AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

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ACADEMIC FREEDOM AND THE LAW

This outline provides an overview of the law of academic freedom. Part I contains a summary of academic freedom as a professional standard. Part II explores the nature of academic freedom as legal right protected by the constitution and the law of contract. Part III focuses on legal principles that protect the academic freedom of faculty members in the classroom. Part IV explores students' academic freedom. Part V deals with legal principles protecting academic freedom at private institutions of higher education.

Disclaimer: This guide is not intended as legal advice, nor is it an exhaustive statement of the law of academic freedom. Instead, it provides general legal information about this area of law. The Association urges you to consult a lawyer in your state who is experienced in higher education or employment law.[1]

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Table of Contents

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Academic Freedom

I. Academic Freedom as a Professional Standard

The academic freedom of individual professors is a longstanding concept with roots tracing back to the nineteenth century and earlier. It is both a professional standard and a legal right.

As a professional standard, academic freedom is tied to academic custom and practice, and to notions regarding the ideal environment for freedom of thought, inquiry, and teaching. Academic freedom as a professional notion was largely developed and refined in this country by the American Association of University Professors. At the AAUP's first meeting, in January 1915, a committee of fifteen faculty members – drawn from Princeton, Harvard, Yale, Johns Hopkins, and the Universities of California, Pennsylvania, and Wisconsin, among others – developed an initial statement on academic freedom and tenure. This statement, the 1915 *Declaration of Principles on Academic Freedom and Academic Tenure*, cited prominently to the freedoms that were standard at German universities, then considered the global standard for excellence in higher education. In the century since, AAUP committees have developed additional statements—often in concert with, or endorsed by, associations representing institutional interests—further defining and describing various aspects of academic freedom. The Committee on Academic Freedom and Tenure, otherwise known as Committee A, has been the progenitor of many of those statements. A number of public and private colleges and universities have incorporated AAUP policies into their faculty handbooks and other guiding documents; whether those policies and documents have the force of law is generally dependent on state law.

A. The 1915 *Declaration of Principles on Academic Freedom and Academic Tenure*

The AAUP's 1915 *Declaration of Principles on Academic Freedom and Academic Tenure* describes three elements that comprise academic freedom: freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action. The Declaration also emphasizes the public interest in an independent professoriate, on the grounds that "education is the cornerstone of the structure of society and . . . progress in scientific knowledge is essential to civilization."

The Declaration continues: "[O]nce appointed, the scholar has professional functions to perform in which the appointing authorities have neither competency nor moral right to intervene. The responsibility of the university teacher is primarily to the public itself, and to the judgment of his own profession . . . ." With respect to the public value of the university and the faculty, universities exist "to promote inquiry and advance the sum of human knowledge;" "to provide general instruction to the students;" and "to develop experts for various branches of the public service." Because of this responsibility of the university to the community as a whole, the university has an obligation to "accept[] and enforc[e] to the fullest extent the principle of academic freedom."

The Declaration also observes that these rights are accompanied by responsibilities to be scholarly and fair; it also states – in language that foreshadows the most critical tension between academic freedom and the First Amendment – that it is "in no sense the contention of this committee that academic freedom implies that individual teachers should be exempt from all restraints as to the matter or manner of their utterances, either within or without the university."

B. The 1940 *Statement of Principles on Academic Freedom and Tenure*

The professional standard of academic freedom is defined by the 1940 *Statement of Principles on Academic Freedom and Tenure*, which was developed by the AAUP and what is now called the American Association of Colleges and Universities. The 1940 *Statement* is the fundamental statement on academic freedom for faculty in higher education, has been endorsed by more than 250 scholarly and professional organizations, and is incorporated into hundreds of college and university faculty handbooks.

With respect to academic freedom, the 1940 *Statement* says that 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," and to "freedom in the classroom in discussing their subject." The *Statement* also links academic freedom and tenure, explaining: "Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society."

With respect to extramural speech, the 1940 *Statement* adds:

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

The AAUP and the AAC&U subsequently met in 1969 to formulate additional interpretations of the 1940 Statement, and observed that the 1940 Statement's language on extramural speech "should also be interpreted in keeping with the 1964 *Committee A Statement on Extramural Utterances*," which states in part:

> The controlling principle is that a faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness for his or her position. Extramural utterances rarely bear upon the faculty member's fitness for the position. Moreover, a final decision should take into account the faculty member's entire record as a teacher and scholar.

As the 1964 Committee A statement continues: "In a democratic society freedom of speech is an indispensable right of the citizen. Committee A will vigorously uphold that right."

Courts, including the United States Supreme Court, have relied on the 1940 *Statement*'s definition of academic freedom. *See, e.g., Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 756 (1976); *Tilton v. Richardson*, 403 U.S. 672, 681–82 (1971).

C. The 1966 *Statement on Government of Colleges and Universities*

The 1915 and 1940 Statements implicitly suggested that faculty would also take part in institutional governance; the 1940 Statement refers, for instance, to faculty as "officers of an educational institution." In 1966, however, the AAUP issued a statement that explicitly asserted and reaffirmed that right and obligation: the Statement on Government of Colleges and Universities. As with the 1940 Statement, this was a joint effort, this time with the American Council on Education (ACE) and the Association of Governing Boards of Universities and Colleges (AGB).

The Statement begins by paying tribute to "the variety and complexity of the tasks performed by institutions of higher education" and the "inescapable interdependence among governing board, administration, faculty, students, and others." As the Statement observes, "the relationship calls for adequate communication among these components, and full opportunity for appropriate joint planning and effort." In areas including determination of general educational policy, internal operations of the institution, including use of physical resources, budgeting, and selection of a president and other academic officers, all components play a role. The Statement notes, however, that different bodies may carry more weight than another in a given decision, and it sets out what the three authoring organizations saw as the appropriate allocation of responsibility.

With respect to the governing board's authority, the Statement speaks to the board's role in defining the institution's overall policies and procedures, stewarding and nurturing the institution's funds, and "pay[ing] attention" to personnel policy. The Statement adds that "although the action to be taken by it will usually be on behalf of the president, the faculty, or the student body, the board should make clear that the protection it offers to an individual or a group is, in fact, a fundamental defense of the vested interests of society in the educational institution."

The president's role is described as relating primarily to institutional leadership; in addition to sharing responsibility for defining and achieving goals, for administrative action, and for ensuring communication among the components of the academic community, the president "has a special obligation to innovate and initiate." The Statement recognizes that the president must "at times, with or without support, infuse new life into a department; relatedly, the president may at times be required, working within the concept of tenure, to solve problems of obsolescence. The president will necessarily utilize the judgments of the faculty but may also, in the interest of academic standards, seek outside evaluations by scholars of acknowledged competence."

Finally, with respect to faculty involvement in institutional matters, the Statement is quite broad. It explains that the faculty have primary responsibility for "curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process," while noting that "[b]udgets, personnel limitations, the time element, and the policies of other groups, bodies, and agencies having jurisdiction over the institution may set limits to realization of faculty advice." The faculty thus "sets the requirements for the degrees offered in course, determines when the requirements have been met, and authorizes the president and board to grant the degrees thus achieved."

In addition, because of its responsibility over faculty status, faculty in a specific scholarly area may judge the work of their colleagues when necessary, and the faculty as a whole has the authority to make judgments regarding "appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal." Moreover, faculty "should actively participate in the determination of policies and procedures governing salary increases."

The Statement also notes that "the right of a board member, an administrative officer, a faculty member, or a student to speak on general educational questions or about the administration and operations of the individual's own institution is a part of that person's right as a citizen and should not be abridged by the institution. There exist, of course, legal bounds relating to defamation of character, and there are questions of propriety."

D. The 1994 *Statement on the Relationship of Faculty Governance to Academic Freedom*

In 1994, the AAUP made explicit the connection between academic freedom and shared governance, in the Statement on the Relationship of Faculty Governance to Academic Freedom. The Statement says in part:

> [A] sound system of institutional governance is a necessary condition for the protection of faculty rights and thereby for the most productive exercise of essential faculty freedoms. Correspondingly, the protection of the academic freedom of faculty members in addressing issues of institutional governance is a prerequisite for the practice of governance unhampered by fear of retribution.

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The Statement also provides that the faculty's voice shall be more or less authoritative on various issues depending upon "the relative directness with which the issue bears on the faculty's exercise of its various institutional responsibilities." Thus, for example, because "the faculty has primary responsibility for . . . teaching and research" under the 1966 Statement on Government of Colleges and Universities described above, the faculty's voice on matters relating to teaching and research "should be given the greatest weight." And in general, since

> such decisions as those involving choice of method of instruction, subject matter to be taught, policies for admitting students, standards of student competence in a discipline, the maintenance of a suitable environment for learning, and standards of faculty competence bear directly on the teaching and research conducted in the institution, the faculty should have primary authority over decisions about such matters—that is, the administration should "concur with the faculty judgment except in rare instances and for compelling reasons which should be stated in detail." [Quoting the Statement on Government of Colleges and Universities.]

The 1994 Statement goes on to articulate three reasons "why the faculty's voice should be authoritative across the entire range of decision making that bears . . . on its responsibilities." The Statement emphasizes that on the basis of these reasons, "it is also essential that faculty members have the academic freedom to express their professional opinions without fear of reprisal."

First, the allocation of authority described "is the most efficient means to the accomplishment of the institution's objectives," because of the expertise offered by both individual scholars in their departments and by faculty committees. Second, "teaching and research are the very purpose of an academic institution and the reason why the public values and supports it;" faculty – who carry out those tasks – should therefore have a "special status" within the university. Finally (and most importantly, in the view of the drafters of the 1994 Statement), allocating authority to the faculty in its areas of responsibility "is a necessary condition for the protection of academic freedom within the institution."

In expanding on this point, the Statement describes academic freedom as including the freedom of faculty members "to express their views (1) on academic matters in the classroom and in the conduct of research, (2) on matters having to do with their institution and its policies, and (3) on issues of public interest generally, and to do so even if their views are in conflict with one or another received wisdom." The justifications for these freedoms are that:

> In the case (1) of academic matters, good teaching requires developing critical ability in one's students and an understanding of the methods for resolving disputes within the discipline; good research requires permitting the expression of contrary views in order that the evidence for and against a hypothesis can be

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> weighed responsibly. In the case (2) of institutional matters, grounds for thinking an institutional policy desirable or undesirable must be heard and assessed if the community is to have confidence that its policies are appropriate. In the case (3) of issues of public interest generally, the faculty member must be free to exercise the rights accorded to all citizens.

The Statement stresses that the protection of academic freedom requires that faculty speech be subject to discipline "only where that speech violates some central principle of academic morality" (as with plagiarism or some other type of fraud or deceit) and that faculty status must turn on a faculty member's substantive views "only where the holding those views clearly supports a judgment of competence or incompetence." The Statement concludes that it is

> in light of these requirements that the allocation to the faculty . . . of authority over faculty status and other basic academic matters can be seen to be necessary for the protection of academic freedom. It is the faculty – not trustees or administrators – who have the experience needed for assessing whether an instance of faculty speech constitutes a breach of a central principle of academic morality, and who have the expertise to form judgments of faculty competence or incompetence.

II. Academic Freedom as a Legal Right

The legal definition of academic freedom is related to the professional standard but has its own framework and rules. It involves constitutional and contract law, and it reflects an attempt to reconcile basic constitutional principles with prevailing views of academic freedom's social and intellectual role in American life. The legal protection that academic freedom receives in a particular case depends on a variety of factors, including whether the academic institution is public or private, the content of state law, and institutional custom and policy.

A. The First Amendment

If the institution is public, the First Amendment to the United States Constitution applies to institutional restrictions on faculty speech.[2] Here again, it must be stressed that "academic

[2] The federal constitution was largely designed to regulate the exercise of governmental power only, and, therefore, virtually all of the constitutional restrictions pertaining to academic freedom and free speech apply only to public employers, such as state colleges and universities, and do not generally limit private employers, such as private colleges, from infringing on professors' freedoms, such as freedom of speech and due process. *See, e.g., Logan v. Bennington College*, 72 F.3d 1017, 1027 (2d Cir. 1995) (holding that sexual harassment policy of private college did not violate the due process rights of tenured professor because the college's "action in terminating [the professor] was in no way dictated by state law or state actors"). *But see Franklin v. Leland*

freedom" and "free speech rights under the First Amendment" are two related but analytically distinct concepts. The First Amendment's Free Speech Clause generally restricts the right of a public college or university to regulate the speech and expressive activity of its employees. Academic freedom, on the other hand, protects rights of faculty members and other academic workers within the educational contexts of teaching, learning, and research, both within and outside of the classroom.

The U.S. Supreme Court has repeatedly recognized that academic freedom is a right bound up with the protections of the First Amendment. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Keyishian v. Board of Regents* , 385 U.S. 589 (1967); *Regents of Univ. of Michigan v. Ewing* , 474 U.S. 214 (1985). But the scope of that right remains unclear. Is academic freedom a separate First Amendment right, or does the First Amendment simply apply distinctively in the university context?

Note: Some state constitutions also provide protections to professors at private colleges. *E.g.*, *N.J. Const., Art*. 1, para. 6 & para. 18 (analyzed in *State v. Schmid*, 84 N.J. 535 (1980), *appeal dismissed sub nom*., *Princeton Univ. v. Schmid*, 455 U.S. 100 (1982)).

1. Text: The text of the First Amendment's Free Speech Clause states that "Congress shall make no law . . . abridging the freedom of speech." It makes no explicit mention of academic freedom. However, the U.S. Supreme Court and other courts have concluded that in at least some instances, there is a constitutional right to academic freedom arising from the First Amendment.

2. Judicial Origins: During the McCarthy era, teachers and other public employees were oftentimes required to sign statements asserting that they were not involved in any subversive groups. In several cases involving these restrictions, the U.S. Supreme Court began to develop the idea of academic freedom as a right based in the Constitution.

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," i.e., groups that advocated the use of violence to

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Stanford Jr. Univ., 218 CAL. RPTR. 228, 230 n. 3 (Cal. App. 1985) (in a case involving the dismissal of a Stanford University professor who advocated violence, the court considered the professor's First Amendment arguments because the university agreed that it should be treated as a state actor: "[F]or purposes of this appeal . . . Stanford has adopted the position that the outcome is the same whether it is viewed as a private or public employer. We thus review Stanford's action as if it were state action."); *Albert v. Carovano*, 824 F.2d 1333, 1339-41 (2d Cir. 1987) (finding Hamilton College to be state actor because, in part, it was chartered by state and received state monies); *Craft v. Vanderbilt University*, 940 F. Supp. 1185 (M.D. Tenn. 1996) (ruling that private university's participation with state government in radiation experiments in the 1940s might constitute "state action" for constitutional standards to apply).

effect a change in 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.

The Supreme Court's decision in *Adler* upheld the statute, but Justice Douglas' dissent contains the first mention of academic freedom in a Supreme Court case. Referring to the procedure 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 U.S. Supreme Court's recognition of academic freedom as a constitutional value. 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 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. Board of Regents***, 385 U.S. 589 (1967). This case explicitly 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*, holding 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."

3. ***Pickering*, *Connick v. Myers*, and *Garcetti***

Following *Keyishian*, several Supreme Court cases further fleshed out the First Amendment rights of public employees. Although these cases did not arise in the academic or higher education context, they have helped to define the First Amendment rights of faculty at public colleges and universities.

a. ***Pickering v. Board of Education***, 391 U.S. 563 (1968), and ***Connick v. Myers***, 461 U.S. 138 (1983).

Pickering involved a public high school teacher who wrote a letter to a local newspaper criticizing the school board's budget decisions and its communications with taxpayers. The board concluded that the statements in the letter were false and that they impugned the board and the school administration, and dismissed the teacher from his position. The state courts upheld the dismissal, and the case was appealed to the U.S. Supreme Court. The Supreme Court rejected the notion that "teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work." The Court then observed that the teacher's criticism of the board reflected "a difference of opinion that clearly concerns an issue of general public interest." In the particular context of the teacher's comments, the Court held that "Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is

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essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." In the Court's eyes, although Pickering identified himself as a public school teacher and wrote on matters that related intimately to his profession, his employment was "only tangentially and insubstantially involved in the subject matter of the public communication." The Court concluded that "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."

In *Connick*, the Supreme Court considered the case of a deputy district attorney who was terminated after sending a questionnaire to fellow staff members asking them about various internal office issues as well as whether they felt pressured to work on political campaigns. The Court articulated its inquiry into the First Amendment issues at stake as "seeking 'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" The Court held that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." The Court indicated that in carrying out its balancing test, it would consider the "content, form, and context of a given statement, as revealed by the whole record," to determine whether it was on a matter of public concern, and would also consider the "manner, time, and place" of the speech. The Court concluded by observing that its holding was "grounded in our longstanding recognition that the First Amendment's primary aim is the full protection of speech upon issues of public concern, as well as the practical realities involved in the administration of a government office."

Under *Pickering* and *Connick*, courts utilize a balancing test to determine whether speech by public employees is protected. The court considers (1) whether the employee uttered the challenged speech in the course of the employee's job responsibilities or as a private citizen, and (2) whether the speech addressed a "matter of public concern." If the employee fails to show either of these, then the speech will be held not to be protected by the First Amendment. But if the employee shows both—i.e., that he or she spoke as a private citizen on a matter of public concern—then the court balances the employee's interest in speaking against the employer's interest in the overall efficient functioning of the workplace. If the employee's interest outweighs the employer's interest, then his or her speech is deemed protected by the First Amendment.

The application of this framework in the academic context raises some particularly knotty issues, such as:

"Efficiency" of the Academic Workplace: Under what circumstances can a faculty member's speech "disrupt" the educational environment when the mission of educational institutions is to create an intellectual marketplace where unpopular, controversial, and sometimes even offensive speech can be expressed?

What Is a Matter of Public Concern? The difference between a "matter of public concern" and a "matter of private interest" is "difficult to draw in many contexts, but is perhaps especially so in the context of classroom speech." William A. Kaplin & Barbara A. Lee, THE LAW OF HIGHER EDUCATION 199 (1995 ed. & 2000 Supp.). *Compare Landrum v. Eastern Kentucky University*, 578 F. Supp. 241 (E.D. Ky. 1984) (ruling as unprotected speech professor's comments about school's real estate curriculum because the comments constituted a "personal grievance"), *with Johnson v. Lincoln University*, 776 F.2d 443 (3rd Cir. 1985) (holding as protected speech professor's comments on faculty reductions, student enrollment, and grade inflation, even though the topics were an outgrowth of personal disputes within the chemistry department, because "questions of educational standards and academic policy" are broad and implicate matters of public concern). *See also Urofsky v. Gilmore*, 216 F.3d 401, 428 (4th Cir. 2000) (Wilkinson, C.J., concurring) (observing that unlike most public employees, professors are "hired for the very purpose of inquiring into, reflecting upon, and speaking out on matters of public concern"; they are not "state mouthpieces" of their institutions, but "speak mainly for themselves."). For commentary on the application of the matter-of-public-concern test to professors, *see* Damon L. Krieger, *May Public Universities Restrict Faculty from Receiving or Transmitting Information Via University Computer Resources? Academic Freedom, the First Amendment, and the Internet*, 59 MD. L. REV. 1398, 1430 (2000) (asserting in discussion of *Urofsky* that *Pickering* doctrine should be "reformulated" because "current public employee speech doctrine is inadequate to address the speech of faculty members"); Alisa W. Chang, "Resuscitating the Constitutional 'Theory' of Academic Freedom: A Search for a Standard Beyond *Pickering* and *Connick*," 53 STAN. L. REV. 915, 938 (2001) ("The first and perhaps most fundamental problem with the automatic application of the *Pickering/Connick* rules to academic contexts is the fact that university professors are not employees in the traditional sense."); "First Amendment-Academic Freedom," 114 HARV. L. REV. at 1419 (noting that the *Urofsky* majority's reasoning means that *Pickering*'s protection is foreclosed simply because professors speak as employees); *see generally* Matthew W. Finkin, "Intramural Speech, Academic Freedom, and the First Amendment," 66 TEX. L. REV. 1323 (1988) (critiquing the application of *Connick* to intramural faculty speech).

b. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). *Garcetti* involved a California deputy district attorney who complained to his supervisors and the defense attorney in one of his cases about what he believed were false statements given by a deputy sheriff. After disputes arose over how to handle the evidence, he was demoted and transferred to a remote office, in what he believed was retaliation for speaking out about the misconduct. He sued, alleging that his speech about the deputy sheriff's

misconduct was protected by the First Amendment. The Supreme Court ruled that when public employees speak "pursuant to their official duties," they are not protected by the First Amendment, even if they are speaking about matters of public concern. Thus, under *Garcetti*, the government, in its role as employer, can demote, fire, transfer, or otherwise discipline public employees in retaliation for their expression without running afoul of the Constitution. (Note: the government's action may still violate state whistleblower laws, other state laws, or collective bargaining agreements).

The *Garcetti* majority wrote that only speech by public employees that has a "relevant analogue to speech by citizens who are not government employees" is protected by the First Amendment. The Court recognized, however, that speech related to scholarship or teaching might be treated differently, writing: "[t]here 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 majority therefore declined to say that its decision "would apply in the same manner to a case involving speech related to scholarship or teaching."

d. Post-*Garcetti* developments.

Although the Supreme Court has not examined or applied the *Garcetti* caveat, the courts of appeals have, to varying degrees.

i. First Circuit. The First Circuit has not closely examined or explicitly applied *Garcetti*'s academic freedom caveat. *Decotiis v. Whittemore*, 635 F.3d 22 (1st Cir. 2011), provides a useful overview of the circuit's current approach to *Garcetti* and *Pickering*. *Alberti v. Carlo-Izquierdo*, 548 F. App'x 625 (1st Cir. 2013) (unpublished), briefly examines an academic freedom argument in the higher education setting, but the court does not mention the *Garcetti* caveat in its discussion of that claim, and the speech at issue did not occur in the classroom.

ii. Second Circuit. *Weintraub v. Board of Education*, 593 F.3d 196 (2d Cir. 2010) is the most prominent post-*Garcetti* case in the Second Circuit, but as it involved an elementary school teacher, it is inapposite where claims in the higher education setting are concerned. In *Bhattacharya v. SUNY Rockland Community College*, 719 F. App'x 26 (2d Cir. 2017) (unpublished), the court stated that it recognizes a First Amendment academic freedom claim "where a restriction on speech implicates the content of a teacher's lessons or restricts a school's ability to determine its curriculum."

iii. Third Circuit. In both *Gorum v. Sessoms*, 561 F.3d 179 (3d Cir. 2009)**,** and *Borden v. School District of the Township of East Brunswick*, 523 F.3d 153 (3d Cir.

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2008), the Third Circuit acknowledged the *Garcetti* caveat, but neither case involved speech closely related to teaching or scholarship.

iv. Fourth Circuit. The Fourth Circuit's decision in *Adams v. Trustees of Univ. of North Carolina–Wilmington*, 640 F.3d 550 (4th Cir. 2011), is important. *Lee v. York County Sch. Div.*, 484 F.3d 687 (4th Cir. 2007), applied the *Garcetti* academic freedom caveat in the K-12 context.

v. Fifth Circuit. The two main post-*Garcetti* cases in the Fifth Circuit, *Buchanan v. Alexander*, 919 F.3d 847 (5th Cir. 2019), and *Trudeau v. Univ. of N. Tex.*, 2021 U.S. App. LEXIS 20423 (5th Cir. July 9, 2021), do not directly concern curriculum choices or in-class speech germane to the subject matter being taught.

vi. Sixth Circuit. The two key post-*Garcetti* cases in this circuit are *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021), and *Evans-Marshall v. Board of Education*, 624 F.3d 332 (6th Cir. 2010). Read together, the law in the Sixth Circuit appears to be relatively favorable to academic freedom claims involving in-class/curriculum-related speech of educators at the college/university level (*Meriwether*), but less favorable to teachers at the K-12 level (*Evans-Marshall*).

vii. Seventh Circuit. *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008), is an unfavorable decision at the university level, but it did not squarely address academic freedom, and so it is possible that the Seventh Circuit would recognize the *Garcetti* exception at the college/university level.

viii. Eighth Circuit. In *Lyons v. Vaught*, 875 F.3d 1168 (8th Cir. 2017), which appears to be the only Eighth Circuit case on the topic, the court stated only that *Garcetti* "left open the question whether its holding would apply to 'speech related to scholarship or teaching.'"

ix. Ninth Circuit. The key case in the Ninth Circuit, *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014), is one of the most favorable decisions applying the *Garcetti* academic freedom caveat of any circuit-level decision.

x. Tenth Circuit. No post-*Garcetti* cases in the Tenth Circuit reference the academic freedom exception.

xi. Eleventh Circuit. There is no on-point caselaw in the Eleventh Circuit regarding the *Garcetti* academic freedom exception.

xii. D.C. Circuit. Law regarding academic freedom, particularly as it relates to the *Garcetti* caveat, is not well developed in the D.C. Circuit. The only circuit-level decision that contains any appreciable discussion of the relevant issues is Judge

Edwards's concurrence in *Emergency Coalition to Defend Educational Travel v. United States Dep't of the Treasury*, 545 F.3d 4 (D.C. Cir. 2008) (Edward, J., concurring); *see also Turner v. U.S. Agency for Global Media*, 502 F. Supp. 3d 333 (D.D.C. 2020); *Mpoy v. Fenty*, 901 F. Supp. 2d 144 (D.D.C. 2012).

B. Contractual Rights and Academic Custom and Usage

Another source of legal protection for individual academic freedom for faculty at public and private institutions can be found in contractual obligations. Sometimes colleges and universities confer specific academic freedom rights upon faculty members via policies or promises that are enforceable as a matter of contract under state law. Internal sources of such 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 *Hamline Law Review* 467 (Winter 1999). *See generally* AAUP Legal Technical Assistance Guide, "Faculty Handbooks As Enforceable Contracts: A State Guide" (2005 ed.).

The protections of academic freedom that contractual obligations provide are overlaid upon, and informed by, "academic custom" or "academic common law." Courts analyzing claims of academic freedom often turn to the AAUP's 1940 *Statement of Principles on Academic Freedom and Tenure*. 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.

As the U.S. Court of Appeals for the District of Columbia Circuit observed in *Greene v. Howard University*, 412 F.2d at 1135:

> 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.

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," there may be an "unwritten 'common law' in a particular university," and so 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 definition 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).

In *McAdams v. Marquette University*, 383 Wisc. 2d 358, 914 N.W.2d 708 (2018)—one of the best decisions on academic freedom in decades—the Wisconsin Supreme Court, citing AAUP polices and an amicus brief filed by the AAUP, ruled that Marquette University wrongly disciplined Dr. John McAdams for comments he made on his personal blog in 2014. Dr. McAdams criticized a graduate teaching instructor by name for her refusal to allow a student to debate gay rights because "everybody agrees on this." The blog was publicized in the national press, and the instructor received numerous harassing communications from third parties. Marquette suspended Dr. McAdams, and demanded an apology as a condition of reinstatement. Relying heavily on AAUP's standards and principles on academic freedom, as detailed in AAUP's amicus brief, the court held that "the University breached its contract with Dr. McAdams when it suspended him for engaging in activity protected by the contract's guarantee of academic freedom." Therefore, the court reversed and remanded this case with instructions that the lower court enter judgment in favor of Dr. McAdams and determine damages, and it ordered Marquette to immediately reinstate Dr. McAdams with unimpaired rank, tenure, compensation, and benefits.

III. Faculty Academic Freedom in the Classroom

One of the most important areas where academic freedom is exercised is the classroom. Classroom speech by professors at public institutions is generally protected under both the First

Amendment and the professional concept of academic freedom, at least so long as 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"). The First Amendment does not typically apply to private institutions, but professors at many private institutions may nonetheless be protected by a tapestry of sources that include employment contracts, institutional practices, and state court decisions. Classroom speech includes classroom teaching methods, curricular choices, and grading methods. More generally, academic freedom claims involving classroom speech implicate questions about the limitations that the Constitution places on legislative intrusions into the higher education classroom.

A. Classroom Teaching Methods and Academic Freedom

Faculty members are uniquely positioned to determine appropriate teaching methods. Accordingly, faculty members should be able to select and use those pedagogical methods that they believe will be effective in teaching the subject matter in which they are experts—without intrusion or retribution from administration or the state. At the same time, the First Amendment right to academic freedom is not absolute. As First Amendment and academic freedom scholar William Van Alstyne has written: "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, they often balance that interest against other concerns and may restrict professors' autonomy in selecting teaching methods when they perceive the methods as crossing the line from legitimate pedagogical choice into either sexual harassment or methods irrelevant to the topic at hand.

1. *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021). In *Meriwether*, the Sixth Circuit reversed the dismissal of a philosophy professor's lawsuit challenging a university's gender identity policy that required faculty to respect students' gender pronouns. The court first held that Garcetti v. Ceballos did not bar the professor's free speech claim because Garcetti does not specifically apply to academic speech, and because other Supreme Court decisions, such as Keyishian v. Bd. of Regents, suggest an expansive view of the free speech rights of professors. The court characterized respect for gender autonomy as a "matter of public import" on which a professor could legitimately have a differing point of view, stating that "when the state stifles a professor's viewpoint on a matter of public import, much more than the professor's rights are at stake." The court stressed the importance of "academic freedom," concluding that "professors at public universities retain First Amendment protections at least when engaged in core academic

functions, such as teaching and scholarship." The court then applied the Pickering-Connick framework to the professor's claim. At the first step of that test, the court concluded that the professor's refusal to use the student's pronouns was a message in itself that was intended to convey his point of view that "one's sex cannot be changed" and was therefore speech on a matter of public concern. At the second step of the test, which required balancing the professor's interest in his speech with the university's interest as an employer in promoting the efficiency of the public services it provides, the court determined that the university's interests were "comparatively weak" in light of the professor's proposal to simply not use any pronouns at all when addressing the student. A petition for en banc rehearing was denied by the full Sixth Circuit. 2021 U.S. App. LEXIS 20436 (6th Cir., July 8, 2021).

2. *Hardy v. Jefferson Community College*, 260 F.3d 671 (6th Cir. 2001). In *Hardy*, an African-American student and a "prominent citizen" complained about the allegedly offensive language used by 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 the professor 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."

3. *Vega v. Miller*, 273 F.3d 460 (2d Cir. 2001). In *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 one class, the students selected the topic of sex and 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.

The professor argued that the non-reappointment violated his constitutional academic freedom. The federal appeals court sided with the administrators, holding that at the time they made their decision on the 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 holding in *Vega* is narrow, and the same court has 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); *see also Cohen v. San Bernardino Valley College*, 92F.3d 968 (9th Cir. 1996); *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).

4. *Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir. 2001). In *Bonnell*, a federal appeals court upheld Macomb Community College's suspension of 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. Recognizing the importance of the First Amendment academic freedom of the professor, the court nevertheless 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 this professor'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 has 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). This is 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. Christina Axson-Flynn was a Mormon student at the University of Utah, who, she said, 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. *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000). In *Urofsky*, 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 have implications for 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. 2d1130, 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.

3. *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."

4. *Linnemeir v. Board of Trustees*, 260 F.3d 757 (7th Cir. 2001). 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 avenue 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."

5. *Edwards v. California University of Pennsylvania*, 156 F.3d 488 (3rd Cir. 1998). A federal appellate court 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.

C. Grading Rights

One recurring legal issue is whether a university's 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. *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. 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*, 868 F.2d 821 (6th Cir. 1986), a case involving Tennessee State University, 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. A different federal appeals court has rejected the reasoning in *Parate*, however. 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."

D. Legislative Intrusion into Faculty Classroom Speech: Indoctrination v. Education.

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

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

Courts too have weighed in on question of teaching versus indoctrination, coming down in support of the need for professors to teach—even passionately—but to avoid indoctrinating. In Justice Frankfurter's *Sweezy* concurrence, he observed: "A university is characterized by the spirit of free inquiry, its ideal being the ideal of Socrates—'to follow the argument where it leads.' This implies the right to examine, question, modify or reject traditional ideas and beliefs. Dogma and hypothesis are incompatible, and the concept of an immutable doctrine

is repugnant to the spirit of a university." 354 U.S. at 234. Similarly, in *James v. Board of Education of Central School District* , 461 F.2d 566, 573-74 (2d Cir. 1972), the Second Circuit defended advocacy by faculty in the classroom: "It would be foolhardy to shield our children from political debate and issues until the eve of their first venture into the voting booth. Schools must play a central role in preparing students to think, and analyze, and to recognize the demagogue." At the same time, the court condemned indoctrination, concluding that "although sound discussions of ideas are the beams and the buttresses of the first amendment, teachers cannot be allowed to patrol the precincts of radical thought with the unrelenting goal of indoctrination, a goal compatible with totalitarianism and not democracy."

E. Freedom of Inquiry and Research

"[I]t is as much an infringement on the teacher's academic freedom to constrain or limit the teacher in research activities as it is to limit the teacher's freedom in the classroom." Charles Hoornstra & Michael Liethen, *Academic Freedom and Civil Discovery*, 10 J.C. & U.L. 113, 124 (1983).

In *United States v. Microsoft*, 162 F.3d 708 (1st Cir. 1998), the First Circuit ruled that the district court properly quashed a subpoena by Microsoft for research by two professors in preparation for their book on Netscape, which was scheduled for publication soon after the Microsoft trial began, because Microsoft could have obtained the same information in a less invasive way. In so ruling, the court opined: "Just as a journalist, stripped of sources, would write fewer, less incisive articles, an academician, stripped of sources, would be able to provide fewer, less cogent analyses." Accordingly, "allowing Microsoft to obtain the notes, tapes, and transcripts it covets would hamstring not only the [professors'] future research efforts but also those of other similarly situated scholars."

Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000) (en banc), mentioned above, ruled that "the regulation of state employees' access to sexually explicit material, in their capacity as employees, on computers owned or leased by the state is consistent with the First Amendment." In so doing, the majority of the court asserted that academic freedom for individual professors is merely a professional norm, not a constitutional right.

IV. Student Academic Freedom and Its Relationship with Faculty Academic Freedom

A. AAUP Policy

"Student freedom is a traditional accompaniment to faculty freedom as an element of academic freedom in the larger sense." Ralph E. Fuchs, "Academic Freedom—Its Basic Philosophy, Function and History," in AAUP, Academic Freedom And Tenure: A Handbook Of The American Association Of University Professors (Louis Joughin, Ed., 1969) at 242, 243-44

(Appendix E). However, what exactly constitutes students' academic freedom, and how that "learning" academic freedom meshes with "teaching" academic freedom, is an area of ongoing uncertainty and debate.

AAUP's 1915 Declaration recognizes that "[a]cademic freedom has traditionally had two applications—to the freedom of the teacher and to that of the student, *Lehrfreiheit* [to teach] and *Lernfreiheit* [to learn]," and the AAUP recognizes that "the freedom to teach and the freedom to learn are inseparable facets of academic freedom." 1967 *Joint Statement on Rights and Freedoms of Students*.

AAUP policy defines freedom to learn as "depend[ing] upon appropriate opportunities and conditions in the classroom, on the campus, and in the larger community." 1967 *Joint Statement on Rights and Freedoms of Students*. Like faculty, "students should exercise their freedom with responsibility."

This statement protects not only the free expression rights of students generally, but speaks specifically to student academic freedom in the classroom. It requires "[t]he professor … [to] encourage free discussion, inquiry, and expression, [and to evaluate students] solely on an academic basis, not on opinions or conduct in matters unrelated to academic standards. It also gives students protection of freedom of expression ("students should be free to take reasoned exception to the data or views offered in any course of study and to reserve judgment about matters of opinion, but they are responsible for learning the content of any course of study for which they are enrolled"), and protection against improper academic evaluation ("students should have protection through orderly procedures against prejudiced or capricious academic evaluation. At the same time, they are responsible for maintaining standards of academic performance established for each course in which they are enrolled"). Redbook at 261.

B. The Legal Status of Student Academic Freedom

The legal standard of student academic freedom, to the extent one exists, is vague and difficult to define.

1. Scholars disagree on whether students have a legal right to academic freedom at all. *See, e.g.,* Professor J. Peter Byrne's argument that students have no First Amendment right of academic freedom: "The term academic freedom' should be reserved for those rights necessary for the preservation of the unique functions of the university, particularly the goals of disinterested scholarship and teaching . . . . [Accordingly,] no recognized student rights of free speech are properly part of constitutional academic freedom, because none of them has anything to do with scholarship or systematic learning." "A Special Concern" at 262. But see Walter Metzger, "Undoubtedly, students fit less snugly than teachers into the constitutional history of academic freedom. The question is: do they fit so poorly that they ought to be ignored? . . . In the end, it seems best to conclude that, in the academic freedom club,

students qualify as special members . . . because to keep them out would be anomalous and impoverishing." "Two Definitions" at 1304-05.

2. Courts discuss student academic freedom most commonly as some type of First Amendment right, although few have addressed the issue directly. However, many courts have used language and reasoning that seems to support at least some kind of First Amendment right of academic freedom for students.

a. *See, e.g., Sweezy v. New Hampshire* , 354 U.S. 234, 250 (1957) "[T]eachers and students must always remain free to inquire, to study and to evaluate, and to gain maturity and understanding; otherwise our civilization will stagnate and die." (emphasis added).

b. *See also Healy v. James* , 408 U.S. at 181-82, where the administration denied recognition to a student group on the grounds that the group's philosophy was antithetical to the college's commitment to academic freedom on campus. The Court overturned the denial of recognition, believing instead that affirming students' right to freedom of association was "reaffirming . . . academic freedom." 408 U.S. 169, 181-82 (1972). The Court reasoned: "[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force [to students] on college campuses than in the community at large. Quite to the contrary, '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" [Cites omitted].

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

3. Other Sources: First Amendment protection is not the only basis of student academic freedom. Students may also be entitled to contractual rights, since many student handbooks include academic freedom provisions. See Cheryl Cameron, Laura Meyers and Steven Olswang, Academic Bills of Rights: Conflict in the Classroom 31 J.C.& U.L. 243 (2005). In addition, some states have enacted state statutory protections that apply to students. See, e.g. Calif. Educ. Code §§ 66301 and 94367 (forbidding any public or private institution from making or enforcing "any rule subjecting any student to disciplinary sanction solely on the

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

V. Academic Freedom at Private Colleges and 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. They may, however, have certain free-speech-related rights deriving not from the First Amendment but from policies adopted by the institution. Faculty at private schools, therefore, have a particularly strong interest in having principles of academic freedom written into their employment contracts and faculty handbooks.

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.