, while others have rejected them entirely. Accordingly, they should be viewed as no more than recommendations by an association representing the interests of faculty.⁹⁹

An issue closely related to procedural safeguards is the standard of conduct by which faculty members should be judged in connection with dismissal. As noted above, the 1915 Declaration recommended only that such standards be stated with definiteness and left the substance to each university to determine. Not surprisingly, there are considerable differences among universities. In its Recommended Institutional Regulations on Academic Freedom and Tenure, the AAUP requires “adequate cause” for dismissal to be “related, directly and substantially, to the fitness of faculty members in their professional capacities as teachers or researchers.”¹⁰⁰ Few universities have adopted the AAUP standard. Its definition of adequate cause is too narrow to take into account the full range of legitimate institutional interests of universities. For example, it is doubtful that under the AAUP standard, a faculty member could be dismissed for conduct unbecoming a member of the profession or even the commission of a crime (at least as

long as the victims were not other faculty members or students and the crime was not committed on campus). However, in that connection, universities are entitled to consider their interests in maintaining public confidence, attracting and retaining student applications and enrollment and providing role models for students.

Similarly, the AAUP's 1958 Statement on Procedural Standards in Faculty Dismissal Proceedings provides that in connection with proceedings to terminate a faculty member, suspension "is justified only if immediate harm to the faculty member or others is threatened by the faculty member's continuance."¹⁰¹ Most universities have regulations or collective bargaining agreements that are not so restrictive and that permit suspension in other circumstances, including when a faculty member has been charged with or convicted of a serious crime, when the faculty member's continued presence would interfere with the operations of the university or when in the president's judgment suspension is otherwise necessary in the best interests of the university.

Academic Freedom and the Rights of Students

The principles of academic freedom do not apply to students as they do to faculty. As discussed above, academic freedom serves to promote the public good by protecting the intellectual independence of faculty in their scholarship and teaching, subject to the professional judgment of their peers. Within the academic community, students are novices, under the intellectual tutelage of the faculty. Their freedom of speech is not properly understood as part of academic freedom because it has nothing to do with "the preservation of the unique functions of the university, particularly the goals of disinterested scholarship and teaching."¹⁰² That is not to say, however, that students do

not have any rights relating to the free expression of their views and opinions. Students at public universities are protected by the First Amendment against restrictions on their rights of free speech and association.¹⁰³ Indeed, in light of the limitations on the First Amendment rights of public employees discussed above, it may be that students at public universities have greater rights to free speech than faculty.

One of the most contentious areas of controversy concerning the First Amendment rights of university students relates to “speech codes,” which have consistently been found unconstitutional.¹⁰⁴ Another area relates to the use of student activity fees. In *Southworth v. Board of Regents of the University of Wisconsin*¹⁰⁵ the Supreme Court upheld the use of mandatory student activity fees to fund student advocacy having educational benefit against a claim that such a fee violates the First Amendment interest of students not to have their money used to promote ideas with which they disagree. The Court reasoned that the university’s educational interest in promoting speech by its students outweighed the students’ interest as long as the university followed a strict policy of “viewpoint neutrality” in the allocation of the funds collected from the mandatory fee.¹⁰⁶

As noted above in discussing the faculty’s freedom of expression in extramural utterances, the university has come to serve an important function as a marketplace of ideas outside the realms of scholarship and systematic learning. It may be analytically correct to view this function as falling outside the protection of academic freedom. Nevertheless, it is a tradition worth protecting and preserving as long as it does not conflict with the core purposes of the university. Accordingly, students should enjoy rights to free speech and association whether or not they attend a public university and

thus enjoy First Amendment protection. Both in the larger university setting and within the classroom, students should be free to express their views, and they should not be subject to reprisals because of their opinions.¹⁰⁷

This freedom of expression by students, however, is subject to two limitations. First, it may not interfere with the other activities of the campus or classroom. This common sense limitation is an accepted part of First Amendment jurisprudence and serves as the justification for reasonable limitations on the time, place and manner of protests and other expressive activities both on and off university campuses.¹⁰⁸

Second, student speech and writing in the classroom context is subject to the academic authority of their teachers to evaluate their course work with respect to factual accuracy, authority of sources, research methodology, organization, quality of expression, analytical rigor and other legitimate academic factors. The Supreme Court has supported this limitation not only in *Southworth* but also in *Hazelwood School District v. Kuhlmeier*.¹⁰⁹ In that case, the Court upheld a high school principal's right to delete two pages from a newspaper produced by students in connection with a journalism class. The Court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."¹¹⁰ Of course, precedents from the K-12 context are not necessarily applicable to higher education, where the greater age and maturity of students and the stronger tradition of free inquiry militate in favor of greater student rights. Nevertheless, it remains true that in both contexts students' right to free speech in the classroom setting is

subject to the legitimate academic standards and concerns of the faculty and the institution.¹¹¹

The authority of faculty, indeed their academic freedom, also extends to the design of curricula and the presentation of materials. This is not primarily a question of their individual rights as teachers but rather their collective authority as part of the academic governance of the institution. The purpose of teaching is not merely to impart knowledge, but to train students to think for themselves. The recent statement on Academic Freedom and Educational Responsibility by the Association of American Colleges and Universities puts it well: “Students do not have a right to remain free from encountering unwelcome or ‘inconvenient questions.’”¹¹² At the same time, however, and as the 1915 Declaration recognizes, faculty are expected to conform to professional norms with regard to avoiding controversial topics unrelated to the subject matter of a course and presenting relevant controversial materials in an academically thoughtful and rigorous way.¹¹³

Most of the litigated cases in this area pertain not to controversial subject matters or views but to the use of language by faculty that is profane or sexual. In several pre-*Garcetti* cases, the courts seem to have grasped the key principle here. On the one hand, courts have dismissed claims by faculty that their rights to free speech or academic freedom were violated because they were terminated for profane or sexual speech that was unrelated to the subject matter of the class and that served no valid educational purpose.¹¹⁴ On the other hand, courts have reversed a university’s discipline of a faculty member where they found that language, although objectionable to some, advanced his valid educational objectives related to the subject matter of his course.¹¹⁵ Nevertheless,

these cases are troubling to the extent that courts in some of them reviewed and in one case reversed the decision of a faculty committee as to what was appropriate, thereby intruding upon the university's autonomy in an area of academic judgment.¹¹⁶

As with many cases involving student speech, these cases often arise in the context of a university's enforcement of a policy against sexual harassment. One court has struck down such a policy because its language was unconstitutionally vague and therefore violated a faculty member's First Amendment rights.¹¹⁷ However, where a professor's speech is reasonably regarded as offensive, is not germane to the subject matter of the course and is sufficiently severe and pervasive as to impair a student's academic opportunity, there is no reason why anti-discrimination laws cannot be applied without violating faculty rights to free speech or academic freedom.¹¹⁸

Another area of contention relates to the introduction of religious texts or subjects. Where this has been done as part of an academic exercise and not to advance a particular religious view, the courts have upheld the university's actions against claims that they violated the Establishment or Free Exercise Clauses of the First Amendment.¹¹⁹ Conversely, one court has upheld limitations on a faculty member's speech about his religious views within a classroom that appeared unrelated to the subject matter of the course.¹²⁰

In sum, it is inconsistent with principles of academic freedom for faculty to have to censor their speech within the classroom because of student objections where such speech is related to the subject of the course. If their speech is not so related and is offensive to a reasonable person, faculty may be appropriately restrained or disciplined. In either case, it is helpful in dealing with these types of controversies for universities to

have internal procedures to review complaints by students concerning faculty behavior in classrooms. Such procedures should involve faculty in the review of student complaints and should provide explicit protection for the principles of academic freedom.¹²¹

Uses and Abuses of Academic Freedom

In the 95 years since the AAUP issued the 1915 Declaration, the principles of academic freedom have gained greater acceptance than its originators could have imagined. There is hardly a university that does not at least profess its commitment to academic freedom, although conformance to its principles, as always, tends to ebb and flow with the phases of the political moon. Indeed, so widespread is the acceptance of academic freedom that some use it to advance claims or proposals that have little or no connection to its principles – or in fact are inconsistent with them. Some such claims border on the silly.¹²² However, two examples, from opposite ends of the spectrum, are worth considering in more detail.

In his Academic Bill of Rights,¹²³ David Horowitz proposes principles to address what he claims is a lack of intellectual and political diversity among university faculty and a resulting tendency of faculty to use the classroom for indoctrination.¹²⁴ Several of those principles consist of restatements of the traditional view of academic freedom. These include the principles that (i) faculty should be evaluated based on their competence and knowledge in their field of expertise; (ii) students should be graded on the basis of their reasoned answers and appropriate knowledge of the subjects and disciplines they study; and (iii) neither faculty nor students should be judged on the basis of their political or religious beliefs.

Others are consistent with the principles of academic freedom, but create pressures against the exercise of intellectual independence or originality. For example, it is a valid objective that curricula, reading lists and classroom teaching should expose students to a range of significant scholarly opinion. However, it is not a simple matter to determine precisely what that should include in order to protect faculty from charges of “indoctrination” from their students or outside groups. As several scholars have commented, the Academic Bill of Rights threatens to “snuff out all controversial discussion in the classroom” by presenting faculty “with an impossible dilemma: either play it safe or risk administrative censure by saying something that might offend an overly sensitive student.”¹²⁵

Moreover, the Academic Bill of Rights seeks to implement its goal of neutrality in teaching by requiring universities to recruit faculty “with a view toward fostering a plurality of methodologies and perspectives,” thereby creating a risk that faculty will be hired based on their political beliefs, notwithstanding the Bill’s own prohibition on precisely such behavior. This risk is exacerbated by modern telecommunications technology. In the past, most scholarship was published in academic journals and books that were not widely available, and criticism (generally from scholars) appeared in similar venues. Now, however, almost everything that faculty write is available online, and commentary by both other scholars and the public (including highly ideological segments of the public) is distributed widely through social media, blogs and other electronic outlets. Although such commentary, even when vitriolic and unfair, is not itself a violation of academic freedom, its widespread availability, including occasional appearances on mainstream media, may well serve to intimidate some faculty.

Finally, by seeking (so far unsuccessfully) the enactment of laws similar to the Academic Bill of Rights by Congress and several state legislatures, its supporters invite the kind of outside interference, from both legislatures and courts, that is inconsistent with academic freedom. Here, as in so many debates concerning academic freedom, the issue is not only what the proper principles are, but who gets to enforce them. As noted above, academic freedom is based on the institutional autonomy of universities. The Academic Bill of Rights, in its purported effort to strengthen academic freedom, would in fact weaken if not destroy it.¹²⁶

Coming from the other direction, the AAUP's vision of academic freedom has been encumbered by the addition of numerous policies, procedures, rules and prohibitions as an old ship accumulates barnacles. The AAUP, of course, deserves great credit for having put academic freedom on the map and having investigated and reported on a number of important cases involving significant violations of its principles. However, there is hardly any aspect of university life on which the AAUP has not expressed an opinion and which, according to the AAUP, is not an aspect of academic freedom. These include such diverse matters as detailed procedures relating to the renewal or nonrenewal of appointments, dismissal and suspension, including the permissible grounds for such action, standards for notices of non-reappointment, the use of collegiality as a criterion for faculty evaluation, post-tenure review, the status of part-time faculty, non-tenure track appointments and the status of such faculty, the use of arbitration in cases of dismissal, operating guidelines for layoffs in cases of financial exigency and so on.¹²⁷ This development is understandable as the AAUP has worked over many years to further the interests of faculty. Nevertheless, to link to academic

freedom every policy and procedure that a professional association or labor organization might want for its members is to drain the concept of all meaning and to lend credence to the unfortunate view of some that academic freedom is no more than special pleading on behalf of a privileged elite. Because there are, and will continue to be, real and serious threats to academic freedom, it is important to all who care about universities to be clear about its meaning, to exercise restraint in its invocation and to support true claims with vigor.

New York City
February 2014

NOTES

¹ The literature on the history of academic freedom is large. One of the best works is Richard Hofstadter & William P. Metzger, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* (1955).

² AAUP, *POLICY DOCUMENTS & REPORTS* 291-301 (10th ed. 2006), available at <http://www.aaup.org/AAUP/pubsres/policydocs/contents/1915.htm>.

³ AAUP, *POLICY DOCUMENTS & REPORTS*, *supra* note 2, at 3-7, available at <http://www.aaup.org/AAUP/pubsres/policydocs/contents/1940statement.htm>

⁴ 344 U.S. 183 (1952).

⁵ *Id.* at 196-98.

⁶ 354 U.S. 234 (1957).

⁷ *Id.* at 250.

⁸ *Id.* at 263 (internal quotes omitted).

⁹ 385 U.S. 589 (1967).

¹⁰ *Id.* at 603 (internal quotes and citations omitted).

¹¹ J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 *YALE L.J.* 251, 257 (1989).

¹² *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 328 (2003); *Univ. of Pennsylvania v. Equal Em't Opportunity Comm'n*, 493 U.S. 182, 198-99 (1990); *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.).

¹³ 474 U.S. 214 (1985).

¹⁴ *Id.* at 225.

¹⁵ *Id.* at 225-26 & n.11.

¹⁶ *See also Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90 (1978) ("Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.").

¹⁷ Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 *Geo. L.J.* 945, 967 (2009).

¹⁸ *See, e.g., Piarowski v. Illinois Cmty. College Dist.515*, 759 F.2d 625, 629 (7th Cir. 1992) (Academic freedom denotes "both the freedom of the academy to pursue its end without interference from the government . . . and the freedom of the individual teacher . . . to pursue his ends without interference from the academy.").

¹⁹ *See, e.g., Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000)(*en banc*). In that case, the Court upheld the constitutionality of a Virginia statute that restricted state employees from accessing sexually explicit

material on computers owned or leased by the state, except to the extent required in conjunction with an agency-approved research project. Plaintiffs were a group of state university faculty who had not sought or been denied permission to access sexually explicit materials pursuant to the statute. They alleged, and the District Court agreed, that the statute violated their First Amendment right to academic freedom. In reversing, the Fourth Circuit held that “to the extent the Constitution recognizes any right of ‘academic freedom’ above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors.” It recognized that as a matter of practice academic freedom included the intellectual freedom of the faculty, but that “the wisdom of a given practice as a matter of policy does not give the practice constitutional status.” *Id.* at 411 n. 12. The Court went on to read the Supreme Court cases relating to academic freedom narrowly, concluding that “[t]he Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs.” *Id.* at 412. The Court purported to respect the principle of institutional autonomy in upholding the Virginia statute because it merely required faculty to obtain permission from their dean to access the materials for bona fide research. However, the Court ignored the fact that that requirement was imposed on state universities by the legislature rather than originating within the universities as a result of their own self-governance.

²⁰ See Neal H. Hutchins, *A Confused Concern of the First Amendment: The Uncertain Status of Constitutional Protection for Individual Academic Freedom*, 36 J.C. & U.L. 145 (2009) for a review of recent case law and legal scholarship on the issue. See also Byrne, *supra* note 11; David M. Rabban, *A Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227 (1990).

²¹ *E.g.*, *Univ. of Mich. v. Ewing*, 474 U.S. at 226; *Weinstock v. Columbia Univ.*, 224 F.3d 33, 43 (2d Cir. 2000); *Vanasco v. National-Louis Univ.*, 137 F.3d 962, 968 (7th Cir. 1998); *Jimenez v. Mary Washington College*, 57 F.3d 369, 376-77 (4th Cir. 1995); *Beitzel v. Jeffrey*, 643 F.2d 870, 875 (1st Cir. 1981); *Smith v. Univ. of North Carolina*, 632 F.2d 316, 345-46 (4th Cir. 1980); *Kunda v. Muhlenberg College*, 621 F.2d 532, 548 (3d Cir. 1980).

²² Through decades of issuing policy documents and investigatory reports, the AAUP has also developed a “common law” of academic freedom. See Matthew W. Finkin and Robert C. Post, *FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM* (2009). However, that “common law” does not constitute any kind of legal precedent or authority and should be considered only to the extent it is persuasive. The AAUP is an advocate for academic freedom, and its guidelines and reports can hardly be considered disinterested. This is especially so because in recent decades it has also functioned as a labor organization on behalf of faculty. Thus, it has tended to blur the line between principles of academic freedom and the sorts of job security and procedural safeguards that are usually the subject of collective bargaining and have only the most remote connection to academic freedom.

²³ 474 U.S. at 226 n.12 (emphasis added). See also *Keen v. Penson*, 970 F.2d 252, 257 (7th Cir. 1992); *Piarowski*, 759 F.2d at 629. Professor Byrne puts the issue nicely: “The institutional right seems to give a university the authority to hire and fire without government interference those very individuals apparently granted a personal right to write and teach without institutional hindrance. How can the same right protect both traditional antagonists – the professor and the university?” Byrne, *supra* note 11, at 257. See also Lawrence White, *Fifty Years of Academic Freedom Jurisprudence*, 36 J.C. & U.L. 791, 827 (2010).

²⁴ White, *supra* note 23, at 827.

²⁵ Academic peers include academic administrators such as deans, provosts and presidents who have traditionally and appropriately played a significant role in the procedures for appointment, tenure and promotion of faculty.

²⁶ See, *e.g.*, *Edwards v. California University of Pennsylvania*, 156 F.3d 488, 491 (3d Cir. 1998) (“[A] public university professor does not have a First Amendment right to decide what will be taught in the classroom” in contravention of the university’s policies.); *Parate v. Isibor*, 868 F.2d 821, 827 (6th Cir.

1989) (“The administration of the university rests not with the courts, but with the administrators of the institution. A nontenured professor does not escape reasonable supervision in the manner in which she conducts her classes or assigns her grades.”); *Lovelace v. Southeastern Mass. Univ.*, 793 F.2d 419, 426 (1st Cir. 1986); *Megill v. Bd. of Regents of Florida*, 541 F.2d 1073, 1085 (5th Cir. 1976) (“It is essential that an academic board review a teacher’s classroom activities in determining whether to grant or deny tenure. This review does not contravene the teacher’s academic freedom.”)

²⁷ In *Parate*, 868 F.2d at 827-30, the Sixth Circuit held that it was a violation of a professor’s First Amendment right of free speech for a university to compel him to change a student’s grade. However, the Court recognized, consistent with the cases cited in note 22 above, that “the individual professor does not escape the reasonable review of university officials in the assignment of grades.” *Id.* at 828. Accordingly, while holding that an individual professor may not be *compelled* to change a grade that she previously assigned to her student, it recognized that a professor may be required to adhere to institutional policy with respect to grading standards, *id.* at 829, and that the university may administratively change grade assignments it deems improper as long as it does not force the professor to do so herself. *Id.* at 830. *Parate* is further distinguishable on the ground that plaintiff refused to change a grade for a student who had cheated on the final exam and submitted falsified medical excuses; that his decision was affirmed by independent faculty members; and that their advice was overridden by a dean who appeared to have done so in order to favor a Nigerian student, not because of the exercise of academic judgment by the dean or the enforcement of an institutional grading policy.

²⁸ See J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 J.C. & U.L. 79, 124-29 (2004).

²⁹ 438 U.S. at 312.

³⁰ 539 U.S. at 329.

³¹ *Id.* at 328-29.

³² See TEX. EDUC. CODE ANN. § 51-803; CAL. CONST. Art. I, § 31(a).

³³ See Lani Guinier, Comment, *The Supreme Court, 2002 Term: Admissions Rituals as Political Acts: Guardians at the Gate of Democratic Ideals*, 117 HARV. L. REV 113, 135-36 (2003), which contends that admissions decisions are both educational questions and political acts. For a different view, which argues that control over admissions is a component of academic freedom and that at least in extreme cases legislative mandates concerning admissions might infringe on academic freedom, see Byrne, *supra* note 24, at 113-22. In this connection, it is worthwhile noting that the South African report quoted by Justice Frankfurter in *Sweezy*, which listed admissions as one of the four areas of freedom of a university, was written in order to try to head off the imposition of apartheid in university admissions by the South African government.

³⁴ 493 U.S. 182 (1990).

³⁵ *Id.* at 197-98.

³⁶ *Id.* at 198, 200-01.

³⁷ White, *supra* note 23 at 825.

³⁸ The Supreme Court has long been reluctant to recognize new privileges even when stronger First Amendment claims were asserted. See, e.g., *Branzburg v Hayes*, 408 U.S. 665 (1972) (rejecting claim of privilege by reporters for evidence that would reveal confidential sources). Some lower courts, however, have afforded journalists a measure of protection from discovery at least for confidential information in order not to undermine their ability to gather and disseminate information. See, e.g., *In re Madden*, 151

F.3d 125, 128-31 (3d Cir. 1998); *Shoen v. Shoen*, 5 F.3d 1289, 1293-94 (9th Cir. 1993); *von Bulow v. von Bulow*, 811 F.2d 136, 142-44 (2d Cir. 1987); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 595-98 (1st Cir. 1980). At least one court has extended that protection to non-confidential information, such as outtakes, notes and other unused materials. See *Shoen*, 5 F.3d at 1295-96.

³⁹ These examples are based on cases in which there was no challenge to the subpoena, *Spann v. AIRCO*, 3:02 CV 1645 (U.S. Dist. Ct., S.D. Miss.), or no published opinion, *Koballa v. Philip Morris Co.*, 2007 33334 CICI (Super. Ct., Deland Co., Fla.).

⁴⁰ See *Gibson v. Florida Legislative Investigation Comm'n*, 372 U.S. 539, 544 (1963); *Watkins v. United States*, 354 U.S. 178, 197-98 (1957).

⁴¹ See *Sweezy*, 354 U.S. at 244-45: "It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas, particularly in the academic community." (emphasis added) In *Dow Chemical Company v. Allen*, 672 F.2d 1262 (7th Cir. 1982), the Court declined to enforce a subpoena issued by Dow for the notes, reports, working papers and raw data of researchers at the University of Wisconsin whose unpublished studies caused the EPA to schedule cancellation hearings for a herbicide produced by Dow. The Court recognized that scholarly research "lies within the First Amendment's protection of academic freedom, and therefore judicially authorized intrusion into that sphere of university life should be permitted only for compelling reasons." *Id.* at 1274. The Court further stated that "to prevail over academic freedom the interests . . . [favoring enforcement of the subpoena] must be strong and the extent of the intrusion carefully limited. *Id.* at 1275. The Court concluded that this standard was not satisfied because there is little to justify an intrusion into university life which would risk substantially chilling the exercise of academic freedom." *Id.* at 1276-77. Cf. *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556 (7th Cir. 1984), where the Court held that a defendant in a product liability action could subpoena some factual information from a cancer researcher at the University of Chicago but could not obtain "any material reflecting development of the researcher's ideas or stating . . . conclusions not yet published." *Id.* at 565.

⁴² See *Cusamano v. Microsoft Corp.*, 162 F.3d 708, 714-15 (1st Cir. 1998).

⁴³ In one current case, the Attorney General of Virginia, Kenneth Cuccinelli, an outspoken global warming skeptic, subpoenaed large numbers of documents, including computer programs, data and emails, in the possession of the University of Virginia related to the research of a Michael Mann, a well known climatologist. The Attorney General contends that the documents are relevant to an investigation into the possibility that Dr. Mann fraudulently obtained state research grants. The University challenged the subpoena on the grounds that it violated principles of academic freedom and would chill research into controversial subjects. A lower court quashed the subpoena on the ground that the Attorney General had failed to show a sufficient reason to believe that the University possessed documents relating to Dr. Mann that would suggest fraud. The Virginia Supreme Court recently accepted the Attorney General's appeal. <http://green.blogs.nytimes.com/2011/03/12/hearing-is-set-in-climate-fraud-case/?partner=rss&emc=rss>.

⁴⁴ In another recent case, the deputy executive director of the Wisconsin Republican Party made an open records request of the University of Wisconsin at Madison for the emails of Professor William Cronon, who had written and spoken about the right of state employees to bargain collectively. The University withheld certain private email exchanges between Professor Cronon and other scholars on the ground of academic freedom, which the Chancellor, Biddy Martin, described in her public statement as "the freedom to pursue knowledge and develop lines of argument without fear of reprisal for controversial findings and without the premature disclosure of those ideas." <http://www.news.wisc.edu/19190>. Her statement went on to say:

Scholars and scientists pursue knowledge by way of open intellectual exchange. Without a zone of privacy within which to conduct and protect their work, scholars would not be

able to produce new knowledge or make life-enhancing discoveries. Lively, even heated and acrimonious debates over policy, campus and otherwise, as well as more narrowly defined disciplinary matters are essential elements of an intellectual environment and such debates are the very definition of the Wisconsin idea.

When faculty members use email or any other medium to develop and share the thoughts with one another, they must be able to assume a right to the privacy of those exchanges, barring violations of state law or university policy. Having every exchange of ideas subject to public exposure puts academic freedom in peril and threatens the processes by which knowledge is created. The consequence for our state will be the loss of the most talented and creative faculty who will choose to leave for universities where collegial exchange and the development of ideas can be undertaken without fear of premature exposure or reprisal for unpopular positions.

Id. No litigation was brought challenging the withholding of these documents.

⁴⁵ See Rachel Levinson-Waldman, *Academic Freedom and the Public's Right to Know: How to Counter the Chilling Effect of FOIA Requests on Scholarship*, American Constitution Society Brief, (September 2011), http://www.acslaw.org/sites/default/files/Levinson_-_ACS_FOIA_First_Amdmt_Issue_Brief_0.pdf.

⁴⁶ There is a tension in the 1940 Statement on this point. On the one hand, it states that when faculty “speak or write as citizens, they should be free from institutional censorship or discipline.” On the other hand, it states that “their special position in the community imposes special obligations” and that “[a]s scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances” and therefore “should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate they are not speaking for the institution.” The 1940 Interpretations to the Statement do nothing to resolve this tension stating that “[i]f the administration of a college or university feels that a teacher has not observed the[se] admonitions . . . and believes that the extramural utterances of the teacher have been such as to raise grave doubts concerning the teacher’s fitness for his or her position, it may proceed to file charges,” but in doing so “the administration should remember that teachers are citizens and should be accorded the freedom of citizens.” It then concludes with the following warning: “In such cases the administration must assume full responsibility, and the American Association of University Professors and the Association of American Colleges are free to make an investigation.” However, the 1970 Interpretive Comments go on to provide further limitations on the enforcement of those “admonitions,” including the following quotation from a 1964 Committee A Statement: “The controlling principle is that a faculty member’s expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member’s unfitness for his or her position. Extramural utterances rarely bear upon the faculty member’s fitness for the position. Moreover, a final decision should take into account the faculty member’s entire record as a teacher and scholar.” AAUP, POLICY DOCUMENTS & REPORTS, *supra* note 3, at 5-6. It thus appears that the current position of the AAUP is that a faculty member’s extramural utterances as a citizen should very rarely be the basis for disciplinary charges.

⁴⁷ Byrne, *supra* note 11, at 264. Professor Byrne argues more generally that the meaning and purposes of academic freedom are distinct from those of the First Amendment, although he supports constitutional protection of academic freedom to the extent necessary to protect universities from political interference with their academic judgments. See also William Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, in THE CONCEPT OF ACADEMIC FREEDOM 59 (1975).

⁴⁸ *But see* Cal. Educ. Code §9436, which protects students (but not faculty) at private colleges and universities from any rule or disciplinary sanction based solely on conduct or speech outside the campus or facility that would be protected from governmental restriction under the First Amendment of the U.S. Constitution or Article 1 of the California Constitution.

⁴⁹ See *Pickering v. Bd. of Ed.*, 391 U.S. 563, 568 (1968). Many of the public employee cases, like *Pickering*, involve primary or secondary school teachers. Courts generally recognize that such schools present a different context from universities, if for no other reason than the age of the students. Accordingly, in applying the balancing test, they generally accord greater First Amendment rights to faculty (and students) in university settings than in public schools. What courts often miss, however, is the fact that only university faculty, and not public school teachers, enjoy academic freedom. Accordingly, it should rarely be the case that speech by university faculty on matters of public concern can be seen as disruptive of the efficient administration of the institution.

⁵⁰ See *Connick v. Myers*, 461 U.S. 138, 146-47 (1983). The Court defined a matter of “public concern” as one “fairly considered as relating to any matter of political, social, or other concern to the community.” *Id.* at 146. This requirement reflects “the common sense realization that government offices could not function if every employment decision became a constitutional matter.” *Id.* at 143. However, as discussed below, the application of this principle to concrete facts has produced widely different results.

⁵¹ See, e.g., *Gorum v. Sessoms*, 561 F.3d 179, 185-86 (3d Cir. 2009) (statements in connection with counseling students and student activities); *Savage v. Gee*, 716 F.Supp.2d 709, 718 (S.D. Ohio 2010) (librarian’s recommendation of book for freshman orientation); *Isenalumhe v. McDuffie*, 697 F.Supp.2d 367, 378-79 (E.D.N.Y. 2010) (faculty member’s complaints to union representatives and grievance officer, accusations that another professor interfered in committee matters and other complaints about internal matters to higher-ups within department, college and university); *Munn-Goins v. Bd. of T. of Bladen Cmty. College*, 658 F.Supp.2d 713, 728 (E.D.N.C. 2009) (faculty member’s request for and distribution of salary information). *But see Jackson v. Leighton*, 168 F.3d 903, 910 (6th Cir. 1999) (professors’ comments on administrative decisions regarding university resources held to be matters of public concern); *Yohn v. Coleman*, 639 F.Supp.2d 776, 786 (E.D. Mich. 2009) (dentistry professor’s comments on alleged lowering of academic standards held to be a matter of public concern).

⁵² 547 U.S. 410, 421 (2006).

⁵³ *Id.*

⁵⁴ *Id.* at 438 (internal quotes omitted).

⁵⁵ *Id.* at 425.

⁵⁶ There have been a considerable number of lower court decisions applying *Garcetti* but only a small number have dealt with faculty at public universities. For a summary of those cases, see Leonard M. Niehoff, *Peculiar Marketplace: Applying Garcetti v. Ceballos in the Public Higher Education Context*, 35 J.C. & U.L. 75 (2008). For a pre-*Garcetti* case that provides a strong endorsement of the right of a faculty member to speak on a controversial matter without reprisal by his college, see *Levin v. Harleston*, 52 F.3d 9 (2d Cir. 1995).

⁵⁷ See, e.g., *Demers v. Austin* ___ F.3d ___, ___, WL 306321, Slip Op. at 11-13 (9th Cir., Jan. 29, 2014); *Gorum v. Sessoms*, 561 F.3d at 187; *Renkin v. Gregory*, 541 F.3d 769, 774 (7th Cir. 2008) (dispute over research grant); *Hong v. Grant*, 516 F. Supp. 2d 1158 (C.D. Cal. 2007) (criticism of department chair and dean); *Isenalumhe*, 697 F.Supp.2d at 378; *Ezuma v. City Univ. of N.Y.*, 665 F.Supp.2d 116, 129-30 (E.D.N.Y. 2009) (transmittal of complaint about sexual harassment). *Cf. Fusco v. Sonoma County Junior College Dist.*, 2009 U.S. Dist. LEXIS at * 11 91431 at *6 (N.D. Cal. Sept. 30, 2009) (court refused to dismiss faculty member’s First Amendment claim where complaint did not establish that her attempts to place certain matters on the agenda for department meetings were pursuant to her official duties). Courts have generally held that speech by teachers in the K-12 context was made pursuant to their official duties. See *Weintraub v. Bd. of Educ.*, 593 F.3d 196 (2d Cir. 2010) (complaints about the handling of student discipline in public secondary school); *Fox v. Traverse City Area Pub. Sch. Bd. of Educ.*, 605 F.3d 345, 348-350 (6th Cir. 2010) (elementary school teacher’s complaints about work load); *Lamb v. Booneville Sch.*

Dist., 2010 U.S. Dist. LEXIS 9728 (N.D. Miss. Feb. 3, 2010) (special education teacher's complaints about corporal punishment). *But see Reinhardt v. Albuquerque Pub. Sch. Bd. of Educ.*, 595 F.3d 1126, 1137 (10th Cir. 2010) (complaints of wrongdoing by speech pathologist in public school system not made pursuant to her duties); *Evans-Marshall v. Board of Education of Tipp City Exempted Village School*, 428 F.3d 223, 230 (6th Cir. 2005) (teacher comments on curricular and pedagogical decisions protected by First Amendment).

⁵⁸ See *Adams v. Tr. of Univ. of North Carolina*, 630 F.3d 550, 561-62 (4th Cir. 2011) (non-scholarly columns and articles published outside the university are protected by the First Amendment even though they were subsequently submitted by faculty member in support of application for promotion). See also Niehoff, *supra* note 56, at 82-84. This distinction creates an odd incentive for faculty members at public universities (and other state employees) to voice their complaints outside of the university (or chain of command), rather than within. If the statements relate to a matter of public concern, the faculty are more likely to be protected by the First Amendment. Furthermore, this distinction seems arbitrary in other ways. It suggests that faculty members are speaking pursuant to their official duties when they write an article in a scholarly journal or give a speech at a professional gathering, but not when they write an article in a popular magazine or give a speech at a political meeting.

⁵⁹ See, e.g., *Renkin*, 541 F.3d at 774; *Hong*, 516 F.Supp.2d at 1166.

⁶⁰ In some of these cases, the court held that the speech related to scholarship and teaching. See *Demers*, ___ F.3d ___, ___, WL 306321, Slip Op. at 13-16 (9th Cir., Jan. 29, 2014); *Adams*, 640 F.3d at 562-64; *Kerr v. Hurd*, 694 F.Supp.2d 817, 843 (S.D. Ohio 2010); *Sheldon v. Dhillon*, 2009 U.S. Dist. LEXIS 110275 at *12 (N.D. Cal. Nov. 25, 2009). In others, the court recognized the exception for speech relating to classroom teaching but held it was not applicable. *Pigee v. Carl Sandburg College*, 464 F.3d 667, 672 (7th Cir. 2006); *Savage*, 716 F. Supp.2d at 718.

⁶¹ *Savage*, 716 F.Supp.2d at 718. In a pre-*Garcetti* case, one court held that faculty members had engaged in speech related to matters of public concern, and therefore were protected by the First Amendment, in connection with objects displaced in a history exhibit. See *Burnham v. Ianni*, 119 F.3d 668, 679-80 (8th Cir. 1997). However, in a secondary school context, a court held that an art teacher's statements to his class about the portfolio requirements of college art programs, including the necessity for providing sketches of male and female nudes, were not protected by the First Amendment. *Panse v. Eastwood*, 2007 U.S. Dist. LEXIS 55080 at *12-13 (S.D.N.Y. July 20, 2007).

⁶² *Demers*, ___ F. 3d at ___, WL 306321, Slip Op. at 23.

⁶³ For a thoughtful argument in favor of extending the protection of the First Amendment to faculty speech relating to its role in the academic governance of universities, see Areen, *supra* note 17, at 985-1000. As that argument makes clear, however, such protection requires a careful analysis of whether or not a particular kind of speech relates to academic governance – a task that is far from easy. This author believes that the Supreme Court is more likely to protect speech relating to such governance issues as the evaluation of scholarship, the revision of curriculum and the structure of academic programs by finding them within the exception for scholarship or teaching, rather than creating a new and separate protected category for speech relating to academic governance.

⁶⁴ Once it is determined that the speech in question relates to a matter of public concern, it is hard to imagine what interest of a university could outweigh the speaker's interest in free expression, and there does not appear to be any case that has ruled against a plaintiff in this circumstance.

⁶⁵ In one pre-*Garcetti* case, a court held that there was no First Amendment protection for faculty speech in the classroom because it did not relate to a matter of public concern. See *Rubin v. Ikenberry*, 933 F.Supp. 1425, 1443 (C.D. Ill. 1996). Another court reached the opposite conclusion. See *Hardy v. Jefferson Community College*, 260 F.3d 671, 679 (6th Cir. 2001). In *Adams*, 640 F.3d at 564-66, the Fourth Circuit

concluded that the speech involved a matter of public concern since the speech in question were writings and advocacy on clearly public issues, not the typical sort of scholarship or classroom teaching.

⁶⁶ See discussion at pp. 35-36 below.

⁶⁷ See, e.g., *Brooks v. Univ. of Wis. Bd. of Regents*, 406 F.3d 476, 480 (7th Cir. 2005) (objections by professors to closing of their laboratories and study programs involved merely a matter of personal interests^{supra}); *Clinger v. N.M. Highlands Univ. Bd. of Regents*, 215 F.3d 1162, 1166 (10th Cir. 2000) (professor's disagreement with processes followed in selecting president and reorganizing university did not involve a matter of public concern).

⁶⁸ In *Demers*, ___ F.3d at ___, WL 306321, Slip Op. at 23-26, the Ninth Circuit held that a plan for restructuring the departments of a school of communications addressed a matter of public concern.

⁶⁹ As the Supreme Court recognized in upholding the free speech rights of students: "The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this nation's dedication to safeguarding academic freedom." *Healy v. James*, 408 U.S. 169, 180-81 (1972), quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

⁷⁰ See, e.g., *Levin v. Harleston*, 966 F.2d 85 (2d Cir. 1992) (college violated professor's right to free speech in creating alternative section of his class and investigating his conduct as a result of articles and speeches arguing that blacks are less intelligent than whites).

⁷¹ Areen, ^{supra} note 17, at 987 n. 240.

⁷² See *Jeffries v. Harleston*, 52 F.3d 9, 14-15 (2d Cir. 1994) (distinguishing removal of department chair from dismissal of tenured professor).

⁷³ It is precisely in such areas as these where universities most resemble governmental agencies and where the need for managerial authority to achieve effective and efficient administration becomes paramount. See Areen, ^{supra} note 17, at 989; *Clarke v. Holmes*, 474 F.2d 928, 931 (7th Cir. 1972); *Ezuma*, 665 F.Supp.2d at 130-31.

⁷⁴ AAUP, POLICY DOCUMENTS & REPORTS, ^{supra} note 2, at 135-40. Although jointly formulated by the three organizations, each took a different action with respect to the Statement on Government. The AAUP's Council adopted it, and the AAUP's membership endorsed it. The Board of Directors of the American Council on Education issued a statement in which it "recognizes the statement as a significant step forward in the clarification of the respective roles of governing boards, faculties, and administrations" and "commends it to the institutions which are members of the Council." Similarly, the Executive Committee of the Association of Governing Boards issued a statement in which it "recognizes the statement as a significant step forward in the clarification of the respective roles of governing boards, faculties, and administrations," and "commends it to the governing boards which are members of the Association."

⁷⁵ <https://portfolio.du.edu/portfolio/getportfoliofile?uid=139204>.

⁷⁶ Areen, ^{supra} note 17, at 964-66.

⁷⁷ 444 U.S. 672 (1980).

⁷⁸ *Id.* at 680.

⁷⁹ *Id.* at 689.

⁸⁰ 465 U.S. 271 (1984).

⁸¹ The issue arose in an unusual context. Minnesota law required public employees to bargain over the terms and conditions of employment and further required their employers to exchange views on subjects relating to employment that were but outside the scope of mandatory bargaining only with the exclusive representatives selected by the employees. The law was challenged by faculty members at a community college who wanted to discuss academic matters directly with their college administration. Although again recognizing the arguments in favor of the value of faculty participation in governance, the Court held there was no constitutional right to do so. *Id.* at 288.

⁸² Quite apart from what is necessary for academic freedom, faculty participation in governance is an appropriate way to reach the best and most informed decisions, to ensure the necessary support from those who actually deliver the services provided by universities and to create an atmosphere conducive to the enthusiastic pursuit of scholarship and teaching. These reasons also support some faculty participation in such “non-academic” matters as budget and facilities, where the expertise of the faculty may not always be relevant, and a more corporate style of governance may seem appropriate. In addition, decisions in even such financial and managerial areas often have a direct and significant impact on scholarship and teaching.

⁸³ AAUP, POLICY DOCUMENTS & REPORTS, *supra* note 2, at 139

⁸⁴ Apart from personnel decisions, already discussed above, one example might be the content of a general education curriculum where it may sometimes occur that faculty judgments are affected by the desire to ensure an adequate number of students take courses in otherwise underutilized departments.

⁸⁵ Both the 1915 Declaration and the 1940 Statement also justify tenure on the ground that by providing a degree of security, it will attract men and women of ability to the academic profession. This is obviously a much weaker justification, depending as it does on a policy judgment that may or may not have empirical support.

⁸⁶ AAUP, *Report on the Status of Non-Tenure Track Faculty* (1993), <http://www.aaup.org/AAUP/comm/rep/nontenuretrack.htm>. As that report makes clear, it is the AAUP’s position that adjunct and other non-tenure track faculty should enjoy the same right to academic freedom as full-time, tenure track faculty. Although many universities accept that general position, they usually do not provide part-time faculty with the same procedural rights, such as a written statement of reasons for nonreappointment. Those differences seem appropriate in light of the necessarily lesser degree of review that can realistically be given to the process of appointing or reappointing part-time faculty. See J. Peter Byrne, *Academic Freedom of Part-Time Faculty*, 27 J.C. & U.L. 583 (2001).

⁸⁷ As noted above, and contrary to the inflexible language of the 1915 Declaration, it is appropriate for a board (or administrators) to intervene where there is evidence that that decision of the faculty was the result of bias, prejudice or other extraneous factors unrelated to proper academic judgment.

⁸⁸ AAUP, POLICY DOCUMENTS & REPORTS, *supra* note 2 at 301.

⁸⁹ AAUP, POLICY DOCUMENTS & REPORTS, *supra* note 2 at 4.

⁹⁰ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

⁹¹ See *Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972); *Wisconsin v. Constantineau*, 400 U. S. 433, 437 (1971); *Wieman v. Updegraff*, 344 U. S. 183, 191 (1952); *United States v. Lovett*, 328 U. S. 303, 316-317 (1946).

⁹² See *Slochower v. Bd. of Educ.*, 350 U. S. 551, 559 (1958).

⁹³ See *Roth*, 408 U.S. at 577-78.

⁹⁴ See *Cleveland Bd. of Educ. v. Loudermill*, 470 U. S. 532, 544-45 (1985); *Edwards*, 156 F.3d at 492; *Watkins v. McConologue*, 820 F.Supp. 70, 72-73 (S.D.N.Y. 1992); *Weg v. Macchiarola*, 729 F.Supp. 328, 336 (S.D.N.Y. 1990).

⁹⁵ *Morrissey v. Brewer*, 408 U. S. 471, 481 (1972).

⁹⁶ See *Loudermill*, 470 U. S. at 545-46.

⁹⁷ See *Gilbert v. Homar*, 520 U.S. 924, 932 (1997); *FDIC v. Mallen*, 486 U.S. 230, 241 (1988).

⁹⁸ AAUP, POLICY DOCUMENTS & REPORTS, *supra* note 2, at 11-30.

⁹⁹ Indeed, the 1958 Statement on Procedural Standards in Faculty Dismissal Proceedings is explicit that the procedural standards set forth therein “are not intended to establish a norm in the same manner as the 1940 Statement of Principles on Academic Freedom and Tenure, but are presented rather as a guide.” AAUP, POLICY DOCUMENTS & REPORTS, *supra* note 2, at 11. Moreover, it is clear from a review of the detailed recommendations set forth in these documents that their relation to academic freedom is remote at best and that what the AAUP means by “academic due process” is largely a wish list of procedures favored by faculty, many of which are quite sensible, but about which faculty have traditionally had to make their case to their respective universities, whether in the context of collective bargaining or in governance proceedings.

¹⁰⁰ AAUP, POLICY DOCUMENTS & REPORTS, *supra* note 2, at 25.

¹⁰¹ *Id.* at 12.

¹⁰² Byrne, *supra* note 11, at 262; see also Byrne, *supra* note 28, at 100 (“Student free speech rights against universities reflect political values rather than academic ones.”).

¹⁰³ See, e.g., *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995) (State university, which pays for the printing expenses of other student publications, violates the First Amendment rights of students in refusing to pay for the printing expenses of a student publication because it primarily promotes or manifests a particular belief in or about a deity or an ultimate reality.); *Widmar v. Vincent*, 454 U.S. 263 (1981) (State university, which makes its facilities generally available for the activities of registered student groups, violates First Amendment rights of students in closing its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion.); *Healy v. James*, 408 U.S. 169 (1972) (State university violates First Amendment rights of students in refusing to recognize student political organization because of its views.). Students have similar, although somewhat more circumscribed rights in public schools. See, e.g., *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982) (Local school boards violate the First Amendment rights of students in removing books from library shelves solely because they dislike the ideas contained in those books and seek by their removal to prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion); *Tinker v. Des Moines Indep. Comty. Sch. Dist.*, 393 U.S. 503 (1969) (School policy violates First Amendment rights of students in prohibiting junior and senior high school students from wearing armbands in protest of the Vietnam War.).

¹⁰⁴ See, e.g., *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008); *Bair v. Shippensburg University*, 280 F.Supp.2d 357 (M.D. Pa. 2003); *Booher v. Bd. of Regents*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. Jul. 21, 1998); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1182-85 (6th Cir. 1995).

¹⁰⁵ 529 U.S. 217 (2000).

¹⁰⁶ *Id.* at 233.

¹⁰⁷ The Joint Statement on Rights and Freedoms of Students, issued by the AAUP, the United States Student Association, the Association of American Colleges and Universities, the National Association of Student personnel Administrators and the National Association for Women in Education, includes the following provisions:

The professor in the classroom and in conference should encourage free discussion, inquiry, and expression. Student performance should be evaluated solely on an academic basis, not on opinions or conduct in matters unrelated to academic standards.

1. *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.

2. *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.

AAUP, POLICY DOCUMENTS & REPORTS, *supra* note 2, at 262.

¹⁰⁸ *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 117-21 (1972); *Tinker*, 393 U.S. at 513.

¹⁰⁹ 484 U.S. 260 (1988).

¹¹⁰ *Id.* at 273.

¹¹¹ *See Brown v. Li*, 308 F.3d 939 (9th Cir. 2002), where the Court upheld the refusal of a faculty committee to approve a master's thesis unless the student removed the "disacknowledgements" section because it did not meet professional standards. The Court applied to a university setting the principles of *Hazelwood*, holding that "the First Amendment does not require an educator to change the assignment to suit the student's opinion or to approve the work of a student that, in his or her judgment, fails to meet a legitimate academic standard." *Id.* at 949.

¹¹² http://www.aacu.org/about/statements/academic_freedom.cfm (internal quotes omitted). *See also Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004). In that case, a Mormon student objected to certain language she was required to say in connection with classroom acting exercises. The District Court granted summary judgment in favor of the defendants and dismissed the case. The Court of Appeals held that the *Hazelwood* standard requires only that restrictions on a student's right to free expression in the classroom be reasonable and that courts will not override a professor's judgment unless it is a substantial departure accepted academic norms or "where the proffered goal or methodology was a sham pretext for an impermissible ulterior motive." *Id.* at 1293. The Court of Appeals remanded the case to the District Court because there was a genuine issue of material fact as to whether the department requirement that the script be strictly adhered to was based on legitimate pedagogical reasons or was a pretext for religious discrimination. *Id.* at 1295.

¹¹³ For a summary of the case law involving the tension between faculty and student rights, *see* Cheryl A. Cameron, Laura E. Meyers & Steven G. Olswang, *Academic Bills of Rights: Conflict in the Classroom*, 31 J.C. & U.L. 243 (2005).

¹¹⁴ *See, e.g., Bonnell v. Lorenzo*, 241 F.3d 800, 823-24 (6th Cir. 2001); *Martin v. Parrish*, 805 F.2d 583, 584 n.2 and 586 (5th Cir. 1986); *Rubin*, 933 F.Supp. at 1442.

¹¹⁵ See, e.g., *Hardy*, 260 F.3d at 679 (Instructor used and solicited from students derogatory expressions pertaining to race, sex and sexual orientation in connection with a lecture and discussion in a communications class about words that have historically served the interests of the dominant culture in violation against policy prohibiting the use of offensive language in class.); *Silva v. University of New Hampshire*, 888 F.Supp. 293, 313 (D.N.H. 1994) (Writing instructor used sexually suggestive language and metaphors in explaining aspects of writing in violation of sexual harassment policy.)

¹¹⁶ Consider the following example that does not involve profanity, sex, religion or other hot button issues. A professor's style of questioning and criticizing students is harsh, and many of them find it difficult if not impossible to learn from him. Students complain bitterly. Those who can avoid his classes do so. Those who cannot perform poorly compared to their peers in other classes. Despite efforts to counsel him by other faculty and administrators, the faculty member refuses to change, arguing that his pedagogical method is entirely legitimate. His department's personnel committee eventually decides not to reappoint him. Would not judicial second-guessing of that result violate the core principles of academic freedom?

¹¹⁷ See, e.g., *Cohen v. San Bernardino Valley College*, 92 F.3d 968, 972 (9th Cir. 1996). In light of its holding on the vagueness issue, the Court declined "to define today the precise contours of the protection the First Amendment provides the classroom speech of college professors." *Id.* at 971. The opinion contains no reference to any of the case law relating to the First Amendment rights of public employees. See also *Dambrot*, 55 F.3d at 1182-85, where the Sixth Circuit upheld a First Amendment challenge to the university's discriminatory harassment policy brought by both a basketball coach and students. Nevertheless, the Court went on to hold that the termination of the coach for use of the word "nigger" in a locker room pep talk was permissible because his speech did not involve a matter of public concern and was not protected by academic freedom. *Id.* at 1185-91.

¹¹⁸ For example, in *Hayut v. State Univ. N.Y.*, 352 F.3d 733 (2d Cir. 2003), the court found that a professor's classroom comments to a female student were sufficiently offensive, severe and pervasive that a reasonable person could conclude that he had created a hostile environment. The professor repeatedly called the student "Monica" because of a purported resemblance to Monica Lewinsky and would ask her in class about "her weekend with Bill" and make other sexually suggestive remarks such as "[b]e quiet Monica, I will give you a cigar later." The professor did not argue that his classroom comments were protected by academic freedom, and thus the court did not express a view on the availability of such a defense. *Id.* at 745. The AAUP, in its Report on Sexual Harassment - Suggested Policy and Procedures for Handling Complaints, offers the view that sexual harassment may include classroom speech that is reasonably regarded as offensive, substantially impairs the academic opportunity of students, is persistent and pervasive and is not germane to the subject matter. AAUP, POLICY DOCUMENTS & REPORTS, *supra* note 2, at 209.

¹¹⁹ See, e.g., *Yacovelli v. Moser*, 2004 WL 1144183 (M.D.N.C. May 20, 2004) (upheld university's assignment of a book about the Qu'ran in freshman orientation program); *Calvary Bible Presbyterian Church of Seattle v. Univ. of Washington*, 436 P.2d 189 (Wash. 1967) (upheld university's course in the Bible as Literature).

¹²⁰ See *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991), where the court upheld restrictions on the speech of an assistant professor of health, physical education and recreation prohibiting him from interjecting his religious beliefs and/or preferences during instructional time periods or conducting optional classes in which a "Christian Perspective" of an academic topic is delivered. The Court held that the First Amendment right to free speech of the faculty member, which it found did not include a distinct right to academic freedom, was outweighed by the authority of the university to establish curriculum. The Court declined to reach the Establishment Clause issue. Although the decision does not specifically state that plaintiff's speech was not related to the subject matter of the course, it would appear to underlie its reasoning; otherwise, it is hard to see why the general authority of the university to establish curriculum allows it to prohibit certain classroom speech of a faculty member consistent with the First Amendment.

¹²¹ For a recent example, see the procedures established at The City University of New York, http://www.cuny.edu/about/administration/offices/1a/PROCEDURES_FOR_HANDLING_STUDENT_COMPLAINTS.pdf

¹²² See, e.g., *Carley v. Arizona Bd. of Regents*, 153 P.2d 1099 (Ariz. Ct. App. 1987) (rejecting claim by faculty member that the university violated his constitutional rights by taking into account negative student evaluations of his teaching in deciding not to renew his contract).

¹²³ American Historical Association, *The Academic Bill of Rights*, available at <http://www.studentsforacademicfreedom.org/abor.html>.

¹²⁴ Similar student bills of rights have been introduced in Congress and in several state legislatures. See Cameron, Meyers & Olswang, *supra* note 113, at 243-47. So far none has been enacted.

¹²⁵ David Beito, Ralph E. Luker and Robert K. C. Johnson, *The AHA's Double Standard on Academic Freedom*, available at <http://www.historians.org/Perspectives/issues/2006/0603/0603vie2.cfm>.

¹²⁶ For a more detailed critique of the Academic Bill of Rights, see the Statement on the Academic Bill of Rights of Committee A of the AAUP, available at <http://www.aaup.org/AAUP/comm/rep/A/abor.htm>.

¹²⁷ See generally AAUP, POLICY DOCUMENTS & REPORTS, *supra* note 2, *passim*. Many of the AAUP's recommendations are thoughtful. However, the connection of many such recommendations to academic freedom is not always clear or well established. Moreover, where there is little or no link between particular AAUP policies and academic freedom, it does not seem appropriate for it to enforce them through investigations, reports and ultimately censure, especially at universities that established different procedures and policies in consultation or collective bargaining with their own faculty.