Review of David Rabban's

ACADEMIC FREEDOM: FROM PROFESSIONAL NORM TO FIRST AMENDMENT

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While writings on academic freedoms are expansive, David M. Rabban's *Academic Freedom: From Professional Norm to First Amendment*[1] makes a noteworthy contribution to the academic freedom literature. Rabban, a faculty member at the University of Texas at Austin's School of Law, is well-positioned to write a consequential book on academic freedom. He previously served as the general counsel and chair of the committee for academic freedom for the American Association of University Professors (AAUP). In the work, Rabban argues for distinctive First Amendment academic freedom protections that apply to individual faculty members, institutions, and students, with the author making a specific argument for each one.

Rabban's book is excellent, but it is perhaps not the gateway work for a reader newly delving into the topic of academic freedom and the First Amendment, especially if they are not a lawyer. For someone seeking an introductory overview of academic freedom, other works, for example, ones by Henry Reichman[2] or Matthew Finkin and Robert Post,[3] might be a good starting place before taking on Rabban's book. Individuals with a solid understanding of issues connected to academic freedom and the First Amendment or with legal expertise will find Rabban's book informative and thought-provoking.

In chapters one and two, Rabban reviews academic freedom as developed under the AAUP, with special attention to its 1915 Declaration of Principles on Academic Freedom and Tenure, and the constitutional role in regulating the "relationship between the university and the state" through the Contract Clause earlier in the

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1 David Rabban, Academic Freedom: From Professional Norm to First Amendment (2024).

2 Henry Reichman, Understanding Academic Freedom (2d ed. 2025).

3 Matthew Finkin & Robert Post, For the Common Good: Principles of American Academic Freedom (2011).

nation's history and, in the twentieth century, the First Amendment.[4] Providing a major focus of the book, chapters three through six focus on academic freedom as an individual First Amendment right for professors. Chapters seven and eight take up the issue of a First Amendment right for institutional academic freedom. In chapter nine, Rabban considers balancing potential conflicts between institutional and individual speech rights. Similarly, the author contemplates in chapter ten the role of the courts in sorting out competing academic freedom claims by professors and their higher education institutions. The issue of student academic freedom is covered in chapter eleven. The bibliographic essay also adds important context to and elaboration of Rabban's arguments for distinctive academic freedom rights for individual professors, institutions, and students.

A noteworthy contribution of the book is to scrutinize not only the opinions from formative legal decisions involving academic freedom, such as *Sweezy v. New Hampshire*,[5] but also to provide important backstories and context for these cases. For instance, with the *Sweezy* decision, along with examining the well-known concurring opinion of Justice Felix Frankfurter, Rabban chronicles exchanges between Chief Justice Earl Warren and Frankfurter that resulted in Warren adding references to academic freedom in what would become the Court's plurality opinion in the case.[6]

Another example of how Rabban goes beyond solely assessing legal opinions is the treatment of the AAUP's involvement with academic freedom and the First Amendment. With *Sweezy*, for example, Rabban recounts how the AAUP was not at the forefront of efforts to establish First Amendment standards to safeguard academic freedom. Rabban chronicles how the AAUP considered filing an amicus brief in the *Sweezy* case but decided not to, even though the organization had previously decided in 1956 to approve such legal advocacy.[7] The AAUP feared that recognition of academic freedom as a constitutional right could undermine the conceptions of academic freedom as a professional standard previously developed by the organization. While acknowledging these concerns, Rabban describes the AAUP's decision not to file an amicus brief in the case as an important missed chance "to influence judicial interpretation of the relationship between academic freedom and the First Amendment at its inception."[8] This type of analysis, where Rabban goes beyond only providing an explication of legal decisions, results in one of the richest contributions of the work, allowing the reader to more fully reflect on the sociohistorical development of academic freedom as a constitutional concern.

Along with analysis that goes beyond legal opinions for source material, Rabban also provides an in-depth examination of pivotal academic freedom legal

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4 Rabban, *supra* note 1, at 35.

5 354 U.S. 234 (1957). With the plurality opinion in *Sweezy* and the concurrence by Frankfurter in the case, Rabban states that "[f]or the first time, in *Sweezy*, a majority of Supreme Court justices indicated that academic freedom is a distinctive First Amendment right." Rabban, *supra* note 1, at 68.

6 Rabban, *supra* note 1, at 65–65.

7 *Id.* at 63.

8 *Id.* at 64.

decisions, including majority, plurality, concurring, and dissenting opinions. This review is complemented by consideration of materials that include parties' briefs, amici briefs, correspondence between justices, and contextual historical information about the decision. The result is a detailed accounting of how the Supreme Court crafted an initial conception of academic freedom along its constitutional dimensions in a series of opinions in the 1950s and 1960s. The careful coverage of this period may prompt a reader to engage in further reading about the surrounding historical context and developments of academic freedom during this period such as Hans-Joerg Tiede's history of the AAUP[9] or Ellen Schrecker's account of higher education during the McCarthy era.[10]

For foundational legal decisions, Rabban gives considerable attention to *Keyishian v. Board of Regents of the University of State of New York*,[11] a case that, in many respects, represents the apex of the Supreme Court's identification of academic freedom as a distinctive First Amendment right. In *Keyishian*, the Supreme Court overturned its prior approval of a New York law in *Adler v. Board of Education of the City of New York*[12] that allowed the dismissal of educators found to be affiliated with organizations deemed subversive. In *Keyishian*, support for academic freedom was included in a Supreme Court majority opinion, with Rabban scrutinizing an often-quoted paragraph of the opinion describing academic freedom as a "special concern of the First Amendment."[13]

While Rabban describes *Keyishian* as a "major step in incorporating academic freedom within the First Amendment," he also considers how the decision left much unanswered about academic freedom and the First Amendment.[14] He states how the "brief paragraph" from the opinion highlighting academic freedom "gave very little guidance about the meaning of academic freedom and gave contradictory signals about its relationship to the First Amendment generally."[15] For instance, he notes how the passage highlights academic freedom as "peculiarly the 'marketplace of ideas.'"[16] In characterizing academic freedom in this way, Rabban states how the majority opinion in *Keyishian* highlighted the distinctive aspects of academic freedom while at the same time, and rather contradictorily, placing the concept under the marketplace of ideas umbrella, a rationale used for the general protection of free speech under the First Amendment.[17] For Rabban, this analytical ambiguity matters. His argument for recognition of academic freedom as a distinctive First Amendment right rests on a different premise than the general

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9 Hans-Joerg Tiede, University Reform: The Founding of the American Association of University Professors (2015).

10 Ellen Schrecker, No Ivory Tower: McCarthyism and the Universities (1986).

11 385 U.S. 589 (1967).

12 342 U.S. 485 (1952).

13 *Keyishian*, 385 U.S. at 603.

14 Rabban, *supra* note 1, at 79.

15 *Id.*

16 *Id.* (quoting from *Keyishian*, 385 U.S. at 603).

17 Rabban, *supra* note 1, at 79.

marketplace of ideas metaphor where speech protected by the First Amendment is not subject to quality control standards like the peer review systems used in higher education.

One of Rabban's defining goals for the book is to chart a distinctive niche for academic freedom as a constitutional right, and he is critical of how many courts have turned to general First Amendment standards to decide cases involving faculty members, even when "clear issues of academic freedom were raised."[18] After surveying a muddled judicial landscape for constitutional academic freedom protections, Rabban argues for the "need for a comprehensive theory that justifies treating academic freedom as a distinctive First Amendment right."[19] He also considers the "realistic issues" that such a right must take into account, such as applications to research, teaching, and intramural campus speech, including participation in shared governance.[20]

Along with examining cases that squarely center on academic freedom, Rabban considers what could be termed academic freedom adjacent cases. For example, Rabban reviews *Rust v. Sullivan*,[21] a case that centered on a prohibition for doctors in federally funded family planning clinics from discussing abortion with their patients. While approving of the prohibition, Chief Justice William Rehnquist's opinion for the majority noted that restraints exist on federal control of speech it funds, with higher education serving as one of the examples to describe limits on federal authority and with Rehnquist citing *Keyishian*.[22] In these academic freedom adjacent cases and with legal decisions with academic freedom issues more explicitly in play, Rabban describes what he views as a series of missed opportunities for the Supreme Court and other courts to define and devise legal standards applicable to First Amendment academic freedom. Like Godot or Waldo, finding academic freedom as a defined First Amendment concept has proven elusive, even while continuing to be identified by the Supreme Court and other courts as a relevant constitutional concern in post-*Keyishian* legal decisions.

In assessing how lower federal courts have responded to claims implicating faculty members' academic freedom, Rabban states, "While overwhelmingly concluding that the First Amendment protects the academic freedom of professors, lower-court rulings have disagreed about its meaning."[23] Rabban acknowledges that some lower courts have rejected First Amendment protection for faculty academic freedom, such as in *Urofsky v. Gilmore*,[24] and with Rabban examining the various opinions of the case in detail. Describing a case like *Urofsky* as an outlier, he states that a number of lower court opinions "have understood Supreme Court decisions as establishing a First Amendment right of academic freedom for

18 *Id.* at 81.

19 *Id*.

20 *Id.* at 81–82.

21 500 U.S. 173 (1991).

22 Rabban, *supra* note 1, at 88.

23 *Id.* at 93.

24 216 F.3d 401 (4th Cir. 2000) (en banc).

professors."[25] Despite concluding that courts have generally recognized academic freedom as constitutionally protected, at least in connection to faculty expertise in teaching and scholarship, Rabban laments the hazy status of First Amendment protection for academic freedom in legal decisions:

> Judges have disagreed about its scope and have reached inconsistent results in many factually similar cases. Even while relying on this right, judges have rarely defined it, which has obscured the relationship of academic freedom to the First Amendment generally.[26]

Rabban is critical of courts looking to general First Amendment principles to settle cases raising academic freedom issues. He also contends that reliance on First Amendment standards applied in employee-speech cases has hindered the development of clear academic freedom rights under the First Amendment.

Before offering the contours of a First Amendment academic freedom right for professors, Rabban offers his justifications for a unique constitutional niche for academic freedom, namely, he points to the "societal value of the contribution to knowledge through the expert academic speech of professors" as "provid[ing] the most convincing justification for treating it as a distinctive category of First Amendment analysis differentiated from the general free speech rights of all citizens… ."[27]

As support for this rationale for constitutional academic freedom, Rabban turns to the AAUP's 1915 Declaration. Specifically, he looks to the document as expressing the need for professors to be able to exercise independence "in producing and disseminating expert knowledge."[28] Additionally, Rabban points to peer review as a fundamental check for ensuring "whether speech by a professor meets the academic standards that justify the protection of academic freedom."[29]

Besides teaching and scholarship, Rabban argues that academic freedom should include faculty speech related to "educational policy," such as in connection to "academic standards, curricular reform, and university governance."[30] However, according to Rabban, such academic freedom protections are not inclusive of all professorial speech related to institutional matters, with the examples he provides of excluded speech including decisions of whether to celebrate a holiday on campus, institutional fundraising efforts, or policies governing athletics.[31] He also makes clear that academic freedom should not extend to speech that is "unprofessional, false, threatening, or harassing."[32]

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25 RABBAN, *supra* note 1, at 99.

26 *Id.* at 111.

27 *Id.* at 136.

28 *Id.* at 137.

29 *Id.*

30 *Id.* at 138.

31 *Id.*

32 *Id.*

A key part of the work focuses on when professors at a public college or university come into legal conflict with their employer institution and questions of academic freedom arise.[33] As to such clashes, Rabban argues that courts are equipped to settle these conflicts through reliance on "traditional techniques of judicial analysis" to evaluate whether actions taken against professors were done so based in "good faith on academic grounds" or, instead, an institution has used academic justifications as pretext.[34]

Much of Rabban's foundation for a First Amendment right for faculty academic freedom is based on peer review. The emphasis on faculty expertise and authority is potentially at odds with efforts and calls in some states to diminish the faculty role in institutional decision-making. A central issue for Rabban's approach to and theory of academic freedom is how courts should respond to academic freedom claims if state legislatures and governing boards have decided to deemphasize the role of faculty authority and expertise, including in responding to allegations of violations of a faculty member's academic freedom. In general, the book leads to questions about the authority of state governments to establish the roles and missions of public higher education institutions and their professors, with the answers to such an inquiry relevant to defining the contours of First Amendment academic freedom rights for faculty members at public colleges and universities in relation to their institutional employers. Rather than a last word, Rabban's work is an important starting point for continuing conversations about the basis for faculty members' First Amendment academic freedom rights when it comes to institutional and state authority to define the intellectual rights of professors in public higher education and to control the basic nature and functions of public colleges and universities in a state.

The chapter devoted to student academic freedom as a distinctive First Amendment right also leaves open ample avenues of future inquiry by scholars and courts. Rabban ties student academic freedom protection to interests in learning. He describes student academic freedom as encompassing "student interests in access to knowledge, in disagreeing with the views of their professors, and in fair evaluation."[35] It is perhaps unfair to ask for more from a book that provides an extensive review of academic freedom. Still, readers may find themselves left wanting even more from Rabban on the issue of student academic freedom, such as more exploration of previous legal decisions, including ones involving elementary and secondary education students that have been imported into higher education cases.

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33 First Amendment academic freedom protections potentially apply to faculty members in public higher education in relation to their institutional employer since they work at colleges or universities that qualify as state actors. In contrast, private colleges and universities would generally not qualify as state actors and, as such, they are not legally beholden to First Amendment standards. For faculty members in private higher education, when it comes to their institutional employer, their academic freedom rights would be protected through sources that include tenure and contract principles or collective bargaining agreements. Rabban's theory of academic freedom would, however, permit a private higher education institution or one of its faculty members to assert First Amendment academic freedom rights against a governmental actor.

34 RABBAN, *supra* note 1, at 254–55.

35 *Id.* at 297.

It is the mark of an engaging book for a reader to be left wanting more, and Rabban's work is an important addition to the scholarship on academic freedom. In a period of sharp uncertainty and challenge for higher education, Rabban's work is a timely and meaningful one. He advances a theory to safeguard academic freedom, but he also places clear limits on when it should apply, especially in the case of faculty members and confining the scope of their academic freedom rights to matters of scholarly expertise subject to standards of peer review or to matters clearly connected to educational policy. Even if a reader does not agree with all of Rabban's conclusions as to distinctive First Amendment academic freedom rights for individual professors, institutions, and students, his work is informative and thought-provoking.