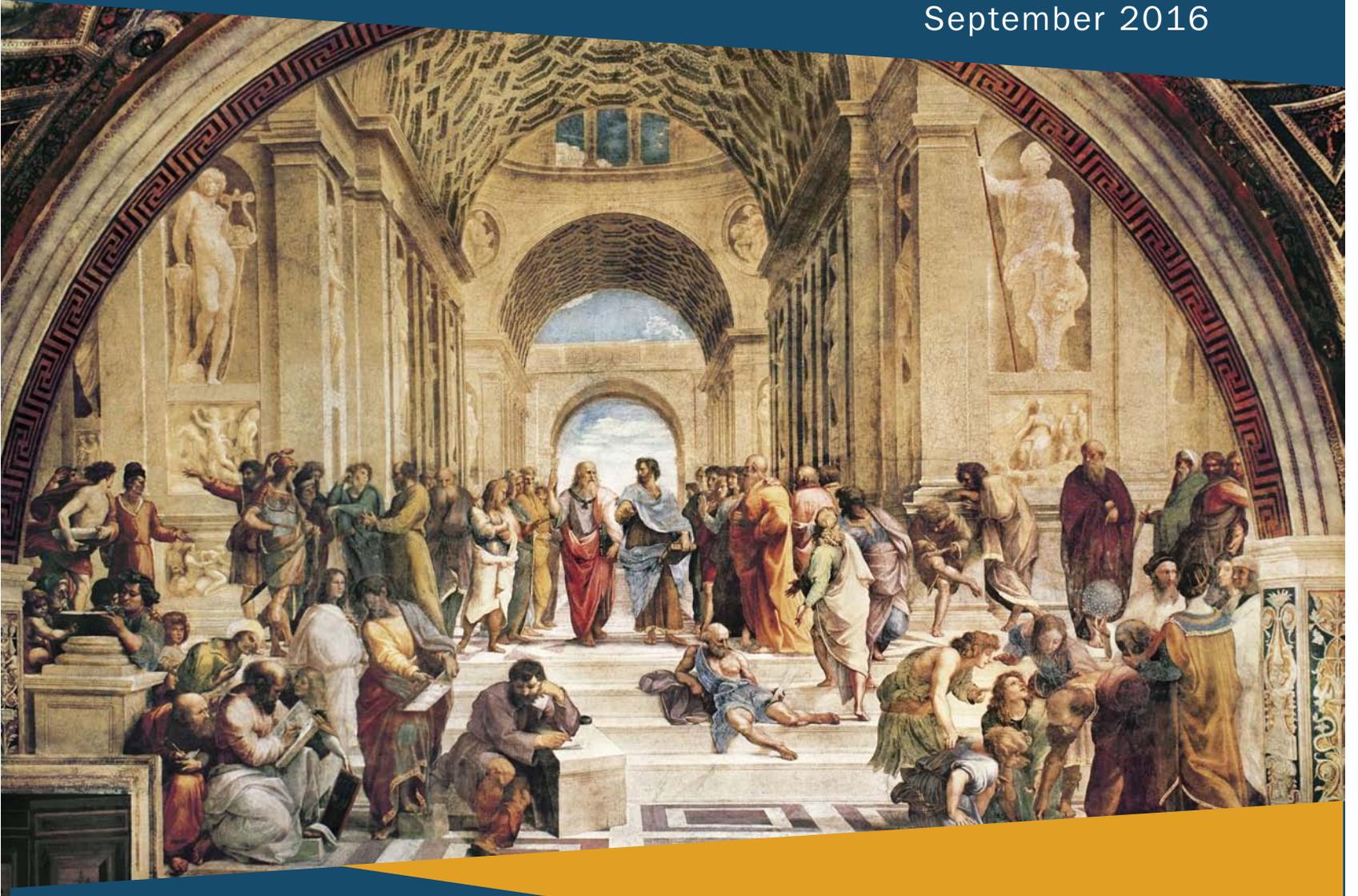


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Academic Freedom in the Age of Political Correctness

Jay Schalin



The John William
POPE CENTER

FOR HIGHER EDUCATION POLICY

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Executive Summary

Academic freedom—the right to seek the truth without fear of retribution—is an enigmatic concept in the modern American university. One perspective with long historical roots defines it as a natural right; another view interprets it as a set of mutable guidelines that exist to serve the public interest, whatever that may be at the time. Others entirely reject academic freedom rights. Tensions often exist between the many various interests on campuses that hold a stake in how academic freedom is defined.

Competing claims about what academic freedom is and to whom it applies are nothing new. It was an issue in the medieval universities of Europe, nearly a millennium ago. During the early twentieth century, the newly formed American Association of University Professors pushed forward a definition of academic freedom that favored faculty interests; that definition—based on the AAUP setting professional standards—became the consensus view throughout academia for nearly a century. The organization especially fought for the rights of faculty to speak freely about controversial issues without fear of reprisal.

Until recently, the AAUP’s very expansive view of faculty speech has largely gone unchallenged by other stakeholders in higher education. Today, however, the need for redefinition is becoming clear as other interests push back. Contentious new issues include the limiting of free speech through campus speech codes, the right of religious students to form campus organizations that exclude according to belief, and the right of students to not be indoctrinated in class.

This report argues that the health of the modern American university depends on deciding the proper limits, checks, and balances of scholarly inquiry, teaching, and commentary in academia. It reviews several methods that may empower administrators, students, and other higher education stakeholders. Legal action—in which all interests involved have an opportunity to present their cases—may be the best, most impartial means to balance the rights of faculty against other interests.

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Introduction

The intellectual life of an open society is inherently chaotic. Humanity instinctually and incessantly strives for knowledge and truth, yet the process naturally includes uncertainty and error. The unthinkable may one day be proven true, and current truth may be shown to be myth. As human beings, we are subject to imperfect perception, bias, and self-interest.

Yet “knowing” is the key to our material survival, and the drive to learn is so ingrained in our nature that some of us strive to do so even under the penalty of death. The right to seek truth, wherever the investigation may lead, has come to be known in higher education as academic freedom. But it can mean different things to different people. To some it is as much a natural right as life or liberty. Others see it as a changing, pragmatic set of principles to serve society—or, perhaps, to serve themselves or their political causes.

Still others, for widely varied reasons, reject the idea of academic freedom outright. And a surprisingly large swath of our scholarly class even questions whether anything can be known at all, that what we call “reality” is just a matter of political arrangements, with free inquiry irrelevant.

As a result of so many conflicting views, academic freedom today is a particularly disordered concept. The lack of certainty has

enabled a vested interest group—the faculty—to dominate the academic freedom discussion and influence policies for their own benefit.

But that dominance may soon diminish—other interests are now pushing back. Additionally, the primary reason the faculty are afforded intellectual control—that academic freedom is best viewed as a professional standard—no longer seems justified as faculty organizations grow increasingly politicized.

In the coming years, no other issue may be as important to the intellectual life of the nation as deciding on the proper limits, checks, and balances of scholarly inquiry, teaching, and commentary in academia. The following paper is an attempt to work through the complexity and contradictions in order to discover a path to sound foundational principles of academic freedom.

Issues: Are There Limits to Academic Freedom?

At first glance, establishing clear boundaries for academic freedom seems relatively simple. It is easy to ensure the freedom of a serious scholar whose thinking is at odds with the current consensus. It is also easy to place limits on freedom in order to prevent the indoctrination of students or to prevent wild idiosyncratic claims by teachers. But it is exceedingly difficult to do both—to ensure freedom and limit freedom—simultaneously. The trade-offs inherent between the universities’ need to maintain credibility by preventing its



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faculty from issuing wild proclamations and the faculty's need to advance knowledge by taking intellectual risks illustrate how academic freedom's proper boundaries are not always clear-cut.

Indeed, the complexity requires that the many different issues and aspects must be examined independently before considering the whole. This section attempts to provide some clarity before discussing issues in greater detail in subsequent sections.

Academic Freedom and the First Amendment

The first issue that needs clarification is whether academic freedom is the same as the First Amendment right to free speech; these two concepts are often confused. Faculty often assume that they have a First Amendment right to say anything inside or outside the classroom (short of excluded categories such as yelling “fire!” in a crowded room, libel, or “fighting words”) without fear of punishment from their school.

But they are wrong. The First Amendment guarantee for the freedom of speech is a legal right—one cannot be arrested for exercising it, and academics share that right. But academic freedom does not guarantee protection against arrest; it concerns employment. As University of Wisconsin political scientist and academic freedom expert Donald Downs has explained, a person has “a right to profess that the world is flat, but such expressions would be grounds for flunking a course in geography or astronomy or for terminating an instructor who taught such nonsense.”¹

Determining where the First Amendment does and does not apply can require a close examination of the particulars of each specific case.

Does Academic Freedom Adhere to Private Schools?

The First Amendment protects citizens from government action that abridges their free speech. Public schools and universities must therefore permit freedom of expression where it does not blatantly interfere with the operations of the university. In the same spirit, public universities clearly must remain impartial and allow a range of views, lest the government stifle free inquiry in order to indoctrinate and maintain power.

Private colleges, however, need not concern themselves with academic freedom if they openly declare that their school “is to be used as an instrument of propaganda.”² In other words, if a college declares that it teaches according to Baptist theology, it can enforce the teaching of Baptist principles.

Today, however, such private colleges that openly profess a specific philosophy are rare. For the rest, the American Association of University Professors (AAUP), the leading academic professional organization, has declared that a private school that does not promote a specific view is a “public trust,” with the board serving as “trustees for the public.”³ It therefore must adhere to the same academic freedom standards as public institutions.

Speech Codes

Some speech that has clear legal protections is under direct campus assault—through so-called “speech codes” that many colleges have adopted in recent decades. The Foundation for Individual Rights in Education (FIRE) defines speech codes as “policies prohibiting student and faculty speech that would, outside the bounds of campus, be protected by the First Amendment.”⁴ These codes have been used to limit the ability to voice one's opinions on campus; for students that can mean even in their own dorm rooms.

Such codes have “repeatedly been struck down by federal and state courts for decades,” yet roughly 55 percent of colleges still have codes that are “severely restrictive,”⁵ largely due to pressure from

a variety of political, racial, and sexual interest groups. Sometimes, speech they consider to be offensive is termed “hate speech,” which they claim is an exception to free speech similar to the exceptions for “fighting words.” They have also invented transgressions that extend the definition of genuine harassment beyond reasonable limits. These include “micro-aggressions,” which are comments that can be taken as an indication of bias, often minor and unintentional, and “trauma triggers,” which supposedly cause somebody to relive a bad experience.

Such codes stifle serious and objective dialogue on controversial matters. That may very well be the real intention.

Spheres of Activity in which Academic Freedom Issues Arise

The AAUP’s seminal document, *The 1915 Declaration on Academic Freedom and Tenure*, divides academic freedom into three spheres of activity for which the professor’s ability to act needs definition: “freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action.”⁶ To these can be added a fourth: intramural utterances, which include comments made about the school, its policies, and its employees. Each sphere requires individual attention.

Research. Academic freedom for research has the broadest and most intuitive justification, for the production of new knowledge requires that researchers be able to explore where facts, logic, and conscience lead. As such, it has powerful claims for independence from political, religious, or economic influence.

But academic freedom in research runs into frequent controversies. Politicization is one cause; powerful campus blocs can try to silence research that opposes their views. One example is pressure applied by politicians on university scientists whose research challenges an assumed link between mankind’s activities and climate change to reveal their funding sources. American Meteorological Society director Keith Seitter said that this tactic “sends a chilling message to all academic researchers.”⁷

Another is money: there are incentives for administrators seeking grant money from industry or the government to promote preferred results. One well-known such case in 1997 featured a medical doctor and professor at Brown University’s medical school, David Kern. Kern discovered a link between a rare lung disease and the workers of an employer who donated considerable money to Brown. The administration pressured Kern to not publish his findings, and, when he refused, his program was eliminated—a blatant rejection of Kern’s academic freedom.⁸

Teaching. It is common for faculty to claim that the wide range of freedom accorded them in research activities gives them equal latitude in the classroom. Yet the two activities are clearly not the same. The researcher places his or her theories into the marketplace of ideas for review, comment, and investigation by others. The teacher, on the other hand, is stating to impressionable charges which theories should be adopted as true or false.

Deliberate conflation of these two spheres of activity by faculty advocates has caused many controversies. Initially, the AAUP based much of the need for wide latitude in teaching on a tenuous claim that students will not respect professors who do not teach what they truly believe—a weak foundation for such an important principle.

Extramural Utterances. These are comments made to the general public about non-university affairs. They include published articles, interviews, and statements made about current events. Today, they include remarks made using social media such as Twitter or Facebook.

There is some confusion about whether such comments have the protection of academic freedom. In one way they do, for faculty members have the same First Amendment rights for their speech as the general public. However, such protections do not guarantee a right to employment. Just as private firms may not wish to employ executives who make angry, malicious, embarrassing rants in public, an academic’s extramural comments can signify a lack of fitness for his job. (The lines between irrational ranting and unusual but potentially valid commentary are, of course, unclear—each case must be decided on its own evidence).

Yet tenured professors are rarely removed for opinions expressed outside of the classroom, for a variety of reasons. These include academic freedom and the difficulty in defining “fitness.” One frequently cited example is Arthur Butz, an electrical engineering professor at Northwestern University who publicly denies the Holocaust. Henry Bienen, who was Northwestern’s president in 2006 when many of Butz’s colleagues called for him to leave the university, explained his expansive view of academic freedom and how that prevented him from forcing Butz from his job.

Butz is a tenured associate professor in electrical engineering. Like all faculty members, he is entitled to express his personal views, including on his personal web pages, as long as he does not represent such opinions as the views of the University. Butz has made clear that his opinions are his own and at no time has he discussed those views in class or made them part of his class curriculum. Therefore, we cannot take action based on the content of what Butz says regarding the Holocaust—however odious it may be—without undermining the vital principle of intellectual freedom that all academic institutions serve to protect.¹⁰

Intramural Utterances. This sphere consists primarily of criticisms of school policy and analyses of colleagues’ research by faculty members. One of the crucial tests for intramural utterances is whether they are legitimate criticisms of policy or intellectual activity—matters of public concern—or mere employee grievances. Another is whether they disrupt ordinary proceedings.

Stakeholders

The academic freedom issue has often centered on the rights of a single interest group: the faculty. But there are other stakeholders in academic freedom; the central question is how to configure the rights of each in the most equitable way. These stakeholders include individual professors, institutions, departments, students, administrators, trustees, and society. Not all of them “own” academic freedom rights in the same way or degree and must be considered separately.

Individual professors. Academic freedom started with the individual scholar’s need to search for

the truth and the high regard for that search in many societies. The development of academic freedom was largely a struggle for the right of scholars to explore and teach according to the dictates of their consciences. Academic freedom is also justified by the hope that the expertise of the individual professor will benefit society.

Institutions. As scholars formed into institutions in the early Middle Ages, the question arose over whether academic freedom belonged to the individual scholar or to the institution as a collective body of scholars. This debate continues today: the AAUP insists academic freedom adheres to the individual, while the courts generally favor institutions.

Departments. As universities grew larger and more complex, they divided into disciplinary departments that inherited much of the authority that formerly belonged to institutions, including control over intellectual content and personnel issues. According to Donald Downs, “disciplinary fields have taken on guild-like powers” by assuming the right “to have the major say in who shall be hired and who shall be awarded tenure.”¹¹

Students. Although students and their wealthy patrons controlled the early Italian universities, and German universities in the early 19th century acknowledged that students had rights, academic freedom for students was hardly considered until mid-twentieth century in the United States.

The AAUP has produced a significant—but insufficient and at times conflicting—trail of statements defining academic freedom for students, starting with the original 1915 document:

The teacher also ought to be especially on his guard against taking unfair advantage of the student’s immaturity by indoctrinating him with the teacher’s own opinions before the student has had a chance to examine other opinions upon the matters in question.¹²

The need to prevent indoctrination was reaffirmed in the 1940 *Statement of Principles on Academic Freedom and Tenure*¹³ and the 1967 *Joint Statement on Rights and Freedoms of Students*.¹⁴ However, when the interests of students and professors come into conflict, the AAUP clearly insists that “academic

freedom rights of faculty and students are not equally weighted,” with the greater weight given to faculty rights, since the faculty possess “not only an individual but also a collective right, informed by professional expertise and peer review.”¹⁵

Administrators. Administrators have an extremely complex relationship to academic freedom. In one function, such as making extramural comments, an administrator may be acting as an individual scholar. In another, he or she represents the school and therefore inherits the rights of an institution. In yet a third, his or her primary function is to serve as an arbiter or enforcer of the various checks and balances when conflicts arise inside the university.

Yet, radicalization of academia has made high-level administrators particularly vulnerable, since their positions place them at the center of many controversies and they are subject to political pressures.

Trustees. Governing board members share administrators’ institutional rights and roles as arbiters. And while they may not be scholars in the true sense, they have the inherent right to seek truth as individuals.

Trustees also have a fiduciary responsibility to the school that places them in a unique position to advocate for the school’s (or state’s) interests in academic freedom cases. Too often, though, they submit to other interests.

Society. Because of the growing importance of higher education in public affairs and in the intellectual life of the nation, the general society is gaining in importance as a stakeholder. The AAUP claims to base its right to academic freedom on the common good and service to the public, with the *1915 Declaration* stating that a professor is “primarily responsible to the public itself, and to the judgment of his own profession.”¹⁶

But there is little definition of how that service is to be conducted, and as conservative writer Russell Kirk explained in his 1955 book *Academic Freedom*, responsibility to the public is a nebulous concept. He suggested that the public described by the AAUP seems less like the electorate of the moment and more like some undefined public at some unspecified



Academic freedom’s origin is often attributed to the death of Socrates, who swallowed hemlock rather than recant his view, because he saw, suggested Kirk, that “life is an inferior thing to truth.”



point in the future that consistently meets the needs of the AAUP.¹⁷ As such, “serving the public” seems less like responsibility than unlimited license.

Academic Freedom’s First Principles: Transcendence versus Pragmatism

Academic freedom arises from differing foundational principles. They can generally be divided into two basic groups: those with transcendent roots and those with pragmatic roots.

Academic freedom has long been defined as part of an eternal spiritual search for the truth. Its origin is often attributed to the death of Socrates, who swallowed hemlock rather than recant his view, because he saw, suggested Kirk, that “life is an inferior thing to truth.”¹⁸ He was not the people’s agent, but the agent of something greater that transcends our physical experience.

The transcendent view can take many forms, sometimes a religious sensibility, at other times a historical sense that regards each new intellectual discovery as part of a process of growing closer to some final truth. Others regard it as something inherent in the nature of all mankind; for Kirk, academic freedom was a “natural right,” which is a right “found by the test of time to accord with human nature.”¹⁹

Throughout most of history, universities had a religious foundation that judged an idea according to “proof of its moral advantages”²⁰—surely a transcendent quality. As society became more secular in the late 19th century, so did perceptions of academic freedom. When the AAUP was founded in 1915, empiricism and pragmatism dominated American colleges and universities;

talk of serving truth as a divine principle coming from God or as the inherent right of all men diminished, replaced by service to the people. AAUP founder Alexander Meiklejohn wrote:

We, who engage in research and teaching, do so as agents of the people of the nation ... Our final responsibility, as scholars and teachers, is not to the truth. It is to the people who need the truth.”²¹

But pragmatism is not always the firmest foundation for an enduring standard. Without a more permanent grounding, academic freedom can become unmoored from reality or slide into political expediency.

Some academics still promote themselves as guardians of truth and demand academic freedom based on their search for the truth—even while questioning the existence of truth itself. Others exploit the lack of a fixed standard to their advantage, claiming all freedom for themselves and none for their opponents, justifying their actions by claiming that their views promote social justice or the public interest.

Today’s range of perspectives includes extreme versions of both transcendent and pragmatism and many in between.

Early History

Many accounts of academic freedom start in the period immediately preceding the formation of the American Association of University Professors in 1915. But that is misleading; issues of academic freedom are as old as the academy itself—or older, if one includes the death of Socrates. A good starting point is the academy’s rebirth in the early Middle Ages.

Medieval: Academic Freedom within Christianity

Many of modern academic freedom’s issues revealed themselves shortly after the inception of the first European university at Bologna in 1098. Despite the widespread modern perception of an overbearing Church that stifled all discussion, there was considerable academic freedom within a Christian

framework. There was, as there is today, a realm of freedom that was circumscribed by authority and a realm of freedom defined by tradition.²²

Most censorship was self-imposed—to attack Christianity’s central beliefs was unthinkable, as the desire for salvation was universal.²³ Academics were at that time overwhelmingly members of the clergy; they had great freedom to search for truth, as, for them, truth began with acknowledging the Christian God.²⁴

Reaction to Heresy

Academic freedom within a Christian framework did not mean that Church authorities never clamped down on those who raised questions at the limits of knowledge. The established order tended to loosen its reins when it felt confident and become rigid and punitive when threatened.

The latter occurred in the 13th century, when heretical faiths and independent thinkers arose to challenge Roman authority.²⁵ In response, clerics conducted an Inquisition of apostates, and church authorities assumed more control over teaching.

Capacity for Change

Medieval universities showed a capacity for change. At the University of Paris, the teaching of Aristotle was forbidden as pagan and heretical in 1210.²⁶ By 1255, however, with his works becoming reconciled with Catholic theology, they were required reading.

Who Had Academic Freedom in Early Universities?

Another element of early universities that framed one of today’s ongoing debates is the question of who holds academic freedom rights. This was plainly visible in the difference between northern and southern universities. The University of Paris, representative of northern schools, was a guild of faculty who controlled the curriculum. Academic freedom adhered to the individual scholars and institutions.²⁷

At Bologna, representative of southern schools, universities were guilds of students and their wealthy patrons. Faculty were considered mere hired help and told what to teach by the school’s patrons.²⁸

Ultimately, however, the Catholic Church retained the final say over intellectual matters, North and South. Furthermore, scholars at that time did not have the sort of formal methods for deciding on natural truths—such as the scientific method—that we have today, bolstering the Church’s position as the ultimate authority.

Renaissance

The decentralized authority of the High Middle Ages and the Renaissance, in which political power was shared between a collection of competing ecclesiastical, noble, and metropolitan officials and wealthy laymen, permitted universities to play one interest against the other in order to maintain considerable autonomy.²⁹

Helping universities preserve independence was the fact that they initially were mobile—they did not develop permanent campuses until later—so they could pick up and leave for another jurisdiction or diocese if the local authorities were heavy-handed.³⁰

Reformation: Sectarian Rigidity

Historian Richard Hofstadter wrote that academic freedom and religious freedom share a common root: the freedom of individual conscience.³¹ But with the advent of the Protestant Reformation, the relative freedom of universities in the 14th and 15th centuries ended. Instead of the greater choice in religion enabling greater freedom for scholars, the opposite happened: each sect became rigid and dogmatic. For a time, most advances in knowledge occurred outside the universities.

Copernican Revolution

The Copernican Revolution that placed the Sun at the center of our solar system instead of the Earth challenged the Catholic Church’s cosmology. The Church reacted strongly: Copernicus’s initial Italian advocate, Giordano Bruno, was burned at the stake for heresy.³² Better known is Galileo Galilei’s ordeal—he was forced to recant, his writings were kept out of circulation, and he was held in house arrest.

Tommaso Campanella’s *The Defense of Galileo* in 1622 posited a powerful defense of intellectual freedom in investigating nature, suggesting that “God gave man his reason and senses in

order to make use of them and to fail to do so is to ‘transgress the natural law of God.’”³³ He said that wisdom is to be sought “in the whole book of God,”³⁴ including nature.

Despite Campanella’s defense, Galileo’s treatment had a chilling effect on science, especially at universities. Scientific research fled into various scientific and philosophical societies that sprang up as academia froze in time.³⁵

Enlightenment Toleration

Eventually, after over a century of violence between Catholics and various sects of Protestants, the need for a stable society caused sectarian bitterness to take a back seat to toleration.³⁶ A new spirit of mysticism turned the spiritual and intellectual thrust from dogma to inner experience, and a new humanism looked to free inquiry and an emphasis on ethics. That spirit of tolerance gradually crept into the universities.

The New World

This gradual process of toleration also occurred in the New World, where the first colleges were formed by sectarian colonies largely to train ministers, with Harvard College the first in 1636.³⁷ Half of its graduates in the 17th century became ministers while its governing boards and top administrators were members of the clergy; there was no question at the start that it taught Puritan doctrine.

Yet, as commerce developed as a competing interest to religion and the population of the Massachusetts Bay Colony grew more diverse, that rigid adherence to doctrine gradually disappeared. In England, the Glorious Revolution of 1688 led to the Act of Toleration in 1689, which made



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it illogical for Harvard to exclude mainstream Anglicans³⁸ (the Puritans started as Anglicans who sought to “purify” the Church of England).

Younger generations of Puritans adopted liberal ways, including two “tutors” (faculty) at Harvard, John Leverett and William Brattle. They came into conflict with the school president, Increase Mather, who had previously taken a hands-off approach, especially in non-religious matters. But in 1697, upon discovering that Leverett and Brattle were assigning mainstream Anglican books, Mather bristled. He told the errant tutors that since they “held offices upon his nomination, it was their duty to teach as he pleased.”³⁹ In general, faculty were considered lowly employees and were often recent graduates waiting for more lucrative opportunities.

Leverett and Brattle resigned, but Mather’s victory proved temporary. Upon Mather’s death in 1707, Leverett, a “lawyer, and one who never affected the study of Divinity,”⁴⁰ according to Increase Mather’s son Cotton, succeeded him as Harvard’s president. Leverett encouraged further liberalization, including the addition of a chair of theology endowed by a Baptist merchant.

Even with the tendency toward liberalism and a free spirit of inquiry, particularly in the sciences, there was no formalized conception of academic freedom. According to Hofstadter, the sort of board governance that American colleges adopted did not lend itself to freedom for faculty.⁴¹ This was the case even after members of governing boards increasingly came from the community at large rather than the church hierarchy.



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Initially, the merchants, government officials, and educated laymen who replaced ministers on the boards favored increased intellectual freedom—they were rationalist and empirical men of the Enlightenment. Yet, like trustees today, they were also important men of affairs who had little time to attend to the details of running a college. Whereas the first boards of colonial colleges were composed of ministers who had intimate knowledge of the schools’ operations, the new lay board members had to yield much of their authority to presidents, who were often faculty themselves.⁴² This new state of affairs would underlie many of the changes that took place in American colleges in the second half of the 19th century.

U.S. Return to Sectarian Rigidity

The first half of the 19th century saw a return to rigidly sectarian education. Colleges proliferated rapidly—instead of schools growing internally, which generally led to more intellectual complexity and freedom for faculty, small new colleges sprang up on the frontier to train local ministers and professionals. They were often church-supported and imposed strict doctrinal obedience.⁴³

Harvard and a few of the other northern colonial-era colleges, such as Dartmouth and Columbia, were becoming modern universities with free inquiry.⁴⁴ For the most part, however, the early 1800s was a time when academic truth was subject to faith; what was important was “the good,” not the empirically verifiable.⁴⁵

Modern History of Academic Freedom

But even as doctrinal Christianity’s dominance of American colleges was reaching its 19th century peak, a new order was emerging. Several major developments emerged roughly around the time of the American Civil War. Within a few decades, U.S. higher education became primarily a secular institution, sweeping away many of the issues of the past and creating new ones.

Rise of the German Model

The first major break with the doctrinal past started on the European continent. German universities

had remained backwaters from the Reformation through the Enlightenment. At the dawn of the 19th century, a variety of factors changed that: German philosophy rose to world preeminence, the growth of the bureaucracy increased demand for educated workers, government financial backing rose, and the Enlightenment's scientific thrust produced a new focus on research.⁴⁶

With this emphasis on research, the new German university became the model for schools in the United States.⁴⁷ As can be expected for institutions focused on discovering new knowledge, there was a renewed concern for academic freedom. According to historian Walter Metzgar, the concept known as "*Wissenschaft* had overtones of meaning utterly missing in its English counterpart, science."⁴⁸ The German term signified a dedicated, sanctified pursuit, "with a moral imperative to uncover "ultimate meanings."

Such a high calling naturally confers a great deal of freedom to seek such truths. That freedom to explore was also given to professors in their teaching capacity, known as *Lehrfreiheit* (freedom to teach). Together with the so-called *Lernfreiheit*, (freedom to learn), the freedom to teach in German universities became formal and expansive. It was expected that professors would openly "profess" the ideas from their research in class, and students would be free to accept or reject them.⁴⁹

It may seem that this arrangement put students at a disadvantage, as students reject their professors' theories at their peril. But it developed at a time when German students were getting other freedoms, such as the ability to live off-campus.⁵⁰ And, even if merely symbolic, *Lernfreiheit* was an acknowledged academic freedom for students—something not seen since the Middle Ages.

Gradually, the German system became commonplace in the United States. The Morrill Land Grant Act of 1862 ushered in the establishment of American public colleges built on that model.⁵¹ As entrepreneurs accumulated vast fortunes in the late 1800s, they created private research universities, such as Johns Hopkins, Stanford, and the University of Chicago. Others, such as the Duke and Vanderbilt families, generously endowed already-established small religious colleges so that they, too, became secularized research schools in the German sense.

These schools did not immediately offer professors the nearly unlimited freedom their German counterparts had, however. Instead, research universities were often initially dominated by their wealthy benefactors, politically connected lay boards, or institution-building administrators, which inevitably led to clashes with the new research-oriented faculty.

Philosophical Shifts

The German influence loomed large in the development of U.S. colleges and universities, but it was hardly alone in its contribution to academic freedom. A philosophical shift, the Darwinian revolution, ended the dominance of doctrinal morality as the final word in the determination of truth, emphasizing instead an empiricism that depended on verification of facts through experimentation.⁵²

An intensely bitter conflict played out through a series of intellectual clashes in which evolutionary thinkers won or lost the right to continue teaching.

One of these collisions occurred in 1879 at Vanderbilt University. Formerly, it had been Central University, a training ground for ministers; Vanderbilt family money initiated a transition into a modern research university. A professor with evolutionist inclinations, Alexander Winchell, was hired and quickly fell into dispute with the school's religious trustees. He was asked to resign and refused, forcing the school to dismiss him—a temporary setback for the empiricists.⁵³

Such actions brought counter-charges by evolutionists that the clergy could not competently judge scientific matters. Accusations of "heresy, infidelity, or atheism" were "beside the question," according to *Popular Science Monthly*. "If a theory in astronomy, in geology, in physics, chemistry, or biology, is in doubt, let it be judged by its own evidence."⁵⁴

Such sentiments were later generalized and encoded in the AAUP's *1915 Declaration*, which stated that only faculty have "the full competency to judge" whether "departures from the requirements of the scientific spirit and method have occurred."⁵⁵

Soon, the tide turned in favor of science. At Yale University in 1879 it was not uncommon for



The AAUP's 1915 *Declaration* stated that only faculty have “the full competency to judge” whether “departures from the requirements of the scientific spirit and method have occurred.”



professors to teach evolution—but only in natural science classes. A professor of social science, William Sumner, was castigated by the school president, Noah Porter, for assigning a book by Herbert Spencer, the father of social Darwinism. Eventually, they achieved a compromise that moved the cause of science—and academic freedom—forward, with Sumner remaining on the Yale faculty.⁵⁶

Sumner's self-defense centered on the idea “whether a professor who was competent enough to be allowed to teach should teach without restraint from religious taboos.”⁵⁷ In this, he presaged another central point of the *1915 Declaration*, which declared that, for public universities and private colleges that do not specify submission to a particular doctrine, trustees “have no moral right to bind the reason or conscience of any professor.”⁵⁸

Formation of the AAUP

Perhaps the biggest event in the history of academic freedom in the United States was the formation of the American Association of University Professors in 1915. This organization formalized the subject, creating a framework that could be used as a workable—if flawed—standard by which academia could ethically operate.

At the dawn of the 20th century, American higher education was a diverse and contentious world. Small religious colleges that clung tenaciously to their doctrinal roots still dotted the landscape, but the German model was starting to dominate.

This new state of affairs brought a clash of two powerful interests: the modern, research-oriented faculty, many of whom held beliefs such as the idea that an economy should be planned by experts versus the monied benefactors of the new

universities, who favored a top-down business model and whose ideas were often rooted in traditional culture and capitalist economics.

As it turned out, the professors were not to be denied. They founded the American Association of University Professors and brought academic freedom into the spotlight.

Progressive Patriotism

The founders of the AAUP were Progressives.⁵⁹ Their vision included a government that would protect ordinary citizens—including their own rights to explore and teach according to their consciences—from the predatory demands of unconstrained capitalism. Ironically, however, their drive to establish norms of academic freedom was driven backward by their supposed allies in the Progressive government of Woodrow Wilson.

This reversal of academic freedom was caused by the Wilson administration stoking nationalistic extremism in order to enter and win World War I. According to Metzgar, “all over the nation, patriotic zealots on boards of trustees, in the community, and on the faculties themselves, harassed those college teachers whose passion for fighting the war was somewhat less flaming than their own.”⁶⁰

Columbia University was a leader in this witchhunt for disloyal academics. It not only instituted a program to look into potential disloyalties, but it “formally withdrew the privilege of academic freedom for the entire duration of the war.”⁶¹

Anticommunism

To many faculty members today, the academic freedom issue is largely defined by the years immediately following World War II, when the United States initiated efforts to ferret out communists who had secretly inserted themselves into positions of influence. The common perception is that the McCarthy era, as the campaign against communism in the 1940s and 1950s was called, included a heavy-handed crusade of injustice conducted against earnest scholars.

Yet, under closer inspection, the common knowledge does not seem as certain. Russell Kirk questioned the great outcry in academia (and elsewhere) over the probing by Senator Joseph McCarthy and

the House on Un-American Activities Committee, with academics eager to defend those accused of Communism while failing to support other real victims of the miscarriage of academic freedom.⁶² Later discoveries, such as the public exposure in 1995 of the Venona Papers detailing Soviet spy activity, revealed that Soviet-backed Communists had indeed made inroads deep into crucial American institutions, including academia.⁶³

Kirk attempted to define realistic limits to academic freedom that place it in a broader context. "It is a principle of English and American jurisprudence and statecraft that we are not compelled to extend freedom to those who would subvert freedom," he wrote.⁶⁴

The Radical University: 1960s to Today

Until the 1960s, academic freedom differences had largely been administrators and faculty against trustees and politicians, or faculty against administrators. But in that decade, radical students took the foreground, pushing hard against all other interests.

Their efforts ushered in a disturbing and incoherent new paradigm for academic freedom. They simultaneously called for a massive expansion of the right to do anything they pleased—including the politicization of the campus—and for their opposition to be silenced.

The results were the biggest blow to academic freedom in the post-World War II era. The ultimate blame rested not on the students, but on the failure by administrators and trustees to respond to the New Left's "extensive array of tactics of confrontation and disruption." These tactics included "shouting down of speakers and the use of ridicule, rudeness, obscenity," and even threats and violence. Since they were used to prevent the rational use of "evidence and logic," they were "a serious threat to reasoned discourse," according to New York University professor Sidney Hook.⁶⁵

Academia's response was "initially complacency, then compromise, and finally appeasement."⁶⁶ Hook described it as "the collapse of moral

courage in higher education," adding that "collegial silence" had "condoned intimidation and allowed it to become respectable."

The confusion caused by a conception of academic freedom that included both unbridled license and the silencing of contrary opinions did not end with the Vietnam Era. Many 1960s student agitators remained in academia as faculty, rose into positions of influence, and replicated themselves in subsequent generations of intellectuals. And they have employed the same aggressive tactics and the same goal: to reduce an ethical and philosophical question—academic freedom—to a political one.

Their victory was so overwhelming in some sectors of academia there was little resistance until the new millennium, when things reached the point at which religious and traditional students and faculty had no choice but to push back or give up entirely.

Range of Perspectives

There is no shortage of conflicting perspectives of academic freedom; the question of how to define and govern it may never be settled to everybody's liking. But because of the issue's complexity, even some clearly flawed models provide considerable insight—at least as counterpoints to better-reasoned views.

It is beyond the scope of this paper to explain every theory ever proposed on the subject of academic freedom. Instead, it will explore several representative models proposing what academic freedom should protect, what it should not, and why. It begins with a discussion of the traditional AAUP views that have dominated academia for a century.

Traditional AAUP

The American Association of University Professors was founded in 1915 after centuries of conflict between faculty and other factions about opening up the spirit of inquiry beyond a narrow search for "the good," as defined by the ministry. The faculty favored empirical verification with no doctrinal strings attached. Additionally, in the period when the AAUP was formed, many professors—particularly those involved in its

founding—were at odds with trustees and administrators about ideological issues, especially socialism versus laissez-faire economics.

Given that contentious atmosphere, the new professional organization tried to ensure that university scholars were never again constrained by outsiders. Its foundational document, the *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, was remarkable—partly for its audacity. At first glance, it appears to be a rational attempt to organize ideas about academic freedom into a workable framework, but, as indicated below, it is also a manifesto for faculty takeover of higher education's intellectual content.

With the gradual acceptance of the AAUP as the primary source of academic freedom standards, that takeover is almost complete. It is amazing that higher education's other interests—trustees, students, administrators, and, for public schools, taxpayers—were so willing to yield such control.

Like many other professional organizations, it has two functions: to set professional standards and to promote the interests of the profession. Obviously, that is a situation fraught with potential for conflicts of interest, particularly since, unlike other self-governing professions such as law or medicine, it is hard to measure tangible outcomes of faculty members' efforts.

The AAUP's founders were upfront about their designs, with the *1915 Declaration* openly stating that “the freedom which is the subject of this report is that of the teacher.”⁶⁷

The *Declaration* defined academic freedom as the “complete and unlimited freedom to pursue inquiry.”⁶⁸ It also promoted a professor's freedom to teach almost as expansively (with some qualifications about indoctrinating students). And a professor's right to make extramural comments was roughly equated to the right of free speech, as “it is neither possible or desirable to deprive a college professor of the political rights vouchsafed to every citizen.”

Additionally, to the founders of the AAUP, academic freedom meant control of the university by the faculty through various types of peer review. The *Declaration* states that disciplinary actions “cannot with safety be taken by bodies not composed of

members of the academic profession.”⁶⁹ Only they have sufficient knowledge to determine “when departures from the requirements of scientific spirit and method have occurred.”

Such expansive rights were based “primarily on the responsibility to the public itself.”⁷⁰ As described earlier, the German concepts of *Lernfreiheit* and *Lehrfreiheit* gave professors the right to indoctrinate.⁷¹ That spirit is included in the *Declaration*; in some instances, the faculty member's main function almost seems to be to serve as a “change agent” of a student's thought:

It is the primary duty of a teacher to make a student take an honest account of his stock of ideas, throw out the dead matter, place revised price marks on what is left, and try to fill the empty shelves with new goods.⁷²

One of the more audacious claims in the *Declaration* says that the faculty power grab was done in part “to protect college executives and governing boards against unjust charges of infringement of academic freedom, or of arbitrary and dictatorial conduct.”⁷³ In other words, the administrators and trustees should feel grateful at this usurpation of their power by the faculty because they need not face criticism from the faculty.

The *Declaration* at least recognized that a professional organization might prove incapable of being defendant, plaintiff, judge, and jury in the academic freedom arena. It stated that “if this profession should prove itself unwilling to purge its ranks of the incompetent and the unworthy, or to prevent the freedom which it claims in the name of science from being used as a shelter for inefficiency, for superficiality, or for uncritical and intemperate partisanship, it is certain that the task will be performed by others.”⁷⁴

Yet over time, the AAUP has increasingly shed constraints on faculty activity. For instance, the 1940 *Statement of Principles on Academic Freedom and Tenure* said that “[w]hen they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations.”⁷⁵

But in 1964, the *Statement on Extramural Utterances* instead asserted “the right of faculty

members to speak or write as citizens, free from institutional censorship or discipline.”⁷⁶ In doing so, according to John K. Wilson, who writes on academic freedom for the AAUP’s Academe blog, “the AAUP as an organization embraced a radical new principle on extramural utterances.”⁷⁷

An equally revolutionary document issued by the AAUP in 1970 was *The Interpretive Comments of the 1940 Statement*. Wilson suggested that it furthered the goal of placing extramural utterances “in the realm of professional ethics, not institutional enforcement.”⁷⁸

Many schools, assuming that the AAUP promoted impartial standards, adopted AAUP language for their own regulations, thereby ceding much control over the university to the faculty. The AAUP’s updated guidelines from the 1960s and 1970s were adopted throughout academia, largely due to administrative “lack of character, lack of backbone, lack of conviction, and lack of ethics,” lamented Alan Kors, a University of Pennsylvania history professor and founder of FIRE.⁷⁹

As a result, the line of demarcation between academic freedom and freedom of speech has been blurred.

Today’s Radical AAUP

The 1964 and 1970 documents were only the start of the AAUP’s shift to radicalization. In the new millennium, the AAUP made a dramatic break with the past. Before then, the general tenor of AAUP guidelines remained true to the principles of the 1915 Declaration despite numerous modifications, clarifications, and additions. In response to the growing clamor of criticism coming primarily from students and outside groups on the right, the AAUP issued the 2007 document *Freedom in the Classroom*. It was a shrill rejection of the critics’ claims about indoctrination, ideological imbalance, hostile learning environments, and pervasive introduction of irrelevant and politicized classroom instruction. It called such criticism a “modern menace.”⁸⁰

The document also represented a departure from earlier attempts to be objective. Previously, the AAUP firmly agreed that there was no reason to introduce into the classroom controversial materials not pertinent to the subject. *Freedom*



... it is acceptable for a professor to state his opinions “about George Bush” if the class is not about political science or U.S. history, as “all knowledge can be connected to all other knowledge.”



in the Classroom mounted a defense for doing so. It began by suggesting that adherence to official descriptive documents, such as course descriptions, are unnecessary, and that it is acceptable for a professor to state his opinions “about George Bush” if the class is not about political science or U.S. history, as “all knowledge can be connected to all other knowledge.”⁸¹

In a similar vein, it suggested that a professor teaching a course on the English Romantic poets of the early 19th century “is free to assign the poetry” of the 20th century Harlem Renaissance, “so long as the course remains focused more on John Keats than on Countee Cullen.”⁸² There may be valid reasons for doing so—such as to demonstrate influence—but there are many reasons for doing so that are mere whim of the professor, and *Freedom in the Classroom* cites no restrictions for such assignments.

With such open-ended standards, as well as the organization’s longstanding assertion that only faculty are equipped to judge other faculty members’ indiscretions, almost anything is permissible. For example, AAUP officials called for reinstatement of Melissa Click as a professor of journalism at the University of Missouri. Click was suspended, then pressured to resign from a non-tenured position when she was filmed calling for student “muscle” to remove a student journalist from a public demonstration. Hans-Joerg Tiede, an AAUP associate secretary, said that the organization’s policies permit suspension of faculty “only if immediate harm to the faculty member or others is threatened by continuance.”⁸³

If Click's outrageous unprofessionalism and contempt for an open society is considered permissible according to the AAUP's standards, then is any behavior by an academic beyond the pale?

It turns out there is. The AAUP has become an advocacy group for faculty—an inconsistent one at that—rather than a consistent guardian of academic freedom for all in the academic community. In 2005, then-Harvard University president Larry Summers addressed the lack of women in science fields, suggesting that innate biological differences between men and women could be in part responsible. Even though Summers made, at the very least, plausible comments about a still-open question of science—clearly deserving of academic freedom—the AAUP offered him no support and in fact joined in his condemnation when he was forced to resign.⁸⁴

By adopting such indefensible and contradictory positions, the AAUP is now filling the moat surrounding the Ivory Tower to fend off any criticism of anything a professor does. Whereas the *1915 Declaration* affirmed that a university professor's first responsibility was to the public, it now regards an increasingly critical public as a "menace."

Russell Kirk

Russell Kirk believed that the desire to know truth is in the soul of all men; he viewed academic freedom as transcendent and permanent, not a pragmatic tool intended to serve the temporary public good. But even though it was a spiritual quality, academic freedom was not ephemeral and elusive, or even a "hoax," as William F. Buckley suggested (below).

Rather, it was an "historical reality, with ascertainable rights and prerogatives,"⁸⁵ a "natural right" of scholars obtained through practice, since throughout time people in all places and cultures have granted wider latitude to those perceived to be scholars. It became a permanent fixture when the medieval colleges appeared—not encoded or granted by charter or authority by Pope or king—but merely accepted and respected as a necessary tool for scholars seeking truth.

Yet even with such a powerful conception, Kirk did not perceive academic freedom as limitless freedom. Nor did he envision restraint coming only from "the

community of qualified scholars."⁸⁶ He regarded it as an ordered liberty, defined and bound by a system of checks and balances derived from the hunger for knowledge, rational method, reason, and society's needs. He favored an approach to defining and regulating academic freedom through court decisions rather than through professional or political means.

Stanley Fish: Professionalism

Former Duke University English professor Stanley Fish placed professionalism at the center of academic freedom in his 2014 book *Versions of Academic Freedom*. He adopted Yale Law School dean Robert Post's assertion that "academic freedom is best understood 'as the unimpeded application of professional norms of inquiry.'"⁸⁷

He also agreed with Post's claim that only those who have been "socialized into the knowledge and practice of professional norms" should be able to pass judgment, since those who have not done so will judge according to "popular political beliefs."⁸⁸ Fish further suggested that without professional standards, "there would be no bounds to the freedom of faculty members."

This perception of faculty primacy remains true to the earliest AAUP literature—and inherits all the early AAUP's problems. In this view, the right of the faculty to act as judge and jury of what is considered proper scholarship comes not from a transcendent mission to search for the truth, but from having been indoctrinated into the ways of academe. Outsiders—the vast majority of people whose interests the AAUP claims to serve—have no say. This enfranchises the faculty as an unchecked elite—a dangerous move, for such elites tend to become insular and self-serving over time.

Additionally, true dissent is silenced in this view. For higher education does not exist for itself, but to transmit the culture to a new generation. The faculty is only one of many parties with an interest in how knowledge is to be treated, yet Fish grants them total control.

He allows that academics must place reasonable limitations on themselves, noting that "political norms ... don't belong because professional norms fill the landscape."⁸⁹ Yet his confidence that the faculty will maintain high professional

standards appears naïve. Professionalism on the level necessary to perform the objective tasks Fish seeks has long been absent from many departments and even entire institutions.

William F. Buckley: Indoctrination From the Right

William F. Buckley was openly antagonistic toward academic freedom. Much of his argument rested on an apparent incompatibility between academic freedom and the standard of consensus at the heart of professionalism. He felt that such consensus ignores those who are truly in need of academic freedom and bolsters those whose ideas have current but transient popularity.⁹⁰

Buckley's main thesis is as follows: there are many ideas and theories schools choose not to teach, as they are not likely to be true. Therefore schools should teach only those ideas "that we consider most closely to approximate truth, or perhaps, even, to be truth itself."⁹¹

To those who consider such selectivity to be unacceptable, he offered the decision after World War II to explicitly teach German schoolchildren that Nazi values are bad and democratic values are good. If it was important to do so to countermand the Nazi influence in German culture, Buckley wondered, then why shouldn't such values be taught generally, to all people? To do otherwise, Buckley wrote, was "an abdication of responsibility, a lapse into complacency."⁹²

Buckley goes so far as to call academic freedom a "hoax" perpetuated by the faculty.⁹³ He blamed a deliberate conflation of the research function of faculty—for which there is ample justification for free inquiry—and the teaching function—for which no such freedom is necessary.

According to Buckley, the two functions are "related solely by convenience, by tradition, and by economic exigency."⁹⁴ This relationship has produced a convention that enables professors to subsidize their scholarship—for which there may be little market—by their teaching function—for which they are well-paid. As Buckley stated, the academic community can cleverly extend the "protective cloak of research to include activities as a teacher,

thereby insuring to himself license in the laboratory, which is both right and proper, and license in the classroom, which is wrong and improper."

One major flaw with Buckley's approach is the very reason he is against academic freedom: the crippling effects of faculty consensus. For if universities were to teach the knowledge and ideas "that we consider most closely to approximate truth, or perhaps, even, to be truth itself,"⁹⁵ how else would the specifics be decided except by consensus? And it would surely go against Buckley's ultimate purpose to maintain traditional thought in academia, since academia has moved much further to the left since *God and Man at Yale*. Today's consensus consists of the very ideas he wished to keep off campus.

Ronald Dworkin: A Limiting Approach on the Left

Buckley's concept of academic freedom is ironically gaining popularity in some sectors of the left. The search for truth is indeed best when free, New York University law professor Ronald Dworkin wrote in *The Future of Academic Freedom*, a collection of essays by left-leaning academics edited by City University of New York English professor Louis Menand. But not always. "We must nevertheless concede that on many occasions certain compromises of academic freedom might well provide even more efficient truth-seeking strategies, particularly if we want to discover not just what is true but also what is useful or important," he explained.⁹⁶

Because "academic resources are limited," he continued, they "should not be spent on those who will occupy their time developing arguments for what is plainly false or researching what is obviously of no serious interest."⁹⁷ He granted that "sometimes a theory or program now dismissed as wrong or



If it was important to do so to countermand the Nazi influence in German culture, Buckley wondered, then why shouldn't such values be taught generally, to all people?



trivial will turn out to be true or crucial.” But since we cannot know *a priori* which ideas will be proven true, it is best to devote the scarce resources to those most likely to be true or productive—by imposing limitations on academic freedom.

Just as with Buckley, Dworkin’s suggestion might be reasonable—if the authority to decide which ideas are likely to be profitable is in reasonable hands. There is no way, however, to ensure such reasoned authority.

In fact, Dworkin opens the door to the likely imposition of unreasonable restrictions on intellectual liberty. He regards academic freedom as “only one value among many”⁹⁸ that may be required to “yield to other competing values”; that view is a ready justification for repressive speech codes and the silencing of valid but politically incorrect opinions.

Having made a case for constraining academic freedom, Dworkin then diverges from that view and equates politicized extramural comments with one’s civic duty. People have an ethical responsibility to speak out “when our society must make a collective decision and we believe that we have information or opinion it should take into account.”⁹⁹ And that apparently goes double for faculty members, who “have a paradigmatic duty to discover and teach what they find to be important and true,” a duty that is not in any way “subject to any qualification about the best interests of to whom they speak. It is an undiluted duty to the truth.”

But this civic duty encourages faculty to become full-time advocates for political causes. For there is never a time when society does not need to make a collective decision. In this regard, Dworkin proposes politicizing the academy further by adding a new job requirement: to proselytize.



Protestors try to drown out speakers by shouting them down, and when security team members escort them from the lecture hall, they complain that their right to free speech is being denied.



Extreme Left

A large swath of academia favors modes of thought that conflict with open inquiry. As Neil Hamilton wrote, the “extreme proponents” of postmodernism reject the potential for “accurate representation of the way the world is”; rather, “impartiality and approximation of objective reality are myths.”¹⁰⁰ The search for objective truth is devalued; in its stead is a politicized intellectual agenda intended to uplift the “oppressed.”

In this paradigm, the freedom that permits one to follow a unique path in the direction of facts and one’s conscience—academic freedom—is a transgression unless it follows specific political dogmas. Open inquiry is replaced by political activism.

There are two parts to this extreme left agenda: limiting the academic freedom of non-radical dissenters, and granting radicals total license to indoctrinate and intimidate. Writer and leftist-turned-conservative activist David Horowitz described a “Wonderland Logic” in which a radicalized faculty can fend off outside attempts “to remove politics *from* the curriculum” by painting them as “political intervention into the curriculum.”¹⁰¹

A prime example of this mindset is frequently expressed during protests against conservative speakers on campuses. Protestors try to drown out speakers by shouting them down, and when security team members escort them from the lecture hall, they complain that their right to free speech is being denied.

While to most people, the sentiments of such protestors seem illogical, selfish, or silly, this conception of academic freedom as a mere tool for political ends is gaining popularity.

Another shift in attitudes oddly resembles the pre-Darwin conviction that academia’s first order was moral education. That prior belief was embodied in two principles defined by Metzgar: “that character was a function of belief” and “that an idea was warranted verified by proof of its moral advantage.”¹⁰²

Those principles were gradually replaced in the mainstream by empiricism and pragmatism.

Yet today, higher education's moral function is receiving new attention, according to Louis Menand. "Is there any teacher who does not believe that, to some degree, character is a function of belief, or that the ideas he or she shares with students ought not to conduce to their moral advantage?" he asks. If they do not "think that there is a positive moral component to their teaching," then "why else would they teach?"¹⁰³

The moral advantages today's politicized professoriate promotes are hardly the same ones the Puritanical founders of the New England colonial colleges had in mind. "But they are willing to apply the same test," Menand concludes.¹⁰⁴

The new campus morality promoted by politicized faculty is a form of political correctness used to justify anything that forwards the Left's agenda. It not only rejects the idea of a fixed moral order to the universe, but also rejects the early AAUP's fixed standards of professionalism. Radical Berkeley professor and gender theorist Judith Butler's view is that such professional norms are merely conventions that are subject to change over time.¹⁰⁵ Therefore, even they should be challenged in light of the changing academic landscape.

In such an atmosphere, there is no intent to sort out rights, duties, and trade-offs to discover the most ethical process; any path that achieves the desired end will do.

One example of this extremist mindset is Denis Rancourt, a physics professor at the University of Ottawa who, in 2011, ignored the mandated course material for a class in environmental physics to promote his particular brand of left-wing activism. Rancourt described his actions as "squatting" a course, in the sense that a person who illegally inhabits another's dwelling without permission is said to be squatting.¹⁰⁶

According to Stanley Fish, Rancourt is ambivalent about academic freedom—he both uses it to defend his own behavior and attacks it to deny the authority of the university (along with students' freedom to not be indoctrinated). "What Rancourt wants professors and students to be autonomous from is the university's monitoring of whatever they choose to do."¹⁰⁷

Examples abound of the increasing rejection of a well-reasoned sense of academic freedom for political purposes. An essay by Harvard student Sandra Korn in the February 18, 2014 *Harvard Crimson*, "The Doctrine of Academic Freedom: Let's give up on academic freedom in favor of justice," received considerable national attention. Whether or not a scholar's academic freedom is infringed upon "is not the most important question to ask," Korn wrote.¹⁰⁸ Instead, that research should pass a test of "something I think much more important: academic justice." This she defines as "when an academic community observes research promoting or justifying oppression, it should ensure this research does not continue."

She bases "the power to enforce academic justice" on "students, faculty, and workers organizing to make our universities look as we want them to do."¹⁰⁹

Furthermore, in this environment, coercion is condoned as a means to promote the multicultural agenda. Neil Hamilton detailed an extensive list of the tactics directed toward faculty who dissented from that agenda.¹¹⁰ These tactics include public accusations of racism and other transgressions, social ostracism, official investigations and tribunals, threats, disruptions of speeches, classes, and administrative functions, and office takeovers.

Those on the extreme left often dismiss the existence of overt indoctrination—or deny that it is problematic. Louis Menand suggests that students are quite capable of sorting through their professors' claims with full understanding, and that they should consider themselves "well-equipped intellectually" after having been taught to view life from the postmodern perspective.¹¹¹

"If this is not good equipment to have," he added, "it is the business of the professor down the hall to persuade them otherwise."

Both of Menand's assertions, that students are capable of sorting through the complex arguments to achieve a mature understanding independent of their professors' guidance and that there are "professors down the hall" waiting to counter indoctrination, seem highly presumptuous. The second is perhaps even laughable, given the verifiable absence of conservative professors in the very disciplines most prone to indoctrination. For instance, a 2016



Many professors whose perspectives are at odds with the consensus of opinion—including conservatives—have credited tenure with permitting them to openly dissent without losing their jobs.



study by The College Fix found that at least 17 departments at the University of North Carolina at Chapel Hill have no registered Republicans.¹¹²

Despite little popular will for the radical agenda, restoration of the academy to a more balanced intellectual climate is not yet likely. Policy makers, alumni, and the general public are often oblivious to just how far academia has moved from the center. Fair-minded, honest, and objective scientists and scholars may still be in the majority, but they tend to mind their own business. The politicized faculty, on the other hand, focus on politics and on driving dissent from their classrooms, their departments, and their campuses. Today, the political quest for social justice is being elevated above the need for a fair and ethical intellectual environment.

Solutions

There is no shortage of expressed solutions to today's growing confusion of what is permissible in academia. At the same time, there is great resistance to change; even those who recognize the severity of the problem and the need to find more workable limits are hesitant to venture too far from the status quo. Many solutions, particularly those that rely on the willingness of the faculty to voluntarily yield power, will likely fail.

Still, some trends are encouraging, such as the development of alternate institutions and a political shift at the state level that may put administrators with stiffer spines atop public universities. Especially hopeful is the growing body of court decisions that finely parses the ethical boundaries of academic freedom.

The AAUP and the Tenure System

Since its inception, the AAUP has promoted the tenure system as the primary defense against violations of academic freedom. Briefly, tenure is a system in which professors are granted considerable job protections once they have received the approval of their department by consensus; it is a legal contract between school and teacher. This means they cannot be terminated for reasons other than “financial exigency” (“a severe financial crisis” that threatens the entire department or school), the “discontinuance of a department or program for educational reasons,” or severely egregious behavior that indicates a lack of “fitness” for their position.¹¹³

Tenure's utility for preserving the ability of faculty to speak freely on controversial subjects is immediately apparent. Many professors whose perspectives are at odds with the consensus of opinion—including conservatives—have credited tenure with permitting them to openly dissent without losing their jobs. Donald Downs and University of Wisconsin historian John Sharpless wrote:

Without tenure protections, professors like us who fight for free speech and liberty ... could be even more at risk of being targeted on college campuses for our beliefs.¹¹⁴

Yet tenure is proving less effective as the complexity and intensity of academic freedom issues grows. One problem is that it is attained through peer review and consensus and therefore suffers those concepts' unsolvable trade-offs. Peer review and consensus are essentially majority rule, and there is a powerful natural tendency for like-minded individuals in a majoritarian system to gradually eliminate dissent over time, even if there is nothing nefarious involved. It is simply an element of human nature for individuals to prefer those who agree with them.

Today, a heavily politicized element in many academic departments is making the process of excluding dissenters faster and more vicious. Louis Menand described the resultant poisonous atmosphere: “it is now regarded as legitimate by some professors to argue that the absence of a political focus or multicultural focus in another professor's work constitutes prima facie disqualification for professional advancement.”¹¹⁵ He also wrote:

The research university is a virtual paradigm of professionalism: specialists within each specialized field have a wide authority to determine who the new specialists will be, and in what the work of the specialization properly consists. This authority insures a commensurably wide freedom of inquiry, *but only for the specialist*. For people who do not become members of the profession, this system constitutes not a freedom but an almost completely disabling restriction.¹¹⁶

For these reasons, the consensus that is the foundation for tenure decisions is also the biggest impediment for aspiring faculty with dissenting views to get hired or receive tenure in the first place.

Additionally, going back at least as far as the AAUP's *1915 Declaration*, tenure has not just been a means for defending academic freedom. It was given a secondary purpose at that time to provide "a sufficient degree of economic security to make the profession attractive to men and women of ability."¹¹⁷

This secondary purpose has become extremely problematic for discovering academic freedom's proper limits. Conflating a means of protecting free inquiry with a means for job security has distorted the AAUP's role; it is becoming less a standard-setting professional organization and more of a labor union, even serving as a bargaining unit at times. (In 2013, it even reorganized into part professional organization, part union, and part fundraising foundation).¹¹⁸ The two purposes—upholding standards of professionalism by a class of worker and serving the employment interests of those same workers—are inherently in conflict.

Restoring Professionalism Voluntarily

Many academics still favor a belief that the modern faculty will voluntarily restore itself as a responsible professional organization. This camp is a diverse lot, including conservative Donald Downs, centrist Neil Hamilton, and liberal Stanley Fish.

Downs is hopeful that most academic freedom issues can still be settled amicably within universities. He suggests that when a professor crosses the line into "slanted and bullying

teaching" or "expressing insensitive views about race, gender, religion or sexual preferences ... one solution is for the department chair or dean to meet with the instructor to discuss the students' concerns and ask the instructor to show more respect for student critiques."¹¹⁹

This may work in ordinary cases, but unreasonable professors may respond unfavorably to requests to be reasonable. And today's university is becoming less amicable by the minute. Downs's expectations seem naïve in that they rely on an assumption that illiberal attitudes are not pervasive in departments or even administrations, when there is ample evidence to the contrary.

Hamilton suggested that "education may be the simplest and best corrective."¹²⁰ This entails "socialization of novitiates into the ethics and traditions of the academic profession" at "the faculty or department level." In other words, new faculty are to be instructed about academic freedom. While that may be a good idea, it offers little remedy for the segment of the faculty most likely to commit academic freedom offenses, since many of them have rejected balanced ethical approaches in favor of political activism.

One consideration about voluntary solutions: if they were likely to work, they would already be working. It may be that they are, in a great many situations and places. But not everything can be solved harmoniously, as some cases will always require intervention or legal action.

Stakeholder Analysis: Arthur Gross-Schaefer

Arthur Gross-Schaefer, a law professor at Loyola-Marymount University, favors a formalized process called "stakeholder analysis" that not only includes the faculty, but also other interests such as students, administrators, and society-at-large (he leaves out trustees).¹²¹

Gross-Schaefer described how the AAUP's domination of the academic freedom debate is proving insufficient in an article in the February 2011 issue of the *Journal of Legal Studies in Business*, entitled "Academic Freedom: Moving Away from the Faculty-Only Paradigm." He wrote that the AAUP

perspective “fails to take into account classroom behavior or a notion of accountability of faculty members to students and administrators.”¹²²

Gross-Schaefer suggests that other interests have been given short shrift by guidelines based on AAUP literature because “the AAUP was created by professors for professors.”¹²³ He states that it is as much a labor organization as professional association, and therefore it is “structurally partisan to the interests of professors by claiming they should be protected from scrutiny by academic freedom.”

The rights of students in particular have suffered under the prevailing scenario of academic freedom. The reasons are obvious, according to Gross-Schaefer: “any gain or recognition of students’ may be interpreted by some as solely a diminishment of faculty power.”¹²⁴ Especially important is a lack of recognition of the “power differences between professor and student.” Faculty not only have control over the classroom and the power to grade, but advantages of knowledge and experience. This asymmetry of power and knowledge was acknowledged in the AAUP’s initial 1915 document.

The other key stakeholder group cited by Gross-Schaefer is administrators. They have often forsaken their power and capitulated to the faculty in academic freedom questions, despite landmark court rulings granting them extensive control over the classroom. “The failure of university professors to effectively address issues of intellectual diversity and other concerns ... is deeply problematic.”¹²⁵

According to Gross-Schaefer, the negligence of administrators (as well as trustees) to counter the AAUP’s one-sided definition and application of academic freedom has created license and a sense of privilege. In this self-interested scenario, “academic freedom ceases to be about the lofty focus of seeking truth and instead looks to preserve the unlimited autonomy of the faculty, including the right to politically proselytize their students.”¹²⁶

His solution is to increase those who have some say in the process. “The AAUP has set no clear expectations for academic standards in the classroom; such an absence begs for outside parties to weigh in and have their concerns taken seriously,” he writes.¹²⁷ He wishes

schools would adopt a “Rights, Responsibility and Respect” model developed by the First Amendment Center at Vanderbilt University.

But Gross-Schaefer falls prey to wishful thinking in believing that universities will voluntarily undergo “stakeholder analysis” to amend the current failure to define and enforce academic freedom. He even admits that “nobody votes themselves out of power.”¹²⁸

And that brings the issue back to its source: it is unrealistic to expect real reform from the very interest group that has controlled the Ivory Tower prejudicially in its own favor and that is growing increasingly defensive of its privilege. Even if the faculty can be brought to the bargaining table, it will only be to prevent reform and a shared definition of academic freedom.

Indeed, if the 2007 document *Freedom in the Classroom* is any indication, the AAUP appears to be retreating from any standards at all other than self-preservation.

David Horowitz and the Academic Bill of Rights

One highly publicized attempt to solve the academic freedom dilemma was the work of David Horowitz. Though preferring to return to the AAUP’s earlier ethical principles, he questioned whether that is possible. Instead, he encoded an “Academic Bill of Rights” (ABOR) modeled, for the most part, on the AAUP’s 1915 document. In his 2007 book, *Indoctrination U.*, he expressed a hope that it would be voluntarily adopted throughout academia, but enacted through legislation if necessary.¹²⁹

Horowitz’s ABOR is a relatively short document consisting of eight principles. Its inclusion of one key aspect of academic freedom for students—the diversity of ideas—has been the center of controversy. Horowitz said ABOR “was designed to promote two agendas—intellectual diversity and academic manners,” in which the latter “meant that differing viewpoints should be accorded proper intellectual respect.”¹³⁰

He explicitly emphasized the need for diversity in teaching. The following passages are taken from the fourth and fifth provisions.¹³¹

4. While teachers are and should be free to pursue their own findings and perspectives in presenting their views, they should consider and make their students aware of other viewpoints. Academic disciplines should welcome a diversity of approaches to unsettled questions.

5. Exposing students to the spectrum of significant scholarly viewpoints on the subjects examined in their courses is a major responsibility of the faculty.

Horowitz's call for more intellectual diversity has come under intense attack. Often the assailants were hysterical: Joan Wallach Scott, a Princeton professor and former chair of the AAUP's Committee A, which oversees its handling of academic freedom questions, wrote that ABOR "recalls the kind of government intervention in the academy practiced by totalitarian governments. Historical examples are Japan, China, Nazi Germany, Fascist Italy, and the Soviet Union. These governments sought to control thought rather than permit a free market of ideas."¹³²

That seemed an outrageous and duplicitous way to describe a sincere albeit insufficient attempt to ensure a diversity of ideas on American campuses. Another example was an article in the *Rocky Mountain News* describing the call for diversity in intellectual classroom material as "an affirmative action program that would force universities to hire conservatives."¹³³ To be certain, ABOR clearly states that, "[N]o faculty shall be hired or fired or denied promotion or tenure on the basis of his or her political or religious beliefs."¹³⁴

Others accused Horowitz of trying to limit the range of views on campus, when his intent was obviously to broaden that range. His detractors have pursued vicious ad hominem routes, calling him "a reincarnation of Joe McCarthy," a "witch hunter," and likening him to "Mao Zedong, whose Cultural Revolution in China featured the persecution of professors by Maoist students for straying from the party line."¹³⁵

Less hyperbolic criticism focused on the difficulty of implementing ABOR's language on intellectual diversity. Many suggested that it mandated an impossible inclusion of all views. Horowitz denied this, writing "there is no implication" in ABOR that "a curriculum include every point



Gross-Schaefer suggests that other interests have been given short shrift by guidelines based on AAUP literature because "the AAUP was created by professors for professors."



of view, let alone points of view that are not worth considering."¹³⁶ Indeed, ABOR states that included perspectives "should reflect 'significant scholarly opinion' and not just any opinion."

Stanley Fish claimed that ABOR's language about intellectual diversity contradicted the spirit of academic freedom, which is "to go wherever intellectual inquiry takes you without regard to directives proclaimed in advance by a regime of prior restraint."¹³⁷ ABOR's language is just such a prior restraint, he concluded.

In this, however, Fish failed to differentiate between research and teaching. ABOR is largely about preserving the academic rights of students; it is not concerned with research. It is ordinarily considered appropriate to place more limitations on teaching—there is a clear chain of court decisions that do not permit professors to go wherever intellectual inquiry takes them inside the classroom.

ABOR made significant progress in state legislatures in the early years of the new millennium. Bills based on ABOR were introduced in 28 states. But only Georgia passed one, and the AAUP website said that "the final text was significantly altered for the better due to lobbying by AAUP members in the state."¹³⁸ In other words, it was rendered ineffective.

The movement to legislate ABOR stalled around 2008. But there has been renewed interest in some sort of academic bill of rights recently, in response to growing pressure by student radicals to silence opposition (along with the capitulation of schools eager to appease radicals by adopting speech codes and other restrictive regulations). Two states—Virginia in 2014 and Missouri in 2015—passed legislation that removes restrictions on campus free speech.¹³⁹

This year, a bill entitled “The Academic Bill of Rights” has been proposed in the Washington State legislature. It is not modeled on Horowitz’s ABOR, but concentrates on preventing attacks on free speech rather than additionally promoting a diversity of ideas.¹⁴⁰

Alternate Institutions

Higher education, an institution extremely resistant to outsider influence, is becoming a vibrant laboratory of new organizations and innovations. One new type of institution is independent higher education think tanks or advocacy organizations that keep a close watch on academia and expose injustices of academic freedom. Some, such as the Foundation for Individual Rights in Education (FIRE) and the Alliance Defending Freedom (ADF), offer legal services for groups and individuals whose academic freedom rights have been trampled. Other monitoring organizations include the National Association of Scholars, the American Council of Trustees and Alumni, and the John W. Pope Center for Higher Education Policy.

Another development is the creation of new schools that teach from specific viewpoints. Patrick Henry College in Virginia, founded in 2000, is one. Technical innovations such as online education are especially important in this development, since they enable dissenting scholars to create their own institutions at a relatively low cost.

Still another possibility for reform is academic centers that exist within universities but have independent funding and governance. They give professors outside the liberal mainstream an opportunity to teach and research according to their own ideas without excessive departmental control.

Student organizations also serve an important role, as they are on the front lines of academic freedom issues. They offer the “safety in numbers” support often required to encourage students to stand up for their rights. And their front row seat for observing school events and operations strengthens a free academic environment by providing transparency.

Court Decisions

There are two arenas for determining academic freedom, one legal and one extralegal. Extralegal academic freedom consists of the constraints

and liberties that arise over time through convention, tradition, and procedures¹⁴¹; the AAUP literature, university policies, faculty handbooks, and employment contracts are the main source of these “corporate” practices.

Legal academic freedom is the body of court decisions establishing binding legal standards. Most academic freedom problems eventually come down to a struggle between two parties to determine the proper boundaries of their rights and obligations; the courts are the fitting place to decide on such matters.

These two conceptions—legal and corporate—have often moved together in mutually supportive fashion. In recent years, however, they appear to be diverging. For instance, as the AAUP grows increasingly protective of faculty rights to promote their beliefs in class, more court cases assert the rights of students in such matters as the introduction of irrelevant classroom material.

The general retreat from responsibility by academic administrators and trustees has left to the courts the enforcement of ethical standards. This can be a sub-optimal solution, however, for it requires time, money, and effort on the part of students and professors who can ill afford to pursue legal redress.

Early American Court Decisions. In the early years of the U.S. academy, conflicts about academic freedom were usually settled within universities. In most major 19th century decisions, the courts strongly backed the rights of universities to fire and control faculty.

The first major court case was *The Reverend John Bracken v. The Visitors of William and Mary College in 1790*. William and Mary’s original charter in 1693 gave the final authority to a Board of Trustees, which, once the college was built and fully operational, was to transfer its power to the faculty.¹⁴²

Over the subsequent century, however, vague language in the original charter enabled a secondary governing body, the Board of Visitors, to assume control. In 1779, largely at the behest of Thomas Jefferson, the Visitors exercised their assumed authority to enact major modernizing reforms, such as eliminating professorships in divinity and

a grammar school for the education of younger students in favor of establishing professorships in science, law, and modern languages.

Bracken, as the head of the grammar school, objected when his job ended. His argument hinged upon “ownership” of the college—Bracken’s counsel John Taylor claimed that the original charter made the faculty the permanent corporation and that the Visitors had usurped the faculty’s rightful inheritance. Furthermore, as members of a corporation, faculty had tenure or a lifetime position that could not be ended without cause or a hearing.

John Marshall, arguing for the Visitors, said that Bracken’s position had been lawfully eliminated and that was sufficient cause. The Virginia Court of Appeals sided with the Visitors and dismissed Bracken’s suit without opinion.

In 1827, in *Murdock v. Phillips Academy*, the Supreme Court of Massachusetts ruled that a professor could be fired as long as he had “the offense with which he is charged, fully and plainly, substantially and formally, described to him.”¹⁴³ *Union County v. James* in 1853 decided that “a professor was an employee and not an officer of the corporation.”¹⁴⁴

In 1892, Supreme Court justice Oliver Wendell Holmes said that “there are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech.”¹⁴⁵ He added that a policeman “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”

Patriotism—Or Else. One reaction to the rise of Communism in the first half of the 20th century was government mandated shows of patriotism. One of the few academic freedom cases of the time occurred in Oregon in 1925. In *Pierce v. The Society of the Sisters of the Holy Names of Jesus and Mary*,

The Supreme Court unanimously ruled that the state has the power, among others, over all schools, to require that “teachers shall be of good moral character and patriotic disposition,” that “certain studies plainly essential to good citizenship be taught” and that “nothing should be taught which is manifestly inimical to the public welfare.”¹⁴⁶

Other cases followed that ruled school districts could compel students to salute the flag and recite the Pledge of Allegiance, such as *Minersville School District v. Gobitis* in 1940.¹⁴⁷ But merely two years after *Gobitis*, the Supreme Court held in *Barnette v. West Virginia Board of Education* by a 6-to-3 decision that compelling public schoolchildren to salute the flag was unconstitutional.¹⁴⁸ The Court found that saluting was a form of utterance and a means of communicating ideas. “Compulsory unification of opinion,” the Court held, was antithetical to First Amendment values.

Loyalty Oaths. After World War II, a series of important loyalty cases occurred. Early on, the most notable cases were those filed as a direct result of Cold War activities. For these, the AAUP strongly backed faculty members accused of subversive activities.

In 1949, the New York legislature passed the so-called Feinberg Law (named after the legislator who introduced the bill), which prevented “members of any organization committed to the overthrow of the United States government by illegal means”¹⁴⁹ from working in public schools. It followed an executive order by Harry Truman calling for increased scrutiny of federal employees for questionable loyalty.¹⁵⁰

Three years later, Feinberg was upheld at the Supreme Court level in *Adler v. Board of Education of the City of New York*. Irving Adler, a mathematics teacher who had long been involved in social activism, refused to answer the question, “Are you now, or have you ever been, a member of the Communist Party?”¹⁵¹ Adler and other teachers based their resistance on another state law that prohibited questioning of civil service employees about their political affiliations.



After World War II, a series of important loyalty cases occurred. Early on, the most notable cases were those filed as a direct result of Cold War activities.



But *Adler* was not to stand forever. A major case concerning the Cold War political affiliations of teachers occurred in 1957: *Sweezy v. New Hampshire*. Paul Sweezy was a Marxist economist and activist who occasionally lectured at the University of New Hampshire. The attorney general of New Hampshire questioned him about his activities; Sweezy declined to answer and was held in contempt.

The contempt ruling was overturned by the U.S. Supreme Court, based on its denial of First Amendment rights and academic freedom.¹⁵² Still, it was a “plurality” decision, which meant that a majority of justices could not find a common rationale that would render the decision a binding precedent.

The Supreme Court contradicted the *Sweezy* decision in *Barenblatt v. The United States* in 1959. Lloyd Barenblatt was a Vassar College psychology professor who refused to answer questions by the House Un-American Activities Committee about his membership in a Communist club while attending the University of Michigan. Barenblatt cited his Fifth Amendment right to not incriminate himself, but was held in contempt. Despite the similarity to *Sweezy* and several other cases involving a refusal to answer questions about communist activities, the Supreme Court upheld Barenblatt’s contempt charge. Justice John Marshall Harlan explained the ruling:

That Congress has wide power to legislate in the field of Communist activity in this Country, and to conduct appropriate investigations in aid thereof, is hardly debatable... This power rests on the right of self-preservation, “the ultimate value of any society.”¹⁵³



Their resolutions demonstrated that the courts, by looking at the particulars of each case, can properly weigh the nuances needed to determine academic freedom’s boundaries.



The binding precedent that ended the Feinberg Law’s hold occurred in 1967 with *Keyishian v. Board of Regents of the State University of New York*. Harry Keyishian worked at the University of Buffalo, which was private until it joined the SUNY system in 1962. As public employees, Buffalo employees became subject to the Feinberg Law; Keyishian and others refused to comply with the loyalty oath, and the Supreme Court decided in their favor.

Keyishian v. Board of Regents swept away Feinberg, but the ruling weakened the ability of the government to deal with “soft” acts of subversion. It declared that “mere knowing membership in a subversive organization”¹⁵⁴ was not enough to determine treasonous intent. Instead, knowledge of the individual’s specific intention to conduct seditious activities was necessary—otherwise, an individual could be declared guilty by association, an infringement of First Amendment rights.

This meant that professors could belong to a subversive group and promote the ultimate goals of that organization, encourage students to join, or chip away at the foundations of American democracy, as long as they did not explicitly state their intention to violently overthrow the U.S. government.

Extramural Utterances: Free Speech or Fair Game? An important group of cases governing the relationship between faculty and society are centered on extramural utterances, specifically, public statements that could suggest a professor’s views are beyond the pale of acceptable speech and may indicate a lack of fitness to be a teacher.

Two cases featuring highly controversial extramural comments both occurred in the early 1990s at the City University of New York. Their resolutions demonstrated that the courts, by looking at the particulars of each case, can properly weigh the nuances needed to determine academic freedom’s boundaries.

The first was *Levin v. Harleston* in 1991.¹⁵⁵ Michael Levin, a philosophy professor, wrote on several occasions questioning the intelligence of blacks. In response, the philosophy department created an alternative course so that students could transfer out of Levin’s if they objected to his writing. Levin and other professors considered such a “shadow class” an infringement on Levin’s academic

freedom. The school president also encouraged students to leave his class and created an ad hoc committee to explore further actions against Levin. Levin sued, and the court decided that his academic freedom had indeed been violated.

Two years later, the court tried the second CUNY case, *Jeffries v. Harleston*. Unlike Levin's scholarly attitude, Leonard Jeffries's conduct was outrageous and emotional. In class, he threw out highly subjective opinions as fact, such as calling people of European ancestry "ice people" and "egotistic, individualistic, and exploitative," while describing Africans as "sun people" with "humanistic, spiritualistic value system[s]."¹⁵⁶

At an event in Albany, Jeffries attacked Jews as power brokers who had financed the slave trade. The school gave him a relatively minor punishment, reducing his department chairmanship from three years to one, but Jeffries responded angrily. As animosity grew—at one point, Jeffries declared "war" on the CUNY faculty—the Board of Trustees removed Jeffries from the department chair.¹⁵⁷

Initially a jury sided with Jeffries, even though it found reasonable the assumption that Jeffries' comments damaged CUNY's reputation (an accepted reason for permitting punishment of faculty). The school failed to prove that Jeffries disrupted its efficient operation. But the ruling in Jeffries's favor was overturned in 1995 by a federal court that found "(1) it was reasonable for them to believe that the Albany speech would disrupt CUNY operations; (2) the potential interference with CUNY operations outweighed the First Amendment value of the Albany speech; and (3) they demoted Jeffries because they feared the ramifications for CUNY, or, at least, for reasons wholly unrelated to the Albany speech."¹⁵⁸

A more recent case that produced sensible boundaries of academic freedom concerned the rescinding of an offer of a tenured position. Steven Salaita was an assistant professor in Native American Studies at Virginia Polytechnic Institute and State University who accepted a job offer from the American Indian Studies department at the University of Illinois in 2013. Before the trustees finalized his contract, disturbing

statements on Twitter came to light. For example, after three Israeli teenagers were reported kidnapped and presumed dead, he tweeted:

You may be too refined to say it, but I'm not: I wish all the f**king West Bank settlers would go missing.¹⁵⁹

Shortly before Salaita started teaching, Illinois's chancellor withheld Salaita's contract from a confirmation vote by the trustees. She then urged the trustees to deny Salaita's appointment, which they did. The AAUP supported Salaita, claiming that he was already a faculty member by virtue of his contract and that he was being denied his rightful position because of his politics.¹⁶⁰

The university maintained that he was instead rejected, not for his politics, but for expressing himself in an unscholarly, uncivil manner. In a statement made in January of 2015, after Salaita filed suit, the university declared:

... while Steven Salaita was still under consideration for a tenured position to teach courses comparing issues related to the experiences of Native Americans to issues related to Palestinians and the Middle East, Dr. Salaita began demonstrating that he lacked the professional fitness to serve on the faculty of the University of Illinois at Urbana-Champaign ... statements and many more like them demonstrate that Dr. Salaita lacks the judgment, temperament and thoughtfulness to serve as a member of our faculty in any capacity, but particularly to teach courses related to the Middle East.¹⁶¹

In this case, the system worked. Since Salaita was not yet an Illinois professor, the school had much greater latitude for deciding that he was unfit for the position than if he were already a faculty member. Clearly, his contract was not binding until it passed through the entire process, which included a vote by the trustees. Had Salaita's appointment gone through, it would have been an affront to the spirit of free inquiry that academic freedom is based upon—because his goal is not scholarship. In example after example, he attests that his goal is activism. In one of his books on the Middle East, *The Holy Land in Transit*, he states, "my entire life has thus been dedicated to



Had the administration and trustees been mere rubber stamps for the faculty, as is often the case, free inquiry at Illinois would have suffered by giving one more unscholarly activist influence on its campus.



Palestinian politics and activism.”¹⁶² In another book, *The Uncultured Wars*, he admits, “I would hate for my own work not to contribute somehow to the project of undermining Israel.”¹⁶³

As former AAUP president (and emeritus Illinois English professor) Cary Nelson wrote, such statements raise “doubts about Salaita’s capacity for disinterested reasoning, for rising above invective, for weighing alternative arguments and rebutting them, and for making arguments that are persuasive and not just assertive.”¹⁶⁴

Salaita’s case was decided by an out-of-court settlement, which amounted to \$600,000 plus an additional \$275,000 for court costs.¹⁶⁵ While Salaita and his supporters declared a victory for academic freedom on the basis of the settlement,¹⁶⁶ that is not the real story. There was indeed a victory for academic freedom, but because the University of Illinois stood firm in denying his appointment. Salaita will not teach at Urbana-Champaign; his settlement occurred because the school agreed that some recompense was due him because he had quit his Virginia Tech job to take the Illinois position.¹⁶⁷ To avoid future responsibility for a rejected applicant’s relocation, Illinois added a requirement that the board’s faculty appointment confirmation votes must take place earlier.

The Salaita case reveals the need to strengthen board review in hiring decisions. Salaita should never have been offered a tenure-track position in the first place at a major research university such as Illinois, given his unscholarly demeanor and lack of serious writing in his real field of Native Americans.¹⁶⁸ Had the administration and trustees been mere rubber stamps for the

faculty, as is often the case, free inquiry at Illinois would have suffered by giving one more unscholarly activist influence on its campus.

Faculty vs. School. There has long been a debate about whether academic freedom is inherent to the institution or to the individual faculty. A corollary argument is whether faculty speech has First Amendment rights that override institutional rights. The *Keyishian* decision concerning loyalty oaths in 1967 clouded the issue over whether academic freedom is a First Amendment right, with the majority opinion stating “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.”¹⁶⁹

Donna Euben, a former staff counsel for the AAUP, wrote in 2002 that:

Although the U.S. Supreme Court has consistently recognized that academic freedom is a First Amendment right, the scope of the First Amendment right of academic freedom for professors remains unclear.¹⁷⁰

The issue may be more clear than Euben suggested when it is seen in light of a different category of cases: those of individual professors versus their institutions. The decision in 1957 in *Sweezy*, which upheld Paul Sweezy’s right to lecture at the University of New Hampshire despite communist ties, gave academic freedom to the institution, rather than the individual professor:

It is the business of a university to provide an atmosphere which is most conducive to speculation, experimentation, and creation. It is an atmosphere in which there prevail “the four essential freedoms” of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”¹⁷¹

Decisions since then have generally given schools, rather than individual professors, the authority to determine many matters, including the right to determine classroom content and grading concerns.

Classroom Content and Grading. A frequent starting point for discussion of academic freedom in classroom teaching is the 1973 case *Hetrick v. Martin*. Phyllis Hetrick was a non-tenured English

teacher fired by Western Kentucky University. Her methods were not only unorthodox but incomprehensible to many students. She described herself as an “unwed mother” in class when in fact she was divorced, and she assigned much less work than her courses were supposed to cover.¹⁷²

The district court sided with the university, stating that a decision not to renew her contract was based on “concern for her teaching methods and ability,”¹⁷³ rather than a denial of First Amendment rights. The decision declared:

Academic freedom does not encompass the right of a non-tenured teacher to have her teaching style insulated from review by her superiors just because her beliefs and philosophy are considered acceptable somewhere in the teaching profession.¹⁷⁴

In 1986, the First Circuit Court supported the right of a college to control the classroom in *Lovelace v. Southeastern Massachusetts University*. The Court ruled against a non-tenured professor whose contract was not renewed because he refused to drop his grading standards to be more in line with school policy. Instead, it determined that schools had the right to set policy on “matters such as course content, homework load, and grading policy” and that “the first amendment does not require that each non-tenured professor be made a sovereign unto himself.”¹⁷⁵

An important class of cases deals with professors’ attempts to introduce religion into the classroom. *Bishop v. Aronov* at the University of Alabama in 1991 involved an exercise physiology professor who brought up his religious beliefs in class.¹⁷⁶ The professor, Philip Bishop, considered the university’s insistence that he not do so to be an infringement of his First Amendment rights to speech and religion.

The court sided with Alabama, permitting the school to exert control over classroom content as long as its “actions are reasonably related to legitimate pedagogical concerns.”¹⁷⁷ Furthermore, Bishop’s right to free expression of religion was not violated, since nothing the school did impeded his “practice of religion.”

Clarity on the right of schools to control classroom content was muddied by *Otero-Burgos v. Inter-*

American University in 2009. A student complained to the university that business professor Edwin Otero-Burgos refused to give him an opportunity to improve his grade after altering the syllabus mid-term, which changed the weight given to various tests and assignments. The university sided with the student, and ordered Otero-Burgos to give the student an additional test.

Otero-Burgos refused, and the school assigned another professor to take over. Otero-Burgos objected that his academic freedom had been violated and he was fired, even though he had tenure. He sued, and his tenure was eventually upheld by a federal appellate court.¹⁷⁸

Intramural Utterances: Workplace Issues.

Conflicts that define the relations between faculty and administrations according to a wide variety of workplace issues, especially a professor’s right to criticize school policy, are quite common.

Discussion of such cases often begin with *Pickering v. Board of Education* in 1968. Marvin Pickering was an Illinois high school science teacher who criticized his school’s budget, suggesting that excessive spending on athletics led to higher taxes. The school board suspended him for making “false statements” that unjustifiably impugned the “motives, honesty, integrity, truthfulness, responsibility and competence” of both the Board and the school administration.¹⁷⁹

An Illinois court decision upholding his suspension was overturned by the Supreme Court. The decision in favor of Pickering was based on achieving a balance between the teacher’s “interest as a citizen in making public comment”¹⁸⁰ against “the State’s interest in promoting the efficiency of its employees’ public services.” Also important considerations were whether Pickering’s remarks were of public concern—which they clearly were—and whether they threatened to hurt his performance or the performance of the school (the Court decided they did not).

In 1983, *Pickering’s* reasoning with respect to conflicts between public employers and employees was affirmed in *Myers v. Connick*. Sheila Myers, an assistant district attorney in New Orleans, was angry about a transfer and sent a survey to co-workers asking if they were dissatisfied with Harry

Connick, Sr., the district attorney. Initially, a state court ruled in her favor, declaring her speech concerning the performance of a high-profile public official to be a matter of public concern.¹⁸¹

That ruling was overturned by the Supreme Court, which said that Myers's speech was not a protected matter of public concern, but an unprotected private grievance.

Deciding whether the concern was public or private forms the first part of what has become to be known as the "Connick Test."¹⁸² Once that part is determined, the second part is applied. That is, a government office must strike a balance between the need to run an efficient and harmonious workplace and the First Amendment rights of the employee.

The general coherence resulting from Pickering and the Connick Test ended with *Garcetti v. Ceballos* in 2006, which essentially silenced all public employees from commenting on workplace controversies in which they played a part. An assistant district attorney in Los Angeles, Richard Ceballos, claimed that he had been unfairly bypassed for promotion and that co-workers retaliated against him. This was because he testified for the defense against other prosecutors that an affidavit contained false statements and could not be used to support prosecution of a case. The Ninth Circuit Court found that Ceballos was protected by the First Amendment as he had addressed matters of public concern.

The Supreme Court reversed the Circuit decision, stating that speech by a public official is only protected if done as a "public citizen," not as an employee. Justice Anthony Kennedy's majority opinion stated that "the fact that his duties sometimes required him to speak or write did not mean his supervisors were prohibited from evaluating his performance."¹⁸³

While the *Garcetti* decision seemingly applied to all public employees, Kennedy's opinion contained a possible exception for academic freedom:

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.¹⁸⁴

Even so, after *Garcetti*, some courts took a restricted view of academic freedom at public universities. In *Renken v. Gregory*, in 2008, an engineering professor spoke out against his dean's plans for using matching funds from his (the professor's) National Science Foundation grant. The court cited *Garcetti*, saying that comments made in connection with the grant were job-related and therefore unprotected.¹⁸⁵

Adams v. The Trustees of the University of North Carolina at Wilmington in 2015 may have been the beginning of the end for *Garcetti's* silencing effect on academics. Mike Adams was hired in 1994 at UNC-Wilmington as an assistant professor of criminology. At the time, he was a political liberal, and in 1998 he breezed through his promotion process to gain tenured status. In 2000, he had a religious conversion from atheist to Christian that also led him to change his political views, and he started writing on politics in the public media.¹⁸⁶

Adams's non-academic writing was a mixed bag, running the gamut from clearly extramural opinions about national events to intramural UNC-Wilmington affairs to statements made as a professional criminologist. He joined serious observations with biting sarcasm directed at UNC-Wilmington faculty members, student activists, and administrators. In return, some of his colleagues treated him with scorn, and one even filed false harassment charges against him. He remained popular as a teacher, however, and continued to receive outstanding student evaluations.¹⁸⁷

In 2006, he applied for a promotion to full professor status. His application was rejected, ostensibly because he lacked enough peer-reviewed academic writing, even though he had published sufficiently according to the school's handbook.¹⁸⁸

Adams sued the university, claiming that his denial of promotion was actually due to religious discrimination. The initial decision went against him, since the court said his attempt to prove discrimination was mostly conjecture, and that the university could indeed punish him for his non-academic writing (which he listed on his

application as evidence of his service or engagement with the community). This was because the university claimed Adams was writing as an employee, which, according to *Garcetti v. Ceballos*, meant that the First Amendment protection for extramural utterances did not apply.¹⁸⁹

But that determination clearly failed to consider Kennedy's proposed exemption in *Garcetti* for academics, who are expected to write and research according to their consciences as part of their job. Adams appealed, and in 2014 he won unequivocally, receiving his promotion, back pay, and legal fees.¹⁹⁰

Student Rights. Historically, students' academic freedom rights were seldom considered. That ended in the Vietnam War era with two cases building on *Barnette v. West Virginia Board of Education* to expand student academic freedom. One was *Tinker v. Des Moines*, decided in 1969. Several members of the Tinker family and friends wore black armbands to high school to protest the war and were expelled. The Supreme Court ruled that the Tinkers' armbands were protected symbolic speech and that by wearing them the Tinkers did not disrupt the classroom.¹⁹¹

In *Healy v. James* in 1972, the Supreme Court decided that academic freedom required Central Connecticut State College to recognize a chapter of Students for a Democratic Society, even though the students involved said they would not rule out violence as a means of promoting their cause.¹⁹²

Since then, court decisions have been mixed about giving students extensive freedom. Increasingly, it is conservative, libertarian, and Christian students who pursue legal redress against liberal activist professors using their classrooms as personal soapboxes. They are often aided by organizations seeking to support their cases, such as FIRE, ADF, and the Center for Individual Rights.

Axson-Flynn v. Johnson in 2001 was one such case. An appeal decision by the 10th Circuit Court of Appeals overturned a lower court ruling permitting the theater department at the University of Utah to insist that a devout Mormon student majoring in theater use obscene and profane language in scripts assigned to her.



In today's highly charged political climate, it is likely that there will be many more cases balancing the rights of students with those of their teachers.



According to Donna Euben, staff counsel for the AAUP, the higher court "did not recognize a separate right of academic freedom [for the professors] under the First Amendment."¹⁹³ Instead, the decision suggested that the professors' "justification for the script adherence requirement" was a "pretext for religious discrimination" rather than a "truly pedagogical" necessity.

In today's highly charged political climate, it is likely that there will be many more cases balancing the rights of students with those of their teachers.

The Legal Solution: Academic Freedom's Best Hope

In 1952 at the University of Nevada-Las Vegas, Frank Richardson, a professor of ornithology, had the temerity to question the admissions policies of the school president, Dr. Minard Stout. Stout, an educational bureaucrat whose main prior experience was at the secondary level, wanted to pump up UNLV's enrollment by dropping admissions requirements.

Richardson sent around reprints of an article that decried lower standards. Stout took offense at Richardson's action and started a chain of proceedings against him that culminated in his dismissal from the UNLV faculty by the Board of Regents.¹⁹⁴

According to Russell Kirk, the regents were small businessmen who had "not the least concept of academic freedom, nor indeed the elementary rules of justice."¹⁹⁵ He also said that the AAUP "began to take a hand only when it appeared that the Board of Regents might imply that Dr. Richardson and the other professors involved were Communists or at least fellow travelers."



The legal process is uniquely constructed to develop a standard of academic freedom that is fair to all interest groups, as it permits advocacy on both sides of an issue.



Richardson resolutely fought for his job in the courts; eventually, the Nevada State Supreme Court reinstated him. Kirk wrote that “he was vindicated thanks to the rule of law, and not by the efforts of any of his colleagues, or of professional associations and learned societies, or because of public protest. The courts, when all is said and done, remain the chief defense of academic freedom.”¹⁹⁶

The legal process is uniquely constructed to develop a standard of academic freedom that is fair to all interest groups, as it permits advocacy on both sides of an issue. Additionally, the standards created in the courts are likely to be appropriate for specific situations instead of relying on overly broad theoretical principles. In contrast, the corporate conception, for which AAUP literature has long formed the basis, can result in a one-sided debate serving only the most entrenched interests.

Conclusion

The modern American institution of higher education is no longer a guild of faculty as existed in northern Europe in the Middle Ages. Creating an ethical and workable framework for academic freedom now means serving a wide variety of interests, not just a community of scholars.

Yet current conventions are heavily weighted in favor of the faculty establishment. The AAUP has long dominated academic freedom policy-making, with schools importing AAUP language and concepts directly into their regulations and handbooks. It is becoming increasingly apparent that the organization is not an impartial arbiter of academic freedom issues, but a highly self-interested pressure group.

Furthermore, radicals have gained great influence—while other professors focus on their jobs, politicized faculty play campus politics. Largely as a result of this trend, today’s academia is a minefield of academic freedom issues.

Unfortunately, many in positions of authority lack the will or desire to address transgressions against policies that almost every sensible person would consider to be fair. The nature of academic administrators is a major source of weakness; they usually come from the faculty and do not advance by taking strong positions against aggressive faculty factions. The complacency or ignorance of trustees is an equal partner in this ineffective governance. With both administrators and trustees cowed into silence, reform is likely to come only from the outside.

Despite such a negative outlook, there is considerable hope going forward. Higher education’s other interests—students, nonconforming faculty, and society—are beginning to stand up for a more equitable academy. New institutions that support sound principles of academic freedom are increasingly part of the landscape.

Partner to this greater vigilance and diversity of ideas is a new media willing to expose and confront academic freedom injustices. So many alternative means of transparency exist that infringements upon the academic freedom rights of non-conforming faculty, students, and society cannot remain permanently out of view as they may have in the past. Exposure is a powerful weapon: academic administrators fear adverse publicity that can hurt fundraising and alumni support.

The legal side of academic freedom is also a cause for hope. The sum of recent court decisions are establishing equitable boundaries between the stakeholders with an impartiality that no self-interested organization can approach. In past decades, the threat of legal action came almost exclusively from the left, pushing administrators farther in that direction. Today, legal pressure is coming from both sides.

While legal recourse may be imperfect—lawsuits are time-consuming and costly for students and faculty—fear of lawsuits is a powerful motivating force for academic administrators to take the right course.

As professionalism is revealed to be an insufficient foundation, it becomes clear that academic freedom must be grounded in mankind's innate inquisitiveness and ingenuity. Men and women are compelled by nature to search for the truth; it is in our DNA and goes much deeper than serving our material needs in pragmatic fashion. Just as church dogma was cast off for greater freedom to explore in earlier times, we must be willing to cast off the more recent dogmas that clearly do not serve truth.

The great conundrum of academic freedom is that both the *absence* of academic freedom and total academic freedom lead to political indoctrination. The goal, then, is to find the limits on academic freedom that create a just and equitable scholarly environment. The United States, with its messy traditions of checks and balances and institution-building, is uniquely constituted to restore and improve our concept of one of the most important freedoms of all: the freedom to learn the truth.

About the Pope Center

The John William Pope Center for Higher Education Policy is a nonprofit institute dedicated to improving higher education in North Carolina and the nation. Located in Raleigh, North Carolina, it is named for the late John William Pope, who served on the Board of Trustees of the University of North Carolina at Chapel Hill.

The center aims to increase the diversity of ideas discussed on campus, encourage respect for freedom, improve student learning, and lower the cost of education to both students and taxpayers.

To accomplish these goals, we inform parents, students, trustees, alumni, and administrators about actual learning on campus and how it can be improved. We inform taxpayers and policymakers about the use and impact of government funds, and we seek ways to help students become acquainted with ideas that are dismissed or marginalized on campuses today.

Jenna A. Robinson is the president of the Pope Center. She can be reached at jarobinson@popecenter.org. More information about the Pope Center, as well as most of our studies and articles, can be found on our website at popecenter.org. Donations to the center, a 501(c)(3) organization, are tax-deductible.

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Academic Freedom in the Age of Political Correctness

Jay Schalin



About this Paper

Academic freedom is at the very center of the modern university; it promotes discovery and teaching of the best possible knowledge. The need for improved regulations governing academic freedom is currently growing as a century-long consensus that focused on granting faculty members the most expansive academic freedom rights is breaking down; other campus interests are becoming more aggressive in demanding their rights as well. This report places contemporary understandings of academic freedom in historical, professional, and legal contexts and recommends the means by which a workable and more equitable framework for academic freedom can be created.

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