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Academic Freedom, the First Amendment and Competing Stakeholders: The Dynamics of a Changing Balance

James D. Jorgensen and Lelia B. Helms

The U.S. Supreme Court first affirmed academic freedom in the context of the First Amendment fifty years ago. In glowing terms, Chief Justice Warren pronounced academic freedom as essential to a free society. “To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation” (*Sweezy v. New Hampshire*, 1957, p. 250). Ten years later in *Keyishian v. Board of Regents* (1967), the Supreme Court reinforced the idea that the concept occupied a key position under the First Amendment: “Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom” (p. 603).

Given such unequivocal language, we might expect more recent judicial decisions to confirm the vitality of academic freedom. But this does not

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appear to be the case. In a range of decisions, courts now identify academic freedom as a potential attribute of three often conflicting stakeholders—institutions, faculty, or students—and find it almost indistinguishable from basic First Amendment jurisprudence. These changes challenge those in the postsecondary sector to revisit and refine concepts defined more than a half century ago.

Except for scholars interested in the law of higher education (Byrne, 1989, 2004; Heckman, 2004; Kaplin & Lee, 2006; Olivas, 1990; O’Neil, 1997), few in the higher education community have examined the dynamics of the evolving case law on academic freedom. Nor have policy analysts or higher education scholars placed the accumulating case law into a framework for understanding the dynamics of academic freedom law. Such a framework can help those interested in the future of this core tenet to better discern the patterns of judicial decisions and enhance practitioners’ capacities to anticipate future directions.

This paper sets out a framework for understanding the temporal dynamics of the jurisprudence of academic freedom beginning with its articulation and moving to its fragmentation and absorption into the general body of First Amendment case law as applied to postsecondary institutions in the public sector. It begins with a brief overview of concepts from the policy and legal literatures integral to an explanatory framework for an analysis of the case law. It then summarizes the origins of academic freedom and the early court opinions noted above before reviewing selected decisions over the past 20 years that illustrate how the courts have addressed the competing claims of institutions, faculty, and students. Since the earliest cases, courts have relied primarily on legal analysis found in First Amendment case law rather than developing a separate body of academic freedom law as originally enunciated. The result is a body of precedent strongly supportive of institutional claims—but often exercised at the expense of faculty and student rights. Finally, we return to our framework to examine its retrospective and prospective utility for understanding the accumulating precedent on academic freedom in light of the increasingly complex legal and regulatory environment of higher education.

POLICY FRAMEWORK OF JUDICIAL DECISION-MAKING: PATH DEPENDENCE AND POLICY SPACE

The concepts of path dependence and policy space, prominent in the literature on public policymaking, provide a starting point for the analysis of the evolving law of academic freedom. From both a policy and legal perspective, “past decisions limit future choices” (Biggs & Helms, 2007, p. 540).

History and context matter. “Policymakers do not start with a blank slate, . . .” Biggs and Helms (2007) continue. “Both policies and the means

to produce them co-evolve and both are subject to the constraints of path dependence” (p. 540). In terms of tracing the evolution of a specific policy, path dependence is a “dynamic property [that] refers to the idea of history as an irreversible branching process” (David, 2000, p. 8). Path dependence describes “processes—in which outcomes in the early stages of a sequence feed on themselves, and once-possible outcomes become increasingly unreachable over time.” Such processes “characterize many important parts of the social world. . . . [S]elf-reinforcing, path-dependent dynamics turn out to be an essential building block for exploring a wide range of issues related to temporal processes” (Pierson, 2004, pp. 21–22).

In terms of law, path dependence describes the evolution of precedent in explaining the outcomes of litigation. In deciding cases, precedent (history) and fact patterns (context) are determinative. “Legal reasoning is reasoning by example. . . [from] case to case” (Levi, 1949, p. 1). In a given case, judges are constrained to apply analyses from previous cases involving similar disputes. Depending on the particular facts of a case, judicial decisions are refined and distinguished over time, but courts are not free to announce a rule of law beyond precedential and factual constraints. Drawing on the analogy of a tree to describe path dependence, judicial precedent, once in place, tends to generate more disputes as practitioners identify gaps in the circumstances of previous cases and argue for the application of favorable precedent to their own dispute. The pattern of growth for trees—generating branches, twigs, and leaves from the trunk of precedent—provides an analogy. Law, like policy, is a self-replicating, dynamic system. The outcomes of subsequent litigation reflect increasingly differentiated contexts and complex holdings. Figure 1 illustrates this dynamic.

The second concept for understanding similarities in the temporal dynamics of the law is “policy space,” a metaphor first introduced by Wildavsky (1979) to describe the crowding and interdependence between policies that evolve in the same domain. A policy space is a domain or common interest area—for example, education, higher education, or, for the purposes of this analysis, academic freedom. Over time, policy spaces grow crowded; the case law accumulates. “Policy domains gradually expand and overlap. . . The first solution to a problem is almost always incomplete and gives rise to additional solutions to fix unmet needs or new problems generated by new solutions” (Biggs & Helms, 2007, pp. 257–258). As policies and precedents are added, “they begin to exert strong effects on each other, increasing reciprocal relations and mutual causation; policy A affects B, B has its effect on C, and C back on A and B” (Wildavsky, 1979, p. 64). The impact of this crowding is increased interdependence between policies with “consequences [that] are more numerous, varied, and indirect,” forcing late-arriving policies “to adjust to. . . existing programs” (Wildavsky, 1979, p. 66). Eventually more (and usually smaller) programs alter the dynamics of the space to which

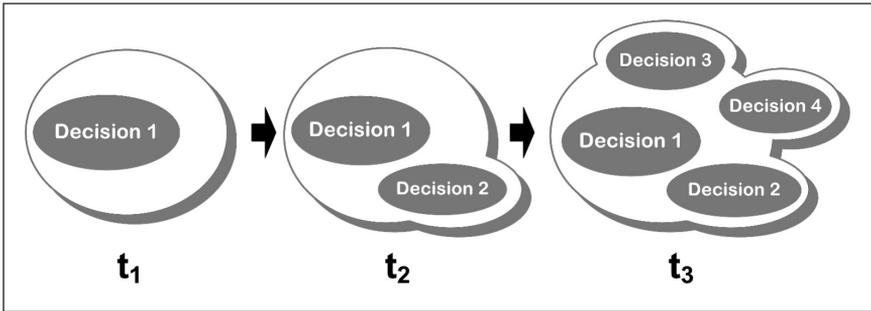


Figure 1. Simple model: Self-replicating system (adapted from Biggs & Helms, 2007, p. 258)

they are assigned, identifying overlapping and competing stakeholders. “This nonlinear growth pattern produces a seemingly counterintuitive effect—polic[ies]. . . proliferate at a much faster rate than the policy domain that they populate and define” (Biggs & Helms, 2007, pp. 257–258). Figure 2 illustrates the effects of replication, differentiation, and proliferation on both policy and case law over longer periods of time.

In combination, the concepts of path dependence and policy space provide a framework for understanding the evolution of the law of academic freedom. Academic freedom has multiple meanings both as an essential principle of American higher education (Hofstadter & Metzger, 1955; Tierney & Lechuga, 2005) and in the law (Cope, 2007; Kaplin & Lee, 2006). Over time, interpretations of the former have been increasingly constrained by the latter as the courts have defined general principles of First Amendment law, derived primarily in other contexts, and applied them to disputes arising in colleges and universities. The next sections track the evolution of this commingling of judicial precedent defining academic freedom with First Amendment law.

THE STARTING POINT: THE AAUP, THE U.S. SUPREME COURT, AND ACADEMIC FREEDOM

The American Association of University Professors played a pivotal role in codifying the ideals of academic freedom, first in the 1915 Declaration of Principles on Academic Freedom and Academic Tenure and later in the 1940 Statement of Principles on Academic Freedom and Tenure. These documents set forth, and later refined, the principles of academic freedom as rights of faculty in the areas of (a) inquiry and research, (b) classroom teaching, and (c) life outside the institutional setting; academic freedom for students is

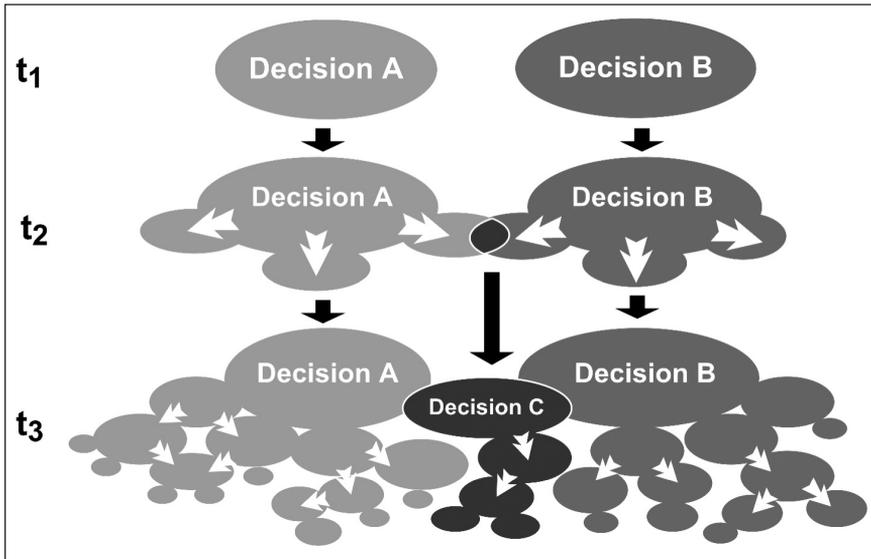


Figure 2. Evolution of case law over time: Complex model

defined as the freedom to learn. Although not binding on institutions, the AAUP Statement (1940) established common ideas about academic freedom, many of which have been voluntarily adopted by colleges and universities as institutional policy. This voluntary commitment is particularly important given the inherent limitations of the U.S. Constitution in “enforcing” academic freedom rights. As a matter of constitutional law, academic freedom exists, if at all, under the First Amendment and applies only to acts of the federal government and, through the Fourteenth Amendment, to acts of public institutions. The First Amendment has no application to the rights of faculty in private institutions. Instead, private schools establish rights to academic freedom through institutional policies, and faculty must rely on contract law to enforce those rights.

The earliest Supreme Court cases involving academic freedom as a matter of constitutional law arose from disputes over government efforts to limit domestic dissent and ensure loyalty in the Cold War era. *Sweezy v. New Hampshire* (1957), a product of the McCarthy era, challenged a New Hampshire law that delegated to the state attorney general the power to investigate “subversive persons” and organizations (p. 236). Pursuant to this statute, the state attorney general conducted an investigation into the activities of Paul Sweezy, his knowledge of Communist-based political organizations, and the content of a guest lecture that Sweezy delivered at the University of New Hampshire. Sweezy refused to answer any questions

about his lecture and the attorney general prosecuted based on Sweezy's failure to cooperate.

Writing for the majority, Chief Justice Warren's opinion stopped short of concluding that Sweezy's free speech rights outweighed the state's interest in investigating subversive activities (*Sweezy*, 1957). Rather, the Court held that the statute did not allow the attorney general to question Sweezy about his lecture. However, Chief Justice Warren penned language that has been cited repeatedly in subsequent cases:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die. (*Sweezy*, 1957, p. 250)

In a concurring opinion, Justice Frankfurter added language that is also found in most legal analyses of academic freedom rights:

Freedom to reason and freedom for disputation on the basis of observation and experiment are the necessary conditions for the advancement of scientific knowledge. A sense of freedom is also necessary for creative work in the arts which, equally with scientific research, is the concern of the university. . . . It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment 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. (*Sweezy*, 1957, p. 263)

Interestingly, although the *Sweezy* case involved individual rights—and the rights of a non-faculty member at that—Justice Frankfurter focused on language espousing the rights of the institution to determine "who may teach, what may be taught, how it shall be taught, and who may be admitted to study." Whether Justice Frankfurter intentionally extended the idea of academic freedom to institutions in the context of an individual's challenge to the state law cannot be known. But the implications for further developments in the law cannot be disputed, as will be shown below.

Ten years later, the Supreme Court entertained a challenge to New York's Feinberg Law, which prohibited employees of public schools and universities from engaging in "subversive acts" and required them to affirm in

writing that they were not members of the Communist Party (*Keyishian v. Board of Regents*, 1967). As in *Sweezy*, *Keyishian* arose in the context of an individual challenge to state action, not an institutional challenge. The majority found the law to be unconstitutionally vague and overbroad. In so ruling, Justice Brennan reiterated the importance of academic freedom in a free and democratic society:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." . . . The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, (rather) than through any kind of authoritative selection." (*Keyishian*, 1967, p. 603)

Together the *Sweezy* and *Keyishian* decisions established the concept of academic freedom as a meaningful, if somewhat ill-defined, matter of constitutional law under the First Amendment. Both cases, however, addressed fact patterns challenging the impact of state laws and policies on individuals in various faculty roles.

ACADEMIC FREEDOM AND FIRST AMENDMENT RIGHTS OF FACULTY AS EMPLOYEES

A new line of First Amendment decisions with continuing implications for faculty rights to academic freedom began in 1968 when the Supreme Court addressed questions about public employees' rights of free speech. In four decisions, *Pickering* (1968), *Connick* (1983), *Waters* (1994), and *Garcetti* (2006), the Court defined and, in three, narrowed the scope of, public employees' speech rights. Only one of these cases arose from a dispute involving the postsecondary sector but all now shape, if not overshadow, the rights of faculty to academic freedom in public institutions.

In *Pickering v. Board of Education* (1968), the Supreme Court found that a high school teacher's letter to a newspaper criticizing his school district involved speech protected by the First Amendment because the letter was private expression that did not interfere with the performance of the teacher's duties in the classroom. Fifteen years later in *Connick v. Myers* (1983), the Court drew on the *Pickering* precedent to distinguish which forms of speech by public employees were protected speech by permitting employers to discipline employees for speech unrelated to matters of public concern. A decade later in *Waters v. Churchill* (1994), the Supreme Court

further broadened the prerogatives of public employers by holding that they need only show a belief that the speech in question could potentially, not actually, be disruptive to university operations. The courts quickly applied *Waters* to a postsecondary case, *Jeffries v. Harleston* (1995), that sustained the removal of a department head from his leadership role following an off-campus, anti-Semitic speech.

Most recently, the Supreme Court further curtailed rights to speech in *Garcetti v. Ceballos* (2006) by holding that, when public employees speak pursuant to their duties, that speech is unprotected. The Court in *Garcetti* allowed an employer to discipline an assistant district attorney who correctly challenged the factual basis of a criminal indictment in a memo to his supervisor and in later court testimony on a motion to dismiss the case. This ruling appears to threaten the basic notion that academic freedom should protect faculty speech related to official duties of research and scholarship (Cope, 2007). Courts have yet to apply *Garcetti* to a higher education dispute; but to preserve the integrity of both precedent *and* traditional notions of academic freedom, they would have to carve out a specific academic speech exception to *Garcetti*.

INSTITUTIONAL RIGHTS TO ACADEMIC FREEDOM: ANOTHER LINE OF CASES

In 1978, the Supreme Court tentatively announced institutional academic freedom rights in its well-known ruling in *Regents of the University of California v. Bakke*. In crafting the Court's plurality opinion holding that the school could not adhere to strict, race-based admissions quotas but that it could take steps to seek a diverse population of students, Justice Powell relied on the Court's notions of academic freedom developed in *Sweezy* and *Keyishian*:

The fourth goal asserted by petitioner [of its admissions policy] is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. (*Regents of the University of California v. Bakke*, 1978, pp. 311–312)

Nordin's (1981) notion of "academic abstention" captured the court's sentiment that it should "leave untouched the sanctity of the academic process" in matters involving student evaluation and conduct (p. 144). Eight years after *Bakke*, the Supreme Court confirmed this approach by declining to substitute its judgment in academic matters for that of the institution in a dispute over the dismissal of a medical student (*Regents of University of*

Michigan v. Ewing, 1985): “Legal freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students . . . but also . . . on autonomous decision making by the academy itself” (p. 226 note 12). Legal scholars commented on the courts’ extension of rights to institutions, relying on the language of judicial deference (academic abstention) but also noted the potential for conflict with faculty rights of academic freedom (Byrne, 1989; Metzger, 1988; Yudof, 1987). In effect, *Bakke* and *Ewing*, and more recently *Grutter v. Bollinger* (2003), “squeezed” academic freedom into a more confined policy space by introducing judicial deference precedent into the balance between faculty and institutional control over teaching. This deference/abstention precedent shaped many subsequent cases that directly implicated multiple stakeholders with competing claims to academic freedom.

Balancing the Rights of Faculty and Institutions

Before the Supreme Court’s opinions in *Bakke* and *Ewing*, relatively few cases directly addressed competing claims to academic freedom between institutions and faculty (*Clark v. Holmes*, 1972; *Hetrick v. Martin*, 1973). Since then, courts have been asked to balance competing claims with greater frequency. Cumulatively, these decisions suggest a growing reliance by lower courts on decisions balancing the rights of employees against those of employers within the larger body of existing First Amendment jurisprudence rather than on interpretations of the doctrine of academic freedom as enunciated in earlier Supreme Court cases. This trend becomes clear from reviewing several of these decisions in more or less chronological order.

In *Piarowski v. Illinois Community College District* (1985), the Seventh Circuit issued an opinion that presages the legal issues associated with various claims to academic freedom over the next two decades. There, the college ordered a faculty member to move his sexually explicit art display from a gallery adjacent to a heavily traveled “mall” area of the college’s main building to a less-traveled area. The plaintiff sued, alleging that the First Amendment protected his right to display his art in the main gallery. The court concluded that the college could regulate the display of explicit material and described the conflicting claims of competing stakeholders:

The term [academic freedom] is equivocal. It is used to denote both the freedom of the academy to pursue its ends without interference from the government . . . and the freedom of the individual teacher (or in some versions—indeed in most cases—the student) to pursue his ends without interference from the academy; and these two freedoms are in conflict, as in this case. (*Piarowski*, 1985, p. 629)

In 1986 the First Circuit issued one of the first opinions to address specifically the institution’s right to control its curriculum and grading policies.

In *Lovelace v. Southeastern Massachusetts University* (1986), a non-tenured professor claimed that the university did not renew his contract because he refused to change his grading standards. The court held that, while the First Amendment protected the plaintiff's right to speak out against the university's standards, it did not protect his refusal to comply with those standards:

To accept plaintiff's contention that an untenured teacher's grading policy is constitutionally protected and insulates him from discharge when his standards conflict with those of the university would be to constrict the university in defining and performing its educational mission. The first amendment does not require that each non-tenured professor be made a sovereign unto himself. (Lovelace, 1986, p. 426).

The Sixth Circuit's decision in *Parate v. Isibor* (1989) involved the weighing of institutional against faculty rights in the classroom. In an example of collegiate soap opera pitting ethnic tensions and academic prerogatives against each other, the court ruled that a dean could freely change a student's grade *after* it was submitted but could not force the instructor himself to change the grade. Finally, the court sustained the dean's prerogative to enter the instructor's classroom, interrupt instruction, and belittle the instructor's teaching methods and content in front of the students. The court found that "university officials remain free to review a professor's classroom activities" and that faculty "do not escape reasonable supervision in the manner in which [they] conduct classes or assign grades" (p. 827).

In *Bishop v. Aronov* (1991), a faculty member failed in his challenge to an administrator's order restricting him from interjecting religious beliefs or preferences into class lectures or from conducting optional classes as a supplement to instruction. In an excellent example of the path dependence and policy space frameworks, the court pursued three lines of judicial precedent to sustain the order. First, it applied the logic of a line of First Amendment cases limiting speech rights in K-12 schools, specifically, *Hazelwood School Dist. v. Kuhlmeier* (1988). Next, it found support in a series of cases dealing with the First Amendment speech rights of public employees (*Bishop*, 1991). Last, it tackled academic freedom as set forth in *Keyishian* and found:

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

retain if they are to be shackled in much of what they do. (*Bishop v. Aronov*, 1991, p. 1075)

Also in the early 1990s, one case ran counter to the tide of precedent as a court dealt with institutional efforts to enforce political correctness on a dissenting professor (*Levin v. Harleston*, 1995). The Second Circuit rebuked an institution for setting up a competing “shadow class” of a required course regularly offered by a tenured faculty member and for organizing a committee to review the professor’s research and disciplining him for “conduct unbecoming” a faculty member (pp. 88–89). The university objected to the faculty member’s regular inclusion of materials in his course on disparities in academic performance and intelligence between Blacks and Whites—a topic on which he had published extensively. However, no student ever filed a complaint about the course. In an opinion that emphasized its “reluctance to intrude upon the decisions of university management,” the court suggested that the institution could better manage the situation without infringing on a public employee’s basic First Amendment rights (p. 88). Again, the court used the First Amendment, rather than the concept of academic freedom, to reach its conclusion.

Subsequent cases, however, draw on precedent to consistently sustain institutional rights to regulate curricular, grading, and other standards that may be seen as involving academic freedom, rather than expanding the concept of academic freedom articulated by the earlier Supreme Court cases. In *Edwards v. California University of Pennsylvania* (1988), the court ruled that the university did not violate the plaintiff professor’s First Amendment rights by imposing a particular syllabus and course materials. After a student complained that Professor Edwards used the class to advance his religious beliefs, the university learned that the plaintiff had assigned unapproved, religious readings and demanded that the plaintiff teach from the approved syllabus. Edwards claimed that the First Amendment protected his right to select and use course materials. The court disagreed, concluding that, “although Edwards has a right to advocate outside the classroom for the use of certain curriculum materials, he does not have a right to use those materials in the classroom” (p. 491). The court based its decision on the First Amendment analysis employed by the Supreme Court in *Rosenberger v. Rector and Visitors of University of Virginia* (discussed below):

“When the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.” (*Edwards*, 1988, pp. 491–492, quoting *Rosenberger*, 1995, pp. 833–834)

The court specifically rejected Edwards's academic freedom argument, citing *Ewing* and Justice Powell's reference to the "four essential freedoms" in *Bakke* as support for the institution's right to determine the curriculum and materials to be used (*Edwards*, 1988, pp. 492).

In 2001, *Brown v. Armenti*, a case involving the same university, the Third Circuit issued a second ruling strengthening the rights of the institution. In *Brown*, a professor sued after the university president ordered him to change a student's grade from an "F" to an "Incomplete." The court acknowledged Brown's First Amendment right to speak but adopted the *Edwards* analysis on the university's right to impose curriculum materials:

Because grading is pedagogic, the assignment of the grade is subsumed under the university's freedom to determine how a course is to be taught. We therefore conclude that a public university professor does not have a First Amendment right to expression via the school's grade assignment procedures. (*Brown v. Armenti*, 2001, p. 75)

Similarly in 2005 the Sixth Circuit found that a department supervisor had not interfered with an adjunct faculty member's academic freedom by requiring her to provide students receiving incompletes in her course with letters explaining their individual deficiencies and spelling out the requirements to obtain a grade (*Johnson-Kurek v. Abu-Absi*, 2005). The court reasoned that academic freedom belongs primarily to the institution and encompasses the rights of determining what classes are taught and what grades issued. It affirmed the university's prerogative to override a professor's evaluation and grade assignment, reasoning that, "while the First Amendment may protect [the teacher's] right to express her ideas about pedagogy, it does not require that the university permit her to teach her classes in accordance with those ideas" (p. 595).

Finally, the Ninth Circuit in *Hudson v. Craven* (2005) was asked to decide whether a community college had "retaliated" against a faculty member by not renewing her contract (p. 693). She had required students in her economics class to participate in a protest rally against the World Trade Organization meeting. Upon learning about this class project, school administrators issued guidelines for all faculty that attendance at such events must be strictly voluntary with no consequences for students who chose not to attend. The faculty member responded to the guidelines by not taking students to the rally as a sponsored group but indicating to them that information about the rally "might be on the test" (p. 694). Relying exclusively on analysis under the First Amendment, the court that found no retaliation had occurred since the college did not restrict the faculty member's speech or associational rights in or outside of the classroom.

Government Mandates Implicating Academic Freedom

Several cases confirm the revival of a group of disputes that challenge how institutions comply with the lengthening list of federal and state mandates that occupy policy space in conflict with faculty claims to academic freedom and First Amendment rights. One, *Urofsky v. Gilmore* (2000), rejected a challenge to the constitutionality of a Virginia statute that restricted faculty and staff, as state employees, from using state-supplied computers to access sexually explicit materials on the internet. The law provided for an exception when access was central to a faculty member's program of research. In a frequently cited opinion that explicitly addressed the relationships between academic freedom and the various stakeholders in academe, the court stated:

[The] Supreme Court has never set aside a state regulation on the basis that it infringed a First Amendment right to academic freedom . . . [and] to the extent it has a right of academic freedom at all, [the university] appears to have recognized only an institutional right of self-governance in academic affairs. (p. 412)

Most of the remaining cases deal with institutional actions that purport to curtail faculty instruction deemed offensive to students or as interfering with student rights to be free from harassment and a hostile learning environment. In these cases, regulatory mandates requiring institutions to protect students derive from statutory requirements, especially those found in Title VI of the Civil Rights Acts of 1964 and Title IX. Not surprisingly, requiring institutions to monitor classroom behavior occasionally conflicts with faculty approaches to teaching and learning. The outcomes of litigation balancing the rights of various stakeholders are mixed with early decisions reflecting problems with initial institutional efforts to "get it right" with respect to their statutory obligations. Several cases illustrate problems in implementing these mandates as well as judicial willingness to probe minute details in the evidence. These cases, decided at the intersection of statutory and regulatory precedent, First Amendment precedent, and the principles of academic freedom, differ somewhat from many of the cases discussed in the previous section where courts accord substantial deference to institutional decision-making.

In one of the early cases in this group, a district court found that, following student complaints about the instructor's frequent use of sexual imagery in his writing class, a university violated the faculty member's First Amendment rights by setting up "shadow" sections for students offended by his approach (*Silva v. University of New Hampshire*, 1994). In a detailed examination of the facts of the case, the judge found that the students had mistakenly interpreted the instructor's comments, that those statements

were made in a “professionally appropriate manner” (p. 313) and that the university’s harassment policy did not prohibit “verbal conduct not of a sexual nature” (p. 313).

Cohen v. San Bernardino Valley College (1996) produced a similar outcome but employed a different legal analysis. Student complaints about sexually offensive classroom speech led the college’s grievance committee to discipline a tenured professor for violating a provision of the school’s newly instituted sexual harassment policy that prohibited “verbal . . . conduct . . . [that] has the purpose or effect of unreasonably interfering with an individual’s academic performance or creating an intimidating, hostile, or offensive learning environment” (p. 971). Using analysis under the First Amendment, the court voided the policy, holding that it was too nebulously drawn to provide faculty with sufficient notice about content prohibitions.

Similarly, in *Hardy v. Jefferson Community College* (2001), the Sixth Circuit held that an adjunct faculty member’s use of strong language, such as “nigger” and “bitch,” in a course on interpersonal communications was educationally appropriate to the discussion despite offending some students (p. 679). Again, the court engaged in a detailed analysis of whether the content and pedagogy were appropriate to the course rather than deferring to the professor’s freedom to decide content.

More recently, limitations on faculty pedagogy identified as creating a hostile learning environment have met with more success. In *Vega v. Miller* (2001), an untenured professor challenged his non-renewal for inappropriate teaching techniques. The university claimed his “clustering exercises” exposed the school to potential harassment liability because students chose words as subjects for writing exercises and sexual topics ultimately dominated the content of the course (p. 463). The Second Circuit upheld the termination as “objectively reasonable” on First Amendment grounds without addressing the claim that such action violated academic freedom rights (p. 468).

In *Hayut v. State University of New York* (2003), a political science professor repeatedly called a student in his class “Monica” because of her purported resemblance to Monica Lewinsky and asked her suggestive questions about her “affair” with Bill Clinton. The student filed an action for sex discrimination under Title IX and violation of her rights to equal protection of the laws. The court dismissed claims against the institution and administrators in the lawsuit but allowed claims against the faculty member to proceed, even though he insisted that his remarks were made in a joking manner. The court specifically noted that the professor never argued that his comments “had any . . . legitimate pedagogical purpose that might merit the kind of First Amendment protection that has long been recognized in the academic arena” (p. 745).

Summary

In the aggregate, these decisions suggest that, once the Supreme Court explicitly recognized institutional academic freedom in *Bakke*, the courts have, with relatively few exceptions, sided with institutions in disputes with faculty members over academic freedom involving teaching and learning. These findings are confirmed by Feaga and Zirkel (2006) in their analysis of outcomes of published court opinions relating to faculty claims to academic freedom between 1988 and 2005. They found that faculty fared poorly in litigation, prevailing in none of the 28 reported cases where academic freedom was claimed as a legal right and in only seven of 87 reported cases where issues of academic freedom were indirectly raised under the rubric of the First Amendment (Feaga & Zirkel, 2006). Further, courts have relied on First Amendment cases involving public employees when asked to balance the rights of institutions and faculty to academic freedom even when the disputes arise from governmental mandates. Thus, this line of precedent has occupied the policy space where faculty rights to academic freedom might otherwise have flourished.

ACADEMIC FREEDOM: STUDENTS AS STAKEHOLDERS

AAUP documents, reiterated in 1967 in a “Joint Statement on Rights and Freedoms of Students,” extend academic freedom to students in the form of freedom to learn (AAUP, 1915, 1940, 1967). Another group of cases bear on the emerging question of whether students may independently claim protection from institutional and/or faculty actions under the umbrella of academic freedom. In addition, political support for some form of academic freedom rights for students has emerged in Congress and several state legislatures. Much of this support has been generated by interest groups seeking to counter the alleged “liberal biases” of faculty and political correctness on campus.

At least two Supreme Court cases recognize some form of student rights in the context of religious freedom without specifically relying on the concept of academic freedom. In *Widmar v. Vincent* (1981), the Supreme Court affirmed the rights of religious student groups to meet on campus. The Court reached this conclusion based on traditional First Amendment public forum analysis but did *not* address the issue of academic freedom from either the students’ or institution’s perspective. In fact, the majority specifically disavowed the decision’s impact on institutional academic freedom in response to concerns in Justice Stevens’s concurring opinion that the ruling represented an unnecessary incursion into institutional rights. Fourteen years later in *Rosenberger v. Rector and Visitors of the University of Virginia* (1995), the Supreme Court again ruled that institutions could not

discriminate against a religious student group by denying funding to the group's newspaper. Instead, as in *Widmar*, the Court employed a traditional First Amendment analysis of the facts without any specific reference to academic freedom (*Rosenberger*, 1995).

However, student rights were limited by the Supreme Court in *Southworth v. Board of Regents of the University of Wisconsin* (2000), a case balancing university and students' First Amendment rights to speech and association. *Southworth* confirmed institutional rights to collect activity fees to support recognized campus organizations and denied students the right to withhold payments to objectionable groups. Provided the university adopted viewpoint-neutral practices for funding student organizations, promotion of student speech collectively outweighed an individual's right not to participate.

Other courts have protected student First Amendment rights against institutional actions in the context of hate speech codes. In both *Doe v. University of Michigan* (1989), and *UWM Post, Inc. v. Board of Regents of the University of Wisconsin System*, (1991), federal courts struck down university hate speech codes under the First Amendment based on the over-breadth and vagueness of the speech policies. Neither court relied on the concept of academic freedom, although the *Doe* court did express concern that the policy might stifle discussion in the classroom. One commentary decried the failure of these courts to draw a distinction between speech in a political and an academic setting:

Quite apart from the wisdom or utility of speech codes . . . the opinions displace academic norms by the civic norms of the First Amendment. Most egregiously, they utterly fail to acknowledge that the college or university stands in a different relation to the speech of its students than the government does to the speech of citizens generally. (Byrne, 2004, p. 101)

Despite early indications that students' First Amendment/academic freedom rights might find a sympathetic ear, more recent cases warrant caution. In two of the more recent cases, students did not fare well. In *Brown v. Li* (2002), the Ninth Circuit rejected a student's claim to First Amendment protections for a foul-mouthed "dis-acknowledgements" section added to his master's thesis after his successful defense before his examining committee. In that all components of the thesis are subject to faculty approval, he was not allowed to graduate until he deleted the offending section.

In another example, *Yacovelli v. Moeser* (2004), students sued under the free exercise clause of the First Amendment when the University of North Carolina assigned a Quran-based reading in its freshman orientation class. The students were given the option of reading the materials or writing a paper explaining their decision not to read them. Without specifically invoking

ing the notion of academic freedom, the court dismissed the plaintiffs' case, holding that the university lawfully assigned the reading for academic, not religious, purposes and that the assignment did not "penalize" any individual or group based on religion (p. 764).

Finally, although siding with the student, a court carefully bounded its decision by recognizing institutional rights in general. *Axson-Flynn v. Johnson* (2004) arose from a Mormon student's participation in the University of Utah's "Actor Training Program." When the student refused to repeat lines that contained certain profanities and asked her instructors to accommodate her religious beliefs in that regard, representatives of the program told her to "modify [her] values" and encouraged her to "talk to some other Mormon girls who are good Mormons, who don't have a problem with this" (p. 1282). Ultimately, the program director informed her that she must conform to the scripts or leave the program.

Axson-Flynn then dropped out of the program and sued, alleging violations of her First Amendment free speech and free exercise rights. Although designating the speech at issue as "school-sponsored speech" (p. 1286) and concluding that the program could legitimately restrict student speech in cases "reasonably related to legitimate pedagogical concerns" (p. 1290, quoting *Hazelwood*), the Tenth Circuit ruled in favor of Axson-Flynn by holding that the condescending comments made by various defendants created a fact issue about whether the stated pedagogical goals were a pretext for religious discrimination. Interestingly, in a footnote, the court expressly disavowed academic freedom as an independent right:

In their pleadings, Defendants rely on the ill-defined right of "academic freedom" when they reference this principle of judicial restraint in reviewing academic decisions. Although we recognize and apply this principle in our analysis, we do not view it as constituting a separate right apart from the operation of the First Amendment within the university setting. (p. 1293 note 14)

Although earlier cases suggest that students may possess rights to academic freedom, courts have been reluctant to extend academic freedom rights to students beyond their basic First Amendment rights. This attitude may change, however, if the movement to ensure students' rights to academic freedom gains momentum.

During debate in the U.S. House of Representatives over reauthorization of the Higher Education Act in the spring of 2004, legislators sought to add a student bill of rights. With such legislation, proponents sought to offset a perceived, pervasive liberal bias in academe and to "promote 'intellectual diversity' in the classroom" (Hebel, 2004, p. A18). The proposed language required that institutions ensure students are:

- evaluated solely on the basis of their reasoned answers and knowledge . . . without regard to their political, ideological or religious beliefs;
- assured that . . . student activities . . . promoted intellectual pluralism and include diverse viewpoints;
- [allowed to] present diverse approaches and dissenting sources and viewpoints within the instructional setting; and
- not exclude[d] from participation in, denied the benefits of, or subjected to discrimination or official sanction on the basis of their political or ideological beliefs. (*College Access and Opportunity Act of 2004*)

Similar proposals for a student bill of rights have been launched in state legislatures in Georgia, California, Ohio, Tennessee, and Washington (Cameron, Meyers, & Olswang, 2005). In Colorado, public universities with the support of the legislature moved to preempt debate by formulating and adopting a memorandum of understanding to protect students' rights in all public institutions (Cameron, Meyers, & Olswang, 2005).

If successful, the bill of rights movement for students has the potential to shift the balance among those claiming rights to academic freedom and to stimulate a new wave of litigation to clarify these changes. At the least, students will challenge the use of texts and materials that students feel inadequately reflect dissenting viewpoints; grades that they believe factor in ideological, religious, or political viewpoints; and classroom discussions that do not incorporate dissenting opinions or that are viewed as doctrinaire (Cameron, Meyers, & Olswang, 2005, pp. 288–290).

TEMPORAL FRAMEWORK: IMPLICATIONS FOR POLICY AND PRACTICE IN HIGHER EDUCATION

The desire to protect colleges and universities from political and governmental interference motivated the AAUP, in part, to formulate its statements of general principles (AAUP, 1915, 1940). The Supreme Court affirmed the importance of academic freedom, initially in cases to limit the impact of a government policy on academe. This development occurred at the beginning of a sustained period of judicial activism in the United States. However, the impact of precedent in other areas quickly overwhelmed the Court's early affirmation of these principles.

Path dependence is critical to understanding how courts have addressed academic freedom and its entanglement with the First Amendment over the past four decades. Judicial involvement in the broader civil rights movement moved courts front and center in policymaking over a wide range of issues, including disputes over employee First Amendment rights against the actions of public institutions, including public colleges and universities. Judicial precedent across many contexts and disputes accumulated rapidly,

eventually to be applied in cases involving postsecondary education. The evolution of the law related to academic freedom reflects characteristics of its dependence on precedent developed in the larger body of case law. In many respects, ideas about academic freedom were subsumed by First Amendment jurisprudence over time.

From a policy perspective, as judicial precedent involving the First Amendment became ever more complex, courts have narrowed the contexts, or spaces, in which the doctrine of academic freedom could flourish. In this “co-evolution,” precedent balancing the free speech rights of public sector employees accumulated rapidly whereas, relatively speaking, cases or judicial analyses recognizing a legal doctrine of academic freedom have been sparse. Few courts have been willing to carve out a distinctive line of precedent for academic freedom separate from the body of First Amendment law. Instead, when faced with competing claims, courts usually conflate academic freedom with the idea of judicial deference and then apply it in support of institutional or employer prerogatives to exercise authority.

The idea of policy space also encompasses the evolving pattern of competing stakeholders and claims to academic freedom. Although originally a prerogative of faculty and students (AAUP, 1915, 1940, 1967), the case law suggests that rights traditionally associated with academic freedom now attach primarily to institutions and that institutions, not faculty, exercise primary control over those rights. Indeed, as suggested by the student “hostile learning environment” cases, institutional authority will continue to expand as regulatory oversight from all levels of government broadens the scope of institutional responsibilities. Efforts to provide students with some rights associated with academic freedom may further tip this balance. The adoption in July 2006 of a student bill of rights by Temple University may signal the beginning of a new phase in the evolution of the concept of academic freedom (Horowitz, 2006). As suggested in Figure 2, these developments point to a dynamic of increasing complexity as courts are asked to sort out conflicting claims to academic freedom.

Practically speaking, what does our analysis suggest about the future litigation involving academic freedom? First are predictions about refinements to existing precedent that reflect narrowing differences in context and fact patterns. Litigation leads to more litigation—a pattern confirmed by the research of Feuga and Zirkel (2006) and Helms (1987). Ironically, however, as evidenced in this review, less and less case law available to judges in crafting decisions arises from a jurisprudence of academic freedom. A body of law addressing the role of academic freedom can develop only in the “spaces” between established First Amendment precedent. Here legal commentators point to areas with potential for supporting a claim for some form of academic freedom. A sample includes claims by state governing boards or insti-

tutions regarding legislative or agency interference and micromanagement, by states, students, and institutions to proposed federal rules on standards and credits (Todd, 2007) and by students who may challenge institutional rules governing elections for student governments (Coder, 2005).

In areas of First Amendment law with well-developed precedent, especially decisions affecting faculty and employment or institutional authority over curriculum and learning, the room is limited for developing a jurisprudence that incorporates academic freedom. Indeed, the greatest erosion in academic freedom can be found in faculty claims to such rights. Application of the recent *Garcetti v. Ceballos* (2006) decision to faculty claims of academic freedom in higher education may eviscerate the remaining vestiges of faculty independence in their roles as researchers or scholars. Faculty almost always engage in research and scholarship pursuant to their official duties, a fact that offers little protection for these activities under *Garcetti* as presently formulated (Cope, 2007). Rahdert (2007) further suggests that the recent Supreme Court appointments of Chief Justice Roberts and Justice Alito by President George W. Bush will result in a sharp restriction of academic freedom. He sees this trend suggested by rulings in *Garcetti*, *Rumsfeld v. FAIR* (holding that the Solomon Amendment did not violate the speech rights of faculty who opposed the military's "don't ask, don't tell" policy regarding homosexuality), and *Morse v. Frederick* (upholding the discipline of a high school student who displayed a sign reading "Bong Hits 4 Jesus" at a school function).

Yet in Justice Kennedy's concurring opinion in *Garcetti* (2006), he provides a glimmer of hope by distinguishing between the reasoning in that case and potential applications to faculty speech involving scholarship and teaching. Within these limitations, those seeking to preserve some legal status for academic freedom for faculty must engage in careful case selection and management to influence outcomes insofar as possible. Unfortunately, faculty claims to academic freedom often arise from unpopular causes and discordant viewpoints and fail to generate support in the popular media or larger academic community.

More broadly, the effects of a half century of change on the environment of higher education from expanded access and societal expectations about college education, increased diversity of students, rapidly increasing costs, and the never-ending search for revenues have altered the dynamics of the higher education policy space and led to a decline in any general consensus about the role of postsecondary institutions (Byrne, 2004). As socially responsive, increasingly entrepreneurial entities with ever-changing missions, universities invite "hyper-regulation" by governments that subsidize a substantial portion of the revenue that sustains the post-secondary sector (White, 2006). In this, higher education differs little from many policy sectors dependent for economic survival on a mix of state-subsidized vouchers (grants and

loans), grants, and contracts. In tandem with many service delivery sectors, postsecondary institutions can expect the continued expansion of regulatory control with ever greater emphasis on accountability, results, and needs to balance the competing rights of a greater numbers of stakeholders.

This review points both to the limited jurisprudence addressing academic freedom and, within that body of law, a changing balance among stakeholder claims. The dynamics of path dependence and policy space suggest few reasons to expect major changes in direction in the near future as courts are asked to resolve internal disputes under the existing case law. Our willingness to rely on the legal system has allowed us to avoid, in part, the hard work of defining and implementing academic freedom.

Wihl (2006) laments the fact that, because the First Amendment requires viewpoint neutrality on the part of state-affiliated institutions, its protections have been used to corrupt the traditional notions of academic freedom. "Political discourse and research, which emanate from our best scholarly works, are being displaced by debates about individual rights to utter insults, slogans, epithets, and slurs on university campuses" (p. 24). To combat these abuses, Wihl recommends "tak[ing] a stand on the values of importance and usefulness, difficult as they may be to define and maintain" (p. 25), to achieve the purpose of preserving academic freedom for those who truly deserve it.

We suggest that, over time, approaches in public sector institutions may emulate those in private colleges and universities precisely because the courts' reliance on the First Amendment in individual cases fails to address broader and more complex policy concerns among the various campus stakeholders. Contract law regulates disputes arising in private institutions, involving questions about the meaning of institutional policies and breaches of those policy terms by either party. In such cases courts do not apply nebulous rights but rather examine the mutual expectations of both parties for specific campus policies and practice. In the best of circumstances, such policies and practices are the product of an ongoing dialogue among and the negotiated consensus of all stakeholders on campus.

In disputes involving public institutions, courts rather consistently defer to institutions, apply First Amendment analysis and ignore an ill-defined law of academic freedom. Appeals to academic freedom as an additional source of rights in such cases may be misleading and counterproductive. As in private institutions, academic freedom in public colleges and universities should be primarily defined by institutional policies and traditions. The parties can develop a meaningful agreement about academic freedom among competing stakeholders through continued the refinement of policies that reflect consensus on practice. From this perspective, policies become contracts that define the terms and conditions governing relationships between stakeholders. The last 20 years of litigation establishes that allowing courts or

legislators to define parameters for academic freedom risks outcomes that do not reflect the traditions and values of academe or of individual campuses. Rather, the competing and often conflicting interests are best negotiated by the parties themselves at the level of individual colleges and universities. For faculty, however, this will require renewed attention to carefully delineating their distinctive rights and responsibilities, for both generating and communicating knowledge within widely varying institutional contexts—an often daunting task in the current environment of higher education.

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