

Academic Freedom in an Age of Assessment and Accountability

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Introduction

This paper will explore academic freedom in the context of public higher education and it will provide background information including discussion of judicial decisions that address the concept of free inquiry and discussion and the American Association of University Professors' view of academic freedom as "fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning." The paper will compare and contrast the interests that various stakeholders have in public institutions of higher education and will analyze the inherent tensions among an instructor's freedom to teach and research, an institution's interest in assessing student learning, and public pressure for accountability of state funded institutions. It will suggest a clearer definition of the faculty's and the institution's respective freedoms to ensure the continued free flow of ideas necessary for the advancement of knowledge.

Section I will begin with an explanation of common usages of the term "academic freedom" and will differentiate among several contexts in which it is frequently applied. Section II will examine the evolution of academic freedom for individual faculty members. Section III will discuss the rights of educational institutions against governmental control and the continuing need for internal governing processes to ensure that the mission of the institution is being achieved. Section IV will discuss recent events which may lead to an articulation of a new dimension of academic freedom – the rights of students.

I.

Defining "Academic Freedom"

The term "academic freedom" is an illusive term which has been used to describe the rights of a variety of stakeholders in the realm of higher education. It has historically been applied to an educational institution's right to operate autonomously, free from governmental control. Individual faculty members use it when discussing their right to express opinions and viewpoints, both in the classroom and in their research activities. Most recently, the definition of "academic freedom" has also been expanded to include students' right to learn.

"Academic freedom is necessary not only so that faculty members can conduct their individual research and teach their own courses, but also so they can enable students – through whole college programs of study – to acquire the learning they need to contribute to society."¹ Exposing students to a wide range of ideas and asking them to critically analyze them and draw their own conclusions, prepares them to deal with complex questions they will encounter in the future. Free inquiry is essential to the development of informed citizens and leaders, and to the promotion of innovation necessary to continued economic development.

A Brief History of Academic Freedom in the United States

The history of academic freedom in the United States has been well chronicled.² Prior to the Twentieth Century, the role of the instructor was understood to be that of one who passes on information to students. The instructor delivered information and the student was expected to absorb it.

In the United States, the concept of academic freedom was first articulated in the early part of the Twentieth Century by the American Association of University Presidents in response to the dismissal of Edward A. Ross, a Stanford economist, by a Republican trustee for his public support of William Jennings Bryant, a Democrat. Its 1915 document, entitled "Report on Academic Freedom and Tenure," asserted the authority of self-governing faculty over matters of research and teaching, rather than university trustees.³

The American Association of University Professors (AAUP) and the Association of American Colleges began working to address the issue of academic freedom in the 1920's. In 1940, representatives drafted a statement "to promote public understanding and support of academic freedom and tenure and procedures to ensure them in colleges and universities."⁴ As advocates for teachers, the groups focused on the rights of the professor in research and publication, as

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well as in the classroom. The 1940 Statement, however, recognizes that rights also carry responsibilities, and that students also have the right of academic freedom to learn. The Statement explains that the purpose of an institution of higher education is to promote the common good which “depends upon the free search for truth and its free exposition.”⁵ This is further described in the Statement’s first paragraph:

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.⁶

Differentiating Among Rights

Legal scholar Peter Byrne has described academic freedom as a “non-legal term referring to the liberties claimed by professors through professional channels against administrative or political interference with research, teaching, and governance.”⁷ These perceived “liberties” are derived from several sources. These include the United States Constitution and judicial opinions, contract law, and academic custom and usage.⁸

“Academic freedom” can be viewed as having “two different dimensions – ‘institutional’ and ‘individual.’”⁹ These dimensions of academic freedom may be further categorized into separate sets of rights: “(1) the academic rights of the institution versus the government’s rights; (2) the academic rights of the individual versus the government’s rights, and (3) the academic rights of the individual versus the academic institution’s rights.”¹⁰ Disputes between professors and administrators in publicly-funded institutions may involve both the second and third categories of rights listed above, since a public employer’s actions may also be interpreted as state action.

Recent cases indicate that a fourth “set” of rights might logically be added to this list: the rights of students to learn¹¹ and to express opposing viewpoints without fear of retaliation.

II.

Rights of the Individual Professor versus the Government

The first mention of the term “academic freedom” in a written judicial opinion¹² is found in the 1940 case of, *Kay v. Bd. Of Higher Ed.*,¹³ a New York Supreme Court case involving the hiring of Bertrand Russell as a professor at City College. Striking down the hiring based on Russell’s writings on sex, the judge said that, “[a]cademic freedom does not mean academic license”¹⁴ and that “[t]here are norms and criteria of truth which have been recognized by the founding fathers.”¹⁵

An understanding of the academic freedom rights of professors began to be developed in several cases which arose during the McCarthy era in the mid-twentieth century. The first of these to be decided by the Supreme Court was *Sweezy v. New Hampshire*¹⁶, involving the state’s holding a college professor in contempt of court for refusing to answer questions about the contents of a lecture given at a state university and about his knowledge of other persons’ “subversive” activities. The Supreme Court held in favor of the professor, citing both First Amendment and Fourteenth Amendment protections against this type of governmental interference with personal expression and association.¹⁷ In explaining this conclusion, the Court referred to the “petitioner’s liberties in the areas of academic freedom and political expression.”¹⁸ The Court went on to describe what this term to the future of the country and, in fact, civilization itself.

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. . . 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.¹⁹

Justice Frankfurter’s concurring opinion in *Sweezy* enumerates 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.”²⁰

Ten years after *Sweezy*, the Court again took up the question of the constitutionality of placing limitations on academic speech. In *Keyishian v. Board of Regents of the University of the State of New York*²¹, faculty members of the State University of New York, who refused to sign a certificate stating that they were not and had not ever been a Communist, sued to have the state’s teacher loyalty laws declared unconstitutional. Relying, in part, on its previous decision in *Sweezy*, the Court again reasserted its commitment to academic freedom, declaring that it is a “special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”²²

While the *Sweezy* and *Keyishian* line of cases were decided using an academic freedom analysis, later decisions involving challenged academic speech looked to First Amendment speech protection for guidance in determining the rights

of the parties. We turn now to an overview of the Court's changing focus on the First Amendment's impact on the speech rights of public employees, including those who teach in publicly-funded schools.

Rights of the Individual Professor versus the Institution

Freedom of Speech

The First Amendment guarantee of freedom of speech extends to employees of publicly-funded colleges and universities for certain categories of speech. Because a First Amendment claim necessarily involves state action against the speaker, private institutions are not subject to freedom of speech suits. Numerous U.S. Supreme Court decisions have set limits on this freedom, with the limitations generally focusing on type and context of the speech, and whether the employee engaged in the speech as an employee or as a public citizen.

In the landmark case of *Pickering v. Board of Education*,²³ the Court announced a balancing test, which would require that the employee's interest as a concerned citizen be balanced against the employer's right to promote employee efficiency. If a public employee makes public statements on a matter of public concern as a private citizen, that speech should be given First Amendment protection. The Court further extended this protection to private statements made by public employees about public matters in *Givhan v. Western Line Consolidated School Distr.*²⁴ It is also clear that private statements by public employees about personnel matters are not afforded the same protection as either public or private statements about public issues *Connick v. Myers*.²⁵

The speech rights of public employees were further restricted in the 2006 decision of *Garcetti v. Ceballos*²⁶, when the Supreme Court ruled that "[t]he First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens."²⁷ However, if a public employee makes a statement pursuant to his or her official duties, "the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."²⁸

However, in *Garcetti*²⁹, the Court recognized that "some expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by [the] Court's customary employee-speech jurisprudence."³⁰ Justice Souter expressed his concern that the majority's ruling in *Garcetti* would extend to the speech of public university and college professors in his dissent. Citing *Grutter v. Bollinger*³¹, *Keyishian v. Board of Regents of Univ. of State of N.Y.*³², and *Sweezy v. New Hampshire*³³, he stated,

This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today's majority does not mean to imperil the First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to official duties.'³⁴

In addition to protections afforded academic speech, there are limits to a public institution's rights to require or compel speech. This principle has been applied to situations in which a professor was ordered to change a student's course grade.³⁵ "Although the individual professor does not escape the reasonable review of university officials in the assignment of grades,"³⁶ the professor should be able to exercise his or her own professional judgment in the application of grading criteria.

In the context of the First Amendment, compelled speech is not distinguished from prohibited speech. For this reason, "the individual professor may not be compelled . . . to change a grade that the professor previously assigned to her student. Because the individual professor's assignment of a letter grade is protected speech, the university officials' action to compel the professor to alter that grade would severely burden a protected activity."³⁷

However, the professor's rights would not be affected if the university officials changed a grade rather than compelling the professor to do so, pursuant to the institution's right to make administrative decisions. We turn now to a discussion of the rights of an educational institution against governmental interference.

III.

Rights of the Institution

Admissions Decisions

Courts may review some of the academic decisions made by a public institution under a due process standard³⁸, but are generally reluctant to interfere with day-to-day management decisions of the academy.³⁹ Some legal scholars refer to this practice as "academic abstention," which refers to the "traditional refusal of courts to extend common law rules of liability to colleges where doing so would interfere with the college administration's good faith performance of its core functions."⁴⁰

The most recent judicial clarification and affirmation of the rights of the institution come from a line of affirmative action admissions policy cases, in which the Court has addressed Justice Frankfurter's "fourth freedom", the determination of "who may be admitted to study."⁴¹

*Regents of the University of California v. Bakke*⁴² was the first of the affirmative action admissions policy cases addressed by the Supreme Court. In the plurality decision, Justice Powell recognized that achieving diversity in a medical school's student body is "clearly... a constitutionally permissible goal for an institution of higher education."⁴³ Citing Frankfurter's concurring opinion in *Sweezy*, Powell asserted that "the freedom of a university to make its own judgments as to education includes the selection of its student body."⁴⁴ Nevertheless, the admissions policy must not infringe on the constitutional rights of applicants, and for that reason the Court held that the "quota" system adopted by the petitioner was invalid.⁴⁵ This precedent was later followed by the Fifth Circuit in its decision in *Hopwood v. Texas*,⁴⁶ and extended further to prohibit not only racial quotas but the use of race as even a "factor" in a law school admission decision.⁴⁷

Twenty-five years after *Baake*, the Supreme Court again turned to the question of the constitutionality of a higher education institution's admissions policy that considered applicants' race in its selection process. *Grutter v. Bollinger*⁴⁸ addresses the issue of whether a "narrowly tailored" plan to increase minority representation in the student body would pass a strict scrutiny analysis. The Law School asked the Court "to recognize, in the context of higher education, a compelling state interest in student body diversity."⁴⁹ In order to find the compelling state interest that would support the affirmative action admissions plan, it was first necessary for the Court to recognize that admissions policies are protected by institutional academic freedom. For the first time in a majority opinion, the Court extended Constitutional protection to an administrative institutional decision, stating that "[t]he weight given to the university's interest, adequate to overcome entrenched equal protection precedent against the use of race in decision making, must be understood as a holding that such core institutional choices are protected by the First Amendment."⁵⁰ In recognizing that deference should be given to educational administrative decisions, Justice O'Connor stated,

The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limit.⁵¹

Freedom of Speech

Institutions as well as individuals have the benefit of First Amendment protection for speech. This right was recently asserted in the controversial case of *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*⁵² In *Rumsfeld*, a group of law schools and law professors challenged the constitutionality of the Solomon Amendment, which required institutions of higher education to grant military recruiters the same access to students as was afforded other recruiters. Failure to allow military recruiters access to students would result in a loss of some federal funding for the offending institutions. The Forum for Academic and Institutional Rights (FAIR) asserted that the Solomon Amendment violated the institutions' rights by compelling speech by requiring informational postings on job boards and emails to students.⁵³ In an 8-0 decision, the Court held that "[a]s a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*--afford equal access to military recruiters--not what they may or may not *say*."⁵⁴ (emphasis provided). Although the informational postings could be classified as communication, "[a] law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper; its accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school."⁵⁵ After *Rumsfeld*, it would seem that the government can compel some kinds of communication, as long as that communication can be characterized as not primarily speech nor as a message the school intends to send. Following this reasoning, institutions may be compelled to report student assessment outcomes and to comply with other requirements in the interest of accountability to the public.

Assessment and Specialized Accreditations

There is no doubt that a question related to regional and state accreditation, necessary for the awarding of degrees with value to the students and a school's stakeholders would receive full support from the courts. Similarly, in today's climate of accountability, it is just as important for an institution to set guidelines requiring assessment of student learning and to seek the approval and endorsement of external professional accrediting bodies.

Despite the view promoted by W. P. Metzger that, "a violation of academic freedom was seen as something that happened in a university, not something that happened to a university"⁵⁶, the courts have consistently recognized that institutional matters necessary for the proper administration of the school are in fact to be considered a defensible aspect of academic freedom.

In *Regents of the Univ. of Mich. v. Ewing*⁵⁷, the Supreme Court opined that "[a]cademic 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."⁵⁸

Five years later, the Court in *University of Pennsylvania v. Equal Employment Opportunity Commission*⁵⁹, allowed the University of Pennsylvania to enforce policies regarding the non-disclosure of private and personal information regarding internal faculty evaluations, stating that, "...courts have stressed the importance of avoiding second-guessing of legitimate academic judgments."⁶⁰

Other decisions further support the general right of an institution to be free to govern itself. "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."⁶¹ "The administration of the university rests not with the courts, but with the administrators of the institution."⁶² "Academic freedom includes the interests of educational institutions, public as well as private, in controlling their own destiny and thus in freedom from intrusive judicial [and governmental] regulation."⁶³ The court has further recognized that:

Faculty criticism of administration policies, for example, is not viewed as a breach of loyalty, but as an exercise of academic freedom. So, too, intervention by the university administration in faculty deliberations would most likely be considered an infringement upon academic freedoms. *Conversely, university administrations rarely consider themselves bound by faculty recommendations.*⁶⁴ (Emphasis added)

It is therefore a reasonable conclusion to recognize that where there is academic freedom to present an opinion, the right of an institution to ignore that opinion is certainly a resultant institutional academic freedom.

Beyond the above generalizations, a variety of cases have established specific rights of the institution to set rules and policy free from reproach. These rules and policies, many discussed previously above, include, determining the make up of the student body⁶⁵, setting the curriculum⁶⁶, requiring research in addition to teaching⁶⁷, requiring a faculty member to engage in appropriate clinical work⁶⁸, determining a faculty member's teaching schedule⁶⁹, whether or not to award grants to faculty members⁷⁰, and the selection and retention of faculty.⁷¹ The courts have obviously recognized a recurring precedent allowing institutional academic freedom to thrive within the confines of administrative functions and institutional advancement.

Despite the generally accepted premise that an educational institution has autonomy in its day-to-day administrative decision-making, recent developments indicate that the public expects more accountability for the performance of college graduates.⁷² While not overtly mandating compliance, the 2006 report from the Commission on the Future of Higher Education (a/k/a the Spelling Report) contains the following language which calls for a commitment on the part of colleges and universities to take responsibility for improving student learning outcomes:

In our view, correcting shortcomings in educational quality and promoting innovation will require a series of related steps, beginning with some of the accountability mechanisms that are summarized below ... [W]e urge postsecondary institutions to make a commitment to embrace new pedagogies, curricula, and technologies to improve student learning."⁷³

The Report of the Commission calls for institutions of higher learning to "measure student learning using quality-assessment data from instruments such as ... the Collegiate Learning Assessment ... and the Measure of Academic Proficiency and Progress."⁷⁴

The AAUP response⁷⁵ to the commission's report is enlightening. Prepared by the AAUP Committee on Accreditation, the response, while opining that more faculty participation on the Commission might have created a better document, also noted that:

Innovation in educational programs and curricula is an important means to educational excellence. (emphasis added) The committee regrets, however that the report focuses its discussion of educational innovation on distance education technologies, while many important forms of pedagogical and curricular creativity are not considered, including pedagogical innovations in the classroom and campus activities: the use of increasingly sophisticated community-based learning experiences and educational exchanges such as apprenticeships, service learning, and study abroad opportunities."⁷⁶

It is important to note that the AAUP, one of the bastions of academic freedom and faculty and student rights, has no quarrel with, and in fact endorses, innovation in educational programs and curricula, two of the recognized academic freedom purviews of the institution.

The AAUP Committee further supports accreditation efforts, naming no academic freedom issues while specifying that existing accreditation measures include factors such as, "...the quality of the faculty, their professional credentials and the intensive review process faculty undergo as part of the current accreditation process."⁷⁷

With regard to the issue of assessment, the report states that, "[t]remendous strides have been made by institutions and their faculty in indexing outcomes when measuring performance."⁷⁸ Then, with no indication of a clash with academic freedom rights, the response simply recognizes a variety of assessment methods not named in the Spelling Report.

Joining both issues, the response further indicates that, "[c]urrent accreditation standards have for a number of years, required an examination of outcomes."⁷⁹ With the Spelling Commission calling for increased academic responsibility on the part of the institution and by implication the faculty, it is important to recognize that at no time in the response did the AAUP mention academic freedom. It is therefore reasonable to conclude that the AAUP recognizes the responsibility of faculty to participate in reasonable accreditation and assessment efforts without academic freedom being an issue.

The Board of Directors of the Association of American Colleges and Universities has also indicated a position on academic freedom and assessment. In a 2006 Board statement⁸⁰ they wrote:

This document articulates an ideal that is based on historic conceptions of academic freedom and extends those precepts to include responsibilities for the holistic education of students. In reality, practice often falls short of these norms. Departments and sometimes whole institutions do not always establish widely shared goals for student learning, programs may drift away from original intentions and assessments may be inadequate. Some departments fail to ensure that their curricula include the full diversity of legitimate intellectual perspectives appropriate to their disciplines. And individual faculty members sometimes express their personal views to students in ways that intimidate them. *There are institutional means for dealing with these matters*, (emphasis added)...⁸¹

Once again we find an association, intent upon protecting academic freedom, acknowledging that particular internal issues are within the purview of the institution to administer and not automatically a threat to academic freedom.

There is also a call for accrediting bodies to make performance measurement a priority.⁸² Specialized accreditation agencies have already begun to require detailed assessment plans as a requirement for initial as well as continued accreditation.⁸³ It is incumbent upon institutions of higher education to respond by taking responsibility for discovering and managing ways to improve and measure student learning outcomes if they hope to maintain the autonomy that was recognized in *Grutter*.⁸⁴

As Justice Frankfurter recognized, two of the freedoms of the academic institution are to determine what may be taught and how it shall be taught. In today's climate these freedoms should also be interpreted as including the responsibility to determine the best practices in education that will result in improvements in student learning.

The literature in these specific areas is not particularly helpful. While academic freedom has been addressed most repeatedly and in a variety of ways, literature analyzing academic freedom as it pertains directly to assessment and/or accreditation is severely lacking, particularly in the United States.⁸⁵ The scant publications in the United States relating academic freedom to assessment and/or accreditation are not inclusive or entirely helpful. Two examples follow.

In 1994, William Pendleton published an essay which suggested that assessment and academic freedom were not compatible.⁸⁶ Citing the fact that most faculty already do classroom assessments, Pendleton questioned the need for additional intrusion. Note that the current "student learning assessment" was not widely used nor was it indicated as a best practice then, as it is today. Pendleton complains about forms mandated by administrations that, "have played little role in the allocation of resources within the university."⁸⁷ Taking a very pessimistic view, Pendleton states that faculty are already, "... assessing well"⁸⁸ and that, "[o]ne cannot escape the impression that much of the assessment movement behaves like children who have found some important ideas and play delightedly with them without regard to the complex set of ideas that underlie them in the adult world."⁸⁹

These simplistic approaches seem to lack an appreciation of modern assessment, usually mandated in some way, but usually developed by faculty or at the least through faculty input.

Taking an opposing view, Sandra E. Elman writes in support of the positive coexistence of accreditation and academic freedom⁹⁰ stating:

Thus, individuals with various roles and of differing status within an institution are all obligated as members of the academy to bear the responsibility for ensuring that academic freedom is not compromised. For regional accreditation the protection of academic freedom is essential to ensuring not only the integrity of the institution, but also, equally as important, its quality."⁹¹

Note that Elman refers to the mandatory regional accreditation necessary for an institution to operate. Unfortunately she does not consider other external specialized accreditations. One might surmise however, that her final reference to quality would find her supporting such additional accreditations, increasingly important in today's climate of continuous improvement and competition for funding among institutions.

With regard to assessment, Elman finds no conflict with assessment being required as long as the faculty is permitted professional and creative input. Recognizing that external imposition of common assessments across disciplines would be an academic freedom issue, she then recognizes that:

Accreditation, at least as we know it today, attempts to maintain a balance between mandating that institutions implement assessment activities and refraining from imposing specific, designed methods of assessment that would stifle faculty initiatives to develop qualitative and quantitative assessments that best reveal student performance.⁹²

With faculty input, the threat to academic freedom by the utilization of assessment techniques provides little threat to academic freedom in today's educational environment.

To date, there have been no reported law suits in the federal judicial arena specifically addressing the issues of accreditation or assessment as abridging or infringing on a faculty member's right to academic freedom. Such a law suit may arise from a variety of scenarios. A professor may question the inclusion of a particular test or other assessment tool to be required in a class. A professor may balk at the additional work needed to compile assessment results providing necessary reports of progress or change. A professor may question increased research needed to remain academically or professionally

qualified to continue effective employment. Most likely, a law suit will occur after a faculty member resistant to one of the aforementioned scenarios is terminated due to their failure to comply.

If and when such a suit is brought, these authors urge the courts to recognize the underlying obligations that an institution has to its faculty, students and its local, national and in some cases international community of stakeholders to provide the best education possible. This can only be done by utilizing the faculty to conduct the needed introspection and maintain the requisite vigilance required of the task. The institutions decisions to institute comprehensive assessment programs or to seek and maintain professional accreditations should be considered necessary for the optimal organization and maintenance of the institution and free from academic freedom infringement claims by faculty.

When administered fairly amongst the faculty, justified in its application and fruitful in its results, assessment and maintenance of professional accreditations are necessary for the survival of institutions and should be considered a vital part of the professor's duties and not an attack on academic freedom. On the contrary, making the academic institution effective, capable and respected only serves to promote and preserve academic freedom.

IV.

Rights of the Student

Freedom of Speech

The AAUP's 1940 Statement includes language referring to the "rights ... of the student to freedom in learning."⁹³ These rights have frequently been asserted in cases protesting the use of university fees to support causes with which the challenging students do not agree as violating freedom of speech.

One of these cases, *Rosenberger v. Rector and Visitors of Univ. of Va.*,⁹⁴ distinguished between the public university's duties under the Establishment Clause to not participate in advocating a particular religion and the duty of the university to not engage in viewpoint discrimination. In *Rosenberger*, the University of Virginia authorized payments from the student activities fund directly to outside contractors who printed various publications for Contracted Independent Organizations (CIOs).⁹⁵ One group, Wide Awake Productions (WAP), was recognized as a CIO, not as a religious organization. However, the University refused to reimburse WAP for printing costs associated with a newspaper that promoted a Christian lifestyle. WAP sued the University for violation of its free speech rights. The Court held that "the government may not regulate speech based on its content or the message it conveys"⁹⁶ and that it "must abstain from regulating speech when the specific motivating ideology ... is the rationale for the restriction."⁹⁷ Although the Court primarily basing its decision on principles of free speech, it nonetheless incorporated language which seemingly endorsed the University's academic freedom in making decisions about funding a variety of speech:

Vital First Amendment speech principles are at stake here. The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. ... The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.⁹⁸

Five years after deciding *Rosenberger*, the Court again turned to an analysis based in part on the academic freedom of the university to determine the constitutionality of using mandatory student fees to support extracurricular speech activities. In *Board of Regents v. Southworth*⁹⁹, the University of Wisconsin required all full time students to pay a fee which was separate from tuition charges.¹⁰⁰ These student fees were then allocated to fund a variety of activities designed to enrich students' university experience. Registered Student Organizations (RSOs) could apply for funding by through the student government or alternatively through a student referendum. While the student government application process appeared to be viewpoint neutral, as required by *Rosenberger*, it appeared that the student referendum outcome would be based on the opinion of the majority of students, and therefore not viewpoint neutral. A group of students protested the payment of the fees on the basis that they did not agree with the opinions expressed by some speakers and that some views expressed by funded programs were, in fact, offensive to them. These students alleged "that imposition of the segregated fee violated their rights of free speech, free association, and free exercise under the First Amendment. They contended the University must grant them the choice not to fund those RSO's that engage in political and ideological expression offensive to their personal beliefs."¹⁰¹ The majority noted that "[t]he University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall. If the University reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends..."¹⁰² This view which gives deference to the University's academic freedom to determine programming necessary to achieve its mission.

However, in a concurring opinion, Justice Souter recognizes that there may be limits to an institution's academic freedom with respect to student rights.

While we have spoken in terms of a wide protection for the academic freedom and autonomy that bars legislatures (and courts) from imposing conditions on the spectrum of subjects taught and viewpoints expressed in college teaching ... we have never held that universities lie entirely beyond the reach of students' First Amendment rights.¹⁰³

Intellectual Diversity

Other interest groups have sought to expand students' right to academic freedom beyond those guaranteed by the First Amendment to include the right to a "balanced viewpoint" approach to topic coverage. In 2006, a group of conservative activists led by David Horowitz, advocated the adoption of a so-called "Academic Bill of Rights" (ABR). None of the pending bills were enacted that year. In 2007, bills requiring "intellectual diversity" were introduced in at least 4 states. The bills were modeled on principles articulated by the American Council of Trustees and Alumni (ACTA), a conservative organization. Language from an ACTA publication, "Intellectual Diversity – Time for Action,"¹⁰⁴ found its way into each of these bills, including requirements for the filing of compliance reports to state higher education coordinating bodies.

In the state of Missouri, HB 213 was introduced in response to an incident at Missouri State University, in which a student, Emily Brooker, sued the university, alleging victimization by a professor because of the student's opposition to adoption by gay couples. The student's social work professor had required each of his students to sign a letter to the state legislature urging the legalization of adoption by gay couples. Brooker objected to signing the letter for religious reasons and was allegedly targeted by the professor because of her refusal. The University settled with Brooker, disciplined the professor, and refunded tuition. Although this incident should more appropriately have been framed as a compelled speech issue, conservatives used the incident as a rationale for introducing legislation to require "intellectual diversity" in the classroom.

In response to the controversy at Missouri State University, the Missouri House of Representatives passed House Bill 213, known as the Emily Brooker Intellectual Diversity Act, by a vote of 97 to 50¹⁰⁵ and sent a Senate Committee Substitute version to the state Senate. The Act would have required each institution of higher education in the state to "have policies that promote academic freedom between and among students and faculty"¹⁰⁶ and to submit a report to the state coordinating board "detailing the specific measures taken to promote student academic freedom."¹⁰⁷ The Senate Committee on Education recommended that the bill also be passed by the Senate, but it was not voted on and died on the floor when the Senate adjourned.

Similar bills introduced in Virginia¹⁰⁸, Georgia¹⁰⁹, and Montana¹¹⁰ include requirements that institutions include intellectual diversity issues in student evaluations¹¹¹ and that intellectual diversity concerns should be included in an institution's guidelines on teaching and program development.

State-mandated protection for student speech should be unnecessary in light of a number of other legal safeguards available. For example, Emily Brooker at Missouri State University could have claimed that her First Amendment right against mandated speech was violated, or that her decision to decline to sign a paper which she opposed on religious grounds was protected by the Free Exercise Clause of the First Amendment.

Most universities and colleges have grievance processes in place to address instances of alleged faculty misconduct. Missouri State University, for example, has a grievance process in place, but Emily Brooker apparently did not take advantage of it to resolve the conflict with her professor.¹¹² The Statement on Professional Ethics adopted by the AAUP in 1987¹¹³ Section 1 of the Statement asserts that "[a]s teachers, professors encourage the free pursuit of learning in their students. They hold before them the best scholarly and ethical standards of their discipline. Professors demonstrate respect for students as individuals and adhere to their proper roles as intellectual guides and counselors." Mistreating a student because of her differing viewpoint would violate these commonly recognized ethical standards, which should also subject the offending faculty member to disciplinary action.

While students should be exposed to a wide range of viewpoints during their college experience, "[a]ll competing ideas on a subject do not deserve to be included in a course or program, or to be regarded as equally valid just because they have been asserted."¹¹⁴ Pursuant to the institution's and the professor's academic freedoms, "in considering what range of views should be introduced and considered, the academy is guided by the best knowledge available in the community of scholars."¹¹⁵ It is the responsibility, as well as the right, of the institution and the professor to determine what information and views merit coverage in class.

Conclusions

Peter Byrne recently noted that "*Grutter v. Bollinger* represents a high-water mark for the recognition and influence of constitutional academic freedom."¹¹⁶ However, with rights, come responsibilities. It is time for institutions of higher education to take the lead in the process of assessment of student outcomes and in revising curriculum and pedagogies to

improve them, or some of their current “freedoms” may be eroded by mandated outcomes measurement and legislated “balanced” approaches to controversial issues.

Additionally, the higher education needs to take responsibility for providing and publishing grievance procedures and to ensure that these procedures are followed, so that students who believe they have been victimized because they did not agree with a professor’s viewpoint may have recourse outside of the judicial system. It is critical to the future of higher education that institutions and faculty continue to engage in the discussion of controversial topics and demonstrate openness to dissenting views. As Justice Holmes eloquently stated, “the ultimate good desired is better reached by free trade in ideas.”¹¹⁷

Footnotes

¹ A Statement of the Board of Directors of the Association of American Colleges and Universities, *Academic Freedom & Educational Responsibility*, LIBERAL EDUCATION, Spring 2006, Vol. 92 Issue 2, p. 8.

² See generally Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265 (1988) and J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment”*, 99 YALE L. J. 251 (1989).

³ Lee C. Bollinger, *Benjamin N. Cardozo Lecture: Academic Freedom and the Scholarly Temperament*, 60 CBA RECORD 326, at 330 (2005).

⁴ The American Association of University Professors, *1940 Statement of Principles on Academic Freedom and Tenure With 1970 Interpretive Comments*, <http://www.aaup.org/AAUP/pubsresearch/policy/policydocs/1940statement.htm?PF=1>

⁵ *Id.*

⁶ *Id.*

⁷ J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment”*, 99 YALE L. J. 251 at 255 (1989).

⁸ *Id.* at 256, “Prior to 1957, academic freedom was a matter of professional ideology and custom.”

⁹ H. James Williams, *Academic Freedom – Is it at Odds with Assessment*, in *Assessment of Student Learning in Business Schools: Best Practices Each Step of the Way*, Vol. 1, No. 2, 199 (The Association for Institutional Research and AACSB International, 2005).

¹⁰ *Id.*

¹¹ *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000).

¹² J.P. Byrne, *The Threat to Constitutional Academic Freedom*, JOURNAL OF COLLEGE AND UNIVERSITY LAW, Vol. 31, 2004 at 86.

¹³ 18 N.Y.S.2d 821 (N.Y. Sup. Ct. 1940).

¹⁴ *Id.* at 829.

¹⁵ *Id.* at 829.

¹⁶ 354 U.S. 234 (1957).

¹⁷ *Id.* at 253.

¹⁸ *Id.* at 250.

¹⁹ *Id.*

²⁰ *Id.* at 263 (Frankfurter, J., concurring), citing “The Open Universities in South Africa.”

²¹ 385 U.S. 589 (1967).

²² *Id.* at 603.

²³ 391 U.S. 138 (1983).

²⁴ 439 U.S. 410 (1979).

²⁵ 461 U.S. 138 (1983).

²⁶ 126 S.Ct. 1951 (2006).

²⁷ *Garcetti v. Ceballos*, 126 S.Ct. 1951, 1958 (2006).

²⁸ *Id.* at 1960.

²⁹ *Id.* at 1969 (Souter, J., dissenting).

³⁰ *Id.* at 1962.

³¹ 539 U.S. 306, 329 (2003).

³² 385 U.S. 589, 603 (1967).

³³ *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

³⁴ *Garcetti*, 126 S.Ct. at 1969 (Souter, J., dissenting).

³⁵ *Parate v. Isibor*, 868 F.2d 821 (6th Cir. 1989).

³⁶ *Id.* at 828

³⁷ *Id.*

³⁸ *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 222 (1985).

³⁹ *Parate*, 868 F.2d 821.

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- ⁴⁰ Byrne, *supra* note 3, at 323.
- ⁴¹ *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (Frankfurter, J., concurring).
- ⁴² 438 U.S. 265 (1978).
- ⁴³ *Id.* at 311-312
- ⁴⁴ *Id.* at 312.
- ⁴⁵ *Id.* at 324.
- ⁴⁶ 78 F.3d 932 (5th Cir. 1996).
- ⁴⁷ *Id.* at 946.
- ⁴⁸ 539 U.S. 306 (2003).
- ⁴⁹ *Id.* at 328.
- ⁵⁰ J. Peter Byrne, *Horowitz, Churchill, Columbia – What Next for Academic Freedom? Constitutional Academic Freedom After Grutter: Getting Real about the “Four Freedoms” of a University*, 77 U. Colo. L. Rev. 929 (Fall, 2006).
- ⁵¹ *Grutter v. Bollinger*, 539 U.S. 306, at 328.
- ⁵² 126 S. Ct. 1297 (2006).
- ⁵³ *Id.* at 1307.
- ⁵⁴ *Id.*
- ⁵⁵ *Id.* at 1310.
- ⁵⁶ W. P. Metzger, *Profession and Constitution: Two definitions of Academic Freedom in America*, TEXAS LAW REVIEW, Vol. 66, at 1284, 1988. (Defending the position that the AAUP through their 1915 and 1940 statements had established that, “academic freedom stood for the freedom of the academic, not for the freedom of the academy.”)
- ⁵⁷ 474 U.S. 214 (1985).
- ⁵⁸ *Id.* at 226.
- ⁵⁹ 493 U.S. 182 (1990).
- ⁶⁰ *Id.* at 199.
- ⁶¹ *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).
- ⁶² *Parate v. Isibor*, 868 F.2d 821, 827 (6th Cir. 1989).
- ⁶³ *Crowley v. McKinney*, 400 F.3d 965, 969 (7th Cir. 2005)
- ⁶⁴ *National Labor Relations Board v. Yeshiva University*, 444 U.S. 672, 700 (1980); Justice Brennan’s dissent joined by Justices White, Marshall and Blackmun, citing, *Northeastern University*, 218 N.L.R.B. 247, 257 (1975)
- ⁶⁵ *Bakke*, 438 U.S. at 312; citing Justice Frankfurter’s concurring opinion in *Sweeny* 354 U.S. at 263.
- ⁶⁶ *Martha Louise Piggee v. Carl Sandburg College*, 464 F.3d 667 (7th Cir. 2006), citing *Webb v Bd. of Trustees of Ball State Univ.*, 167 F.3d 1146, 1149 (7th Cir. 1999).
- ⁶⁷ *Bd. of Trustees of Ball State Univ.*, 167 F.3d at 1150.
- ⁶⁸ *Vicki E. Pollock v. University of Southern California*, 2006 Cal. App. Unpub. LEXIS 4692.
- ⁶⁹ *Martinez v. University of Puerto Rico*, 2006 U.S. Dist. LEXIS 92925.
- ⁷⁰ *Radolf v. Univ. of Conn.*, 364 F. Supp. 2d 204, 216 (D. Conn. 2005).
- ⁷¹ *Shelton v. Tucker*, 364 U.S. 479 (1960) citing *Sweezy*, 354 U.S. at 255; *Hishon v. King & Spalding*, 467 U.S. 69, 80 (1984), citing *Lieberman v. Gant*, 630 F.2d 60, 67-68 (CA2 1980); *Kunda v. Muhlenberg College*, 621 F.2d 532, 547-548 (CA3 1980); *Bakke*, at 311-315 (opinion of Justice Brennan).
- ⁷² Alex Kingsbury, *The Measure of Learning*, U. S. NEWS AND WORLD REPORT, MAR. 12, 2007, 52-57.
- ⁷³ *A Test of Leadership: Charting the Future of U.S. Higher Education*, Final Report of the Secretary’s Commission on the Future of Higher Education, <http://www.ed.gov/print/about/bdscomm/list/hiedfuture/reports.html>
- ⁷⁴ *Id.* at 24.
- ⁷⁵ *AAUP Responds to Spelling Commission Accreditation Recommendations*, released October 13, 2006. <http://www.aaup.org/AAUP/newsroom/prarchives/2006/accred.htm?PF=1>, last visited May 27, 2007.
- ⁷⁶ *Id.*
- ⁷⁷ *Id.* ¶ 1.
- ⁷⁸ *Id.* ¶ 2.
- ⁷⁹ *Id.* ¶4.
- ⁸⁰ *Academic Freedom & Educational Responsibility, A Statement of the Board of Directors of the Association of American Colleges and Universities*, 6 LIBERAL EDUCATION, Spring, 2006.
- ⁸¹ *Id.* at 13.
- ⁸² *Id.* at 25.
- ⁸³ See Assurance of Learning Standards, *Eligibility Procedures and Accreditation Standards for Business Accreditation*, AACSB International, pages 59-69, http://www.aacsb.edu/accreditation/process/documents/AACSB_STANDARDS_Revised_Jan07.pdf
- ⁸⁴ *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

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- ⁸⁵ Relevant foreign publications include, Lisa Kaczmarczuk, *Accreditation and Student Assessment in Distance Education: Why We all Need to Pay Attention*, ACM SIGCSE BULLETIN, v. 33, Issue 3, September, 2001 (England); Peter Knight, *The Value of a Programme-wide Approach to Assessment*, ASSESSMENT AND EVALUATION IN HIGHER EDUCATION, v. 25, 2000 (England); Carole Kayrooz and Paul Preston, *Academic Freedom: Impressions of Australian Social Scientists*, MINERVA, v. 40, n. 4, December, 2002 (Australia); David Boud, *Assessment and the Promotion of Academic Values*, STUDIES IN HIGHER EDUCATION, v. 15, Issue 1, 1990 (Australia).
- ⁸⁶ William W. Pendleton, *The Freedom to Teach*, NEW DIRECTIONS FOR HIGHER EDUCATION, n. 88, Winter, 1994.
- ⁸⁷ *Id.* at 15-16.
- ⁸⁸ *Id.* at 16.
- ⁸⁹ *Id.*
- ⁹⁰ Sandra E. Elman, *Academic Freedom and Regional Accreditation: Guarantors of Quality in the Academy*, NEW DIRECTIONS FOR HIGHER EDUCATION, n. 88, Winter, 1994.
- ⁹¹ *Id.* at 93.
- ⁹² *Id.* at 96.
- ⁹³ 1940 Statement of Principles on Academic Freedom and Tenure With 1970 Interpretive Comments,” *supra* note 7.
- ⁹⁴ 515 U.S. 819 (1995).
- ⁹⁵ *Id.* At 824.
- ⁹⁶ *Id.* at 828.
- ⁹⁷ *Id.* at 829.
- ⁹⁸ *Id.* at 835.
- ⁹⁹ 529 U.S. 217 (2000).
- ¹⁰⁰ *Id.* at 221.
- ¹⁰¹ *Id.* at 227
- ¹⁰² *Id.* at 233.
- ¹⁰³ *Id.* at 238-239.
- ¹⁰⁴ <http://www.goacta.org/publications/Reports/IntellectualDiversityFinal.pdf>
- ¹⁰⁵ <http://www.house.mo.gov/bills071/action/aHB213.htm>
- ¹⁰⁶ HB 213 §173.057.1.
- ¹⁰⁷ *Id.* §173.057.5.
- ¹⁰⁸ HB 1643, <http://leg1.state.va.us/cgi-bin/legp504.exe?071+ful+HB1643>
- ¹⁰⁹ HB 154, http://www.legis.state.ga.us/legis/2007_08/fulltext/hb154.htm
- ¹¹⁰ HB 5525, d <http://data.opi.mt.gov/bills/2007/billhtml/HB0525.htm#About>
- ¹¹¹ See Model Student Evaluation of Faculty Questions, <http://www.goacta.org/publications/Reports/IntellectualDiversityFinal.pdf> -- Questions include the following:
Instructor’s presentation of social and political issues:
Balanced and fair 1 2 3 4 5
Biased and unfair
Course readings on controversial issues:
Multiple perspectives 1 2 3 4 5 One-sided
Classroom environment with respect to student expression of political or social views:
Tolerant 1 2 3 4 5 Hostile
Treatment of students who express political or social views:
Tolerant 1 2 3 4 5 Hostile
Use of classroom to present instructor’s personal political views:
Rare or infrequent 1 2 3 4 5 Frequent
Instructor comments on politics unrelated to the course:
Rare or infrequent 1 2 3 4 5 Frequent
- ¹¹² Patricia P. Brodsky, *Letter to the editor: Diversity Act is Anti-Intellectual*, ST. LOUIS DAILY RECORD, Mar. 15, 2007. Patricia Brodsky is president of the UMKC chapter of the AAUP.
- ¹¹³ Statement on Professional Ethics, American Association of University Professors, <http://www.aaup.org/AAUP/pubsres/policydocs/statementonprofessionalethics.htm>
- ¹¹⁴ *Supra* note 3, at p. 9.
- ¹¹⁵ *Id.*
- ¹¹⁶ Byrne, *supra* note 38, at 929.
- ¹¹⁷ *Abrams v. United States*, 250 U.S. 616, 630 (1919), (Holmes, J., dissenting).