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### A Contract Theory of Academic Freedom

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# A CONTRACT THEORY OF ACADEMIC FREEDOM<sup>1</sup>

PHILIP LEE\*

## INTRODUCTION

Academic freedom is central to the core role of professors in a free society. Yet, current First Amendment protections exist to protect academic institutions, not the academics themselves. For example, in *Urofsky v. Gilmore*, six professors employed by various public colleges and universities in Virginia challenged a law restricting state employees from accessing sexually explicit material on computers owned or leased by the state.<sup>2</sup> The professors claimed, in part, that such a restriction was in violation of their First Amendment academic freedom rights to conduct scholarly research.<sup>3</sup> The Fourth Circuit upheld the law and noted that “to the extent the Constitution recognizes any right of ‘academic freedom’ above and beyond the First Amendment rights to which every citizen is entitled, *the right inheres in the University, not in individual professors*, and is not violated by the terms of the Act.”<sup>4</sup> In other words, this particular court held that academic freedom protects the institution as a whole, but not the individual professors. When other courts have decided to protect various scholarly activities through First Amendment principles,

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1. A version of this Article appears in chapters 4–6 of PHILIP LEE, *ACADEMIC FREEDOM AT AMERICAN UNIVERSITIES: CONSTITUTIONAL RIGHTS, PROFESSIONAL NORMS, AND CONTRACTUAL DUTIES* (2015), published by Lexington Books. Professor Lee’s book also contains expanded discussions on the history of the American Association of University Professors, additional professorial freedom categories based on the First Amendment, and a related case study.

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2. *Urofsky v. Gilmore*, 216 F.3d 401, 404 (4th Cir. 2000).

3. *Id.* at 405.

4. *Id.* at 410 (emphasis added). Note that Chief Judge Harvie J. Wilkinson’s concurring opinion in this case disagrees with the reasoning of the majority opinion and warns about the dangers to academic freedom that it poses. *See id.* at 426–35 (Wilkinson, J., concurring).

their analysis has generally been rooted in public employee free speech analysis, and has not taken into account the unique context of American higher education.

In this Article, I argue that the dominant constitutional analysis of academic freedom is insufficient to protect the full range of academic freedom interests that have emerged over time. Specifically, constitutionally based academic freedom is unduly limited by: (1) the state action doctrine; (2) the constraints of public employee free speech principles; and (3) the judicial interpretations that grant this freedom to universities only, leaving professors without this protection when their interests collide with their universities. Thus, constitutionally based academic freedom is inadequate to preserve the free exchange of ideas that universities are supposed to epitomize.

As an alternative to an exclusively First Amendment foundation for this freedom, I argue for a contract law-based conception specifically for professors. Contract law allows courts to protect the rights of professors at both public and private universities. It also allows for the recognition of professional norms and academic custom in interpreting the rights and duties of professors and their universities. Finally, contract law also allows courts to structure remedies that take into account the specific campus contexts that give rise to various disputes. Therefore, in order to create more consistency in the law and an alignment between institutional and professorial protections at both public and private universities, I argue that while constitutional law is still the proper mechanism for defending institutional rights from government interference, contract law should be the primary mechanism for protecting professorial academic freedom. While professors at state institutions would have additional First Amendment protections against their employers, for reasons I detail in this Article, I contend that these protections are insufficient. Thus, developing a rich body of contract law on this subject would greatly enhance professorial academic freedom across the country.

This Article proceeds in three parts. Part I describes the evolution of judicial conceptions of academic freedom. Part II then analyzes the limitations of constitutionally based academic freedom to protect professors engaging in their scholarly work. Given these constraints, Part III concludes with an exploration of contract law as a better foundation for professorial academic freedom.

## PART I: ACADEMIC FREEDOM AND THE COURTS

A. *Constitutionally Based Academic Freedom*

## 1. Institutional Academic Freedom: Alignment of Professorial and University Interests Against State Action.

Starting in the 1950s, courts started to grapple with defining academic freedom—using the concept to protect universities from the excesses of government authority during the McCarthy period.<sup>5</sup> The McCarthy era was a time of anti-Communist hysteria that used congressional hearings and other mechanisms to purge people thought to have Communist affiliation from American life.<sup>6</sup> If the government required proof of loyalty from professors, universities generally became complicit in ferreting out those deemed “disloyal” by association, not by action. Christopher J. Lucas writes:

The sad history of what happened in higher education between 1940 and the mid-fifties when McCarthyism held sway offers yet another cautionary tale about the fragility of academic freedom in American life. Although it is true there were many instances where there was resistance, in the main, when academe was pressured to cleanse itself of suspected dissidents, colleges and universities readily accepted.<sup>7</sup>

At least 100 tenured or continuing professors were dismissed by universities around the country for suspected Communist affiliations or refusal to testify against friends, colleagues, and neighbors with such suspected ties.<sup>8</sup>

The constitutional foundation for academic freedom arose from a number of cases that originated as challenges to unfettered government intrusion in relation to public universities during the McCarthy era. Even though faculty members sued to vindicate their individual rights in each of these cases, the interests of their universities were aligned with theirs—therefore, the courts did not create a distinction between the professors’ and the institutions’ rights. Academic freedom was presumed to lie with the state institution—and to include the protection of the collective faculty. This situation, where professorial and institutional interests align, was typical in the early academic freedom court cases of the 1950s.

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5. See ELLEN W. SCHRECKER, *NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES* 3–4 (1986).

6. See RICHARD M. FRIED, *NIGHTMARE IN RED: THE MCCARTHY ERA IN PERSPECTIVE* 3 (1990); VICTOR S. NAVASKY, *NAMING NAMES* 13 (3d ed. 2002); ELLEN SCHRECKER, *THE AGE OF MCCARTHYISM: A BRIEF HISTORY WITH DOCUMENTS* 1 (2d ed. 2002).

7. CHRISTOPHER J. LUCAS, *AMERICAN HIGHER EDUCATION: A HISTORY* 330 (2d ed. 2006).

8. See ROBERT O’NEIL, *ACADEMIC FREEDOM IN THE WIRED WORLD: POLITICAL EXTREMISM, CORPORATE POWER, AND THE UNIVERSITY* 23 (2008).

These McCarthy-era cases defined a public university's right, based primarily on First Amendment principles, to be free from state interference in making educational decisions.<sup>9</sup> The First Amendment provides, in pertinent part, "Congress shall make no law . . . abridging the freedom of speech . . ."<sup>10</sup> Although the text of this amendment makes no mention of academic freedom, a number of courts have held that academic freedom implicates First Amendment rights.

As early as 1952, in *Wieman v. Updegraff*, the U.S. Supreme Court invalidated a law that barred people who were members of "subversive organizations" from public employment.<sup>11</sup> Faculty members at a state college challenged the law on due process grounds.<sup>12</sup> In Justice Felix Frankfurter's concurring opinion, which would serve as precursor to his subsequent views on academic freedom, he discussed both First and Fourteenth Amendment concerns and stressed the public importance of free-thinking scholars.<sup>13</sup> He wrote:

To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. . . . 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.<sup>14</sup>

Four years later, in *Slochower v. Board of Higher Education of New York City*, a professor at Brooklyn College challenged his dismissal, which was based on a state law that required public colleges in New York to dismiss any employee who exercised his or her Fifth Amendment privilege against self-incrimination when testifying before investigatory committees.<sup>15</sup> The Court struck down the law on due process grounds.<sup>16</sup>

In 1957, the U.S. Supreme Court decided the seminal academic freedom case of *Sweezy v. New Hampshire*.<sup>17</sup> The Court held that a state investigation of a visiting guest lecturer at the University of New Hampshire, who was allegedly a "subversive person" for the content of his classroom speech and his

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9. Note that some of the earlier cases relied on due process grounds to invalidate certain state laws. The focus would soon shift to First Amendment principles.

10. U.S. CONST. amend. I.

11. *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952).

12. *Id.* at 185.

13. *Id.* at 195–96 (Frankfurter, J., concurring).

14. *Id.* at 196.

15. *Slochower v. Bd. Of Higher Educ. of N.Y.C.*, 350 U.S. 551, 552 (1956).

16. *Id.* at 559.

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

extramural political associations, was a violation of his due process and free association rights.<sup>18</sup> The Court observed, “We believe that there unquestionably was an invasion of petitioner’s liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread.”<sup>19</sup> The Court elaborated:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.<sup>20</sup>

Justice Felix Frankfurter, in oft-cited concurring language in *Sweezy*, defined 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.”<sup>21</sup> Justice Frankfurter’s four essential freedoms would become a crucial element to later constitutional cases that would grapple with the meaning of academic freedom.

*Sweezy* was followed by a succession of cases that substantially weakened the government’s grip over public schools (K–12) and colleges and universities. In *Shelton v. Tucker*, the Court struck down an Arkansas statute that required all teachers in public schools or colleges to annually disclose organizational memberships.<sup>22</sup> The Court observed, “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”<sup>23</sup> In 1964, the Court decided *Baggett v. Bullitt*.<sup>24</sup> In *Baggett*, professors, staff members, and students from the University of Washington challenged a loyalty oath on constitutional grounds.<sup>25</sup> The Court held that the oath requirement was unconstitutionally vague and, therefore, a violation of basic First Amendment principles.<sup>26</sup>

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18. *Id.* at 246–47.

19. *Id.* at 250.

20. *Id.*

21. *Id.* at 263 (Frankfurter, J., concurring) (internal quotation marks omitted).

22. *Shelton v. Tucker*, 364 U.S. 479, 480 (1960).

23. *Id.* at 487.

24. *Baggett v. Bullitt*, 377 U.S. 360, 360 (1964).

25. *Id.* at 361.

26. *Id.* at 366. Interestingly, the Court recognized the academic freedom of students—albeit it did so indirectly in addressing the standing of the students to sue. The Court observed:

Three years later, in *Keyishian v. Board of Regents of the University of New York*, the concept of academic freedom was explicitly connected to the First Amendment.<sup>27</sup> *Keyishian* involved a challenge to a loyalty oath for state employees brought by four State University of New York professors and a university librarian who also served as a part-time lecturer in English.<sup>28</sup> The Court struck down the oath requirement (i.e., the Feinberg Law) as a violation of the First Amendment.<sup>29</sup> The Court noted:

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.<sup>30</sup>

The Court also observed, “The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’”<sup>31</sup>

In the same term as *Keyishian*, the Court decided *Whitehill v. Elkins*. In *Whitehill*, a potential hire who was offered a teaching position at the University

Since the ground we find dispositive immediately affects the professors and other state employees required to take the oath, and the interests of the students at the University in academic freedom are fully protected by a judgment in favor of the teaching personnel, we have no occasion to pass on the standing of the students to bring this suit.

*Id.* at 366 n.5.

27. *Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 609 (1967).

28. *Id.* at 592.

29. *Id.* at 609. This case overturned the Supreme Court’s decision in *Adler v. Board of Education* (upholding the Feinberg Law). *Adler v. Bd. of Educ.*, 342 U.S. 485, 509 (1952). Note that Justice Douglas, in his dissenting opinion in *Adler*, was the first to mention “academic freedom” in a judicial opinion. *Id.* at 509 (Douglas, J., dissenting). He wrote:

The mere fact of membership in the organization raises a prima facie case of her own guilt. She may, it is said, show her innocence. But innocence in this case turns on knowledge; and when the witch hunt is on, one who must rely on ignorance leans on a feeble reed. The very threat of such a procedure is certain to raise havoc with academic freedom.

*Id.* He further explained:

What happens under this law is typical of what happens in a police state. . . . A pall is cast over the classrooms. There can be no real academic freedom in that environment. Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect. . . . This system of spying and surveillance with its accompanying reports and trials cannot go hand in hand with academic freedom. It produces standardized thought, not the pursuit of truth. Yet it was the pursuit of truth which the First Amendment was designed to protect.

*Id.* at 510–11.

30. *Keyishian*, 385 U.S. at 603 (emphasis added).

31. *Id.*

of Maryland challenged the constitutionality of a state-mandated loyalty oath that was a prerequisite for his employment.<sup>32</sup> The loyalty oath required the professor to certify that he was “not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence.”<sup>33</sup> The Court, in a unanimous opinion, struck down the oath requirement.<sup>34</sup> Relying on the principles set forth in *Sweezy*, the Court observed, “We are in the First Amendment field. The continuing surveillance which this type of law places on teachers is hostile to academic freedom.”<sup>35</sup>

Starting in the 1970s, courts began to rely on the language contained in McCarthy-era academic freedom cases—especially Justice Frankfurter’s concurrence in *Sweezy*—to define academic freedom as a special deference to universities in their educational decisions that insulated them from state interference, including interference from courts.<sup>36</sup> In these cases, like the earlier ones from the 1950s and 60s, the interests of the institutions and their professors were aligned; therefore, no distinction between institutional and professorial freedoms was discussed. For example, in *Regents of the University of California v. Bakke*, the Court upheld race-conscious admissions at UC-Davis Medical School.<sup>37</sup> In *Bakke*, a white male applicant, who was denied admission after two attempts, challenged the race-conscious admissions policy as a violation of the Equal Protection Clause.<sup>38</sup> Under this constitutional provision, the government is required to justify its actions based on different levels of review depending on the nature of the rights involved or the classifications made.<sup>39</sup> If the government action infringes upon a fundamental right or makes classifications based on a person’s membership in a suspect class (e.g., race or ethnicity), then the applicable standard of review for a court hearing the challenge is strict scrutiny.<sup>40</sup> The Court found that the relevant standard for *Bakke* was strict scrutiny since the policy in question was based on

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32. *Whitehill v. Elkins*, 389 U.S. 54, 55 (1967).

33. *Id.*

34. *Id.* at 62.

35. *Id.* at 59–60.

36. For a fascinating account of the historic rationale for judicial deference to academic decisions see Robert M. O’Neil, *Judicial Deference to Academic Decisions: An Outmoded Concept?*, 36 J.C. & U.L. 729, 729–47 (2010).

37. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 269–71 (1978).

38. *Id.* at 276–78.

39. The Equal Protection Clause of the Fourteenth Amendment provides, in pertinent part: “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.

40. *Bakke*, 438 U.S. at 291 (“Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.”).



racial classifications.<sup>41</sup> When strict scrutiny is applied, the government must show that its action is narrowly tailored to achieve a compelling state interest.<sup>42</sup> Justice Powell, writing the plurality opinion, found that educational diversity was a compelling government interest under strict scrutiny review.<sup>43</sup> The Court, citing Justice Frankfurter's concurrence in *Sweezy*, reasoned that academic freedom for a university includes the discretion to select its own student body on educational grounds.<sup>44</sup> This constitutionally permissible use of race, based on the discretion afforded universities under academic freedom to choose whom to admit, was affirmed by the Supreme Court in both *Grutter v. Bollinger* and *Gratz v. Bollinger*.<sup>45</sup> These companion cases involved challenges to the race-conscious admissions policies at the University of Michigan Law School and undergraduate program, respectively. In affirming the University of Michigan Law School's policy in *Grutter*, the Court observed:

We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition. . . . Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that "good faith" on the part of a university is "presumed" absent "a showing to the contrary."<sup>46</sup>

In the most recent challenge to race-conscious admissions, *Fisher v. University of Texas*, the Court deferred to the university's educational

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41. *Id.* at 299. The other two levels of scrutiny are intermediate scrutiny and rational basis review. If the government action makes classifications based on a person's membership in a quasi-suspect class (e.g., gender), then the court hearing the challenge will apply intermediate scrutiny. *See, e.g., Craig v. Boren*, 429 U.S. 190, 197 (1976) (holding that intermediate scrutiny applies to classifications by gender). Under intermediate scrutiny, the government must demonstrate that its actions were substantially related to an important government objective. *Id.* ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."). Finally, for all other categories of state action (e.g., economic regulations), the court hearing the challenge will apply rational basis review—in which the government must show that its actions were rationally related to a legitimate state objective. *See, e.g., United States v. Carolene Products*, 304 U.S. 144, 152 (1938) (holding rational basis review applies to economic regulations). Strict scrutiny is the most difficult standard of review for a law to survive. Rational basis review, on the other hand, is the least stringent. Intermediate scrutiny falls somewhere in between the two.

42. *Bakke*, 438 U.S. at 299 ("When [the classifications] touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.").

43. *Id.* at 312–14.

44. *Id.* at 312.

45. *Gratz v. Bollinger*, 539 U.S. 244, 271–75 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 343–44 (2003).

46. *Grutter*, 539 U.S. at 329.

judgment as to the compelling interest that diversity serves, but remanded the case for the lower court to properly apply the narrow tailoring analysis to the means chosen to further that interest.<sup>47</sup> From *Bakke* to *Fisher*, therefore, the Court has shown deference to the university's educational judgments.

In the context of academic dismissals, the Court has also given deference to universities. In *Board of Curators v. Horowitz*, a medical student at the University of Missouri-Kansas City Medical School brought a due process challenge to her dismissal during her final year of study for failure to meet academic standards.<sup>48</sup> The Court, in ruling that due process was satisfied, differentiated the heightened process required for disciplinary dismissals to the facts at hand in the following way:

The decision to dismiss respondent, by comparison, rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.<sup>49</sup>

In other words, academic dismissals required academic judgments that are best made by school officials. Further, in *Regents of the University of Michigan v. Ewing*, the Court upheld a medical school's decision to dismiss a student on academic grounds.<sup>50</sup> The medical school refused to allow the student to re-take an exam after that student failed with the lowest score in the history of the program.<sup>51</sup> In recognizing academic freedom at the institutional level, the Court deferred to the educational judgment of the medical school to determine whether a student should be dismissed based on academic grounds.<sup>52</sup> In a footnote, the Court also acknowledged the potential conflict between institutional and professorial freedoms, noting: "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students . . . but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself . . ."<sup>53</sup> This tension will be highlighted in cases where professorial and institutional interests diverge.

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47. *Fisher v. Univ. of Texas*, 133 S.Ct. 2411, 2421 (2013).

48. *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 79 (1978).

49. *Id.* at 89–90.

50. *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 215 (1985).

51. *Id.* at 216.

52. *Id.* at 225.

53. *Id.* at 226 n.12 (citations omitted).

In cases where students have claimed free speech rights in the face of educational judgments made by universities, institutional academic freedom has fared well.<sup>54</sup> In a case decided by the Ninth Circuit, *Brown v. Li*, a student at the University of California at Santa Barbara challenged the university's refusal, based on its curriculum requirements, to allow the student to include a "disacknowledgements" section in his master's thesis as a violation of his free speech rights.<sup>55</sup> This section began, "I would like to offer special *Fuck You's* to the following degenerates for of [sic] being an ever-present hindrance in my graduate career. . . ." and identified a number of university affiliates and others that supposedly hindered his progress toward his degree.<sup>56</sup> The court found for the university, noting that the "decision was reasonably related to a legitimate pedagogical objective: teaching [the plaintiff] the proper format for a scientific paper."<sup>57</sup> Similarly, in a case before a federal district court, *Yacovelli v. Moeser*, a number of University of North Carolina at Chapel Hill (UNC) students brought a Free Exercise Clause claim against the university to prevent it from assigning a book with a positive portrayal of Islam.<sup>58</sup> The reading assignment was part of an orientation program for all freshmen. UNC allowed any student who objected to the reading to opt out of the assignment.<sup>59</sup> The district court, giving deference to the university's educational judgment, dismissed the students' claim.<sup>60</sup> The court noted, "UNC, instead of endorsing a particular religious viewpoint, merely undertook to engage students in a scholarly debate . . . about the Islamic religion. Students were free to share their opinions on the topic whether their opinions be positive, negative or neutral."<sup>61</sup>

Institutional academic freedom, however, is not absolute. Universities are given discretion to make their educational decisions unless these decisions are constitutionally or otherwise legally prohibited. For example, in *Bakke*, although the educational benefits of diversity were deemed compelling for equal protection purposes, the two-tiered admissions process—one for regular applicants and a separate one for racial minorities that were considered "disadvantaged"—was struck down for not being narrowly tailored.<sup>62</sup> The same result occurred as with the University of Michigan's undergraduate admissions policy in *Gratz*, which assigned a specific weight to

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54. Students' free speech rights are beyond the scope of this Article so they will not be addressed in detail here.

55. *Brown v. Li*, 308 F.3d 939, 941 (9th Cir. 2002).

56. *Id.* at 943.

57. *Id.* at 952.

58. *Yacovelli v. Moeser*, 324 F. Supp. 2d 760, 762 (M.D.N.C. 2004).

59. *Id.*

60. *Id.* at 763–65.

61. *Id.* at 764.

62. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 272–73, 320 (1978).

underrepresented minority status that proved determinative in the admissions decision.<sup>63</sup> The only race-conscious admissions policy that has survived strict scrutiny review by the U.S. Supreme Court was the University of Michigan Law School's in *Grutter*, which employed flexible, individualized, holistic review.<sup>64</sup> So, although the Court will grant some deference to universities based on institutional academic freedom, it will still scrutinize these decisions to ensure compliance with constitutional principles. This scrutiny can also be seen in antidiscrimination law.

In *Powell v. Syracuse University*, a visiting architecture professor challenged her termination as a product of racial and sexual bias.<sup>65</sup> Even though the Second Circuit affirmed the district court's dismissal of her claims, the court nonetheless recognized that the academic freedom of a university does not embrace "the freedom to discriminate."<sup>66</sup> Similarly, in *University of Pennsylvania v. EEOC*, the university challenged the EEOC's refusal to exclude relevant peer review materials in a discrimination case brought by a Chinese-American female professor who was denied tenure.<sup>67</sup> The university claimed a special academic freedom privilege protecting disclosure of peer review materials based on principles of institutional academic freedom to determine "who may teach."<sup>68</sup> The Court summarized the university's argument as follows:

[I]t argues that the First Amendment is infringed by disclosure of peer review materials because disclosure undermines the confidentiality which is central to the peer review process, and this in turn is central to the tenure process, which in turn is the means by which [the university] seeks to exercise its asserted academic-freedom right of choosing who will teach.<sup>69</sup>

The Court then observed, "To verbalize the claim is to recognize how distant the burden is from the asserted right."<sup>70</sup> The Court ruled for the professor holding that she had an unqualified right to acquire the peer review materials to determine whether illegal discrimination took place.<sup>71</sup> This case serves as a reminder that universities' claims to academic freedom will not immunize them from the strictures of Title VII and other federal laws.

Some courts have acknowledged that universities provide a special context in matters involving free expression relating to conditional grants. In *Rust v.*

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63. *Gratz v. Bollinger*, 539 U.S. 244, 271–72, 275 (2003).

64. *Grutter v. Bollinger*, 539 U.S. 306, 334–35 (2003).

65. *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1151 (2d Cir. 1978).

66. *Id.* at 1151, 1154.

67. *Univ. of Pa. v. EEOC*, 493 U.S. 182, 184–86 (1990).

68. *Id.* at 196.

69. *Id.* at 199–200.

70. *Id.* at 200.

71. *Id.* at 201–02.

*Sullivan*, the Court held that the Department of Health and Human Services' regulations limiting the ability of recipients of federal funding to engage in abortion-related activities were constitutionally permissible.<sup>72</sup> However, the Court noted that such restrictions on funding in higher educational contexts may engender a different result by noting:

[W]e have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.<sup>73</sup>

Other cases have presented a narrower view. For example, in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* ("FAIR"), the Court rejected the law schools' argument that they should have the discretion, under First Amendment principles, to exclude military recruiters on their campuses.<sup>74</sup> The law schools contended that such exclusion was as an expression of their opposition to military policies that discriminate against openly LGBT soldiers, and they should, therefore, not be penalized by the loss of federal funding under the Solomon Amendment.<sup>75</sup> The Court rejected the law schools' free speech claim and held for the military, observing that "[n]othing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies."<sup>76</sup> This case demonstrates that institutional expression can be limited by federal funding regulations.

In addition to institutional academic freedom, individual professors also have protections in their scholarly work based on First Amendment principles. I will explore some of these protections in the next part.

## 2. Academic Freedom as Free Speech for Professors: Divergence of Professorial and University Interests

A number of cases have recognized that First Amendment protections can apply to a public university professor's right to engage in his or her scholarly work at the university and speech outside the classroom. In most of these cases, the interests of professors and their universities are at odds; indeed, the typical dispute arises when professors are punished for veering away from institutional mandates such as sexual harassment policies, grading rules, or internet usage restrictions. The professors have then pressed their claims in

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72. *Rust v. Sullivan*, 500 U.S. 173, 177–78, 203 (1991).

73. *Id.* at 200.

74. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 53, 56 (2006).

75. *Id.* at 51–53.

76. *Id.* at 65.

court, claiming that the state universities have infringed on their constitutional rights. In these cases, the dichotomy between institutional and professorial rights becomes clear. To illustrate this distinction between institutional and professorial freedom, I analyze court cases that support the existence of the following five broad categories of professorial freedom: 1) classroom teaching; 2) faculty speech not related to teaching; 3) curricular decisions; 4) grading; and 5) research.<sup>77</sup>

a. Faculty Speech Related to Classroom Teaching

Professor speech at public universities is protected by the same principles that protect the free speech of all other public employees. In *Pickering v. Board of Education*, the U.S. Supreme Court held for the first time that a public employee could claim First Amendment protection while speaking as a citizen on matters of public concern.<sup>78</sup> Prior to *Pickering*, the dominant legal view was that public employees relinquished constitutional rights by agreeing to work for the government. For example, in *McAuliffe v. Mayor of New Bedford*, a police officer was fired for violating a rule against political canvassing.<sup>79</sup> The police officer challenged the termination in court, but the Massachusetts Supreme Judicial Court held that the officer waived his constitutional rights by signing his employment contract observing:

The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech . . . by the implied terms of his contract.<sup>80</sup>

This view would be dominant until *Pickering* was decided in 1968.

*Pickering* involved a high school teacher who challenged his termination for publishing critical comments about the school leadership.<sup>81</sup> Specifically, the teacher wrote a letter to a newspaper that criticized the Board of Education's allocation of school funds between educational and athletic programs and the Board's and the superintendent's methods of preventing the school district's taxpayers from knowing the real reasons why additional revenues were being requested for the schools.<sup>82</sup> The Court, in ruling for the

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77. In a book that I am currently writing, under a publication agreement with Lexington Books, I expand these general categories to include faculty artistic expression and shared governance.

78. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574–75 (1968).

79. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

80. *Id.* at 517–18. This view was later superseded by the doctrine of unconstitutional conditions. See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1415–16 (1989).

81. *Pickering*, 391 U.S. at 564.

82. *Id.* at 569.

teacher, articulated the following balancing test: “The problem in any case is to arrive at a balance between the interests of the teacher, 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.”<sup>83</sup>

Free speech protection for public employees was, therefore, not absolute. The Court must first make a determination under *Pickering* that the public employee was speaking as a citizen on “matters of public concern.”<sup>84</sup> After this threshold issue is determined, a balancing test would then be employed to determine if the speech would be protected under the First Amendment. The contours of the *Pickering* test were subsequently defined by a number of Supreme Court cases, including *Mount Healthy School District Board of Education v. Doyle* and *Connick v. Myers*.<sup>85</sup> Subsequent court decisions have relied on the *Pickering* test in a variety of public employment contexts, including those brought by college and university professors who are attempting to protect their classroom speech.

While determining if professor speech used in classroom teaching is protected under the *Pickering* test, many courts have looked to the pedagogical relevance of the disputed speech.<sup>86</sup> Specifically, these courts have found that

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83. *Id.* at 568.

84. *Id.*

85. *Connick v. Myers*, 461 U.S. 138, 147–49 (1983) (holding that public employees speaking about internal office matters are not speaking on matters of public concern and, therefore, not protected by *Pickering*); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (defining the following procedure for *Pickering* analysis: First, the plaintiff must prove that he engaged in constitutionally protected speech—i.e., plaintiff spoke as a citizen on matters of public concern and whose speech interest outweighed the employer’s interest in prescribing the speech. Second, the plaintiff must show that the conduct was a “substantial” or “motivating” factor behind the termination. Third, the defendant can avoid liability if it can show by a preponderance of the evidence that it would have reached the same decision to terminate the plaintiff, even in the absence of the protected conduct). *See also Waters v. Churchill*, 511 U.S. 661, 677–78 (1994) (holding that it was not necessary to determine what an employee actually said, as long as the employee had a reasonable belief as to the content and a reasonable belief that such content would cause workplace disruption); *Rankin v. McPherson*, 483 U.S. 378, 380–81, 388, 392 (1987) (holding that the speech of a county deputy constable who was overheard by a co-worker making comments regarding a presidential assassination attempt was a matter of public concern and the balance weighed in employee’s favor under *Pickering*).

86. Note that some courts have just applied the pedagogical relevance test without any reference to *Pickering*. *See, e.g., Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968, 972 (9th Cir. 1996) (holding that sexual harassment policy as applied to the professor in this case was too vague, noting that he “was simply without any notice that the Policy would be applied in such a way as to punish his longstanding teaching style—a style which, until the College imposed punishment upon Cohen under the Policy, had apparently been considered pedagogically sound and within the bounds of teaching methodology permitted at the College.”); *Kracunas v. Iona Coll.*, 119 F.3d 80, 88 (2d Cir. 1997) (noting the relevant standard for the protection of the

the speech must be germane to the content that the professor is teaching about in order to be protected by the First Amendment. For example, in *Hardy v. Jefferson Community College*, an adjunct instructor was dismissed for using the words “nigger” and “bitch” in his class regarding the impact of such oppressive and disparaging language.<sup>87</sup> In applying the “public concern” prong of *Pickering*, the Sixth Circuit noted:

Because the essence of a teacher’s role is to prepare students for their place in society as responsible citizens, classroom instruction will often fall within the Supreme Court’s broad conception of “public concern.” . . . Although Hardy’s in-class speech does not itself constitute pure public debate, it does relate to matters of overwhelming public concern—race, gender, and power conflicts in our society.<sup>88</sup>

In applying the *Pickering* balancing test, the court held, “On balance, Hardy’s rights to free speech and academic freedom outweigh the College’s interest in limiting that speech.”<sup>89</sup> In *Dube v. State University of New York*, an assistant professor of Africana Studies claimed that he was denied tenure for discussing controversial subjects in the classroom.<sup>90</sup> Specifically, the professor made comparisons between Nazism in Germany, Apartheid in South Africa, and Zionism in Israel in a class titled *The Politics of Race*.<sup>91</sup> The Second Circuit remanded the First Amendment claims to trial and rejected qualified immunity as a defense.<sup>92</sup> In citing to *Pickering* and other cases, the Second Circuit observed that “assuming the defendants retaliated against [the professor] based upon the content of his classroom discourse, such conduct was, as a matter of law, objectively unreasonable.”<sup>93</sup>

Some courts have refused to apply college sexual harassment policies to punish professors who had legitimate pedagogical reasons for teaching in a provocative way. In *Silva v. University of New Hampshire*, a tenured professor brought an action against the university after he was dismissed for violating the

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professor’s speech was whether it “was done in good faith as part of his teaching . . . [or] as appropriate to further a pedagogical purpose.”).

87. *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 675 (6th Cir. 2001).

88. *Id.* at 679 (citation omitted).

89. *Id.* at 682.

90. *Dube v. State Univ. of N.Y.*, 900 F.2d 587, 589–90 (2d Cir. 1990).

91. *Id.* at 589.

92. *Id.* at 600. In a civil rights action pursuant to 42 U.S.C. § 1983, qualified immunity protects government officials performing discretionary functions from civil damages “insofar as their conduct does not violate clearly established or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

93. *Dube*, 900 F.2d at 598. *But see Vega v. Miller*, 273 F.3d 460, 468 (2d Cir. 2001) (upholding qualified immunity defense because no court has clearly established First Amendment academic freedom rights for the type of conduct that the professor engaged in).



university's sexual harassment policy.<sup>94</sup> The professor, while teaching a course on technical writing, engaged the students in a number of sex-themed discussions. For example, he compared the relationship between writers and their subjects to the sexual relationships between people.<sup>95</sup> He also illustrated how a good definition combines a general classification with concrete specifics by invoking the following analogy, "Belly dancing is like jello on a plate with a vibrator under the plate."<sup>96</sup> The professor claimed that he used these sexual examples because he was trying to catch the attention of his class and relate abstract concepts to everyday experiences.<sup>97</sup> A number of female students complained about these examples and the professor was eventually dismissed after a formal hearing.<sup>98</sup> In finding that Silva's speech touched on matters of public concern, the court recognized:

It is a fundamental tenet of First Amendment jurisprudence that the preservation of academic freedom is a matter of public concern. . . . Further, the issue of whether speech which is offensive to a particular class of individuals should be tolerated in American schools is a matter of public concern.<sup>99</sup>

The court held in this regard, "The evidence . . . demonstrates that Silva's classroom statements were not statements 'upon matters only of personal interest,' but rather were made for the legitimate pedagogical, *public* purpose of conveying certain principles related to the subject matter of his course."<sup>100</sup> The court then, under what it called the "*Connick-Pickering* balancing test," held, "Silva's First Amendment interest in the speech at issue is overwhelmingly superior to UNH's interest in proscribing said speech."<sup>101</sup>

Other courts have recognized situations where professors were not shielded by the First Amendment because the classroom speech was not relevant to the subject matter. For example, in *Bonnell v. Lorenzo*, a community college professor was dismissed for using offensive language in class unrelated to any legitimate teaching purpose.<sup>102</sup> He consistently used the words "fuck," "cunt," "pussy," "shit," "damn," and "ass" and made a number of sexual jokes in his English class without any pedagogical purpose.<sup>103</sup> In finding that some of the speech—namely the professor's sarcastic apology—touched on matters of

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94. *Silva v. Univ. of N.H.*, 888 F. Supp. 293, 317 (D.N.H. 1994).

95. *Id.* at 298.

96. *Id.* at 299.

97. *Id.* at 298.

98. *Id.* at 311.

99. *Silva*, 888 F. Supp. at 315 (citations omitted).

100. *Id.* at 316.

101. *Id.*

102. *Bonnell v. Lorenzo*, 241 F.3d 800, 802–03 (6th Cir. 2001).

103. *Id.* at 805.

public concern and balancing the interests under *Pickering*, the Sixth Circuit held for the student, noting:

While 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. To hold otherwise under these circumstances would send a message that the First Amendment may be used as a shield by teachers who choose to use their unique and superior position to sexually harass students secure in the knowledge that *whatever* they say or do would be protected.<sup>104</sup>

Similarly, in *Martin v. Parrish*, a college professor challenged his termination for his incessant use of profanity in the classroom.<sup>105</sup> The professor browbeat his students with expletives such as "bullshit," "hell," "damn," "God damn," and "sucks" in response to their alleged poor attitude.<sup>106</sup> The professor claimed that his speech was protected by the First Amendment.<sup>107</sup> The Fifth Circuit, in applying *Pickering* (although citing only to *Connick v. Meyers*), held for the university.<sup>108</sup> The Court noted that the professor's abusive speech did not relate to matters of public concern and, therefore, did not even reach the balancing test.<sup>109</sup> The Court further noted that the students were a "captive" audience and they "paid to be taught and not be vilified in indecent terms."<sup>110</sup> In *Piggee v. Carl Sandburg College*, a part-time instructor of cosmetology at a community college located in Galesburg, Illinois, gave a gay student two religious pamphlets on the sinfulness of homosexuality.<sup>111</sup> After the student complained to administrators, the instructor was terminated.<sup>112</sup> The instructor then challenged the termination on First Amendment grounds.<sup>113</sup> The Seventh Circuit, applying *Pickering*, ruled for the college.<sup>114</sup> Assuming that the instructor's proselytizing related to matters of public concern, the court then noted that "we see no reason why a college or university cannot direct its instructors to keep personal discussions about sexual orientation or religion out of a cosmetology class or clinic."<sup>115</sup>

The outcomes of these cases have turned on the pedagogical relevance of the speech at issue. When the professors' classroom speech was not germane to

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104. *Id.* at 823–24.

105. *Martin v. Parrish*, 805 F.2d 583, 583–84 (5th Cir. 1986).

106. *Id.* at 584.

107. *Id.*

108. *Id.* at 583–84.

109. *Id.* at 585.

110. *Martin*, 805 F.2d at 586.

111. *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 668 (7th Cir. 2006).

112. *Id.*

113. *Id.* at 670.

114. *Id.* at 673.

115. *Id.* at 671, 673.

any pedagogical purpose—e.g., the professors just used profanity for its own sake or engaged in conduct that antagonized their students—the speech was not protected under the *Pickering* test.

In 2006, *Pickering* was substantially narrowed by *Garcetti v. Ceballos*.<sup>116</sup> *Garcetti* involved a deputy district attorney who claimed retaliation for a memorandum he wrote and circulated to his supervisors criticizing factual inaccuracies in an affidavit related to a pending criminal case.<sup>117</sup> The Court held that this public employee was not protected under *Pickering* because “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”<sup>118</sup> Concerned about the implications that the majority opinion would have on professor speech at public universities, Justice Souter wrote in dissent:

This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today’s majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write “pursuant to . . . official duties.”<sup>119</sup>

The majority responded in language that has become known as the *Garcetti* reservation:

There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.<sup>120</sup>

Courts that have subsequently applied *Garcetti* to speech involving classroom teaching have generally recognized the reservation. In *Kerr v. Hurd*, a federal district court ruled that a medical professor’s speech—in which he advocated vaginal delivery to his students over Caesarean sections and lectured on the use of forceps—was protected under the First Amendment.<sup>121</sup> A federal district court in Ohio noted:

Recognizing an academic freedom exception to the *Garcetti* analysis is important to protecting First Amendment values. Universities should be the active trading floors in the marketplace of ideas. Public universities should be

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116. See *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006).

117. *Id.* at 413–14.

118. *Id.* at 421.

119. *Id.* at 438 (Souter, J., dissenting) (citation omitted).

120. *Id.* at 425 (majority opinion).

121. *Kerr v. Hurd*, 694 F. Supp. 2d 817, 842 (S.D. Ohio 2010).

no different from private universities in that respect. At least where, as here, the expressed views are well within the range of accepted medical opinion, they should certainly receive First Amendment protection, particularly at the university level.<sup>122</sup>

Similarly, in *Sheldon v. Dhillon*, a federal district court in California recognized that the “official duties” analysis in *Garcetti* did not apply to a biology professor’s teaching-related comments regarding possible scientific causes of homosexuality.<sup>123</sup>

In sum, courts have analyzed professor classroom speech under the First Amendment by using public employee free speech principles. They have attempted to distinguish constitutionally protected, pedagogically relevant speech from unprotected harassing speech by protecting the former but not the latter. Based on recent cases, professors at state universities have the strongest level of constitutional protection in speech related to their teaching.

#### b. Faculty Speech Not Related to Classroom Teaching

In the wake of *Garcetti*, lower courts have struggled to consistently apply what academic freedom means in situations where professor speech outside the classroom-teaching context and university interests are at odds—particularly in situations where professors have criticized their administrations.

Reflecting on *Garcetti*, Judith Areen argues that restricting university professors to only promoting government-approved messages would interfere with the traditional role of public higher education and would, thus, be an unconstitutional prohibition against free speech.<sup>124</sup> This approach has gained limited traction in the courts. Indeed, a number of courts have simply ignored the *Garcetti* majority’s stated reservation and found that university professor speech criticizing university management was not protected by the First Amendment any more than other public employees’ speech.

In *Renken v. Gregory*, a tenured engineering professor at the University of Wisconsin at Milwaukee had his pay reduced and his research funding terminated after he criticized the university’s use of grant funds.<sup>125</sup> He brought

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122. *Id.*

123. *Sheldon v. Dhillon*, No. C-08-03438 RMW, 2009 WL 4282086, at \*3 (N.D. Cal. Nov. 25, 2009).

124. Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 999–1000 (2009). Areen makes an analogy to *Legal Services Corporation v. Velazquez*, in which the U.S. Supreme Court invalidated a rule that legal services attorneys could not make certain arguments when representing clients seeking to change existing welfare law. *Id.* at 992; *see also* *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 549 (2001). The Court recognized that such a rule could interfere with the traditional role of attorneys in the judicial system and was, therefore, an unconstitutional prohibition against free speech. *Id.* at 534.

125. *Renken v. Gregory*, 541 F.3d 769, 770–72 (7th Cir. 2008).

a First Amendment challenge in court.<sup>126</sup> The Seventh Circuit, relying on *Garcetti*, held that the professor was not protected by the First Amendment because he “was speaking as a faculty employee, and not as a private citizen, because administering the grant . . . fell within his teaching and service duties that he was employed to perform.”<sup>127</sup> Similarly, in *Gorum v. Sessoms*, a tenured communications professor at Delaware State University was terminated for making critical comments against the administration, for advising a student-athlete who violated the university disciplinary code, and for rescinding an invitation to the university president to speak at a public event.<sup>128</sup> The Third Circuit, also relying on *Garcetti*, held the professor was not protected by the First Amendment because he was acting in accordance with his official duties, and not as a private citizen.<sup>129</sup>

In a recent case, the Fourth Circuit gave proponents of professorial academic freedom hope that some judges would be willing to recognize a constitutionally based protection for individual professors speaking on matters outside of classroom teaching. *Adams v. Trustees of the University of North Carolina-Wilmington* involved a state university professor’s challenge to his university’s refusal to promote him to full professor, which he alleged was based on his outspoken Christian and conservative beliefs.<sup>130</sup> This professor publicized his beliefs in various fora outside the university including conservative internet news sites and radio and television broadcasts. The university argued that *Garcetti* precluded the professor’s First Amendment claims because the professor’s speech was made in relation to his official duties as a state employee.<sup>131</sup> The Fourth Circuit rejected this argument noting:

Applying *Garcetti* to the academic work of a public university faculty member under the facts of this case could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment. That would not appear to be what *Garcetti* intended, nor is it consistent with our long-standing recognition that no individual loses his ability to speak as a private citizen by virtue of public employment. In light of the above factors, we will not apply *Garcetti* to the circumstances of this case.<sup>132</sup>

This holding, thus, recognized an exception to *Garcetti* for a professor’s speech not related to classroom teaching. Similarly, in *Demers v. Austin*, the Ninth Circuit held that a tenured Washington State University professor’s

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126. *Id.* at 773.

127. *Id.* at 774.

128. *Gorum v. Sessoms*, 561 F.3d 179, 182–84 (3d Cir. 2009).

129. *Id.* at 185.

130. *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 553 (4th Cir. 2011).

131. *Id.* at 564.

132. *Id.*

distribution of a pamphlet and submission of an in-progress book, both of which were critical of the university, were matters of public concern under *Pickering*.<sup>133</sup> The Court made it clear that *Garcetti* did not apply to these types of professorial speech.<sup>134</sup>

Other courts have ruled more narrowly, finding faculty criticism of university policies outside the realm of protected speech. In *Payne v. University of Arkansas, Fort Smith*, a tenured professor was demoted for criticizing a university policy that increased the minimum hours that faculty members were expected to be present on campus.<sup>135</sup> Relying on *Garcetti*, the court held:

Plaintiff's email and subsequent discussion . . . regarding the policy was a criticism of a condition of employment, not of public concern. Accordingly, the Court finds that, as a matter of law, Plaintiff's speech does not relate to matters of public concern for the purposes of *Pickering* and, therefore, is not protected speech under the First Amendment.<sup>136</sup>

Further, in *Hong v. Grant*, a tenured engineering professor at the University of California at Irvine was denied a merit salary increase because of his critical statements to other faculty members regarding the hiring and promotion of some of his colleagues and regarding the university's use of lecturers to teach courses.<sup>137</sup> In ruling for the university, the federal district court noted that the professor's statements "were made pursuant to his official duties as a faculty member and therefore do not deserve First Amendment protection."<sup>138</sup> In other words, the professor's speech, which the court found connected to his duties as a professor, was not at all protected by the First Amendment. Robert M. O'Neil notes that a bizarre result of this ruling, if taken to its logical conclusion, would be that faculty members "would, in effect, be able to speak freely only about matters that are remote from their academic disciplines and expertise, while being denied such protection when speaking or writing within that realm."<sup>139</sup>

Some courts have viewed speech made on a faculty governance committee as not protected by the First Amendment. In *Isenalumhe v. McDuffie*, two tenured nursing professors at Medgar Evars College of the City University of New York, who were members of various faculty committees, complained

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133. *Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014).

134. *Id.* at 412.

135. *Payne v. Univ. of Ark. Fort Smith*, No. 04-2189, 2006 U.S. Dist. LEXIS 52806 at \*3, \*9, \*12 (W.D. Ark. July 26, 2006).

136. *Id.* at \*13.

137. *Hong v. Grant*, 516 F. Supp. 2d 1158, 1160 (C.D. Cal. 2007).

138. *Id.* at 1168.

139. Robert M. O'Neil, *Academic Speech in the Post-Garcetti Environment*, 7 FIRST AMEND. L. REV. 1, 20 (2008).

about the process of instituting curricular changes and the process of hiring new faculty.<sup>140</sup> They claimed that the department chairperson subsequently retaliated against them for these complaints.<sup>141</sup> A New York federal district court held that the disputed speech was made pursuant to their official duties as faculty committee members and was not speech made by citizens on matters of public concern.<sup>142</sup> In a similar vein, in *Savage v. Gee*, the head reference librarian at Ohio State University at Mansfield claimed that he was retaliated against for suggesting a book to assign to all incoming freshman while he was serving on a faculty committee convened for that purpose.<sup>143</sup> The book contained “a chapter discussing homosexuality as aberrant human behavior.”<sup>144</sup> While recognizing that there may be a possible *Garcetti* exception to “teaching or research,” the Ohio federal trial court held that the librarian’s recommendation was neither.<sup>145</sup> Instead, the court found, it was made “pursuant to [his] official duties” in serving on the committee and was, therefore, not protected under the First Amendment.<sup>146</sup> These decisions stand in stark contrast to the view that faculty speech related to faculty governance—made pursuant to service on governance committees—should be protected by academic freedom.

In summary, a professor’s speech at state institutions not related to classroom teaching is governed by the same legal framework that protects the speech of all government employees. Specifically, if the professor is speaking as a citizen on matters of public concerns, courts will apply the *Pickering* balancing test to determine if the speech is protected.<sup>147</sup> However, if a court

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140. *Isenalumhe v. McDuffie*, 697 F. Supp. 2d 367, 369–72 (E.D.N.Y. 2010).

141. *Id.* at 369.

142. *Id.* at 378.

143. *Savage v. Gee*, 716 F. Supp. 2d 709, 710, 713 (S.D. Ohio 2010).

144. *Id.* at 711.

145. *Id.* at 718.

146. *Id.* at 717.

147. Some courts will apply a different test for situations in which universities impose prior restraints on unspoken speech. This situation is unlike the *Pickering* line of cases because instead of being punished after engaging in prohibited speech, the professors or students are instead prohibited from speaking altogether. For example, in *Crue v. Aiken*, the University of Illinois, pursuant to athletic regulations, did not allow Native American students to communicate with prospective student-athletes. The students wanted to inform these prospective students about their views on a current mascot controversy. *Crue v. Aiken*, 370 F.3d 668, 674 (7th Cir. 2004). Relying on *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), the Court articulated a balancing test for prior restraints on speech in which the government must demonstrate “the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by the expressions’ ‘necessary impact on the actual operation’ of the Government.” *Id.* at 678. The Seventh Circuit held that the students’ right to express what they saw was a blatantly racist practice outweighed the university’s interest in suppressing the speech. *Id.* at 680.

determines that a professor is speaking as a public employee, and not as a citizen on matters of public concern, then the speech is not protected by the First Amendment. Courts have generally held that professorial speech on matters of institutional functioning are made as part of official employment duties and, thus, not matters of public concern—thereby, stripping professors of First Amendment protection for this speech. However, the issue is far from settled.

c. Faculty Curricular Decisions

Professors have certain rights over the content of the curriculum when their students disagree as to what that content should be.<sup>148</sup> In *Axson-Flynn v. Johnson*, a student, based on her Mormon beliefs, refused to use particular offensive words or to take God's name in vain during classroom acting exercises at the University of Utah's Actor Training Program.<sup>149</sup> The faculty members told her to "get over" her language issues and she eventually left the program because she believed that she would have been eventually dismissed.<sup>150</sup> The student challenged the university's attempt to force her to use certain words as a violation of her free speech and free exercise rights under the First Amendment.<sup>151</sup> The Tenth Circuit acknowledged that this was "school-sponsored speech," and as such, the university's decision to compel that speech would be upheld as long as its decision was "reasonably related to legitimate pedagogical concerns."<sup>152</sup> The court remanded the case to determine whether the strict adherence requirement was truly pedagogical or a pretext for religious discrimination.<sup>153</sup> Similarly, in *Head v. Board of Trustees of California State University*, a student in San Jose State University's teaching credential program challenged the institutionalization of multiculturalism in the university's curriculum as a violation of his First Amendment rights—given that he vehemently disagreed with the tenets of multiculturalism.<sup>154</sup> The court 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 to interfere with instruction or the educational mission. Although the

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148. A similar principle applies in the K–12 classroom. *See, e.g., Settle v. Dickson Cnty. Sch. Bd.*, 53 F.3d 152, 155 (6th Cir. 1995) ("So long as the teacher limits speech or grades speech in the classroom in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion, the federal courts should not interfere.").

149. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1280 (10th Cir. 2004).

150. *Id.* at 1282–83.

151. *Id.* at 1280.

152. *Id.* at 1290.

153. *Id.* at 1293.

154. *Head v. Bd. of Trs. of Cal. State Univ.*, No. H029129, 2007 Cal. App. Unpub. LEXIS 393, at \*7–8 (Cal. Ct. App. Jan. 18, 2007).



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.<sup>155</sup>

Both *Axon-Flynn* and *Head* cited to *Hazelwood v. Kuhlmeier*<sup>156</sup> for the "legitimate pedagogical concerns" standard.<sup>157</sup> *Hazelwood* was another K-12 case, but it set forth the relevant legal standard in future cases that involved classroom speech at public universities. This case involved a high school student's First Amendment challenge to the removal of two articles in the school's newspaper.<sup>158</sup> One of the articles dealt with students' experiences with pregnancy and the other reported on the impact of divorce on students at the school.<sup>159</sup> Pursuant to the school's pre-approval procedure, the principal decided to remove the articles based on concerns about appropriateness and confidentiality.<sup>160</sup> The Court, in finding for the school, held "that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."<sup>161</sup>

When the interests of a professor collide with the interests of a university, some courts have held that the freedom to determine the curriculum resides with the university as long as the university's judgment is consistent with the *Hazelwood* principle. In *Bishop v. Aronov*, an assistant professor of physical education at the University of Alabama continually referred to his Christian beliefs during instructional time and organized after-class meetings to further discuss the relationship of his religious beliefs to human physiology.<sup>162</sup> The university requested that the professor cease the interjection of religion into his

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155. *Id.* at \*36. The court also recognized the academic freedom of the institution to incorporate multiculturalism into its curriculum: "We discern nothing in First Amendment jurisprudence that precludes a public university from adopting, in its exercise of its academic freedom, academic standards that must be satisfied by a student seeking a professional teaching credential even where those standards reflect a certain philosophy of education or academic viewpoints with which a student vehemently disagrees." *Id.* at \*44-45.

156. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 274 (1988).

157. *Axon-Flynn*, 356 F.3d at 1289 ("[W]e hold that the *Hazelwood* framework is applicable in a university setting for speech that occurs in a classroom as part of a class curriculum."); *Head*, 2007 Cal. App. Unpub. LEXIS 393, at \*35 ("Student speech in school-sponsored expressive activities may be restricted so long as the restrictions reasonably relate to legitimate pedagogical concerns.").

158. *Hazelwood*, 484 U.S. at 262.

159. *Id.* at 263.

160. *Id.*

161. *Id.* at 273.

162. *Bishop v. Aronov*, 926 F.2d 1066, 1068-69 (11th Cir. 1991).

classes and after-class meetings.<sup>163</sup> The professor sued the university for violating his free speech rights.<sup>164</sup> The Eleventh Circuit, also relying on the *Hazelwood* standard of “legitimate pedagogical concerns,” held, “The University’s conclusions about course content must be allowed to hold sway over an individual professor’s judgments.”<sup>165</sup> The Court, regarding the concept of academic freedom, noted:

Though we are mindful of the invaluable role academic freedom plays in our public schools, particularly at the post-secondary level, we do not find support to conclude that academic freedom is an independent First Amendment right. And, in any event, we cannot supplant our discretion for that of the University. Federal judges should not be ersatz deans or educators. In this regard, we trust that the University will serve its own interests as well as those of its professors in pursuit of academic freedom. University officials are undoubtedly aware that quality faculty members will be hard to attract and retain if they are to be shackled in much of what they do.<sup>166</sup>

*Bishop* makes clear the tension between professorial and institutional freedoms. In this case, the court gave deference to the university in determining what could be taught over what an individual professor thought appropriate.<sup>167</sup>

At least one court has taken the extreme position that state university professors have no First Amendment interest in determining the curriculum. In *Edwards v. California University of Pennsylvania*, a tenured professor changed the course content of a class titled, “Introduction to Educational Media,” by including new material on bias, censorship, religion, and humanism.<sup>168</sup> A student complained that the professor was using the class to advance religious ideas.<sup>169</sup> The university administration suspended the professor with pay.<sup>170</sup> The professor challenged the university on First Amendment and other constitutional grounds.<sup>171</sup> While acknowledging that the proper standard of review in certain First Amendment challenges involving state university actors

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163. *Id.* at 1069.

164. *Id.* at 1070.

165. *Id.* at 1074, 1077.

166. *Id.* at 1075.

167. *Bishop*, 926 F.2d at 1074. The court also noted:

As a place of schooling with a teaching mission, we consider the University’s authority to reasonably control the content of its curriculum, particularly that content imparted during class time. Tangential to the authority over its curriculum, there lies some authority over the conduct of teachers in and out of the classroom that significantly bears on the curriculum or that gives the appearance of endorsement by the university.

*Id.*

168. *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 489 (3d Cir. 1998).

169. *Id.*

170. *Id.* at 490.

171. *Id.*

was the “legitimate educational interest” test, the court held that such analysis was unnecessary here because “we conclude that a public university professor does not have a First Amendment right to decide what will be taught in the classroom.”<sup>172</sup> That right, the court held, was the exclusive domain of the university.<sup>173</sup>

Other courts have held for the professor when universities cancel classes for reasons that violate the First Amendment. For example, in *Dibona v. Matthews*, the Educational Cultural Complex, which is a branch of San Diego Community College, cancelled a drama class that was planning to use a play titled “Split Second” about an African American police officer who shoots and kills a white suspect during the course of an arrest, after the suspect subjects the officer to a flurry of racial slurs.<sup>174</sup> The police officer subsequently planted a knife in the hand of the victim and fabricated a self-defense justification for the shooting.<sup>175</sup> The college administrators cancelled the class because it did not want to be subject to opposition from the community and it wanted to avoid a politically sensitive topic.<sup>176</sup> The drama professor along with a student brought a First Amendment challenge against the college.<sup>177</sup> The court, in ruling for the professor and student, held that the college’s “desire to avoid ‘taking on’ the religious community is clearly an insufficient basis for cancellation of the class.”<sup>178</sup> Further, the court observed:

As to the “politically sensitive” nature of the play’s subject matter, not only is it a constitutionally inappropriate reason for censorship, ultimately it may also be counterproductive for the community. A central premise of the constitutional guaranty of free speech is that difficult and sensitive political issues generally benefit from constructive dialogue of the sort which might have been generated by “Split Second.”<sup>179</sup>

This does not mean, however, that courts will impose a legal mandate for equal time for every type of expression imaginable. In his concurring opinion in *Widmar v. Vincent*, a case upholding a student religious organization’s right to use a university facility to conduct its meetings, Justice Stevens noted in this regard:

Because every university’s resources are limited, an educational institution must routinely make decisions concerning the use of the time and space that is available for extracurricular activities. . . . I should think it obvious, for

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172. *Id.* at 491.

173. *Edwards*, 156 F.3d at 491.

174. *Alan DiBona v. Robert L. Matthews*, 269 Cal. Rptr. 882, 883 (Cal. Ct. App. 1990).

175. *Id.*

176. *Id.* at 885.

177. *Id.* at 886.

178. *Id.* at 891.

179. *DiBona*, 269 Cal. Rptr. at 891.

example, that if two groups of 25 students requested the use of a room at a particular time—one to view Mickey Mouse cartoons and the other to rehearse an amateur performance of Hamlet—the First Amendment would not require that the room be reserved for the group that submitted its application first.<sup>180</sup>

In other words, universities would still have choices to make in distributing limited resources.

In summary, a professor's curriculum choices generally supersede individual student curriculum preferences, unless these choices are a pretext for illegal discrimination. However, universities' curriculum choices typically trump professorial discretion; even though some courts have found that a university's discretion may be limited by free speech principles.

#### d. Faculty Grading

Some courts have held that professors have the right to assign grades to students. For example, in *Parate v. Isibor*, an associate professor of engineering at Tennessee State University refused to change the grade from "B" to "A" of a student whom he caught cheating.<sup>181</sup> The university administration, after retaliating against this professor by constantly berating him in meetings and criticizing his teaching ability in front of his students on numerous occasions, eventually terminated him.<sup>182</sup> The professor brought a legal challenge to his termination based partly on his right to academic freedom.<sup>183</sup> In ruling, in part, for the professor, the court recognized, "Because the assignment of a letter grade is a symbolic communication intended to send a specific message to the student, the individual professor's communicative act is entitled to some measure of First Amendment protection."<sup>184</sup> However, the court held that even though the university could not compel the professor to change the grade, thereby forcing him to submit to speech that he did not

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180. *Widmar v. Vincent*, 454 U.S. 263, 278 (1981) (Stevens, J., concurring). Both *Dibona* and *Widmar* raise the issue of students' free speech rights. *Dibona* involved a student claiming a right to see a controversial play, while *Widmar* involved a student organization's right to use university facilities. See *supra* notes 174–180 and accompanying text. In addition, a number of cases covered in this chapter, particularly in which professors' and students' interest collide, could also implicate students' free speech rights. Other issues involving students' free speech rights include campus hate speech restrictions such as in *Corry v. Stanford*, No. 740309 (Cal. App. Dep't Super. Ct. Feb. 27, 1995) (order granting preliminary injunction) and the use of student activity fees such as in *Bd. of Regents of the Univ. of Wis. v. Southworth*, 529 U.S. 217 (2000). While an interesting issue exists on the relationship between student freedom and professorial freedom, such an analysis is beyond the scope of this Article.

181. *Parate v. Isibor*, 868 F.2d 821, 823–24 (6th Cir. 1989).

182. *Id.* at 825.

183. *Id.*

184. *Id.* at 827.

subscribe, the university retained the ultimate right to change the grade, as an administrative matter, on its own.<sup>185</sup>

A different court rejected the reasoning of *Parate* and went even further in bolstering the freedom of the institution to determine student grades over the professor's freedom to do so. In *Brown v. Armenti*, a tenured university professor at California University of Pennsylvania assigned a failing grade to a student.<sup>186</sup> The university ordered the professor to change the grade to an incomplete, but the professor refused.<sup>187</sup> The professor was terminated and brought suit against the university. The Third Circuit held for the university, reasoning, "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. We therefore conclude that a public university professor does not have a First Amendment right to expression via the school's grade assignment procedures."<sup>188</sup> Similarly, in *Lovelace v. Southeastern Massachusetts University*, a professor challenged his termination as a violation of his First Amendment rights claiming that his contract was not renewed because he refused to inflate his grades or lower his teaching standards.<sup>189</sup> The First Circuit ruled for the university noting:

To accept plaintiff's contention that an untenured teacher's grading policy is constitutionally protected and insulates him from discharge when his standards conflict with those of the university would be to constrict the university in defining and performing its educational mission. The [F]irst [A]mendment does not require that each nontenured professor be made a sovereign unto himself.<sup>190</sup>

Thus, in both of these cases, courts have found that the university's educational judgment superseded an individual professor's discretion.

Also, when a court determines that a grading conflict between a university and a professor is over an administrative matter, such as requiring that professors provide clear reasons for assigned grades, the university typically wins. For example, in *Johnson-Kurek v. Abu-Absi*, a part-time English lecturer at the University of Toledo was terminated for refusing to comply with a request that she communicate more clearly to her students what was required to complete the coursework for her class.<sup>191</sup> Specifically, the professor gave a grade of "incomplete" to thirteen of seventeen students and informed the students that their incompletes were assigned for one or more of three reasons:

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185. *Id.* at 829–30.

186. *Brown v. Armenti*, 247 F.3d 69, 72 (3d Cir. 2001).

187. *Id.* at 72.

188. *Id.* at 75.

189. *Lovelace v. Southeastern Mass. Univ.*, 793 F.2d 419, 425 (1st Cir. 1986).

190. *Id.* at 426.

191. *Johnson-Kurek v. Abu-Absi*, 423 F.2d 590, 591 (6th Cir. 2005).

1) improper formatting; 2) improper citations; and/or 3) required textual changes. Instead of providing individualized comments to each student, she left it up to the students to determine which of these reasons applied to their own situations.<sup>192</sup> She claimed that “writing individualized letters would have interfered with the students’ learning experience and the purpose of the class.”<sup>193</sup> The students complained that they did not know how to proceed and the administration asked her to send further clarification to the students about how to receive credit for the course.<sup>194</sup> When the professor refused to comply, she was refused additional teaching assignments.<sup>195</sup> The professor challenged this reprisal on First Amendment grounds.<sup>196</sup> The Sixth Circuit held that the professor’s “First Amendment rights were not implicated” by the university’s request that she explain how she determined the final grades in her class.<sup>197</sup> It further noted, “The freedom of a university to decide what may be taught and how it shall be taught would be meaningless if a professor were entitled to refuse to comply with university requirements whenever they conflict with his or her teaching philosophy.”<sup>198</sup>

Additionally, when clear grading procedures are in place, courts are reluctant to give professors much discretion in deviating from such procedures. For example, in *Wozniak v. Conry*, the university required professors to grade on a prescribed curve and submit their grading materials for review.<sup>199</sup> An engineering professor at the University of Illinois at Urbana-Champaign, in an act of defiance, refused to submit his grading materials in purposeful violation of this requirement.<sup>200</sup> The professor ignored a number of requests for explanation by the university.<sup>201</sup> While retaining him on the payroll, the university subsequently stripped the professor of his professorial responsibilities and privileges.<sup>202</sup> The professor brought a challenge in court. In ruling for the university, the Seventh Circuit recognized, “Universities are entitled to assure themselves that their evaluation systems have been followed; otherwise their credentials are meaningless.”<sup>203</sup>

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192. *Id.* at 591–92.

193. *Id.* at 592.

194. *Id.*

195. *Id.* at 593.

196. *Johnson-Kurek*, 423 F.2d at 593.

197. *Id.* at 594–95.

198. *Id.* at 595.

199. *Wozniak v. Conry*, 236 F.3d 888, 889 (7th Cir. 2001).

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 891. The court recognized:

Some universities offer their faculty more control over grading than the University of Illinois afforded [the professor], and maybe discretion is good. But competition among systems of evaluation at different universities, not federal judges, must settle the question

In sum, some courts have acknowledged professors' rights to assign grades, while others have deemed this right as belonging to the university. Courts that acknowledge that the right resides with the professor also recognize that the university can change grades on student transcripts as an administrative act. Finally, some courts are reluctant to give professors any discretion around grading when clear university grading guidelines are in place.

e. Freedom for Faculty Research

Freedom for faculty research has not fared well in the courts especially when this interest has been weighed against state and federal laws that conflict with such freedom. I will summarize the law in two areas: faculty internet usage and travel for research purposes.

The Fourth Circuit's decision in *Urofsky v. Gilmore* highlighted an extremely restricted view of a professor's freedom to conduct internet research.<sup>204</sup> *Urofsky* involved a challenge to a Virginia state law that banned state employees from accessing "sexually explicit content" on their work computers without prior approval from a state agency head.<sup>205</sup> A number of public university scholars from institutions located in Virginia sued in federal court in order to challenge the law on First Amendment academic freedom grounds.<sup>206</sup> The Fourth Circuit held that the state has the power to "control the manner in which its employees discharge their duties and to direct its employees to undertake the responsibilities of their positions in a specified way."<sup>207</sup> It recognized no exception for state university professors. It further held that "to the extent the Constitution recognizes any right of 'academic freedom' above and beyond the First Amendment rights to which every citizen is entitled, *the right inheres in the University, not in individual professors*, and is not violated by the terms of the Act."<sup>208</sup> Not all of the sitting judges were convinced by this rationale. Chief Judge J. Harvie Wilkinson's concurring opinion, for example, offered some solace to proponents of academic

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which approach is best. Each university may decide for itself how the authority to assign grades is allocated within its faculty.

*Id.*

204. See *Urofsky v. Gilmore*, 216 F.3d 401, 414–15 (4th Cir. 2000). Note that this is a pre-*Garcetti* case.

205. *Id.* at 405. When the Fourth Circuit decided the case, the state law defined "sexually explicit content" to include "(i) any description of or (ii) any picture, photograph, drawing, motion picture film, digital image or similar visual representation depicting sexual bestiality, a lewd exhibition of nudity, . . . sexual excitement, sexual conduct or sadomasochistic abuse, . . . [and] coprophilia, urophilia, or fetishism." *Id.*

206. *Id.* at 405–06.

207. *Id.* at 409.

208. *Id.* at 410 (emphasis added).

freedom.<sup>209</sup> Although he agreed with the majority's result, he disagreed with its reasoning.<sup>210</sup> Wilkinson warned, "By embracing the Commonwealth's view that all work-related speech by public employees is beyond public concern, the majority sanctions state legislative interference in public universities without limit."<sup>211</sup>

In another case, *Loving v. Boren*, a professor at the University of Oklahoma challenged the university's decision to implement a policy to restrict a number of news groups being accessed through the university's news server.<sup>212</sup> The university developed this policy because it was concerned about violating a state law that made it a felony to "distribute . . . any obscene or indecent writing, paper, book, picture, photograph, motion picture, figure, form or any description or any type of obscene material."<sup>213</sup> Although the professor did not specifically claim that the university ban interfered with his right to conduct research, the implications of such a ban on research freedom are clear. In response to the professor's challenge, the university implemented a new policy in which the university created two news servers.<sup>214</sup> The "A" server only allowed access to news groups approved by the university.<sup>215</sup> The "B" server, on the other hand, allowed full access to all news groups.<sup>216</sup> To access the "B" server, the user had to be over the age of eighteen and was required to click a box that denoted acceptance of certain rules of usage including a restriction that the "B" server be used solely for academic and research purposes.<sup>217</sup> The court held that this new policy was constitutional and, therefore, the professor's claim was moot.<sup>218</sup> The court also held that the professor's claim was further moot because the blocked news groups on the "A" server could be accessed on university computers in alternative ways.<sup>219</sup>

In a different research-related context, *Emergency Coalition to Defend Educational Travel v. United States Department of the Treasury* involved

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209. Wilkinson is a former law professor and governing board member of the University of Virginia. O'NEIL, *supra* note 8, at 198.

210. *Urofsky*, 216 F.3d at 426 (Wilkinson, J., concurring). Wilkinson applied the *Pickering* test and found that the balancing of the competing interests in this case weighed in the State's favor. *Id.* at 431–35. Under the majority decision, since First Amendment rights were not implicated, the *Pickering* balancing test was not performed. *Id.* at 409 (majority opinion).

211. *Id.* at 429–30.

212. *Loving v. Boren*, 956 F. Supp. 953, 954 (W.D. Okla. 1997).

213. *Id.*

214. *Id.* at 955.

215. *Id.*

216. *Id.*

217. *Loving*, 956 F. Supp. at 955.

218. *Id.*

219. The court remained puzzled by these unspecified alternative means of access, but nonetheless agreed "that the fact of alternative routes to reach the blocked news groups does make Plaintiff's claim moot." *Id.* at 956.



federal restrictions for travel to Cuba.<sup>220</sup> An association of academics, two college professors, and three undergraduates challenged the restrictions as a violation of their academic freedom rights.<sup>221</sup> The plaintiffs claimed that the “restrictions on U.S. academic programs in Cuba unconstitutionally violate their rights to academic freedom under the First Amendment . . . and their rights to travel internationally for First Amendment purposes.”<sup>222</sup> The D.C. Circuit, in ruling for the government, held that the purpose of the restrictions was to curtail tourism in Cuba so, therefore, was a constitutionally permissible, content-neutral law.<sup>223</sup>

Thus, courts seem reluctant to protect a professor’s freedom to conduct research on the internet if this freedom conflicts with state or federal legislation. Further, deference is given to laws that restrict access to certain countries—even if these laws potentially inhibit a professor’s ability to conduct scholarly research.

In conclusion, the seminal cases of institutional academic freedom arose from challenges to government authority during the McCarthy era. In all of these cases, institutional interests were aligned with professorial interests against the overreaching of state authority. The judicial opinions, thus, did not acknowledge any distinction between professorial and institutional rights. On the other hand, in cases where professorial and institutional interests diverged, courts used First Amendment principles to decide the disputes. When it comes to professorial free speech rights, the outcomes have been mixed. When professors conflict with their universities, some cases have held for professors on particular issues, while others have given great deference to universities. What this conflicting judicial language on the protection of various scholarly activities tells us is that there is no strong consensus on these matters. And this has been true for most of the five categories of professorial protection outlined above.

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220. *Emergency Coal. to Defend Educ. Travel v. U.S. Dep’t of the Treasury*, 545 F.3d 4, 6 (D.C. Cir. 2008).

221. *Id.*

222. *Id.* at 8.

223. *Id.* at 13.

PART II: THE LIMITATIONS OF CONSTITUTIONALLY BASED ACADEMIC  
FREEDOM

A. *The Limitations of Academic Freedom Based on the First Amendment*

1. Conceptual Inconsistency: Institutional Autonomy Versus Professorial Rights

Legal scholars have analyzed the principles arising from constitutional academic freedom in a number of law review articles. These articles generally emphasize the tension between institutional academic freedom and its professorial counterpart—particularly in cases where professorial and institutional interests conflict. In this Section, I will briefly summarize two diverging views.

On the one hand, J. Peter Byrne argues that institutional autonomy rather than individual professorial rights is the proper focus of academic freedom.<sup>224</sup> Byrne criticizes how “academic freedom has been thought to encompass all First Amendment rights exercisable on a campus or by members of the academic community.”<sup>225</sup> He articulates a distinction between “academic freedom” and “constitutional academic freedom”—the former being “a non-legal term referring to the liberties claimed by professors through professional channels against administrative or political interference with research, teaching, and governance” and the latter being “the insulation of scholarship and liberal education from extramural political interference.”<sup>226</sup> He argues for a very limited role for courts in protecting faculty from their schools and contends that the proper locus for constitutional academic freedom lies with the university from external interference and not with individual professors.<sup>227</sup> In support of his arguments, Byrne cites the history of judicial abstention in matters of university decision-making and the existence of state constitutional provisions that shield universities from undue government interference.<sup>228</sup>

Other scholars support this view of academic freedom residing in the institution. For example, Paul Horowitz argues for expanded First Amendment protections for institutional autonomy.<sup>229</sup> He contends that universities should have considerable discretion to define “what their academic mission requires, and their own sense of what academic freedom entails, rather than evaluate those claims against a top-down, judicially imposed understanding of academic

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224. J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251, 312 (1989).

225. *Id.* at 262.

226. *Id.* at 255.

227. *See id.* at 306–09.

228. *Id.* at 323–27.

229. Paul Horowitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1502 (2007).

freedom.”<sup>230</sup> Also, Lawrence Rosenthal argues that *Garcetti* properly recognized the “managerial prerogative” of public employers to control the speech of their employees—even at public universities.<sup>231</sup> Rosenthal contends “the First Amendment law of managerial prerogative tolerates regulation of speech within the university as long as that regulation represents a bona fide professional judgment of academic merit consistent with scholarly norms.”<sup>232</sup> According to Rosenthal, academic freedom resides with the university’s judgment of academic merit and not with the discretion of individual professors.

On the other hand, David M. Rabban contends that both institutional autonomy and professorial rights are protected under the broad umbrella of academic freedom.<sup>233</sup> Rabban argues that even though courts have been presented with more institutional claims throughout history, they have nonetheless addressed the professorial counterpart.<sup>234</sup> With this as his starting point, he contends that the concept of academic freedom moves beyond professionally defined norms and implicates First Amendment rights. He states, “Asserting constitutional protection for professors and universities is not simply a form of special pleading to elevate the job-related concerns of a particular profession or the institutional interests of a particular enterprise. Rather, constitutional academic freedom promotes first amendment values of general concern to all citizens in a democracy.”<sup>235</sup> He concludes by arguing for a “functional justification” of constitutional academic freedom based on the distinctive roles of professors and universities in American society.<sup>236</sup>

Similarly, other scholars support the notion that academic freedom should focus on professors—or at least not focus so much on institutions. For example, Matthew W. Finkin contends that prior judicial interpretations of institutional academic freedom threaten the constitutional protections of individual professors.<sup>237</sup> Finkin states:

The theory of “institutional” academic freedom would provide institutional authority with more than a prudential claim to judicial deference; it provides a constitutional shield against interventions that would not ordinarily seem

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230. *Id.* at 1547–48.

231. Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 *FORDHAM L. REV.* 33, 33 (2008).

232. *Id.* at 105.

233. David M. Rabban, *A Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment*, *LAW & CONTEMP. PROBS.*, Summer 1990, at 227, 230.

234. *Id.*

235. *Id.*

236. *Id.*

237. Matthew W. Finkin, *On “Institutional” Academic Freedom*, 61 *TEX. L. REV.* 817, 853–54 (1982–83).

inappropriate, for example, judicial intervention on behalf of a faculty whose civil or academic rights had been infringed by the institution.<sup>238</sup>

In these situations of proper judicial intervention, Finkin rejects the idea that academic freedom lies solely with the institution and argues that it should protect individual professors as well.<sup>239</sup> Richard H. Hiers goes even further and argues that the Supreme Court's modern interpretation of institutional academic freedom is incorrect because it is based on Justice Powell's flawed opinion in *Bakke*.<sup>240</sup> Hiers contends that contrary to Powell's assertions, the U.S. Supreme Court has never before ruled that the First Amendment protected institutional academic freedom rights. He states:

Arguably, as "expressive association," academic institutions may invoke First Amendment academic freedom protections on behalf of their faculty and students. Courts may certainly defer to the expert judgment of academicians, or even recognize institutional autonomy "within constitutionally prescribed limits" whether as a matter of sound public policy or as an important state interest. But none of these propositions is the same as saying that colleges, universities or their professional schools, themselves, are entitled to the enjoyment of either academic freedom or autonomy under the First Amendment.<sup>241</sup>

Therefore, according to Hiers, any modern ruling relying on *Bakke* or its progeny for the existence of institutional academic freedom is mistaken.

Some scholars, therefore, argue that constitutional academic freedom should center on institutions, while other scholars disagree and focus on professorial freedom. Given the conflicting judicial interpretations that lend support to both views, a simple resolution based on constitutional law principles seems unlikely. These issues are made even more complicated based on the state actor requirement for First Amendment claims.

## 2. The State Action Doctrine and Academic Freedom

The full text of the First Amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."<sup>242</sup> While originally only applicable to laws passed by Congress and not individual states, courts would later hold that the First Amendment

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238. *Id.* at 851.

239. *Id.* at 852.

240. Richard H. Hiers, *Institutional Academic Freedom or Autonomy Grounded Upon the First Amendment: A Jurisprudential Mirage*, 30 *HAMLIN L. REV.* 1, 13 (2007).

241. *Id.* at 57–58 (footnotes omitted).

242. U.S. CONST. amend. I.

applies to the states through the Due Process Clause.<sup>243</sup> Only government actors, therefore, are legally required to comply with the First Amendment. This is known as the state action doctrine.<sup>244</sup> When the government is acting against a university, then state action is implicated in a constitutional claim. This is true whether the university is public or private. However, when a university is acting against its own faculty members, a court must determine whether or not the institution is a state actor before constitutional analysis can proceed.<sup>245</sup> This state action inquiry is a threshold matter—i.e., an essential first step—for constitutional claims. If the court determines that the university is not a state actor, then the constitutional analysis ends.

Implicit in this doctrine is the policy decision to provide limits, based on constitutional restrictions, on unfettered government authority. This is why a reviewing court's first inquiry for constitutional purposes will be to determine the level of government involvement in the disputed decision. A purely private decision will not be protected by the Constitution, while a purely public decision will be held to judicial scrutiny. The state action doctrine creates a strange result for academic freedom cases in which their holdings, when based on First Amendment principles, only apply to state universities or private universities if they are deemed to be acting as state actors. But why does it make sense that academic freedom is constitutionally protected at a public institution but not at its private counterpart—especially when both higher educational institutions operate for the benefit of the public? In the following sections, I will analyze the legal contours of the public versus private distinction in order to problematize the concept for academic freedom purposes.

a. The Murky Distinction Between Public and Private Actors Under the State Action Doctrine

An infinite variety of institutional arrangements, in terms of public versus private, exist in American higher education, and these arrangements change over time. Harvard and Yale Universities, for example, began with substantial public support in terms of land and funding, even though they would consider themselves private today.<sup>246</sup> Similarly, Tulane University started out as a public institution called the University of Louisiana, but evolved to the private

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243. See *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937); *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

244. See Wilson R. Huhn, *State Action Doctrine and the Principle of Democratic Choice*, 34 *HOFSTRA L. REV.* 1379, 1383–86 (2006).

245. See, e.g., *Powe v. Miles*, 407 F.2d 73, 74–75 (2d Cir. 1968) (analyzing whether the New York State College of Ceramics was a state actor).

246. ROBERT M. O'NEIL, *FREE SPEECH IN THE COLLEGE COMMUNITY* 220 (1997).

institution it is today.<sup>247</sup> On the other hand, Rutgers started out as a private institution but ended up as a state university.<sup>248</sup> Other universities are hybrids that retain both public and private characteristics. For example, private-charter institutions like Howard University, University of Pittsburgh, and Temple University receive substantial public funding, while public-charter institutions like the Universities of Delaware and Vermont demonstrate many private qualities.<sup>249</sup> MIT, which is private, has been the beneficiary of federal land-grant support since 1862 and Cornell University, which is also private, contains four statutory colleges that are state-funded as part of the State University of New York.<sup>250</sup> Because of this infinite possibility of arrangements, a simple private versus public dichotomy is inadequate to trigger constitutional protection. Instead, courts query the level of state involvement in the challenged action before constitutional protection is triggered. William A. Kaplin and Barbara A. Lee observe:

Due to varying patterns of government assistance and involvement, a continuum exists, ranging from the obvious public institution (such as a tax-supported state university) to the obvious private institution (such as a religious seminary). The gray area between these poles is a subject of continuing debate about how much the government must be involved in the affairs of a “private” institution or one of its programs before it will be considered “public” for the purposes of the “state action” doctrine.<sup>251</sup>

In the landmark state action case, *Burton v. Wilmington Parking Authority*, the U.S. Supreme Court noted, “Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.”<sup>252</sup> In *Burton*, an African American customer challenged a private restaurant owner’s refusal of service, based on the customer’s race, on constitutional grounds.<sup>253</sup> The restaurant was located in a public parking garage owned by a state entity and profits from the restaurant benefited the state.<sup>254</sup> The Court found state action in the restaurant owner’s

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247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*; David J. Staley, *Democratizing American Higher Education: The Legacy of the Morrill Land Grant Act*, ORIGINS (Jan. 2013), <http://origins.osu.edu/article/democratizing-american-higher-education-legacy-morrill-land-grant-act>.

251. WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION: A COMPREHENSIVE GUIDE TO LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING* 42–43 (4th ed. 2006).

252. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

253. *Id.* at 716.

254. *Id.* at 716–19.

refusal of service.<sup>255</sup> Subsequent cases would engage in such context-specific factual sifting to determine if state action was present.

In an early case regarding the state action issue in a private university context, *Powe v. Miles*, seven students at Alfred University, some of whom were studying at the New York State College of Ceramics, were dismissed for disrupting an awards ceremony during parents' weekend.<sup>256</sup> The students challenged their dismissal on constitutional grounds.<sup>257</sup> The university subsequently moved to dismiss based on the lack of state action on the case.<sup>258</sup> The Second Circuit dismissed the claims against the private entity, Alfred University; however, it ruled that the actions of the College of Ceramics constituted state action.<sup>259</sup> In finding state action at the College of Ceramics, the court noted:

The State pays all the direct expenses of the College (sometimes hereafter CC). In addition it pays a stipulated sum per credit hour for courses taken by CC students in "the private sector," with a corresponding payment by the latter for instruction CC gives students in other colleges. The State reimburses Alfred for a pro rata share of the entire administrative expense of the University including the salaries of the President, the Dean of Students, and other general officers, utilities and overhead.<sup>260</sup>

The court also observed that the "very name of the college identifies it as a state institution," and proceeded to list the numerous ways in which the College of Ceramics was enmeshed in state laws regarding its funding and operation.<sup>261</sup> It noted:

The State furnishes the land, buildings and equipment; it meets and evidently expects to continue to meet the entire budget; it requires that all receipts be credited against that budget, Education Law § 6102; and in the last analysis it can tell Alfred not simply what to do but how to do it. . . . The control of these student protests by the President and the Dean of Students on behalf of the State is an instance of positive state involvement, whether obvious or not.<sup>262</sup>

The State of New York was, thus, so linked with the funding and operation of the College of Ceramics that the Second Circuit held that state action was present.

Other cases would make it harder to claim state action at private universities. For example, in *Grossner v. Trustees of Columbia University*, a

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255. *Id.* at 724.

256. *Powe v. Miles*, 407 F.2d 73, 77-79 (2d Cir. 1968).

257. *Id.* at 79.

258. *Id.*

259. *Id.* at 81-82.

260. *Id.* at 76.

261. *Powe*, 407 F.2d at 82-83.

262. *Id.* at 83.

federal trial court found no state action at Columbia University.<sup>263</sup> *Grossner* involved students who brought a constitutional challenge to their disciplinary proceedings which were instituted as punishment for their involvement in a series of sit-ins.<sup>264</sup> The students claimed the university's receipt of substantial government funding created a state actor.<sup>265</sup> The court, however, found no state action since "there [was] nothing . . . to suggest any substantial or relevant degree of interconnection between the State and the University."<sup>266</sup> It further noted that "receipt of money from the State is not, without a good deal more, enough to make the recipient an agency or instrumentality of the Government."<sup>267</sup> In *Blackburn v. Fisk University*, twelve students of Fisk University, which is a private institution located in Nashville, Tennessee, brought a constitutional challenge to their summary suspensions.<sup>268</sup> The Sixth Circuit found that no state action was present.<sup>269</sup> It observed, "State involvement sufficient to transform a 'private' university into a 'State' university requires more than merely chartering the university; providing financial aid in the form of public funds; or granting of tax exemptions."<sup>270</sup> In another case, *Grafton v. Brooklyn Law School*, two law students at a private law school in New York challenged their dismissals on free speech grounds claiming that they were punished for their anti-war activities.<sup>271</sup> The students contended that state action was present because the law school served a public function, the law school provided a path to state regulated bar admission, and the school received state aid and resources.<sup>272</sup> The court, rejecting these arguments, found no state action.<sup>273</sup>

Not all courts reached the same conclusion during this time. In *Rackin v. University of Pennsylvania*, for example, a professor of English challenged her department's denial of her tenure application claiming that the decision was motivated by unlawful gender discrimination.<sup>274</sup> The federal trial court found that the University of Pennsylvania was a state actor.<sup>275</sup> It relied on the extensive interdependence between government and the university, including

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263. *Grossner v. Trs. of Columbia Univ.*, 287 F. Supp. 535, 549 (S.D.N.Y. 1968).

264. *Id.* at 538.

265. *Id.* at 546–47.

266. *Id.* at 548.

267. *Id.* at 547–48.

268. *Blackburn v. Fisk Univ.*, 443 F.2d 121, 122 (6th Cir. 1971).

269. *Id.* at 124.

270. *Id.* at 123 (citations omitted).

271. *Grafton v. Brooklyn Law Sch.*, 478 F.2d 1137, 1139–40 (2d Cir. 1973).

272. *Id.* at 1140–42.

273. *Id.* at 1140; *see also* *Krohn v. Harvard Law Sch.*, 552 F.2d 21, 23–25 (1st Cir. 1977) (finding no state action at Harvard Law School even though historic connections existed between the school and the state and legal education was currently regulated by the state).

274. *Rackin v. Univ. of Pa.*, 386 F. Supp. 992, 994 (E.D. Pa. 1974).

275. *Id.* at 1004.



the Commonwealth's long-standing financial support, state construction, leasing and financing of university buildings, federal construction grants and contracts, public funding of research projects, tax exemptions and benefits, state scholarships and loan aid, university development agreements with the state, and other linkages.<sup>276</sup> The court observed:

This symbiosis becomes readily apparent when one considers the give and take relationship which has developed between the University and the Commonwealth principally because of the University's financial dependence upon the Commonwealth. . . . The Commonwealth, in effect, maintains a stranglehold on the University and therefore potentially has significant input into University policies.<sup>277</sup>

In *Wahba v. New York University*, on the other hand, an associate professor of biochemistry at the NYU School of Medicine challenged the university's decision to remove him from work on a research project funded by federal grants.<sup>278</sup> The Second Circuit weighed a number of factors to determine if state action was present, including "the degree of government involvement, the offensiveness of the conduct, and the value of preserving a private sector free from the constitutional requirements applicable to government institutions."<sup>279</sup> After balancing these factors, the court found no state action to carry constitutional protections over to the university's dealings with this professor.<sup>280</sup> Similarly, in *Greenya v. George Washington University*, an English instructor at the U.S. Naval School of Hospital Administration, who taught mostly naval officers, challenged his termination from teaching.<sup>281</sup> The university provided these courses to the Navy under a contractual agreement.<sup>282</sup> The professor argued that since he taught government employees at government facilities, the university acted as a state actor.<sup>283</sup> The court found no state action, observing:

Our conclusions are predicated on the absence of any showing . . . that the Federal or District of Columbia Government has exercised any role in the management of George Washington University or has adopted a pervasive scheme of statutes, codes, and conditions which has the effect of regulating in detail the University's management. While the determination of how much governmental involvement is necessary before a private institution is subject to constitutional limitations must be made on a case by case basis, we are clear that the mere receipt of government loans or funding by an otherwise private

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276. *Id.* at 996–1002.

277. *Id.* at 1004–05.

278. *Wahba v. N.Y. Univ.*, 492 F.2d 96, 97 (2d Cir. 1974).

279. *Id.* at 102.

280. *Id.*

281. *Greenya v. George Washington Univ.*, 512 F.2d 556, 558 (D.C. Cir. 1975).

282. *Id.*

283. *Id.* at 561–62.

university is not sufficient involvement to trigger constitutional guarantees in the University's relations with its employees.<sup>284</sup>

Arising from the multifaceted balancing of interests contained in the early cases, the Supreme Court subsequently articulated three specific tests to determine whether state action is present: (1) the symbiotic relationship test; (2) the nexus test; and (3) the public function test.<sup>285</sup> First, the symbiotic relationship test seeks to determine the nature of the contacts between the private entity and the state. The foundational case for this test, *Burton v. Wilmington Parking Authority*, noted that the question was whether “[t]he State has so far insulated itself into a position of interdependence with [the institution] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been . . . ‘purely private.’”<sup>286</sup> Under a finding of state action under this test, since the private entity's actions are so interdependent on the government, a specified state linkage to the action need not be shown. Second, and narrower than the symbiotic relation test, the nexus test focuses on the level of state involvement in the particular act being challenged. According to the seminal case for this test, *Jackson v. Metropolitan Edison Co.*, the question “must be whether there is a sufficiently close nexus between the State and the challenged action of the [private] entity so that the action of the latter may be fairly treated as that of the State itself.”<sup>287</sup> In an important state action case involving the nexus test as applied to nursing homes, the Court observed:

[O]ur precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.<sup>288</sup>

The nexus, thus, focuses on the state's specific involvement in the challenged decision. Third, the public function test focuses on the nature of the private entity's particular function as compared to the traditional role of the state. The Court in *Jackson* observed that the function must be one that is “traditionally

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284. *Id.* at 561.

285. In addition to the symbiotic relation, nexus, and public function tests, a separate approach was articulated in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001). In *Brentwood*, a secondary school sued a not-for-profit athletic association for unconstitutionally imposing sanctions against the school. *Id.* at 293. The Court defined a new standard of “pervasive entwinement of public institutions and public officials in [the private entity's] composition and workings.” *Id.* at 298. The Court, applying this test, found state action in this case. In the private university state action cases, most courts still apply the symbiotic relation and nexus tests. *Id.* at 302.

286. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961).

287. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974).

288. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (finding no state action at private nursing homes).

exclusively reserved to the State. . . . [and] traditionally associated with sovereignty.”<sup>289</sup> This test was so narrowly defined in *Jackson* that many subsequent cases have focused on the other two approaches.

In applying these state action tests, more recent cases involving private educational contexts have been decided both ways—finding state action in some cases and no state action in others. In a leading education-specific state action case, *Rendell-Baker v. Kohn*, a number of teachers at a private school for troubled high school students challenged their dismissals for opposing school policy as in violation of their constitutional rights.<sup>290</sup> The teachers argued that the school was a state actor because it received at least ninety percent of its funding from public subsidies and was subject to both state and local regulations.<sup>291</sup> The Court, applying the nexus, symbiotic relation, and public function tests, found no state action when the school dismissed its employees.<sup>292</sup> Similarly, in *State v. Schmid*, a member of the U.S. Labor Party, who was distributing political materials on the main campus of Princeton University and who was not enrolled as a student there, challenged his arrest and criminal charge for trespass.<sup>293</sup> The New Jersey Supreme Court applied the symbiotic relation, nexus, and public function tests in analyzing whether or not state action was present.<sup>294</sup> It ultimately found that the issue of state action was unclear for purposes of the U.S. Constitution.<sup>295</sup> On the other hand, in two consolidated cases, the court reached a different result when employees of both the University of Pittsburgh and Temple University sued their schools on constitutional grounds.<sup>296</sup> The University of Pittsburgh argued that although it was part of the state’s system of higher education, the state did not control its tenure decisions—hence, no state action was present.<sup>297</sup> And Temple argued that, as a private university, the state had no control over its decisions.<sup>298</sup> The court, applying the symbiotic and nexus tests, disagreed with the universities and found that state action existed at both places.<sup>299</sup> In distinguishing the facts of *Rendell-Baker*, the court noted that for both Pittsburgh and Temple, the institutions were required by law to: (1) allow the state to control how state

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289. *Jackson*, 419 U.S. at 352–53.

290. *Rendell-Baker v. Kohn*, 457 U.S. 830, 832, 834 (1982).

291. *Id.* at 832–33.

292. *Id.* at 836, 840–43.

293. *State v. Schmid*, 423 A.2d 615, 616 (N.J. 1980).

294. *Id.* at 620, 622.

295. *Id.* at 624. But note that the court found state action under the New Jersey state constitution. *Id.* at 633.

296. *Krynicky v. Univ. of Pittsburgh and Schier v. Temple Univ.*, 742 F.2d 94, 96–97 (3d Cir. 1984).

297. *Id.* at 96.

298. *Id.* at 97.

299. *Id.* at 103.

funding would be used at the universities; (2) submit state-sponsored audits or make yearly reports to the state; and (3) allow the state to appoint one-third of their trustees.<sup>300</sup> Indeed, the linkages between the state and the schools were so strong that the court observed “it would require a legislative enactment to disentangle Temple and Pitt from the Commonwealth.”<sup>301</sup> As such, the symbiotic relation and nexus tests were satisfied at both institutions with regard to the challenged decisions.

In *Smith v. Duquesne University*, on the other hand, a doctoral student in English challenged his dismissal from his program on constitutional grounds.<sup>302</sup> The federal trial court, relying on the symbiotic relation and nexus tests, found no state action in the case.<sup>303</sup> As to the symbiotic relation test, the court observed that “there [was] no statutory interrelationship between the state and Duquesne University: the state does not participate in the management or operation of Duquesne, review the institution’s expenditures, nor require the institution to submit voluminous financial reports to the state.”<sup>304</sup> In applying the nexus test, the court then observed, “The decision to expel Smith, like the decision to matriculate him, turned on an academic judgment made by a purely private institution according to its official university policy. If indirect involvement is insufficient to establish state action, then certainly the lack of any involvement cannot suffice.”<sup>305</sup> Similarly, in *Imperiale v. Hahnemann University*, a doctor challenged the university’s decision to revoke his medical degree.<sup>306</sup> The court, in applying the symbiotic relation and nexus tests, found no state action by Hahnemann University.<sup>307</sup> And in *Logan v. Bennington College Corp.*, in a case where a professor challenged his dismissal for sexual harassment on due process grounds, the court found no state action under the nexus test.<sup>308</sup> The court noted, “His termination was neither imposed by the acts of state officials acting alone or in concert with College officials, nor imposed by Bennington in the belief that it was required by law.”<sup>309</sup>

However, in other cases, courts have found state action at private universities. In *Doe v. Gonzaga University*, a former education student sued Gonzaga on civil rights grounds claiming that the university spread false allegations that he had sexually assaulted another student.<sup>310</sup> The student won

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300. *Id.* at 102–03.

301. *Krynicky*, 742 F.2d at 103.

302. *Smith v. Duquesne Univ.*, 612 F. Supp. 72, 73–74 (W.D. Pa. 1985).

303. *Id.* at 78.

304. *Id.*

305. *Id.*

306. *Imperiale v. Hahnemann Univ.*, 966 F.2d 125, 126 (3d Cir. 1992).

307. *Id.*

308. *Logan v. Bennington Coll. Corp.*, 72 F.3d 1017, 1020–21, 1028 (2d Cir. 1995).

309. *Id.* at 1028.

310. *Doe v. Gonzaga Univ.*, 24 P.3d 390, 393–95 (Wash. 2001) (en banc).

at trial and the Washington Supreme Court affirmed the jury's finding of state action, holding "[w]here there is joint action of the sort described at trial, the jury had substantial evidence to find that action under color of state law is present."<sup>311</sup> Further, in *Craft v. Vanderbilt University*, the former subjects of experiments involving the not-consented-to exposure of radioactive iron isotopes sued the university under federal civil rights laws.<sup>312</sup> The federal district court, under the symbiotic relation test, found that a reasonable jury could have found that Vanderbilt was a state actor.<sup>313</sup> It noted, "The two parties appear to have cooperatively agreed to combine their respective nutrition study efforts to promote public welfare and avoid conflict or duplication of efforts . . . ."<sup>314</sup>

The inconsistency of results regarding the state action doctrine in higher education is a reflection of the almost infinite variation of public and private institutions around the country. On one end of the spectrum, institutions such as University of Pittsburgh and Temple University have been found to have such pervasive overlap with government that they have been deemed an instrumentality of the state. On the other end, institutions such as Duquesne have had such little government involvement in its affairs that constitutional protections have been held inapplicable on their campuses. Other cases have fallen somewhere in between. In all of these cases, mere state funding has not been enough to establish state action; but public subsidies along with some degree of state governance over campus affairs can tip the scales toward finding state action. With respect to protecting academic freedom at American universities, this state action inquiry leaves much to be desired. Evan G. S. Siegel, in an article about free student speech on college campuses, critiques state action analysis for purposes of academic freedom, observing:

The educational mission of a university, whether public or private, includes the promotion of the free exchange of ideas, the pursuit of knowledge, and a tolerance of diversity in opinion. Few institutions better exemplify "the marketplace of ideas." A student who chooses to attend a private college instead of an equally reputable state university assumes that he will receive at least the same quality of education and expects that he will enjoy the same kind of freedom and independence he would have at a public institution.<sup>315</sup>

In other words, why should academic freedom be protected on some campuses and not others simply based on the degree of state involvement on campus

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311. *Id.* at 396, 401-02.

312. *Craft v. Vanderbilt Univ.*, 18 F. Supp. 2d 786, 789 (M.D. Tenn. 1998).

313. *Id.* at 793.

314. *Id.*

315. Evan G. S. Siegel, Comment, *Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech at Colleges and Universities*, 39 EMORY L.J. 1351, 1387-88 (1990) (footnotes omitted).

decision-making? Are there other ways of protecting professorial rights at both public and private universities?

In the next section, I will explore some areas of state law that collapse the public/private distinction to illustrate such alternative, albeit state-specific, legal mechanisms. I am not arguing for the deletion of the state action requirement in First Amendment analysis. Instead, I am exploring different legal mechanisms that would apply to both public and private universities.

b. Examples of Special State Laws That Apply to Both Public and Private Universities

Not all laws treat public- and private-entity universities differently. Indeed, some laws actually collapse the distinction between public and private in order to ensure fairness in both types of institutions. These laws are not restricted in their application by the state actor requirement. They, therefore, treat both state and private actors in the same manner. The relevant inquiry under these laws is whether the challenged action itself is legal, and not the level of state involvement of the actor. In this section, I will give two unique examples arising under state laws.

i. Article 78 Proceedings in New York

Article 78 of the New York Civil Practice Law and Rules (CPLR) provides for an expedited court proceeding against a body or officer.<sup>316</sup> The law defines “body or officer” as “every court, tribunal, board, corporation, officer, or other person, or aggregation of persons, whose action may be affected by a proceeding under this article.”<sup>317</sup> And the questions that can be raised at the proceeding include, in relevant part:

1. [W]hether the body or officer failed to perform a duty enjoined upon it by law; or
2. [W]hether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or
3. [W]hether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed . . . .<sup>318</sup>

While Article 78 proceedings typically arise from challenges to government action, private entities—including private universities—are not immune from them. In the oft-cited case of *Gray v. Canisius College of Buffalo*, the New York appellate court noted:

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316. N.Y. C.P.L.R. 7801–06 (McKinney 2008).

317. N.Y. C.P.L.R. 7802 (McKinney 2008).

318. N.Y. C.P.L.R. 7803 (McKinney 2008).

Historically, a writ of mandamus has been made applicable to corporations, both public and private, because these institutions are creations of the government and a supervisory or visitorial power is always impliedly reserved to see that corporations act agreeably to the end of the institution, that they keep within the limits of their lawful powers, and to correct and punish abuses of their franchises. These corporations, having accepted a charter and having thus become a quasi-governmental body can be compelled in an article 78 proceeding to fulfill not only obligations imposed upon them by state or municipal statutes but also those imposed by their internal rules. *Thus, courts have traditionally reviewed the action of private colleges and universities in cases where it was alleged that the institution had failed to follow its own hearing or review procedures in the discipline of a student or the dismissal of a faculty member.*<sup>319</sup>

Unlike the state action doctrine for purposes of constitutional analysis, therefore, Article 78 treats private universities as *per se* quasi-governmental entities that are subject to judicial review to ensure compliance with their own internal rules and other legal duties. In *Gray*, a tenured professor and chair of the elementary education department at Canisius College challenged her termination of employment.<sup>320</sup> She claimed that the college unfairly dismissed her because she commenced criminal proceedings against one of her colleagues that cast her employer and the colleague in a negative light.<sup>321</sup> The professor was terminated after the colleague was found not guilty after a bench trial.<sup>322</sup> Her subsequent Article 78 petition was dismissed by the trial court; however, the intermediate appellate court reversed the trial court's decision.<sup>323</sup> The Fourth Department ordered the proceeding to go forward "to determine whether respondents' action in terminating Dr. Gray's services violated the college rules and was arbitrary and capricious, i.e., whether the respondents complied with their own rules concerning tenure and properly exercised their discretion in terminating Dr. Gray's services."<sup>324</sup>

In *Gertler v. Goodgold*, a tenured faculty member at NYU School of Medicine challenged his termination based on contract and tort theories.<sup>325</sup> The court found no duty in contract or tort for NYU to be liable under those theories and held that the professor should have commenced an Article 78 proceeding instead.<sup>326</sup> The court noted:

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319. *Gray v. Canisius Coll. of Buffalo*, 430 N.Y.S.2d 163, 166 (N.Y. App. Div. 1980) (emphasis added) (citations omitted) (internal quotation marks omitted).

320. *Id.* at 164.

321. *Id.* at 167.

322. *Id.* at 164–65.

323. *Id.* at 168.

324. *Gray*, 430 N.Y.S.2d at 168.

325. *Gertler v. Goodgold*, 487 N.Y.S.2d 565, 567 (N.Y. App. Div. 1985).

326. *Id.* at 569–70, 572.

[H]aving accepted a State charter and being subject to the broad policy-making jurisdiction of the Regents of the University of the State of New York, a single corporate entity of which they are deemed a part, private colleges and universities are accountable in a CPLR Article 78 proceeding, with its well-defined standards of judicial review, for the proper discharge of their self-imposed as well as statutory obligations.<sup>327</sup>

The court further observed that “the judgment of professional educators is subject to judicial scrutiny to the extent that the appropriate inquiry may be made to determine whether they abided by their own rules, and whether they have acted in good faith or their action was arbitrary or irrational.”<sup>328</sup> However, since the four-month statute of limitations for commencing Article 78 proceedings had expired, the professor was ultimately left without a legal venue to pursue his claims.<sup>329</sup>

Similarly, in *Maas v. Cornell University*, a tenured psychology professor sued Cornell, challenging the disciplinary action against him for breaching the university’s sexual harassment policy.<sup>330</sup> The professor sued on contract and tort grounds; however, the court found no duty imposed by Cornell based on these theories.<sup>331</sup> The court held that the professor should have brought an Article 78 proceeding against this private university, but he was now time-barred from doing so.<sup>332</sup> Another recent case reached a similar result. In *Padiyar v. Albert Einstein College of Medicine*, a student sued his medical school, a private entity, for its decision to terminate him as a candidate from its joint M.D./Ph.D. program.<sup>333</sup> The student couched his claims in unlawful discrimination and breach of contract terms.<sup>334</sup> The court held that the student should have brought an Article 78 proceeding instead, but he was now time-barred from doing so.<sup>335</sup>

Article 78’s treatment of private universities is illustrative of how the public versus private distinction does not have to be determinative in deciding whether or not a court has the authority to intervene in a dispute. New York’s law has a much broader view of when judicial review over a private university’s actions is proper than the federal state action doctrine allows. Indeed, based on Article 78 case law, jurisdiction is proper as long as the

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327. *Id.* at 569–70 (citations omitted).

328. *Id.* at 570.

329. *Id.*

330. *Maas v. Cornell Univ.*, 721 N.E.2d 966, 967 (N.Y. 1999).

331. *Id.* at 967–68, 970.

332. *Id.* at 969.

333. *Padiyar v. Albert Einstein Coll. of Med. of Yeshiva Univ.*, No. 116296/06, 2009 WL 1136795, at \*1 (N.Y. Sup. Ct. Apr. 17, 2009).

334. *Padiyar v. Albert Einstein Coll. of Med. of Yeshiva Univ.*, 900 N.Y.S.2d 866, 866 (N.Y. App. Div. 2010).

335. *Id.*



private university promulgates its own rules—a condition that is almost always satisfied. This expansive jurisdiction over both public and private entities indicates a certain policy choice that runs counter to the federal state action doctrine. Specifically, for Article 78 purposes, ensuring that both public and private institutions are being fair takes priority over restricting unfettered state authority.

ii. The Leonard Law in California

State legislatures can also address whether they will impose different rules on public and private universities. For example, in California, the legislature passed a law that collapsed the distinction for First Amendment purposes. The Leonard Law provides, in pertinent part:

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 or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution . . . .<sup>336</sup>

The Leonard Law allows a private cause of action for students who are harmed by a violation of this law and authorizes attorney's fees for a prevailing plaintiff. The law exempts institutions controlled by religious organizations. This statute is California's attempt to provide free speech protection at private universities.

One of the first litigated challenges brought under the Leonard Law was *Corry v. Stanford University*. In *Corry*, a number of university students sued to challenge Stanford's speech code.<sup>337</sup> Stanford's speech code was "intended to clarify the point at which free expression ends and prohibited discriminatory harassment begins."<sup>338</sup> Prohibited speech included "discriminatory intimidation by threats of violence and also . . . personal vilification of students on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin."<sup>339</sup> The code defined speech as constituting personal vilification if it:

- a) [I]s intended to insult or stigmatize an individual or a small number of individuals on the basis of their race, sex, color, handicap, religion, sexual orientation, or national and ethnic origin; and
- b) [I]s addressed directly to the individual or individuals whom it insults or stigmatizes; and

336. CAL. EDUC. CODE § 94367 (West 1992).

337. *Corry v. Stanford Univ.*, No. 740309, at 1, 4 (Cal. App. Dep't Super. Ct. Feb. 27, 1995) (order granting preliminary injunction).

338. *Id.* at 2.

339. *Id.*

c) [M]akes use of insulting or “fighting” words or non-verbal symbols.<sup>340</sup>

Two main issues emerged during the litigation. The first issue was whether the speech code was constitutional. Stanford argued that the speech restricted by its code was not protected by the First Amendment.<sup>341</sup> Instead, the restrictions targeted only “fighting words,” which are not protected by the Constitution under the U.S. Supreme Court’s ruling in *Chaplinsky v. New Hampshire*.<sup>342</sup> On the other hand, the students argued that the speech code impaired their First Amendment rights, as applied to Stanford under the Leonard Law.<sup>343</sup> The second issue was whether the Leonard Law was constitutional. Stanford argued, among other things, that as an institution of higher education, it is protected by academic freedom to be free from state infringement on its educational decisions—including the creation of a respectful campus atmosphere.<sup>344</sup> The students, on the other hand, argued that the Leonard Law was a valid exercise of the state’s power to regulate the protection of free speech on a private campus.<sup>345</sup>

The court held for the students on both issues.<sup>346</sup> First, the court analyzed the speech code under the fighting words doctrine and determined that it did not seek to limit only fighting words, but “particular ideas and constitutionally protected speech.”<sup>347</sup> Further, the court noted that cases after *Chaplinsky* narrowed the fighting words doctrine to prohibit intentional speech that would “likely cause an imminent breach of the peace.”<sup>348</sup> It held that the code was overly broad in that it barred speech that may just hurt feelings and not produce imminent violence.<sup>349</sup> In other words, since the code was neither content-neutral nor outcome-specific, it did not pass constitutional muster. Next, the court analyzed the constitutionality of the Leonard Law.<sup>350</sup> In making short shrift of Stanford’s academic freedom argument, the court observed:

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340. *Id.*

341. *Id.* at 3.

342. *Corry*, No. 740309, at 3. *See also* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569–72, 574 (1942) (holding that fighting words doctrine allowed speech restrictions in situation where a person called a city official a “God damned racketeer” and a “damned Fascist” because his words would have “likely provoked the average person to retaliate, and thereby cause a breach of the peace”).

343. *Corry*, No. 740309, at 3.

344. *Id.* at 4, 28.

345. *Id.* at 4.

346. *Id.* at 42–43.

347. *Id.* at 6–7. For this point, the court relied on *R.A.V. v. City of St. Paul*, which invalidated a state anti-hate crime ordinance punishing certain categories of fighting words—based on race, color, creed, religion, or gender—but not others. *Id.* at 10–12 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)).

348. *Corry*, No. 740309, at 9.

349. *Id.* at 20.

350. *Id.* at 27.

Defendants incorrectly suggest that “academic freedom” provides them with *carte blanche* to do what they wish. Both *Regents of University of California v. Bakke* and *Sweezy v. New Hampshire*, cases relied upon by the Defendants, discuss academic freedom in the context of academic decisions. The Speech Code, however, has nothing to do with any of the four academic freedoms the Supreme Court has established.<sup>351</sup>

Thus, the court found the Leonard Law constitutional and not a violation of academic freedom.

On March 9, 1995, Stanford President Gerhard Casper issued a response to the decision.<sup>352</sup> Casper disagreed with the court’s opinion.<sup>353</sup> He maintained that the university speech rule was not overbroad and the Leonard Law was unconstitutional.<sup>354</sup> He first argued that the speech restriction relied on the fighting words exception to the First Amendment and should have been upheld.<sup>355</sup> As to the second issue, Casper asserted that he disagreed with the court that the speech regulation had nothing to do with academic freedom as set forth in *Sweezy*.<sup>356</sup> He contended that almost all other states respect their universities’ discretion to set their own educational policies—policies like the regulation of hate speech.<sup>357</sup> However, he stated that in order to preserve Stanford’s limited resources, the university would not appeal the decision.<sup>358</sup>

The dispute in *Corry* provides an example of how a state legislature can collapse the distinction between private and public actors through the enactment of laws. In this case, First Amendment principles are applied at a private university through a legislative rule. State action analysis was, therefore, not necessary. California lawmakers decided that maintaining free speech at both public and private universities was more important than just fettering the power of the state to control people’s expression. California, however, is the only state with such a law.

In sum, Article 78 in New York and the Leonard Law in California provide two examples of legal mechanisms that collapse the public/private distinction. These laws, however, are state-specific so they do not offer broad protection to

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351. *Id.* at 36 (citations omitted). In *Sweezy*, Justice Frankfurter’s concurrence acknowledged a university’s freedom “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.” *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

352. Gerhard Casper, *Statement on Corry vs. Stanford University President Gerhard Casper*, *Stanford University Faculty Senate*, STANFORD U. NEWS SERV. (Mar. 9, 1995), <http://news.stanford.edu/pr/95/950309Arc5331.html>.

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.*

357. Casper, *supra* note 352.

358. *Id.*

professors outside their respective states. In other words, they are unable to adequately fill the broad gaps left by constitutionally based academic freedom. I will detail these gaps in the next section before suggesting a more comprehensive alternative to the First Amendment.

### 3. The Inadequacy of First Amendment-Based Academic Freedom Law and the Need for an Alternative Legal Foundation

The state action doctrine, as required in First Amendment analysis, prioritizes the limitation of unfettered state power. As part of this doctrine, the theoretical focus is on how much governmental involvement is ideal in university decisions. On the one end of the spectrum is complete government control over university decisions. This would not be the best way to protect academic freedom. The McCarthy era, while not a complete government take-over of universities, came close. During this time, inquiry into unpopular subjects and theories was severely chilled and academic freedom suffered. On the other end lies complete institutional autonomy for university decisions. This, too, would be less than ideal. For decades, federal, state, and local laws have shielded professors at both public and private universities from discriminatory treatment by the universities based on race, gender, sexual orientation and other protected categories. Other laws have ensured fair employment practices and safe workplaces and numerous other employee benefits. And others have imposed ethical duties on research involving human subjects. In a world with complete institutional autonomy, such reasonable external interference into the internal decision-making of the university would be prohibited. This unlimited discretion would lead to unjust outcomes that externally imposed laws were implemented to prevent. Courts have struggled to find the ideal middle ground between these two extremes. The balancing of the proper amount of government involvement in university affairs makes sense for cases in which the state is interfering with educational decision-making at both public and private universities. This has been the typical case. In such disputes, institutional and professorial interests are aligned. For example, in *Bakke* and subsequent cases allowing public universities to consider race in the selection of their students, the interests of the universities in the educational benefits of diversity were not in conflict with professorial interests.<sup>359</sup> The Court, therefore, made no distinction between professorial and institutional academic freedom when it discussed this freedom in the opinions.

When the interests between institutions and professors diverge, however, the state action limitation precludes judicial resolution of academic freedom issues at private institutions. J. Peter Byrne observes, “[T]he state action doctrine mandates judicial enforcement of constitutional liberties against

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359. See *supra* notes 47–48 and accompanying text.

institutional infringements for half the nation's academics and denies it to the other half for reasons which, if desirable at all, are very far removed from the realities of academic life."<sup>360</sup> These reasons focus on restricting state power. But when professors are involved in disputes with universities, regardless of the level of state involvement, the most relevant inquiry should be how we can best protect the principles of academic freedom for the benefit of society. However, the state action doctrine will preclude any analysis at most private universities. For example, in a case where a private university (i.e., a private university not deemed a state actor) is attempting to unduly restrict the scholarly work of a professor, no constitutional remedy would be available. In other words, the state action doctrine would preclude a constitutional analysis even when a state university professor would be protected in the same situation. The application of state action, thus, creates illogical results because vastly different legal outcomes would arise depending on whether the university is public or private even though the purposes of higher education at both types of institutions would be the same.

In addition, for universities that are restricted by the First Amendment (i.e., state actors), the principles arising from public employee free speech cases have been inadequate to protect the academic freedom of professors at state universities. For example, the Fourth Circuit in *Urofsky* noted that there are no constitutionally based academic freedom rights for professors—these rights, if they exist at all, belong solely to the institution.<sup>361</sup> This holding, if followed by other courts, has dire implications as to the scant level of protection that professors will be afforded under a constitutional theory of academic freedom. Furthermore, regarding non-classroom-related speech, cases post *Garcetti* have struggled with how to apply the *Garcetti* reservation to state university professors. While courts have afforded professors some protection when they are teaching their students, their expression in other contexts has not fared as well.<sup>362</sup> Indeed, most of the rulings have simply ignored the reservation, meaning that professors, even at state universities, are without constitutional protection because almost all of their disputed speech has been held to have been pursuant to their official duties. Both *Urofsky* and *Garcetti*, as applied to university professors have therefore, created a situation in which constitutional academic freedom for professors is on extremely shaky footing.

A new legal foundation for professorial academic freedom is sorely needed. In order to expand the academic freedom protections for all university

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360. Byrne, *supra* note 224, at 299–300 (footnotes omitted).

361. *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000).

362. Compare *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 679, 682 (6th Cir. 2001) (holding that professor speech related to teaching was protected), with *Renken v. Gregory*, 541 F.3d 769, 775 (7th Cir. 2008) (holding that professor speech criticizing university management was not protected).

professors, regardless of the state involvement at their institutions, the proper theoretical focus should be on how we can ensure that universities act in a way that maximizes the social benefits of higher education. The policy statements of the American Association of University Professors (AAUP)—“the single most influential and important defender of professional tenure and academic freedom” —embody this focus.<sup>363</sup> For example, one of the AAUP’s most influential policy statements, the 1940 Statement of Principles of Academic Freedom and Tenure, acknowledged, “Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free expression.”<sup>364</sup> The AAUP made no distinction between public and private universities. Both were “conducted for the common good.”<sup>365</sup> As such, the AAUP’s normative statements regarding academic freedom at American universities contain no state action requirement. They apply to all American universities whose mission is the unfettered search for truth.

For the same reasons that the unique statutory twists based on state law pay no heed to state actor requirements—e.g., review of private universities in Article 78 proceedings and the application of the Leonard Law to private institutions—I contend that protecting academic freedom at both public and private American universities is more important “for the common good” than restricting only state action. Thus, I urge an alternative mechanism that would protect professorial rights on a wider scale. I turn away from constitutional law and explore other sources of law that will allow this to happen. In my exploration, I not only aim to expand academic freedom protections for professors at both public and private institutions, but also to find a legal foundation that will permit the recognition of AAUP policies as guideposts in adjudicating professorial academic freedom rights.

In a context related to professorial rights, some courts have attempted to protect student rights at private universities by common law principles when constitutional protection was unavailable due to the state actor doctrine. The author of a *Yale Law Journal* article contends:

The common law protects valuable interests of individuals and groups from arbitrary deprivation or unreasonable injury if those interests have enterprise-worth or are deemed inherently worthwhile under the prevailing social ethic.

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363. LUCAS, *supra* note 7, at 206.

364. Am. Ass’n of Univ. Professors, *Academic Freedom and Tenure: Statement of Principles*, 1940, 27 BULL. AM. ASS’N OF U. PROFESSORS 40, 40–41 (1941) (footnote omitted).

365. *Id.*

Students at private universities have an interest sufficiently valuable under these tests that the courts should protect it against arbitrary deprivation.<sup>366</sup>

As applied to the academic freedom rights of a private university professor, this property-based associational right is a clumsy solution, at best. I can envision a claim for these rights arising when a professor at a private university has been discharged in violation of academic freedom principles. A reliance on private associational rights to protect this professor, however, does not take into consideration the unique context of higher education and the special purpose of this enterprise. The same analysis would apply to *any* private entity—from boating club to social club to private university. This broad framework would, thus, be insufficient in dealing with professorial rights because it would fail to take into account the ideals of academic freedom and the social utility of higher education. Furthermore, this analysis of private associational rights would create a body of law that excludes analysis at public institutions. Academic freedom predicated on these common law rights would, therefore, create separate rules for private versus public entities—much like the state action doctrine has done.

In order to take into account the unique context of American higher education, I propose an alternative foundation of academic freedom grounded in contract law. Contract law allows the recognition of AAUP's principles as interpretive guideposts in adjudicating disputes between professors and their universities. This organization's rich history in protecting academic freedom has significant bearing on the reasonable expectations of modern-day professors and universities regarding academic freedom rights. Further, unlike First Amendment analysis, contract law makes no distinction between state and private actors. The agreement controls the rights and duties of the parties, both public and private. Also, unlike First Amendment analysis, contract law allows for the recognition of professors as something more than just public employees. Specifically, it permits inquiry into rights and duties based on the reasonable understandings of the parties and, in some situations, guided by the norms and customs of the scholarly profession as a whole, as to what academic freedom entails rather than predicating the analysis on public employee status. Finally, contract law may provide better-tailored remedies than constitutional law could in academic disputes. Contract law attempts to make parties whole in the event of a breach of an agreement. In other words, it looks to the expectations of the parties to see where the aggrieved party would be if the breaching party performed under the agreement and tries to make up the difference by awarding monetary damages or other remedies. Remedies under contract law are typically context-specific and narrow. They arise from the

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366. Note, *Common Law Rights for Private University Students: Beyond the State Action Principle*, 84 YALE L.J. 120, 150 (1974).

mutual assent of the parties in a myriad of higher educational contexts. Contract law is flexible enough to encompass such contextual differences because it leaves room for the understanding of the parties to change depending on the different types of institutions involved. Constitutional law, on the other hand, attempts to fashion remedies that conform to constitutional principles. It looks to judicial interpretations of these principles and tries to make rules that apply to any particular dispute based on these interpretations. Constitutional remedies, therefore, tend to be broad and far-reaching. They arise from general principles and apply to specific situations across the country. Based on the wide range of disputes that can arise under the umbrella of professorial academic freedom, contract remedies provide the necessary specificity to consider each unique campus context and allow for the crafting of tailored remedies that take into account the reasonable expectations of the parties. Constitutional law's broader remedies, on the other hand, do not allow sufficient flexibility to tailor remedies to different contexts.

Although constitutional protections would remain available to professors at state universities, I have argued in this part that they are insufficient. Therefore, I urge that plaintiffs and judges rely on an alternative contractual basis for academic freedom that provides more comprehensive protection for professors across the country.

Some lower courts have recognized a contractual basis for academic freedom rights. I will outline this alternative foundation in the final part.

### PART III: A CONTRACT THEORY OF ACADEMIC FREEDOM

#### A. *An Alternative Foundation for Professorial Academic Freedom: Contract Law*

##### 1. Express Contractual Terms

A contract is “[a]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.”<sup>367</sup> The formation of a contract requires “a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.”<sup>368</sup> In contract disputes, courts will try to determine what the parties intended when entering into the agreement.

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367. BLACK'S LAW DICTIONARY 389 (10th ed. 2014).

368. RESTATEMENT (SECOND) OF CONTRACTS § 17 (2005). Mutual assent means an “[a]greement by both parties to a contract, [usually] in the form of offer and acceptance.” BLACK'S LAW DICTIONARY 189 (10th ed. 2014). And consideration refers to “[s]omething (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee.” *Id.* at 378.



Contractual duties can arise from the express terms of an agreement. An express contract is an agreement “whose terms the parties have explicitly set out.”<sup>369</sup> For example, some universities detail the rights and obligations of their professors as part of their faculty handbooks. A number of courts have given the provisions of such handbooks contractual status. In *Sola v. Lafayette College*, a college professor, alleging gender discrimination, brought a breach of contract action against her college after she was denied tenure.<sup>370</sup> The Third Circuit held that language in the faculty handbook regarding affirmative action could have contractual status and provided the faculty member with a cause of action based on breach of this provision.<sup>371</sup> Similarly, in *Arneson v. Board of Trustees, McKendree College*, a college professor at McKendree College who was terminated from employment brought a breach of contract action arguing that he did not receive the proper notice as required by the faculty handbook.<sup>372</sup> The Appellate Court of Illinois held that the handbook was legally binding because the college caused its faculty to rely on the manual as part of the “rules and regulations of the College” to which both parties were subject.<sup>373</sup>

Duties may also arise from express terms contained in faculty handbooks but read in the unique context of higher education. In *Greene v. Howard University*, five non-tenured faculty members were terminated without notice or hearing for their involvement in campus disturbances.<sup>374</sup> The professors asserted “that the University failed in its obligation, incident to their contracts, to give the appropriate advance notice of non-renewal.”<sup>375</sup> The D.C. Circuit noted that even though the faculty handbook was not incorporated by reference into the employment agreement, it nonetheless “governs the relationship between faculty members and the University.”<sup>376</sup> When the university pointed to a disclaimer in the faculty handbook that denied any contractual obligations created by the words contained in the handbook, the court refused to honor this disclaimer, observing:

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.<sup>377</sup>

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369. BLACK'S LAW DICTIONARY 393 (10th ed. 2014).

370. *Sola v. Lafayette Coll.*, 804 F.2d 40, 41–42 (3d Cir. 1986).

371. *Id.* at 45.

372. *Arneson v. Bd. of Trs., McKendree Coll.*, 569 N.E.2d 252, 253–54 (Ill. App. Ct. 1991).

373. *Id.* at 254, 256–57.

374. *Greene v. Howard Univ.*, 412 F.2d 1128, 1129, 1132 (D.C. Cir. 1969).

375. *Id.* at 1132.

376. *Id.*

377. *Id.* at 1135.

The court found in favor of the professors noting that, despite the disclaimer, the provisions in the faculty handbook gave the professors the right to reasonable notice and an opportunity to be heard.<sup>378</sup> As *Greene* suggests, some courts will emphasize that the interpretation of contractual obligations will rest on the particular context of higher education, which is unlike the commercial realm, even to the point of invalidating explicit disclaimers contained in faculty handbooks.<sup>379</sup>

Alternative sources of express contractual duties may include letters of appointment combined with institutional rules. In *Brady v. Board of Trustees of the Nebraska State Colleges*, a tenured professor of history at Wayne State College was terminated without a hearing after the college's budget was reduced.<sup>380</sup> The professor challenged his summary dismissal based on a breach of contract theory.<sup>381</sup> His employment contract "specifically included the college bylaws, policies, and practices relating to academic tenure, and faculty dismissal procedures."<sup>382</sup> The court, in ruling that the denial of due process breached provisions of the college bylaws, observed:

There can be no serious question but that the bylaws of the governing body with respect to termination and conditions of employment became a part of the employment contract between the college and Brady. At the time of the offer and acceptance of initial appointment . . . , Brady was advised in writing that the offer and acceptance of appointment at Wayne constituted a contract honoring the policies and practices set forth in the faculty handbook, which was furnished to him at that time.<sup>383</sup>

AAUP policy documents, when incorporated by reference in employment agreements, can also form the basis of contractual obligations between professors and their universities. Specifically, these documents can elucidate the norms and shared understandings between the parties. Indeed, some courts have relied on AAUP policy statements to determine if a breach of contract occurred in certain situations. For example, in *Browzin v. Catholic University of America*, a tenured professor of engineering was terminated due to conditions of "financial exigency" and, in determining if a breach of contract occurred, the court faced the issue of whether the professor's termination was

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378. *Id.* at 1131, 1134–35.

379. Note that not all employment contexts will elicit such an outcome. *See, e.g.*, Natalie Bucciarelli Pedersen, *A Subjective Approach to Contracts?: How Courts Interpret Employee Handbook Disclaimers*, 26 HOFSTRA LAB. & EMP. L.J. 101, 101–61 (2008) (providing a general discussion on the different approaches that courts have used to interpret employee handbook disclaimers).

380. *Brady v. Bd. of Trs. of Neb. State Colls.*, 242 N.W.2d 616, 617 (Neb. 1976).

381. *Id.* at 617, 619.

382. *Id.* at 618.

383. *Id.* at 619.

consistent with the AAUP's definition of this concept.<sup>384</sup> The parties stipulated that the 1968 AAUP regulations were incorporated by the contract between the professor and university.<sup>385</sup> In ruling for the university, the court relied on a number of AAUP materials outside the 1968 regulations to interpret the agreement, stating:

Those materials include statements widely circulated and widely accepted by a large number of organizations involved in higher education (such as the 1925 Conference Statement and the 1940 Statement of Principles on Academic Freedom and Tenure), as well as guidelines and reports issued by the AAUP as a result of its investigations into incidents where principles of academic freedom or tenure have allegedly been violated. . . . As to the former documents—the widely accepted statements—the propriety of our considering them in interpreting the contract here could hardly be questioned. They form a kind of legislative history for the 1968 Regulations, and they do represent widely shared norms within the academic community, having achieved acceptance by organizations which represent teachers as well as organizations which represent college administrators and governing boards.<sup>386</sup>

Collective bargaining agreements can also provide express terms that merge professional norms with contractual duties. This has not always been so. In 1919, the president of the AAUP, Arthur Lovejoy, declared “three decisive reasons” why the AAUP should not be part of a labor union.<sup>387</sup> First, he noted that the majority of university professors would not be part of a faculty union in the near future so pursuing this organizational form would be divisive to the profession.<sup>388</sup> Second, Lovejoy observed that labor unions' primary objectives are to increase wages, diminish the hours of labor, and improve working conditions for wage earners.<sup>389</sup> However, university professors are different from other wage earners because they “are responsible officers of institutions created by the state or by the voluntary gifts of other men for public ends—for the maintenance of one of the highest and most important functions in the life of society.”<sup>390</sup> As such, labor unions are not capable of representing the

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384. *Browzin v. Catholic Univ. of Am.*, 527 F.2d 843, 844–45 (D.C. Cir. 1975).

385. *Id.* at 845.

386. *Id.* at 847 n.8. However, the D.C. Circuit noted that “[t]he propriety of considering the latter category—the AAUP's guidelines and reports—however, is more problematic. Although the AAUP's investigations are noted for their thoroughness and scrupulous care, the reports remain the product of an organization composed of professors alone.” *Id.* The court noted that due to the professor's failure to establish a prima facie case of contract breach based on the AAUP statement alone, it would not have to “delve more deeply into the applicability of the AAUP guidelines and reports.” *Id.*

387. Arthur O. Lovejoy, *Annual Message of the President*, 5 BULL. AM. ASS'N U. PROFESSORS 10, 23 (1919).

388. *Id.* at 23, 25.

389. *Id.* at 25.

390. *Id.*

interests of university professors, which include enabling “the profession . . . to discharge their distinctive function in the economy of modern society with the highest degree of competency and serviceableness.”<sup>391</sup> Third, he argued that a university professor is “a professional investigator of social problems” and “ought to avoid entangling permanent alliances with any of the purely economic groups which are now struggling with one another to retain or to increase their shares of the social dividend.”<sup>392</sup>

By the 1970s, the AAUP’s conception of itself in relation to collective bargaining would change. While in its early years, the AAUP insisted it was unlike a union and more like a professional association akin to the American Bar and American Medical Associations, by 1970, General Secretary Bertram A. Davis signaled a break from this idea:

It is a mistake to conclude, as many do, that the American Association of University Professors should model its policies after those of the American Bar Association or the American Medical Association. However estimable those associations may be, their policies have been adapted to the fact that members of the legal and medical professions are largely self-employed and deal directly with the public. Members of the academic profession of course are not self-employed, and it is their institutions rather than they which deal directly with the public.<sup>393</sup>

Philo A. Hutcheson notes that, in the following years, AAUP leadership pursued “a cautious yet oddly determined development of collective bargaining.”<sup>394</sup>

By 1973, the AAUP issued a “Statement on Collective Bargaining” that provided, “The longstanding programs of the Association are means to achieve a number of basic ends at colleges and universities: the enhancement of academic freedom and tenure; of due process; of sound academic government. Collective bargaining, properly used, is essentially another means to achieve these ends.”<sup>395</sup> The AAUP was, therefore, endorsing collective bargaining agreements as mechanisms that could fuse professional norms with express

391. *Id.* at 26.

392. Lovejoy, *supra* note 387, at 26.

393. Bertram H. Davis, *From the General Secretary: A Responsible Profession*, 56 BULL. AM. ASS’N U. PROFESSORS 357, 357 (1970).

394. PHILO A. HUTCHESON, A PROFESSIONAL PROFESSORIATE: UNIONIZATION, BUREAUCRATIZATION, AND THE AAUP 135 (2000).

395. Am. Ass’n of Univ. Professors, *Statement on Collective Bargaining*, 59 BULL. AM. ASS’N U. PROFESSORS 167, 167 (1973). This Statement was “revised in 1984, was approved by the Association’s Committee on Representation of Economic and Professional Interests, adopted by the Association’s Council in November 1993, and endorsed by the Eightieth Annual Meeting. In 2009, the AAUP Council approved a minor revision of the statement.” *Statement on Collective Bargaining*, AM. ASS’N UNIV. PROFESSORS, <http://www.aaup.org/report/statement-collective-bargaining> (last visited Jan. 27, 2015).

contractual obligations. Modern examples include agreements in which the AAUP is designated as the official bargaining representative.<sup>396</sup> In these agreements, AAUP policies are typically included as contract provisions. Kent State's collective bargaining agreement is a particularly detailed example of academic freedom that arises from contract. Article IV, titled "Academic Freedom and Professional Responsibility," provides:

Section 1. The parties recognize that membership in the academic profession carries with it both special rights and also special responsibilities. Accordingly, the parties reaffirm their mutual commitment to the concepts of academic freedom and professional responsibility.

Section 2. As stated in the American Association of University Professors' 1940 Statement of Principles on Academic Freedom and Tenure, Faculty members are entitled to freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties. The principles of academic freedom and freedom of inquiry shall be interpreted to include freedom of expression in both traditional print and newly-emerging electronic formats such as the creation of digital images, web sites, or home pages.

Faculty members are entitled to freedom in the classroom (including the virtual 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. In making public statements—including the exercise of the right to responsible dissent on matters of institutional policy or educational philosophy—members of the Faculty have an obligation to be accurate, to exercise appropriate restraint, to show respect for the opinions of others and to make every effort to indicate that they are not speaking for the University.

Section 3. As stated in the American Association of University Professors' 1966 Statement on Professional Ethics, Faculty members, in exercising their professional roles as teacher, scholar and colleague, accept the obligation to exercise critical self-discipline and judgment in using, extending and transmitting knowledge, and to practice intellectual honesty in accord with the standards of expectation of their respective disciplines and of the University's Faculty Code of Professional Ethics.<sup>397</sup>

Further, consistent with AAUP policies, the Kent State agreement also includes provisions for faculty participation in policy and details on the tenure

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396. The AAUP website notes, "Currently, over seventy local AAUP chapters have been recognized as collective bargaining agents representing faculty, graduate employees, academic professionals, and contingent faculty from all sectors of higher education." *Collective Bargaining*, AM. ASS'N UNIV. PROFESSORS, <http://www.aaup.org/issues/collective-bargaining> (last visited Jan. 27, 2015).

397. TENURE-TRACK UNIT OF THE AM. ASS'N OF UNIV. PROFESSORS, KENT STATE UNIV., COLLECTIVE BARGAINING AGREEMENT art. IV (2005), available at <http://digitalcommons.ilr.cornell.edu/blscontracts/1654>.

process.<sup>398</sup> Collective bargaining agreements that employ such language, thus, create academic freedom obligations for both professors and their universities. These contracts, therefore, can provide an additional and especially robust source of academic freedom rights and duties.

In recent years, most academic unionization has occurred at state universities rather than their private counterparts. The expansion of faculty collective bargaining into private universities essentially ceased after *NLRB v. Yeshiva University*,<sup>399</sup> where the U.S. Supreme Court held in 1980 that Yeshiva professors were “managerial employees,” and thus excluded from coverage under the National Labor Relations Act—a federal law that guaranteed collective bargaining rights to private-sector employees, but not to managers. After *Yeshiva*, most private universities could elect to, but were no longer required to, recognize faculty unions as official bargaining representatives. Despite this decision, a number of AAUP chapters at private universities continue to maintain the benefits and protections of collective bargaining.<sup>400</sup> Public university professors, not affected by *Yeshiva*, continue to engage in collective bargaining pursuant to state laws.

## 2. Implicit Contractual Terms

When a written agreement does not exist or does not capture the full intent of the parties, contractual obligations can be implicit. There are two types of implicit contracts: implied-in-fact and implied-in-law. Implied-in-fact contracts are agreements “that the parties presumably intended as their tacit understanding, as inferred from their conduct and other circumstances.”<sup>401</sup> An implied-in-law contract is a duty “created by law for the sake of justice, [specifically], an obligation imposed by law because of some special relationship between them or because one of them would otherwise be unjustly enriched.”<sup>402</sup> As evidenced by case law, the most relevant type for my analysis is the implied-in-fact agreement.

The U.S. Supreme Court in *Perry v. Sindermann*, a case involving a professor’s challenge to his termination based on his public criticism of the Board of Regents, explained the difference between express and implied-in-fact terms as it related to the dispute at hand:

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398. *Id.*

399. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 694 (1980).

400. *Collective Bargaining*, *supra* note 396. Note that NLRB action in May 2012 regarding faculty bargaining at Point Park University has suggested that the Board may be trying to re-open the issues decided in *Yeshiva*. See Scott Jaschik, *Reopening ‘Yeshiva’?*, INSIDE HIGHER ED (May 24, 2012), <http://www.insidehighered.com/news/2012/05/24/nlrb-action-suggests-possibility-reopening-yeshiva-case-faculty-unions>.

401. BLACK’S LAW DICTIONARY 394 (10th ed. 2014).

402. *Id.*

[T]he law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be “implied.” Explicit contractual provisions may be supplemented by other agreements implied from “the promisor’s words and conduct in light of the surrounding circumstances.” And, “[t]he meaning of [the promisor’s] words and acts is found by relating them to the usage of the past. . . .”

. . . . [S]o there may be an unwritten “common law” in a particular university that certain employees shall have the equivalent of tenure. This is particularly likely in a college or university, like Odessa Junior College, that has no explicit tenure system even for senior members of its faculty, but that nonetheless may have created such a system in practice.<sup>403</sup>

The Court, therefore, recognized the possible existence of implied-in-fact “common law” practices in a particular university based on the academic custom and usage of that university.<sup>404</sup> In another case employing custom and usage analysis, *Bason v. American University*, an assistant professor of law was denied tenure, and he challenged this decision as a breach of contract.<sup>405</sup> He claimed that the university failed to give him feedback on his tenure progress.<sup>406</sup> In reversing summary judgment for the university, the D.C. Court of Appeals noted:

As we interpret the record, the fundamental issue is whether [the professor] had a contractual right to be evaluated and kept informed of his progress toward tenure. The answer to that question requires resort to the actual employment contract, those documents expressly incorporated into it (the *Faculty Manual*, the *Bylaws of the American Association of Law Schools*, and the “Standards and Rules of Procedures,” *Approval of Law Schools*, American Bar Association) and the customs and practices of the University.<sup>407</sup>

Not all cases that utilize the customs and practices of an institution as a contractual interpretation device hold for the faculty member. In *Brown v. George Washington University*,<sup>408</sup> an education professor challenged her denial of promotion and tenure as a breach of contract. She claimed that her department had not followed its own written policy that provided that candidates for promotion would be invited to appear before the promotion committee to present additional relevant information. Faculty members in the education department testified that they had a practice of interpreting this provision as discretionary.<sup>409</sup> In deciding for the university, the court ruled that

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403. *Perry v. Sindermann*, 408 U.S. 593, 597, 601–02 (citations omitted).

404. *See id.* at 601.

405. *Bason v. American Univ.*, 414 A.2d 522, 523 (D.C. 1980).

406. *Id.* at 524.

407. *Id.* at 525.

408. *Brown v. George Washington Univ.*, 802 A.2d 382, 384, 386 (D.C. 2002).

409. *Id.* at 386.

the department's interpretation was reasonable and not a breach of contract.<sup>410</sup> The custom and usage of this particular department, therefore, determined the outcome of the case.

Other courts have recognized custom and usage of the academic community—not just at a specific university or department but the scholarly community as a whole—to analyze the terms of a professor's contract. William A. Kaplin and Barbara A. Lee observe in this regard:

As a method of contractual interpretation, a court may look beyond the policies of the institution to the manner in which faculty employment terms are shaped in higher education generally. In these cases the court may use “academic custom and usage” to determine what the parties would have agreed to had they addressed a particular issue. This interpretive device is only used, however, when the contract is ambiguous, or when a court believes that a significant element of the contract is missing.<sup>411</sup>

For example, in *McConnell v. Howard University*, a professor was fired because he refused to teach a math class until a disciplinary dispute with a student was resolved.<sup>412</sup> He challenged his termination on breach of contract grounds.<sup>413</sup> In remanding the case for trial, the court noted that when the contract terms are ambiguous, they “must be construed in keeping with general usage and custom at the University *and* within the academic community.”<sup>414</sup> Also, in *Board of Regents of Kentucky State University v. Gale*, a professor was appointed to the institution's first endowed chair in the humanities.<sup>415</sup> The university subsequently sought to make the professor execute a contract that would impose a time limitation on his endowed chair.<sup>416</sup> The professor challenged the university's actions in court arguing that his appointment implicitly came with permanent status (i.e., tenure).<sup>417</sup> The court, in ruling for the professor, noted, “The evidence relied upon by the trial court in the instant case showed that, unless the advertisement for the position otherwise indicated, it was customary and understood within the academic community that the chair was to be occupied by a distinguished colleague for his life time.”<sup>418</sup> The academic custom and usage of the professoriate was, thus, determinative in analyzing this implied term.

Although this remains an issue yet to be decided by the courts, when academic freedom is not addressed in a professor's employment contract, I

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410. *Id.* at 387.

411. KAPLIN & LEE, *supra* note 251, at 479–80.

412. *McConnell v. Howard Univ.*, 818 F.2d 58, 61 (D.C. Cir. 1987).

413. *Id.* at 62.

414. *Id.* at 64 (emphasis added).

415. *Bd. of Regents of Ky. State Univ. v. Gale*, 898 S.W.2d 517, 519 (Ky. Ct. App. 1995).

416. *Id.* at 520.

417. *Id.*

418. *Id.* at 521.



argue that the custom and usage of the academic community regarding these rights can be elucidated by AAUP policies and principles. Matthew W. Finkin and Robert C. Post contend:

As the reasoned conclusions of an especially knowledgeable body, the opinions of Committee A [AAUP's investigative committee] offer an unusually rich resource for understanding the meaning of academic freedom in America. They strive to interpret a governing instrument, the 1940 *Statement*, which has achieved near-universal acceptance in the academic community. They do so in a disciplined, lawlike way, seeking to apply principle to context, often by reasoning from precedential analogies. . . . They are backed by a system of sanctions that, although lacking the coercive power of the state, are nevertheless consequential. The opinions thus conduce toward a coherent national system of norms.<sup>419</sup>

This coherent set of norms can aid courts in interpreting the reasonable expectations of professors and universities when they enter into contractual relationships. Specifically, I can envision a dispute in which a professor claims that her university violated her contractually based academic freedom rights and the university responds that these rights do not exist because they are not explicitly provided for in the employment agreement. Along with other sources of implicit terms, if any, a court can benefit by turning to AAUP opinions and policies as general academic custom and usage to determine the reasonable expectation of the parties regarding academic freedom in this situation.

### 3. The Limitations of Contract Law and Suggested Solutions

Due to the limitations of constitutionally based academic freedom, contract law is better at protecting individual faculty members when their interests diverge from their institutions. However, contract law is by no means perfect. In this section, I highlight three limitations of a contracts-based approach to academic freedom and offer potential solutions.

First, contracts are governed by state law, so the law of one state may conflict with the laws in others.<sup>420</sup> For example, even though I highlighted some key legal decisions that rely on an expansive view of what constitutes a professor's employment contract, some courts are reluctant to take this interpretive path. I have already discussed three New York cases that have rejected professors' contract-based claims against their universities, holding that the proper legal mechanism for challenging their employment grievances

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419. MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 51–52 (2009).

420. See, e.g., AM. ASS'N OF UNIV. PROFESSORS, FACULTY HANDBOOKS AS ENFORCEABLE CONTRACTS: A STATE GUIDE IV (2009), available at <http://www.aaup.org/sites/default/files/files/Faculty%20Handbooks%20as%20Contracts%20Complete.pdf> (summarizing conflicting state laws regarding faculty handbooks as contracts).

was Article 78.<sup>421</sup> Other courts have also rejected contract claims brought by professors. In *Marson v. Northwestern State University*, an associate professor challenged his termination as in violation of the university's faculty handbook.<sup>422</sup> The state appellate court held that the faculty handbook was not binding because it was not explicitly made part of the employment agreement.<sup>423</sup> Similarly, in *University of Baltimore v. Iz*, the appellate court found that general statements of policy contained in the faculty handbook did not create enforceable contract rights.<sup>424</sup> In a case dealing with academic custom and usage, *Jones v. University of Central Oklahoma*, a professor of education challenged his denial of tenure, arguing that it violated the custom and usage of the university regarding prior tenure decisions.<sup>425</sup> In holding for the university, the Oklahoma Supreme Court held that custom and usage will not supersede a contrary written tenure policy, even if past practice by the university differs from the written terms.<sup>426</sup> Also, contrary to some of the cases I analyzed that demonstrated a broad view of using AAUP policy statements to resolve a number of educational disputes, some courts have ruled that an adoption of a particular statement will not contractually bind the university to subsequently issued statements. For example, in *Waring v. Fordham University*, a faculty member at the Graduate School of Social Service who was denied tenure sued for breach of contract.<sup>427</sup> Fordham University had a policy that placed a limit on the proportion of tenured faculty at each of its schools.<sup>428</sup> Fordham, however, had adopted the 1940 Statement that did not issue an opinion on tenure quotas—not the subsequent 1973 Statement opposing such quotas.<sup>429</sup> The court, noting that the university did not adopt the 1973 Statement, ruled that the university's action was not a breach of contract.<sup>430</sup> Because of the vagaries of differing state laws, Cary Nelson urges that “shared governance, due process, and tenure regulations need to be

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421. See *Maas v. Cornell Univ.*, 721 N.E.2d 966, 970 (N.Y. 1999) (holding that Maas failed to plead a distinct breach of contract claim); *Padiyar v. Albert Einstein Coll. of Med. of Yeshiva Univ.*, 900 N.Y.S.2d 866, 866 (N.Y. App. Div. 2010) (holding that the plaintiff's claim is time-barred by a four-month statute of limitations); *Gertler v. Goodgold*, 487 N.Y.S.2d 565, 567, 569 (N.Y. App. Div. 1985) (noting that the professor cannot establish a clear contractual right to the amenities of tenure claimed).

422. *Marson v. Northwestern State Univ.*, 607 So. 2d 1093, 1094 (La. Ct. App. 1992).

423. *Id.* at 1096.

424. *Univ. of Balt. v. Iz*, 716 A.2d 1107, 1126 (Md. Ct. Spec. App. 1998).

425. *Jones v. Univ. of Cent. Okla.*, 910 P.2d 987, 988 (Okla. 1995).

426. *Id.* at 991.

427. *Waring v. Fordham Univ.*, 640 F. Supp. 42, 43 (S.D.N.Y. 1986).

428. *Id.*

429. *Id.* at 44.

430. *Id.* at 43; See also *Jacobs v. Mundelein Coll., Inc.*, 628 N.E.2d 201, 205 (Ill. App. Ct. 1993) (holding only expressly incorporated AAUP policies are binding).

mirrored in legally enforceable contracts.”<sup>431</sup> Clarity in express contractual language is essential. Clear contract language that creates such terms will, thus, provide professors and universities with much more predictability in how a court will enforce the rights of the parties. Jim Jackson advocates an even stronger approach to contract drafting by arguing that the language should “not only describe academic freedom as contractual but[,] in an interpretive sense[,] say that it is a fundamental clause.”<sup>432</sup> This would benefit both professors and universities by ensuring that the unique context of American higher education is taken into account when enforcing the contractual rights and duties of the parties.

Second, the greater bargaining power that universities have over professors may skew the agreement terms away from academic freedom. Some scholars have suggested that universities may even try to tweak contract language to weaken such protection and offer jobs to professors on a take-it-or-leave-it basis.<sup>433</sup> Others have warned of the dangers when employers unilaterally change their policies.<sup>434</sup> In these situations, professors can claim protection under the doctrine of unconscionability. This doctrine reflects the idea “that a court may refuse to enforce a contract that is unfair or oppressive because of procedural abuses during contract formation or because of overreaching contractual terms, esp. terms that are unreasonably favorable to one party while precluding meaningful choice for the other party.”<sup>435</sup> However, the heavy burden in proving unconscionability would lie with the professor. Another possible solution would be for professors to rely on the implied covenant of good faith and fair dealing in contract law. This is an “implied covenant to refrain from any act that would injure a contracting party’s right to receive the

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431. CARY NELSON, *NO UNIVERSITY IS AN ISLAND: SAVING ACADEMIC FREEDOM* 195 (2010).

432. Jim Jackson, *Express and Implied Contractual Rights to Academic Freedom in the United States*, 22 *HAMLIN L. REV.* 467, 495 (1999).

433. See Neil H. Hutchens, *A Confused Concern of the First Amendment: The Uncertain Status of Constitutional Protection for Individual Academic Freedom*, 36 *J.C. & U.L.* 145, 181 (2009) (stating that institutions can draw less attention to tweaking individual contracts than by making a change to an institution-wide policy).

434. See Richard J. Pratt, *Unilateral Modification of Employment Handbooks: Further Encroachments on the Employment-at-Will Doctrine*, 139 *U. PA. L. REV.* 197, 199–200 (1990) (stating that employees cannot presume a satisfactory duration of employment); Michael D. Strong, *Personnel Policy Manuals as Legally Enforceable Contracts: The Implied-in-Fact Contract—A Limitation on the Employer’s Right to Terminate at Will*, 29 *WASHBURN L.J.* 368, 414 (1990) (indicating employment-at-will doctrines have been subject to increasing criticisms in the modern workforce); Brian T. Kohn, Note, *Contracts of Convenience: Preventing Employers from Unilaterally Modifying Promises Made in Employee Handbooks*, 24 *CARDOZO L. REV.* 799, 805 (2003) (advocating that employers should not be able to modify contractual relations without additional consideration and employee assent).

435. *BLACK’S LAW DICTIONARY* 1757 (10th ed. 2014).

benefit of the contract.”<sup>436</sup> This covenant is premised on the idea that certain promises are “instinct with an obligation” to act in good faith.<sup>437</sup> An aggrieved faculty member that had academic freedom rights written out of her contract could claim that the university breached its duty to act in good faith. These protective doctrines, however, are open to the criticism that they create uncertainty in outcomes due to the subjective judicial evaluations they require. Therefore, the better solution would entail professors negotiating for clear terms in their contracts. In order to improve their bargaining positions, I argue that professors should enter into or strengthen their relationships with educational organizations that can create pressure for universities to operate in good faith in making academic freedom part of their employment agreements. The AAUP is one of their strongest allies in this regard. For example, this organization recently advocated for model policy language regarding academic freedom rights being adopted by universities across the country. In a report in 2009, the AAUP pointed to the following clause from the University of Minnesota’s academic freedom policy as particularly effective language for incorporation in faculty handbooks and agreements:

Academic freedom is the freedom to discuss all relevant matters in the classroom, to explore all avenues of scholarship, research, and creative expression, and to speak or write without institutional discipline or restraint on matters of public concern as well as on matters related to professional duties and the functioning of the University. Academic responsibility implies the faithful performance of professional duties and obligations, the recognition of the demands of the scholarly enterprise, and the candor to make it clear when one is speaking on matters of public interest, one is not speaking for the institution.<sup>438</sup>

Incorporation of such policy language into professors’ contracts can provide a shared contractual basis of academic freedom rights across the country. In addition, the AAUP has been working to create pressure on universities through the accreditation process. In a 2012 statement, the AAUP, in conjunction with the Council for Higher Education Accreditation, argued that accreditation agencies take academic freedom into account when making their decisions.<sup>439</sup> The statement offered the following suggestions for accrediting agencies:

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436. *Id.* at 443.

437. *Wood v. Lucy*, 118 N.E. 214, 214 (N.Y. 1917). *Wood* is the classic case of a court interpreting an implied covenant of good faith and fair dealing in a contract.

438. ROBERT M. O’NEIL ET AL., PROTECTING AN INDEPENDENT FACULTY VOICE: ACADEMIC FREEDOM AFTER *GARCETTI V. CEBALLOS* 87–88 (2009), available at <http://www.aaup.org/file/Protecting-Independent-Voice.pdf>.

439. AM. ASS’N OF UNIV. PROFESSORS & COUNCIL OF HIGHER EDUC. ACCREDITATION, ACCREDITATION AND ACADEMIC FREEDOM: AN AMERICAN ASSOCIATION OF UNIVERSITY

- Emphasize the principle of academic freedom in the context of accreditation review, stressing its fundamental meaning and essential value.
- Affirm the role that accreditation plays in the protection and advancement of academic freedom.
- Review current accreditation standards, policies and procedures with regard to academic freedom and assure that institutions and programs accord with high expectations in this vital area.
- At accreditation meetings and workshops, focus on challenges to academic freedom, with particular attention to the current climate and its effect on faculty, institutions and programs.
- Explore developing partnerships among accreditors to concentrate additional attention on academic freedom and further secure the commitment of the entire accreditation community.<sup>440</sup>

By making academic freedom a consideration for accreditation, professors' bargaining position with regard to this term would be greatly enhanced. Specifically, universities would be more likely to adopt contractual obligations regarding academic freedom if accreditation agencies were evaluating them based on their commitment to this freedom.

Third, academic freedom, as defined by contract law, may support the erroneous view that higher education can be reduced to a commodity—i.e., universities are simply pushing a commercial product on students, who are just consumers of this product. A number of scholars have critiqued this view.<sup>441</sup> Nonetheless, the commodity view of higher education continues to percolate through society. It was evidenced by a judge in a case involving a student who challenged the university's disciplinary action for his sexual misconduct. The Massachusetts Supreme Judicial Court held for Brandeis, but a dissenting judge in the case disagreed with the majority, observing, "As consumers, students should not be subject to disciplinary procedures that fail to comport

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PROFESSORS—COUNCIL FOR HIGHER EDUCATION ACCREDITATION ADVISORY STATEMENT (2012), available at <http://www.chea.org/pdf/AAUP-CHEA%20-%20FINAL.pdf>.

440. *Id.*

441. See DEREK BOK, *UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION* 2–5 (2003) (explaining that universities have lost their intellectual moorings creating aimlessness through commercialization); WESLEY SHUMAR, *COLLEGE FOR SALE: A CRITIQUE OF THE COMMODIFICATION OF HIGHER EDUCATION* 12 (1997) (arguing the increasingly untenable commodification of universities by corporations creates crises on campuses); SHEILA SLAUGHTER & GARRY RHOADES, *ACADEMIC CAPITALISM AND THE NEW ECONOMY: MARKETS, STATE, AND HIGHER EDUCATION* 1 (2004) (noting that academic capitalism considers students as consumers and academic institutions as marketers). JENNIFER WASHBURN, *UNIVERSITY, INC.: THE CORPORATE CORRUPTION OF AMERICAN HIGHER EDUCATION* 139 (2005) (indicating that academic-industry relationships have flourished creating universities that cater to corporate needs).

with the rules promulgated by the school itself.”<sup>442</sup> In a footnote that accompanied the word “consumers,” the court noted, “As college costs have been rapidly increasing, students and their parents often must make a substantial financial investment to obtain an education.”<sup>443</sup> The dissenting judge, thus, argued that any ambiguity in the disciplinary rules should have been read in the student’s favor because of his status as a “consumer” who pays for his educational product.<sup>444</sup> Although this was a dissenting opinion in a non-academic freedom case, the view that students are mere consumers of higher education is problematic because it downplays or ignores the public good that higher education produces and reduces higher education to a consumer good. However, this purported limitation is not fatal to contractually based academic freedom. Just because an agreement is reduced to a written contract does not mean that its terms have to involve only market-based values. For example, the previously discussed use of collective bargaining agreements to memorialize academic freedom principles is an apt illustration. While the AAUP was initially reluctant to pursue unionization for fear of diminishing its image as a defender of non-economic goals, it later realized that it could capture the higher purposes of university work by incorporating these ideals directly into the collective bargaining agreements themselves.<sup>445</sup> In addition, international treaties provide further insight. These treaties can be viewed as contracts between nations.<sup>446</sup> Some of these treaties, such as the United Nations International Bill of Human Rights or the Kyoto Protocol to the United Nations Framework Convention on Climate Change, involve agreements that reflect values, such as human dignity and preservation of the environment. The fact that these agreements are reduced to writing in no way diminishes the non-market aspects of these values. Similarly, professors’ employment contracts can reflect the social usefulness of higher education as articulated by AAUP policy statements and acknowledged by courts without embracing a commodity view of the American university.

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442. *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 381 (Mass. 2000) (Ireland, J., dissenting) (footnote omitted).

443. *Id.* at 381 n.1.

444. *Id.* at 381.

445. HUTCHESON, *supra* note 394, at 6–7.

446. See Curtis J. Mahoney, Note, *Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties*, 116 YALE L.J. 824, 826 (2007). Chancellor Kent, writing in the nineteenth-century, observed:

Treaties of every kind, when made by the competent authority, are as obligatory upon nations, as private contracts are binding upon individuals; and they are to receive a fair and liberal interpretation, and to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts.

1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 163 (1826).

## CONCLUSION

This Article was motivated, in part, by my interest in the ways that higher education, at its best, transforms the perspectives of its students by allowing an environment of free inquiry, vigorous debate, and unhindered exploration of various perspectives. This transformative power is situated in the freedom that higher educational actors—both professors and universities—have over their educationally based decisions. Academic freedom at American universities, however, is, by no means, guaranteed. Generations of professors have fought for it, and the fight continues to this day.

Although constitutionally based academic freedom can provide some safeguards to educational actors from excessive state interference, it is insufficient to protect the multitude of interests that arise in contemporary disputes. Due to the restrictions of the state action doctrine, constitutional academic freedom does not apply to private universities, leaving professors at these institutions without First Amendment protection. And even in public institutions where the Constitution is applicable, judicial decision makers have recently put academic freedom at risk by either significantly narrowing the protections of professorial free speech or denying the very existence of professorial academic freedom. Further, broad constitutional remedies may be poorly suited to address the almost infinite variation of university contexts across the country.

There is, however, another way. Specifically, developing a body of contractually based academic freedom case law would greatly expand the ways that courts can protect aggrieved professors when their interests diverge from their employers'. Unlike First Amendment principles, contract law would protect professors at both public and private universities. It would also allow for the proper consideration of the custom and usage of the academic community as either express or implied contract terms in resolving disputes between universities and professors. Finally, contract law would enable courts to structure remedies that take into account the particular campus contexts that give rise to various disputes instead of crafting broad remedies that may ill fit certain campus environments.