

# ACADEMIC BILLS OF RIGHTS: CONFLICT IN THE CLASSROOM

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“If anybody has a mortarboard, you can move your tassels from right to left, right to left, which is what I hope happened to your politics in the last four years.”<sup>1</sup>

## INTRODUCTION

Without significant empirical basis, colleges and universities have historically been accused of being bastions of liberal, even radical, thought. Faculty are often accused of ultra-liberal leanings and being intolerant of students’ conservative positions in the classroom. Recent studies, attempting to measure liberal bias on campuses, indicate that Democrats outnumber Republicans on American college and university faculties.<sup>2</sup>

Nationwide there are efforts to promote “intellectual diversity” in the classroom.<sup>3</sup> This movement is in response to students’ perception that their rights to academic freedom are being violated when their views (e.g., political, ideological, or religious) differ from those of their faculty. In an attempt to remedy this percep-

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1. *Perspectives*, NEWSWEEK, June 7, 2004, at 25. George Washington University President Stephen Trachtenberg made this comment in an address at the university’s commencement exercises.

2. Thomas Bartlett, *More Faculty Members are Democrats*, CHRON. HIGHER EDUC., Dec. 3, 2004, at A15 (“Increasingly, American academe behaves as if it were a church with a creed rather than a marketplace of ideas”) (quoting Stephen H. Balch, president of the National Association of Scholars). The pair of studies referred to in this article were conducted by the National Association of Scholars and will be published in the association’s journal, *Academic Questions*. The studies are currently available at [http://www.nas.org/aa/klein\\_launch.htm](http://www.nas.org/aa/klein_launch.htm). *But see*, Lionel Lewis, *The Academic Elite Goes to Washington, and to War*, ACADEME, Jan. 2005, at 22 (stating that “students . . . need not fear indoctrination by liberal faculty”).

3. Sara Hebel, *Patrolling Professors’ Politics: Conservative Activists and Students Press Campaign Against Perceived Bias on Campuses*, CHRON. HIGHER EDUC., Feb. 13, 2004, at A18.

tion, numerous legislative efforts have been initiated to enact student “bills of rights.”<sup>4</sup> In May 2004, legislation that was introduced in the U.S. House of Representatives to reauthorize the Higher Education Act, a student bill of rights was included that provides as follows:

It is the sense of Congress that—

(1) no student attending an institution of higher education on a full- or part-time basis should, on the basis of participation in protected speech or protected association, be excluded from participation in, be denied the benefits of, or be subjected to discrimination or official sanction under any education program, activity, or division of the institution directly or indirectly receiving financial assistance under this Act, whether or not such program, activity, or division is sponsored or officially sanctioned by the institution; and

(2) an institution of higher education should ensure that a student attending such institution on a full- or part-time basis is—

(A) evaluated solely on the basis of their reasoned answers and knowledge of the subjects and disciplines they study and without regard to their political, ideological, or religious beliefs;

(B) assured that the selection of speakers and allocation of funds for speakers, programs, and other student activities will utilize methods that promote intellectual pluralism and include diverse viewpoints;

(C) presented diverse approaches and dissenting sources and viewpoints within the instructional setting; and

(D) not excluded from participation in, denied the benefits of, or subjected to discrimination or official sanction on the basis of their political or ideological beliefs . . . .<sup>5</sup>

In addition to federal legislative efforts, individual states are considering mechanisms to respond to these perceived political concerns. In Georgia, the general assembly adopted a resolution that recommends the observance of an academic bill of rights by public colleges and universities.<sup>6</sup> Legislation has also been introduced in California<sup>7</sup> and the State of Washington.<sup>8</sup> Other states are following

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4. This is a controversial movement that has received attention in the local press. See, e.g., *Challenges to Colleges: Higher Education Ought to Seek Greater Diversity of Viewpoints on Faculties*, COLUMBUS DISPATCH, Feb. 15, 2005, at 8A; Shirley A. Schatz, ‘Academic Bill of Rights’ Shocking, DAYTON DAILY NEWS, Feb. 11, 2005, at A11; Jeff Bruce, *Let no Student be ‘Left’ Behind; Legislators: Time to Take the ‘Liberal’ out of Liberal Arts*, DAYTON DAILY NEWS, Feb. 6, 2005, at B6; John W. Wenzel, ‘Academic Bills of Rights’ is an Assault on Constitution, COLUMBUS DISPATCH, Feb. 5, 2005, at 11A; Mark Fisher, *Bill Seeks Reins on Profs in Classroom*, DAYTON DAILY NEWS, Feb. 1, 2005, at A1.

5. H.R. 4283, 108th Cong. § 103 (2004). A harsher version of this resolution, H. Con. Res. 318, 108th Cong. (2003), was previously stalled in the House education committee although similar legislation is still viable in states such as Washington. See H.B. 1991, 59th Leg., Reg. Sess. (Wash. 2005).

6. S. Res. 661 (Ga. 2004).

7. S.B. 1335, Reg. Sess. (Ca. 2003–04); S.B. 5, Reg. Sess. (Ca. 2005–06). See AAUP of

suit.<sup>9</sup> Washington's legislative language is more specific than the federal resolution and is closely modeled upon the academic bill of rights developed by activist David Horowitz.<sup>10</sup> It focuses on both the criteria that colleges and universities may use in faculty employment decisions and the variety of viewpoints that students should be exposed to during their college education. It provides:

To secure the intellectual independence of faculty and students and to protect the principle of intellectual diversity, the following principles and procedures shall be observed. These principles apply only to public universities and to private universities that present themselves as bound by the canons of academic freedom. Private institutions choosing to restrict academic freedom on the basis of creed must explicitly disclose the scope and nature of these restrictions.

(1) All faculty shall be hired, fired, promoted, and granted tenure on the basis of their competence and appropriate knowledge in the field of their expertise and, in the humanities, the social sciences, and the arts, with a view toward fostering a plurality of methodologies and perspectives. No faculty may be hired, fired, or denied promotion or tenure on the basis of his or her political or religious beliefs.

(2) No faculty member may be excluded from tenure, search, and hiring committees on the basis of the member's political or religious beliefs.

(3) Students will be graded solely on the basis of their reasoned answers and appropriate knowledge of the subjects and disciplines they study, not on the basis of their political or religious beliefs.

(4) Curricula and reading lists in the humanities and social sciences

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California, *Response to the Academic Bill of Rights, Legislating Academic Freedom: The Larkin-Horowitz Debate*, available at <http://www.aaup-ca.org/abor.html> (last modified March 10, 2005) (stating that the academic bill of rights "pushes an agenda that is antithetical to the best traditions of American higher education").

8. H.B. 3185, 58th Leg., Reg. Sess. (Wash. 2004).

9. S.B. 24, 126th Reg. Sess. (Ohio 2005-06); H.B. 1531, 114th Reg. Sess. (Ind. 2005); H.B. 432 & S.B. 1117, 104th Gen. Assem., Reg. Sess. (Tenn. 2005). The Students for Academic Freedom ("SAF") *Year End Report 2003-2004*, announces that legislators in Missouri, Michigan, Oklahoma, Massachusetts and Utah are also moving to introduce legislation regarding academic bills of rights. See SAF, YEAR END REPORT 2003-2004 available at <http://studentsforacademicfreedom.org> (last visited Mar. 20, 2005). See also Sara Hebel, *Statehouse Digest: A Roundup of This Week's News From the State Capitols*, CHRON. HIGHER EDUC. DAILY, (Feb. 25, 2005), available at <http://chronicle.com/daily/2005/02/2005022505n.htm> (noting similar legislative efforts in California, Florida, Indiana, Ohio, and Tennessee); Mary Beth Marklein, *Proposed 'Academic Bill of Rights' Makes Inroads in a Handful of States*, USA TODAY, Mar. 17, 2004, at 7D (discussing the conservative legislative movement to create academic bill of rights for college and university campuses).

10. David Horowitz, president of the Center for the Study of Popular Culture, is a conservative columnist and civil rights activist who is encouraging Congress and state legislatures to adopt an academic bill of rights. He also founded SAF to promote the issue. SAF is planning to push about twenty states to enact academic bills of rights this year. See *Conservatives Ask Lawmakers to Restrain "Liberal Bias,"* FORT WAYNE SENTINEL, Dec. 21, 2004, available at <http://studentsforacademicfreedom.org/archive/2005/January2005/FortWayneSentinelAParticle010305.htm>.

should reflect the uncertainty and unsettled character of all human knowledge in these areas by providing students with dissenting sources and viewpoints where appropriate. 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 faculty. Faculty will not use their courses for the purpose of political, ideological, religious, or antireligious indoctrination.

(6) Selection of speakers, allocation of funds for speakers' programs, and other student activities will observe the principles of academic freedom and promote intellectual pluralism.

(7) An environment conducive to the civil exchange of ideas is an essential component of a free university; the obstruction of invited campus speakers, destruction of campus literature, or other effort to obstruct this exchange is prohibited.

(8) . . . [A]cademic institutions and professional societies should maintain a posture of organizational neutrality with respect to the substantive disagreements that divide researchers on questions within, or outside, their fields of inquiry.<sup>11</sup>

Some colleges and universities are voluntarily developing student bills of rights. In Colorado, the public universities subscribed to a memorandum of understanding in March of 2004 that provides:

Higher education in Colorado is a prized institution that fosters learning, culture and economic vitality. Colorado's institutions of higher education are committed to valuing and respecting diversity, including respect for diverse political viewpoints. No student should be penalized because of political opinions that differ from a professor's. Every student should be comfortable in the right to listen critically, and challenge a professor's opinions. Policies that protect students' rights should not cast doubt on professors' academic freedom. Academic freedom of faculty and academic freedom of students are essential and complementary elements of successful education. While the State of Colorado has a legitimate oversight role in state-sponsored higher education, the individual institutions and their governing bodies are in the best position to implement policies to respect the rights of students and faculty. Each institution will review its students' rights and campus grievance procedures to ensure that political diversity is explicitly recognized and protected. Each institution will ensure those rights are adequately publicized to students. Each institution will work with student leadership to ensure that the use of student activity fees meets standards articulated

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11. H.B. 1991, 59th Leg., Reg. Sess. (Wash. 2005).

by the U.S. Supreme Court for an open forum that is fair to all viewpoints. We will have future discussions to share ideas and perspectives on a range of issues to ensure the campus environment is open and inviting to students of all political viewpoints.<sup>12</sup>

This movement presents the possibility of a dramatic shift in the control of the classroom and curricular content from the institution and its faculty to the students. This potential conflict could have enormous unintended effects on faculty and institutional autonomy. This article reviews the historical and current legal status of the institutions', faculties', and students' academic freedom<sup>13</sup> in the classroom, and examines the potential shift in the authority relationship that could result from current and pending legislative interventions. Case law and the growing acceptance of education as a consumer product suggest that the judiciary has become more receptive to student breach of contract suits that allege specific, identifiable, and objective promises. Student bills of rights could provide students with an additional source on which to base breach of contract cases against colleges and universities.

Part I reviews the development of the concept of academic freedom and expression rights for faculty, institutions, and students with a focus on disputes developing in the classroom context where professors are teaching and students learning. The emphasis in the related case law is how a subject is taught, what is taught, which materials and textbooks are used, what kinds of expression are acceptable during class, and who has the authority to determine the parameters of these choices. Critical to the analysis is the respective authority positions of faculty, institutions, and students rather than the public and private institutional distinctions and constitutionality issues.

Part II discusses student contract rights and the trend to view education as a consumer product. Colleges and universities enjoy substantial judicial deference in most academic matters. The judiciary generally refuses to consider educational malpractice suits, even when disguised as breach of contract claims. Student

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12. MEMORANDUM OF UNDERSTANDING, available at <http://www.studentsforacademicfreedom.org/reports/COMemorandumofunderstanding.htm> (last visited Mar. 20, 2005). The *Memorandum of Understanding* was supported by the Colorado legislature in April of 2004. See S.J. Res. 04-033, 64th Gen. Assem., 2d Reg. Sess. (Colo. 2004). Debate continues in Colorado regarding the appropriateness of the principles of student bills of rights. A new bill would supplement existing policies of Colorado colleges and universities by softening notions of academic freedom set forth in the *Memorandum of Understanding*. See S.B. 05-085, 65th Gen. Assem., 1st Reg. Sess. (Colo. 2005); Chris Frates, *Bill Would Protect College Faculty's Speech: A Democratic Senator Says He Hopes to Counter Any Bad Effects From Last Year's Debate on an Academic Bill of Rights*, DENVER POST, Jan. 16, 2005, at C-03.

13. The authors of this article use the phrase "academic freedom" as a term of art based more on the authority to direct the educational process rather than as a constitutional construct. As such, this ability to control the educational process generally applies in both public and private college and university contexts. Some authors argue that academic freedom is a constitutional right in the public university context. See, e.g., J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 J.C. & U.L. 79 (2004). Other authors argue that although courts should give deference to university autonomy based on public policy and educational missions that encompass academic freedom, public universities do not have institutional academic freedom or autonomy grounded in the First Amendment. See e.g., Richard H. Hiers, *Institutional Academic Freedom—A Constitutional Misconception: Did Grutter v. Bollinger Perpetuate that Confusion?* 30 J.C. & U.L. 531 (2004).

breach of contract claims succeed when specific, objective, identifiable promises are not honored. The courts recognize the need for students as consumers to hold colleges and universities accountable for their specific services. After reviewing student contract rights in general, the discussion focuses on disputes arising in the classroom context.

Part III takes into account concepts discussed in Part I and Part II and considers whether student academic bills of rights could allow students to bring breach of contract cases with “teeth” against colleges and universities that ultimately could alter the current authority relationship between faculty, institutions, and students.

### I. AUTHORITY AND ACADEMIC FREEDOM IN THE CLASSROOM

Academic freedom has been part of the educational landscape for many years. Originally associated with teachers and professors, the concept of academic freedom is now also associated with educational institutions and students. There are three types of academic freedom recognized by both the judiciary and the educational system. First and foremost, academic freedom is deeply ingrained as a professional and cultural aspect in the educational realm. This type of academic freedom is a salient feature on most college and university campuses and is reflected in the American Association of University Professors’ (“AAUP”) statement on academic freedom.<sup>14</sup> Although they are not generally legally enforceable, professional norms reinforce respect for inquiry, discourse, and the freedom to express academically related ideas. Dedication to professional academic freedom can vary from institution to institution. Second, academic freedom may become an explicit or implicit part of a faculty member’s contract, creating a judicially enforceable right. Academic freedom thus becomes defined by the terms of the contract. Third, notions of academic freedom can be used to limit state action. Constitutional academic freedom often draws on notions of cultural and professional academic freedom and is grounded in the First Amendment. Constitutional academic freedom can only be claimed by faculty at governmental institutions.

#### A. Faculty

The ability for faculty to direct their intellectual expression and generally run their classrooms as they choose is tied to the notion of academic freedom. Academic freedom is the philosophy, or set of norms and values, that protects a faculty member’s freedom of intellectual expression and inquiry. Although academic freedom is a somewhat amorphous concept,<sup>15</sup> it generally encompasses a faculty member’s freedom of inquiry in research and publication, freedom of association, freedom to evaluate students and assign grades, freedom to determine classroom speech, and freedom of speech as a citizen.<sup>16</sup>

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14. See AAUP, *1940 Statement of Principles on Academic Freedom and Tenure*, in POLICY DOCUMENTS & REPORTS (9th ed. 2001) [hereinafter AAUP, *1940 Statement*].

15. See Donald J. Weidner, *Academic Freedom and the Obligation to Earn it*, 32 J.L. & EDUC. 445, 445 (2003) (“Academic freedom is not defined nearly as much as it is discussed. Although many assume that academic freedom is based in law, no one is quite sure what that law is.”).

16. For additional information on academic freedom, see STEPHEN H. ABY & JAMES C.

The first statement regarding academic freedom in the United States was developed by representatives from several learned societies who formed the AAUP in response to the conflict between two opposing forces in the twentieth century.<sup>17</sup> On one hand, new academic discoveries were warmly received with the expansion of scientific knowledge, free market theory, and American appreciation of pluralism. However, this transformation of academic freedom into a powerful force ran contrary to the traditional role of lay boards of trustees who, as “preservers of collegiate truth,” balked at the new social science theories as un-American. Furthermore, during this period, faculty terminations in the interest of the institution were considered justified. As a result of these opposing forces in 1916, the AAUP published its first statement on academic freedom, which focused on freedom of inquiry and research, freedom of teaching within the university, and freedom of extramural utterance and action.<sup>18</sup> The main basis for this declaration of intellectual independence and autonomy stemmed from the asserted primary responsibility faculty had to the “public” and “profession,” rather than to institutional boards.<sup>19</sup>

University teachers should be understood to be, with respect to the conclusions reached and expressed by them, no more subject to the control of trustees than are judges subject to the control of the President with respect to their decisions; while, of course, for the same reasons, trustees are no more responsible for, or to be presumed to agree with, the opinions or utterances of professors, than the President can be assumed to approve of all the legal reasonings by the courts.<sup>20</sup>

Today, the AAUP’s 1940 *Statement of Principles on Academic Freedom and Tenure* is considered the authoritative statement regarding academic freedom for faculty in higher educational institutions, setting forth that “[t]eachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties. . . .”<sup>21</sup>

Drawing upon these notions of cultural and professional academic freedom, courts have also reasoned that academic freedom is essential to the educational

KUHN IV, *ACADEMIC FREEDOM: A GUIDE TO THE LITERATURE* (2000).

17. See FREDERICK RUDOLPH, *THE AMERICAN COLLEGE AND UNIVERSITY* (1962); WALTER P. METZGER, *THE AMERICAN CONCEPT OF ACADEMIC FREEDOM IN FORMATION* (1977); W.H. COWLEY & DONALD T. WILLIAMS, *INTERNATIONAL AND HISTORICAL ROOTS OF AMERICAN HIGHER EDUCATION* (1991).

18. AAUP, *General Report of the Committee on Academic Freedom and Academic Tenure*, 1915, in 1 AAUP BULLETIN 17 (1916) [hereinafter AAUP, 1916 *General Report*].

19. See Charles M. Ambrose, *Academic Freedom in American Public Colleges and Universities*, 14:1 REVIEW OF HIGHER EDUC. 5 (Fall 1990); Robert K. Poch, *Academic Freedom in American Higher Education*, 1994 ASHE-ERIC HIGHER EDUCATION REPORTS; Walter P. Metzger, *Professional and Legal Limits to Academic Freedom*, 20 J.C. & U.L. 1 (1993); NEIL W. HAMILTON, *ZEALOTRY AND ACADEMIC FREEDOM: A LEGAL AND HISTORICAL PERSPECTIVE* (1995).

20. AAUP, 1916 *General Report*, *supra* note 18, at 26.

21. AAUP, 1940 *Statement*, *supra* note 14, at 3. The AAUP draws no distinction between faculty at public and private universities, as faculty at both types of institutions benefit from professional autonomy in their teaching and scholarship endeavors. Byrne, *supra* note 13, at 108 (2004). Terms set forth by the AAUP may be binding on an institution depending on whether it is incorporated into university policies and contracts.

process:

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 classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to the robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'<sup>22</sup>

This commitment to academic freedom was demonstrated in *Levin v. Harleston*,<sup>23</sup> which highlights the protections courts afford controversial expression, no matter how much the faculty, administration, and students object to its content. In *Levin*, a philosophy professor at City College of the City University of New York ("CCNY"), published several articles and made many professional speeches about his research, arguing that blacks are less intelligent than whites.<sup>24</sup> His work was very embarrassing to CCNY and prompted several student protests.<sup>25</sup> The college responded by creating an alternative Philosophy 101 section to allow students to transfer out of the professor's class and created an ad hoc committee to investigate whether the professor's conduct extended beyond the protections of academic freedom or constituted conduct warranting discipline.<sup>26</sup> The professor thereafter turned down several invitations to speak or write about his views for fear that he would be fired.<sup>27</sup> The professor sued the college and several college officials alleging that his First and Fourteenth Amendment rights were violated.<sup>28</sup> The district court found that the professor's due process and free speech rights were violated.<sup>29</sup> The college president and dean appealed.<sup>30</sup>

The Second Circuit emphasized that although the judiciary is reluctant to intrude on academic decisions made by college and university officials, it will interfere if a First Amendment right is violated.<sup>31</sup> Here, the professor's First Amendment rights were not outweighed by a legitimate educational interest.<sup>32</sup> "[The College's] encouragement of the continued erosion in the size of Professor Levin's class if he [did] not mend his extracurricular ways [was] the antithesis of freedom of expression."<sup>33</sup> In addition, the court said the creation of the ad hoc committee, even though it did not find grounds for discipline, had the effect of indirectly chill-

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22. *Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967).

23. 966 F.2d 85 (2d Cir. 1992).

24. *Id.* at 87.

25. *Id.*

26. *Id.* at 87-89.

27. *Id.* at 89.

28. *Id.* at 88.

29. *Id.*

30. *Id.* at 87.

31. *Id.* at 88.

32. *Id.*

33. *Id.*



ing the professor's expression.<sup>34</sup>

Even though First Amendment free speech and academic freedom are related, the rights that they offer are not coextensive.<sup>35</sup> While the First Amendment protects various types of expression from regulation by public institutions such as public colleges and universities, academic freedom as a cultural norm "addresses the rights within the educational contexts of teaching, learning, and research both in and outside of the classroom—for individuals at private as well as public institutions."<sup>36</sup> Faculty members, however, may use First Amendment protections related to academic freedom only in governmental institutions. In general, faculty may not be terminated for the content of their classroom speech, so long as it is consistent with the purpose of the course. Furthermore, an institution cannot limit a public faculty member's right to speech or terminate a faculty appointment for speech expressed in the context of the citizen role or about a public issue: "[A] teacher's exercise of his rights to speak on issues of public importance may not furnish the basis for his dismissal from public employment."<sup>37</sup>

While academic freedom provides some safeguards to faculty expression, there are limits to its protection. When speech is disruptive of the educational environment, it is not protected by academic freedom and can be the basis for dismissal. Thus, "[a]cademic freedom is not a license for activity at variance with job related procedures and requirements, nor does it encompass activities which are internally destructive to the proper function of the University or disruptive to the education[al] process."<sup>38</sup> In addition, academic freedom cannot be used to compromise a student's right to learn in a hostile-free environment since colleges and universities are legally required to provide such an environment.<sup>39</sup>

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34. *Id.* at 89. See also *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968,972 (9th Cir. 1996) (finding the college's new sexual harassment policy was unconstitutionally vague as applied to a professor's classroom speech and his longstanding confrontational teaching style); *Silva v. Univ. of N.H.*, 888 F. Supp. 293, 314 (D.N.H. 1994) (ruling that the application of the university's sexual harassment policy to the professor's classroom comments violated his First Amendment rights).

35. Donna Euben, *Legal Issues in the Classroom*, APPALACHIAN COLL. ASS'N TEACHING & LEARNING INST., at <http://www.aaup.org/Legal/info%20outlines/classroom.htm> (June 4, 2003). See Byrne, *supra* note 13; Hiers, *supra* note 13.

36. Euben, *supra* note 35.

37. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968). Faculty at public institutions can enjoy expanded rights through First Amendment claims against their institutions and "protection against penalty for nonacademic speech on matters of public concern under doctrines encompassing all public employees." Byrne, *supra* note 13, at 108.

38. *Stastny v. Bd. of Trs. of Cent. Wash. Univ.*, 647 P.2d 496, 504 (Wash. 1982).

39. *Bonnell v. Lorenzo*, 241 F.3d 800, 823–24 (6th Cir. 2001). See 20 U.S.C. § 1681(a) (2000) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ."). Claims of discrimination can also be reviewed by the Department of Education, Office of Civil Rights ("DED-OCR") in an effort to evaluate the appropriateness of an institutional response. See e.g., Letter from Alice B. Wender, director, DED-OCR Southern Division to Dr. James Moeser, chancellor, University of North Carolina-Chapel Hill, available at [http://www.nacua.org/documents/UNC\\_OCR\\_Letter.pdf](http://www.nacua.org/documents/UNC_OCR_Letter.pdf) (Sept. 22, 2004) (regarding OCR Docket No. 11-04-6001 and DED-OCR's review of the university's compliance with Title VI and Title IX).

Academic freedom does not give faculty the right to say or do whatever they please in the classroom. Faculty need to relate their classroom speech to topics that are “germane to the subject matter;” otherwise, speech that is unrelated to the course or at variance with prescribed curriculum may not be protected by academic freedom and may be subject to discipline.<sup>40</sup> The 1940 AAUP Statement reiterates this point by cautioning teachers “not to introduce into their teaching controversial matter which has no relation to their subject.”<sup>41</sup> Ultimately, academic freedom does not allow professors the freedom to use “uncontrolled expression at variance with established curricular contents and internally destructive [to] the proper functioning of the institution.”<sup>42</sup>

It is not always easy to determine whether or not classroom speech is subject-related, an issue that is frequently disputed in public college and university settings. In *Bonnell v. Lorenzo*,<sup>43</sup> the professor’s gratuitous in-class use of vulgarity including the words “shit,” “damn,” “fuck,” and “ass” in an English composition class were deemed “not germane to the subject matter” of the class.<sup>44</sup> Thus, the professor had no constitutionally protected right to use such language in the classroom setting.<sup>45</sup> The court noted that, “[w]hile a professor’s rights to academic freedom and freedom of expression are paramount in the academic setting, they are not absolute to the point of compromising a student’s right to learn in a hostile-free environment.”<sup>46</sup> However, in *Hardy v. Jefferson Community College*,<sup>47</sup> the court held that an adjunct faculty member’s use of words such as “nigger” and “bitch” in a course on interpersonal communications was germane to the subject matter of the course and limited to an academic discussion of the words.<sup>48</sup> The court refused to grant the college officials qualified immunity for removing his teaching contract, holding that “a teacher’s in-class speech deserves constitutional protection” as a matter of public concern, so long as it does not impede the teacher’s “proper performance of his daily duties in the classroom or [interfere] with the regular operation of the schools generally.”<sup>49</sup> The court noted that reasonable school officials should know that speech is protected by the First Amendment when it advances an academic message and is germane to the classroom subject matter.<sup>50</sup>

In *Vega v. Miller*,<sup>51</sup> a former, non-tenured English professor was not reappointed by the New York Maritime College because of his use of an offensive classroom word association exercise in a remedial, pre-freshman English class.<sup>52</sup>

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40. *Bonnell*, 241 F.3d at 820–21. See AAUP, *1970 Interpretive Comments*, in POLICY DOCUMENTS & REPORTS 5 (9th ed. 2001); *Martin v. Parrish*, 805 F.2d 583, 586 (5th Cir. 1986).

41. AAUP, *1940 Statement*, *supra* note 14, at 3.

42. *Clark v. Homes*, 474 F.2d 929, 931 (7th Cir. 1972).

43. 241 F.3d 800 (6th Cir. 2001).

44. *Id.* at 821.

45. *Id.* at 820, 824.

46. *Id.* at 823–24.

47. 260 F.3d 671 (6th Cir. 2001).

48. *Id.* at 679.

49. *Id.* at 681 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572–73 (1986)).

50. *Id.* at 683.

51. 273 F.3d 460 (2d Cir. 2001).

52. *Id.* at 462–63.

The exercise was used to generate several different words with the same general meaning.<sup>53</sup> The students in the class chose the topic of sex and thereafter called out a variety of words associated with the topic.<sup>54</sup> Although none of the students complained, the college administrators decided not to reappoint the professor as his conduct could be considered sexual harassment.<sup>55</sup> The professor sued arguing that his First Amendment right of academic freedom was violated.<sup>56</sup> The court stepped around the issue concluding that the college could have reasonably believed at the time that not reappointing the professor did not violate the professor's First Amendment academic freedom rights.<sup>57</sup>

Sometimes a professor's choice of course content clashes with the institution's or students' views regarding what is offensive or an extraneous interjection of religion or politics. In *Bishop v. Aronov*,<sup>58</sup> an assistant professor of health, physical education and recreation at the University of Alabama was asked to restrict his speech by the university administration<sup>59</sup> after stating his personal religious beliefs in class and holding an optional after-class discussion on "the evidence of God in human physiology or from a 'Christian perspective.'"<sup>60</sup> After ruling that the classroom was not an open forum because it was reserved for instructional time, the court addressed how much control a school can exert on a teacher's classroom instruction before intruding on the teacher's First Amendment rights.<sup>61</sup> In regard to the professor's classroom comments, the court examined the in-class context, the university's position as a public employer with a teaching mission, and the concept of academic freedom, holding that the restriction of the professor's speech was reasonably related to legitimate pedagogical goals and that the university retained power to control curriculum.<sup>62</sup> Interestingly, the court could not find support to conclude that academic freedom was an independent First Amendment right and chose not to override the university's discretion, trusting that the university would preserve both its own academic interests and the academic interests of its professors since it would not otherwise be able to attract quality teachers.<sup>63</sup> As for the "optional" after-class meetings, the court found that the university's demand to completely disassociate classroom instruction from his Christian perspective physiology meetings was also reasonable.<sup>64</sup>

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53. *Id.*

54. *Id.* at 463.

55. *Id.*

56. *Id.* at 464.

57. *Id.* at 470–71.

58. 926 F.2d 1066 (11th Cir. 1991).

59. Bishop was informed by a memo that he was to "separate his personal and professional beliefs and that he not impart the former to his students during 'instructional time' or under the guise of the courses he teaches in so-called optional classes." *Id.* at 1071. The restrictions placed on Dr. Bishop by the university were that he refrain from "1) the interjection of religious beliefs and/or preferences during instructional time periods and 2) the optional classes where a 'Christian Perspective' of an academic topic is delivered." *Id.* at 1069.

60. *Id.* at 1076.

61. *Id.* at 1071.

62. *Id.* at 1074.

63. *Id.* at 1075.

64. *Id.* at 1076.

In *Edwards v. California University of Pennsylvania*,<sup>65</sup> a tenured media studies professor sued the administration for violating his free speech rights by restricting his choice of classroom materials that emphasized issues of “bias, censorship, religion and humanism.”<sup>66</sup> The department had voted to use a common version of a course syllabus after a student complained that the professor used the class to advance religious ideas.<sup>67</sup> At trial, the jury found for the university on the professor’s First Amendment claim.<sup>68</sup> The professor appealed arguing that the district court inadequately instructed the jury by failing to clarify what “reasonably related to a legitimate educational interest” means by stressing the strength of a professor’s academic freedom rights.<sup>69</sup> The appellate court found it unnecessary to determine whether the jury instructions were appropriate because “a public university professor does not have a First Amendment right to decide what will be taught in the classroom” in contravention of the university’s policies.<sup>70</sup> The court stated that although the professor “has a right to advocate outside of the classroom for the use of certain curriculum materials, he does not have a right to use those materials in the classroom.”<sup>71</sup> The professor’s reliance on academic freedom did not change the outcome since the concept of academic freedom is associated with university autonomy.<sup>72</sup>

Professors generally enjoy the freedom to control classroom discussions, assignments, and texts. By relying on notions of academic freedom and First Amendment protections, professors have been successful in cases where their classroom actions clash with students or institutions. However, when classroom speech or coursework is at variance with prescribed curriculum, professors may be subject to discipline. Academic bills of rights could diminish professors’ classroom independence by placing academic decision-making authority into the hands of the legislature or students thereby altering the current student-professor-institution authority relationship.

#### B. Colleges and Universities

Courts have recognized that both the faculty and the institution have control over the classroom environment. To the extent that the topics covered by faculty are germane to the assigned course content parameters and are not conveyed in ways that are aggressively offensive so as to be measurably provocative, the faculty are left to their “academic freedom” to teach their classes as they deem proper. But institutional freedom is growing as a trump card, as a college or university can first decide, by job assignment, the course to be offered, and its content, and secondly, if the manner in which content is offered is beyond its standards of decency or relevancy. The current academic bill of rights movement could alter the profes-

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65. 156 F.3d 488 (3d Cir. 1998).

66. *Id.* at 489.

67. *Id.* at 489–90.

68. *Id.* at 490.

69. *Id.* at 491.

70. *Id.*

71. *Id.*

72. *Id.* at 492.

sor-institution authority relationship by requiring colleges and universities to closely oversee classroom content and expression in order to avoid liability on either statutory or contractual claims.

To the extent that academic freedom has been recognized for faculty, the Fourth Circuit has held that the freedom actually inheres in the educational institution. In *Urofsky v. Gilmore*,<sup>73</sup> six professors from various state educational institutions challenged the constitutionality of a Virginia law that restricted state employees from accessing sexually explicit materials on the internet.<sup>74</sup> The professors argued that the Act violated their academic freedom rights. The court characterized their claim in another way:

In essence, [the professors] contend that a university professor possesses a constitutional right to determine for himself, without the input of the university (and perhaps even contrary to the university's desires), the subjects of his research, writing, and teaching. [They] maintain that by requiring professors to obtain university approval before accessing sexually explicit materials on the Internet in connection with their research, the Act infringes this individual right of academic freedom. Our review of the law, however, leads us to conclude that to the extent the Constitution recognizes any right of academic freedom above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors, and is not violated by the terms of the Act.<sup>75</sup>

Noting that the concept of academic freedom is not clearly defined, the court briefly examined its historical use, concluding that although academic freedom has strong roots as a professional practice, it has not become an established constitutional right.<sup>76</sup> In fact, the court stated that:

[T]he 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 constitutionalized a right of academic freedom at all, [it] appears to have recognized only an institutional right of self-governance in academic affairs.”<sup>77</sup>

The court rejected the professors' claim that *Sweezy v. New Hampshire*<sup>78</sup> adopted the concept of academic freedom, noting that although academic freedom was relied on in *Sweezy*, the right recognized was not an individual right, but rather an institutional right belonging to the university.<sup>79</sup> Language in *Sweezy* focused on the rights of the educational institution and not the academic freedom rights of individual faculty: “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

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73. 216 F.3d 401 (4th Cir. 2000).

74. *Id.* at 404.

75. *Id.* at 409–10.

76. *Id.* at 411.

77. *Id.* at 412.

78. 354 U.S. 234 (1957).

79. *Urofsky*, 216 F.3d at 412.

taught, and who may be admitted to study.”<sup>80</sup> The court, however, found analysis of past precedent inconsequential because regardless of whether teachers had at one time enjoyed additional protection under the First Amendment by virtue of academic freedom, the same First Amendment rights later became available to all public employees thereby invalidating the need for any additional academic safeguards.<sup>81</sup>

Through its analysis, the court highlighted a recent shift toward institutional academic freedom in Supreme Court jurisprudence and noted that the Court “has never recognized that professors possess a First Amendment right of academic freedom to determine for themselves the content of their courses and scholarship, despite opportunities to do so.”<sup>82</sup> Interestingly, the court cited *Edwards v. Aguillard*,<sup>83</sup> a case involving an action to challenge the constitutionality of the Louisiana Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act.<sup>84</sup> The Act required that the theories of creationism and evolution be taught together, with “equal time” for opposing opinions, or not at all, in primary and secondary public schools.<sup>85</sup> In *Edwards*, the Supreme Court essentially brushed aside the Act’s purported purpose of protecting academic freedom to find that the Act violated the Establishment Clause by “requiring either the banishment of the theory of evolution from public school classrooms or the presentation of a religious viewpoint that rejects evolution in its entirety.”<sup>86</sup> However, the Court noted that the Act did not protect the purported purpose of advancing academic freedom because it did not give teachers any more flexibility than they already possessed.<sup>87</sup> In fact, it limited teachers’ choices since the Act did not encourage the teaching of all scientific theories: “teachers who were once free to teach any and all facets of this subject are now unable to do so.”<sup>88</sup> Nevertheless, the Court did not seriously consider academic freedom in holding the Act unconstitutional.<sup>89</sup>

Ultimately, the *Urofsky* court rejected the professors’ argument that academic freedom is an individual professor’s constitutional right and that the First Amendment provides special protection for academic speakers.<sup>90</sup> Aside from professional values and practice standards, the court stated that professors simply have the same First Amendment rights as any other public employee.<sup>91</sup>

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80. *Id.* at 413 (quoting *Sweezy*, 354 U.S. at 263 (1957)). The language used by Justice Frankfurter in his concurring opinion in *Sweezy* derives from a South African text published in 1957. See ALBERT VAN DE SANDT CENTLIVRES ET AL., CONFERENCE OF REPRESENTATIVES OF THE UNIVERSITY OF CAPE TOWN AND THE UNIVERSITY OF THE WITWATERSRAND, THE OPEN UNIVERSITIES IN SOUTH AFRICA at 10–12 (1957). See also Heirs, *supra* note 13, at 533–36 (discussing the origins and development of the concept of institutional academic freedom).

81. *Urofsky*, 216 F.3d 413–14.

82. *Id.* at 414.

83. 482 U.S. 578 (1987).

84. *Id.* at 580.

85. *Id.* at 588.

86. *Id.* at 596–97.

87. *Id.* at 587.

88. *Id.* at 589.

89. *Urofsky v. Gilmore*, 216 F.3d 401, 415 (4th Cir. 2000).

90. *Id.* at 411–12.

91. *Id.* at 415. There is disagreement among scholars regarding the reasoning and outcome

The concept of institutional autonomy was addressed by the Supreme Court in *Grutter v. Bollinger*,<sup>92</sup> where the admissions policy of the University of Michigan Law School was at issue.<sup>93</sup> A law school applicant who was denied admission sued the university alleging that the admissions policy, which considered race as a factor, violated her equal protection rights.<sup>94</sup> The district court held that the admissions policy was unlawful and enjoined the law school from using race as a factor.<sup>95</sup> The appellate court reversed and vacated the injunction.<sup>96</sup> In holding that the law school had a compelling interest in creating a diverse student body and that the admissions policy was narrowly tailored, the Court reaffirmed the judicial tradition of giving deference to university academic decisions:

Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits. We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.<sup>97</sup>

The Court may have perpetuated the confusion of whether institutional academic freedom is a constitutional right by using language associated with institutional autonomy, but failed to clarify how academic freedom is linked to the First Amendment.<sup>98</sup>

A recent case highlights the recognition of institutional academic freedom. In

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of the *Urofsky* case. See Byrne, *supra* note 13, at 112 (stating that “*Urofsky* vividly illustrates the disasters that can flow from assessing college and university speech issues without sensitivity for academic values and the tradition of academic freedom”); Rebecca Gose Lynch, *Pawns of the State or Priests of Democracy? Analyzing Professors Academic Freedom Rights Within the State's Managerial Realm*, 91 CAL. L. REV. 1061, 1065 (2003) (arguing that “the Fourth Circuit erred in automatically deferring to the state, in failing to ask the operative question of functional necessity, and in distinguishing between ‘individual’ and ‘institutional’ academic freedom”); Stacy E. Smith, Note, *Who Owns Academic Freedom: The Standard for Academic Free Speech in Public Universities*, 59 WASH. & LEE L. REV. 299, 351 (2002) (stating that “the Fourth Circuit stripped the core of academic freedom by ruling that academic freedom provides no protection to the academic inquiry and research of individual professors”); Doug Rendleman, *Academic Freedom in Urofsky's Wake: Post September Remarks on “Who Owns Academic Freedom?”* 59 WASH. & LEE L. REV. 361, 362 (2002) (stating that “*Urofsky* is a triumph for collectivism and conformity and a recipe for timidity”). But see Todd A. DeMitchell, *Academic Freedom—Whose Rights: The Professor's or the University's?* 168 EDUC. LAW REP. 1, 17–18 (2002) (arguing that a professor's academic freedom flows from the professor-university employment relationship. He notes that the AAUP's statement on academic freedom is subject to the adequate performance of the professor at the university and that the four essential elements of academic freedom belong with the university); Weidner, *supra* note 15, at 448 (stating that *Urofsky* was a victory for deans, university managers, productive faculty, students, and state taxpayers).

92. 539 U.S. 306 (2003). For a comprehensive discussion regarding *Grutter v. Bollinger*, the development of the concept of institutional academic freedom and its tenuous association with the First Amendment, see Hiers, *supra* note 13.

93. *Grutter*, 539 U.S. at 306.

94. *Id.*

95. *Id.*

96. *Id.* at 306–07.

97. *Id.* at 328–29.

98. Hiers, *supra* note 13, at 573–77.

*Yacovelli v. Moeser*,<sup>99</sup> students challenged the use of a book about the Qur'an in a freshman orientation program.<sup>100</sup> The University of North Carolina at Chapel Hill had required all incoming students to read the book, write a paper, and discuss their responses to the book; an activity designed to examine current controversies in light of the September 11 terrorist attacks in an academic context.<sup>101</sup> Students argued that the activity violated the Establishment Clause.<sup>102</sup> The court disagreed.<sup>103</sup> While discussing the third prong of the *Lemon* Test,<sup>104</sup> the court reiterated the need for academic freedom at colleges and universities by quoting from *Sweezy*:

To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.<sup>105</sup>

In an amended complaint,<sup>106</sup> the students also brought a Free Exercise claim against the university. They asserted that the university violated their constitutional freedoms by forcing them to read a positive portrayal of Muhammad and Islam and write about their personal religious beliefs.<sup>107</sup> The court disagreed, finding that the exercise was academic in nature, aimed at stimulating student debate about Islamic religion and did not punish or endorse any student opinion.<sup>108</sup> A similar result was reached in *Calvary Bible Presbyterian Church of Seattle v. University of Washington*,<sup>109</sup> where the Supreme Court of Washington also quoted from the above passage in *Sweezy* and found that the university's treatment of the class "English 390: The Bible as Literature," was objective, dealt with literary features of the Bible and did not advance any particular point of view and therefore did not violate the First Amendment.<sup>110</sup>

The *Urofsky* holding and its related progeny provide a controversial, even heretical, view of where academic freedom is vested. Its holding, that academic freedom is vested in the institution and not in faculty individually,<sup>111</sup> runs fundamentally and polarly opposite to AAUP doctrine and ingrained academic beliefs.

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99. No. 1:02CV596, 2004 WL 1144183 (M.D.N.C. May 20, 2004).

100. *Id.* at \*1.

101. *Id.*

102. *Id.* at \*2.

103. *Id.* at \*16.

104. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

105. *Yacovelli*, 2004 WL 1144183 at \*14 (quoting *Sweezy*, 354 U.S. 234, 250 (1957)).

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

107. *Id.* at 762.

108. *Id.* at 763–64.

109. 436 P.2d 189 (Wash. 1967).

110. *Id.* at 192–94.

111. *Urofsky v. Gilmore*, 216 F.3d 401, 411–12 (4th Cir. 2000).



This interpretation, forced as it is on constitutional First Amendment doctrine, does not override the contractual rights to such freedoms that colleges and universities may vest in their faculty by contract. It does, however, suggest that institutional authority may trump faculty authority in a showdown.

Universities frequently exercise authority when confronted with questions of the appropriateness of a faculty member's classroom content. When a faculty member injects sexual content into lectures, institutions and students have responded strongly. Courts have supported claims that faculty academic freedom cannot be used to compromise a student's right to learn in a hostile-free environment.<sup>112</sup> Sexual harassment is a form of sex discrimination that is prohibited by laws protecting employees and students under Title VII of the Civil Rights Act of 1964<sup>113</sup> and Title IX of the Education Amendments of 1972,<sup>114</sup> respectively. Title IX prohibits sex discrimination in educational programs and activities.<sup>115</sup> Sexual harassment is defined as:

Unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either implicitly or explicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the bases for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive environment."<sup>116</sup>

Sexual harassment cases stemming from teaching-related incidents often also involve a determination of whether the faculty speech or conduct is germane to the subject matter being taught.<sup>117</sup> The AAUP has issued a statement that addresses the type of speech or conduct that equates to sexual harassment in the teaching context:

Such speech or conduct is reasonably regarded as offensive and substantially impairs the academic or work opportunity of students . . . . If it takes place in the teaching context, it must also be persistent, pervasive, and not germane to the subject matter. The academic setting is distinct from the workplace in that wide latitude is required for professional judgment in determining the appropriate content and presentation of academic material.<sup>118</sup>

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112. See, e.g., *Bonnell v. Lorenzo*, 341 F.3d 800, 823–24 (6th Cir. 2001).

113. Pub. L. No. 88-352, §§ 701–718, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2000)).

114. Pub. L. No. 92-318, §§ 901–907, 86 Stat. 235, 373–75 (codified as amended at 20 U.S.C. §§ 1681–1688 (2000)).

115. 20 U.S.C. § 1681(a) (2000).

116. 29 C.F.R. § 1604.11 (2004). This definition, promulgated by the EEOC, was upheld by the Supreme Court in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

117. See *Silva v. Univ. of N.H.*, 888 F. Supp. 293 (D.N.H. 1994); *Rubin v. Ikenberry*, 933 F. Supp. 1425 (C.D. Ill. 1996).

118. AAUP, *Sexual Harassment: Suggested Policy and Procedures for Handling Complaints*, in *POLICY DOCUMENTS & REPORTS* 208 (9th ed. 2001).

Judicial review of faculty classroom speech and its relevancy to course subject matter was illustrated in *Silva v. University of New Hampshire*.<sup>119</sup> In *Silva*, a communications professor used sexual imagery as a way to convey the concept of “focusing a thesis statement” in writing, and illustrated the concept of “metaphor” by comparing a belly dancer to a plate of Jell-O on top of a vibrator.<sup>120</sup> After a number of students in his class complained, the university determined that the professor violated the school’s sexual harassment policy, initiated disciplinary procedures against the professor and created “shadow classes” so students could transfer.<sup>121</sup> The professor was thereafter suspended without pay for one year.<sup>122</sup> On review, the court found that his classroom comments were not “of a sexual nature,” and therefore were protected classroom speech.<sup>123</sup> The court stated that his expressions “advanced his valid educational objective of conveying certain principles related to the subject matter of his course,”<sup>124</sup> and that it was wrong for the university to rely on the subjective reactions of adult students as the indicator of what speech is impermissible or inappropriate:

[T]he court concludes that the [University System of New Hampshire] Sexual Harassment Policy as applied to Silva’s classroom speech is not *reasonably* related to the legitimate pedagogical purpose of providing a congenial academic environment because it employs an impermissibly subjective standard that fails to take into account the nation’s interest in academic freedom.<sup>125</sup>

Finding that the professor’s interest in academic freedom outweighed the University’s interest in proscribing offensive speech, Dr. Silva was reinstated with back pay and damages.<sup>126</sup>

Similarly, in *Cohen v. San Bernardino Valley College*,<sup>127</sup> the Ninth Circuit determined that a remedial English professor was inappropriately disciplined for using vulgar and obscene language during class and requiring students to write on the topic of pornography.<sup>128</sup> Although the court did not analyze the speech at issue, it found that the discipline violated the professor’s due process rights because the sexual harassment policy was unconstitutionally vague.<sup>129</sup> Since the professor had used these teaching methods for many years and was not warned that they violated the policy, he was entitled to infer that his techniques were “pedagogically sound and within the bounds of teaching methodology permitted at the college.”<sup>130</sup>

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119. 888 F. Supp. 293 (D.N.H. 1994).

120. *Id.* at 298–99.

121. *Id.* at 303.

122. *Id.* at 307.

123. *Id.* at 312–13.

124. *Id.* at 313.

125. *Id.* at 314.

126. *Id.* at 316–17. See Sonya G. Smith, *Cohen v. San Bernardino Valley College: The Scope of Academic Freedom within the Context of Sexual Harassment Claims and In-Class Speech*, 25 J.C. & U.L. 1 (1998).

127. 92 F.3d 968 (9th Cir. 1996).

128. *Id.* at 970–71.

129. *Id.* at 972.

130. *Id.*

Though the previous cases supported faculty speech, where that classroom speech rises to the level of sexual harassment and is unrelated to necessary pedagogy, courts support a institution's right to enforce its standards. Such an instance is demonstrated in *Rubin v. Ikenberry*,<sup>131</sup> where Rubin, a professor of a class called "Methods of Teaching Social Studies in the Elementary Schools," made comments and inquiries about sexual preferences, cooking in the nude, what type of underwear women should wear, abortion, his unconditional love for a student, and his divorce settlement—among other things.<sup>132</sup> Two students filed sexual harassment grievances against the professor based on his classroom comments and the professor was relieved from his teaching duties during the investigation.<sup>133</sup> The professor thereafter sued several university administrators alleging violations of procedural and substantive due process, First Amendment and academic freedom rights.<sup>134</sup> After considering whether the professor's First Amendment and academic freedom rights were violated by examining the nature of the professor's comments and their relevance to the course, the district court granted summary judgment to the university.<sup>135</sup> Noting that academic freedom is not an independent First Amendment right, the court determined that the university's characterization of the professor's conduct as harassment appropriately balanced the needs and objectives of the parties and was reasonable.<sup>136</sup>

The court found that "Rubin's classroom comments which have a sexual focus do not appear connected to the course content and legitimate objective of teaching students how to teach elementary school social studies. The degree of departure from the expected course content to Rubin's comments appears extensive. Their relevance is quite attenuated."<sup>137</sup> The court also concluded that Rubin's speech was not protected by the First Amendment because it did not address a matter of public concern.<sup>138</sup>

In *Hayut v. State University of New York*,<sup>139</sup> a political science professor's in-class comments to a female student were found to be sufficiently offensive, severe, and pervasive that a reasonable fact finder could conclude that a hostile academic environment was created.<sup>140</sup> The professor repeatedly called the student "Monica" because of a purported resemblance to Monica Lewinsky.<sup>141</sup> During class, the professor would ask the student about "her weekend with Bill," and make other sexually suggestive remarks such as "[b]e quiet, Monica. I will give you a cigar later."<sup>142</sup> Several months after the student complained, the professor resigned.<sup>143</sup>

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131. 933 F. Supp. 1425 (C.D. Ill. 1996).

132. *Id.* at 1440–41.

133. *Id.* at 1430.

134. *Id.* at 1431–32.

135. *Id.* at 1442.

136. *Id.* at 1441–42.

137. *Id.* at 1442.

138. *Id.* at 1444.

139. 352 F.3d 733 (2d Cir. 2003).

140. *Id.* 745–46.

141. *Id.* at 738.

142. *Id.* at 739.

143. *Id.* at 752.

But the student still sued the professor, university, and several other university personnel for violating her equal protection rights and Title IX.<sup>144</sup> Because the professor did not argue that his classroom comments were related to the curriculum or protected by academic freedom, the court did not express a view on whether or not such a defense would be available.<sup>145</sup>

Colleges' and universities' obligations to ensure a safe classroom environment and to ensure that the topics of a course are what are actually taught by the faculty are enforceable rights that must be balanced against faculty classroom freedoms. But, when the faculty member strays off the course topic to reach into matters of the students' personal lives, courts tend to find that it violates the students' rights of privacy and goes beyond the academic freedom rights of the faculty, thereby reinforcing the institutional right of control. That students themselves have some control over the classroom freedoms and prerogatives of faculty members is itself important to review.

### C. Students

The parameters of college students' free expression rights in the classroom are somewhat unsettled. With no Supreme Court ruling specifically addressing post-secondary freedom of expression rights, lower courts are grappling with how to apply primary and secondary education Supreme Court case law in the higher education setting.<sup>146</sup>

In 1969, the Supreme Court famously noted in *Tinker v. Des Moines Independent Community School District*,<sup>147</sup> that "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>148</sup> The *Tinker* case involved junior and high school students wearing black armbands to protest the Vietnam War in contravention of school district policy.<sup>149</sup> The Court distinguished the student expression in this case from "speech or action that intrudes upon the work of the schools or the rights

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144. *Id.* at 752–53.

145. *Id.* at 745.

146. See Laura K. Schulz, A "Disacknowledgment" of Post-Secondary Student Free Speech—*Brown v. Li and the Applicability of Hazelwood v. Kuhlmeier to the Post-Secondary Setting*, 47 ST. LOUIS U. L.J. 1185, 1188 (2003) (noting the need for Supreme Court clarification of whether the *Hazelwood* standard applies to student expression in the post-secondary setting). See also Karyl Roberts Martin, Note, *Demoted to High School: Are College Students' Free Speech Rights the same as those of High School Students?* 45 B.C. L. REV. 173 (2003) (providing a comprehensive portrait of the development of college students' free speech rights and arguing what standard should be used in protecting those rights); Mark J. Fiore, *Trampling the "Marketplace of Ideas": The Case Against Extending Hazelwood to College Campuses*, 150 U. PA. L. REV. 1915 (2002) (arguing that the *Hazelwood* standard should not apply to public colleges and universities). For an interesting discussion regarding the development of First Amendment expression rights of teachers in the primary/secondary school context, which is somewhat analogous to the development of free expression rights of students and teachers in the post-secondary setting, see Venessa A. Wernicke, *Teachers' Speech Rights in the Classroom: An Analysis of Cockrel v. Shelby County School District*, 71 U. CIN. L. REV. 1471 (2003).

147. 393 U.S. 503 (1969).

148. *Id.* at 506.

149. *Id.* at 504.

of other students,”<sup>150</sup> by characterizing the armband use as passive expression that was “akin to ‘pure speech.’”<sup>151</sup> The Court emphasized that students enjoy constitutional rights of expression at school:

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are ‘persons’ under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.<sup>152</sup>

The decision granted to students First Amendment rights of expression in educational contexts as long as the expression did not “‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.’”<sup>153</sup> The mere desire of school officials “to avoid the discomfort and unpleasantness” associated with “unpopular viewpoint[s]” was not enough to prohibit the expression of a particular opinion.<sup>154</sup>

The *Tinker* standard was applied in the post-secondary context in *Salehpour v. University of Tennessee*,<sup>155</sup> where a dental student sued the university for violating his First Amendment right to protest against a classroom rule prohibiting first year dental students from sitting in the last row of some classes.<sup>156</sup> The student argued that under federal law and the student handbook,<sup>157</sup> he had the right to protest the rule by sitting in the last row and expressing his displeasure to the faculty.<sup>158</sup> In regard to balancing students’ rights against teachers’ rights, the court noted that: “The rights afforded to students to freely express their ideas and views without fear of administrative reprisal, must be balanced against the compelling interest of the academicians to educate in an environment that is free of purposeless distractions and is conducive to teaching.”<sup>159</sup>

The court found that the student’s “sole purpose of advancing and pursuing his admitted ‘power struggle’ with the University, was not protected activity,” and that his actions appeared to have “no intellectual content” or “discernable purpose”

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150. *Id.* at 508.

151. *Id.*

152. *Id.* at 511.

153. *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

154. *Id.*

155. 159 F.3d 199 (6th Cir. 1998).

156. *Id.* at 201–03.

157. The student handbook stated: “It is the right and responsibility of the individual student or groups of students to be interested in and to question the policies, regulations, and procedures affecting them.” *Id.* at 207.

158. *Id.*

159. *Id.* at 208.

other than to disrupt class work under the *Tinker* standard.<sup>160</sup> Thus, the student's actions were not protected by the First Amendment. The court, however, stressed that the ruling should not deter "legitimate debate" in educational contexts even though the expression might be inconvenient.<sup>161</sup>

In 1988, the Supreme Court set forth a new standard in *Hazelwood School District v. Kuhlmeier*,<sup>162</sup> which is now followed in most student expression cases, including several post-secondary cases.<sup>163</sup> The ruling provided school officials more leeway to direct student expression during curriculum related activities. In *Hazelwood*, student newspaper staff members sued their high school for violating their First Amendment rights when the principal deleted two pages of the newspaper based on concerns of privacy, age-appropriateness, and insufficient time to make necessary changes before publication.<sup>164</sup> The deleted pages were produced as part of a journalism class in the school's curriculum and included articles on student pregnancy and the impact of divorce on students.<sup>165</sup> The district court found that the students' First Amendment rights were not violated and denied their request for an injunction.<sup>166</sup> The students appealed and the Eighth Circuit reversed.<sup>167</sup>

The Supreme Court began its examination of the case by noting that the "First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings,' and must be 'applied in light of the special characteristics of the school environment.'"<sup>168</sup> After determining that the school newspaper was not a public forum, the Court drew a distinction between the type of personal student expression involved in *Tinker* and expressive activities that might reasonably be perceived to "bear the imprimatur of the school."<sup>169</sup> The Court reasoned that educators may exercise greater control over the latter to ensure that students learn what lessons are designed to impart, avoid exposure to age-inappropriate material, and avoid attributing individual views to the school,<sup>170</sup> ultimately holding that educators can regulate "student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."<sup>171</sup> Consequently, the Court found that the students' First Amendment rights had not been violated because the principal's actions were rea-

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160. *Id.*

161. *Id.*

162. 484 U.S. 260 (1988).

163. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1289 (10th Cir. 2004); *Brown v. Li*, 308 F.3d 939, 947-49 (9th Cir. 2002); *Kincaid v. Gibson*, 236 F.3d 342, 346 (6th Cir. 2001). *But cf.* *Martin*, *supra* note 146 (arguing that the restrictive *Hazelwood* standard is inappropriate in a college or university setting).

164. *Hazelwood*, 484 U.S. at 263-64.

165. *Id.* at 263.

166. *Id.* at 264-65.

167. *Id.* at 265.

168. *Id.* at 266 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

169. *Id.* at 271.

170. *Id.*

171. *Id.* at 273. *See Axson-Flynn v. Johnson*, 356 F.3d 1277, 1286 (10th Cir. 2004) ("The 'pedagogical' concept merely means that the activity is 'related to learning.'") (quoting *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 925 (10th Cir. 2002)).

sonable in light of the principal's legitimate pedagogical concerns.<sup>172</sup> The Court did not address the applicability of the ruling in the college and university context, leaving open the question of whether college and university students might receive greater free expression rights: "We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level."<sup>173</sup>

Since *Hazelwood*, judges and scholars have wrestled with the question of what standard should be applied in post-secondary free expression cases.<sup>174</sup> A recent Ninth Circuit case, *Brown v. Li*,<sup>175</sup> held that the *Hazelwood* standard applies to curriculum-related questions in the college and university context, finding that a thesis committee's refusal to approve a graduate student's masters thesis did not violate the student's First Amendment rights.<sup>176</sup> In *Brown*, a master's degree candidate inserted an additional section into his thesis without the thesis committee's knowledge after the committee approved his original version.<sup>177</sup> The two-page addition was entitled "Disacknowledgements" and included the statement: "I would like to offer special *Fuck You's* to the following degenerates for being an ever-present hindrance during my graduate career . . . ."<sup>178</sup> The student then named the dean and staff of the graduate school along with several other individuals.<sup>179</sup> After discovery of the added section, the student met with the thesis committee and submitted an alternate version that eliminated the profanity.<sup>180</sup> The committee however believed that the "disacknowledgements" section did not meet the professional standards in the field and refused to approve the thesis unless the section was removed.<sup>181</sup> Without committee approval, the student was denied his degree.<sup>182</sup> The student sued, alleging violation of his First Amendment, procedural due process, and state constitutional rights.<sup>183</sup> The district court granted summary judgment in favor of the university and the student appealed.<sup>184</sup>

The Ninth Circuit noted that there was no precedent directly on point but relied on the reasoning of *Hazelwood* and *Settle v. Dickson County School Board*<sup>185</sup> to reach its decision.<sup>186</sup> In *Settle*, the Sixth Circuit examined a similar fact pattern but at the secondary level.<sup>187</sup> There, a junior high school student changed her previ-

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172. *Hazelwood*, 484 U.S. at 260–61.

173. *Id.* at 273 n.7.

174. See, e.g., Martin, *supra* note 146; Schulz, *supra* note 146; Tom Saunders, *The Limits on University Control of Graduate Student Speech*, 112 YALE L.J. 1295 (2003).

175. 308 F.3d 939 (9th Cir. 2002), *cert. denied*, 538 U.S. 908 (2003).

176. *Id.* at 941.

177. *Id.* at 943.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 944.

183. *Id.* at 945–46.

184. *Id.* at 946.

185. 53 F.3d 152 (6th Cir. 1995).

186. *Brown*, 308 F.3d at 947–49.

187. *Settle*, 53 F.3d at 153.

ously approved paper topic without the consent of her teacher.<sup>188</sup> The student argued that her First Amendment rights were violated when her teacher refused to approve her new paper topic on Jesus Christ and gave her a failing grade.<sup>189</sup> The court relied on *Hazelwood* to reject the student's argument, stating that "[t]he free speech rights of students in the classroom must be limited because effective education depends not only on controlling boisterous conduct, but also on maintaining the focus of the class on the assignment in question."<sup>190</sup> The court continued:

So long as the teacher limits speech or grades speech in the classroom in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion, the federal courts should not interfere.

Like judges, teachers should not punish or reward people on the basis of inadmissible factors—race, religion, gender, political ideology—but teachers, like judges, must daily decide which arguments are relevant, which computations are correct, which analogies are good or bad, and when it is time to stop writing or talking. Grades must be given by teachers in the classroom, just as cases are decided in the courtroom; and to this end teachers, like judges, must direct the content of speech . . . . [I]t is the essence of the teacher's responsibility in the classroom to draw lines and make distinctions—in a word to encourage speech germane to the topic at hand and discourage speech unlikely to shed light on the subject. Teachers therefore must be given broad discretion to give grades and conduct class discussion based on the content of speech. Learning is more vital in the classroom than free speech.<sup>191</sup>

Judge Batchelder's concurring opinion<sup>192</sup> highlighted the need to balance students' free expression rights in the classroom against the "teacher's right to control and manage [the] classroom."<sup>193</sup> Interestingly however, Judge Batchelder believed that no First Amendment rights were implicated at all by characterizing the case as a dispute regarding whether a teacher could "determine what topic is appropriate to satisfy a research paper assignment," rather than the student's "right to express her views, opinions or beliefs, religious or otherwise, in the classroom."<sup>194</sup>

Ultimately, the *Brown* court held that the *Hazelwood* principles do articulate a standard applicable to a university's assessment of a student's academic work:

[A]n educator can, consistent with the First Amendment, require that a student comply with the terms of an academic assignment. [T]he First Amendment does not require an educator to change the assignment to suit the student's opinion or to approve the work of a student that, in his or her judgment, fails to meet a legitimate academic standard. Rather,

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188. *Id.* at 154.

189. *Id.* at 155.

190. *Id.* (internal citations omitted).

191. *Id.* at 155–56.

192. *Id.* at 156 (Batchelder, J., concurring). Judge Batchelder concurred only in the judgment.

193. *Id.*

194. *Id.* at 157.



as articulated by *Hazelwood*, ‘educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.’<sup>195</sup>

The court determined that the more restrictive *Hazelwood* standard was appropriate in the case of the added thesis pages by distinguishing extracurricular speech from the curricular speech at issue,<sup>196</sup> noting that the curriculum of a public university is a way that the university expresses its policy and that others do not have a constitutional right to interfere with that policy.<sup>197</sup> In addition, the court suggested that “an institution’s interest in mandating its curriculum and in limiting a student’s speech to that which is germane to a particular *academic* assignment”<sup>198</sup> arguably expands with the student’s age as the “need for academic discipline and editorial rigor increases as the student’s learning progresses.”<sup>199</sup> The court bolstered its argument by mentioning Supreme Court cases<sup>200</sup> recognizing professorial academic freedom that implied a university’s control over student academic related issues may be broader than in primary and secondary schools.<sup>201</sup> It reasoned that the *Hazelwood* standard appropriately balances the university’s academic freedom and the student’s First Amendment rights, allowing the university to use its “expertise in defining academic standards and teaching students to meet them.”<sup>202</sup>

The Ninth Circuit concluded that the student’s First Amendment rights were not violated, noting that the thesis assignment was part of the curriculum and that the paper was designed to teach the student how to research and present his results in a way that was acceptable in the field.<sup>203</sup> In addition, the court rejected the student’s argument that he had a First Amendment right to write the section from any viewpoint because under the First Amendment, as explained in *Hazelwood* and *Settle*, teachers have the ability to require students to complete “a paper from a particular viewpoint, even if it is a viewpoint with which the student disagrees, so long as the requirement serves a legitimate pedagogical purpose.”<sup>204</sup>

Not only do college and university students expect certain free expression rights in the classroom, they also object when other people’s beliefs are forced upon them. Students have sought relief through the courts for controversies involving

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195. *Brown v. Li*, 308 F.3d 939, 949 (9th Cir. 2002) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)).

196. *Id.* at 950. (“The Supreme Court has suggested that core *curricular* speech—that which is an integral part of the classroom—differs from students’ *extracurricular* speech and that a public educational institution retains discretion to prescribe its curriculum.”).

197. *Id.* at 950–51.

198. *Id.*

199. *Id.*

200. *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 237–39 (2000). Although *Southworth* involved students suing a university over mandatory student activity fees, the *Brown* court used language from Justice Souter’s concurrence in *Southworth* to summarize “the current state of ‘academic freedom.’” *Brown*, 308 F.3d at 951.

201. *Brown*, 308 F.3d at 951.

202. *Id.* at 952.

203. *Id.*

204. *Id.* at 953.

student fees that fund groups advocating opposing views,<sup>205</sup> compelled classroom speech,<sup>206</sup> and indoctrination in the classroom.<sup>207</sup> In *Axson-Flynn v. Johnson*,<sup>208</sup> a Mormon theatre student in the University of Utah's Actor Training Program sued the university for violating her free speech and free exercise rights when she was required to say words that she found offensive such as "fuck" and "goddamn" in classroom acting exercises.<sup>209</sup> During the student's audition, she told departmental instructors that she would not take off her clothes, say God's name in vain, or say the word "fuck."<sup>210</sup> The student was admitted to the program and a few weeks later omitted the words "goddamn" and "shit" from a monologue without informing her instructor.<sup>211</sup> She later asked to modify the language of a scene from a different play and was denied, beginning a series of disagreements between the student and the department.<sup>212</sup> The student thereafter withdrew from the department with the belief that she would be forced out of the program if she did not acquiesce and sued for violation of her First Amendment free speech and free exercise rights.<sup>213</sup> The district court granted summary judgment to the defendants and the student appealed.<sup>214</sup>

The appellate court first determined that the *Hazelwood* standard (restrictions on student expression must be reasonably related to a legitimate pedagogical concern) applied because the actor's training program was a nonpublic forum, the expression involved "school sponsored speech"<sup>215</sup> and the compelled speech was part of the school-mandated curriculum in a classroom context.<sup>216</sup> Furthermore, the *Hazelwood* standard requires only that the restrictions on student expression are reasonable, and that anything more "would effectively give each student veto power over curricular requirements, subjecting the curricular decisions of teachers

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205. The Supreme Court granted a student religious group equal access to university facilities since the university had essentially created an open forum by allowing most student groups to use the facilities. *Widmar v. Vincent*, 454 U.S. 263 (1981). The Supreme Court subsequently ruled a university's denial of student fees to a student organization that published a religiously based magazine amounted to viewpoint discrimination. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

206. See, e.g., *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004).

207. See, e.g., *Ross v. Creighton Univ.*, 957 F.2d 410 (7th Cir. 1992).

208. *Axson-Flynn*, 356 F.3d at 1277.

209. *Id.* at 1280.

210. *Id.* at 1281.

211. *Id.*

212. *Id.* at 1282.

213. *Id.* at 1282-83.

214. *Id.* at 1281-82.

215. The court concluded that "speech which is prescribed as part of the official school curriculum in connection with a classroom exercise is school-sponsored speech." *Id.* at 1286. See also *Kissinger v. Bd. of Trs. of the Ohio State Univ.*, 5 F.3d 177 (6th Cir. 1993):

Ohio State's curriculum was not intended to prohibit any particular religious practice or belief. The record contains no evidence that Ohio State used its curriculum to attack or exclude any individual on the basis of his or her religious beliefs. To the contrary, the record indicates that the College required Operative Practices and Techniques for purely pedagogical purposes.

*Id.* at 179.

216. *Axson-Flynn*, 356 F.3d at 1280.

to the whims of what a particular student does or does not feel like learning on a given day.”<sup>217</sup> Here, the proffered reasons for script adherence were to help prepare students for careers in professional acting, assume character roles that might be foreign to a student’s own values, preserve the integrity of an author’s script, and convincingly portray different characters.<sup>218</sup> Even though the judiciary generally gives educators deference in academic matters, courts will, however, override a professor’s judgment if it is a substantial departure from accepted academic norms<sup>219</sup> or “where the proffered goal or mythology was a sham pretext for an impermissible ulterior motive.”<sup>220</sup> The Tenth Circuit remanded the case as there was a genuine issue of material fact as to whether the department’s strict script adherence was truly pedagogical or if it was a pretext for religious discrimination.<sup>221</sup>

Although the concept of academic freedom is most often associated with professors and universities, the academic freedom of students has also been recognized. In *Piarowski v. Illinois Community College District 515*,<sup>222</sup> the court stated that academic freedom encompasses “the freedom of the individual teacher” and “the student.”<sup>223</sup> In addition, the importance of student expression and participation in the educational process has been recognized by the Supreme Court:

In ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous assemblages or concourses for students to speak and write and learn . . . . The quality and creative power of student intellectual life to this day remains a vital measure of a school’s influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the nation’s intellectual life, its college and university campuses.<sup>224</sup>

In 1967, the AAUP published a *Joint Statement on Rights and Freedoms of Students*, which outlined minimal standards for the academic freedom of students.<sup>225</sup> The AAUP notes that the academic freedom to teach and learn are intertwined, and that the ability for students to realize their freedom to learn “depends upon appropriate opportunities and conditions in the classroom . . . .”<sup>226</sup> Consequently, it is the responsibility of all the members in an academic community to ensure that

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217. *Id.* at 1292.

218. *Id.* at 1291.

219. *See Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985).

220. *Axson-Flynn*, 356 F.3d at 1293. *See also Settle v. Dickson County Sch. Bd.*, 53 F.3d 152, 155–56 (6th Cir. 1995) (noting that in order to “encourage speech germane to the topic at hand,” teachers may limit classroom speech as long as the limitations are not “a pretext for punishing . . . student[s] for [their] race, gender, economic class, religion or political persuasion”).

221. *Axson-Flynn*, 356 F.3d at 1295.

222. 759 F.2d 625 (7th Cir. 1985).

223. *Id.* at 629.

224. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 836 (1995).

225. AAUP, *1967 Joint Statement on Rights and Freedoms of Students*, in *POLICY DOCUMENTS & REPORTS* 261 (9th ed. 2001).

226. *Id.*

each student's right to learn is preserved and protected,<sup>227</sup> including "the duty [of the college or university] to develop policies and procedures which provide and safeguard this freedom."<sup>228</sup>

The AAUP statement sets forth numerous academic rights for students such as the right to "examine and discuss all questions of interest to them, and to express opinions publicly and privately."<sup>229</sup> One section specifically addresses the rights of students in the classroom context:

The professor in the classroom and in conference should encourage free discussion, inquiry, and expression. Student performance should be evaluated solely on an academic basis, not on opinions or conduct in matters unrelated to academic standards.

#### 1. Protection of Freedom of Expression

Students should be free to take reasoned exception to the data or views offered in any course of study and to reserve judgment about matters of opinion, but they are responsible for learning the content of any course of study for which they are enrolled.

#### 2. Protection against Improper Academic Evaluation

Students should have protection through orderly procedures against prejudiced or capricious academic evaluation. At the same time, they are responsible for maintaining standards of academic performance established for each course in which they are enrolled.

#### 3. Protection against Improper Disclosure

Information about student views, beliefs, and political associations which professors acquire in the course of their work as instructors, advisors, and counselors should be considered confidential. Protection against improper disclosure is a serious professional obligation. Judgments of ability and character may be provided under appropriate circumstances, normally with the knowledge and consent of the student.<sup>230</sup>

Other AAUP publications and statements offer additional support for some student freedoms, stating that teachers "should be careful not to introduce into their teaching controversial matter which has no relation to their subject,"<sup>231</sup> avoid forcing students "to make particular personal choices as to political action or his own part in society,"<sup>232</sup> evaluate students on academic performance rather than irrelevant matters such as "personality, race, religion, degree of political activism, or personal beliefs,"<sup>233</sup> and encourage the free pursuit of learning by their students,

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227. *Id.*

228. *Id.*

229. *Id.* at 263.

230. *Id.*

231. AAUP, *1940 Statement*, *supra* note 14, at 3 (internal citations omitted).

232. AAUP, *A Statement of the Association's Council: Freedom and Responsibility*, in 56 AAUP Bulletin 375 (1970).

233. *Id.*

including protecting notions of academic freedom.<sup>234</sup>

Free expression rights for students in classroom contexts have been established through both academic freedom and First Amendment case law for students in public colleges and universities. However, those rights are not absolute and may be restricted by faculty or the institution during curriculum related classroom instruction as long as the limitations are not a pretext for unrelated matters such as political or religious discrimination. Student academic freedom rights, barring statutory authority and contract rights, do not overrule faculty or institutional academic freedom.

## II. STUDENT CONTRACT RIGHTS

Students are actively participating in their education and demanding more accountability from colleges and universities as tuition and student fees are skyrocketing.<sup>235</sup> Students are becoming savvy educational service consumers, paying colleges and universities to provide them with a post-secondary education and expecting a quality education in return. Consequently, as an accountability mechanism students have sued colleges and universities under consumer protection laws, educational malpractice theories, and breach of contract theories arguing that these educational institutions have misrepresented their services, provided inadequate services or failed to provide promised services.<sup>236</sup> A student academic bill of rights could build on the concepts of consumerism and accountability by opening the door to additional breach of contract cases inviting judicial determination and reevaluation of the student-faculty-institution authority relationship. Furthermore, courts have proven willing to hold colleges and universities liable for violating promises to students in certain circumstances under breach of contract theories.

Contract theory, framed within the reciprocity of obligations between institution and student, fits nicely into current popular models of the relationship between colleges and universities and their enrollees, and complements the characterization of American post-secondary students as consumers of goods and services.<sup>237</sup>

Balanced against these contract rights, courts generally remain reluctant to step into the educational realm and are deferential to educational institutions and faculty regarding academically related issues.<sup>238</sup> This reluctance may rest on the col-

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234. *Id.* at 135; AAUP, *Statement on Graduate Students*, in POLICY DOCUMENTS & REPORTS 268 (9th ed. 2001).

235. Clara M. Lovett et al., *How Can Colleges Prove They're Doing Their Jobs?*, CHRON. HIGHER EDUC., Sept. 3, 2004 at B6.

236. See WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 373 n. 1 (3d ed. 1995) (stating that breach of contract claims are the main theory that students use to demand legal recourse beyond those rights provided in the Constitution and state and federal statutes).

237. K.B. Melear, *The Contractual Relationship Between Students and Institution: Disciplinary, Academic and Consumer Contexts*, 30 J.C. & U.L. 175, 208 (2003) (discussing the current status of the student-university contractual relationship in disciplinary, academic and consumer contexts).

238. See KAPLIN & LEE, *supra* note 236, at 227–229 (3d ed. Supp. 2000); Hazel Glenn Beh, *Student Versus University: The University's Implied Obligations of Good Faith and Fair Dealing*, 59 MD. L. REV. 183, 183–84 (2000) (arguing that courts abrogate their judicial authority to

lege or university's lauded role as a revered cultural necessity<sup>239</sup> and vestiges of the traditional student-university in loco parentis relationship.<sup>240</sup>

Much of the student-university relationship can be defined in contractual terms, either express or implied, with some terms of the contract found strewn among several different university publications.<sup>241</sup> These publications can include catalogues, bulletins, circulars, and the regulations of the institution.<sup>242</sup> In addition, a

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protect students by according too much deference to educational institutions). *See also* Melear, *supra* note 237, at 188 ("Due to the traditional deference of the courts to the judgment and expertise of members of the academy, decisions concerning academic matters are typically made with a relative degree of insulation from judicial scrutiny except in cases of the overt abuse of authority or arbitrary and capricious institutional action.").

239. Beh, *supra* note 238, at 186. *See* Keyishian v. Bd. of Regents of the Univ. of N.Y., 385 U.S. 589, 603 (1967) ("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.'" (internal citations omitted)). *See also* Clements v. County of Nassau, 835 F.2d 1000 (2d Cir. 1987):

Allegations of improper conduct leveled against teachers in our university systems call into play fundamental questions of fairness. At times, however, they threaten to strike at the heart of institutions of higher learning. As Robert Maynard Hutchins once cautioned, "Freedom of inquiry, freedom of discussion, and freedom of teaching—without these a university cannot exist." This is particularly true where the charges are aimed at the core of a teacher's authority, the student's grade. In such cases of academic dismissals, summary judgment, when properly employed, can serve the laudable function of protecting our crucibles of knowledge from the vagaries of the judicial system.

*Id.* at 1001.

240. Peter F. Lake, *The Special Relationship(s) Between a College and a Student: Law and Policy Ramifications for the Post In Loco Parentis College*, 37 IDAHO L. REV. 531 (2001); Peter F. Lake, *The Rise of Duty and the Fall of In Loco Parentis and Other Protective Tort Doctrines in Higher Education Law*, 64 MO. L. REV. 1 (1999).

241. Beh, *supra* note 238, at 183. *See also* KAPLIN & LEE, *supra* note 236, at 373–377 (discussing the contractual rights of students). Traditional contract theory was applied in *Steinberg v. Chicago Medical School*, where a medical school applicant sued the school for breach of contract after the student was denied admission to the school. 371 N.E.2d 634, 639 (Ill. 1977). In this seminal case, the applicant alleged that the school failed to evaluate his application according to the school bulletin's stated criteria. *Id.* Recognizing a contractual relationship between the student and the university, the court noted that "[a] contract between a private institution and a student confers duties on both parties which cannot be arbitrarily disregarded and may be judicially enforced." *Id.* at 640 (quoting *DeMarco v. Univ. of Health Sciences*, 352 N.E.2d 356, 361 (Ill. App. 1976)). Some courts have taken various degrees of liberties in adjusting traditional contract principles to fit the unique student-institution relationship, finding that traditional contract law does not necessarily apply. *See* Robert L. Cherry, Jr. & John P. Geary, *The College Catalog as a Contract*, 21 J.L. & EDUC. 1, 9–11 (1992) (discussing to what extent contract law applies to the student-institution relationship).

242. *E.g.*, *Zumbrum v. Univ. of S. Cal.*, 25 Cal. App. 3d 1, 10 (1972); *Raethz v. Aurora Univ.*, 805 N.E.2d 696 (Ill. App. 2004). *See also* Ralph D. Mawdsley, *The Community College's Responsibility to Educate and Protect Students*, 189 EDUC. LAW REP. 1 (2004):

Post-secondary institutions in general make promises in applications, brochures, other publications, and oral statements to students regarding their courses and programs, and when they do so and students rely upon these promises, courts examine the promises under applicable contract and tort law. Community college students, as for all students in higher education, have a reasonable expectation that courses will be delivered as promised.

student-university contractual relationship can arise from oral as well as written elements.<sup>243</sup> The contractual relationship between students and universities was recognized in *Carr v. St. John's University, New York*,<sup>244</sup> where the court stated that “[w]hen a student is duly admitted by a private university, secular or religious, there is an implied contract between the student and the university that, if he complies with the terms prescribed by the university, he will obtain the degree which he sought.”<sup>245</sup> Courts are now increasingly using contract theory to settle academic and disciplinary student-university disputes in both public and private post-secondary settings, with public institutions generally enjoying more defenses against such contract claims.<sup>246</sup>

Various forms of contract theory have now been applied in disputes involving admissions,<sup>247</sup> tuition,<sup>248</sup> course offerings,<sup>249</sup> grades,<sup>250</sup> specific promises and representations,<sup>251</sup> program eliminations,<sup>252</sup> discipline,<sup>253</sup> expulsions,<sup>254</sup> and degree

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*Id.* at 2.

243. *Id.* at 9.

244. 17 A.D.2d 632 (N.Y. 1962).

245. *Id.* at 633.

246. KAPLIN & LEE, *supra* note 236, at 373. See also Michael Zolandz, *Storming the Ivory Tower: Renewing the Breach of Contract Claim by Students Against Universities*, 69 GEO. WASH. L. REV. 91, 93 (2000) (noting that “contractual principles provide the best basis for students to assert cognizable legal claims against their universities” and that contractual approaches to the student-university relationship “is both gaining acceptance and providing a well-reasoned solution to enforcing university promises to its students.”); *Driscoll v. Stucker*, No. 2004-C-0589, 2005 WL 106474 (La. Jan. 19, 2005); *Corso v. Creighton Univ.*, 731 F.2d 529 (8th Cir. 1984); *Swartley v. Hoffner*, 734 A.2d 915 (Sup. Ct. Pa. 1999).

247. See, e.g., *Steinberg v. Chicago Med. Sch.*, 371 N.E.2d 634 (Ill. 1977); *Elliott v. Duke Univ.*, 311 S.E.2d 632 (N.C. Ct. App. 1984).

248. See e.g., *Basch v. George Washington Univ.*, 370 A.2d 1364 (D.C. Ct. App. 1977); *Reynolds v. Sterling Coll., Inc.*, 750 A.2d 1020 (Vt. 2000).

249. See, e.g., *Wickstrom v. N. Idaho Coll.*, 725 P.2d 155 (Idaho 1986). Junior college students were allowed to amend their complaint to state a cause of action for breach of contract when a school bulletin stated that completion of a maintenance course would qualify them for employment as “entry level journeymen,” when in fact, it did not. *Id.* at 158. In describing a valid cause of action, the court stated: “if certain fundamentals of the course necessary to attaining qualification as an ‘entry-level journeyman’ were not even presented in the course, such could be a breach of the implied contract between the college and the students . . . .” *Id.* at 157. Further, the cause of action would state objective criteria such as the number of days/hours required for the course and would not implicate policy concerns such as teaching methodology. *Id.* at 157 n.1.

250. See, e.g., *Davis v. Regis Coll.*, 830 P.2d 1098 (Colo. Ct. App. 1991).

251. See, e.g., *Guckenberger v. Boston Univ.*, 974 F. Supp. 106 (D. Mass. 1997); *Ross v. Creighton Univ.*, 957 F.2d 410 (7th Cir. 1992).

252. See, e.g., *Goode v. Antioch Univ.*, 544 A.2d 704 (D.C. 1988); *Eden v. Bd. of Trs. of Farleigh Dickinson Univ.*, 49 A.D.2d 277 (N.Y. App. Div. 1975); *Beukas v. Farleigh Dickinson Univ.*, 605 A.2d 776 (N.J. Super. Ct. Law Div. 1991), *aff'd*, 605 A.2d 708 (N.J. Super. Ct. App. Div. 1992). For additional discussion of student rights during retrenchment, see Hazel G. Beh, *Downsizing Higher Education and Derailing Student Educational Objectives: When Should Student Claims for Program Closures Succeed?*, 33 GA. L. REV. 155 (1998); Steven G. Olswang, Elsa Kircher Cole & James Wilson, *Program Elimination, Financial Emergency, and Student Rights*, 9 J.C. & U.L. 163 (1982); and Steven G. Olswang, Ellen M. Babbitt, Cheryl A. Cameron & Edmund K. Kamai, *Retrenchment*, 30 J.C. & U.L. 47 (2003).

conferrals.<sup>255</sup>

The application of contract theory to the educational context is often complicated as these cases require examination of the professional judgment of academic decision-makers in educational contexts. Consequently, courts generally avoid intruding upon academic matters by making distinctions between academic-related disputes and cases involving misconduct or express or implied objective promises to students, thus providing deference to institutions in matters that require professional academic evaluations.<sup>256</sup> Judicial reluctance to interfere with professional academic decision-making is demonstrated in *Board of Curators of the University of Missouri v. Horowitz*,<sup>257</sup> and *Regents of the University of Michigan v. Ewing*.<sup>258</sup> In *Horowitz*, a medical student sued the University of Missouri-Kansas after she was dismissed from the school during her last year for failing to meet its academic standards.<sup>259</sup> Without deciding whether students have a property or liberty interest in their education, the Supreme Court found that the due process required for such an interest had been provided to the student since the student had notice of the faculty's dissatisfaction with her academic progress and the school's ultimate decision was "careful and deliberate."<sup>260</sup> The Court noted that an academically-based decision requires "an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision-making," and thus "decline[d] to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship."<sup>261</sup> Ultimately, the court held that the university's decision to dismiss the student was not arbitrary and therefore did not violate any assumed due process right.<sup>262</sup>

Similarly, in *Ewing*,<sup>263</sup> the Supreme Court assumed arguendo that students have a property interest in continued education that gives rise to a due process obligation, and again chose not to interfere with the university's academic decision-

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253. See, e.g., *Swanson v. Wesley Coll.*, 402 A.2d 401 (Del. Super. Ct. 1979); *Russell v. Salve Regina Coll.*, 649 F. Supp. 391 (D.R.I. 1986); *James v. Wall*, 783 S.W.2d 615 (Tex. Ct. App. 1989); *Sharick v. S.E. Univ. of Health Scis., Inc.*, 780 So. 2d 136 (Fla. App. Dist. 2000).

254. See, e.g., *Jansen v. Emory Univ.*, 440 F. Supp. 1060 (N.D. Ga. 1977), *aff'd*, 579 F.2d 45 (5th Cir. 1978); *Bleicher v. Univ. of Cincinnati Coll. of Med.*, 604 N.E.2d 783 (Ohio Ct. App. 1992); *Love v. Duke Univ.*, 776 F. Supp. 1070 (M.D.N.C. 1991), *aff'd*, 959 F.2d 231 (4th Cir. 1991); *Faigel v. Fairfield Univ.*, 815 A.2d 140 (Conn. App. Ct. 2003).

255. See, e.g., *Healy v. Larsson*, 323 N.Y.S.2d 625 (N.Y. Sup. Ct. 1971), *aff'd*, 318 N.E.2d 608 (N.Y. 1974); *DeMarco v. Univ. of Health Scis.*, 352 N.E.2d 356 (Ill. App. Ct. 1971); *Dinu v. President & Fellows of Harvard Coll.*, 52 F. Supp. 2d 129 (D. Mass. 1999).

256. KAPLIN & LEE, *supra* note 238, at 229.

257. 435 U.S. 78 (1978).

258. 474 U.S. 214 (1985).

259. *Id.* at 215.

260. *Horowitz*, 435 U.S. at 84-85.

261. *Id.* at 90.

262. *Id.* at 92.

263. 474 U.S. 214 (1985). See also *Davis v. Regis Coll.*, 830 P.2d 1098 (Colo. Ct. App. 1992) (holding that even where assuming a property interest, the school's decision to award a failing grade was academic in nature and not arbitrary, capricious, or done in bad faith).



making since there was no “arbitrary state action.”<sup>264</sup> Here, a medical student was dismissed from the University of Michigan after he failed an important examination and was not allowed to retake it even though other students had the opportunity to do so.<sup>265</sup> The Court noted that the district court correctly decided that the school did not contractually bind itself to allow a second examination either expressly or through course of conduct.<sup>266</sup> Furthermore, a university pamphlet which indicated that students would be allowed to retake the exam did not “amount[] either to an unqualified promise to him or [give] him a contract right to retake the examination.”<sup>267</sup> The Court then examined whether the university’s refusal to allow the student to retake the exam was arbitrary in and of itself. In finding that the university’s action was not arbitrary since it was not “such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment,”<sup>268</sup> the Court reaffirmed the importance of academic freedom and the “hands off” practice generally used in the judicial review of academic matters:

Ewing’s claim, therefore, must be that the University misjudged his fitness to remain a student in the . . . program. The record unmistakably demonstrates, however, that the faculty’s decision was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing’s academic career. When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty’s professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

. . . .

Added to our concern for lack of standards is a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, “a special concern of the First Amendment.” If a “federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies,” far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require “an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decision-making.”<sup>269</sup>

These Supreme Court cases indicate that the judiciary is deferential to colleges and universities when matters such as the education and management of students

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264. *Ewing*, 474 U.S. at 220.

265. *Id.* at 215, 219.

266. *Id.* at 223–24.

267. *Id.* at 220.

268. *Id.* at 225.

269. *Id.* at 225–26 (internal citations omitted).

are involved. The judicial deference demonstrated in *Ewing*, was recently followed in *Raethz v. Aurora University*,<sup>270</sup> where a student challenged her dismissal from the master's in social work program.<sup>271</sup> The trial court found that the university had breached an agreement created by its handbook and field instruction manual.<sup>272</sup> The appellate court acknowledged that colleges and universities have a contractual relationship with their students but that the relationship cannot be strictly characterized in contractual terms in the unique, private post-secondary setting.<sup>273</sup> In addition, judicial deference to academic decisions dictated that students should not be allowed remedies for breach of contract claims unless there was a complete lack of academic judgment or the decision in question was arbitrary, capricious, or made in bad faith.<sup>274</sup> The court noted that no promises or requirements had been violated and refused to accept that the university's failure to follow its catalog amounted to per se arbitrary and capricious conduct; rather the university's faculty and agents had documented the student's failures and used their academic judgment to dismiss the student.<sup>275</sup>

Student use of consumer protection laws and educational malpractice theory is demonstrated in *Finstad v. Washburn University of Topeka*.<sup>276</sup> In *Finstad*, several students sued the university for violating the Kansas Consumer Protection Act by falsely misrepresenting that the university court reporting program was accredited in its school catalogue.<sup>277</sup> The year that the students entered the program, the program's written materials indicated that the school expected to have accreditation the year prior to their acceptance.<sup>278</sup> After the students were admitted, the university's general catalogue stated that the program was accredited.<sup>279</sup> The Kansas Supreme Court found that the students were consumers under the Act but had not been "aggrieved" because many, if not all students, were unaware of the statement in the catalogue, the catalogue was printed after their enrollment in the program, and that there was no injury or loss.<sup>280</sup>

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270. 805 N.E.2d 696 (Ill. Ct. App. 2004). See *Mittra v. Univ. of Med. & Dentistry of N.J.*, 719 A.2d 693 (N.J. Super. Ct. App. Div. 1998) (stating that the student-institution relationship cannot be characterized in purely contractual terms and that in regard to academic decision-making, courts will defer to colleges and universities if students are given fair hearings and notice, and there is general conformity with the institution's rules and regulations).

271. *Raethz*, 805 N.E.2d at 697.

272. *Id.* at 698.

273. *Id.* at 699.

274. *Id.* at 699-700.

275. *Id.* at 700.

276. 845 P.2d 685 (Kan. 1993). See also *Rodi v. S. New England Sch. of Law*, 389 F.3d 5 (1st Cir. 2005) (dismissing a law student's consumer protection claim for failing to meet a procedural prerequisite set forth in the Massachusetts Consumer Protection Act, but allowing the student's fraudulent misrepresentation claim to proceed).

277. *Finstad*, 845 P.2d at 687.

278. *Id.*

279. *Id.*

280. *Id.* at 691.

### A. Educational Malpractice and Breach of Contract

Educational malpractice cases can be brought as either a tort or breach of contract claim. Educational malpractice breach of contract cases that allege: (1) specific identifiable and objective promises that were not kept and do not involve an evaluation of the quality of services rendered or academic professional judgment, or (2) a fundamental failure of an educational program,<sup>281</sup> are more likely to be successful. Claims that allege that certain services were not of an acceptable standard, however, are frequently unsuccessful since they often attack the general quality of a student's educational experience, entail judicial imposition of additional duties on colleges and universities, and require courts to delve into the academic realm to evaluate the decisions of academic professionals. Academic bills of rights could open the door to more breach of contract cases by providing students the ability to add "teeth" to their claims. With statutorily and contractually based allegations to add to their arsenal, students may be able to reshape the current student-professor-institution authority relationship.

Though educational malpractice suits may be attractive to students, these cases are difficult for courts to evaluate:

Admittedly, the term "educational malpractice" has a seductive ring to it; after all, if doctors, lawyers, accountants and other professionals can be held liable for failing to exercise due care, why can't teachers? The answer is that the nature of education radically differs from other professions. Education is an intensely collaborative process, requiring the interaction of student with teacher. A good student can learn from a poor teacher; a poor student can close his mind to a good teacher. Without effort by a student, he cannot be educated. Good teaching method may vary with the needs of the individual student. In other professions, by contrast, client cooperation is far less important; given a modicum of cooperation, a competent professional in other fields can control the results obtained. But in education, the ultimate responsibility for success remains always with the student. Both the process and the result are subjective, and proof or disproof extremely difficult.<sup>282</sup>

In *Gally v. Columbia University*,<sup>283</sup> a Jewish student seeking a Doctor of Dental Surgery degree sued the university for breach of contract alleging that the faculty did not address her concerns about "rampant cheating" going on among other students and that she was also subjected to animosity by one of her professors, a Muslim, based on her race, gender and ethnicity.<sup>284</sup> The court began its analysis by noting that not all disputes between students and educational institutions fit into breach of contract claims and that claims for failing to provide an effective educa-

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281. For a good framework for categorizing educational breach of contract claims, see *Cullen v. University of Bridgeport*, No. CV020396010, 2003 WL 23112678 (Conn. Super. Ct. Dec. 10, 2003) (categorizing education breach of contract claims) (unpublished opinion).

282. *Ross v. Creighton Univ.*, 740 F. Supp. 1319, 1328. (N.D. Ill. 1982) (internal citation omitted).

283. 22 F. Supp. 2d 199 (S.D.N.Y. 1998).

284. *Id.* at 202.

tion, essentially educational malpractice, are not allowed.<sup>285</sup> The court “recognizes that universities are empowered to set their own academic standards and procedures.”<sup>286</sup> The student’s argument that the administration failed to adequately respond to her concerns about cheating as an educational malpractice claim was dismissed since the issue hinged on whether the program provided an effective education.<sup>287</sup> “The application of contract principles to the student-university relationship does not provide judicial recourse for every disgruntled student.”<sup>288</sup> The court also dismissed the student’s mistreatment claim noting that the program’s code of conduct statement was just a general reference to existing anti-discrimination laws and did not provide an enforceable promise; and even if it did set forth a promise, the student failed to allege sufficient facts to show it was breached.<sup>289</sup> The court stated:

In short, while reasonable minds may differ as to the effectiveness of [the professor’s] style, the fact that [the professor] may have been harsh or even belittling to plaintiff does not create a valid cause of action. To hold otherwise would open the floodgates to a slew of claims by students who found their professors’ techniques personally offensive. Such claims are better left to the sound handling of school administrators.<sup>290</sup>

The court also dismissed the student’s argument that the university breached a contractual obligation to provide remediation for the student because the university had provided some remediation services to the student.<sup>291</sup> The adequacy of the services rendered was not a determination that the court wanted to make since it was a subjective evaluation that school administrators are better at addressing.

Courts have acknowledged that a contractually based breach of contract claim might be viable when “the pleadings or evidence demonstrate some specific, identifiable agreement for an educational institution’s provision of particular services to its students.”<sup>292</sup> Even in such cases where specific allegations are alleged and allowed to proceed, the reluctance to find educational institutions liable is illustrated in *Ross v. Creighton University*.<sup>293</sup> In *Ross*, a former student sued the uni-

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285. *Id.* at 206–07. One commentator has argued that *Gally v. Columbia Univ.* should have been analyzed from a contractual perspective rather than as a tort:

Perhaps the most unfortunate aspect of courts’ approach to contract claims is their frequent characterization of contract claims as educational malpractice claims. As a result, courts often dismiss valid claims sounding in contract. Dismissal in this manner is in clear contrast with the well-established principle that the “student-college relationship is essentially a contractual one.”

Zolandz, *supra* note 246, at 98.

286. *Gally*, 22 F. Supp. 2d at 207.

287. *Id.*

288. *Id.*

289. *Id.* at 208.

290. *Id.*

291. *Id.* at 209.

292. *Bittle v. Okla. City Univ.*, 6 P.3d 509, 514 (Okla. Civ. App. 2000).

293. 957 F.2d 410 (7th Cir. 1992). *See also* Zolandz, *supra* note 246, at 99 (“*Ross v. Creighton University* provides a baseline for a discussion of the most effective approach toward contract disputes between students and their universities.”).

versity under negligence and breach of contract theories alleging that the university recruited him to play basketball despite the fact that he was not prepared for the academic rigors of the university and failed to provide him any real access to the university's educational curriculum.<sup>294</sup> The student-athlete struggled with the university's academics and later withdrew from the university with the "overall language skills of a fourth grader and the reading skills of a seventh grader."<sup>295</sup> His complaint was dismissed for failure to state a claim and the student appealed.<sup>296</sup> The appellate court began its analysis by examining the student's negligence claim of educational malpractice and rejected it, noting that a majority of states have rejected educational malpractice torts and that Montana, an exception to that general rule, allows such claims only because Montana statutes place a duty of care on educators.<sup>297</sup> Several policy reasons against allowing educational malpractice suits were mentioned:

First, there is the lack of a satisfactory standard of care by which to evaluate an educator. Theories of education are not uniform, and "different but acceptable scientific methods of academic training [make] it unfeasible to formulate a standard by which to judge the conduct of those delivering the services." Second, inherent uncertainties exist in this type of case about the cause and nature of damages. "Factors such as the student's attitude, motivation, temperament, past experience and home environment may all play an essential and immeasurable role in learning." Consequently, it may be a "practical impossibility [to] prov[e] that the alleged malpractice of the teacher proximately caused the learning deficiency of the plaintiff student." A third reason for denying this cause of action is the potential it presents for a flood of litigation against schools. As the district court noted, "education is a service rendered on an immensely greater scale than other professional services." The sheer number of claims that could arise if this cause of action were allowed might overburden schools. This consideration also suggests that a common-law tort remedy may not be the best way to deal with the problem of inadequate education. A final reason courts have cited for denying this cause of action is that it threatens to embroil the courts into overseeing the day-to-day operations of schools. This oversight might be particularly troubling in the university setting where it necessarily implicates considerations of academic freedom and autonomy.<sup>298</sup>

In *Ross*, the student's breach of contract claim alleged "that Creighton agreed, in exchange for Mr. Ross' promise to play on its basketball team, to allow him an opportunity to participate, in a meaningful way, in the academic program of the University."<sup>299</sup> The court was careful to point out that the contractual nature of the

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294. *Ross*, 957 F.2d at 412.

295. *Id.*

296. *Id.* at 413.

297. *Id.* at 414.

298. *Id.* at 414–15 (internal citations omitted).

299. *Id.* at 415–16.

student-university relationship has certain limits when academic judgments are made.<sup>300</sup> Thus, in order to avoid simply “repackage[ing] an educational malpractice claim as a contract claim,” the student must meet certain objective and specific requirements:

To state a claim for breach of contract, the plaintiff must do more than simply allege that the education was not good enough. Instead, he must point to an identifiable contractual promise that the defendant failed to honor. Thus, as was suggested in *Paladino*, if the defendant took tuition money and then provided no education, or alternately, promised a set number of hours of instruction and then failed to deliver, a breach of contract action may be available. Similarly, a breach of contract action might exist if a student enrolled in a course explicitly promising instruction that would qualify him as a journeyman, but in which the fundamentals necessary to attain that skill were not even presented. In these cases, the essence of the plaintiff’s complaint would not be that the institution failed to perform adequately a promised educational service, but rather that it failed to perform that service at all. Ruling on this issue would not require an inquiry into the nuances of educational processes and theories, but rather an objective assessment of whether the institution made a good faith effort to perform on its promise.<sup>301</sup>

Ultimately, the only actionable claim that met these requirements and did not require supervision of the student-university relationship was the very specific claim that the student “was barred from *any* participation in and benefit from the University’s academic program.”<sup>302</sup> Such a narrow focus avoided determining whether the academic services provided were deficient, but rather whether “the University had provided any real access to its academic curriculum at all.”<sup>303</sup>

A similar analysis and outcome occurred in *CenCor, Inc. v. Tolman*,<sup>304</sup> where the Supreme Court of Colorado found that summary judgment in favor of CenCor Career Colleges, Inc. was improper because several students sufficiently alleged that the school breached specific contractual obligations to provide services such as supervision by qualified faculty, up-to-date equipment and advanced training at no additional cost.<sup>305</sup> The students based their claim on provisions of their enrollment agreement and CenCor’s catalog.<sup>306</sup> The court distinguished specific, viable contract claims from other more general negligence claims alleging unreasonable conduct:<sup>307</sup>

Contract claims that in fact attack the general quality of educational experiences . . . raise questions concerning the reasonableness of conduct by educational institutions in providing particular educational services

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300. *Id.* at 417.

301. *Id.* at 416–17 (internal citations omitted).

302. *Id.* at 417.

303. *Id.*

304. 868 P.2d 396 (Colo. 1994).

305. *Id.* at 399.

306. *Id.*

307. *Id.* at 400.

to students—questions that must be answered by reference to principles of duty, standards of care, and reasonable conduct associated with the law of torts.

However, when students allege that educational institutions have failed to provide specifically promised educational services, such as a failure to offer any classes or a failure to deliver a promised number of hours of instruction, such claims have been upheld on the basis of the law of contracts.<sup>308</sup>

Ultimately, the students' claim that they had paid for certain services that the institution allegedly failed to provide was specific enough to move forward.<sup>309</sup>

A breach of contract claim was also successfully stated by a medical resident in *Ryan v. University of North Carolina Hospitals*.<sup>310</sup> Noting that the *Ross* court “recognized certain narrow circumstances under which a plaintiff could allege a *reviewable* breach of contract,” the court found that the former medical resident stated a claim for breach of contract when he alleged that the university breached the “Essentials of Accredited Residencies” by failing to provide a month of gynecology rotation.<sup>311</sup> This case was allowed to proceed because the medical resident alleged “specific aspects of the contract that would not involve an ‘inquiry into the nuances of educational process and theories.’”<sup>312</sup>

A similar conclusion was reached in *Alsides v. Brown Institute, Ltd.*,<sup>313</sup> where students at a for-profit trade school sued the school based on misrepresentations made in the school's brochure.<sup>314</sup> Although the court rejected claims of educational malpractice on policy grounds, it ruled that “a student may bring an action against an educational institution for breach of contract, fraud or misrepresentation, if it is alleged that the institution failed to perform on specific promises it made to the student” and review does not require analysis of educational-related nuances mentioned in *Ryan* above.<sup>315</sup> Some of the claims dismissed by the district court fell into this category and therefore were allowed to proceed. These claims included allegations that: (1) the institute failed to provide instruction on installing and upgrading software; (2) instructors were frequently late or absent and wasted class time by discussing personal issues; (3) the institute represented that students would have “hands on” training; (4) the institute did not provide enough operational computers to teach the course; (5) computer hardware and software was not modern; and (6) the institute did not provide enough hours of instruction as set

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308. *Id.* at 398–99.

309. See Mawdsley, *supra* note 242, at 2–4 (discussing community colleges and contracts to educate). The author notes, “The contractual relationship between students and their colleges forms the basis not only for treating students as participants in a contract, but also as consumers of educational services.” *Id.* at 4.

310. *Ryan v. Univ. of N.C. Hosp.*, 494 S.E.2d 789 (N.C. Ct. App. 1998).

311. *Id.* at 791.

312. *Id.* at 794 (internal citation omitted).

313. 592 N.W.2d 468 (Minn. Ct. App. 1999). See also Peter F. Lake, *Higher Education and the Courts: 1999 in Review, Tort Litigation in Higher Education*, 27 J.C. & U.L. 255, 308–310 (2000) (discussing the possible implications of *Alsides*).

314. *Alsides*, 592 N.W.2d at 470.

315. *Id.* at 473.

forth in student materials.<sup>316</sup> One author notes that these claims illustrate the trend to view education as a product in a business sense:

These types of complaints, which survived the educational malpractice rule, are in fact the kinds of allegations that students could typically make in other areas with a little tailoring. It is particularly interesting that the allegation relating to tardiness and absenteeism and the wasting of class time survived, given that courts have typically been unwilling to examine how class time is used by instructors and generally give wide latitude to academic freedom. Moreover, students could typically allege in an educational malpractice action that equipment is not cutting edge or adequate or readily available, or that particular matters that were promised to be taught were not taught (I shudder to think how many professors fail to cover material on syllabi that are handed out at the beginning of the semester and how frequently hard-wired classrooms crash or become inoperable, etc.).

In short, the kinds of allegations that the Minnesota Court of Appeals permitted to survive as being specific enough to defeat an issue of educational malpractice are the types of allegations that could be routinely made in any other type of suit. Will we see a day when the long disfavored educational malpractice tort rears its head as a different type of claim made with more specificity, but potentially raising many of the same public policy issues? Moreover, the *Alsides* case deliberately and overtly treats education as a 'product' for purposes of the consumer acts in Minnesota. Once again, this is illustrative of a growing trend to view universities in a business category, as selling a product to students as "consumers."<sup>317</sup>

The court also ruled that the students' consumer fraud claim was improperly dismissed and that the Consumer Fraud Act allowed for recovery since the school was a private, for-profit institution and the students had paid for its educational services.<sup>318</sup>

Although many educational breach of contract cases have been unsuccessful for lack of specificity and judicial deference to educational matters, there is an area where successful claims have emerged. *Cullen v. University of Bridgeport*,<sup>319</sup> distinguished the tort of educational malpractice and breach of contract and further defined the kinds of breach of contract cases that would be allowed to proceed. Here, a graduate student who was unhappy with his professors, administrators, and course work, alleged that the university breached its contract by failing to adequately provide the educational services set forth in the course catalog.<sup>320</sup> The student also alleged that the university had violated the Connecticut Unfair Trade Practices Act by inducing the student to enroll in its Naturopathic Medicine Pro-

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316. *Id.* at 474.

317. Lake, *supra* note 313, at 309.

318. *Alsides*, 592 N.W.2d at 474-75.

319. No. CV020396010, 2003 WL 23112678 (Conn. Super Ct. Dec. 10, 2003) (unpublished opinion).

320. *Id.* at \*1.



gram based on several misrepresentations made to the student.<sup>321</sup> The court relied on *Gupta v. New Britain General Hospital*,<sup>322</sup> which designated two types of instances where a breach of contract for educational services would be allowed: first, where an objectively measurable, “fundamental failure” of an educational program occurs, as demonstrated in *Ross*<sup>323</sup> and *Wickstrom v. North Idaho College*,<sup>324</sup> and second, where a breach of a specific contractual promise occurs, as demonstrated in *CenCor*.<sup>325</sup> Ultimately, the student in this case failed to meet the requirements of either instance since he had not provided any “concrete evidence such as a failure to offer required courses or clinics . . . [or] that it was impossible to obtain a degree” in his program that would indicate a “fundamental failure” of the program;<sup>326</sup> nor had he shown any “identifiable written or oral promise (other than the course catalog which was not submitted),” that would show a breach of a specific contractual promise.<sup>327</sup>

#### B. Breach of Contract Cases Arising in the Classroom Context

Within the confines of the classroom context, student breach of contract cases have been less successful. This distinction appears somewhat intuitive given that classroom activities are generally viewed to be within the faculty member’s professional discretion. If state and national legislation provide students with enforceable classroom rights, however, these forms of student breach of contract claims could become more successful. In *Andre v. Pace University*,<sup>328</sup> two students sued Pace University for tuition and textbook refunds under a breach of contract theory.<sup>329</sup> The students enrolled in a beginning sequence graduate level computer science course and consulted with the chair of the computer science department about whether their mathematical background was sufficient for the course; the chairman assured them that it was.<sup>330</sup> The students began having difficulties with the math during the second class meeting when they were assigned problems from a course textbook that was mathematically dense.<sup>331</sup> The students informed the professor and department chair about their difficulties, and withdrew from the course after

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321. *Id.*

322. 687 A.2d 111 (Conn. 1996).

323. 957 F.2d 410 (7th Cir. 1992).

324. *Wickstrom v. N. Idaho Coll.*, 725 P.2d 155 (Idaho 1986). In this case, several students sued their college after discovering that upon completion of a maintenance mechanic course, they were not qualified to be entry level journeymen as was indicated in the school bulletin. *Id.* at 156. The district court granted summary judgment for the college and the students appealed. *Id.* The Supreme Court of Idaho held that the students’ tort claims were barred by the state Tort Claims Act and that the students failed to state a cause of action for breach of contract. *Id.* The court provided the students the opportunity to amend their complaint. *Id.* at 158.

325. *See supra* notes 304–308 and accompanying text.

326. *Cullen*, 2003 WL 23112678, at \*10.

327. *Id.* at \*13.

328. *Andre v. Pace Univ.*, 655 N.Y.S.2d 777 (N.Y. App. Term 1996).

329. *Id.* at 778.

330. *Id.*

331. *Id.*

the fifth class.<sup>332</sup> At trial, the court found the university liable for breach of contract, breach of fiduciary duty, negligence or educational malpractice, and violation of General Business Law § 349 and awarded each student \$885 in damages plus interest and costs, \$115 pursuant to General Business Law § 349, and \$1,000 in punitive damages.<sup>333</sup> The New York Supreme Court, Appellate Term, reversed the judgment and directed judgment in favor of the university against each student for the remaining \$800 of tuition due.<sup>334</sup> The court held that the students' allegations amounted to an unactionable claim of educational malpractice and that the trial court improperly evaluated the adequacy of the textbook and the pedagogical methods used by the professor:

It is clear that the essence of plaintiffs' breach of contract claim necessarily entails an evaluation of the adequacy and quality of the textbook used and the effectiveness of the pedagogical method chosen by the professor to teach the graduate Pascal programming class. In order to determine whether "Condensed Pascal" was inappropriate because of its focus on math and science based problems, this court would be required to examine not only "Condensed Pascal", and its earlier, allegedly simpler version, but also other possible available textbooks on Pascal programming language, and to conduct a comparative analytical review in order to ascertain their relative merits and appropriateness for this particular course. Additionally the court would be engaged in a comprehensive review of a myriad of educational and pedagogical factors, as well as administrative policies that enter into the consideration of whether the method of instruction and choice of textbook was appropriate, or preferable, for a graduate level course in Pascal programming language leading up to a Graduate Certificate in Programming. Such inquiry would constitute a clear "judicial displacement of complex educational determinations" that is best left to the educational community. A different situation might be presented if defendant were to provide "no educational services" or failed to meet its contractual obligation to provide certain specified services, such as a designated number of hours of instruction.<sup>335</sup>

Another student was unsuccessful in challenging the adequacy of a professor's teaching practices in *Bittle v. Oklahoma City University*,<sup>336</sup> where an Oklahoma court found that a law student did not have a viable tort or contract claim against the university when the student was unable to maintain a minimum grade point average.<sup>337</sup> In this case, the student alleged that the university failed to provide an adequate education when a law professor arrived late for class, left early and cancelled classes without rescheduling, and failed to provide implied academic assis-

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332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.* at 779–80 (internal citations omitted).

336. *Bittle v. Okla. City Univ.*, 6 P.3d 509 (Okla. Civ. App. 2000).

337. *Id.* at 517.

tance.<sup>338</sup> The court affirmed the lower court's dismissal since the student's lawsuit was basically an educational malpractice claim.<sup>339</sup> Since the student did not allege any specific identifiable agreement for particular services, there was also no viable breach of contract claim.<sup>340</sup>

In *Lemmon v. University of Cincinnati*,<sup>341</sup> several students enrolled in a Computerized Court Reporting program ("CCR"), accredited by the National Court Reporter's Association ("NCRA"), sued the university under breach of contract, fraud, and negligence claims for allegedly representing to the students that they would achieve certain levels of typing speed when in fact they did not.<sup>342</sup> The complaint stemmed from concerns regarding teaching methods and testing used by one of the instructors.<sup>343</sup> Under the breach of contract claim, the court found that the terms of the contract between the NCRA and the university setting forth the standards for the program and its certificate/degree conferral extended to the students.<sup>344</sup> The court did not, however, find that the contract was breached because: (1) the teaching method used by the instructor, though determined unacceptable by the NCRA, was not unreasonable as there were no specific requirements that were not met;<sup>345</sup> (2) the college "made every effort to fulfill its contractual obligation, to allay plaintiffs' concerns regarding the validity of the testing and the CCR program in general, and to assist the students in achieving their educational goals;"<sup>346</sup> and (3) the court concluded that none of the plaintiffs would have passed the program regardless of whether the alternative testing method was used.<sup>347</sup> "[T]he court finds from the evidence that plaintiffs' dissatisfaction with [the instructor's] teaching methods, and with the [University of Cincinnati] program overall, was a way to rationalize their own inability to meet demanding course requirements."<sup>348</sup> The court also found that no fraud had been committed for the same reasons as above and noted that the evidence did not show the instructor, who had been teaching for many years, knew or should have known that the testing method was not acceptable.<sup>349</sup>

A more recent case stemming from a student's dissatisfaction with his classroom educational experience might provide a hint at the future of educational

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338. *Id.* at 511.

339. *Id.* at 517.

340. *Id.* at 514–15.

341. *Lemmon v. Univ. of Cincinnati*, 750 N.E.2d 668 (Ohio Misc. 2d 2001).

342. *Id.* at 669–70.

343. *Id.* at 669.

344. *Id.* at 670.

345. *Id.* at 670–71.

346. *Id.* at 671.

347. *Id.*

348. *Id.*

349. *Id.* at 672. *See also* *Harris v. Alder Sch. of Prof'l Psychology*, 723 N.E.2d 717, 720 (Ill. App. Ct. 1999) (refusing to rule on the academic issue of whether the content of a student exam tested students on appropriate subject matter); *Elliot v. Univ. of Cincinnati*, 730 N.E.2d 996 (Ohio Ct. App. 1999) (finding that the university breached provisions in its bulletin requiring doctoral oral qualifying exams to be conducted by five faculty members, but refusing to address the content of the oral examinations because it was an academic matter requiring deference by the court).

breach of contract allegations and the growing desire to hold colleges and universities accountable to their students as consumers. In *Miller v. Loyola University of New Orleans*,<sup>350</sup> a law student sued Loyola alleging that his legal profession course was incomplete and unsatisfactorily taught, thus breaching the school's obligation to him.<sup>351</sup> He also asserted that Loyola was negligent for providing an unqualified professor and failing to have the appropriate number of professors to teach the law school courses.<sup>352</sup> Interestingly, a review committee found that the law professor was deficient in several aspects including: violating the faculty handbook for randomly changing class times without approval, failing to request course books in a timely manner, giving a final exam that contained errors and was copied from other materials, inadequately communicating material to students, providing ineffective answers to questions asked, and generally being ineffective as a professor.<sup>353</sup> The professor was thereafter sanctioned.<sup>354</sup>

After examining several policy reasons against recognizing educational malpractice claims, including those listed in *Ross*,<sup>355</sup> the court declined to recognize an educational malpractice claim under either tort or contract theories,<sup>356</sup> explaining:

Universities must be allowed the flexibility to manage themselves and correct their own mistakes. . . . It is not the place of the court system to micromanage the adequacy of the instruction or management at institutions of higher learning, even if it were feasible, which we feel it is not. This is a task best handled by the universities themselves.<sup>357</sup>

The court continued its analysis by finding that the law school had not been unjustly enriched since the law student had received instruction, though unsatisfactory, and credit for the course in return for the student's payment.<sup>358</sup> Furthermore, the student had not detrimentally relied on the course listings because course descriptions are informative in nature and not intended to be inflexible and binding in the face of changing educational needs.<sup>359</sup>

Although the court's majority opinion follows the general tendency to step back from educationally related matters, Judge Plotkin's dissent provides some interesting personal insight regarding the potential legal implications of growing consumerism in higher education.<sup>360</sup> Judge Plotkin, distinguished educational malpractice cases rooted in breach of contract claims and those rooted in tort. He argued that the current conditions in higher education, along with notions of equity and justice, necessitate judicial recognition of a breach of contract claim.<sup>361</sup> In advocating that

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350. *Miller v. Loyola Univ. of New Orleans*, 829 So.2d 1057 (La. Ct. App. 2002).

351. *Id.* at 1057.

352. *Id.* at 1059.

353. *Id.* at 1058–59.

354. *Id.* at 1059.

355. *Ross v. Creighton Univ.*, 957 F.2d 410, 414–15 (7th Cir. 1992).

356. *Miller*, 829 So.2d at 1060–61.

357. *Id.* at 1061.

358. *Id.* at 1061–62.

359. *Id.* at 1062.

360. *Id.* at 1063 (Plotkin, J., dissenting).

361. *Id.* at 1064.

a narrow cause of action in certain breach of contract cases should be recognized based on the principles of good faith and fair dealing, as in *Ross*, Judge Plotkin stated:

In this day and age, with the ever increasing price of higher education, universities now aggressively market themselves to would be consumers. Students should have some form of remedy available to them when they are specifically promised something, which is not delivered. With the use of marketing tactics by universities, comes added responsibility and accountability to the consuming public. Therefore, public policy and sentiments of equity and justice require Louisiana law to allow for a limited cause of action for educational malpractice involving breach of contract claims.<sup>362</sup>

Furthermore, Judge Plotkin noted that the judiciary's traditional deference to colleges and universities has led to an abdication of its duty to students in some instances, "resulting in a continued and prolonged lack of oversight and accountability."<sup>363</sup> Judge Plotkin also stated that the contractual notions of good faith and fair dealing could be used as a structure to appropriately address and protect both institutional autonomy and student rights while providing some accountability in higher education.<sup>364</sup>

Case law suggests that there are some areas of "educational malpractice" contract law that are viable. Both academics and courts are starting to acknowledge the need to balance institutional autonomy and the academic freedom of professors and institutions against student demands in an increasingly consumer driven context. This conflict becomes ripe when states or the federal government begin to pass laws giving students statutory rights to enforce curricular choices made by their professors and institutions.

### III. STUDENT BILL OF RIGHTS AS A CONTRACT

Recent legislative efforts may push the evolution of academic freedom for educational institutions, faculty, and students in new directions, thus potentially shifting the balance of rights involved. As institutions and state legislatures consider adopting academic bills of rights, it is critical to consider the ramifications when the principles that are set forth are allegedly not met. How will perceived failures be measured and enforced? Although precedent suggests that courts will be reluctant to become involved in academic disputes, academic bills of rights may invite

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362. *Id.*

363. *Id.*

364. *Id.* at 1064–65. For an examination of the changing student-university relationship and the need for a more constructive judicial role in regulating the relationship, see Beh, *supra* note 238 (advocating the use good faith and fair dealing principles as a workable method to regulate educational contract disputes). This article, referred to by Judge Plotkin in his dissent, states that "when courts accord too much deference to the institution, they abrogate judicial responsibility to protect students." *Id.* at 184. See also Kent Weeks & Rich Haglund, *Fiduciary Duties of College and University Faculty and Administrators*, 29 J.C. & U.L. 153 (2002) (stating that notions of good faith and fair dealing are limited upon terms contemplated in student-university contracts and that fiduciary relationships may offer more protection).

judicial involvement and thus judicial evaluation of educational matters.<sup>365</sup>

Academic bills of rights have been designed to “‘protect students from one-sided liberal propaganda’ and to ‘safeguard a student’s right to get an education rather than an indoctrination.’”<sup>366</sup> Cases such as *Brown*<sup>367</sup> and *Axson-Flynn*<sup>368</sup> indicate that student freedom of expression in classroom related activities can be limited to ensure that faculty may teach the lessons that the curriculum is designed to impart so long as the limitations follow the prescribed curriculum and are not used to punish students for their race, gender, economic class, religion, or political persuasion. Student academic bills of rights have been drafted to ensure that those established rights are protected and that the principles set forth by the AAUP are expanded. Under these new principles, universities have the duty to provide “curricula and reading lists . . . [that] provide students with dissenting sources and viewpoints” and a faculty that “foster[s] a plurality of methodologies and perspectives.”<sup>369</sup> What will happen when students think these provisions have been violated and try to enforce them as a breach of contract? Courts recognize the contractual relationship between institutions and students and may become increasingly willing to enforce them in educationally-related matters. Presumably, under *Ross*, suits against colleges or universities might be allowed in cases where a professor failed to provide any diverse or dissenting viewpoints in a course or if a college or university failed to provide its designated procedural processes to address student allegations of indoctrination. These new statutory or contractual privileges could empower courts to evaluate the adequacy of courses, curricula, and professorial performance to determine whether students’ rights have been infringed, altering traditional patterns of institutional deference.

The additional protections provided to students may in turn limit faculty academic freedom by dictating how professors present educational concepts. Although some proposed legislation purports to protect faculty freedom by emphasizing that employment decisions cannot be based on the faculty member’s “political, ideological, or religious beliefs,” the AAUP has noted that principles of neutrality are already in place and that the new rights would ironically infringe on the very academic freedoms that they purport to protect.<sup>370</sup> Ultimately, the AAUP believes that classroom management and student evaluation, traditionally considered educationally based determinations measured by pedagogical standards, could shift away from the faculty to college and university administrators and courts.<sup>371</sup> Further-

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365. For a discussion involving professional liability, changes in educational policy, and possible statutory liability regarding instructional practices in primary and secondary settings under the theory of educational malpractice as a tort for negligence, see Todd A. DeMitchell & Terri A. DeMitchell, *Statutes and Standards: Has the Door to Educational Malpractice been Opened?* 2003 B.Y.U. EDUC. & L.J. 485 (2003).

366. Alyson Klein, *Worried on the Right and the Left*, CHRON. HIGHER EDUC., July 9, 2004 at A22 (quoting U.S. Representative Jack Kingston).

367. 308 F.3d 939 (9th Cir. 2002), *cert denied*, 538 U.S. 908 (2003).

368. 356 F.3d 1277 (10th Cir. 2004).

369. See H. Con. Res. 318, 108th Cong. (2003).

370. AAUP, *Academic Bills of Rights*, available at <http://www.aup.org/statements/SpchState/Statements/billofrights.htm> (Dec. 2003) [hereinafter AAUP, *Bill of Rights*].

371. *Id.*

more, if institutions must ensure that a variety of viewpoints are expressed in the classroom, the institution might wield greater supervision over faculty teaching methods and curriculum choices to ensure these student rights are not infringed. The American Civil Liberties Union states that academic bills of rights “would censor . . . colleges and universities . . . because [they] could be used to curtail academic freedom and to encourage thought policing in our institutions of higher education.”<sup>372</sup> The “academic bill of restrictions” would “shift the responsibility for course content and student evaluation from highly trained faculty to the state government or the courts.”<sup>373</sup>

On a broader level, academic bills of rights may force some educational institutions to re-evaluate their missions and employment practices. Colleges and universities with missions aimed at providing students with a particular type of education would be particularly affected. The president of the Appalachian Bible College recently cautioned that legislation requiring presentation of diverse viewpoints would undermine his college’s faith-based mission<sup>374</sup> and thus the intellectual freedom of the college. Furthermore, the AAUP alleges that by requiring colleges and universities to make employment decisions aimed at developing a plurality of perspectives and methodologies, notions of campus diversity might be measured by political standards rather than traditional academic criteria<sup>375</sup> thus limiting institutional control.

#### CONCLUSION

Absent legislative authority or expressions of legislative intent, courts will not interfere with academic-related matters such as textbook selection and classroom exercises, assignments, and discussions. Academic bills of rights have the potential to create a new framework by providing students with enforceable statutory or contractual rights to challenge these curricular matters.<sup>376</sup>

In the classroom, academic bills of rights give students: (1) the ability to demand that institutions and professors provide them with texts and readings that cover dissenting viewpoints; (2) the ability to challenge grading based on the belief that political, ideological, or religious beliefs factored into the grade assignment; (3) the ability to demand that professors who share personal viewpoints also make students aware of other viewpoints; (4) the expectation that classes will provide a spectrum of significant scholarly viewpoints; and (5) the right to be free from indoctrination.<sup>377</sup> Although current guidelines already protect some of these princi-

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372. ACLU of Ohio, *Ohio Senate Bill 21*, available at [http://www.acluohio.org/issues/free\\_speech/sb24.htm](http://www.acluohio.org/issues/free_speech/sb24.htm) (Feb. 2005).

373. *Id.*

374. Klein, *supra* note 366, at A22.

375. AAUP, *Bill of Rights*, *supra* note 370.

376. See H.R. 4283, 108th Cong. §103 (2004); H.B. 1991, 59th Leg., Reg. Sess. (Wash. 2005). There are other examples of congressional intrusion in dictating educational curriculum at colleges and universities such as Sen. Bryd’s insertion of a requirement that all institutions receiving federal funding aid offer instruction on the Constitution each September 17. See Karin Fischer, *Bill May Force Many Colleges to Teach About the Constitution*, CHRON. HIGHER EDUC., Dec. 10, 2004, at A19.

377. H.R. 4283. This legislation, though not binding, “encourages all public and private col-

ples, they are not yet elevated to statutory rights or contract terms. Legislative enactments that strengthen students' academic rights may result in increased conflict as institutions', professors', and students' academic freedoms clash for control in the classroom.

The historical reliance by faculty and institutions on the authority given to them over students by their assertions of academic freedom in the classroom are likely to fall on deaf judicial ears if statutory or contractual academic bills of rights are provided to students, particularly since courts have given great deference to the authority of states to legislate the behavior of state institutions and employees and are receptive to both public and private breach of contract claims. Enforceable rights are likely to shift the balance of academic decision-making in higher education; a serious issue that needs to be considered when such bills or compacts are proposed.

Ultimately, academic bills of rights could create unrecognized shifts in established norms and institutional control, possibly providing students with a statutory or contractual basis to hold academic institutions and individual faculty liable for representations or promises set forth in institutional bulletins and catalogues based on perceived or biased efforts in the classroom.

Historically, academic freedom in the classroom resided with the faculty. Current case law indicates that academic freedom may actually inhere in the educational institution. Academic bills of rights may take the authority to control the classroom away from professional educators and into the hands of the students, government, or courts regardless of whether the authority resides with the faculty or the institution.

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leges and universities in the United States to adopt an academic bill of rights and to observe the principles and procedures" set forth in the legislation. Depending on the academic bill of rights adopted by a college or university or state or federal legislature, provisions therein could be enforceable.