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Academic Freedom and the First Amendment¹

As a legal matter, it can be extremely difficult to determine where faculty members' rights under academic freedom and the First Amendment begin and end. It can also be difficult to explain the distinction between “academic freedom” and “free speech rights under the First Amendment”—two related but analytically distinct legal concepts. Academic freedom rights are not coextensive with First Amendment rights, although courts have recognized a relationship between the two.

The First Amendment generally restricts the right of a public institution—including a public college or university—to regulate expression on all sorts of topics and in all sorts of settings. Academic freedom, on the other hand, addresses rights within the educational contexts of teaching, learning, and research both in and outside the classroom—for individuals at private as well as at public institutions. This outline aims to give an overview of the protections afforded by academic freedom and the First Amendment, as well as some guidance on the areas in which they do not overlap or where courts have been equivocal or undecided on how far their protections extend.² Because the First Amendment applies only to governmental actors, this outline focuses primarily on public institutions.

SOURCES OF ACADEMIC FREEDOM RIGHTS

Academic freedom has a number of sources; the protection it affords in a given circumstance can depend on a variety of factors, including state law, institutional custom and policy, and whether the institution is public or private. The notion of academic freedom was originally given legal recognition and force in a series of post-McCarthy-era Supreme Court opinions that invoked the First Amendment to the U.S. Constitution.

¹ For further discussion of many of the themes covered in this outline and more, see Donna Euben, *Academic Freedom of Professors and Institutions* (2002) (http://www.aaup.org/AAUP/protectrights/legal/topics/AF-profs-inst.htm?wbc_purpose=Basic&WBCMODE=PresentationUnpublished?PF=1) and Donna Euben, *Academic Freedom and Professorial Speech* (2004) (http://www.aaup.org/AAUP/protectrights/legal/topics/prof-speech.htm?wbc_purpose=Basic&WBCMODE=PresentationUnpublished?PF=1); this outline owes a significant debt to both outlines. In addition, 2007 summer legal intern Anna Czarples, University of Minnesota Law School class of 2008, provided significant assistance in the preparation of this outline.

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A. First Amendment – Text and Interpretations:

1. **Text:** The text of the First Amendment to the U.S. Constitution, “Congress shall make no law . . . abridging the freedom of speech,” makes no explicit mention of academic freedom. However, many courts that have considered claims of academic freedom – including the U.S. Supreme Court – have concluded that there is a “constitutional right” to academic freedom in at least some instances, arising from their interpretation of the First Amendment.

2. **Judicial Origins:** During the McCarthy era, a number of employers began to require teachers (and other public employees) to sign statements assert that they were not involved in any subversive groups. In response to these cases, the U.S. Supreme Court began to codify the notion of constitutional academic freedom.

a. *Adler v. Board of Education*, 342 U.S. 485 (1952) (Douglas, J., dissenting). This case involved a New York state statute that essentially banned state employees from belonging to “subversive groups” – groups that advocated the use of violence in order to change the government. Under the statute, public employees were forced to take loyalty oaths stating that they did not belong to subversive groups in order to maintain their employment.

While the Supreme Court’s decision upheld the state statute, Justice Douglas’ dissent contains the first mention of academic freedom in a Supreme Court case. Referring to the process by which organizations were found “subversive,” Justice Douglas asserted that “[t]he very threat of such a procedure is certain to raise havoc with academic freedom. . . . A teacher caught in that mesh is almost certain to stand condemned. Fearing condemnation, she will tend to shrink from any association that stirs controversy. In that manner freedom of expression will be stifled.” Douglas said that because the law excluded an entire viewpoint without a showing that the invasion was needed for some state purpose, it impermissibly invaded academic freedom.

b. *Wieman v. Updegraff*, 344 U.S. 183 (1952). *Wieman*, decided shortly after *Adler*, involved a state-imposed loyalty oath that required Oklahoma professors to promise that they had never been part of a communist or subversive organization. Professors at one state college refused to take the oath, and an Oklahoma taxpayer sued to block the college from paying their salaries. A concurring opinion by Justices Douglas and Frankfurter was based on First Amendment academic freedom grounds; Justice Frankfurter’s concurrence specifically emphasizes the importance of academic freedom and teaching as a profession uniquely requiring protection under the First Amendment. In Justice Frankfurter’s words:

Such unwarranted inhibition upon the free spirit of teachers affects not only those who . . . are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and

practice; it makes for caution and timidity in their associations by potential teachers. . . . Teachers must . . . be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma.

c. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957). Sweezy marks a landmark in the Court's recognition and acceptance of academic freedom, and of academic freedom's grounding in the Constitution. Sweezy, a professor at the University of New Hampshire, was interrogated by the New Hampshire Attorney General about his suspected affiliations with communism. Sweezy refused to answer a number of questions about his lectures and writings, but did say that he thought Marxism was morally superior to capitalism. The Supreme Court accepted Justice Frankfurter's reasoning from *Wieman* and stated its belief that academic freedom is protected by the Constitution. In addition, Justice Frankfurter outlined 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."

d. *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967). This case finally extended First Amendment protection to academic freedom. Faculty at the State University of New York at Buffalo were forced to sign documents swearing that they were not members of the Communist Party. The faculty members refused to sign the documents and were fired as a result. Because of *Adler*, the New York State Law prohibiting membership in subversive groups was still in effect. This time, however, the Court specifically overturned its decision in *Adler*, ruling that by imposing a loyalty oath and prohibiting membership in "subversive groups," the law unconstitutionally infringed on academic freedom and freedom of association. As the Court held: "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."

B. **Contractual Rights**: Sometimes colleges and universities decide to bestow specific academic freedom rights upon professors via school policy. Internal sources of contractual obligations may include institutional rules and regulations, letters of appointment, faculty handbooks, and, where applicable, collective bargaining agreements. Academic freedom rights are often explicitly incorporated into faculty handbooks, which are sometimes held to be legally binding contracts. *See, e.g., Greene v. Howard University*, 412 F.2d 1128 (D.C. Cir. 1969) (ruling faculty handbook "govern[ed] the relationship between faculty members and the university"). *See also* Jim Jackson, "Express and Implied Contractual Rights to Academic Freedom in the United States," 22 HAMLIN L. REV. 467 (Winter 1999). *See generally* AAUP

Legal Technical Assistance Guide, "Faculty Handbooks As Enforceable Contracts: A State Guide" (2005 ed.).

C. **Academic Custom and Usage**: Academic freedom is also often protected as part of "academic custom" or "academic common law." Courts analyzing claims of academic freedom often turn to the AAUP's Joint 1940 Statement of Principles on Academic Freedom and Tenure. (See <http://www.aaup.org/AAUP/pubsres/policydocs/1940statement.htm>.) The 1940 Statement provides a measured definition of academic freedom, stating:

Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties. . . . 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. . . . 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.

AAUP, POLICY DOCUMENTS & REPORTS 3-4 (10th ed. 2006) (hereafter "Redbook"). As the U.S. Court of Appeals for the District of Columbia Circuit observed in *Greene v. Howard University*:

Contracts are written, and are to be read, by reference to the norms of conduct and expectations founded upon them. This is especially true of contracts in and among a community of scholars, which is what a university is. The readings of the market place are not invariably apt in this non-commercial context.

412 F.2d at 1135.

The U.S. Supreme Court explicitly recognized the importance of this type of contextual analysis in *Perry v. Sindermann*, 408 U.S. 593, 601 (1972). In *Perry*, the Court held that just as there may be a "common law of a particular industry or of a particular plan," so there may be an "unwritten 'common law' in a particular university" so that even though no explicit tenure system exists, the college may "nonetheless . . . have created such a system in practice." Similarly, another federal appeals court found that jointly issued statements of AAUP and other higher education organizations, such as the 1940 Statement, "represent widely shared norms within the academic community" and, therefore, may be relied upon to interpret academic contracts. *Browzin v. Catholic University of America*, 527 F.2d 843, 848 n. 8 (D.C. Cir. 1975); *see also Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976) (relying on 1940 Statement's definite of academic freedom); *Tilton v. Richardson*, 403 U.S. 672 (1971) (same); *Bason v. American University*, 414 A.2d 522 (D.C. 1980) (noting the "customs and practices of

the university"); *Board of Regents of Kentucky State University v. Gale*, 898 S.W.2d 517 (Ky. Ct. App. 1995) (examining the "custom" of the academic community in defining the meaning of "endowed chair" and whether the position carried tenure).

FACULTY ACADEMIC FREEDOM IN THE CLASSROOM

One of the most fertile areas for claims of academic freedom and First Amendment protection is, of course, classroom teaching. Speech by professors in the classroom at public institutions is generally protected under the First Amendment and under the professional concept of academic freedom if the speech is relevant to the subject matter of the course. *See, e.g., Kracunas v. Iona College*, 119 F.3d 80, 88 & n. 5 (2d Cir. 1997) (applying the "germaneness" standard to reject professor's academic freedom claim because "his conduct [could not] be seen as appropriate to further a pedagogical purpose," but noting that "[t]eachers of drama, dance, music, and athletics, for example, appropriately teach, in part, by gesture and touching"). At private institutions, of course, the First Amendment does not apply, but professors at many institutions are protected by a tapestry of sources that could include employment contracts, institutional practice, and state court decisions. The specific areas of classroom speech could include, among others, the following:

A. **Classroom Teaching Methods**: Are faculty members able to select and use pedagogical methods they believe will be effective in teaching the subject matter in which they are expert? Faculty members are, of course, uniquely positioned to determine appropriate teaching methods. Courts may restrict professors' autonomy, however, when judges perceive teaching methods to cross the line from pedagogical choice to sexual harassment or methods irrelevant to the topic at hand.

1. *Hardy v. Jefferson Community College*, 260 F.3d 671 (6th Cir. 2001), *cert. denied*, 535 U.S. 970 (2002). In *Hardy*, an African-American student and a "prominent citizen" complained about the allegedly offensive language used by Kenneth E. Hardy, an adjunct communications professor, in a lecture on language and social constructivism in his "Introduction to Interpersonal Communication" course. The students were asked to examine how language "is used to marginalize minorities and other oppressed groups in society," and the discussion included examples of such terms as "bitch," "faggot," and "nigger." While the administration had previously informed Professor Hardy that he was scheduled to teach courses in the fall, after the controversy erupted the administration told him that no classes were available.

A federal appeals court concluded that the topic of the class – "race, gender, and power conflicts in our society" – was a matter of public concern and held that "a teacher's in-class speech deserves constitutional protection." The court opined: "Reasonable school officials should have known that such speech, when it is germane to the classroom subject matter and advances an academic message, is protected by the First Amendment."

2. *Vega v. Miller*, 273 F.3d 460 (2d Cir. 2001), *cert. denied*, 535 U.S. 1097 (2002)

Not all courts agree that individual professors have the academic freedom to select the pedagogical tools they consider most appropriate to teach their subject matter. In *Vega v. Miller*, for example, Edward Vega, a non-tenure-track professor of English, sued the New York Maritime College when the state-run college declined to reappoint him after he led what the college referred to as an "offensive" classroom exercise in "clustering" (or word association) in a remedial English class. The clustering exercise required students to select a topic and then call out words related to the topic. In Professor Vega's summer 1994 class, the students selected the topic of sex, and the students called out a variety of words and phrases, from "marriage" to "fellatio." Administrators found that the professor's conduct "could be considered sexual harassment, and could create liability for the college," and therefore decided not to renew his contract.

Vega argued that the nonreappointment violated his constitutional academic freedom. The federal appeals court sided with the administrators, holding that at the time they made their decision on Vega's contract, no court opinion had conclusively determined that an administration's discipline of a professor for not ending a class exercise violated the professor's clearly established First Amendment academic freedom rights.

The same court has, however, recognized as constitutionally protected a professor's First Amendment academic freedom "based on [his] discussion of controversial topics in the classroom." *Dube v. State University of New York*, 900 F.2d 587, 597-98 (2d Cir. 1990), *cert. denied*, 501 U.S. 1211 (1991). *See also Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996), *cert. denied*, 520 U.S. 1140 (1997), and *Silva v. University of New Hampshire*, 888 F. Supp. 293 (D.N.H. 1988) (declining to apply institutional sexual harassment policies to punish professor who used "legitimate pedagogical reasons," which included provocative language, to illustrate points in class and to sustain his students' interest in the subject matter of the course).

3. ***Bonnell v. Lorenzo*** (Macomb Community College), 241 F.3d 800, *cert. denied*, 534 U.S. 951 (2001).

Of course, a professor's First Amendment right to academic freedom is not absolute. As First Amendment and academic freedom scholar William Van Alstyne has said, "There is . . . nothing . . . that assumes that the First Amendment subset of academic freedom is a total absolute, any more than freedom of speech is itself an exclusive value prized literally above all else." Van Alstyne, "The Specific Theory of Academic Freedom and the General Issue of Civil Liberty," in *THE CONCEPT OF ACADEMIC FREEDOM* 59, 78 (Edmund L. Pincoffs ed., 1972). And so, even when courts recognize the First Amendment right of academic freedom for individual faculty members, courts often balance that interest against other concerns.

In *Bonnell v. Lorenzo*, a federal appeals court upheld Macomb Community College's suspension of John Bonnell, a professor of English, for creating a hostile learning environment. A female student sued the professor, claiming that he had

repeatedly used lewd and graphic language in his English class. While recognizing the importance of the First Amendment academic freedom of the professor, the court concluded that “[w]hile a professor's rights to academic freedom and freedom of expression are paramount in the academic setting, they are not absolute to the point of compromising a student’s right to learn in a hostile-free environment.” Significantly, unlike the speech in *Hardy*, the court found Bonnell’s use of vulgar language “not germane to the subject matter” and therefore unprotected.

B. Curricular Choices and Academic Freedom:

The right of teachers "to freedom in the classroom in discussing their subject" under the 1940 *Statement* is inextricably linked to the rights of professors to determine the content of their courses. The AAUP’s *Statement on Government of Colleges and Universities* provides that faculty have "primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction." As one commentator noted: "Faculty will always have the best understanding of what is essential in a field and how it is evolving." Steven G. Poskanzer, *Higher Education Law: The Faculty* 91 (The Johns Hopkins University Press 2002). Moreover, the expertise of a professor and a department helps insulate administrators and trustees from political pressures that may flow from particularly controversial courses.

1. ***Axson-Flynn v. Johnson***, 356 F.3d 1277 (10th Cir. 2004). One case that directly raises the issue of academic freedom in determining curriculum—as well as the tension between the academic freedom of professors and the academic freedom of students—is *Axson-Flynn v. Johnson*. Christina Axson-Flynn was a Mormon student at the University of Utah, who, she says, told the theater department before being accepted that she would not "take the name of God or Christ in vain" or use certain "offensive" words. After she was accepted into the program, she changed some words in assigned scripts for in-class performances so as to avoid using words she found offensive. Her professors warned her that she would not be able to change scripts in future assignments. Axson-Flynn dropped out of the special theater program and sued her professors, arguing that her First Amendment rights to free speech and free exercise of religion had been violated.

In 2001, a federal trial court ruled against Axson-Flynn. The court reasoned that if the program requirements constituted a First Amendment violation, "then a believer in 'creationism' could not be required to discuss and master the theory of evolution in a science class; a neo-Nazi could refuse to discuss, write or consider the Holocaust in a critical manner in a history class."

The federal appeals court agreed that courts should defer to faculty members’ professional judgment with respect to teaching and curriculum, but sent the case back for the trial court to determine whether the professors’ rationale for compelling Axson-Flynn to perform the scripts as written “was truly pedagogical or whether it was a pretext for religious discrimination.” The court ruled that the teachers were allowed to compel speech from Axson-Flynn as long as doing so was “reasonably related to pedagogical concerns.” Although the court did not recognize a specific right to academic freedom

within the First Amendment, it did observe that within the university context, the First Amendment had special significance.

2. ***Yacovelli v. Moeser***, Case No. 02-CV-596 (M. D. N.C., Aug. 15, 2002), *aff'd*, Case No. 02-1889 (4th Cir. Aug. 19, 2002). One widely publicized example of a curriculum controversy involved the 2002 summer reading program at the University of North Carolina (UNC) at Chapel Hill. At the beginning of the school year, UNC scheduled a schoolwide discussion for all new students based on the book *Approaching the Qur'an: The Early Revelations*, by Michael Sells, a professor at Haverford College. A group of students and taxpayers sued to halt the summer program, arguing that the assignment of the book violated the First Amendment doctrine of separation of church and state under the "guise of academic freedom, which is often nothing other than political correctness in the university setting." The university argued that the program was not endorsing or promoting a particular religion, and that if the court issued an injunction it would chill academic freedom because "the decision was entirely secular, academic, and pedagogical." As one English professor inquired: "Would next year's committee be forbidden to require incoming students to read *The Iliad*, on the grounds that it could encourage worship of strange, disgraceful gods and encourage pillage and rape?"

The federal trial court ruled in favor of the university and denied the plaintiffs' request to halt the reading sections, holding: "There is obviously a secular purpose with regard to developing critical thinking, [and] enhancing the intellectual atmosphere of a school for incoming students." The day of the reading program, the federal appeals court upheld the trial court's ruling. In general, academic courses are not subject to a legal mandate for "equal time" to explore the "other side" of an issue. As Justice Stevens noted in his concurrence in the Supreme Court case *Widmar v. Vincent*, 454 U.S. 263, 278-79 (1981), the "judgments" about whether to prefer a student rehearsal of "Hamlet" or the showing of Mickey Mouse cartoons "should be made by academicians, not by federal judges."

3. ***Linnemeir v. Board of Trustees, Indiana University-Purdue University, Fort Wayne***, 260 F.3d 757 (7th Cir. 2001). Similarly, another federal appellate court ruled that faculty approval of a controversial play selected by a student for his senior thesis, which offended some religious individuals, did not violate the First Amendment. In *Linnemeir*, some Indiana taxpayers and state legislators sued to force Indiana University-Purdue University (IPFW) to halt the campus production of Terrence McNally's play "Corpus Christi," which had been unanimously approved by the theater department faculty committee. The taxpayers and legislators argued that the play was an "undisguised attack on Christianity and the Founder of Christianity, Jesus Christ," and claimed that performance of the play on a public university campus therefore violated the First Amendment's guarantee of separation of church and state.

The federal appeals court permitted the play to be performed. The majority opined: "The contention that the First Amendment forbids a state university to provide a venue for the expression of views antagonistic to conventional Christian beliefs is

absurd." It continued: "Classrooms are not public forums; but the school authorities and the teachers, not the courts, decide whether classroom instruction shall include works by blasphemers. . . . Academic freedom and states' rights alike demand deference to educational judgments that are not invidious."

4. *Edwards v. California University of Pennsylvania*, 156 F.3d 488 (3rd Cir. 1998), *cert. denied*, 525 U.S. 1143 (1999). Another federal appellate court has ruled that professors have no First Amendment right of academic freedom to determine appropriate curriculum, though under somewhat different circumstances. In *Edwards*, Dilawar M. Edwards, a tenured professor in media studies, sued the administration for violating his right to free speech by restricting his choice of classroom materials in an educational media course. The classroom materials, which emphasized issues of "bias, censorship, religion and humanism," had been disapproved by the media studies department, which had voted to use an earlier version of the syllabus. The court concluded that because "a public university professor does not have a First Amendment right to decide what will be taught in the classroom," it was not relevant whether the professor's course content was "reasonably related to a legitimate educational interest." The court's conclusion, however, appears to have been influenced by the fact that Edwards' departmental colleagues had approved a different syllabus – reinforcing the principle that professors as a whole, if not always individual professors, have the right to determine curricular focus.

5. *FAIR v. Rumsfeld*, 547 U.S. (2006). This Supreme Court case involved a federal law known as the Solomon Amendment, which required that colleges and universities allow the military full access to recruiting on campus. Any university excluding military recruiters from campus faced a loss of federal funding, even if only one component of the university flouted the law.

Because of the military's "don't ask, don't tell" policy on sexual orientation, a number of law schools objected to the access requirement, arguing that the requirement violated the schools' own anti-discrimination policies. A coalition of law schools sued the federal government, arguing that having to choose between violating their non-discrimination policies and losing millions of dollars of federal funding violated their First Amendment rights to academic freedom, free speech, and freedom of association.

The Supreme Court decided that the law schools must permit the military to recruit on campus. Reasoning that law schools still had a number of other ways to publicize their objections to the military's policies, including signs and protests, the Court concluded that "the Solomon Amendment neither limits what law schools may say nor requires them to say anything."

C. Grading Rights

One recurring issue is whether a university administration has the right to change a grade given by a faculty member to a student—or, to phrase the issue differently, whether the faculty member has the academic freedom to assign the grade without interference or second-guessing

by administrators. The answer to the first formulation of the issue (at least under current case law) is generally yes; the answer to the second is that it depends on the court.

The AAUP affirms the right of faculty members to assign student grades and oversee any changes to grades. Under the 1940 *Statement of Principles on Academic Freedom and Tenure*, one faculty right that flows from a "teacher's freedom in the classroom" is the assessment of student academic performance, including the assignment of particular grades. In addition, the AAUP Statement on the Assignment of Course Grades and Student Appeals sets forth principles to be followed in assigning and changing grades, with a focus on faculty control over assignment and review of grades.

Some courts have acknowledged that instructors have the right to assign grades to students. See, e.g., *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985) (noting that "judges . . . should show great respect for the faculty's professional judgment"); *Settle v. Dickson County School Board*, 53 F.3d 152 (6th Cir. 1995) (observing, in a K-12 case, that "teachers . . . must be given broad discretion to give grades"). However, professors may be required to conform to university-wide grading procedures, particularly when the policies have been developed or approved by the faculty. For instance, in *Wozniak v. Conry*, 236 F.3d 888 (7th Cir.), cert. denied, 121 S.Ct. 2243 (2001), a federal appeals court ruled that the University of Illinois at Urbana-Champaign did not violate due process rights of a tenured professor at the undergraduate engineering school because he failed to comply with established grading policies when he refused to submit the required materials for review: "No person has a fundamental right to teach undergraduate engineering classes without following the university's grading procedures."

Courts have generally distinguished, however, between the right to assign a grade and the right not to have the institution itself change the grade. For instance, in *Parate v. Isibor* (Tennessee State University), 868 F.2d 821 (6th Cir. 1986), a federal appeals court agreed that requiring the professor himself to change a grade violated the professor's First Amendment right "to send a specific message to the student," but simultaneously held that a professor "has no constitutional interest in the grades which his students ultimately receive." The court therefore permitted the administration to change the grade, even if the administration could not compel the professor to do so.

In 2001, another federal appeals court went even further, rejecting the reasoning in *Parate*. In *Brown v. Armenti*, 247 F.3d 69 (3rd Cir. 2001), a tenured professor at the California University of Pennsylvania objected to being ordered by the president of the university to change a student's grade from an "F" to an incomplete. The Third Circuit ruled in favor of the university president, concluding that a "public university professor does not have a First Amendment right to expression via the school's grade assignment procedures." It reasoned: "Because grading is pedagogic, the assignment of the grade is subsumed under the university's freedom to determine how a course is to be taught."

(For a more in-depth discussion of the First Amendment and academic freedom implications of grading, see Donna Euben, WHO GRADES STUDENTS? (2001), www.aaup.org/AAUP/protectrights/legal/topics/whogrades.htm.)

D. Legislative Intrusion into Faculty Speech in the Classroom

In recent years, through “Academic Bill of Rights” proposals (ABOR) and their successors, “Intellectual Diversity in Higher Education” bills, state legislators have injected themselves into curricular decision-making. Although legislative language varies from state to state, the overall thrust has been the same: to increase so-called political diversity in the faculty, and to expand both legislative oversight over what professors may teach and the power of students to challenge teachings methods or ideologies with which they disagree.

Some of the provisions that pose the greatest risk of infringement on faculty members’ First Amendment and academic freedom rights include requirements that faculty members provide students with information on “dissenting viewpoints,” regardless of scholarly consensus in the field; the significant influence that student complaints would have over whether faculty members are seen to be introducing “controversial” material into the classroom; and increased administrative oversight over professors’ freedom to grade their students. For more background, see “The ‘Academic Bill of Rights’ – Coming to Your Campus,” www.aaup.org/AAUP/GR/ABOR/facultyhandout.htm?PF=1.

So far, faculty members and university administrations have been largely successful in fending off these challenges to academic freedom. Individual faculty members and higher education associations and leaders have educated legislators about the policies that already exist at many institutions – many based in substantial part on AAUP model policies – and the absence of a real threat to students’ freedom from indoctrination, politically-motivated grading, and other supposed dangers. Nevertheless, some states have contemplated statutes that, if passed, would represent an unprecedented incursion into professors’ First Amendment and academic freedom rights.

To take just one example, in February 2007, the Arizona state senate considered a bill that would have banned faculty members at public colleges and universities in the state from endorsing, supporting, or opposing any candidate for office, any pending legislation, or any court litigation; advocating “one side of a social, political, or cultural issue that is a matter of partisan controversy;” or obstructing military recruiting activity on campus or supporting those who do. See \$500 FINES FOR POLITICAL PROFS, *Inside Higher Ed* (Feb. 19, 2007), www.insidehighered.com/layout/set/print/news/2007/02/19/ariz. Failure to comply with the restrictions could have resulted in criminal prosecutions and fines of up to \$500. The legislative sponsor, state senator and Republican majority leader Thayer Verschoor, cited a 14-year-old incident from when he was a student, in which he was offended by a classroom exercise (in a class in which he was not enrolled) that required male students to dress up like women. Rejecting the charge that the bill violated academic freedom, Sen. Verschoor said, “You can speak about any subject you want – you just don’t take a position.” Even David Horowitz, father of the ABOR, opposed the policy, saying that he had never advocated limits imposed by the legislature on faculty speech in the classroom. *Id.* Although the bill did not pass, it hints at the anxiety felt in many states about the bedrock principles of academic freedom, which are inextricably tied to the protections of the First Amendment.

Because no statutes of this type have yet passed a state legislature, no courts have yet tackled the contours of their entrenchment onto academic freedom rights. Nevertheless, AAUP policy on this issue is quite clear. As the AAUP Statement on the Academic Bill of Rights says, “The Academic Bill of Rights . . . threatens to impose administrative and legislative oversight on the professional judgment of faculty, to deprive professors of the authority necessary for teaching, and to prohibit academic institutions from making the decisions that are necessary for the advancement of knowledge The AAUP has consistently held that academic freedom can only be maintained so long as faculty remain autonomous and self-governing.” Indeed, as historian Walter Metzger said a quarter of a century ago:

[A state legislature] invades the very core of academic freedom . . . when it dictates the contents of any course at any level or for any purpose. . . . [Doing so] converts the university into a bureau of public administration, the subject into a vehicle for partisan politics or lay morality, and the act of teaching into a species of ventriloquism. . . . The central precepts of academic freedom . . . are that professors should say what they believe without fear or favor and that universities should appoint meritorious persons, not followers of a diversity of party lines.

Walter R. Metzger, "Comments on Creationism and the Classroom," *Academe* 12 (Mar.-Apr. 1982). For further ideas on how to approach legislators about the importance of preserving academic freedom at public institutions, see the appendix to this outline, as well as the many resources on the Government Relations section of the AAUP website (www.aaup.org/AAUP/GR).

FACULTY EXPRESSION IN INSTITUTIONAL MATTERS

In addition to their teaching, research, and service obligations, faculty members frequently help run their academic institutions through shared governance. Legal issues sometimes arise when faculty members speak out on institutional matters—such as the process by which a college president is appointed or the negative consequences of a new admissions standard. Such faculty criticism is often directed at the institution's governing board, the president and other administrators, and even faculty colleagues. Courts had traditionally used a balancing test when assessing whether faculty expression at a public institution was protected; in light of a recent Supreme Court opinion, however, it is not yet clear how much latitude public faculty members have to speak, and under what circumstances.

A. “Matters of Public Concern” Test

Before 2006, federal courts relied on a “matters of public concern” test in determining whether speech by public employees – including faculty members at public institutions – was protected. Under the “matters of public concern” test, which was developed largely in cases not related to academics, a court considered whether the employee had uttered the challenged speech in the course of the employee’s job responsibilities or as a private citizen, and whether the speech addressed a “matter of public concern.” If the employee failed to show either of these things, then the speech was not protected by the First Amendment. If the professor could show that he or she spoke as a private citizen on a matter of public concern, then the court would

balance the employee's interest in speaking against the public employer's (i.e., the university's) interest in the overall functioning of the workplace. Only if the employee's interest in speaking on the issue in question outweighed the employer's interest in a functioning workplace would the employee's speech be protected by the First Amendment.

1. *Schrier v. University of Colorado*. Robert Schrier, a doctor and a tenured faculty member at the University of Colorado School of Medicine, chaired the department of medicine for over 20 years until the administration removed him from that position in October 2002. Dr. Schrier opposed the Board of Regents' decision to move the medical school to another campus. He sued the school, arguing, in part, that his removal as chair violated his First Amendment right of academic freedom. The district court rejected Dr. Schrier's legal claims. The court found that Dr. Schrier's status as a university professor, who also served as department chair, entitled him to no rights distinct from those of any other public employees. The federal appeals court affirmed the denial of Schrier's injunction by the lower court, affirming that Schrier's speech was on a matter of public concern, but ruling that the administration's interest in suppressing Schrier's speech outweighed his right to free expression. The court appeared to focus on Dr. Schrier's status as a department chair in reaching its decision.
2. *Crue v. Aiken (University of Illinois-Champaign)*. This case involved a challenge by faculty and students at the University of Illinois-Champaign to the administration's policy prohibiting them from communicating with prospective student athletes. The faculty and students opposed the school's use of the Chief Illiniwek mascot, and contended, in part, that the mascot created a hostile learning environment for Native American students and increased the difficulty of recruiting Native American students to the campus. They wished to contact prospective student athletes to make them aware of this controversy. The district court ruled in favor of the faculty and students, finding that the administration's directive violated the First Amendment. The Seventh Circuit, in a 2-1 decision, ruled that an administrative directive prohibiting faculty and students from communicating with prospective student athletes violated the First Amendment, because the directive constituted a prior restraint. The majority also concluded that the chancellor's directive was "a broad prohibition" on speech that was "on a matter of significant important and public concern" and therefore was protected speech.

B. **"Official Duties" Test – *Garcetti v. Ceballos* and Developing Law**

Of course, in the academic context, professors frequently speak on "matters of public concern" – the economy, politics, health, global warming, etc. And that speech is also an integral part of their job as public employees. In 2006, the Supreme Court decided a case that, in many ways, adopted the most restrictive understanding of public employees' speech rights.

In *Garcetti v. Ceballos*, 547 U.S. ___, 126 S.Ct. 1951 (2006), the U.S. Supreme Court ruled that when public employees speak "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.” No more balancing test or “public concern” inquiry need be done. The court explicitly set aside speech in the academic context, however, holding that “there is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for” by the Court’s decision. The court therefore concluded that “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.” Justice Souter added in dissent that “I have to hope that today’s majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write ‘pursuant to official duties.’”

C. Post-Garcetti Cases

The cases that have been decided on public employees’ speech rights since *Garcetti* give some window into the possible effect on public university faculty members’ speech rights; however, because the courts so far have considered only secondary and elementary school teachers, not university faculty, there is no firm guidance yet on how much protection courts might give to faculty members speaking in the course of their jobs.

1. ***Casey v. West Las Vegas Independent School District***, 473 F.3d 1323 (10th Cir. 2007). In *Casey*, a school district superintendent brought a retaliation claim against the school board, asserting that she was demoted because of her criticism of the board’s decisions concerning the Head Start program. The court ruled that the superintendent’s job duties included reporting to the board about the Head Start program, and the superintendent’s speech therefore was not constitutionally protected.
2. ***Ryan v. Shawnee Mission Unified School District No. 512***, 437 F. Supp. 2d 1233 (D. Kan. 2006). Ryan was a physical therapist who worked at a school district with children whose health problems interfered with their education. Ryan complained to her director that too many children needed her services, and that some were being denied adequate care. As a result, she was eventually asked to resign. The federal trial court decided that most of Ryan’s speech was made not as a citizen but as part of her job duties, and that she could thus be fired for complaining.
3. ***Mayer v. Monroe County Community School Corporation***, 2007 U.S. App. LEXIS 1469 (7th Cir. Jan. 24, 2007). Although this case took place in an elementary school rather than in an institution of higher education, it helps illustrate how some courts might approach higher education cases under *Garcetti*.

Deborah Mayer, a probationary first-year elementary school teacher, was asked by her students if she participated in political demonstrations; she replied that she honked her horn in support of a peace demonstration. After some parents complained, Mayer’s contract was non-renewed, and Mayer sued, claiming that the school’s decision was retaliatory and was a violation of her First Amendment rights.

The trial court ruled in favor of the school district, concluding, among other things, that “because the uncontroverted facts establish that Ms. Mayer expressed her views to her students at a time and place and as part of her official classroom instruction,” she was acting as an “employee,” rather than as a “citizen,” leaving her speech constitutionally unprotected.

The federal appeals court affirmed the trial court’s decision. Noting that primary and secondary school teachers must stick to the prescribed curriculum, including any prescribed viewpoint, the appeals court reasoned: “This is so in part because the school system does not ‘regulate’ teachers’ speech as much as it *hires* that speech. Expression is a teacher’s stock in trade, the commodity she sells to her employer in exchange for a salary.” Although the case did not raise issues of post-secondary instruction, the court remarked that because college professors are hired to instruct students, “employers are entitled to control speech from an instructor to a student on college grounds during working hours.” Although this part of the court’s opinion is not binding on other courts examining issues of faculty speech, it remains to be seen whether courts will adopt this reasoning as more faculty speech cases arise.

4. ***Head v. Bd. of Trustees of California State University***, 2007 Cal. App. Unpub. LEXIS 393 (Cal. Ct. App. 2007) (unpub.). Stephen Head, a student in a teaching credential program, alleged that because he disagreed with the professor’s viewpoint in a required class on multiculturalism, he received an F in the course and was placed on academic probation. An internal subcommittee rejected Head’s grievance, finding that the professor had given Head grading criteria on the course syllabus, assessments on returned assignments, and extended opportunities to resubmit corrected work. Head then sued the university, arguing that his First Amendment and due process rights were violated by the curriculum, his grade, his treatment during the course, and the “professional dispositions” that teaching credential candidates had to demonstrate. He asked that the university change his failing grade to an A or a B, and asked for an injunction against the use of the professional dispositions, against infringement of the constitutionally protected speech of teaching credential students, and against grade discrimination against “White, White-appearing, or male” credential candidates.

The trial court denied Head’s petition, and the appeals court upheld the lower court’s decision, firmly holding that “the First Amendment broadly protects academic freedom in public colleges and universities.” With respect to Head’s request that his grade be changed, the appeals court emphasized that academic decisionmaking is not traditionally appropriate for judicial review and that judges should respect a faculty member’s professional judgment. On Head’s free speech claims, the appeals court indicated that instructors can exercise reasonable control over student expression during class to ensure that students learn the lessons that are being taught. The court further held:

Public university instructors are not required by the First Amendment to provide class time for students to voice views that contradict the material being taught or interfere with

instruction or the educational mission. Although the First Amendment may require an instructor to allow students to express opposing views and values to some extent where the instructor invites expression of students' personal opinions and ideas, nothing in the First Amendment prevents an instructor from refocusing classroom discussions and limiting students' expression to effectively teach.

The court concluded by affirming that "institutional assessments of a student's academic performance . . . necessarily involve academic determinations requiring the special expertise of educators."

5. *Payne v. University of Arkansas Fort Smith*, 2006 U.S. Dist. LEXIS 52806 (W.D. Ark. July 26, 2006). Diana Payne, a tenured professor at the University of Arkansas, was fired after nineteen years of service. Before she was fired, among other things, Payne complained to a university administrator about a new university policy governing time spent on campus, arguing that the policy was a "huge disservice to the community." She contended that in retaliation for her email complaint she was assigned the rank of Instructor, rather than the higher rank of Assistant Professor. The court determined that even though the email invoked community concerns, the "crux" of it was Payne's "dissatisfaction with an internal employment policy and not an issue of public concern." The court therefore concluded that her email was not protected speech under the First Amendment, and dismissed Payne's claim of retaliation.

D. Other Standards for Protection of Speech

1. *Crue v. Aiken*, 370 F.3d 668 (7th Cir. 2004). *Crue v. Aiken*, described earlier, arose from a dispute at the University of Illinois involving its then-mascot Chief Illiniwek. Faculty and students at the university opposed the administration's policy prohibiting communication with prospective student athletes, arguing that they wanted to be able to inform prospective students about the racial injustice aspects of the use of the mascot. A previous Supreme Court opinion had held that when the government seeks to prohibit speech in advance (rather than punishing speech after the fact), the government employer must show that the impact of the expression on the employer's (here, the university's) operations is so significant that it outweighs the interest of any other audience in hearing the speech. *United States v. NTEU*, 513 U.S. 454 (1995). Relying on *NTEU*, the appeals court in *Crue* held that the faculty's and students' right to question what they believed was a racist practice outweighed the University's interest in halting the speech. Therefore, if a professor-plaintiff can characterize a university action as a restraint imposed on as yet unspoken speech, instead of as punishment for speech that has already taken place, the faculty member may be more likely to win his/her case.

ACADEMIC FREEDOM AND THE INTERNET

In general, the intersection of academic freedom and the Internet is guided by the same rules that govern other areas of faculty speech. However, several important cases have arisen in the context of regulation of faculty access to the internet.

A. Use of University-Owned Computers and E-mail

In *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000), a federal appeals court upheld the constitutionality of a Virginia law that banned professors from using university computers to “access, download, print or store any information infrastructure files or services having sexually explicit content.” The law did allow for one small exception: a professor could apply to the university to conduct research on a sexually explicit topic, and as long as the university considered the project to be “bona fide,” the professor would be permitted to conduct research on the topic. Relying heavily on this exception, the court upheld the law. The court opined that the university, rather than individual professors, holds the First Amendment right to research, and emphasized that without the exception, the law might infringe upon the universities’ First Amendment rights.

The reasoning in *Urofsky* — which could potentially be extended to state-imposed bans on research regarding other controversial topics — has been followed by other circuits and was even cited in the *Garcetti* decision. See, for example, *Harrison v. Coffman*, 111 F. Supp. 2d 1130, 1131 (D. Ark. 2000); *Johnson-Kurek v. Abu-Absi*, 423 F.3d 590, 593 (6th Cir. 2005); *Campbell v. Galloway*, 483 F.3d 258, 266 (4th Cir. 2007); *Erickson v. City of Topeka*, 209 F. Supp. 2d 1131, 1143 (D. Kan. 2002). Similarly, in *Loving v. Boren*, 956 F. Supp. 953, 955 (D. Okla. 1997), a federal trial court held that the University of Oklahoma did not violate a journalism professor’s First Amendment rights by blocking access from his campus computer to an “alt.sex” host, because the professor could obtain the material he sought through a commercial on-line service.

In *Bowers v. Rector & Visitors of the University of Virginia*, 478 F. Supp. 2d 874, 878 (D. Va. 2007), Bowers worked in the human resources (HR) department for the University of Virginia. She attended a meeting about pay increases that was held by the NAACP, of which she was a member. One of her co-workers in the HR department asked Bowers to forward her the information from the NAACP meeting. The co-worker then sent out the NAACP information to dozens of other people, one of whom sent the email out to “hundreds” of people. Bowers was fired for using her university email account to send out this email. The court held that Bower’s speech in her email was not protected, since she used her university email account to send the information. In addition, the email appeared to be from Bowers as an HR employee rather than as a private citizen. Her email was thus not protected by the First Amendment.

In addition to the First Amendment, the Fourth Amendment to the Constitution, which protects citizens from unreasonable searches and seizures by the government, comes into play in cases of possible violations of email privacy at public institutions. For a case list, see Donna Euben, *ACADEMIC FREEDOM OF PROFESSORS AND INSTITUTIONS* (2002), pp. 22-24.

According to AAUP policy, expression in cyberspace does not “justify alteration or dilution of basic principles of academic freedom and free inquiry within the academic community.” Academic Freedom and Electronic Communications, *Academe* (July-August 1997). See the Appendix to this outline for suggestions on developing a sustainable university policy regarding the use and privacy of email.

B. Faculty Websites and Academic Freedom

Faculty are sometimes given space on a university web server for faculty web pages. Courts have generally held that because the university server is not a public forum, public universities can regulate, at least to some extent, the content put on the web pages. If the university opens up the web sites to the general public (via online message boards or other public forums), however, then the university is likely to be restricted from imposing content-based bans on speech expressed there. *Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834, 844 (6th Cir. 2000). As a general rule, however, public universities may regulate content on faculty web pages as long as the restrictions are reasonable and are not simply an attempt to suppress faculty viewpoint.

In addition to faculty members’ conditional right to communicate on the internet, students are sometimes said to have a right to receive speech. *Meyer v. Nebraska*, 262 U.S. 390 (U.S. 1923); see also *Lamont v. Postmaster General*, 381 U.S. 301 (U.S. 1965) and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (U.S. 1976). “The U.S. Supreme Court has referred to a First Amendment right to receive information and ideas, and that freedom of speech necessarily protects the right to receive.” Students’ First Amendment right to receive their professors’ speech through the internet – as yet untested in court – could further constrain the ability of public universities to tightly restrict professors’ online speech.

A NOTE ON PRIVATE UNIVERSITIES

Private universities are largely not subject to the constitutional requirements described above, and students, faculty, and staff at most private universities therefore do not enjoy a “First Amendment” right of protection against discipline for speech-related infractions.³ They may, however, have certain free-speech-related rights deriving not from the First Amendment but from policies adopted by the institution.⁴ Faculty at private schools, therefore, have a particularly strong interest in having principles of academic freedom written into their employment contracts and faculty handbooks.

³ California, however, has enshrined First Amendment-style protections for private universities as well: “No private postsecondary educational institution shall make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus ..., is protected from governmental restriction by the First Amendment” Cal. Educ. Code § 94367(a) (West, 1998).

⁴ See, e.g., Pitzer College’s Faculty Handbook, which expressly incorporates the 1940 Statement on Academic Freedom and Tenure. (http://www.pitzer.edu/offices/dean_of_faculty/handbook/BYLAWS-faculty_student_gov-rev_02-05-07.pdf)

**Some thoughts on defining and protecting faculty academic freedom,
and talking to legislators, administrators, and others
about academic freedom and appropriate policies**

Locating your rights: Often the answer to whether something is protected by academic freedom or the First Amendment is, “it depends.” You can, however, try to make an educated assessment of your rights and obligations. Although this list is by no means exhaustive, it will help in thinking about where to go to determine the scope of your rights and the circumstances in which the institution can restrict them:

- Are you at a public institution?
 - If so, the First Amendment generally applies – but, as described above, the First Amendment and academic freedom are not coextensive, and the law is quite unsettled in some areas.
 - Do you have a faculty handbook and/or collective bargaining contract? They may further define the scope of academic freedom.
 - Has your institution taken steps to restrict speech rights in area in which speech rights may be lawfully restricted (i.e., on university-wide computer systems)? If so, have they done so clearly and consistently, and in a manner that does not depend upon the *content* of the speech?
 - Was the speech in question clearly related to the internal administration of the university (in which case universities have better legal authority for restricting it), or was it related to scholarship and other academic issues (in which case there may be a stronger argument that it should be protected by the First Amendment)?
 - Was the conduct "germane to the subject matter"? If so, there is a stronger argument for protection under the First Amendment.
- Are you at a private school? If so, look to your employment contract, faculty handbook, and other university policies.

Working with university administrators on general policies:

- Employment contracts and employee handbooks are good places to codify a university’s policy towards academic freedom. The Redbook, of course, provides a number of model policies for the protection of academic freedom and a number of other issues.
- Many universities have implemented anti-harassment policies. Harassment policies should track the discrimination laws and be applied so as to recognize the different types of issues that arise in the context of higher education. Anti-discrimination policies should regulate conduct, not the content of speech.
- University officials should articulate values of tolerance and civility, and respond with "more speech" when racist or sexist expression takes place.
- Content-neutral regulations can be used to limit disruptive behavior and expression (e.g., rules against fighting words, disturbing the peace, alcohol and drug abuse, vandalism of property, arson).

Developing an email use policy:

- Every college or university should make clear, to all users, any exceptions it considers it must impose upon the privacy of electronic communications.
- There must be substantial faculty involvement both in the formulation and in the application (with due process) of any such exceptions.
- Third, the general standard of e-mail privacy should be that which is assured to persons who send and receive sealed envelopes through the physical mail system—that envelopes would not be opened by university officials in the absence of exigent circumstances (e.g., leaking a noxious substance, indicia of a bomb, etc.).
- If a need arises to divert or intercept a private e-mail message, both sender and recipient should be notified of that prospect in ample time to pursue protective measures—save in the highly improbable case where any delay would risk danger to life, or destruction of property.
- The contents of any such message that has been diverted or intercepted may not be used or disseminated more widely than the basis for such extraordinary action may warrant.

Communicating with legislators⁵:

- Defining the issue in terms of civil liberties can be very helpful with the right policymaker. Anyone who is a staunch defender of free speech, etc., is usually quick to grasp the concept and its importance.
- Fields of study are always evolving, and faculty have the best understanding of what is important in a field. Legislatures are not equipped to take account of the dynamic nature of academia; at institutions with shared governance, legislators can be assured that faculty members and administrators jointly reach decisions, and that another layer of oversight and review would be counterproductive and would undermine the authority of the institution itself. As the AAUP's Statement on Professional Ethics (1987) says, "It is the mastery teachers have of their subjects and their own scholarship that entitles them to their classrooms and to freedom in the presentation of their subjects"
- In talking to legislators who may have very set ideas about "liberal" faculty, use examples that relate to hard science classes, which are usually seen as more neutral and apolitical than the social sciences. When talking about bills that would restrict professors' speech on "controversial" topics, consider giving examples of topics that are accepted by the vast majority, but disputed by a few, and talk about how requiring equal time or attention to the fringe views would give a false impression of the academic weight and disciplinary consensus of each argument/theory.
- If possible, use the clip from the Colbert Report talking about how higher education is intended to take uninformed minds and send them out still uninformed. The message is that professors should respect students, but that student opinions are not appropriately on par with professors' research. If professors are to fulfill their teaching responsibilities, they must be able to challenge assumptions and instill the ability to think critically.
- Legislators may argue that because taxpayers fund the university, they therefore have the right to dictate what is taught. As Michael Berube has articulated:

³ With many thanks to Nicole Byrd, AAUP's Government Relations Associate.

I sometimes find myself faced with people who say, in effect, “I pay ten percent of your salary, and that gives me the right to screen one hundred percent of your thoughts.” . . . [M]y fellow citizens[,] you have every right to know that your money is not being wasted. But you do not have the right to suggest that the biology department should make room for promoters of Intelligent Design; or that the astronomy department should take stock of the fact that many people believe more in astrology than in cosmology; or that the history department should concentrate more on great leaders and less on broad social movements; or that the philosophy department should put more emphasis on deontological rather than on utilitarian conceptions of the social contract. The people who teach these subjects in public universities actually do have expertise in their fields, an expertise they have accumulated throughout their lives. And this is why we believe that decisions about academic affairs should be conducted by means of peer review rather than by plebiscite. It’s a difficult contradiction to grasp: on the one hand, professors at public universities should be accountable and accessible to the public; but on the other hand, they should determine the intellectual direction of their fields without regard to public opinion or political fashion. This is precisely why academic freedom is so invaluable: it creates and sustains educational institutions that are independent of demographic variables. Which is to say: from Maine to California, the content of a public university education should not depend on whether 60 percent of the population doubts evolution or whether 40 percent of the population of a state believes in angels—and, more to the point, the content of a university education should be independent of whatever political party is in power at any one moment in history.⁶

⁶ Excerpted with permission from Berube’s very thought-provoking blog post on this issue, “Academic Freedom Again,” at http://www.michaelberube.com/index.php/weblog/academic_freedom_again/ (posted June 13, 2006).

Updates to Academic Freedom and First Amendment outline – July 2007-October 2008¹
Rachel Levinson, Senior Counsel
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Grading:

Stronach v. Virginia State University, 2008 U.S. Dist. LEXIS 2914 (E.D. Va. Jan. 15, 2008)

In this case, the federal court for the Eastern District of Virginia considered a complaint from Carey Stronach, a long-time tenured faculty member at Virginia State University (VSU) who alleged that the administration's exercise of authority over the grades he gave to a student violated his academic freedom. Stronach and the student had a dispute over whether the student received a 16 and 21 on two physics quizzes, which would have resulted in a final grade of F (though Stronach gave him a D), or 95 on both of them, which would have resulted in a final grade of A. Stronach told the student that copies of the quizzes showing the higher grades were doctored, and declined to change the D to an A. The student appealed to the department chairman, who sided with the student and changed the student's final grade on file to an A. Stronach appealed to the dean of the school of engineering and, ultimately, the provost, who ratified the chair's decision to change the grade. Stronach then sued, arguing that the decision violated his constitutionally protected academic freedom.

However, the court noted that most other federal courts reviewing a professor's freedom to grade have held that the academic freedom to grade encompasses the right to *assign* a grade, but not the right to have that grade protected from *change* by the administration, and the district court here adopted that line of reasoning. The district court concluded that "however definite the university's right to academic freedom is . . . it is clear that it is the *university's* right and not the *professor's* right. . . . [T]he Court finds that no constitutional right to academic freedom exists that would prohibit senior VSU officials from changing a grade given by Stronach to one of his physics students against his will."

Faculty Speech:

Hong v. Grant, 516 F. Supp. 2d 1158 (C.D. Cal. 2007)

Juan Hong was a full professor in the engineering department at the University of California-Irvine, a public university, where he had taught since 1987. In 2002, he challenged the university on a number of issues relating to hiring, promotions, and staffing; these confrontations with the university culminated in the university's denying him a merit salary increase, which led Dr. Hong to file suit against the university for violating his First Amendment right to free speech. In this decision, the federal trial court

¹ This outline is intended to provide general information, not binding legal guidance. If you have a legal inquiry, you should consult an attorney in your state who can advise you on your specific situation.

in California concluded that because Professor Hong's criticisms were made in the course of his job and were not of "public concern," they were not protected by the First Amendment.²

The University of California system, of which UC-Irvine ("UCI") is a part, is governed by principles of shared governance among the faculty, the Board of Regents, and the system's president. As the court noted, "participation in UCI's governance is a professional right of the faculty. Faculty exercise their right of self-governance through involvement in a wide array of academic, administrative and personnel functions including departmental governance" The faculty "advises the administration on academic appointments, promotions and budgets under the auspices of the Academic Senate. . . . Accordingly, as a member of the UCI faculty, Mr. Hong participates in a peer review process that evaluates faculty members seeking appointment and promotion within his department."

The court reviewed four confrontations that Dr. Hong had with the university's administration. First, in 2002, Dr. Hong took part in the mid-career review of one of his colleagues, Dr. Ying Chang. During the review, Dr. Hong learned of a rumor that Dr. Chang had previously failed to divulge a financial conflict of interest. Dr. Hong complained to a faculty meeting and his department chair, Stanley Grant; although Dr. Chang resigned her candidacy soon after, Dr. Hong prepared a letter of dissent for Dr. Chang's file and asked that it be forwarded to the Dean of the School of Engineering.

Next, in March 2003, Dr. Hong complained to Dr. Grant that six of the eight classes in his department were being taught by lecturers rather than by available tenured faculty members, redirecting departmental resources and ill-serving students. After looking into the matter, Dr. Grant informed Dr. Hong that the Dean's office (rather than the department) funded the bulk of the lecturers' compensation, and that he intended for lecturers to teach at most one course per department.

Third, Dr. Hong participated in the review of a colleague, Dr. Mohammed, for an accelerated merit promotion in October 2003. He voted against the application and provided a letter of dissent, based primarily on two parts of the application that he believed were improper; he also raised his concerns at a faculty meeting. Dr. Mohammed's promotion was ultimately approved, and he sent an email to all faculty in the department thanking them; in a reply to all faculty, Dr. Hong asserted that Dr. Grant, as well as the Vice Provost for Academic Personnel and additional people in the Dean's office, had improperly influenced the review process, and Dr. Hong requested that an investigation be launched.

Finally, in May 2004, Dr. Grant announced that an assistant professor candidate had accepted an informal offer of employment, to be voted on at an upcoming faculty meeting. Dr. Hong opposed the offer, believing that such an informal offer before full faculty approval violated the faculty's right to self-governance, including the right to

² Dr. Hong has appealed the decision to the U.S. Court of Appeals for the Ninth Circuit, and the AAUP filed a joint amicus brief with the Thomas Jefferson Center for the Protection of Free Expression.

determine “who can teach, who can do creative research, [and] who can serve in the community and university.” Dr. Hong faulted Dr. Grant and the Engineering Chair for the offer; he urged the university’s Executive Vice Chancellor, Michael Gottfredsen, to investigate the hiring, stating that “participation in the governance of the University including appointment and promotion of faculty is professional right of faculty [sic].”

In 2003, Dr. Hong was scheduled for a routine merit increase, but asked for a one-year deferral because of his unsatisfactory research performance; in September 2004, he submitted his application, in which he ranked himself low in several areas. Accordingly, in January 2005, the faculty recommended that he be denied a merit increase. In March, Dr. Gottfredsen told the Chair of Engineering that he was disappointed with Dr. Hong’s research progress, asked Dr. Grant to initiate a remediation plan with Dr. Hong, and asked that Dr. Hong be assigned an increased teaching load due to his decreased scholarly contributions. After filing several internal complaints with the university, Dr. Hong filed suit, alleging that he was retaliated against for exercising his First Amendment rights to speak as a citizen on a matter of public concern.

The court rejected his claim and found in favor of the university, in a decision that could lay the foundation for further infringement of faculty speech. The judge relied on *Garcetti v. Ceballos*, the 2006 Supreme Court decision ruling that when public employees speak “pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communication from employer discipline,” even if the speech implicates matters of public concern. Thus, the traditional First Amendment tests for speech no longer apply in the public employment context – as long as a public employee speaks pursuant to his or her “official job duties,” the employer is free to take action against the employee based on the speech.

The Supreme Court set aside, however, the question of whether its new test applies to speech by a public employee in the academic context, acknowledging that “there is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests.” The Court therefore concluded that “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 scholarship or teaching.” Since then, lower federal courts have weighed *Garcetti* when considering First Amendment claims of retaliation from public school teachers – generally with discouraging results. *See, e.g., Mayer v. Monroe County Community School Corporation*, 2007 U.S. App. LEXIS 1469 (7th Cir. Jan. 24, 2007) (opining, in a case involving an elementary school teacher, that “employers are entitled to control speech from an instructor to a student on college grounds during working hours”). This case, however, is one of the first that squarely addresses faculty speech in the higher education context. *See also Payne v. University of Arkansas Fort Smith*, 2006 U.S. Dist. LEXIS 52806 (W.D. Ark. July 26, 2006) (upholding termination of tenured professor for email complaining to university administrator that new university policy “was a “huge disservice to the community,” because “crux” of email was “dissatisfaction with an internal employment policy and not an issue of public concern”).

The judge considering Dr. Hong's case reviewed *Garcetti* and subsequent cases construing *Garcetti*, and concluded – without acknowledging that speech in the academic context may be treated differently – that “an employee’s official duties are construed broadly to include those activities that an employee undertakes in a professional capacity to further the employer’s objectives.” The key question for the court was whether Dr. Hong’s critical statements were made “pursuant to his official duties” as a UCI faculty member. The court noted that in the University of California system

a faculty member’s official duties are not limited to classroom instruction and professional research. . . . Mr. Hong’s professional responsibilities . . . include a wide range of academic, administrative and personnel functions in accordance with UCI’s self-governance principle. As an active participant in his institution’s self-governance, Mr. Hong has a professional responsibility to offer feedback, advice and criticism about his department’s administration and operation from his perspective as a tenured, experienced professor. UCI allows for expansive faculty involvement in the interworkings of the University, and it is therefore the professional responsibility of the faculty to exercise that authority.

The court concluded that Dr. Hong’s criticisms about Dr. Chang’s mid-career review were unprotected by the First Amendment, because “UCI ‘commissioned’ Mr. Hong’s involvement in the peer review process and his participation is therefore part of his official duties as a faculty member. The University is free to regulate statements made in the course of that process without judicial interference.” The court disregarded the fact that while Dr. Hong was participating in review of a colleague, he was not part of an official peer review faculty committee. The court also failed to recognize that UC-I’s Academic Personnel Manual distinguished between professional *rights* and professional *responsibilities* – and that participation in institutional governance is a core right, but not (unlike preventing conflicts of interest, for instance) a responsibility.

Dr. Hong’s criticism of the use of lecturers, which spoke “only to internal departmental staffing and administration,” was also unprotected, because Dr. Hong was under a “professional obligation to actively participate in the interworkings and administration of his department, including the approval of course content and manner of instruction. . . . The form, content, and context of Mr. Hong’s statements all indicate he was fulfilling a professional obligation and not acting as a private citizen.” The court made a similar determination about Dr. Hong’s criticisms about Dr. Mohamed, stating that Dr. Hong’s “feedback and criticism was ‘commissioned’ by UCI when it established the faculty’s integral role in peer evaluations.”

The court also decided that Dr. Hong’s statements about administrative manipulation of the promotion process were unprotected; citing to an email to the Executive Vice Chancellor in which Dr. Hong stated that he had a “duty” as a member of the UCI community to report “inequitable conducts [sic] by the Dean and two faculty members,” the court declared that “internal complaints about supervisory

mismanagement are within an employee's official duties and not subject to First Amendment protection." Finally, the court ruled that Dr. Hong's criticisms of Dr. Grant's handling of the informal employment offer were made pursuant to his official duties and therefore were unprotected because "they were the result of his professional obligation to participate in departmental self-governance." The court concluded that "UCI is entitled to unfettered discretion when it restricts statements an employee makes on the job and according to his professional responsibilities."

Characterizing Dr. Hong's criticisms overall as "internal administrative disputes which have little or no relevance to the community as a whole," the court added that it had "great difficulty" viewing Dr. Hong's comments "as a matter of such public concern that protection under the First Amendment is deserved. . . . Each of Mr. Hong's statements – regarding faculty performance reviews, departmental staffing and faculty hiring – involved only the internal personnel decisions of his department. In no way did they implicate matters of pressing public concern such as malfeasance, corruption or fraud." The court therefore ruled in favor of the university.

Renken v. Gregory, et al., No. 07-3126 (7th Cir. Sept. 4, 2008)

This case involved Kevin Renken, a tenured professor at University of Wisconsin who argued that the university had retaliated against him for complaining about the university's use of grant funds. The U.S. Court of Appeals for the Seventh Circuit upheld the district court's decision that that university had not retaliated.

Renken was a tenured professor in the College of Engineering; under the university's policies & procedures manual, he was "responsible for teaching, researching, and public service," all of which were to be considered in promotion and tenure decisions. In decisions about awarding full professorships, considerations included a faculty member's grants and projects developed from the grants. While he was at the university, he obtained more than \$300,000 in grants, including from the National Science Foundation.

Renken and some collaborators applied for an NSF grant to work with engineering undergraduates in the lab. The university and the NSF both approved the grant, but Renken refused to sign the confirmation letter from the university because of disagreements with his dean, William Gregory, over the administration of the grant – among other things, he said that Gregory was violating NSF rules about the use of funds. In the midst of the disagreements, Renken filed a complaint against Gregory with a university committee, citing, among other things, a delay in paying undergrads who were working on the project. When Renken didn't sign any of the confirmation letters, Gregory told him that the university had started the process of returning the grant funds to the NSF; soon after that, Renken emailed the secretary of the board of regents, alleging that Gregory wanted him to sign off on an incorrect use of funds; that the dean's office had refused a variety of expenditures that were necessary for the grant; and that the dean's actions were "unprofessional and vindictive in the extreme." After an additional

complaint, the dean of the graduate school presented a compromise, which Renken refused, and at that point the university decided to return the grant to the NSF.

Renken sued the university, claiming that the university had reduced his pay and returned the grant in retaliation for his criticism about the university's use of grant funds. The district court used the *Garcetti* analysis, and decided that his complaints about the grant funding were made pursuant to his official duties, not as a citizen, and therefore weren't protected by the First Amendment. The district court added that even if he was speaking as a citizen, his speech wasn't protected because it related to his teaching and research and those weren't matters of public concern. The court of appeals agreed, saying that "Renken was speaking as a faculty employee, and not as a private citizen, because administering the grant as a [principal investigator] fell within the teaching and service duties that he was employed to perform." The court added that "whether Renken was explicitly required to apply for grants does not address whether his efforts related to the grant, including his complaints, were a means to fulfill his employment requirements, namely teaching and research." The court held that it wasn't significant that the administration of the grants wasn't within Renken's *core* job functions, because the *Garcetti* inquiry just asks whether expression was *pursuant* to official responsibilities. Renken argued that his complaints were pursuant to the terms of the grant, not his employment – but the court rejected his argument on the grounds that he would receive a teaching reduction for serving as PI and his grants were a factor in receiving a full professorship. The court therefore affirmed the district court's decision granting judgment to the university.