

PEDAGOGY ON TRIAL: WHEN ACADEMIC FREEDOM AND EDUCATION CONSUMERISM COLLIDE

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INTRODUCTION	107
I. ACADEMIC FREEDOM OF FACULTY IN TEACHING.....	110
A. Conceptions of Academic Freedom	110
B. Issues of Pedagogy and Assessment.....	112
II. STUDENT RATINGS OF TEACHING.....	126
A. Issues of Validity.....	126
B. Student Satisfaction.....	133
C. Student Ratings in Court.....	140
III. THE MARKETPLACE IN HIGHER EDUCATION.....	147
A. Students' Expressive Rights	147
B. Educational Malpractice.....	151
C. Balance and Neutrality	153
D. Hostile Environment.....	158
IV. CONCLUSION	160

INTRODUCTION

The front page of the February 27, 2009 issue of *The Chronicle of Higher Education* featured an article concerning threats to the academic freedom of faculty¹ and another on student ratings (“student evaluations”) of faculty.² The authors treat their topics as separate, unrelated issues, yet the administrative use of student ratings is a subtle aspect of a more

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1. Peter Schmidt, *Professors' Freedoms under Assault in the Courts*, 55 CHRON. HIGHER EDUC. Feb. 27, 2009, at A1.

2. Thomas Barlett, “*Dear Professor: I Hate You*”—Anonymous, 55 CHRON. HIGHER EDUC. Feb. 27, 2009, at A1. The term *student evaluation of teaching* (with the acronym “SET”) has become synonymous with standardized surveys of student opinions about an instructor and a course. Whether these questionnaires indicate assessment of teaching effectiveness or merely reflect student satisfaction is the subject of passionate disagreement in academia. For purposes here, the term *student ratings* will be employed to refer to numerical data collected by means of such instruments.

widespread threat to intellectual freedom in academia. As this article will argue, within a marketplace academy, student ratings of faculty contribute to a shift of pedagogical authority from the professoriate to “student consumers,”³ and place the academic freedom of faculty at risk.⁴

“In essence,” Mathew Finkin and Robert Post observe, “academic freedom consists of the freedom to pursue the scholarly profession according to the standards of that profession.”⁵ Although in the past, courts have expressed a general obeisance to academic authorities, their increasing willingness to more narrowly define what constitutes an academic judgment that warrants judicial deference suggests the judiciary is “sliding toward a dangerous distrust of academic decision making.”⁶ Recent federal appellate court decisions have ascribed academic freedom to colleges and universities, militating against academic freedom that might be accorded to teaching faculty of those institutions.⁷ Courts have ruled that conflicts between the First Amendment rights of faculty and student complaints are to be decided by determining whether the classroom speech is “germane to the subject matter and advances an academic message,”⁸ and whether the sanction (or the practice at issue) is “reasonably related to legitimate pedagogical concerns.”⁹ Such determination requires judgments made on academic grounds, yet judges do not possess the expertise to distinguish between “legitimate and illegitimate academic decision-

3. For critical commentaries on this metaphor, see Gabrielle Baldwin, *The Student as Customer: The Discourse of “Quality” in Higher Education*, 9 J. FOR HIGHER EDUC. MGMT. 131 (1994); Jill J. McMillan & George Cheney, *The Student as Consumer: The Implications and Limitations of a Metaphor*, 45 COMM. EDUC. 1 (1996).

4. This article does not attempt to examine the scope of academic freedom or the range of its contemporary threats, but focuses specifically on academic freedom in teaching for faculty in public colleges and universities in the United States, amidst growing consumerist demands in higher education.

5. MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 7 (2009).

6. J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 J.C. & U.L. 79, 79 (2004). On the growing legalization of academia, see generally AMY GAJDA, THE TRIALS OF ACADEME: THE NEW ERA OF CAMPUS LITIGATION (2009).

7. See, e.g., Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third “Essential Freedom,”* 45 STAN. L. REV. 1835, 1837 (1993) (“[Academic freedom] protects quite expansively the scholarly enterprise from outside interference (grand juries, witch-hunting public officials, funding agencies, and other assorted patrons, critics, and ‘do-gooders’), but only grants limited protection to professors’ intramural speech or classroom activities against institutional interests.”).

8. *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 683 (6th Cir. 2001).

9. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1290 (10th Cir. 2004) (quoting *Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918, 926 (10th Cir. 2002)).

making.”¹⁰ Consequently, when pedagogy is subject to judiciary scrutiny, rulings are likely to be made based on non-academic considerations.

“[A]s higher education institutions act more like corporations, courts are more willing to see the policies and practices of institutions as ‘contracts’ with the ‘customers’ or ‘clients’ (students) regarding the quality of the ‘product’ (education).”¹¹ Within a growing accountability movement and the escalating marketing of college and university experiences,¹² standardized student ratings are offered by institutions for external appraisal as quantified evidence of quality and excellence.¹³ In a consumerist academy, excellence in teaching becomes redefined as that which satisfies students’ desires and tastes.¹⁴ When administrators monitor and manage faculty to teach in ways that result in high student ratings, teaching faculty no longer maintain control over pedagogical matters. In addition, judges increasingly view the protection of students’ interests in academic disputes as a judicial responsibility, and courts are becoming more sympathetic to students’ challenges of academic judgments.¹⁵ The potential adverse impact of legal opinions following these trends are the demise of faculty speech rights and their pedagogical authority and control,

10. J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251, 307 (1989).

11. Ann D. Springer, *Legal Issues for Faculty* ¶ 5, American Association of University Professors (Feb. 2004), <http://www.aaup.org/AAUP/protect/legal/topics/fac-legal-concerns.htm>.

12. For discussions of educational marketing, see Michael Mulnix, *College Students as Consumers: A Brief History of Educational Marketing*, 2 J. MARKETING FOR HIGHER EDUC. 123 (1989); Elaine El-Khawas, *Consumerism as an Emerging Issue for Postsecondary Education*, 56 EDUC. REC. 126 (1975). For accounts of what is variously termed *commercialization*, *commodification*, and *corporatization* of higher education, see DEREK BOK, *UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION* (2003); ROGER L. GEIGER, *KNOWLEDGE AND MONEY: RESEARCH UNIVERSITIES AND THE PARADOX OF THE MARKETPLACE* (2004); ERIC GOULD, *THE UNIVERSITY IN A CORPORATE CULTURE* (2003); DAVID L. KIRP, *SHAKESPEARE, EINSTEIN, AND THE BOTTOM LINE: THE MARKETING OF HIGHER EDUCATION* (2003); *BUYING IN OR SELLING OUT? THE COMMERCIALIZATION OF THE AMERICAN RESEARCH UNIVERSITY* (Donald G. Stein, ed., 2004); SHEILA SLAUGHTER & GARY RHOADES, *ACADEMIC CAPITALISM AND THE NEW ECONOMY: MARKETS, STATE, AND HIGHER EDUCATION* (2004); JENNIFER WASHBURN, *UNIVERSITY, INC.: THE CORPORATE CORRUPTION OF AMERICAN HIGHER EDUCATION* (2005).

13. See Derek Bok, *Reclaiming the Public Trust*, 24 CHANGE 13 (1992); Peter T. Ewell, *Assessment and Public Accountability: Back to the Future*, 23 CHANGE 12 (1991).

14. See DAVID RIESMAN, *ON HIGHER EDUCATION: THE ACADEMIC ENTERPRISE IN AN ERA OF RISING STUDENT CONSUMERISM* (1980).

15. See Cheryl A. Cameron et al., *Academic Bills of Rights: Conflict in the Classroom*, 31 J.C. & U.L. 243, 282–87 (2005).

along with an increase in students' power to shape the education that colleges and universities offer them.

This article begins by examining conceptions of academic freedom, concentrating on its application when faculty clash with administrators who advocate for students' preferences concerning speech in the classroom.¹⁶ Attention then shifts to student ratings of teaching, the ubiquitous means of student influence in higher education. An overview of the vigorous debates concerning their use in faculty evaluation is provided, and then cases are presented wherein student ratings have played a pivotal role in courts upholding administrative decisions adversely affecting faculty.¹⁷ The article then reviews cases involving students' expressive rights claims challenging the academic freedom of faculty in their teaching,¹⁸ and students' consumer dissatisfaction complaints concerning classroom experiences that were not to their liking.¹⁹ Finally, attention is given to a conservative movement calling for "balance" and "neutrality" in curriculum.²⁰ In closing, the final section outlines some implications of the growing case law that denies faculty pedagogical authority, recognizes students' claims of educational injustices, and empowers students with consumer sovereignty over higher education.²¹

I. ACADEMIC FREEDOM OF FACULTY IN TEACHING

A. Conceptions of Academic Freedom

Academic freedom has been an essential aspect of higher education in the United States, as reflected in the American Association of University Professors' classic 1940 statement on academic freedom,²² but the concept itself "eludes precise definition."²³ Some scholars have argued that the meaning and scope of constitutional academic freedom differs significantly

16. *See infra* section II and accompanying notes.

17. *See infra* section III and accompanying notes.

18. *See infra* section IV A and accompanying notes.

19. *See infra* section IV B and accompanying notes.

20. *See infra* section IV C & D and accompanying notes.

21. *See infra* section V and accompanying notes.

22. American Association of University Professors (AAUP), *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, in POLICY DOCUMENTS & REPORTS 3 (10th ed. 2006). For a historical account of academic freedom, see RICHARD HOFSTADTER & WALTER METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* (1955). For a discussion of the principles of academic freedom enunciated by AAUP, see Walter P. Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, 53 LAW & CONTEMP. PROBS. 3 (1990).

23. WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 613 (4th ed. 2006).

from the concept of academic freedom within the academic profession.²⁴ According to J. Peter Byrne, constitutional academic freedom has not been consistently defined or recognized by the courts, such that “[a]ttempts to understand the scope and foundation of a constitutional guarantee of academic freedom . . . generally result in paradox or confusion. The cases, shorn of panegyrics, are inconclusive, the promise of their rhetoric reproached by the ambiguous realities of academic life.”²⁵ The Fifth Circuit Court of Appeals observed that “[w]hile academic freedom is well recognized, its perimeters are ill-defined and the case law defining it is inconsistent.”²⁶ As Byrne explains, “[t]he problems are fundamental. There has been no adequate analysis of what academic freedom the Constitution protects or of why it protects it. Lacking definition or guiding principle, the doctrine floats in the law, picking up decisions as a hull does barnacles.”²⁷

When the U.S. Supreme Court decided *Sweezy v. New Hampshire* in 1957,²⁸ the plurality opinion by Chief Justice Warren referred to violations of academic freedom: “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.”²⁹ In Justice Frankfurter’s concurrence, he stated that “the ardor and fearlessness of scholars” in their

24. See Byrne, *supra* note 10; Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265 (1988); David M. Rabban, *A Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227 (1990); Mark Yudof, *Three Faces of Academic Freedom*, 32 LOY. L. REV. 831 (1987). *But see, e.g.*, Richard H. Hiers, *Institutional Academic Freedom vs. Faculty Academic Freedom in Public Colleges and Universities: A Dubious Dichotomy*, 29 J.C. & U.L. 35 (2002) (criticizing arguments favoring an institutional understanding of constitutional academic freedom). The conceptual divide was illustrated in *Cook v. Tadros*, 2000 U.S. Dist. LEXIS 21238 (D. Neb. Aug. 24, 2000). The district court ruled as inadmissible expert testimony by a law school professor on the general principles of academic freedom and the conduct that is traditionally regarded in a university setting as falling under the protection of academic freedom. Although the court stated that in order to determine whether speech was protected it had to be “understood in context,” the court also found that expert testimony concerning professional academic freedom would usurp judicial authority. *Id.* at *5–*7.

25. Byrne, *supra* note 10, at 252–53. *See also* Rabban, *supra* note 24, at 230 (“[T]he Supreme Court’s glorification of academic freedom . . . has produced hyperbolic rhetoric but only scant, and often ambiguous, analytic content.”).

26. *Hillis v. Stephen F. Austin State Univ.*, 665 F.2d 547, 553 (5th Cir. 1982) (citations omitted).

27. Byrne, *supra* note 10, at 253.

28. 354 U.S. 234 (1957).

29. *Id.* at 250.

intellectual pursuits “must be left as unfettered as possible.”³⁰ Decades later, expressly addressing academic freedom in its teaching component, the Court stated that “academic freedom embodies the principle that individual instructors are at liberty to teach that which they deem to be appropriate in the exercise of their professional judgment.”³¹ However, when professorial academic authority and student consumerism collide, court opinions have often deferred to institutional administrators pursuing student satisfaction.

B. Issues of Pedagogy and Assessment

Case law concerning intra-college and university disputes about teaching is inconsistent, as the Ninth Circuit Court of Appeals has observed.³² Employing corporate language, the Eleventh Circuit has concluded that “[t]he university necessarily has dominion over what is taught by its professors and may so manage them.”³³ The Third Circuit has agreed that “a public university professor does not have a First Amendment right to decide what will be taught in the classroom.”³⁴ The Fifth Circuit, however, has expressed the view that academic freedom “protects against infringements on a teacher’s freedom concerning classroom content and method.”³⁵ Choosing to delineate separate areas of responsibilities, the Southern District of New York distinguished between an administration’s authority over curriculum and a professor’s “right to develop and use his or her own pedagogical method.”³⁶

Various federal district and circuit courts have affirmed First Amendment protection for some forms of in-class expression by faculty that students have sought to limit. In two cases concerning pedagogy and classroom demeanor, both arising in the context of students’ allegations of sexual harassment in the classroom, courts upheld the faculty member’s right to select and implement teaching methods. In the first case, *Silva v.*

30. *Id.* at 262 (Frankfurter, J., concurring).

31. *Edwards v. Aguillard*, 482 U.S. 578, 586 n.6 (1987) (citation and quotation marks omitted). For a discussion of the history of usages of academic freedom by the Supreme Court, see William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS. 79 (1990).

32. *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968, 971 (9th Cir. 1996) (“Neither the Supreme Court nor this Circuit has determined what scope of First Amendment protection is to be given a public college professor’s classroom speech.”).

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

34. *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3d Cir. 1998).

35. *Hillis v. Stephen F. Austin State Univ.*, 665 F.2d 547, 553 (5th Cir. 1982).

36. *Mahoney v. Hankin*, 593 F. Supp. 1171, 1175 (S.D.N.Y. 1984).

University of New Hampshire,³⁷ J. Donald Silva, a tenured faculty member in communications, was suspended for creating a hostile or offensive environment that violated the university's sexual harassment policy. Among other accusations,³⁸ six adult women filed formal complaints that in a technical writing class he had sexualized classroom discussion and used sexual innuendos that violated the university's sexual harassment policy.³⁹

The court employed the standard of "reasonably related to legitimate pedagogical concerns" that the Supreme Court had introduced in *Hazelwood School District v. Kuhlmeier*.⁴⁰ In *Hazelwood*, the Court found that secondary school "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 pedagogical concerns."⁴¹ Some lower courts have appropriated this standard and applied it to the censuring of teachers' speech by school administrators,⁴² and to cases in higher education,

37. 888 F. Supp. 293 (D.N.H. 1994).

38. Several students complained about his sexually suggestive remarks outside of the classroom, and expressed discomfort with speaking to him directly. *Id.* at 300–04.

39. On one occasion he compared the concept of focus to sexual intercourse: I will put focus in terms of sex so that you can better understand it. Focus is like sex. You seek a target. You zero in on your subject. You move from side to side. You close in on the subject. You bracket the subject and center on it. Focus connects experience and language. You and the subject become one.

Id. at 299. Silva explained that the purpose of his comparison was "to relate an abstract concept to everyday experiences most students are familiar with." *Id.* at 298.

40. 484 U.S. 260, 273 (1988).

41. *Id.* at 273. The Supreme Court held that in overseeing school-sponsored publications, school administrators may regulate student expressive activity to achieve three goals: to maximize student learning experience, to limit exposure to material inappropriate for students' maturity level, and to prevent the erroneous attribution of individual students' views to the school. *Id.* at 271. The Court declined to address the appropriateness of the standard at the postsecondary level. *Id.* at 273.

42. *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 775–79 (10th Cir. 1991) (finding pedagogical interests to include preventing speech that used a "position of authority to confirm an unsubstantiated rumor"; ensuring that "teacher employees exhibit professionalism and sound judgment"; and "providing an educational atmosphere where teachers do not make statements about students that embarrass those students among their peers."); *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993) (citing *Mailloux v. Kiley*, 448 F.2d 1242, 1243 (1st Cir. 1971) (per curiam)) (weighing "the age and sophistication of the students, the relationship between the teaching method and valid educational objective, and the context and manner of

including those concerning faculty classroom speech, such as *Silva*.⁴³ In *Silva*, the legitimate pedagogical concerns of the administrators were identified as “providing a congenial academic environment.”⁴⁴ *Silva* successfully asserted his own pedagogical interests, claiming that his statements served a “legitimate pedagogical, public purpose,” and the court agreed that his classroom statements advanced his valid educational objective of “conveying certain principles related to the subject matter of his course.”⁴⁵ The court did not identify the means by which the determination was made that *Silva*’s words and techniques for communicating the curriculum were pedagogically sound.⁴⁶ The court

the presentation” in determining whether a regulation governing teacher speech is reasonably related to legitimate pedagogical concerns).

43. See, e.g., *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004) (concerning student speech in a university classroom); *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002) (concerning student speech in a master’s thesis); *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991) (upholding institutional authority over post-secondary faculty classroom speech referencing religious beliefs).

44. *Silva*, 888 F. Supp. at 313.

45. *Id.* at 316. The court categorized *Silva*’s comments under academic freedom but also suggested that *Silva* was protected as a public employee speaking on a matter of public concern. Here the court appropriated the Supreme Court’s test for identifying the First Amendment protection afforded to out-of-class speech of teachers as public employees, articulated in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). In *Pickering*, the Court detailed a balancing test in which the government’s legitimate interest as employer in maintaining an efficient workplace is weighed against the employee’s right as a citizen to comment upon “matters of public concern.” *Id.* at 568. The *Silva* court’s convoluted argument was that the preservation of academic freedom is a matter of public concern, and because the question of whether speech some people find offensive should be tolerated in schools is a matter of public concern, so too are *Silva*’s in-class comments. *Silva*, 888 F. Supp. at 316. Such reasoning about what constitutes a public concern seemingly would protect any kind of harassing speech by university professors. See Amy H. Candido, *A Right to Talk Dirty? Academic Freedom Values and Sexual Harassment in the University Classroom*, 4 U. CHI. L. SCH. ROUNDTABLE 85, 111 (1997); see also Todd A. DeMitchell & Richard Fossey, Commentary, *At the Margin of Academic Freedom and Sexual Harassment: An Analysis of Silva v. University of New Hampshire*, 111 EDUC. L. REP. 13, 28 (1996) (describing the court’s argument as “nonsense”).

46. The term *pedagogy*, originating from the Greek *paidagōgós*, meaning to lead a child, is used in the field of education to refer to the theory and practice of teaching. ROBERT K. BARNHART, *THE BARNHART CONCISE DICTIONARY OF ETYMOLOGY: THE ORIGINS OF AMERICAN ENGLISH WORDS* 550 (1995). District and circuit courts have provided various, sometimes contrary, elaborations on the concept, including opposing views on the status of pedagogy as protected speech. When the Tenth Circuit specified the meaning of the term, they stated: “The ‘pedagogical’ concept merely means that the activity is ‘related to learning.’” *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1286 (10th Cir. 2004) (citing *Fleming v.*

judged Silva's in-class comments as ones "made in a professionally appropriate manner" and not so outrageous as to offend the sensibilities of a reasonable person.⁴⁷ The court then determined that the sexual harassment policy, as applied to Silva's speech, was invalid because it failed to take Silva's academic freedom into account.⁴⁸ The court unequivocally endorsed the view that "academic freedom permits faculty members freedom to choose specific pedagogical techniques or examples to convey the lesson they are trying to impart to their students."⁴⁹

The second and more recent case in which a faculty member's academic freedom prevailed also rested on judgment of the pedagogical relevance of speech, absent any criteria for assessing pedagogical methods. In *Hardy v. Jefferson Community College*,⁵⁰ the Sixth Circuit Court of Appeals held

Jefferson Cnty. Sch. Dist. R-1, 298 F.3d 918, 925 (10th Cir. 2002)). *See also* Boring v. Buncombe Cnty. Bd. of Educ., 98 F.3d 1474 (4th Cir. 1996), (Widener, J., dissenting), *vacated en banc*, 136 F.3d 364, 370 (4th Cir. 1998) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1663 (1971), and defining "pedagogical" as "educational"). *See generally* Brown v. Armenti, 247 F.3d 69, 75 (3d Cir. 2001) ("Because grading is pedagogic, the assignment of the grade is subsumed under the university's freedom to determine how a course is to be taught."); Boring v. Buncombe Cnty. Bd. of Educ., 98 F.3d 1474 (4th Cir. 1996), *vacated en banc*, 136 F.3d 364, 370 (4th Cir. 1998) (holding that the makeup of the curriculum is a legitimate pedagogical concern); Searcey v. Harris, 888 F.2d 1314, 1319 (11th Cir. 1989) (. . . "the purpose of a curricular program is by definition 'pedagogical'"); Parate v. Isabor, 868 F.2d 821, 828 (6th Cir. 1989) ("[T]he professor's evaluation of her students and assignment of their grades is central to the professor's teaching method."); Hillis v. Stephen F. Austin State Univ., 665 F.2d 547, 553 (5th Cir. 1982) (the "claim that the refusal to assign a grade . . . constituted a 'teaching method' is unfounded."); Carley v. Ariz. Bd. of Regents, 737 P.2d 1099 (Ariz. Ct. App. 1987) (considering teaching methods as independent of teaching content, or content-neutral).

47. *Silva*, 888 F. Supp. at 313. The court did not accept the written complaints of harm the female students reported suffering as a consequence of Silva's harassing speech. Candido, *supra* note 45. The judge concluded that one of the professor's remarks (comparing a bowl of jello and a vibrator to a belly dancer) was not sexual in nature, and reasoned that the complainants' misinterpretation of this analogy misled them to regard Silva's focus statement as part of an offensive academic environment. *Silva*, 888 F. Supp. at 312-13.

48. *Id.* at 314.

49. *Id.* at 330 (citing affidavit of W. Van Alstyne). For an earlier case stating that professors may use their chosen teaching methods, see *Mahoney v. Hankin*, 593 F. Supp. 1171, 1175 (S.D.N.Y. 1984) (expressing support for dicta in prior cases that a professor's freedom to use their own chosen pedagogical method is a form of academic freedom). *See also* Hillis v. Stephen F. Austin State Univ. 665 F.2d 547, 553 (5th Cir. 1982) (stating, in dicta, that a professor's classroom content and method are protected by academic freedom).

50. 260 F.3d 671 (6th Cir. 2001).

that “a teacher’s in-class speech deserves constitutional protection.”⁵¹ Kenneth Hardy had used “gender and racial slurs” in his lecture on “how language is used to marginalize minorities and other oppressed groups in society.”⁵² He conducted a group exercise in which he asked students to suggest examples of “words that [had] historically served the interests of the dominant culture.”⁵³ Students’ suggestions included “the words ‘girl,’ ‘lady,’ ‘faggot,’ ‘nigger,’ and ‘bitch.’”⁵⁴ A student who was offended by the last two words discussed her concerns with Hardy and college administrators, and Hardy apologized to the student for any discomfort the class had caused her. The student then took her complaint to a vocal religious leader in the community, who raised the issue with college administrators and threatened to affect the college’s enrollment if disciplinary action was not taken. Subsequently, despite receiving favorable student course ratings, Hardy was informed that he would not be teaching in the future.

Hardy sued, claiming his rights under the First and Fourteenth Amendments to the United States Constitution had been violated.⁵⁵ Hardy also contended that university officials had retaliated against him for exercising his rights of free speech and academic freedom.⁵⁶ The class discussion reportedly was “academically and philosophically challenging,”⁵⁷ and the court described Hardy’s speech as “limited to an academic discussion of the words in question” and “not gratuitously used by Hardy in an abusive manner.”⁵⁸ The court determined that Hardy’s speech “was germane to the subject matter of his lecture on power and effect of language”⁵⁹ and concluded that an instructor’s speech, when it is “germane to the classroom subject matter and advances an academic message, is protected by the First Amendment.”⁶⁰ Like the *Silva* court, the Sixth Circuit treats pedagogical relevance as if it were a readily evident objective feature of speech, rather than their affirmed conclusion based on grounds not specified.

In another case of a similar nature decided just three months prior to *Hardy* concerning student complaints about a professor’s vulgar language, the same appellate court reached a contrary decision. In *Bonnell v.*

51. *Id.* at 680.

52. *Id.* at 674–75.

53. *Id.* at 675.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 679.

59. *Id.*

60. *Id.* at 683. The appellate court also concluded that “Hardy’s lecture on social deconstructivism and language, which explored the social and political impact of certain words,” was on a matter of public concern. *Id.* at 679.

Lorenzo,⁶¹ a female student in John C. Bonnell's English Language and Literature class (at Macomb Community College in Michigan) filed a sexual harassment complaint against him for using language in class that she claimed created a hostile learning environment. The plaintiff sought multiple remedies, including a written apology and Bonnell's immediate termination. According to administrators, the language at issue included profanity such as "shit," "damn," "fuck," and "ass," and sexual allusions such as "blow-job."⁶² The college took disciplinary action when it deemed Bonnell's language to be gratuitous, vulgar, and obscene speech that was "not germane to course content (and thus educational purpose) as measured by professional standards."⁶³ Previously—when responding to a complaint by a parent of another of his students—Bonnell had defended his use of such language for purposes of "demonstrating an academic point," explaining that "he used the terms to 'point out the chauvinistic degrading attitudes in society that depict women as sexual objects, as compared to certain words to describe male genitalia, which are not taboo or considered to be deliberately intended to degrade.'"⁶⁴ The court ruled that an instructor's constitutional right to use profane words does not extend to using them in the context of the classroom when not germane to the subject matter.⁶⁵ The court did not indicate any standards for ascertaining if Bonnell's classroom profanity had served his alleged pedagogical intent or was simply gratuitous, and it did not indicate any grounds for accepting the college's claim that his profanity was not germane.

When employing the standard from *Hazelwood*,⁶⁶ courts have considered the relative importance of a professor's speech in pursuing an educational objective against the pedagogical concerns of administrators in controlling the professor's means to achieve that purpose. When such "balancing" tests are used, there is the impression of an objective weighing of competing interests, but as Richard Hiers has argued, such "balancing is inevitably and primarily a normative undertaking."⁶⁷ Answering the question whether an action is "reasonably related" to a pedagogical concern that is "legitimate" requires a normative judgment as to the relative importance of the competing interests. Judges, lacking higher education

61. 241 F.3d 800 (6th Cir. 2001).

62. *Id.* at 805.

63. *Id.*

64. *Id.* at 803.

65. ". . . Plaintiff may have a constitutional right to use words such as 'pussy,' 'cunt,' and 'fuck,' but he does not have a constitutional right to use them in a classroom setting where they are not germane to the subject matter, in contravention of the College's sexual harassment policy." *Id.* at 820.

66. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). See *supra* notes 40–43 and accompanying text.

67. Richard H. Hiers, *Normative and Ostensibly Norm-Neutral Conventions in Contemporary Judicial Discourse*, 14 *LEGAL STUD. F.* 107, 126 (1990).

expertise, apparently decide whose pedagogical interests (motives, or objectives) will prevail on the basis of which constituency they see as legitimately holding power and control, thereby rendering that constituency's pedagogical interests to be legitimate ones.⁶⁸ When authority is declared to belong to institutions alone, the pedagogical soundness of administrators' determinations is presumed, even though subject matter and instructional expertise lies with the teaching faculty.

In the past, federal courts have afforded broad deference for the expertise and specialized knowledge of academic professionals in cases involving various kinds of academic decisions.⁶⁹ Recognizing "difficulties in deciding what is germane and what is not" in cases involving the more "discernable limits" of a union's or bar association's purposes, the Supreme Court has admitted that "the standard becomes all the more unmanageable in the public university setting."⁷⁰ The broad scope of what could be considered educational—"everything is in a sense educational"⁷¹—raises difficulties for determining pedagogical germaneness. The Court has acknowledged that "[i]t is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning."⁷²

68. In such a formulation, the test is tautological. William G. Buss, *Academic Freedom and Freedom of Speech: Communicating the Curriculum*, 2 J. GENDER RACE & JUST. 213, 238 (1999).

69. See *Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991) ("Federal judges should not be ersatz deans or educators."); *Faro v. New York Univ.*, 502 F.2d 1229, 1231–32 (2d Cir. 1974) ("Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision."); *Jiminez v. Mary Washington Coll.*, 57 F.3d 369, 377 (4th Cir. 1995) ("The federal courts have adhered consistently to the principle that they operate with reticence and restraint regarding tenure-type decisions."); *Kunda v. Muhlenberg Coll.*, 621 F.2d 532 (3d Cir. 1980):

Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by professionals, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges.

Id. at 548. For discussions of historical changes in judicial deference to academic decisions, see GAJDA, *supra* note 6, at 22–49; Robert M. O'Neil, *Judicial Deference to Academic Decisions: An Outmoded Concept?*, 36 J.C. & U.L. 729 (2010).

70. *Bd. of Regents of the Univ. of Wisc. v. Southworth*, 529 U.S. 217, 232 (2000) (referencing *Lehnert v. Ferris Fac. Ass'n*, 500 U.S. 507 (1991), where Justices disagreed about what expressive activity was or was not germane to a labor union's collective bargaining).

71. *Southworth v. Grebe*, 151 F.3d 717, 725 (7th Cir. 1998).

72. *Bd. of Regents of the Univ. of Wisc. v. Southworth*, 529 U.S. 217, 232 (2000).

The Supreme Court also has suggested that courts ought not to question the legitimacy or efficiency of educators' pedagogical methods.⁷³ Courts, though, have misplaced their support for administrators' claims of their own superiority over faculty in understanding students' pedagogical needs,⁷⁴ when increasingly in our corporate culture, higher education administrators are hired without academic credentials, and are selected from industry for their corporate experience rather than pedagogic skills or instructional expertise.⁷⁵ The decision in *Cohen v. San Bernardino Valley College*⁷⁶ made evident the judicial preference for the judgments of institutional administrators over the views of those who teach. Dean Cohen, a tenured professor of English and film studies, admittedly used an unorthodox confrontational style in the classroom that included regularly employing vulgarities and profanity, repeatedly discussing controversial topics (such as cannibalism, sex with children, and pornography), emphasizing topics of a sexual nature, and assigning provocative essay topics. When assigned an essay defining pornography, a student in his remedial English class requested an alternative essay topic; Cohen refused, and the student filed a sexual harassment complaint under a recently adopted sexual harassment policy. The institutional authorities found that

73. See *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) ("When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment."); see also *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 444 (5th Cir. 2001) ("It is not the job of federal courts to determine the most effective way to educate our nation's youth.").

74. The incompetence of administrators as evaluators of pedagogy was demonstrated in a federal circuit case, *Parate v. Isabor*, 868 F.2d 821 (6th Cir. 1989). Following a grading dispute, a dean and department head visited the classroom of a non-compliant professor, ostensibly to evaluate Natthu Parate's teaching. The dean interrupted Parate's teaching by shouting orders to Parate from the back of the classroom. The dean then assumed control of the class and berated Parate's teaching in front of the students. Subsequently, the dean replaced the Parate as instructor of the class and ordered him to attend as a student. The court rejected a claim that the classroom events constituted a violation of academic freedom, even though it found that the dean's actions were "unprofessional." The court concluded that the administrator's behaviors did not breach academic freedom because an incident of interference did not "cast a pall of orthodoxy over the classroom," even though Parate was removed as instructor following the classroom visit. For a discussion of the court's elusive reasoning in this case, see Donal M. Sacken, Commentary, *Making No Sense of Academic Freedom: Parate v. Isabor*, 56 EDUC. L. REP. 1107 (1993).

75. WASHBURN, *supra* note 12, at 205–07; Henry A. Giroux, *Neoliberalism, Corporate Culture, and the Promise of Higher Education: The University as a Democratic Public Sphere*, 72 HARVARD EDUC. REV. 425, 438–42 (2002).

76. 883 F. Supp. 1407 (C.D. Cal. 1995), *rev'd in part*, 92 F.3d 968 (9th Cir. 1996).

through these in-class actions, Cohen had violated the college's sexual harassment policy and that his conduct warranted punishment. Cohen filed suit, arguing, in part, that his right to academic freedom prevented the institution from punishing him for his classroom behavior.

The trial court reviewed the extent of a professor's control over teaching methods and the restrictions on the state's control of classroom conduct:

[C]olleges and universities must have the power to require professors to effectively educate all segments of the student population, including those students unused to the rough and tumble of intellectual discussion. If colleges and universities lack this power, each classroom becomes a separate fiefdom in which the educational process is subject to professional whim.⁷⁷

The court implied that, absent managerial control, a professor's pedagogy could be merely whimsical rather than the result of expertise and considered judgment about how students learn the subject matter. When the Ninth Circuit Court of Appeals reversed the lower court, it did so on grounds not explored by the lower court, focusing instead on the language of the contested sexual harassment policy. Finding the policy's terms to be "unconstitutionally vague," the court concluded that college officials had acted "on an entirely ad hoc basis" in applying the sexual harassment policy's "nebulous outer reaches to punish teaching methods that Cohen had used for many years" and had been viewed as "pedagogically sound" by his colleagues.⁷⁸ The court dodged addressing the question of faculty academic freedom by choosing to "decline to define the precise contours of the protection the First Amendment provides the classroom speech of college professors"⁷⁹ The opinion leaves unanswered if or when a professor has a constitutional right to use profane language in the classroom while employing nontraditional yet pedagogically legitimate strategies that some students and administrators find offensive.

In a more recent case, *Johnson-Kurek v. Abu-Absi*,⁸⁰ the appellate court held that any right of academic freedom in its teaching component belongs to the college or university and not the individual faculty member. Rosemary Johnson-Kurek, a part-time lecturer at the University of Toledo, alleged that a decision to deny her a second English course teaching assignment was made in retaliation for her refusal to comply with an administrative direction to communicate more explicitly with her students about what was required for their completion of a course she had taught the previous year, in which 13 of her 17 students had received grades of "Incomplete." In a listserv message, she informed students that grades of incomplete had been assigned for one of three reasons (formatting issues,

77. *Id.* at 1419-20.

78. *Cohen*, 92 F.3d at 972.

79. *Id.* at 971.

80. 423 F.3d 590 (6th Cir. 2005).

improper citations, or the need for textual changes) but, for pedagogical reasons, she did not provide individualized information on deficiencies, leaving it up to the student to determine which reason applied in their own case. One student complained about the lack of specific direction, and her supervisor directed Johnson-Kurek multiple times to provide written, individualized, precise directions for each student on what they personally needed to do to finish the coursework and obtain a final grade. Johnson-Kurek did not comply. Her lawsuit was dismissed at the trial court level, and the Sixth Circuit affirmed, stating:

While the First Amendment may protect Johnson-Kurek's right to express her ideas about pedagogy, it does not require that the university permit her to teach her classes in accordance with those ideas. The freedom of the university to decide what may be taught and how it shall be taught would be meaningless if a professor were entitled to refuse to comply with university requirements whenever they conflict with his or her teaching philosophy.⁸¹

In line with issues of setting academic and pedagogic standards, circuit courts have tended to agree that institutions set the grading policies to which faculty are obligated to adhere.⁸² In *Stronach v. Virginia State University*,⁸³ the federal court for the Eastern District of Virginia held that while academic freedom arguably protects a professor's right to *assign* a grade, it also protects the prerogative of the college or university (presumably its administrators) to *change* the grade over the professor's objection. Carey Stronach, a long-time tenured professor of physics at Virginia State University, had a dispute with a student about the grade he received on two quizzes, resulting in a final grade of "F," rather than an "A," as claimed by the student. The student submitted faxed copies of his score sheets to Stronach, who concluded the higher quiz scores were altered ones, not the grades actually earned. The student appealed to the chairperson of the department, who agreed with the student and changed the grade. Stronach sued the chairperson and other university officials for violating his academic freedom. The trial court judge ruled that academic freedom "is the *university's* right, and not the *professor's* right."⁸⁴

81. *Id.* at 595.

82. See Jennifer L.M. Jacobs, Note, *Grade "A" Certified: The First Amendment Significance of Grading by Public University Professors*, 87 MINN. L. REV. 813, 821 (2003); see also Evelyn Sung, Note, *Mending the Federal Circuit Split on the First Amendment Right of Public University Professors to Assign Grades*, 78 N.Y.U. L. REV. 1550 (2003) (reviewing different analyses among the circuit courts leading to same conclusion).

83. 2008 U.S. Dist. LEXIS 2914 (E.D. Va. Jan. 15, 2008).

84. *Id.* at *7. Similarly, in *Parate v. Isabor*, 828 F.2d 821 (6th Cir. 1989), the circuit court stated that "[t]he professor's evaluation of her students and

In 2000, the Fourth Circuit Court of Appeals, in *Urofsky v. Gilmore*,⁸⁵ asserted that although academic freedom for individual professors may exist as a “professional norm,” it is not a legal standard or “constitutional right.”⁸⁶ The circuit court’s review of Supreme Court opinions erroneously concluded that if academic freedom exists, it is vested exclusively in the institution and not in individual professors.⁸⁷ More recently, in *Garcetti v. Ceballos*,⁸⁸ the Supreme Court held that when a public employee is speaking as part of his or her “official duties” (i.e., in the course of

assignment of their grades is central to the professor’s teaching method.” *Id.* at 828. Institutional control was still preserved because the court held that Parate had “no constitutional interest in the grades which his students ultimately receive,” and thus his First Amendment rights would not be violated if university administrators changed the grade themselves, rather than compelling the professor to do so. *Id.* at 829.

85. 216 F.3d 401 (4th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 1070 (2001).

86. *Id.* at 411. The court referred to the “audacity” of the claim of special constitutional protection for academic speakers, stating that it would be “manifestly at odds with a constitutional system premised on equality.” *Id.* at 411 n.13.

87. *Id.* at 412. (“The Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs.”). Challenging such misinterpretations of prior authority, Richard H. Hiers has meticulously demonstrated that the cases the circuit court cites, in fact, involved individual faculty claims of academic freedom, and no distinction was intimated in the opinions of the Court between a university’s academic freedom and that of its faculty. Hiers, *supra* note 24. *See also* Elizabeth Mertz, Comment, *The Burden of Proof and Academic Freedom: Protection for Institution or Individual?*, 82 NW. U. L. REV. 492, 539 (1988) (“Universities can only claim special academic freedom protection when they act to shield individual scholars from outside intervention.”). The *Urofsky* decision has been criticized as “profoundly wrong as a matter of law” by J. Peter Byrne, a legal scholar relied upon by the majority for its reasoning. J. Peter Byrne, *Constitutional Academic Freedom in Scholarship and in Court*, 47 CHRON. HIGHER EDUC. B13, B13 (2001). *See also* Rebecca Gose Lynch, Comment, *Pawns of the State or Priests of Democracy? Analyzing Professors’ Academic Freedom Rights within the State’s Managerial Realm*, 91 CAL. L. REV. 1061, 1064 (2003) (characterizing the decision as “clearly incorrect” having “essentially relegated public university professors to being pawns of the state.”); Stacy E. Smith, Note, *Who Owns Academic Freedom? The Standard for Academic Free Speech at Public Universities*, 59 WASH. & LEE L. REV. 299, 353 (2002) (criticizing the court’s failure to appreciate the mission of academic scholarly speech); Kate Williams, Note, *Loss of Academic Freedom on the Internet; The Fourth Circuit’s Decision in Urofsky v. Gilmore*, 21 REV. LITIG. 493, 495 (2002) (describing the ruling as “erroneous” with “dangerous implications for academics nationwide.”).

88. 547 U.S. 410 (2006).

performing his or her job), then the employee's speech is entitled to no First Amendment protection and can be the basis for discipline or discharge.⁸⁹ Critics have pointed out that the speech *Garcetti* fails to deem protected is, in an academic setting at a governmentally-run college or university, the very speech that academic freedom is meant to protect.⁹⁰ In his dissenting opinion, Justice Souter wrote, "I have to hope that today's majority does not mean to imperil First Amendment protection to academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties.'"⁹¹ The Court recognized that freedom of expression related to scholarship would be a cause of concern,⁹² but the majority opinion side-stepped this issue, merely reserving the question of whether this standard applies to academic scholarship and classroom teaching.⁹³

Legal commentators have outlined the serious threat to academic freedom the application of *Garcetti* to college and university faculty poses.⁹⁴ Most cases involving college and university faculty where *Garcetti*

89. *Id.* at 421. Speech in carrying out one's professional duties is likened to commissioned work, and thus subject to the employer's control. "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id.* at 421–22. To categorize the academic speech of professors as proprietary speech is antithetical to the idea of academic freedom, and it undermines the essential purposes of higher education institutions. R. George Wright, *The Emergence of First Amendment Academic Freedom*, 85 NEB. L. REV. 793, 824–25 (2007).

90. Leonard M. Niehoff, *Peculiar Marketplace: Applying Garcetti v. Ceballos in the Public Higher Education Context*, 35 J.C. & U.L. 75, 91 (2008); Larry D. Spurgeon, *A Transcendent Value: The Quest to Safeguard Academic Freedom*, 34 J.C. & U.L. 111, 149 (2007); Wright, *supra* note 89, at 820.

91. *Garcetti*, 547 U.S. at 438 (Souter, J., dissenting) (citations omitted).

92. *Id.* at 425 (majority opinion) ("There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence.").

93. *Id.*

94. See American Association of University Professors, Report, *Protecting an Independent Faculty Voice: Academic Freedom after Garcetti v. Ceballos*, 95 ACADEME 67 (2009) (recommending the development of institutional policies and practices to define and protect academic freedom due to the failure of constitutional law in the courts to ensure it); Barbara K. Bucholtz, *What Goes around Comes Around: Legal Ironies in an Emergent Doctrine for Preserving Academic Freedom and the University Mission*, 13 TEX. WESLEYAN L. REV. 311, 316 (2007) (arguing that the decision "baldly threatens the academic freedom of scholars in public universities"); Risa L. Lieberwitz, *Linking Professional Academic Freedom, Free Speech, and Racial and Gender Equality*, 53 LOY. L.

has been applied have not concerned classroom speech or pedagogy, although they have involved situations of faculty expressing views based on their pedagogical or scholarly expertise.⁹⁵ In at least some of those decisions, courts have treated faculty speech related to scholarship or teaching as protected forms of speech.⁹⁶ Very few cases have directly addressed the relevance of the *Garcetti* caveat to a professor's classroom speech. In one such case, *Sheldon v. Dhillon*,⁹⁷ a federal district court in California held that a professor's speech in class about the scientific theories on homosexuality was protected, recognizing that the *Garcetti* official duties analysis did not apply to such academic speech. June Sheldon, an experienced adjunct biology instructor at San José Community College, was asked about the genetic basis of homosexual behavior by a student in her course on human heredity. In her response, the instructor noted the complexity of the issue being debated in the scientific community, cited a genetic example in the course textbook, and referenced

REV. 165, 169 (2007) (concluding that following *Garcetti*, "the constitutional viability of individual rights of academic freedom is even more questionable."); Spurgeon, *supra* note 90, at 149 (observing that if *Garcetti* is applied to public college and university faculty, "it could provide a blunt weapon to those who would challenge the content of a professor's expression.").

95. Cases that have involved faculty speech as part of institutional governance have placed such speech outside the realm of free speech. *See, e.g.*, *Savage v. Gee*, 716 F. Supp. 2d 709 (S.D. Ohio 2010) (recognizing *Garcetti*'s academic freedom exception, but holding that the speech in question did not concern scholarship or teaching and was therefore unprotected under the official duties analysis of *Garcetti*); *Gorum v. Sessoms*, 561 F.3d 179 (3d Cir. 2009) (citing Justice Kennedy's caution about blindly applying *Garcetti* to faculty speech and activities, and Justice Souter's warning, but finding that the speech in question was not related to scholarship or teaching and was not then protected faculty speech); *Hong v. Grant*, 2010 U.S. App. LEXIS 23504, at *3-*4 (9th Cir. Nov. 12, 2010) (stating that it is unclear whether university faculty have a First Amendment right to comment on administrative matters without retaliation, and deciding to "leave the question . . . for consideration in another case").

96. In *Adams v. Trs. of the Univ. of N. Carolina–Wilmington*, 640 F.3d 550 (4th Cir. 2011), the Fourth Circuit Court of Appeals, citing their earlier decision in *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687 (4th Cir. 2007), stated that applying *Garcetti* to "the academic work of a public university faculty member . . . could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment." *Adams*, 640 F.3d at 574. In *Kerr v. Hurd*, 694 F. Supp. 2d 817 (S.D. Ohio Mar. 15, 2010), a federal district court in Ohio ruled that a medical professor's speech to students was protected by the First Amendment, explicitly stating that in-class faculty speech falls within an academic freedom exception to *Garcetti*. The case is currently on appeal before the Sixth Circuit.

97. *Sheldon v. Dhillon*, 2009 U.S. Dist. LEXIS 110275 (N.D. Cal. Nov. 25, 2009).

the biological findings of a German scientist. Sheldon explained that the scientist's research presented only one set of theories from the nature versus nurture debate to be addressed in the course, which would cover how homosexual behavior may be influenced by both genes and the environment. Another student in the class complained to college officials about being offended by Sheldon's answer, alleging that she had "made 'offensive and unscientific' statements, including that there 'aren't any real lesbians' and that 'there are hardly any gay men in the Middle East because women are treated very nicely.'"⁹⁸ When terminated for "teaching misinformation as science,"⁹⁹ Sheldon sued in federal court, charging that her First Amendment and other rights were violated.

While making no determination on whether Sheldon's First Amendment rights were violated, the ruling stated that she had First Amendment rights and did not lose them by virtue of the speech in question having taken place while she was teaching at a public college. The court rejected the college's reliance on the *Garcetti* decision, noting that "by its express terms," the *Garcetti* decision did "not address the context squarely presented here: the First Amendment's application to teaching-related speech."¹⁰⁰ Acknowledging that prior appeals court opinions "recognized that teachers have *First Amendment* rights regarding their classroom speech, albeit without defining the precise contours of those rights,"¹⁰¹ the court also noted that the Supreme Court has held that "a teacher's instructional speech is protected by the *First Amendment*."¹⁰² If the defendants acted in retaliation of Sheldon's instructional speech, her rights would have been violated unless their conduct was reasonably related to a "legitimate pedagogical concern."¹⁰³ Because the court could not determine if the community college terminated her employment on the grounds of reasonable pedagogical concerns, it denied the college's motion to dismiss. In July 2010, the community college district settled the case by agreeing to pay Sheldon \$100,000 as compensation for lost wages and removing any references to her dismissal from her file.¹⁰⁴

98. *Id.* at *6.

99. *Id.* at *7.

100. *Id.* at *11.

101. *Id.* at *12–*13.

102. *Id.* at *13–14 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)).

103. *Id.* at *14.

104. *Id.* at *2–3.

II. STUDENT RATINGS OF TEACHING

A. Issues of Validity

The evaluation of faculty performance in higher education is a broad field,¹⁰⁵ with legal issues permeating the various processes and criteria for review, as well as the uses that are made of those appraisals.¹⁰⁶ Numerical student ratings are a well-entrenched feature of faculty evaluation¹⁰⁷ and often are the only evidence used for judgments of teaching quality,¹⁰⁸ even though the voluminous accumulation of empirical research over several decades has not been compelling enough to produce consensus about their

105. For authoritative works in the field, see LARRY A. BRASKAMP & JOHN C. ORY, *ASSESSING FACULTY WORK: ENHANCING INDIVIDUAL AND INSTITUTIONAL PERFORMANCE* (1994); JOHN A. CENTRA, *REFLECTIVE FACULTY EVALUATION: ENHANCING TEACHING AND DETERMINING FACULTY EFFECTIVENESS* (1993).

106. See John D. Copeland & John W. Murry, Jr., *Getting Tossed from the Ivory Tower: The Legal Implications of Evaluating Faculty Performance*, 61 MO. L. REV. 233 (1996); Roger W. Reinsch et al., *Evidentiary and Constitutional Due Process Constraints on the Uses by Colleges and Universities of Student Evaluations*, 32 J.C. & U.L. 75 (2005); William Arthur Wines & Terence J. Lau, *Observations on the Folly of Using Student Evaluations of College Teaching for Faculty Evaluation, Pay, and Retention Decisions and Its Implications for Academic Freedom*, 13 WM. & MARY J. WOMEN & L. 167 (2006).

107. James A. Kulik, *Student Ratings: Validity, Utility, and Controversy*, in THE STUDENT RATINGS DEBATE: ARE THEY VALID? HOW CAN WE BEST USE THEM? 9 (Michael Theall et al. eds., 2001). Student rating instruments are institutionally or commercially developed machine-readable standardized questionnaire forms, that typically include items for a holistic or overall rating of the course and of the instructor's effectiveness, as well as ratings of factors such as organization and structure of the course, appropriateness of the level of course difficulty and workload assignments, fairness and accuracy in assessment, clarity and communication skills of the instructor, the instructor-student relationship (instructor's development of rapport, their caring and concern for students, being respectful of students), various instructor qualities (such as preparation, level of knowledge, enthusiasm) and, less commonly, student self-rated learning. See CENTRA, *supra* note 105, at 52–58; Carol I. Young, *An Analysis of Student Evaluation Forms: Are They Compatible with Active Learning Strategies?*, 3 J. ACAD. BUS. EDUC., available at <http://www.abe.sju.edu/proc2002/young2.pdf>. Potential alternative sources for the assessment of teaching include teaching portfolios, developed curriculum, course syllabi, classroom observations by peers or administrators, scholarly research and publication on teaching, alumni opinions, student learning outcomes, and enrollment patterns. See, e.g., CHANGING PRACTICES IN EVALUATING TEACHING: A PRACTICAL GUIDE TO IMPROVED PERFORMANCE AND PROMOTION/TENURE DECISIONS (Peter Seldin & Associates eds., 1999).

108. Seldin & Associates, *supra* note 107, at 1.

psychometric quality.¹⁰⁹ The central issue in this very divisive debate is whether student ratings fairly and accurately indicate quality of teaching, with researchers either defending or denouncing such instruments.¹¹⁰ Strong proponents of student ratings offer confirming evidence that student

109. In the student ratings literature, the predominate question is one of *construct validity*, or the degree to which a rating instrument measures what it purports to measure (in this case, the construct of quality of teaching). Validity theory, as it has developed in the field of psychometrics, concerns the logical arguments and empirical evidence required to support interpretations, inferences, and actions based on data collected from a particular data-gathering procedure. For seminal writings on validity, see Lee J. Cronbach, *Test Validation*, in EDUCATIONAL MEASUREMENT 443 (Robert L. Thorndike ed., 2d ed. 1971); Lee J. Cronbach & Paul E. Meehl, *Construct Validity in Psychological Testing*, 52 PSYCHOL. BULL. 281 (1955); Samuel Messick, *Validity*, in EDUCATIONAL MEASUREMENT 13 (Robert L. Linn ed., 3d ed. 1989). For an historical perspective, see Lorrie A. Shepard, *Evaluating Test Validity*, in 19 REV. RES. EDUC. 405 (Linda Darling-Hammond ed., 1993). For overviews of the extraordinarily vast literature on the validity of student ratings, see Philip C. Abrami et al., *The Dimensionality of Student Ratings of Instruction: What We Know and What We Do Not*, in EFFECTIVE TEACHING IN HIGHER EDUCATION: RESEARCH AND PRACTICE 321 (Raymond P. Perry & John C. Smart eds., 1997); Kulik, *supra* note 107; John C. Ory & Katherine Ryan, *How Do Student Ratings Measure up to a New Validity Framework?*, in THE STUDENT RATINGS DEBATE: ARE THEY VALID? HOW CAN WE BEST USE THEM? 27 (Michael Theall et al. eds., 2001); Howard K. Wachtel, *Student Evaluation of College Teaching Effectiveness: A Brief Review*, 23 ASSESSMENT & EVALUATION HIGHER EDUC. 191 (1998).

110. Compare William E. Cashin, *Student Ratings of Teaching: The Research Revisited*, IDEA PAPER. No. 32, 6 (1995), available at http://www.theideacenter.org/sites/default/files/Idea_Paper_32.pdf (concluding that “[i]n general, student ratings tend to be statistically reliable, valid, and relatively free from bias or the need for control; probably more so than any other data for evaluation”), and Peter A. Cohen, *Student Ratings of Instruction and Student Achievement: A Meta-Analysis of Multisection Validity Studies*, 51 REV. EDUC. RES. 281, 305 (1981) (concluding, based on meta-analysis, that “student ratings of instruction are a valid index of instruction effectiveness”), and Michael Theall & Jennifer Franklin, *Looking for Bias in All the Wrong Places: A Search for Truth or a Witch Hunt in Student Ratings of Instruction?*, in THE STUDENT RATINGS DEBATE: ARE THEY VALID? HOW CAN WE BEST USE THEM? 45, 46 (Michael Theall et al. eds., 2001) (assessing the research and concluding that student ratings are generally “reliable and valid”), with Randi L’Hommedieu et al., *Methodological Explanations for the Modest Effects of Feedback from Student Ratings*, 82 J. EDUC. PSYCHOL. 232 (1990) (arguing that the modest persistent positive effect of student ratings found in meta-analyses is attenuated by methodological and conceptual validity issues in the research), and Robert Sproule, *The Underdetermination of Instructor Performance by Data from the Student Evaluation of Teaching*, 21 ECON. EDUC. REV. 287 (2002) (arguing that instructor performance is underdetermined by student ratings data).

ratings are valid measures of teaching effectiveness, dismiss evidence to the contrary as the product of “unreplicable” and methodologically flawed research, and disparage rival positions as the misdirected “witch hunt” for bias that perpetuates “myths” needing debunking.¹¹¹ Opponents of student ratings question the construct validation approach for gathering evidence that student ratings are indicators of teaching competence given that faculty hold widely diverse views on the goals of teaching,¹¹² and there is no agreement on how to define good teaching itself.¹¹³ In order to have content validity, the items on the student ratings questionnaires need to consist of a set of substantially invariant elements reflecting an acceptable definition of teaching effectiveness that transcends disciplines, subject matter, epistemologies, student capabilities, teaching methods, contexts, and so on.¹¹⁴ Critics point out that the concept of effective teaching has generally been operationalized on rating forms by a list of observable behaviors embedded in a teacher-centered didactic model of pedagogy.¹¹⁵ Although

111. Theall & Franklin, *supra* note 110, at 45–48. *See also* Lawrence M. Aleamoni, *Student Rating Myths Versus Research Facts from 1924 to 1998*, 13 J. PERSONNEL EVALUATION EDUC. 153 (1999); Herbert W. Marsh & Lawrence A. Roche, *Effects of Grading Leniency and Low Workload on Students' Evaluations of Teaching: Popular Myth, Bias, Validity, or Innocent Bystanders?*, 92 J. EDUC. PSYCHOL. 202 (2000); Kenneth A. Feldman, *Identifying Exemplary Teachers and Teaching: Evidence from Student Ratings*, THE SCHOLARSHIP OF TEACHING AND LEARNING IN HIGHER EDUCATION: AN EVIDENCE-BASED EXPERIENCE 93 (Raymond P. Perry & John C. Smart eds., 2007).

112. *See* David Kember, *A Reconceptualisation of the Research into University Academics' Conceptions of Teaching*, 7 LEARNING & INSTRUCTION 255 (1997); Daniel D. Pratt, *Conceptions of Teaching*, 42 ADULT EDUC. Q. 203 (1992).

113. *See* Abrami et al., *supra* note 109, at 324–42 (critically analyzing three distinct definitions of teaching effectiveness); Cashin, *supra* note 110, at 2–3 (“Unfortunately there is no agreed upon definition of ‘effective teaching’ nor any single, all-embracing criterion.”); Kulik, *supra* note 107, at 10 (stating that “no one knows what measure to use as the criterion of teaching effectiveness.”); Herbert W. Marsh, *Students' Evaluations of University Teaching: Research Findings, Methodological Issues, and Directions for Future Research*, 11 INT’L J. EDUC. RES. 253, 285 (1987) (noting that “[s]tudent ratings, which constitute one measure of teaching effectiveness, are difficult to validate since there is no single criterion of effective teaching.”); Philip C. Abrami & Sylvia d’Apollonia, *The Dimensionality of Ratings and Their Use in Personnel Decisions*, STUDENT RATINGS OF INSTRUCTION: ISSUES FOR IMPROVING PRACTICE 97 (Michael Theall & Jennifer Franklin eds., 1990) (studying the uniformity of student rating forms and finding them to be inconsistent in their operational definitions of instructional effectiveness).

114. *See* Michael Scriven, *Summative Teacher Evaluation*, in HANDBOOK OF TEACHER EVALUATION 244 (Jason Millman ed., 1981).

115. *See* CENTRA, *supra* note 105, at 47–48 (claiming that “the typical student rating form is devised to reflect effectiveness in . . . teacher-centered methods”);

presumed to be representative of the components of all good teaching, this framework renders the instruments differentially consequential for those who engage in alternative forms of teaching.¹¹⁶ Moreover, critics have argued that a professor's pedagogical goals can be qualitatively distinct from students' expectations for their teaching performance, such that an instructor's violation of students' expectations becomes misconstrued as instructional incompetence.¹¹⁷

Ostensibly, results from student surveys are supposed to increase the overall quality of teaching through a process of individual instructors converting student input into improved teaching, and by serving as summative profiles of professors' effectiveness to inform administrative decisions on hiring, retention, promotion, and compensation.¹¹⁸

Arthur Best, *Student Evaluations of Law Teaching Work Well: Strongly Agree, Agree, Neutral, Disagree, Strongly Agree*, 38 SW. U. L. REV. 1, 16 (2008) (concluding that "the forms studied . . . overwhelmingly convey the idea that learning is a passive activity and that teaching consists of a one-way delivery process, with information and skills directed to students by the professor."); Sylvia d'Apollonia & Philip C. Abrami, *Navigating Student Ratings of Instruction*, 52 AM. PSYCHOLOGIST 1198, 1199 (1997) (arguing that typical student feedback forms are based on traditional didactic teaching models and "do not necessarily generalize across other instructional contexts"); Wilbert J. McKeachie, *Student Ratings: The Validity of Use*, 52 AM. PSYCHOLOGIST 1218, 1220 (1997) (pointing out that student rating forms collect information about "conventional classroom teaching"); Tom C. Wilson, *Student Evaluation-of-Teaching Forms: A Critical Perspective*, 12 REV. HIGHER EDUC. 79, 90-91 (1988) (arguing that student rating forms support a basically "conservative pedagogy" and a "reification of knowledge").

116. See Elaine Kolitch & Ann V. Dean, *Student Ratings of Instruction in the USA: Hidden Assumptions and Missing Conceptions About "Good" Teaching*, 24 STUD. HIGHER EDUC. 27 (1999) (finding a typical rating questionnaire to be more compatible with a transmission model of teaching than an engaged-critical model); G. Stevenson Smith, *Assessment Strategies: What Is Being Measured in Student Course Evaluations*, 13 ACCT. EDUC. 3 (2004) (describing the majority of interactions queried on rating forms as behaviors of the instructor rather than methods of developing students' thinking skills).

117. See Arnold S. Linsky & Murray A. Straus, *Student Evaluation of Teaching: A Comparison of Sociology with Other Disciplines*, 1 TEACHING SOC. 103, 112 (1973) (presenting student ratings as moral evaluations of the congruence of a professor's role performance with students' expectations); Richard J. Gigliotti, *Are They Getting What They Expect?*, 15 TEACHING SOC. 365 (1987) (finding that a professor's violation of students' expectations to be significantly related to student ratings); Jordan J. Titus, *Student Ratings in a Consumerist Academy: Leveraging Pedagogical Control and Authority*, 51 SOC. PERSP. 397 (2008) (finding students' expectations to be framed by a consumerist mentality of comfortable satisfaction fundamentally at odds with professors' instructional goals to challenge students to think critically).

118. *Formative evaluation* is assessment conducted while the activities are

Researchers, though, have failed to gather reliable evidence showing, with reasonable certainty, the purported improvements following institutionalizing a student ratings system.¹¹⁹ While educational researchers

forming (in progress), for the purpose of improvement. *Summative evaluation* is judging the worth of activities after their completion, with a focus on the outcome, and usually for the benefit of an external audience or decision-maker. The student rating forms are designed for summative (rather than formative) evaluation, and are distributed at the end of a course of study. There is little controversy concerning the formative role of student feedback, but much heated debate exists about use of student ratings data in summative evaluation for differential rewards. For the original distinction between formative and summative roles of evaluation, see Michael Scriven, *The Methodology of Evaluation*, in PERSPECTIVES OF CURRICULUM EVALUATION 39, 41–43 (R. W. Tyler et al. eds., 1967). For elaboration on the terms, see Michael Scriven, *Beyond Formative and Summative Evaluation*, in EVALUATION AND EDUCATION: AT QUARTER CENTURY 18 (Milbrey W. McLaughlin & D. C. Phillips eds., 1991). For a discussion on the inherent conflict between these two functions, see W. J. Popham, *The Dysfunctional Marriage of Formative and Summative Teacher Evaluation*, 1 J. PERSONNEL EVALUATION EDUC. 269 (1988).

119. See Kenneth A. Feldman, *The Seniority and Instructional Experience of College Teachers as Related to the Evaluations They Receive from Their Students*, 18 RES. HIGHER EDUC. 3 (1983) (reviewing studies and reporting student ratings of teaching to be either unrelated or positively related to academic rank, but unrelated or negatively correlated with instructor's age and years of teaching experience); David Kember et al., *Does the Use of Student Feedback Questionnaires Improve the Overall Quality of Teaching?*, 27 ASSESSMENT & EVALUATION HIGHER EDUC. 411 (2002) (finding that over a 4-year period, student ratings produced no evidence of improvement in the quality of teaching); Herbert W. Marsh & Dennis Hocevar, *Students' Evaluations of Teaching Effectiveness: The Stability of Mean Ratings of the Same Teachers over a 13-Year Period*, 7 TEACHING & TCHR. EDUC. 303 (1991) (using a longitudinal design and a diverse cohort of instructors, finding that teaching effectiveness as perceived by students was stable over time relative to increases in teaching experience). See also George W. Carey, *Thoughts on the Lesser Evil: Student Evaluations*, 22 PERSP. ON POL. SCI. 17, 17 (1993) (judging the belief that student ratings "provide appropriate quality control" to be "a highly dubious presumption at best"); Orlando J. Olivares, *Student Evaluations of Teachers: Intended and Unintended Social Consequences*, 15 J. ON EXCELLENCE C. TEACHING 105, 113 (2004) (arguing that there is "little if any direct evidence to suggest that the wide-spread use of teacher ratings has resulted in more effective teachers or more learned students"); Robert Powell, *Faculty Rating Scale Validity: The Selling of a Myth*, 39 C. ENG. 616, 626 (1978) (observing that "[t]hough student evaluation of faculty systems have been adopted in numerous colleges, there has been a lack of reliable research evidence that the official adoption of such systems within a department or college has ever improved the level of instruction"). But see Harry G. Murray, *Does Evaluation of Teaching Lead to Improvement of Teaching*, 2 INT'L J. ACAD. DEV. 8 (1997) (determining from a review of prior research that under certain conditions, but not others, the introduction of student ratings leads to improvement of teaching); L'Hommedieu

quite consistently identify a factor of effective teaching to be reflected by student learning,¹²⁰ most studies have found little or no correlation between objective measures of student achievement and students' ratings of their instructors.¹²¹ At the same time, documentation grows of the different kinds

et al., *supra* note 110 (finding from a meta-analysis, the overall improvement effect on teaching by student ratings to be too small for any practical value to instructors). Some researchers argue that by inducing lowered academic standards and grade inflation, student ratings can have negative effects on educational quality. *See, e.g.*, VALEN E. JOHNSON, *GRADE INFLATION: A CRISIS IN COLLEGE EDUCATION* (2003); James J. Ryan et al., *Student Evaluations: The Faculty Responds*, 12 RES. HIGHER EDUC. 317 (1980).

120. *See* Cohen, *supra* note 110, at 283 (“Even though there is a lack of unanimity on a definition of good teaching, most researchers in this area agree that student learning is the most important criterion of teaching effectiveness.”); Marsh, *supra* note 113, at 720 (“The most widely accepted criterion of effective teaching is student learning . . .”). In this literature, one aspect of construct validation (or convergent validation) consists of demonstrating substantial positive correlation of student ratings with other purported measures of teaching effectiveness. *See* Cronbach, *supra* note 109. Assessing the construct validity of student ratings in this way is problematic if the measures used to validate those instruments are also of questionable validity. In this case, the criterion measure (amount of student learning) cannot be considered a perfect measure of the construct of interest (teaching effectiveness) because variables apart from the quality of teaching can influence the amount students learn. Serious concerns arise when certain measures of student learning, such as student scores on achievement tests, are used as a sole basis for evaluating an instructor’s teaching performance, a purpose for which such tests were not designed. *See* Jason Millman, *Student Performance as a Measure of Teacher Competence*, HANDBOOK OF TEACHER EVALUATION 146 (Jason Millman ed., 1981); Gene V. Glass, *Using Student Test Scores to Evaluate Teachers*, THE NEW HANDBOOK OF TEACHER EVALUATION: ASSESSING ELEMENTARY AND SECONDARY SCHOOL TEACHERS 229 (Jason Millman & Linda Darling-Hammond eds., 1990); Thomas Kane & Douglas Staiger, *Volatility in School Test Scores: Implications for Test-Based Accountability Systems*, BROOKINGS PAPERS ON EDUCATION POLICY 235 (Diane Ravitch ed., 2002); TIM R. SASS, THE STABILITY OF VALUE-ADDED MEASURES OF TEACHER QUALITY AND IMPLICATIONS FOR TEACHER COMPENSATION POLICY (The Urban Institute 2008); PETER Z. SCHOCHET & HANLEY S. CHIANG, ERROR RATES IN MEASURING TEACHER AND SCHOOL PERFORMANCE BASED ON STUDENT TEST SCORE GAINS (NCEE 2010-4004 2010).

121. A correlation coefficient is a number (ranging from -1.0 to +1.0) that expresses the extent (from none to perfect) and direction (positive or inverse) of relationship between two variables. *Compare* Miriam Rodin & Burton Rodin, *Student Evaluations of Teachers*, 177 SCIENCE 1164, 1165–66 (1972) (showing a strong negative correlation [-.75] between ratings and learning), and Penelope J. Yunker & James A. Yunker, *Are Student Evaluations of Teaching Valid? Evidence from an Analytical Business Core Course*, 78 J. EDUC. BUS. 313 (2003) (finding a statistically significant negative relationship between student evaluations and student achievement), and Ganesh Mohanty et al., *Multi-Method Evaluation of*

of faculty performances that can result in high student ratings irrespective of the quality of teaching.¹²² Grading policies, for example, have been found to have at least a modest positive correlation with student ratings,¹²³

Instruction in Engineering Classes, 18 J. PERSONNEL EVALUATION EDUC.139 (2005) (using pre- and post-tests of content knowledge, finding no relationship between student learning and student ratings), with David A. Dowell & James A. Neal, *A Selective Review of the Validity of Student Ratings of Teaching*, 53 J. HIGHER EDUC. 51, 60 (1982) (combining the results from six studies and calculating a weak “unimpressive” correlation [+0.20] between student ratings and learning), and Jeff Koon & Henry G. Murray, *Using Multiple Outcomes to Validate Student Ratings of Overall Teacher Effectiveness*, 66 J. HIGHER EDUC. 61 (1995) (finding a correlation of +.304 between final examination scores and mean student ratings of overall teaching effectiveness), and Cohen, *supra* note 110 (finding from a meta-analysis of 41 studies, an average correlation of +.43 between overall instructor rating and student achievement). When researchers have studied the relationship of achievement and ratings across consecutive courses with highly cumulative content, students of instructors they rate highly performed less well in subsequent courses than students of lower rated instructors. See Stephen Shmanske, *On the Measurement of Teacher Effectiveness*, 19 J. ECON. EDUC. 307 (1988); Yunker & Yunker, *supra*; Scott E. Carrell & James E. West, *Does Professor Quality Matter? Evidence from Random Assignment of Students to Professors*, 118 J. POL. ECON. 409 (2010).

122. See, e.g., Ian Neath, *How to Improve Your Teaching Evaluations without Improving Your Teaching*, 78 PSYCHOL. REP. 1363 (1996); Paul A. Trout, *How to Improve Your Teaching Evaluation Scores without Improving Your Teaching!*, 7 MONT. PROFESSOR, available at <http://mtprof.msun.edu/Fall1997/HOWTORAI.html>. Manipulative practices that faculty have reported using successfully to obtain more positive ratings include using food (snacks, chocolate, pizza) as an inducement. P. M. Simpson & J. A. Siguaw, *Student Evaluations of Teaching: An Exploratory Study of the Faculty Response*, 22 J. MARKETING EDUC. 199 (2000); Robert J. Youmans & Benjamin D. Jee, *Fudging the Numbers: Distributing Chocolate Influences Student Evaluations of an Undergraduate Course*, 34 TEACHING PSYCHOL. 245 (2007).

123. See, e.g., Anthony G. Greenwald & Gerald M. Gillmore, *Grading Leniency Is a Removable Contaminant of Student Ratings*, 52 AM. PSYCHOLOGIST 1209, 1210 (1997) (observing that “course grades are positively correlated with course evaluative ratings”); Kenneth A. Feldman, *Grades and College Students’ Evaluations of Their Courses and Teachers*, 4 RES. HIGHER EDUC. 69 (1976) (concluding that a student’s anticipated or actual course grade is positively associated with their evaluation of the course and instructor). Although there is general agreement that a correlation exists between expected grades and student ratings, there are multiple interpretations of the magnitude of this relation. For overviews of various explanations, see Herbert W. Marsh, *Students’ Evaluations of University Teaching: Dimensionality, Reliability, Validity, Potential Biases and Usefulness*, THE SCHOLARSHIP OF TEACHING AND LEARNING IN HIGHER EDUCATION: AN EVIDENCE-BASED EXPERIENCE 319 (Raymond P. Perry & John C. Smart eds., 2007).

prompting the contentious speculation that grading leniency can increase ratings.¹²⁴

B. Student Satisfaction

There is vigorous dispute over the possibility that variables extraneous to an instructor's teaching effectiveness influence student ratings.¹²⁵

124. As one assistant professor of English explained, "I still teach with the same rigor and enthusiasm and I still enjoy the material, but I don't hold students as accountable as I used to. I need to get tenure." Louise Churchill, *Professor Goodgrade: Or How I Learned to Stop Worrying and Give Lots of A's*, 52 CHRON. HIGHER EDUC. C1, C1 (2006). One prominent theory explaining the relationship between grades and student ratings is that an instructor's grading leniency influences ratings by students. See Charles F. Eiszler, *College Students' Evaluations of Teaching and Grade Inflation*, 43 RES. HIGHER EDUC. 483 (2002) (supporting the conclusion that student ratings may encourage grade inflation); Greenwald & Gillmore, *supra* note 123 (concluding that a grades-ratings correlation is due to instructors' grading leniency influencing ratings); Valen E. Johnson, *Teacher Course Evaluations and Student Grades: An Academic Tango*, 15 CHANCE 9 (2002) (arguing that there is conclusive evidence of a biasing effect of grades on student evaluations of teaching); J. E. Stone, *Inflated Grades, Inflated Enrollment, and Inflated Budgets: An Analysis and Call for Review at the State Level*, 3 EDUC. POL'Y ANALYSIS ARCHIVES, available at <http://epaa.asu.edu/epaa/v3n11.html> (arguing that an institutional reliance on student ratings results in lowered standards and grade inflation). *But see* Marsh & Roche, *supra* note 111, at 226 (explaining that "teachers cannot get higher than average SETs [student ratings] merely by offering easier courses and giving students higher than deserved grades"); John A. Centra, *Will Teachers Receive Higher Student Evaluations by Giving Higher Grades and Less Course Work?*, 44 RES. HIGHER EDUC. 495 (2003) (demonstrating minimal effect of expected grades on course ratings). For a critical summary of research on the leniency hypothesis, see Steven E. Gump, *Student Evaluations of Teaching Effectiveness and the Leniency Hypothesis: A Literature Review*, 30 EDUC. RES. Q. 55 (2007).

125. Student ratings are considered *biased* "to the extent that they are influenced by variables that are unrelated to teaching effectiveness," or *unfair* "to the extent that they are affected by variables that are not under the control of the instructor." Marsh, *supra* note 113, at 310–11. Variables that may confound measurement of teaching effectiveness include those associated with the administration of the evaluations (timing, rater anonymity, instructor's presence, stated purpose), characteristics of the course (electivity, meeting time, course level, class size, subject area, workload), characteristics of students (personality, prior subject interest, gender, expectations such as expected grade, emotional state, age, political views, prejudice), and characteristics of the instructor (rank, age, experience, reputation, research productivity, gender, race, sexual orientation, physical appearance and attractiveness, personality, expressiveness). For summaries of this vast literature, see Kenneth A. Feldman, *College Students' Views of Male and Female College Teachers: Part II—Evidence from Students' Evaluations of Their Teachers*, 34 RES. HIGHER EDUC. 151 (1993); Cashin, *supra*

Although popular instructors may be popular because they are excellent at enhancing student learning, there is considerable evidence to suggest that the instructor's perceived personality (their "likability") exerts a disproportionate and overwhelming "halo effect" on students' ratings of all specific aspects of a course.¹²⁶ There is less agreement concerning whether

note 110; Anthony G. Greenwald, *Validity Concerns and Usefulness of Student Ratings of Course Instruction*, 52 AM. PSYCHOLOGIST 1182 (1997); Wachtel, *supra* note 109.

126. Initially termed "halo error," the phenomenon of halo effect refers to "suffusing ratings of special features with a halo belonging to the individual as a whole." Edward L. Thorndike, *A Constant Error in Psychological Ratings*, 4 J. APPLIED PSYCHOL. 25, 25 (1920). For research on students' general impressions of teachers influencing their ratings of specific teaching categories, see Philip C. Abrami et al., *The Relationship between Student Personality Characteristics, Teacher Ratings, and Student Achievement*, 74 J. EDUC. PSYCHOL. 111 (1982) (concluding from three studies, perceived instructor personality to be correlated with student ratings); Dennis E. Clayson & Debra A. Haley, *Student Evaluations in Marketing: What Is Actually Being Measured?*, 12 J. MARKETING EDUC. 9 (1990) (finding that personality was significantly related to student ratings); Dennis E. Clayson & Mary Jane Sheffet, *Personality and the Student Evaluation of Teaching*, 28 J. MARKETING EDUC. 149 (2006) (finding student ratings to be largely a measure of perceived personality); Michael Delucchi & Susan Pelowski, *Liking or Learning? The Effect of Instructor Likeability and Student Perceptions of Learning on Overall Ratings of Teaching Ability*, 2 RADICAL PEDAGOGY 1 (2000) (finding a positive effect of instructor likability on students' overall ratings of teaching ability, but not on students' perceptions of learning); Kenneth A. Feldman, *The Perceived Instructional Effectiveness of College Teachers as Related to Their Personality and Attitudinal Characteristics: A Review and Synthesis*, 24 RES. HIGHER EDUC. 139 (1986) (reviewing literature and finding that students' perceptions of the instructor's personality to be moderately to strongly correlated with student ratings of overall teaching effectiveness); Regan A. R. Gurung & Kristin M. Vespia, *Looking Good, Teaching Well? Linking Liking, Looks, and Learning*, 34 TEACHING PSYCHOL. 5 (2007) (finding the strongest single predictor of self-reported learning to be likability of the professor); Ronald B. Marks, *Determinants of Student Evaluations of Global Measures of Instructor and Course Value*, 22 J. MARKETING EDUC. 108 (2000) (determining that instructor personality had a very strong influence on overall ratings); Sally A. Radmacher & David J. Martin, *Identifying Significant Predictors of Student Evaluations of Faculty through Hierarchical Regression Analysis*, 135 J. PSYCHOL. 259 (2001) (revealing a significant relationship between an instructor's personality trait of extroversion and student ratings of teaching); Mark Shevlin et al., *The Validity of Student Evaluation of Teaching in Higher Education: Love Me, Love My Lectures?*, 25 ASSESSMENT & EVALUATION HIGHER EDUC. 397 (2000) (concluding from their study that student ratings of all aspects of a course are significantly affected by students' perceptions of an instructor's charisma); Wendy M. Williams & Stephen J. Ceci, *"How'm I Doing?": Problems with Student Ratings of Instructors and*

student ratings are overly sensitive to perceptions of an instructor's expressiveness and enthusiasm.¹²⁷ Some researchers have found effects of gender variables to be negligible,¹²⁸ while others have demonstrated certain complex ways in which gender matters in student ratings.¹²⁹ Studies

Courses, 29 CHANGE 12 (1997) (demonstrating that content-free stylistic aspects of an enthusiastic teaching style result in substantially higher student ratings).

127. The original study on "educational seduction" described the "Dr. Fox effect" (Fox was the name of the pseudo-professor in the study) as students being seduced into the illusion of learning by a lecturer's charismatic style of delivery, even though she spoke nonsense. Donald H. Naftulin et al., *The Doctor Fox Lecture: A Paradigm of Educational Seduction*, 48 J. MED. EDUC. 630 (1973). Later studies referred to a lecturer's presentation style, or "expressiveness," as influencing student ratings of teaching. See John E. Ware, Jr. & Reed G. Williams, *The Dr. Fox Effect: A Study of Lecture Expressiveness and Ratings of Instruction*, 50 J. MED. EDUC. 149 (1975); John E. Ware, Jr. & Reed G. Williams, *An Extended Visit with Dr. Fox: Validity of Student Ratings of Instruction after Repeated Exposure to a Lecturer*, 14 AM. EDUC. RES. J. 449 (1977); Raymond P. Perry et al., *Educational Seduction: The Effect of Instructor Expressiveness and Lecture Content on Student Ratings and Achievement*, 71 J. EDUC. PSYCHOL. 107 (1979); Williams & Ceci, *supra* note 126. While advocates of student ratings have criticized the methodologies of these studies and dismissed their implications, they have not always denied the findings. See, e.g., Abrami et al., *supra* note 126, at 123 ("How students perceive the personality characteristics of their instructors appears related to their teacher effectiveness ratings.").

128. See, e.g., John A. Centra & Noreen B. Gaubatz, *Is There Gender Bias in Student Evaluations of Teaching?*, 71 J. HIGHER EDUC. 17, 32 (2000) (concluding that gender preferences in ratings "though statistically significant, are not large and should not make much difference in personnel decisions"); Juan Fernández & Miguel Angel Mateo, *Student and Faculty Gender in Ratings of University Teaching Quality*, 37 SEX ROLES 997, 1001 (1997) (finding that "the effect of student and faculty gender on teaching quality assessment is slight or almost non-existent").

129. See Kristi Andersen & Elizabeth D. Miller, *Gender and Student Evaluations of Teaching*, 30 PS: POL. SCI. & POL. 216, 217 (1997) (arguing that "student expectations of the instructor, including expectations based on gender role beliefs, play a significant role in student evaluations"); Christine M. Bachen et al., *Assessing the Role of Gender in College Students' Evaluations of Faculty*, 48 COMM. EDUC. 193 (1999) (using qualitative analysis to uncover how students' gender schema influences their assessments of faculty); Susan A. Basow, *Student Evaluations of College Professors: When Gender Matters*, 87 J. EDUC. PSYCHOL. 656, 664 (1995) (finding that professor gender interacts with "student gender, the discipline of the course, and the specific questions on the form"); Marilyn S. Chamberlin & Joann S. Hickey, *Student Evaluations of Faculty Performance: The Role of Gender Expectations in Differential Evaluations*, 25 EDUC. RES. Q. 3 (2001) (showing gender to be an important influence on how students evaluate professors); Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J.L. & FEMINISM 333 (1996) (concluding from her study

examining if race factors into student ratings are very limited in number, but those available suggest racial bias exists.¹³⁰ Recently, the role that physical attractiveness plays in student ratings¹³¹ has received renewed attention in analyses of data from online anonymous rating websites that include scales for students to score their professor's sexual appeal (e.g., a

of women in the legal academy that students exhibit gender-based stereotypes in their perceptions and evaluations of female law professors); Melanie Moore & Richard Trahan, *Biased and Political: Student Perceptions of Females Teaching About Gender*, 31 C. STUDENT J. 434 (1997) (suggesting that students perceive female instructors as more biased and politically motivated in teaching courses on gender than male instructors of such courses); Joey Sprague & Kelley Massoni, *Student Evaluations and Gendered Expectations: What We Can't Count Can Hurt Us*, 53 SEX ROLES 779 (2005) (finding gender bias in an analysis of students' descriptions of instructors).

130. See Kristin J. Anderson & Gabriel Smith, *Students' Preconceptions of Professors: Benefits and Barriers According to Ethnicity and Gender*, 27 HISP. J. BEHAV. SCI. 184 (2005) (revealing in an experimental study Latina professors being more affected than male or female Anglo professors by the interactive effects of gender and ethnicity in students' ratings of professors' warmth and capability); David A. Dilts et al., *Student Evaluation of Instruction: Objective Evidence and Decision Making*, 2 J. INDIVIDUAL EMP. RTS. 3 (1993 (finding from student self-reports, race of instructor to be significantly correlated with student ratings); Jai Ghorpade & J. R. Lackritz, *Student Evaluations: Equal Opportunity Concerns*, 7 THOUGHT & ACTION 61 (1991) (reporting highly significant differences in student ratings favoring white over minority faculty); Katherine Grace Hendrix, *Student Perceptions of the Influence of Race on Professor Credibility*, 28 J. BLACK STUD. 738 (1998) (suggesting that students employ different criteria to assess, and are more likely to question, the credibility and competence of Black professors than their white counterparts); Theresa A. Huston, *Race and Gender Bias in Higher Education: Could Faculty Course Evaluations Impede Further Progress toward Parity?*, 4 SEATTLE J. SOC. JUST. 591 (2006) (pointing to bias in student ratings against faculty of color); Jeannette M. Ludwig & John A. Meacham, *Teaching Controversial Courses: Student Evaluations of Instructors and Content*, 21 EDUC. RES. Q. 27 (1997) (demonstrating through an experimental study how race and gender interact with course content in students' expectations of professors); Deborah J. Merritt, *Bias, the Brain, and Student Evaluations of Teaching*, 82 ST. JOHN'S L. REV. 235 (2008) (arguing that the conventional practices of collecting student ratings generates bias stemming from social stereotypes); Pamela J. Smith, *Teaching the Retrenchment Generation: When Sapphire Meets Socrates at the Intersection of Race, Gender, and Authority*, 6 WM. & MARY J. WOMEN & L. 53 (1999) (discussing racial stereotypes in student ratings of teaching).

131. See, e.g., Daniel S. Hamermesh & Amy M. Parker, *Beauty in the Classroom: Instructors' Pulchritude and Putative Pedagogical Productivity*, 24 ECON. EDUC. REV. 369 (2005); Gurung & Vespia, *supra* note 126.

chili pepper icon to represent “hotness”).¹³² These studies report that “hot” professors receive higher ratings and more positive comments than professors perceived to be “not hot.”¹³³

A common criticism of such rating websites is that they are consumer-oriented indicators of customer satisfaction rather than academic measures of teaching effectiveness,¹³⁴ a criticism that has also been directed toward the standard college or university-sanctioned rating forms.¹³⁵ When teaching performance is measured by student ratings, good teaching becomes equated with satisfying students’ expectations, and student satisfaction is met by factors such as providing enjoyable and entertaining classroom experiences.¹³⁶

132. Multiple online sites currently exist (including www.professorperformance.com, and www.rateaprof.com) but www.RateMyProfessors.com (RMP) is the most popular, boasting over 11 million ratings of over 1 million professors in over 6000 schools (as of June 2011).

133. James Felton et al., *Web-Based Student Evaluations of Professors: The Relations between Perceived Quality, Easiness, and Sexiness*, 29 ASSESSMENT & EVALUATION HIGHER EDUC. 91 (2004); James Felton et al., *Attractiveness, Easiness and Other Issues: Student Evaluations of Professors on RateMyProfessors.Com*, 33 ASSESSMENT & EVALUATION HIGHER EDUC. 45 (2008); Todd C. Riniolo et al., *Hot or Not: Do Professors Perceived as Physically Attractive Receive Higher Student Evaluations?*, 133 J. GEN. PSYCHOL. 19 (2006); Robert A. Lawson & E. Frank Stephenson, *Easiness, Attractiveness, and Faculty Evaluations: Evidence from RateMyProfessors.Com*, 33 ATLANTIC ECON. J. 485 (2005); Jennifer Bonds-Raacke & John D. Raacke, *The Relationship between Physical Attractiveness of Professors and Students’ Ratings of Professor Quality*, 1 J. PSYCHIATRY, PSYCHOL. & MENTAL HEALTH 1 (2007); Scott Freng & David Webber, *Turning up the Heat on Online Evaluations: Does “Hotness” Matter?*, 36 TEACHING PSYCHOL. 189 (2009); Kathleen M. Silva et al., *Rate My Professor: Online Evaluations of Psychology Instructors*, 35 TEACHING PSYCHOL. 71 (2008).

134. See, e.g., Elizabeth Davison & Jammie Price, *How Do We Rate? An Evaluation of Online Student Evaluations*, 34 ASSESSMENT & EVALUATION HIGHER EDUC. 51 (2009). Some researchers have argued for the legitimacy of RMP ratings after finding RMP and official student ratings to be correlated to some degree. See, e.g., James Otto et al., *Does Ratemyprofessor.Com Really Rate My Professor?*, 33 ASSESSMENT & EVALUATION HIGHER EDUC. 355 (2008); Michael J. Brown et al., *Rating Ratemyprofessors.Com: A Comparison of Online and Official Student Evaluations of Teaching*, 57 C. TEACHING 89, 91 (2009).

135. See Titus, *supra* note 117 (finding enjoyment widely used by students as sole criterion for ratings of instructors, thereby conflating students’ pleasure and teaching quality).

136. Kent L. Granzin & John J. Painter, *A New Explanation for Students’ Course Evaluation Tendencies*, 10 AMER. EDUC. RES. J. 115 (1973); Jerry W. Shepherd, *Relevance and Responsibility: A Postmodern Response. Response to “A Postmodern Explanation of Student Consumerism in Higher Education,”* 25 TEACHING SOC. 333 (1997); Titus, *supra* note 117; Paul A. Trout, *Disengaged Students and the Decline of Academic Standards*, 10 ACAD. QUESTIONS 46 (1997);

Despite considerable controversy about the value of student ratings, there is substantial agreement that problems result from an over-reliance on them as a basis for decisions in faculty employment and compensation.¹³⁷ The numerical and statistical accounts give the illusory appearance of precision and scientific objectivity and obscure the value judgments, opinions, and complexities of interpretation actually instantiated in the data.¹³⁸ At most institutions, the determination of professional status (such as tenure and promotion) and financial rewards (such as merit raises and bonuses) are firmly attached to student ratings.¹³⁹ Given the authoritative status granted student ratings simply from their ubiquitous use, when

Jannecke Wiers-Jenssen et al., *Student Satisfaction: Towards an Empirical Deconstruction of the Concept*, 8 QUALITY HIGHER EDUC. 183 (2002).

137. See Reinsch et al., *supra* note 106 (arguing that student evaluations and their use by administrators raise a substantive due process rights issue); Wines & Lau, *supra* note 106 (concluding that the use of student evaluations as the sole source of evidence in assessing teaching effectiveness in faculty retention and promotion decisions might violate academic freedom and the First Amendment). See also Gerald M. Gillmore, *Student Ratings as a Factor in Faculty Employment Decisions and Periodic Review*, 10 J.C. & U.L. 557, 575–76 (1983–84) (arguing that “student ratings are a valid indicator of teaching quality in the aggregate,” yet concluding that “student ratings deserve to play a major role, but they were never intended to, not should they, shoulder the entire burden of the evaluation of faculty teaching”); Merritt, *supra* note 130, at 274 (explaining that “student evaluations impose serious risks of bias”); Theall & Franklin, *supra* note 110, at 46 (cautioning that “[e]ven when the data are technically rigorous, one of the major problems is day-to-day practice: student ratings are often misinterpreted, misused, and not accompanied by other information that allows users to make sound decisions”).

138. In modern society, quantification enjoys elevated prestige as an ideal means of representing reality. See ALFRED W. CROSBY, *THE MEASURE OF REALITY: QUANTIFICATION AND WESTERN SOCIETY, 1250–1600* (1997) (providing an historical account of the development of a quantification perception of the world); THEODORE M. PORTER, *TRUST IN NUMBERS: THE PURSUIT OF OBJECTIVITY IN SCIENCE AND PUBLIC LIFE* (1995) (investigating the appeal of quantification and the development of cultural meanings of objectivity); Donald W. Katzner, *Our Mad Rush to Measure: How Did We Get into This Mess?*, 3 METHODUS 18, 18–23 (1991) (discussing our cultural “enchantment with measurement” and “the myth of synonymy of objective analysis and measurement”).

139. The close association of salary to student ratings is illustrated by reforms at Texas A&M University. One policy for “holding tenured professors more accountable, viewing students like customers and universities like businesses,” awards faculty bonuses of up to \$10,000, based solely on end-of-semester anonymous student evaluations. Vimal Patel, *A&M Regents Push Reforms*, ¶ 1 (June 13, 2010), <http://www.theeagle.com/am/A-amp-amp-M-regents-push-reforms>. Future reforms involve measuring “teaching efficiency and effectiveness” by data on “salary and benefit cost, number of students taught over the last year, average ‘student satisfaction rating’ and ‘average percentage’ of As and Bs given.” *Id.* ¶ 46.

situated in a consumerist academy, student ratings can effectively serve to redefine excellence in higher education by distinguishing particular forms of pedagogy to be institutionally rewarded from forms to be penalized.¹⁴⁰ Because they are so consequential, student ratings, and all the biases they embody, can put pressure on faculty to self-censor their views if they are ones not popularly held, and to teach as students prefer.¹⁴¹

Institutionally authorized anonymous student ratings increasingly are posted on institutions' websites.¹⁴² Students are not disinterested or neutral observers and, absolved of any accountability through anonymity,¹⁴³ can

140. RIESMAN, *supra* note 14; Matthew D. Shank et al., *Understanding Professional Service Expectations: Do We Know What Our Students Expect in a Quality Education?*, 13 J. PROF. SERVICES MARKETING 71 (1995). Student ratings have become consequential enough that some faculty have resorted to unethical practices to alter scores. In one case, a math professor for 30 years at University of Saskatchewan (Stephen Berman), used RateMyProfessor.Com to anonymously post 80 comments over a seven-month period wherein he maligned some colleagues and complimented others. After an investigation (by a panel from outside the university), he was fired. Dan Carnevale, *U. of Saskatchewan Fires Tenured Professor Accused of Maligning Colleagues on RateMyProfessors.Com Web Site*, 52 CHRON. HIGHER EDUC. A28 (2006). In another case, a professor at the University of Iowa's College of Law resigned after allegations that he tampered with anonymous student evaluations. Kenneth Kress admitted replacing three unfavorable student-completed questionnaires with his own versions and altering portions of two others to improve his rating from an "average" score to one designated as "outstanding." Elia Powers, *Legal Turmoil for Former Law Prof*, INSIDE HIGHER ED, <http://insidehighered.com/news/2007/04/04/iowa>. The Iowa Supreme Court Attorney Disciplinary Board suspended his law license indefinitely. *Iowa v. Kress*, 747 N.W.2d 530 (Iowa 2008).

141. *See* Wines & Lau, *supra* note 106.

142. Texas law mandates that student ratings be posted on all public university websites. *See* TEX. EDUC. CODE ANN. § 51.974(h) (West 2009).

143. Researchers have found that student ratings when signed (yet confidential) tend to be more positive responses than anonymous ratings. *See* Christopher J. Fries & R. James McNinch, *Signed Versus Unsigned Student Evaluations of Teaching: A Comparison*, 31 TEACHING SOC. 333, 333 (2003); Eugene Stone et al., *Effects of Anonymity and Retaliatory Potential on Student Evaluations of Faculty Performance*, 6 RES. HIGHER EDUC. 313 (1977). The question of whether students have a privacy interest in evaluations they give to professors at the end of the semester arose in the case of a student who wrote disparaging comments on course rating forms. According to news accounts, the University of Georgia disciplined a student who responded to the question "What aspects of the course could use improvement or change?" by writing "[Professor X] is a complete asshole. I hope he chokes on a dick, gets AIDS and dies. To hell with all gay teachers who are terrible with their jobs and try to fail students!" Anonymity was waived and the student was found in violation of three University Codes of Conduct. Paul Ruddle, *Student cited for Survey Remarks*, RED AND BLACK (Oct. 27, 2007), <http://media.ww.redandblack.com/media/storage/>

penalize a professor who is not compliant with their consumer-oriented agenda, viewing instructional techniques used to educate them as a reason to punish an instructor with low ratings.¹⁴⁴ When students' unattributed critical comments are made accessible to the public, the consequences may be professionally damaging, yet targeted professors have little legal recourse.¹⁴⁵

C. Student Ratings in Court

Traditionally, courts have viewed the evaluation of the academic performance of faculty to be a matter for academicians, not the judiciary,¹⁴⁶

paper871/news/2007/10/22/News/Student.Cited.For.Survey.Remarks-3045812.shtm. See also, Randy Cohen, *Anonymity Breach*, N.Y. TIMES, Jan. 20, 2008 § 6 (Magazine), at 22, available at http://www.nytimes.com/2008/01/20/magazine/20wwln-ethicist-t.html?_r=2&ref=magazine&oref=slogin.

144. See Larry Crumbley et al., *Students' Perceptions of the Evaluation of College Teaching*, 9 QUALITY ASSURANCE EDUC. 197 (2001) (finding students rating conscientious instructors harshly for asking them questions they could not answer, grading strictly, giving quizzes, and assigning homework); Dilts et al., *supra* note 130 (reporting students' admissions of using the evaluation process to punish instructors they dislike).

145. Robert M. O'Neil, *Bias, "Balance," and Beyond: New Threats to Academic Freedom*, 77 U. COLO. L. REV. 985, 996 (2006). A case from California, *Curzon-Brown v. San Francisco Cmty. Coll. Dist.*, No. 307335 (San Francisco Super. Ct. 2000), provides an illustrative example. Daniel Curzon-Brown, an English professor, brought a defamation suit against the webmaster of a student-published website ("TeacherReview.com") which posted unedited, anonymous reviews of faculty at City College of San Francisco and San Francisco State University. Curzon Brown claimed to have been falsely labeled "homomaniac," "racist," and "mentally ill," among other profane and homophobic charges against him and other faculty ("bigoted," "mean old drunk," "just plain evil," and "perverted"). Debra J. Saunders, *Right to Flame Can't Make It Right to Flame*, S.F. CHRON., May 2, 2000, at A21. See also, Tanya Schevitz, *Prof Fights Web Trash Talk: City College Students Use Online Site for Harsh Attacks on Faculty*, S.F. CHRON., Apr. 6, 2000, at A1; Pamela Burdman, *City College Instructors Claim Web Defamation*, S.F. CHRON., May 1, 1998, at A1; Harriet Chiang, *City Instructors Sue Over Bad-Mouthing Web Site*, S.F. CHRON., Oct. 22, 1999, at A26. A physics professor, Jesse David Wall, joined the lawsuit when an amended complaint was filed seeking damages for offensive comments students had posted about them. The suit conceded that students may legally form and express these opinions, but disputed their right to do so anonymously. Shortly before the case went to hearing, and amidst concerns that the court would award to the defendant, the professors voluntarily dismissed their defamation suit and settled the case. Lisa Fernandez, *Instructor at City College Settles Suit on Web Critiques*, SAN JOSE MERCURY NEWS, Oct. 3, 2000, at 4B.

146. See TERRY L. LEAP, *TENURE, DISCRIMINATION, AND THE COURTS* 56 (2d ed. 1995) ("Judges have repeatedly expressed reservations about becoming

and their decisions generally have addressed the consistency and objectivity of procedures, but not the scientific standards of the evaluations.¹⁴⁷ The deference courts have granted in these cases generally has been to institutional administrators, not to those who teach. The remarkable consequences of this selective deference was illustrated in *Scheelhaase v. Woodbury Central Community School District*,¹⁴⁸ an early case concerning the termination of a grade school teacher. The circuit court accepted a school administrator's erroneous opinion, contrary to testimony by experts in the field, that a school teacher's incompetence was indicated by her students' scores on standardized achievement tests. A concurring judge explicitly stated that the school board "possessed the right and responsibility of evaluating its teacher personnel, and such evaluations, where they are based on some evidence, even though possibly erroneous, will not serve to make those determinations subject to judicial review as unconstitutionally arbitrary and capricious."¹⁴⁹

Today, as far as courts are concerned, administrators can evaluate a faculty member's teaching by whatever means they choose, including student ratings, without the merits of those ratings meeting any academic or psychometric standard.¹⁵⁰ In *Yarcheski v. Reiner*,¹⁵¹ a first-year tenure-track

involved in academic personnel matters primarily because they feel ill equipped to question the subjective and scholarly evaluations that must be made regarding reappointment, promotion, and tenure decisions."); Copeland & Murry, *supra* note 106, at 246 ("Traditionally the courts have been reluctant to interfere in what has been basically deemed to be an academic exercise For the most part, the courts have viewed the evaluation of academic performance as an exercise outside the expertise of the courts and one better left to academicians.").

147. See BENJAMIN BAEZ & JOHN A. CENTRA, TENURE, PROMOTION, AND REAPPOINTMENT: LEGAL AND ADMINISTRATIVE IMPLICATIONS. ASHE-ERIC HIGHER EDUCATION REPORT. No. 1 (1995), at 139 ("Despite the subjectivity of measuring the quality of a faculty member's scholarship, service, and teaching accomplishments, courts will rarely, if ever, question the appropriateness of an institution's criteria (or how they measure them) for granting reappointment, promotion, or tenure."); ROBERT M. HENDRICKSON & BARBARA A. LEE, ACADEMIC EMPLOYMENT AND RETRENCHMENT: JUDICIAL REVIEW AND ADMINISTRATIVE ACTION. ASHE-ERIC HIGHER EDUCATION REPORT. No. 8 (1983), at 30 ("[C]ourts are more likely to review the fairness or reasonableness of the application of the decisional criteria than evaluate the relevance or appropriateness of the criteria themselves.").

148. 488 F.2d 237 (8th Cir. 1973).

149. *Id.* at 245 (Bright, J., concurring).

150. For summaries of academic freedom cases in Canada and the United States involving student ratings, see Robert E. Haskell, *Academic Freedom, Promotion, Reappointment, Tenure and the Administrative Use of Student Evaluation of Faculty: (Part II) Views from the Court*, 5 EDUC. POL'Y ANALYSIS ARCHIVES 1 (1997). <http://epaa.asu.edu/ojs/article/viewFile/618/74>.

151. 669 N.W.2d 487 (S.D. 2003).

faculty member at the University of South Dakota claimed that the university violated his academic freedom by over-reliance upon student evaluations that related complaints ranging from his “arrogance in the classroom to dissatisfaction with his disorganized teaching style.”¹⁵² Thomas Yarcheski was formally evaluated as unsatisfactory in teaching, with the following commentary: “[S]tudent evaluations indicated students did not learn relevant material, indicated assignments were not helpful, and there was a lack of systematic presentations [sic].”¹⁵³

Yarcheski filed a grievance arguing that his non-renewal resulted solely from student evaluations and that such over-reliance infringed on his academic freedom because it involved “students judging members of the academy” and “students controlling the destiny of faculty through their opinions and opinion surveys.”¹⁵⁴ The court observed that “[e]valuating academic performance is a venture beyond our expertise and our jurisdiction.”¹⁵⁵ In denying his appeal, the court first noted that academic freedom generally assures educators that there will be no interference in their First Amendment pursuits by administrators, other faculty, or students. On the other hand, “[u]nder the aegis of academic freedom, a university may determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”¹⁵⁶ Thus, a college or university may lawfully choose not to renew the contract of a nontenured professor whose pedagogical attitude and teaching methods fail to conform to the institution’s standards.¹⁵⁷ The court stated that institutions of higher learning must ensure the quality of the education they provide and that the use of student surveys as part of the teaching evaluation process is not an infringement of academic freedom.¹⁵⁸ Finally, the court concluded, “[s]urely, educational institutions have the right to expect that their teachers will be able to teach,” the implication being that while judges themselves admittedly defer to those with

152. *Id.* at 489.

153. *Id.* at 494.

154. *Id.* at 497. When Yarcheski’s grievance was denied, he appealed in circuit court. After his attorneys filed an untimely brief, his case was dismissed and he filed a malpractice claim against them. The court ruled that his case would not have prevailed if the brief had been timely, and the district court affirmed.

155. *Id.* at 492.

156. *Id.* at 497 (citations and quotation marks omitted).

157. In the early 1970s, the Sixth Circuit Court of Appeals in *Hetrick v. Martin*, 480 F.2d 705 (6th Cir. 1973), also held that a university may terminate an instructor “whose pedagogical style and philosophy do not conform to the pattern prescribed by the school administration.” *Id.* at 706.

158. *See Yarcheski*, 669 N.W.2d at 498.

educational expertise, students' qualifications as evaluators of instructional quality need not be questioned.¹⁵⁹

In *Carley v. Arizona Board of Regents*,¹⁶⁰ an untenured art professor was also unsuccessful in arguing that student ratings were an infringement on his academic freedom. Denny Carley was denied tenure and not retained based on a determination that his teaching was inadequate. His pedagogy in a commercial art course included regularly leaving classes and studio sessions unsupervised in order to promote a business atmosphere and instill independence and self-reliance. Carley characterized his professional style as being a "demanding teacher contrary to some student expectations" and maintained that his popularity suffered and resulted in low student evaluations.¹⁶¹ His appraisals by various committees and administrators had been inconsistent. The court noted that students' complaints and low ratings of his teaching over a period of time featured prominently in multiple levels of decision making.¹⁶² Carley argued that his teaching methodology was protected speech and that student evaluations should not be relied upon primarily or solely in faculty review because, in being critical of his methods, they were an infringement on protected activity. His appeal at the university level resulted in the institution's "University Academic Freedom and Tenure committee," with a six-to-three vote in his favor, finding that "Carley's rights to academic freedom and due process had been violated."¹⁶³

Carley sued, claiming that he was engaged in a constitutionally protected activity—that his teaching methods were "protected speech"—and that this activity was a motivating factor in the university's decision not to rehire him.¹⁶⁴ He contended that the university must show he would have been terminated notwithstanding the protected activity.¹⁶⁵ Carley filed a complaint in superior court; when the superior court upheld the administrative decision, Carley filed a notice of appeal to the Court of Appeals of Arizona.¹⁶⁶ The court observed that "student evaluations," as a

159. *Id.* As some commentators have observed, students do not meet the federal standards for giving expert testimony, yet "students are put into the role of being 'experts' as to proper pedagogy, without being experts on pedagogy." Roger W. Reinsch et al., *Evidentiary and Constitutional Due Process Constraints on the Uses by Colleges and Universities of Student Evaluations*, 32 J.C. & U.L. 75, 103 (2005).

160. 737 P.2d 1099 (Ariz. Ct. App. 1987).

161. *Id.* at 1101.

162. *Id.* at 1104.

163. *Id.* at 1100.

164. *Id.* at 1101.

165. *Id.* Carley's assertion the university must show he would have been terminated notwithstanding the protected activity refers to the rule established in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, (1977).

166. *Carley*, 737 P.2d at 1101.

means for assessing teaching, had been upheld without discussion in a number of previous cases, and it pointed out that Carley offered no authority for supporting his claim that using only student ratings was impermissible.¹⁶⁷ The court refused to equate teaching methods with speech content and therefore did not recognize pedagogy as protected speech.¹⁶⁸ Because teaching methods were considered to be independent of teaching content, the court concluded that relying upon student evaluations expressing disapproval of Carley's teaching did not violate his First Amendment rights.¹⁶⁹

In cases involving allegations of discrimination with respect to the summative use of student ratings, courts have chosen not to scrutinize the methodology of student ratings data-gathering. In *Jiminez v. Mary Washington College*,¹⁷⁰ a tenure-track economics professor received a terminal contract after an appraisal finding his teaching effectiveness to be "negligible." Students' letters of support for his classroom behavior and a student's testimony at trial suggested that he was the victim of a concerted effort at racial and national origin discrimination among some students seeking to have him terminated allegedly as the result of poor student evaluations. While the trial court found in his favor, concluding that his student evaluations were "tainted by collusion and racial and national origin animus,"¹⁷¹ the appellate court reversed, judging the evidence of a student conspiracy to be "rank speculation" and "insubstantial."¹⁷²

Even when the methods of data-collection are clearly defective, courts have favored an institution's position that student ratings accurately reflect teaching quality. In a sex discrimination case, *Brouard-Norcross v. Augustana College Association*,¹⁷³ the Eighth Circuit Court of Appeals unequivocally declared student ratings to be unbiased and ruled that "student reaction is a legitimate, nondiscriminatory factor on which to

167. *Id.* at 1105. The four cases cited by the court were: *Lovelace v. Se. Mass. Univ.*, 793 F.2d 419, 425–26 (1st Cir. 1986); *Dyson v. Lavery*, 417 F. Supp. 103, 111 (E.D. Va 1976); *Lieberman v. Grant*, 474 F. Supp. 848, 866 (D. Conn. 1979); and *Peters v. Middlebury Coll.*, 409 F. Supp. 857, 867 (D. Vt. 1976). While most courts have not questioned the validity of student ratings, an exception to this widespread trend was provided in *Johnson v. Univ. of Pittsburg*, 435 F. Supp. 1328 (W.D. Pa. 1977). In this denial of promotion and tenure case, the district court was considering evidence of sex discrimination, and after a dean "deprecated" student ratings, the court reported that it had "placed little reliance on students' surveys" as reflecting teaching performance. *Id.* at 1367.

168. *Carley*, 737 P.2d at 1102.

169. *Id.* at 1103.

170. 57 F.3d 369 (4th Cir. 1995).

171. *Id.* at 376.

172. *Id.* at 380.

173. 935 F.2d 974 (8th Cir. 1991) (en banc).

evaluate tenure candidates.”¹⁷⁴ This declaration is especially troubling in light of the established facts in this case, in particular that the student rating forms had been distributed in a manner “distorted” from the regular procedure, sent to students in one course after they had received unfavorable grades yet not distributed to students in another course who all received “A’s.”¹⁷⁵ The court observed that Brouard-Norcross “neither alleges nor provides any evidence that the student evaluation forms, or the comments on them, are gender-biased in any way.”¹⁷⁶ The court was satisfied that if the forms were deemed to have content validity, no consideration need be given to the question of whether the data collected had been corrupted in ways that might impact the validation of their use as indicators of teaching quality.

Similarly, in *Bickerstaff v. Vassar College*,¹⁷⁷ the district court declared student ratings to be an “objective” indicator of “teaching of a high quality,” a criterion considered an exception to what was deemed the college’s otherwise vague and subjective promotion criteria—or, in the judge’s words, “just so much bafflegab.”¹⁷⁸ Joyce Bickerstaff, a joint Education/African Studies professor alleged that the college discriminated against her on the basis of gender and race in denying her promotion to full professor. As part of the evidence examined, the court considered whether the institution’s use of student ratings in its determination that she had failed to reach the required level of “marked distinction” in teaching was racially discriminatory. Unconvinced that different racial compositions of course enrollments accounted for her uneven student ratings,¹⁷⁹ the Second Circuit upheld the college’s use of “Course Evaluation Questionnaires” as the principal tool for assessing teaching ability.¹⁸⁰

When used to assess teaching, the content on student rating forms, in effect, operationally defines it,¹⁸¹ but courts have not scrutinized the adequacy or appropriateness of the assessment criteria that the forms contain. In *Wirsing v. Board of Regents of the University of Colorado*,¹⁸² a

174. *Id.* at 976.

175. *Id.* at 980–81 (Heaney, J. dissenting).

176. *Id.* at 976 (majority opinion).

177. 992 F. Supp. 372 (S.D.N.Y. 1998), *aff’d*, 196 F.3d 435 (2d Cir. 1999).

178. *Bickerstaff*, 992 F. Supp. at 375.

179. Bickerstaff had received very high ratings in over 80 percent of her African studies classes, where African American students made up one-fourth to one-third of the enrollment, compared with such scores in only about 40 percent of her education courses that enrolled few, if any, African American students. *Bickerstaff*, 196 F.3d at 448–50.

180. *Id.* at 454–56.

181. Sylvia d’Apollonia & Philip C. Abrami, *Scaling the Ivory Tower, Part I: Collecting Evidence of Instructor Effectiveness*, 6 PSYCHOL. TEACHING REV. 46, 51 (1997).

182. 739 F. Supp. 551 (D. Colo. 1990), *aff’d without opinion.*, 945 F.2d 412

tenured professor of education, Marie Wirsing, was put in the position of affirming the use of course evaluation procedures to which she took intellectual exception. She challenged the use of an assessment tool that was “contrary to her theory of education” and the scholarly intent of her courses.¹⁸³ Her philosophical opposition was on grounds that she taught her students that “teaching and learning cannot be evaluated by any standardized approach.”¹⁸⁴ Consistent with her views, she refused to administer the university’s standardized course evaluation forms for her classes and used a non-standard form instead. Additionally, Wirsing’s teaching performance had been evaluated and given the highest possible rating by a faculty committee. Wirsing argued that by forcing her to use the evaluation forms, the university was “interfering arbitrarily with her classroom method, compelling her speech, and violating her right to academic freedom.”¹⁸⁵

The court held that although the professor “may have a constitutionally protected right under the First Amendment to disagree with the university’s policies, she has no right to evidence her disagreement by failing to perform the duty imposed upon her as a condition of employment.”¹⁸⁶ The adoption of a college or university policy of evaluation, the court found, is protected by “the University’s own right to academic freedom.”¹⁸⁷ The court reasoned that the evaluation forms “are not expressive of a content-based regulation” and therefore did not interfere with the professor’s academic freedom.¹⁸⁸ Because the court found it to be the purview of the university to select the means of evaluating teaching, it did not consider Wirsing’s claims that the standardized form in question lacked validity to be relevant.

(10th Cir. 1991).

183. *Id.* at 553.

184. *Id.* at 552.

185. *Id.* at 553.

186. 739 F. Supp. at 553 (citation omitted).

187. *Id.* at 554.

188. *Id.* In determining whether a particular case of regulation of speech is constitutionally permissible, courts distinguish between *content-based* restrictions that place restraint on the message communicated, and *content-neutral* restrictions of communication that are without regard to the message. The Supreme Court has said that content-based restrictions must meet a more strict and exacting level of scrutiny than those that are content-neutral. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 758–63 (1997). See also Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981).

III. THE MARKETPLACE IN HIGHER EDUCATION

A. Students' Expressive Rights

An emerging collection of cases arising from students' disagreements with professorial decisions places the professional autonomy of faculty in conflict with students' expressive rights, rather than against administrative controls on teaching. *Axson-Flynn v. Johnson*¹⁸⁹ involved a practicing member of the Church of Jesus Christ of Latter-Day Saints who was a student in the University of Utah's Actor in Training Program (ATP). Christina Axson-Flynn sued the university's theatre department professors for violating her right to free speech and free exercise of religion under the First Amendment by requiring students to perform in-class plays to which she had religious objections. The professors asserted that as part of the curriculum "it is an essential part of an actor's training to take on difficult roles, roles which sometime[s] make actors uncomfortable and challenge their perspective."¹⁹⁰ The student alleged that she told the department before being accepted into the ATP that she would not remove her clothing, use the words "God" or "Christ" as profanity, or "say the four-letter expletive beginning with the letter F."¹⁹¹ After acceptance into the program, she omitted some words and phrases she found religiously objectionable in assigned scripts for in-class performances, without permission and without penalty. At the end of her first semester, her professors warned her that she would "no longer be given allowance on language."¹⁹² She dropped the program and filed suit.

The trial court ruled against her, finding that she was "not being asked to be an instrument for, or to adhere to, an ideological point of view."¹⁹³ The court hypothesized that:

Were this [curriculum requirement] a First Amendment violation, then a believer in 'creationism' could not be required to discuss and master the theory of evolution in a science class; a neo-Nazi could refuse to discuss, write or consider the Holocaust in a critical manner in a history class. Indeed, a Catholic law student could not be required to make an argument in favor of

189. 151 F. Supp. 2d 1326 (D. Utah 2001), *rev'd*, 356 F.3d 1277 (10th Cir. 2004).

190. *Id.* at 1328.

191. *Axson-Flynn*, 356 F.3d at 1281. The appellate court noted she had no religious objections to saying some words that could be considered swearing, such as 'shit'; her objections were limited to the words "fuck," (which she claimed debased her religious beliefs by vulgarizing what her religion held to be a sacred act appropriate only within a marriage), "goddamn," and its variants. *Id.*

192. *Axson-Flynn*, 151 F. Supp. 2d at 1329.

193. *Id.* at 1336.

capital punishment during an in-class exercise designed to enable law students to argue cases they find unsympathetic.¹⁹⁴

On appeal, the Tenth Circuit acknowledged that courts have a long history of deferring to the professional judgment of faculty to determine what is pedagogically appropriate in the college classroom and, relying on *Hazelwood*, that in the context of a school curriculum, speech can be restricted or compelled as long as the decision is “reasonably related to legitimate pedagogical concerns.”¹⁹⁵

The court stated that it gave “substantial deference to educators’ stated pedagogical concerns” and declined to “second-guess the *pedagogical* wisdom or efficacy of [their] goal,”¹⁹⁶ but it concluded that there was a question as to whether the justification for the script adherence requirement was truly pedagogical or a pretext for religious discrimination.¹⁹⁷ The appellate court therefore reversed and remanded the case for further proceedings to determine if the policy was actually neutral; if there was no underlying discriminatory purpose, the university could not be prohibited from requiring the student to use religiously offensive words. Before action was taken at the district level, a settlement was reached and the case was dropped.¹⁹⁸

Courts have generally asserted the principle of judicial noninterference when students bring suit over their academic assessment by faculty,¹⁹⁹ but

194. *Id.*

195. *Axson-Flynn*, 356 F.3d at 1290.

196. *Id.* at 1292 (emphasis in original) (citation omitted).

197. *Id.* at 1293.

198. According to news accounts, the settlement required the university to appoint a committee to create a policy allowing students to request exemptions from curricular exercises that conflict with their religious beliefs, with an appeals process for students whose requests were denied. In addition, the university reimbursed Axson-Flynn for her attorneys’ fees (approximately \$250,000), tuition, and fees. The school invited her to rejoin the ATP; she declined. *See College, Mormon Student Settle Theatrical-Swearing Case*, FIRST AMENDMENT CENTER July 15, 2004, <http://www.firstamendmentcenter.org/college-mormon-student-settle-theatrical-swearing-case>; Angie Welling, *U., Axson-Flynn Settle Civil Rights Suit*, DESERET MORNING NEWS, July 15, 2004, at A1.

199. *See* Thomas A. Schweitzer, “Academic Challenge” Cases: Should Judicial Review Extend to Academic Evaluations of Students?, 41 AM. U. L. REV. 267, 295 (1992) (reviewing cases involving students challenging adverse academic evaluations by faculty and finding an “overwhelming deference shown by the courts to university professors and administrators who make the disputed academic judgments”); Virginia Davis Nordin, *The Contract to Educate: Toward a More Workable Theory of the Student-University Relationship*, 8 J.C. & U.L. 141 (1981) (finding that in cases involving grades, courts usually practice judicial noninterference in academic decision making); Olivas, *supra* note 7, at 1841 (“Generally, in any situation in which students’ rights are pitted against those of faculty, academic tradition will prevail and faculty rights will triumph.”). *See also*

there is evidence of growing tension between the pedagogical authority of faculty and students' rights. *Brown v. Li*²⁰⁰ concerned a master's degree candidate at the University of California at Santa Barbara, Christopher Brown, who covertly inserted a "Disacknowledgments" section to his thesis, after his thesis was initially approved, in which he vulgarly criticized certain individuals for allegedly obstructing his progress toward a degree.²⁰¹ When he attempted to file his thesis, including the unapproved addendum, in the university's library—in order to satisfy a university requirement—the dean and the thesis committee members were notified of the additional section. After they rejected his vulgar disacknowledgments, Brown drafted another version of the section that expressed the same sentiment without the profanity. The thesis committee refused to approve the "Disacknowledgments" section, even in its nonprofane form, because the thesis modified by the section no longer "satisfied professional requirements for publication in the discipline."²⁰² Brown was informed that his degree would be confirmed after he removed the section that he had added to the approved thesis.

After unsuccessfully pursuing internal grievances over the thesis committee's decision, Brown was placed on academic probation for exceeding the time limit for completing his degree requirements. Although the university later awarded him the degree, he sued, claiming violation of his First Amendment free speech rights by the delay in granting his degree and the exclusion of his thesis from the library. While the three-judge panel of the Ninth Circuit upheld the trial court's rejection of the validity of his constitutional claim, it did so by rendering three divergent opinions. Judge Graber's prevailing opinion expressly adopted the reasoning in *Hazelwood*,²⁰³ transferring that secondary school precedent to higher

Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985) (citation omitted) (cautioning that federal courts are unsuited "to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions" and that courts "should show great respect for the faculty's professional judgment"); Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 90 (1978) ("Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.").

200. 308 F.3d 939 (9th Cir. 2002).

201. *Id.* at 943. The "Disacknowledgements" section read: "I would like to offer special *Fuck You's* to the following degenerates for of [sic] being an ever-present hindrance during my graduate career . . .," listing various people including the dean and staff of the graduate school, library managers, a former governor, university regents, and "Science." *Id.* at 942 (emphasis in original).

202. *Id.* at 943.

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

education, finding that the committee's rejection of his thesis was a legitimate decision, because it was "reasonably related to a legitimate pedagogical objective" (teaching about the proper format of a scientific paper).²⁰⁴ The court acknowledged the thesis committee's right to make academic judgments about the completion of degree requirements and said it must defer "to the university's expertise in defining academic standards and teaching students to meet them."²⁰⁵ The court described a faculty member as having a First Amendment right to "evaluate students as determined by his or her independent professional judgment,"²⁰⁶ and therefore, the court found that "the committee members had an affirmative First Amendment right not to approve Plaintiff's thesis," which, in turn, "underscores [the student's] lack of a First Amendment right to have his nonconforming thesis approved."²⁰⁷

In his dissent, Judge Reinhardt rejected as inappropriate to the adult university setting of this case the reliance on a standard that the Supreme Court had used to dilute the free speech rights of high school students.²⁰⁸

204. *Brown*, 308 F.3d at 952.

205. *Id.* Judge Ferguson agreed that Brown's First Amendment claim should be dismissed but disagreed with Judge Graber as to the reason. The concurring judge saw the case to be about "an erosion of academic integrity." *Id.* at 955 (Ferguson, J., concurring). Because Brown's insertion of the section was "academically dishonest," and the "First Amendment does not protect nor authorize deception," the rejection and the delay were justified. *Id.* at 956 (Ferguson, J., concurring).

206. *Id.* at 952 (opinion)

207. *Id.*

208. Most Supreme Court cases directly addressing First Amendment rights for students have arisen in the context of secondary public schools. For a discussion of those students' substantive speech rights, see C. Thomas Dienes & Annemargaret Connolly, *When Students Speak: Judicial Review in the American Marketplace*, 7 YALE L. & POL'Y REV. 343 (1989). For a discussion of the distinctions between the free-speech rights of students in secondary schools and students in post-secondary institutions, see Karyl Roberts Martin, *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). For discussions of the misapplication of judicial standards from secondary to post-secondary settings, see Gail Sorenson & Andrew S. Lamanque, *The Application of Hazelwood v. Kuhlmeier in College Litigation*, 22 J.C. & U.L. 971 (1996); Mark J. Fiore, Comment, *Trampling the "Marketplace of Ideas": The Case against Extending Hazelwood to College Campuses*, 150 U. PA. L. REV. 1915 (2002). For discussions focused on the *Brown* court's error in deeming the constitutional interests of a graduate student to be equivalent to those of a high school student, see Adam R. Gardner, Comment, *Giving Credit Where it is Due? An "Acknowledgement" of Higher Education in America*, 37 LOY. L.A. L. REV. 69 (2003); Tom Saunders, Comment, *The Limits on University Control of Graduate Student Speech*, 112 YALE L.J. 1295 (2003).

For Judge Reinhardt, the university's reactions to Brown's critical speech raised a plausible claim that his thesis had been rejected to punish him for his offensive viewpoint.²⁰⁹ Robert O'Neil has cautioned that if the student's view had prevailed in federal court, the potential implications for faculty academic freedom would have been grave, including the liability of the faculty members of his thesis committee for their academic judgments about degree completion.²¹⁰ In O'Neil's view, a ruling in the form of Judge Reinhardt's dissent could have left any academic decision concerning academic standards open to legal challenge, requiring defense in federal courts to prove its reasonable academic grounds.

B. Educational Malpractice

Courts generally have been reluctant to recognize a cause of action for educational malpractice, one, that is, that alleges that an educational institution has failed to provide an adequate quality of education.²¹¹ Recently, though, the growing trend to treat education as a product sold to students as consumers is reflected by courts increasingly accepting contract claims by students.²¹² In *Alsides v. Brown Institute, Ltd.*,²¹³ students sued a trade school claiming misrepresentations were made in the school's brochure about the content and forms of instruction. The appellate court 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 provided that the review did not require an inquiry into the intricacies of educational processes and theories.²¹⁴

209. *Brown*, 308 F.3d at 958 (Reinhardt, J., concurring in part and dissenting in part).

210. ROBERT O'NEIL, *ACADEMIC FREEDOM IN THE WIRED WORLD: POLITICAL EXTREMISM, CORPORATE POWER, AND THE UNIVERSITY* 229 (2008).

211. John G. Culhane, *Reinvigorating Educational Malpractice Claims: A Representational Focus*, 67 WASH. L. REV. 349, 350–53 (1992). In *Ross v. Creighton Univ.*, 957 F.2d 410, 416–17 (7th Cir. 1992) the court specified that a student cannot "simply allege that the education was not good enough . . . but must point to an identifiable contractual promise that the [university] failed to honor."

212. See GAJDA, *supra* note 6, at 214–22 (describing cases illustrating student contract rights); Todd A. DeMitchell & Terri A. DeMitchell, *Statutes and Standards: Has the Door to Educational Malpractice Been Opened?*, 2003 BYU EDUC. & L.J. 485 (2003) (considering malpractice liability of educators in the context of growing accountability measures in education); Peter F. Lake, *Tort Litigation in Higher Education*, 27 J.C. & U.L. 255 (2000) (reviewing trends in tort litigation and finding that courts increasingly consider student and institution relationships in terms of business categories). For a historical review of the "educational contract," see Nordin, *supra* note 199.

213. 592 N.W.2d 468 (Minn. Ct. App. 1999).

214. *Id.* at 473.

While breach of contract cases have been less successful when focused on the classroom context, the ruling in *Alsides* considered allegations specifically concerning curriculum content and pedagogical methods.²¹⁵ In another case, where a law student was unsuccessful in suing Loyola University of New Orleans over a legal profession course that was allegedly incomplete and unsatisfactorily taught, a dissenting judge's perspective reflects the legal implications of consumerism in higher education. In *Miller v. Loyola University of New Orleans*,²¹⁶ Judge Plotkin argued, in dissent, that:

In this day and age, with the ever increasing price of higher education, [colleges and] 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 [colleges and] universities, comes added responsibility and accountability to the consuming public.²¹⁷

The adoption of a consumerist approach to accountability, assessment, and accreditation in higher education has pressured faculty to create comprehensive syllabi, detailing information about the professor, course content and materials, procedures, policies, prohibitions, penalties, as well as performance expectations as a form of "contract" between the professor and the students.²¹⁸ In the rhetoric of "greater transparency and accountability" deployed by a libertarian think tank,²¹⁹ Texas law now mandates that public colleges and universities in Texas post on their websites detailed syllabi for all undergraduate courses.²²⁰ At the same time, increasing liability concerns have led some colleges and universities and the American Association of University Professors to encourage faculty to

215. Lake, *supra* note 212, at 309. Claims that the district court had dismissed and the appellate court allowed to proceed included: the institution failed to provide instruction on installing and upgrading software; instructors were frequently late or absent and wasted class time by discussing personal issues; the institute represented that students would have "hands on" training; and the institute did not provide enough hours of instruction as set forth in student materials. *See supra* note 213, at 474 n.3.

216. 829 So. 2d 1057 (La. Ct. App. 2002).

217. *Id.* at 1064 (Plotkin, J., dissenting).

218. *See, e.g.*, Jay Parkes & Mary B. Harris, *The Purposes of a Syllabus*, 50 C. TEACHING 55, 55–57 (2002); Jeanne M. Slattery & Janet F. Carlson, *Preparing an Effective Syllabus: Current Best Practices*, 53 C. TEACHING 159, 160 (2005).

219. *E.g.*, JAY SCHALIN, OPENING UP THE CLASSROOM: GREATER TRANSPARENCY THROUGH BETTER, MORE ACCESSIBLE COURSE INFORMATION 1 (John William Pope Center for Higher Education Policy 2008).

220. H.B. No. 2504, effective Sept. 1, 2009, available at <http://www.legis.state.tx.us/tlodocs/81R/billtext/pdf/HB02504F.pdf>.

employ tentative language, disclaimers, and warnings in their detailed syllabi as a form of protection against potential student challenges.²²¹

C. Balance and Neutrality

Based on the view that “academic freedom has a dark side,” mandatory website postings of syllabi is intended to expose “a professor’s deviation from normal expectations,” including engaging in “radical indoctrination” and “introduc[ing] material that is shocking, immoral and offensive to extremes.”²²² Prominently intersecting the debate over academic freedom are allegations that a disproportionate percentage of faculty are liberal, and that an ideological imbalance in the academy has led to the indoctrination of students to radical liberal viewpoints.²²³ For decades, the professoriate has been found to be one of the most liberal occupations in America, but with diversity across disciplines within the academy and across institution types.²²⁴ Studies claiming that the academy predominantly consists of

221. Springer, *supra* note 11, at ¶¶ 20–21. See also Paula Wasley, *The Syllabus Becomes a Repository of Legalese*, CHRON. HIGHER EDUC. March 14, 2008, at A1 (2008). Students have been found to view the syllabus as a contractual obligation, and interpret any shift from the course’s predictability as a violation of their consumer rights. Titus, *supra* note 117, at 411–12. In *Alsides v. Brown Inst., Ltd.*, 592 N.W.2d 468 (Minn. Ct. App. 1999) some of the allegations that the appellate court allowed to proceed are the kinds of complaints that students could raise if a professor deviated in some way, such as curriculum content or pedagogical method, from that specified on the course syllabus. Lake, *supra* note 212, at 309.

222. SCHALIN, *supra* note 219, at 4.

223. See GARY A. TOBIN & ARYEH K. WEINBERG, VOLUME I: A PROFILE OF AMERICAN COLLEGE FACULTY: POLITICAL BELIEFS AND BEHAVIOR. (2006); Barry Latzer & Jerry L. Martin, *Intellectual Diversity: Time for Action* (2005), available at <https://www.goacta.org/publications/downloads/IntellectualDiversityFinal.pdf>; Daniel B. Klein & Charlotta Stern, *Political Diversity in Six Disciplines*, 18 ACAD. QUESTIONS 40 (2004/2005); Daniel B. Klein & Charlotta Stern, *Professors and Their Politics: The Policy Views of Social Scientists*, 17 CRITICAL REV. 257 (2005); David Horowitz, *Democratic Abuse of the Academy*, (Apr. 19, 2004), available at <http://www.frontpagemag.com/Articles/Read.aspx?GUID=D59A6DEA-12F9-4C37-92BC-4E1DA41D0313>.

224. PAUL F. LAZARSFELD & WAGNER THIELENS, *THE ACADEMIC MIND: SOCIAL SCIENTISTS IN A TIME OF CRISIS* (1958); EVERETT CARLL LADD, JR. & SEYMOUR MARTIN LIPSET, *THE DIVIDED ACADEMY: PROFESSORS AND POLITICS* (1975); BRUCE L. R. SMITH ET AL., *CLOSED MINDS? POLITICS AND IDEOLOGY IN AMERICAN UNIVERSITIES* (2008); Michael A. Faia, *The Myth of the Liberal Professor*, 47 SOC. EDUC. 171 (1974); Richard F. Hamilton & Lowell L. Hargens, *The Politics of the Professors: Self-Identifications, 1969–1984*, 71 SOC. FORCES 603 (1993); Stanley Rothman et al., *Politics and Professional Advancement among College Faculty*, 3 FORUM (2005), available at <http://www.bepress.com/forum/vol3/iss1/art2/>; John F. Zipp & Rudy Fenwick, *Is the Academy a Liberal*

dangerous radicals are repeated by politicians and widely disseminated in the popular media,²²⁵ despite scholarly criticism of the methodologies employed and conclusions drawn in those works.²²⁶ Some recent work has suggested that the academy is not growing more liberal over time, and currently there is movement toward a more moderate faculty, with more heterogeneity of political opinion than previously believed.²²⁷

Based on selected course syllabi, the American Council of Trustees and Alumni (ACTA) has attacked undergraduate liberal arts curriculum for “professors . . . using their classrooms to push political agendas in the name of teaching students to think critically,” and higher education in general for being “narrow, single-minded, and tendentious.”²²⁸ For conservative critics,

Hegemony? The Political Orientations and Educational Values of Professors, 70 PUB. OPINION Q. 304 (2006); Neil Gross & Solon Simmons, *The Social and Political Views of American Professors* (Working Paper 2007), available at http://www.wjh.harvard.edu/~ngross/lounsbey_9-25.pdf.

225. For example, in a report on a survey on higher education, a columnist stated, “America’s academic paradise harbors plenty of serpents.” 376 ECONOMIST 8 (September 10, 2005).

226. See JOHN LEE, THE “FACULTY BIAS” STUDIES: SCIENCE OR PROPAGANDA? (2006), available at http://www.freeexchangeoncampus.org/index.php?option=com_docman&task=cat_view&gid=22&Itemid=25 (critically reviewing reports by ACTA and by Horowitz); Zipp & Fenwick, *supra* note 224 (arguing that the studies are based on data that is unrepresentative of institutions and/or disciplines, and mistakenly focus on party identification rather than political ideology); Gross & Simmons, *supra* note 224 (noting specific methodological shortcomings); FREE EXCHANGE ON CAMPUS, FACTS COUNT: AN ANALYSIS OF DAVID HOROWITZ’S THE PROFESSORS: THE 101 MOST DANGEROUS ACADEMICS IN AMERICA (2006), available at http://www.freeexchangeoncampus.org/index.php?option=com_docman&task=cat_view&gid=12&Itemid=25 (critiquing Horowitz’s allegations and lack of evidence); FREE EXCHANGE ON CAMPUS, FACTS STILL COUNT: AN ANALYSIS OF DAVID HOROWITZ’S ONE-PARTY CLASSROOM (2009), available at http://www.freeexchangeoncampus.org/index.php?option=com_docman&task=cat_view&gid=43&Itemid=25 (examining Horowitz’s inaccuracies and baseless conclusions).

227. Gross & Simmons, *supra* note 224; Hamilton & Hargens, *supra* note 224; Zipp & Fenwick, *supra* note 224.

228. Anne D. Neal, *How Many Ward Churchills? A Study by the American Council of Trustees and Alumni* 3–4 (2006), available at <https://www.goacta.org/publications/downloads/ChurchillFinal.pdf>. Some ABOR publications have also relied exclusively on institutional website postings of course syllabi. See, e.g., DAVID HOROWITZ & JACOB LAKSIN, ONE PARTY CLASSROOM: HOW RADICAL PROFESSORS AT AMERICA’S TOP COLLEGES INDOCTRINATE STUDENTS AND UNDERMINE OUR DEMOCRACY (2009). A report by another group presented as evidence of the liberal slant of faculty, the frequency counts of the words ‘diversity’ and ‘freedom’ using Goggle searches of college and university websites. National Association of Scholars, *Words to Live By: How Diversity*

the prevalence of liberal professors inevitably leads to the oppression of a conservative minority. ACTA claims that almost half of American college students feel that professors use their classes to preach politics, and a quarter of them believe they must mimic their professors' views in order to get a good grade.²²⁹ David Horowitz, a prominent conservative activist, provides anecdotal accounts from students of faculty lowering grades or verbally criticizing students for holding conservative political views.²³⁰ Despite the compelling stories, there is no definitive empirical evidence of ideological bias on the part of liberal faculty; in fact, one contemporary study found that conservative students received grades equal to or higher than more liberal students.²³¹ There is some evidence, though, that students' own partisan or ideological views are correlated with their ratings of their professors. One study found that students tend to judge their faculty on the basis of their politics rather than merit; when students perceive their professors to be political allies they rate their courses more favorably than they do for those faculty members whom students perceive to be ideologically distant.²³² Few studies have tried to determine whether any relationship actually exists between faculty ideology and advocacy through pedagogy, but contrary to charges of indoctrination, two recent publications found that faculty politics have no significant impact on the political views of students.²³³

Nationwide efforts by advocacy groups have advanced the view that students' academic rights are being violated when students' views differ

Trumps Freedom on Academic Websites (2006), available at http://www.nas.org/polimage.cfm?doc_Id=873&size_code=Doc.

229. American Council of Trustees and Alumni, *Politics in the Classroom: A Survey of Students at the Top 50 Colleges and Universities* (2004), available at https://www.goacta.org/publications/downloads/PoliticsintheClassroom_.pdf; Jerry L. Martin & Anne D. Neal, *Defending Civilization: How Our Universities Are Failing and What Can Be Done About It* 5–6 (Revised and expanded 2002), available at <https://portfolio.du.edu/portfolio/getportfoliofile?uid=85865>.

230. For examples of recounted stories of injustices, see Horowitz, *supra* note 223; David Horowitz, *Campus Blacklist* (2003), available at http://www.studentsforacademicfreedom.org/file_download/5/campusblacklistbooklet.pdf. For discussions of discredited accounts, see SMITH ET AL., *supra* note 224; Mary Beth Marklein, *Ex-Liberal Navigates Right*, USA TODAY, (May 31, 2006), available at http://www.usatoday.com/news/education/2006-05-31-horowitz-cover_x.htm.

231. See Markus Kemmelmeier et al., *What's in a Grade? Academic Success and Political Orientation*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 1386 (2005).

232. See April Kelly-Woessner & Mathew C. Woessner, *My Professor Is a Partisan Hack: How Perceptions of a Professor's Political Views Affect Student Course Evaluations*, 39 PS: POL. SCI. & POL. 495 (2006).

233. See *id.*; Mack D. Mariani & Gordon J. Hewitt, *Indoctrination U.? Faculty Ideology and Changes in Student Political Orientation*, 41 PS: POL. SCI. & POL. 773 (2008).

from those of their faculty.²³⁴ In slightly altered variations, an academic bill of rights (ABOR), such as the one developed by Horowitz,²³⁵ has been initiated in the United States House of Representatives and twenty-eight state legislatures; although failing to become law, it has received serious consideration.²³⁶ Ironically adopting the rhetorical frames of individual rights and academic freedom to legitimize their appeal, right-wing forces have waged a focused campaign to limit the autonomy of faculty and place control over what is taught and said in higher education classrooms under legislative oversight.

The ABOR and its derivatives seek to mandate the replacement of what they regard as ideologically based instruction with “more balanced, genuinely tolerant teaching.”²³⁷ Values such as balance and “intellectual diversity” are invoked as ideological imperatives, with the ultimate aim of policing classroom knowledge and compelling a curriculum of “neutrality”²³⁸ with “readings representing multiple views.”²³⁹ Numerous academic groups have denounced such mandates, the ideological agenda they obscure, and government regulation of speech that they seek.²⁴⁰ A

234. On the website Students for Academic Freedom (<http://www.studentsforacademicfreedom.org/>), an organization founded by Horowitz, students’ allegations of faculty abuses against conservatives are tracked online. On “Politics in the Classroom” (<http://www.politicsintheclassroom.com/>) students can write anonymous reports on professors’ alleged use of classrooms for political purposes. On “No Indoctrination” (<http://www.NoIndoctrination.org/>) students are invited to document instances of blatant sociopolitical bias by faculty. On “Campus Watch” (<http://www.campus-watch.org/>) students can report Middle East-related “analytical failures, the mixing of politics with scholarship, intolerance of alternative views, apologetics, and the abuse of power over students.” Some universities, including Temple University and Pennsylvania State University, have adopted procedures for students to complain about professors who they believe have presented biased lessons in their classes. See Robin Wilson, *Using New Policy, Students Complain About Classroom Bias on 2 Pa. Campuses*, CHRON. HIGHER EDUC., July 23, 2008, available at <http://chronicle.com/article/Students-in-Pa-Complain-About/1004>.

235. *Academic Bill of Rights (ABOR) (2003)*, available at <http://www.studentsforacademicfreedom.org/documents/1925/abor.html>.

236. For a history of ABOR and “intellectual diversity” legislation promoted by ACTA, see the Legislation Tracker by Free Exchange on Campus, http://www.freeexchangeoncampus.org/index.php?option=com_content&task=section&id=5&Itemid=61. The text of different legislative versions of the ABOR is available at <http://www.studentsforacademicfreedom.org/documents/?c=Legislation-Texts>.

237. Neal, *supra* note 228, at 38.

238. ABOR, *supra* note 235, ¶ 15.

239. Latzer & Martin, *supra* note 223, at 13.

240. American Association of University Professors, *Freedom in the Classroom*, 93 ACADEME 54 (2007); American Association of University

danger of such legislation is that it could “invite diversity to be measured by political standards that diverge from the academic criteria of the scholarly profession.”²⁴¹ For example, assuming a posture of neutrality implies treating as credible even those opinions that have been repudiated within the discipline, and this is “flatly incompatible with a scholar’s accountability to professional standards.”²⁴² Balance is not a necessary component of pedagogy or an essential academic goal, but it is invoked by conservatives as a political strategy that could help to dismantle professorial authority.²⁴³

Byrne has pointed out that “[a] key flaw in the arguments for the ABOR is that faculties have no obligation to be viewpoint neutral in any constitutional sense regarding substantive disputes within their disciplines.”²⁴⁴ Courts have made clear that students do not have the legal right to demand that classes be viewpoint neutral or “balanced.” In *Edwards v. Aguillard*,²⁴⁵ the U.S. Supreme Court rejected the argument that a student’s academic freedom to be informed of both views (evolution and creationism) could justify the legislative requirement that both views be taught. The court reasoned, in part, that academic freedom meant academic freedom for teachers as well: “The Act [in question] actually serves to diminish academic freedom by removing the flexibility to teach evolution without also teaching creation science, even if teachers determine that such curriculum results in less effective and comprehensive science instruction.”²⁴⁶ More recently, in *Board of Regents of the University of*

Professors, *Statement on Academic Bill of Rights* (2003), available at <http://www.aaup.org/AAUP/comm/rep/A/abor.htm?PF=1>; American Council on Education, *Statement on Academic Rights and Responsibilities* (2005), available at <http://www.aaup.org/NR/rdonlyres/746CB2D9-7EFE-4A89-A0D3-76E5CAA7213E/0/ABORJointStatement.pdf>; Association of American Colleges and Universities, *Academic Freedom and Educational Responsibility* (2006), available at <http://www.aacu.org/about/statements/documents/academicFreedom.pdf>; FREE EXCHANGE ON CAMPUS, *MANUFACTURED CONTROVERSY: AN EXAMINATION OF THE “ACADEMIC BILL OF RESTRICTIONS” MOVEMENT* (2009), available at http://www.freeexchangeoncampus.org/index.php?option=com_docman&task=cat_view&gid=44&Itemid=25.

241. American Association of University Professors, *Statement on Academic Bill of Rights*, *supra* note 240, at ¶ 2.

242. FINKIN & POST, *supra* note 5, at 103.

243. See Henry A. Giroux, *Academic Freedom under Fire: The Case for Critical Pedagogy*, 33 C. LITERATURE 1 (2006).

244. J. Peter Byrne, *Constitutional Academic Freedom after Grutter: Getting Real About the “Four Freedoms” of a University*, 77 U. COLO. L. REV. 929, 945 (2006).

245. 482 U.S. 578 (1987).

246. *Id.* at 586 n.6. In *Edwards*, the Supreme Court struck down a Louisiana law that required when evolution was taught in public schools, creationism must also be taught. This 7–2 decision ended any prospect of public schools in the

Wisconsin System v. Southworth,²⁴⁷ Justice Souter observed, in his concurrence, that within a university setting, “students are inevitably required to support the expression of personally offensive viewpoints in ways that cannot be thought constitutionally objectionable unless one is prepared to deny the University its choice over what to teach . . . [and] claim that the University is somehow required to offer a spectrum of courses to satisfy a viewpoint neutrality requirement.”²⁴⁸

D. Hostile Environment

ACTA recommends that institutions include questions about a professor’s “social, political, or religious bias” on student rating forms.²⁴⁹ As an expedient means of monitoring faculty behavior, institutions have begun adding questions to existing rating forms to gauge students’ perceptions of the political climate in the classroom, aiming to detect sexism, racism, and cultural insensitivity on the part of a faculty member.²⁵⁰ Early research findings, explained in terms of “fundamental attribution error,”²⁵¹ suggest that students attribute hostility and

United States being legally forced to teach creationism or “creation science,” or “the literal interpretation of the Book of Genesis.” *Id.* at 596. Later, antievolutionists adopted the term “intelligent design” which the district court, in *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 722 (M.D. Pa. 2005), determined to be “creationism re-labeled.”

247. 529 U.S. 217 (2000).

248. *Id.* at 242–43 (Souter, J., concurring).

249. Latzer & Martin, *supra* note 223, at 13. The questions they recommend are: instructor’s presentation of social and political issues (rated balanced and fair or biased and unfair); course readings on controversial issues (rated multiple perspectives or one-sided); classroom environment with respect to student expression of political or social views (rated tolerant to hostile); treatment of students who express political or social views (rated tolerant to hostile); use of classroom to present instructor’s personal political views (rated rare or infrequent to frequent); instructor comments on politics unrelated to the course (rated rare or infrequent to frequent). *Id.* at 34.

250. Stanley Coren, *Are Course Evaluations a Threat to Academic Freedom?*, ACADEMIC FREEDOM AND THE INCLUSIVE UNIVERSITY 104, 105 (Sharon E. Kahn & Dennis J. Pavlich eds., 2000).

251. The *fundamental attribution error* is a cognitive bias in explaining the behavior of others that places a heavy emphasis on others’ internal personality traits, characteristics, or motives, and underestimates external situational factors. The term was coined by Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY, VOL. 10, 173, 184 (Leonard Berkowitz ed., 1977). For a seminal study in this area, see Edward E. Jones & Victor A. Harris, *The Attribution of Attitudes*, 3 J. EXPERIMENTAL SOC. PSYCH. 1 (1967). In student ratings research, the fundamental attribution error predicts that students cannot

discriminatory intentions to an instructor whose course content they do not like, or one who discusses research that reaches unpopular conclusions, or presents scientific evidence that does not agree with beliefs that they hold.²⁵² In addition, there is evidence of a “halo effect” in studies finding students with an unfavorable opinion of the course to be more likely to label the instructor as racist, sexist, and culturally biased.²⁵³

In *Cohen v. San Bernardino Valley College*, the trial court recognized that “[g]ood teaching should challenge students and at times may intimidate students or make them uncomfortable”; however, the court also presumed that the “rough and tumble” attribute of learning, while perhaps desirable, is unnecessary in higher education.²⁵⁴ Contrary to the *Cohen* court, academics tend to define education as a commitment to “critically engaging the difficult,” that is, the “perplexing, challenging, troubling, unsettling, [and] intriguing.”²⁵⁵

Contemporary conservative critics of higher education accuse faculty of creating a hostile environment for students possessing conservative political or religious views. The ABOR defines academic freedom in terms that grant students an “intellectual independence” from intellectual authorities within the institution.²⁵⁶ Their mandate states that “professors should never intimidate or treat unfairly students with a ‘dissenting’ point of view.”²⁵⁷ Professional norms and ethics call for teachers to respect all of their students, but respect for students is not the same as acceptance of all viewpoints that students hold and express.²⁵⁸ Because some students

separate a message (such as objectively presented scientific data) from the messenger (a student’s perception of the instructor’s attitudes).

252. Stanley Coren, *When Teaching Is Evaluated on Political Grounds*, 6 ACAD. QUESTIONS 73 (1993); Stanley Coren, *Student Evaluations of an Instructor’s Racism and Sexism: Truth or Expedience?*, 8 ETHICS & BEHAV. 201 (1998); see also Moore & Trahan, *supra* note 129 (finding that students perceive female instructors teaching about gender as more biased and more likely to have a political agenda than male instructors teaching about gender).

253. On the concept of *halo effect*, see *supra* note 126. See also Heidi J. Nast, ‘Sex,’ ‘Race’ and Multiculturalism: Critical Consumption and the Politics of Course Evaluations, 23 J. GEOGRAPHY HIGHER EDUC. 102, 104 (1999) (arguing that by addressing “issues of homophobia, racism, classism, misogyny or heterosexism” in their curriculum, faculty can cause student discomfort that may result in negative evaluations).

254. *Cohen v. San Bernardino Valley Coll.*, 883 F. Supp. 1407, 1419–20 (C.D. Cal. 1995).

255. James F. Slevin, *Keeping the University Occupied and out of Trouble*, 130 ADE BULL. 50, ¶¶ 26–27 (2002). See also MARTHA NUSSBAUM, CULTIVATING HUMANITY: A CLASSICAL DEFENSE OF REFORM IN LIBERAL EDUCATION (1997).

256. ABOR, *supra* note 235.

257. Latzer & Martin, *supra* note 223.

258. FINKIN & POST, *supra* note 5, at 107.

experience criticism as hostility or harassment, charges of a hostile educational environment may reflect students' painful and difficult experiences when faculty interrogate their ideas.²⁵⁹ In *Closed Minds?*, Smith, Mayer, and Fritschler argue that a risk-averse campus climate is beginning to emerge, with professors not confronting and challenging students' beliefs because of the anticipated negative student reactions and the detrimental consequences that follow.²⁶⁰

IV. CONCLUSION

Almost a century ago, Thorstein Veblen observed that "the ideals of scholarship are yielding ground, in an uncertain and varying degree, before the pressure of businesslike exigencies."²⁶¹ He warned against turning the university into a "corporation of learning,"²⁶² arguing that "the intrusion of business principles in the universities goes to weaken and retard the pursuit of learning, and therefore to defeat the ends for which a university is maintained."²⁶³ Pedagogy lies at the core of the mission of colleges and universities, and is a site where professorial authority in teaching practices competes against the influence exercised by students who have been granted consumer sovereignty in a marketplace academy.

In many respects, the present drive for student control echoes the manifestation of student power in medieval universities of southern Europe, when sovereign power was vested in the student community.²⁶⁴ In thirteenth century Bologna, professors were mere employees, annually selected by the students, and completely dependent on student fees for their university income.²⁶⁵ Once selected, professors were compelled to take an oath of submission to the jurisdiction of an organized student guild.²⁶⁶ Under the student governing system, professors were forbidden to attend university assemblies, yet bound to unquestionably obey any statutes the

259. Titus, *supra* note 117.

260. SMITH ET AL., *supra* note 224.

261. THORSTEIN VEBLÉN, THE HIGHER LEARNING IN AMERICA: A MEMORANDUM ON THE CONDUCT OF UNIVERSITIES BY BUSINESS MEN 190 (Academic Reprints 1954) (1918).

262. *Id.* at 35.

263. *Id.* at 224. For a contemporary analysis of the conflicts between the principles of education and the market, see John McMurtry, *Education and the Market Model*, 25 J. PHIL. EDUC. 209 (1991). See also Robert N. Bellah, *Freedom, Coercion, and Authority*, 85 ACADEME 16 (1999).

264. See HASTINGS RASHDALL, THE UNIVERSITIES OF EUROPE IN THE MIDDLE AGES VOL. I 176–203 (1964).

265. *Id.* at 208.

266. *Id.* at 195.

student congregations proclaimed.²⁶⁷ Student control over a lecturer's life was pervasive. At the beginning of the academic session, the students and professors reached agreement on the text material to be covered and its equal distribution over the course of the year.²⁶⁸ Failure to reach a particular portion in the text by the previously specified date, or glossing over or omitting a portion of the material, rendered the professor liable to repay some or all of the student fees, depending on the extent of perceived professorial negligence.²⁶⁹ Punctuality requirements were rigidly enforced. A professor was fined for starting a lecture a minute late or continuing after the prescribed time.²⁷⁰ To ensure a professor's conformity to the statutes, at the beginning of the academic session, a professor had to deposit a specified sum with a city banker who acted on behalf of the students, and from this deposit any fines incurred were deducted.²⁷¹ Such formidable control was supported by a system of secret denunciations. Certain students were elected to act as spies who continuously monitored and assessed professors' lecturing performances and were obligated to report finable irregularities, such as a bad lecturing technique.²⁷²

Medieval student power succeeded in "reducing the masters to an almost incredible servitude."²⁷³ Medieval student power movements, though, were not aimed at changing the established utilitarian function of the university of their time. Students were not concerned with the content of the curriculum, or even the selection of content for a course syllabus, as there was an agreed upon core of studies derived from a standard set of texts.²⁷⁴ In contrast, the success of contemporary students' rights claims and demands for customer satisfaction is leading to their power to specify and enforce curricular requirements and forms of communicating the curriculum. As a result, faculty's fundamental control over the selection of ideas to expose students to, and the teaching techniques to employ, is now threatened.

The complicated combination of the commitment of colleges and universities to the market and commercialization, conservative emphases on stronger control over curriculum, and managerial forms of accountability in higher education, has led to widespread measurement policies and surveillance mechanisms that intrude upon and threaten our

267. Alan B. Cobban, *Medieval Student Power*, 53 PAST AND PRESENT 28, 40 (1971).

268. *Id.* at 41.

269. RASHDALL, *supra* note 264, at 197.

270. *Id.* at 196.

271. Cobban, *supra* note 267, at 41.

272. RASHDALL, *supra* note 264, at 197.

273. *Id.* at 148. The titles of *master*, *doctor* and *professor* were used synonymously in the Middle Ages. Cobban, *supra* note 267, at 19.

274. Cobban, *supra* note 267, at 31.

most creative and critical pedagogical practices. The traditional role of the professoriate in guarding academic integrity is increasingly being challenged, as what students think of their professors and of their teaching gains greater importance to college and university administrators. Students exercise their influence constantly by their responsiveness or boredom in the classroom, and then by attributing a level of tedium or their inattentiveness to failure on the part of the professor to hold their interest.²⁷⁵ Today's student culture is often described as one of disengagement²⁷⁶ and entitlement,²⁷⁷ so it should come as no surprise if students who enter colleges and universities with a consumer mentality are not comfortable accepting a professor's pedagogical authority and choose to file legal complaints in order to have their demands satisfied.

The imposition of a market logic into higher education has been facilitated by the power of a marketing discourse to frame the public conversation, by substituting the vocabulary of a market transaction (such as the student as consumer metaphor) for a pedagogical relationship. Institutionalization of the student consumer metaphor has been accompanied by a shift in the ways in which people think about education, transformed from a process of becoming (more learned) to a product for purchase (a grade, or a degree). The public has expressed concern about the value of postsecondary education as a personal investment, and higher education institutions have responded with structures designed "to engage citizens in determining how public higher education can serve them" with the aim of "providing world-class service and value to students."²⁷⁸ Additionally, legislative bodies have identified specific performance and productivity measurements and dictated how institutions must provide evidence that they are achieving those institutional objectives or risk

275. RIESMAN, *supra* note 14, at 278. *See also* Titus, *supra* note 117 (finding this general term of disapproval to be the most popular reason students give for assigning low ratings to professors).

276. *See, e.g.*, Holly Hassel & Jessica Lourey, *The Dea(r)th of Student Responsibility*, 53 C. TEACHING 2 (2005); Paul A. Trout, *Disengaged Students and the Decline of Academic Standards*, 10 ACAD. QUESTIONS 46 (1997).

277. *See, e.g.*, PETER SACKS, *GENERATION X GOES TO COLLEGE: AN EYE OPENING ACCOUNT OF TEACHING IN POSTMODERN AMERICA* (1996); Jill Singleton-Jackson et al., *Students as Consumers of Knowledge: Are They Buying What We're Selling?*, 35 INNOVATIVE HIGHER EDUC. 343 (2010).

278. Terry MacTaggart, *Shaping Alaska's Future: Setting Strategic Directions for the University of Alaska* 3 (2011). http://www.alaska.edu/files/research/Shaping-Alaska's-Future_100311.pdf. The quotations are from a current report distributed at this author's institution, but the discourse of "service" and "value" is ubiquitous in American universities.

reductions in annual appropriations.²⁷⁹ A logic of quantification gauges value within a framework of utility and materially measured performance, but an educated person is not quantifiable.

In efforts to increase the influence of populist values and dilute the academic authority of the professoriate, political pressure is being brought to bear on administrators to regulate faculty's academic speech. Cameron, Meyers, and Olswang argue that legislation based on ABOR and its progeny could provide "[e]nforceable rights [that] are likely to shift the balance of academic decision-making" from "professional educators and into the hands of students, government, or courts"²⁸⁰ Aggrieved students, apparently possessing rights to consumer satisfaction, could file suit when a professor's lecture, course textbook, or classroom discussion inadequately incorporates dissenting viewpoints, or when their professor fails to affirm equal truth status of unsupported opinions that students express. Student spies of the thirteenth century now appear in the form of conservative student group websites posting anonymous accusations. In one controversial instance, a group at University of California, Los Angeles solicited class notes, handouts, and illicit recordings of lectures (offering \$100 for all three) of faculty "radicals" who were "actively proselytizing their extreme view in the classroom."²⁸¹ Such student privileges could further reduce faculty independence in their roles as teachers, while empowering courts to evaluate the adequacy of courses and professorial performance to determine whether students' rights have been infringed.

These are dangerous times for the professoriate. If faculty do not resist external demands and administrative monitoring, their residual freedom to define the curriculum, decide pedagogical strategies, and determine standards of student achievement will be eviscerated. To experience "intellectual growth and discovery" requires "the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable."²⁸² Although judicial authorities have recognized a

279. See F. King Alexander, *The Changing Face of Accountability: Monitoring and Assessing Institutional Performance in Higher Education*, 71 J. HIGHER EDUC. 411 (2000).

280. Cameron et al., *supra* note 15, at 290. Similarly, Byrne has stated that enactment of state statutes based on ABOR "would violate constitutional academic freedom because they would displace academic control of core educational decisions with lay political control." Byrne, *supra* note 244, at 945.

281. See Jon Weiner, "UCLA's Dirty Thirty," *Nation*, February 13, 2006, 23–24; Saree Makdisi, "Witch Hunt at UCLA," *Los Angeles Times*, January 22, 2006, M1. Subsequently, a university attorney warned that students who sold audiotapes of lectures could be violating professors' intellectual property rights, and the offer of payment was withdrawn.

282. REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION AT YALE 5 (1975), available at http://yalecollege.yale.edu/sites/default/files/woodward_report.pdf.

justification for deference to faculty on decisions that are fundamentally academic in nature, judges without any expertise in this area are increasingly mediating such conflicts. The conflicts arising from commodification in higher education are not simply about the autonomy of professors; at the heart of the disputes are opposing views on the nature and goals of education. As courts are increasingly inserted into disputes concerning pedagogy, fundamental educational issues become transformed into judicial rulings, distorting traditional values of college and university culture, and potentially causing damage to the academic enterprise itself.

