they chilling, given that he embodied the University as its president? Many today, including myself, would question this level of political engagement for a University president. While separating the University from its president in a legal sense is easy enough, it is problematic practically, and thus the potential chilling effect of a politically active president is something I and other of Hutchins's successors have tried to avoid.

Finally, let me give you a question to consider, one that has arisen recently (though not at the University of Chicago). Suppose there is a war that is very unpopular with the faculty of university X. A motion comes before the faculty governing body to the effect that the faculty of X declare themselves opposed to the war and call upon the government to end it immediately. What should happen? Is this faculty expressing their views? Or is it a chilling act that is inappropriate? What do considerations of academic freedom say?

I began with some historical comments about the evolution of the university, and I did that not only to contextualize our discussion but to emphasize another important point. Universities are institutions with a long history and the prospects for a very long future. It is essential to preserve their value, their capacity for inquiry, discovery, and education over time, which will inevitably far outlast any particular political issue of the day, no matter how important it is.

Academic freedom, fundamental to universities' capacity to effectively fulfill their mission, has a long history. It faces challenges both internal and external to the academy. It cannot be taken for granted. Establishing it has been a long struggle, and preserving it will always be a struggle. But for the contribution that we make to society and that we alone can make—for the integrity of inquiry and the quality of our education—vigilance is essential. Discussions and decisions will sometimes be unpopular, even within our own academic community; often difficult; and possibly even dangerous—they have been all of these in the relatively recent past. But all of us, in the academy or without, are stewards of this hard-won legacy, and its preservation and enhancement are incumbent upon us all.

NOTES

1. University of Chicago, *Report of the President* (Chicago, 1900), 208.
2. George Stigler, Harry Kalven, et al., "Report on the University's Role in Political and Social Action," November 11, 1967, www-news.uchicago.edu/releases/07/pdf/kalverpt.pdf.

12

ACADEMIC FREEDOM

Some Considerations

MATTHEW GOLDSTEIN AND FREDERICK SCHAFFER

THE PRINCIPLE OF academic freedom is so essential to colleges and universities that it could be said to be part of the genetic code of higher education institutions. It is a self-evident truth of a university's constitution. As Thomas Jefferson once said of the University of Virginia, "Here we are not afraid to follow truth wherever it may lead, nor to tolerate error so long as reason is left free to combat it."[1]

Less self-evident are its scope and application. Defining the concept of academic freedom has become a task shared by courts, colleges, and not a few constitutional scholars. The result has been something less than consensus and something more resembling an evolving conversation, shaped by actual practice.

CORE PRINCIPLES OF ACADEMIC FREEDOM

The principles of academic freedom in the United States were heavily influenced by the thinking and practice at German universities and the growth of nonsectarian American universities in the second half of the nineteenth century.[2] With the rise of ideological conflicts, especially those relating to economic theory, faculty began to feel the need for protection against trustees and/or administrators who sought the dismissal of faculty whose views they found unpalatable.

In 1915, the American Association of University Professors (AAUP) was founded, and the "Declaration of Principles on Academic Freedom and Academic Tenure" it set forth is still a cornerstone definition.[3] The "Declaration" states that academic freedom of the teacher "comprises three elements: freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action."

The "Declaration" considers these freedoms as deriving from the function of faculty "to deal first hand, after prolonged and specialized technical training, with the sources of knowledge; and to impart the results of their own and of their fellow-specialists' investigations and reflection, both to students and to the general public, without fear or favor." These principles come with corresponding obligations, both on the part of the individual scholar—to conduct inquiry with "a scholar's spirit"—and on the part of the scholarly body, to determine when violations of those obligations have occurred. All faculty members are subject to the judgment of their peers. In addition, decisions relating to appointments, tenure, and promotion are subject to laws prohibiting discrimination.

Ninety years later, in 2005, the City University of New York endorsed a statement by the First Global Colloquium of University Presidents that defined academic freedom in much the same way: "The freedom to conduct research, teach, speak, and publish, subject to the norms and standards of scholarly inquiry, without interference or penalty, wherever the search for truth and understanding may lead."

Universities, by definition, must seek to understand difficult ideas and answer complex questions. That requires rigorous inquiry, openness to all reasonable paths to illumination, and a willingness to challenge orthodoxy. Academic freedom protects the academy from efforts to impose restrictions on free inquiry, internally and externally. In turn, members of the academy are responsible for ensuring that such inquiry is pursued with integrity.

Through several decisions of the Supreme Court, and a number of decisions of lower courts, academic freedom was established as a legal principle, possibly with constitutional underpinnings, that protected faculty from termination based on ideological disagreement with their teaching, scholarship, political associations, or extramural utterances.

Notwithstanding this development, the concept of academic freedom has fared less well in the courts in the ensuing decades. The reasons for this are

complex and relate to many issues considered elsewhere in this volume. It is sufficient to note at this point the comment of one scholar that the Supreme Court "has been far more generous in its praise of academic freedom than in providing a precise analysis of its meaning."[4] As Robert Post has noted, it is "a subject that has exceedingly fuzzy boundaries."[5] This poses challenges, particularly at public institutions, to university administrators dedicated to protecting and preserving academic freedom while operating increasingly complex institutions accountable to government, regulatory agencies, taxpayers, and students, among others.

The "1915 Declaration" ends its discussion with an important point that relates to all aspects of academic freedom: "It is, in short, not the absolute freedom of utterance of the individual scholar, but the absolute freedom of thought, of inquiry, of discussion and of teaching, of the academic profession, that is asserted by the declaration of principles." As Post has said, "[T]he protections of academic freedom are not best conceived as personal rights, but as freedoms and responsibility accorded to the corporate body of the faculty."[6]

In 1940, the AAUP and the Association of American Colleges (today the Association of American Colleges and Universities) agreed to a shorter version of the "Declaration," now known as the "1940 Statement of Principles on Academic Freedom and Tenure."[7] The basic purpose of academic freedom remained the same:

> Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.
>
> Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.
>
> Academic freedom can serve the public good only if universities as institutions are free from outside pressures in the realm of their academic mission and individual faculty members are free to pursue their research and teaching subject only to the academic judgment of their peers.

ACADEMIC FREEDOM AND THE CITY UNIVERSITY OF NEW YORK

At the City University of New York, the nation's largest public urban university, the commitment to academic freedom is well established and firmly held. As a university that prides itself on diversity and access to opportunity, we hold in the highest regard policies and principles that guarantee open and tolerant academic inquiry and exchange. The freedom to conduct research, teach, speak, and publish is vigorously protected and defended.

At CUNY, as at other public institutions of higher education, the notion of a free exchange of ideas informs the entire academic community: students choosing a course of study; faculty pursuing scholarly research and teaching; and institutions admitting students, appointing faculty, and setting standards. Historically, this shared value, along with a condition of mutual respect, has enabled the existence of open scholarly research and discourse.

The university's governing board has recognized that value. The chair of CUNY's Board of Trustees, Benno C. Schmidt Jr., made clear the underlying principles that guide free discourse: "The university, true to its academic ideals, must treat each member of the community as a unique individual worthy of respect, to be judged solely by his or her actions, intellect, and character. A university does not stereotype its members; it does not permit them to be put into categories based on suspicion, ignorance, or prejudice; it does not deny to any of its members the full rights of academic freedom and engagement."

The board's recognition and support of the concept of academic freedom is important to a public institution that comprises different types of colleges, serves many constituencies, and is accountable to municipal and state governments that provide funding. CUNY is a system of 24 colleges and schools, with nearly 500,000 degree-seeking and continuing education students. The system comprises community colleges, baccalaureate colleges, and graduate and professional schools. Reminiscent of Clark Kerr's "multiversity" system described in the 1960 Master Plan for Higher Education in California, the CUNY system's many portals of entry are meant to ensure access and excellence for all students, opportunities for transfer, and, as Jonathan R. Cole put it in *The Great American University*, "a chance to realize the American dream."[8]

In fact, CUNY began as the Free Academy in 1847, an institution founded on the idea of democratizing higher education, as its first president, Horace

Webster, noted: "The experiment is to be tried, whether the children of the people, the children of the whole people, can be educated; and whether an institution of the highest grade, can be successfully controlled by the popular will, not by the privileged few." That principle still informs CUNY: 44 percent of students are first-generation college attendees, 38 percent report household incomes under $20,000, and more than 200 ancestries are represented.

Giving voice to all is a fundamental CUNY value. The university encourages informed discussion and expects its faculty members to pursue rigorous thinking and debate without restraint. As Robert Maynard Hutchins, former president of the University of Chicago and a champion of academic freedom, noted: "Education is a kind of continuing dialogue, and a dialogue assumes different points of view."[9] Of course, at public institutions the "freedom of external utterance and action" set forth by the "1915 Declaration" is not only qualified by what the "Declaration" calls "hasty or unverified or exaggerated statements" and "intemperate or sensational modes of expression," but is also subject to the First Amendment, which limits the scope of free speech afforded to public employees generally.

At CUNY, as elsewhere, the office of a chancellor, president, or other administrator cannot be used to compromise the principle of academic freedom. For intellectual freedom to flourish, the institution itself should remain neutral. Faculty and students do not speak on behalf of the university, and administrators should generally refrain from taking political positions. Fostering an environment conducive to open dialogue, free from hostility and repercussion, requires administrators to be protectors of, rather than participants in, debate. However, as protectors, they can and should advocate on behalf of the ideals that bind the academic community. For example, in 2009, in response to reports of suspensions, arrests, and investigations into university students, scholars, and curricula in Iran, a CUNY chancellor's statement was issued to address the troubling effort to quash dissent and nullify the very purpose of higher learning:

> At its core, a university operates as an open and civilized forum, one focused on increasing the capacity of our intellect and understanding. A university is dedicated to building an educated society, one composed of citizens who think deeply and broadly across a range of subjects—and that effort requires candid discourse and inquiry. . . . Higher education is not simply a high ideal but a necessary means of developing citizens and leaders who promote the peaceful advancement and co-existence of all societies. Our voices on behalf of our

academic colleagues in Iran, as well as our criticism of government actions in that country that restrict the pursuit of scholarship, dialogue, and advanced learning, must be amplified. . . . When the world's intellectual centers are imperiled, we lose more than the voices of a few; we risk the loss of an essential building block to a more stable and enlightened future and generations of human potential.

ACADEMIC FREEDOM AND FREE SPEECH

Of the three elements of academic freedom, the freedom of "extramural utterance and action" is surely the most problematic. Unlike freedom in research and teaching, it has no special connection to the university and no justification based on the special expertise of faculty members to judge the quality of the work of their peers based on academic standards. Indeed, both the "1915 Declaration" and the "1940 Statement" refer to the right of faculty to speak as citizens.[10] However, we do not ordinarily think of the right of citizens to speak and associate freely as a function of their professional or occupational status. Accordingly, in most contexts, the freedom of faculty "to speak publicly on matters of public concern reflects the permeation of the campus by general civil rights rather than an elaboration of a right unique to the university."[11]

This development has been a mixed blessing. The First Amendment limits the power only of government. Thus, private colleges and universities are not restrained by its terms, and their faculty members are not thereby protected.[12] Furthermore, the status of faculty at public universities subjects them to the narrower scope of free speech afforded to public employees generally. First, the protection afforded to a public employee's free speech depends on the application of a balancing test between the employee's interest in the expression and the interest of the employer in promoting efficiency of the public services it performs through its employees.[13] Second, the First Amendment protects the speech of a public employee only when he or she is speaking as a private citizen on a matter of public concern and not merely a matter of personal interest.[14] It is therefore doubtful under this test that constitutional protection exists for many aspects of faculty speech relating to internal university matters.[15] Finally, as the Supreme Court held in *Garcetti v. Ceballos*, public employees enjoy no freedom of speech when their speech or expression is made "pursuant to their official duties."[16]

In *Garcetti* the Supreme Court rejected the free speech claim of a prosecutor who had been fired allegedly in retaliation for his testimony on behalf of a criminal defendant to the effect that a sheriff's deputy obtained a search warrant by means of a false affidavit. The court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[17] Since the parties stipulated that the speech in question was made pursuant to the employee's duties, the court dismissed the complaint.

The *Garcetti* case presented a context that was quite different from a public university, and the court acknowledged that difference. In his dissenting opinion, Justice Souter expressed a concern that the decision might "imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties.'"[18] In response, Justice Kennedy wrote:

> Justice Souter suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.[19]

In subsequent decisions lower courts have wrestled with the application of *Garcetti* to free speech claims of faculty members in public universities.[20] First, there is the question of when faculty members are speaking pursuant to their official duties. Most courts have interpreted this concept broadly, including speech related not only to activities that may be specified in a written job description or faculty handbook but also to pretty much everything that faculty traditionally do within the university setting, at least where the speech was directed to others within that setting.[21] By contrast, speech by faculty members directed to audiences outside the university, such as letters to the editor of a newspaper, articles for popular magazines, or speeches in nonacademic settings, have not been viewed as within their official duties.[22]

Second, there is the question of what significance should be given to Justice Kennedy's caveat and whether to carve out an exception from the *Garcetti*

analysis for speech relating to scholarship or teaching. Some courts appear to have ignored the issue of academic freedom but did so in cases that did not involve speech relating to scholarship or teaching.[23] Others have explicitly held that speech relating to scholarship or teaching is protected by the First Amendment.[24] So far only a few courts have addressed a close question as to the meaning of "speech relating to scholarship and teaching." In one case the court interpreted that category rather narrowly, holding that a librarian's recommendation of a book for freshman reading in connection with orientation is not speech relating to teaching.[25] More recently, the Ninth Circuit held that a professor's plan concerning the faculty structure of a school of communications, written while he served on a committee that was debating some of the issues addressed by his plan, constituted speech related to scholarship or teaching because it was a proposal to implement a change "that, if implemented, could have substantially altered the nature of what was taught at the school, as well as the composition of the faculty that would teach it."[26]

This broader definition of speech relating to scholarship or teaching seems appropriate. If academic freedom is to be adequately protected, it would seem at a minimum that speech relating to scholarship and teaching should include not only what is written in scholarly articles and spoken in the classroom, but also statements made in connection with such activities as the evaluation of the scholarship of others, the establishment of curricula and academic standards, and the academic advising of students.

Moreover, apart from providing a fuller definition of "speech relating to scholarship and teaching," courts will need to define the scope of First Amendment protection. Such speech will always be pursuant to the official duties of faculty and will often not address matters of public concern. Thus, if there is to be meaningful protection for academic speech, those elements of the First Amendment analysis will have to be jettisoned.[27] However, it is likely that courts will continue to apply some sort of balancing test since not everything a teacher might say in a classroom deserves the protection of the principles of academic freedom. This includes speech that does not relate to the subject matter of the class and is profane, sexual, or otherwise objectionable.[28]

In due course the Supreme Court will undoubtedly have occasion to clarify the application of *Garcetti* to the public university faculty. In addition to the questions discussed above, the court may also consider whether to expand the categories enjoying greater protection for faculty speech to statements made in the course of performing their role in the academic governance of

the university. Unlike other public employees, faculty members are expected to exercise independent thought and judgment on university governance rather than carry out the mandate of their agency head.[29]

However the courts eventually resolve these First Amendment questions concerning faculty speech at public universities, academic freedom is a concept independent of constitutional law. The question therefore arises whether the principles of academic freedom should establish norms within universities that are more protective of extramural speech than the First Amendment, even if they cannot be enforced by courts. At both private and public institutions of higher education, academic freedom should continue to protect speech in which faculty speak as citizens on matters of public concern. Although not directly related to the primary rationale for academic freedom, such freedom of expression is part of a long and valued tradition of universities as places committed to wide-ranging debate on such matters.[30] There is no good reason why any faculty, whether at private or public universities, should be subject to reprisals because colleagues, administrators, alumni, or politicians take umbrage at the expression of views on subjects of public concern.[31] Moreover, the boundaries of what constitutes matters of public concern should be interpreted broadly. At least some matters pertaining to university issues, such as presidential pay, conflicts of interest by trustees, and significant change in general education requirements or academic standards, are of real and legitimate interest to the larger community.

In addition, if the Supreme Court does not eventually recognize the need for expanded protection for speech relating to scholarship or teaching, or interprets those categories narrowly, or does not also include speech relating to academic governance as deserving of similar protection, a strong argument can be made for continuing to protect such speech under the umbrella of academic freedom as applied within the setting of the university itself.

Some would argue further that academic freedom should also protect speech unrelated to matters of public concern or to scholarship, teaching, or academic governance.[32] However, it is far from clear why such speech has value to the academic enterprise and should be protected by principles of academic freedom. Moreover, the recognition and enforcement of such a broad concept of academic freedom within universities would inevitably give rise to endless disputes and grievances as faculty claim retaliation for every adverse action. Internal procedures already exist at most universities to review decisions relating to reappointment, promotion, and tenure on the ground that

they were based on extraneous factors and not on the quality of scholarship, teaching, and service. That seems not only appropriate but consistent with principles of academic freedom, which are premised upon the integrity of a system of academic judgment and peer review. However, academic freedom is in no way advanced by requiring the review of a morass of petty retaliation claims arising in contexts where there do not exist formal review procedures, such as departmental disagreements as to course content, class schedules, or the selection of department chairs,[33] and where there are no connections to the core values of scholarship or teaching.[34]

ACADEMIC FREEDOM AND THE RIGHTS OF STUDENTS

The principles of academic freedom do not apply to students as they do to faculty. As discussed previously, academic freedom serves to promote the public good by protecting the intellectual independence of faculty in their scholarship and teaching, subject to the professional judgment of their peers. Within the academic community, students are novices, under the intellectual tutelage of the faculty. Their freedom of speech is not properly understood as part of academic freedom because it has nothing to do with "the preservation of the unique functions of the university, particularly the goals of disinterested scholarship and teaching."[35] That is not to say, however, that students do not have any rights relating to the free expression of their views and opinions. Students at public universities are protected by the First Amendment against restrictions on their rights of free speech and association.[36] Indeed, in light of the limitations on the First Amendment rights of public employees discussed earlier, it may be that students at public universities have greater rights to free speech than faculty.

One of the most contentious areas of controversy concerning the First Amendment rights of university students relates to "speech codes," which have consistently been found unconstitutional.[37] Another area relates to the use of student activity fees. In *Southworth v. Board of Regents of the University of Wisconsin*,[38] the Supreme Court upheld the use of mandatory student activity fees to fund student advocacy having educational benefit against a claim that such a fee violates the First Amendment interest of students not to have their money used to promote ideas with which they disagree. The court reasoned that the university's educational interest in promoting speech by its

students outweighed the students' interest as long as the university followed a strict policy of "viewpoint neutrality" in the allocation of the funds collected from the mandatory fee.[39]

As we noted in discussing the faculty's freedom of expression in extramural utterances, the university has come to serve an important function as a marketplace of ideas outside the realms of scholarship and systematic learning. It may be analytically correct to view this function as falling outside the protection of academic freedom. Nevertheless, it is a tradition worth protecting and preserving as long as it does not conflict with the core purposes of the university. Accordingly, students should enjoy rights to free speech and association whether or not they attend a public university and thus enjoy First Amendment protection. Both in the larger university setting and within the classroom, students should be free to express their views, and they should not be subject to reprisals because of their opinions.[40]

However, such freedom of expression by students is subject to two limitations. First, it may not interfere with the other activities of the campus or classroom. This commonsense limitation is an accepted part of First Amendment jurisprudence and serves as the justification for reasonable limitations on the time, place, and manner of protests and other expressive activities both on and off university campuses.[41]

Second, student speech and writing in the classroom context is subject to the academic authority of faculty to evaluate their course work with respect to factual accuracy, authority of sources, research methodology, organization, quality of expression, analytical rigor, and other legitimate academic factors. The Supreme Court has supported this limitation not only in *Southworth* but also in *Hazelwood School District v. Kuhlmeier*.[42] In that case the court upheld a high school principal's right to delete two pages from a newspaper produced by students in connection with a journalism class. The court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[43] Of course, precedents from the K–12 context are not necessarily applicable to higher education, where the greater age and maturity of students and the stronger tradition of free inquiry militate in favor of greater student rights. Nevertheless, it remains true that in both contexts, students' right to free speech in the classroom setting is subject to the legitimate academic standards and concerns of the faculty and the institution.[44]

The authority of faculty, indeed their academic freedom, also extends to the design of curricula and the presentation of materials. This is not primarily a question of their individual rights as teachers but rather their collective authority as part of the academic governance of the institution. The purpose of teaching is not merely to impart knowledge, but to train students to think for themselves. The recent statement on "Academic Freedom and Educational Responsibility" by the Association of American Colleges and Universities puts it well: "Students do not have a right to remain free from encountering unwelcome or 'inconvenient questions.'"[45] At the same time, however, and as the "1915 Declaration" recognizes, faculty are expected to conform to professional norms with regard to avoiding controversial topics unrelated to the subject matter of a course and presenting relevant controversial materials in an academically thoughtful and rigorous way.[46]

Most of the litigated cases in this area pertain not to controversial subject matters or views but to the use of language by faculty that is profane or sexual. In several pre-*Garcetti* cases, the courts seem to have grasped the key principle here. On the one hand, courts have dismissed claims by faculty that their rights to free speech or academic freedom were violated because they were terminated for profane or sexual speech that was unrelated to the subject matter of the class and that served no valid educational purpose.[47] On the other hand, courts have reversed a university's discipline of a faculty member where they found that language, although objectionable to some, advanced his valid educational objectives related to the subject matter of his course.[48] Nevertheless, these cases are troubling to the extent that courts in some of them reviewed, and in one case reversed, the decision of a faculty committee as to what was appropriate, thereby intruding upon the university's autonomy in an area of academic judgment.[49]

As with many cases involving student speech, these cases often arise in the context of a university's enforcement of a policy against sexual harassment. One court has struck down such a policy because its language was unconstitutionally vague and therefore violated a faculty member's First Amendment rights.[50] However, where a professor's speech is reasonably regarded as offensive, is not germane to the subject matter of the course, and is sufficiently severe and pervasive as to impair a student's academic opportunity, there is no reason why antidiscrimination laws cannot be applied without violating faculty rights to free speech or academic freedom.[51]

Another area of contention relates to the introduction of religious texts or subjects. Where this has been done as part of an academic exercise and not to advance a particular religious view, the courts have upheld the university's actions against claims that they violated the Establishment or Free Exercise Clauses of the First Amendment.[52] Conversely, one court has upheld limitations on a faculty member's speech about his religious views within a classroom that appeared unrelated to the subject matter of the course.[53]

In sum, it is inconsistent with principles of academic freedom for faculty to have to censor their speech within the classroom because of student objections where such speech is related to the subject of the course. If their speech is not so related and is offensive to a reasonable person, faculty may be appropriately restrained or disciplined. In either case, it is helpful in dealing with these types of controversies for universities to have internal procedures to review complaints by students concerning faculty behavior in classrooms. Such procedures should involve faculty in the review of student complaints and should provide explicit protection for the principles of academic freedom.[54]

ACADEMIC FREEDOM AND UNIVERSITY GOVERNANCE

The emphasis on the independence of faculty in the "1915 Declaration" applies not only to their individual work as researchers and teachers, but also appears to have implications for the shared governance of the institution: "A university is a great and indispensable organ of higher life of a civilized community, in the work of which the trustees hold an essential and highly honorable place, but in which the faculties hold an independent place, with quite equal responsibilities—and in relation to purely scientific and educational questions the primary responsibility." However, *how* governance and responsibility are shared—and how that connects to academic freedom—is not always clear, and the distinctions drawn in practice often depend on institutional traditions and mission.

The "1915 Declaration" is explicit that academic freedom requires the faculty to play the central role in making academic judgments about scholarship and teaching and in disciplining faculty for failure to meet appropriate standards. The "1940 Statement" is silent on issues of governance. However, in 1966 the AAUP adopted a "Statement on Government of Colleges and

Universities" (the "Statement on Government") that it had jointly formulated with the American Council on Education and the Association of Governing Boards of Universities and Colleges.[55] The "Statement on Government" emphasizes the need for shared responsibility by boards, faculties, and administrators. It notes that the role of each group and the form of their cooperation will vary depending on the area in question. Like the "1915 Declaration," it gives the faculty primary responsibility for academic matters based on their expertise and goes on to define those matters as "curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life that relate to the educational process."

In 1998 the Association of Governing Boards issued its own "Statement on Institutional Governance."[56] The AGB statement notes "a widespread perception that faculty members, especially in research universities, are divided in their loyalties between their academic disciplines and the welfare of their own institutions" and the belief of many governing boards, faculty, and chief executives that "internal governance arrangements have become so cumbersome that timely decisions are difficult to make, and small factions often are able to impede the decision-making process." While acknowledging the important role of faculty regarding academic matters, the AGB statement emphasizes "the ultimate responsibility" of governing boards, the role of other constituencies, such as students, non-faculty staff, and external stakeholders, and the need for the fiscal and managerial affairs of universities to be "administered with appropriate attention to commonly accepted business standards." The variations between the AAUP statement and the AGB statement reflect not only the different perspectives of the associations that issued them but also the differing practices of the many universities and colleges within the United States. Nevertheless, as a matter of practice it is fair to say that faculty generally have strong but not dispositive authority over such critical academic matters as curricula and appointments.[57]

Notwithstanding its recognition of the policy arguments in favor of such shared authority, in *Minnesota State Board for Community Colleges v. Knight*,[58] the Supreme Court held that faculty have no First Amendment right to participate in academic governance at a public institution of higher education.[59] Where does this leave the idea of shared governance as a component of academic freedom? It seems clear that a substantial faculty role in the academic governance of the university is a sine qua non for academic freedom even if it is not a matter of constitutional right and may not be subject to judicial

enforcement.[60] However, there will continue to be considerable disagreement as to the exact contours of that role. The AAUP "Statement on Government" maintains that the president and the board should overrule the faculty "only in exceptional circumstances, and for reasons communicated to the faculty" and goes on to identify financial constraints or personnel limitations as the kinds of factors that might justify the rejection of a faculty recommendation.[61]

Nevertheless, many university presidents are members of the faculty and have deep experience in exercising academic judgment. Moreover, even if one were to agree that presidents should generally defer to the faculty on academic matters (and boards even more so), it seems entirely appropriate for them to review faculty decisions where there is evidence that they may not have rested on academic judgment.

For public institutions subject to review and oversight by governmental entities, the notion of shared governance and its relation to academic freedom is further complicated. For example, legislatures in several states have enacted legislation mandating articulation policies that rely on the establishment of a common core curriculum. Ensuring ease of transfer among the state's higher education institutions—from community colleges to baccalaureate colleges in particular—is cited as a particular mandate by such legislative bodies. Likewise, accrediting agencies review a university's policies to ensure that institutional operations are conducive to student learning. For institutions like CUNY, in which governance is shared among the system, individual colleges, and discipline-based departments, the path to compliance is not always clear.

For example, in 1967, a Middle States report on the organization of the City University of New York noted that "articulation between the two-year and four-year colleges is a pressing problem. . . . The goal should be the acceptance by the four-year colleges of the entire block of transfer work taken in a university two-year college, without examination of specific course titles or credits except to establish prerequisites for more advanced work." New York's Education Law specifies that CUNY is one university and must have clear transfer paths and curricular alignment across its colleges. Nowhere is CUNY's unique structure of two-year and four-year institutions with individual faculties and traditions within a confined geographical area more pronounced than in its vast network of articulation agreements and transfer decisions. Today, more than 50 percent of graduates from the baccalaureate colleges are transfer students (from CUNY and non-CUNY campuses), and many students graduate with more credit than required for their degrees and

take a longer time to graduate, jeopardizing financial aid availability, often because of transfer issues.

Nonetheless, there has been disagreement about CUNY's current efforts—forty-plus years after the Middle States report—to create a general education framework and transfer system for the entire university. While faculty conceive, develop, review, approve, and teach the core courses, it is the CUNY board that passed a resolution to create an efficient transfer system. Some faculty have questioned the board's actions. (This is not entirely surprising; as Cole notes, Clark Kerr's California master plan "did meet with resistance. . . . Paradoxically, individual university faculty members tend to be liberal, but when they are brought together to discuss educational reform, they become highly conservative.")[62]

Clearly, it is the function of the faculty corpus, as the "1915 Declaration" says, to "deal first hand . . . with the sources of knowledge; and to impart the results of their own and of their fellow-specialists' investigations and reflections." But where does the *impetus* for structural change originate? How does an institution create necessary—and, in some cases, legally mandated—system-wide change in the absence of faculty unanimity and cohesion? Administrators may feel justifiably compelled to generate an operational framework to improve the educational experience and progress of students, while remaining committed to the faculty prerogative to make decisions about the development of curricula. Likewise, it is the entire faculty body—from all campuses, across the entire system—that share in governance. As Kerr said, "A multiversity is inherently a conservative institution but with radical functions. There are so many groups with an interest in the status quo, so many veto groups; yet the university must serve a knowledge explosion and a population explosion simultaneously. The president becomes the central mediator among the values of the past, the prospects for the future and the realities of the present."[63] It is often the case that the more faculty who participate in issues of governance, the stronger the concept, and practice, of shared governance becomes, especially when the faculty body is large and diverse. Administrators and faculty together must ensure that decisions about a core curriculum are guided by a commitment to upholding academic rigor and disciplinary standards and ensuring a structure conducive to student learning—not by workload issues or efforts to boost enrollment in underutilized departments.

As Stanley Fish has pointed out, such disagreements about what constitutes "participation" in shared governance are often viewed outside of the

academy as petty academic squabbles.[64] And indeed, they risk reducing the ideals of a scholarly community to procedure and politics. Ideally, this must be avoided; robust disagreement is often useful to an institution, but such discourse should aim to be a model to students and citizens of open-minded, fairly considered, and deeply felt inquiry. Over the years, the term "academic freedom" has been applied to contentious opposition of all kinds. But disagreement alone does not necessarily threaten—or necessarily relate to— academic freedom; on the contrary, it is often indicative of an active and free exchange of ideas. In practice as in theory, it is an institution's insistence on academic freedom that makes possible progress on the academy's most difficult and important task: the creation and dissemination of knowledge.

USES AND ABUSES OF ACADEMIC FREEDOM

In the ninety-five years since the AAUP issued the "1915 Declaration," the principles of academic freedom have gained greater acceptance than its originators could have imagined. There is hardly a university that does not at least profess its commitment to academic freedom, although conformance to its principles, as always, tends to ebb and flow with the phases of the political moon. Indeed, so widespread is the acceptance of academic freedom that some use it to advance claims or proposals that have little or no connection to its principles—or in fact are inconsistent with them. Some such claims border on the silly.[65] However, two examples from opposite ends of the spectrum are worth considering in more detail.

In his Academic Bill of Rights,[66] David Horowitz proposes principles to address what he claims is a lack of intellectual and political diversity among university faculty and a resulting tendency of faculty to use the classroom for indoctrination.[67] Several of those principles consist of restatements of the traditional view of academic freedom. These include the principles that (1) faculty should be evaluated based on their competence and knowledge in their field of expertise; (2) students should be graded on the basis of their reasoned answers and appropriate knowledge of the subjects and disciplines they study; and (3) neither faculty nor students should be judged on the basis of their political or religious beliefs.

Others are consistent with the principles of academic freedom, but create pressures against the exercise of intellectual independence or originality. For example, it is a valid objective that curricula, reading lists, and classroom

teaching should expose students to a range of significant scholarly opinion. However, it is not a simple matter to determine precisely what that should include in order to protect faculty from charges of "indoctrination" from their students or outside groups. As several scholars have commented, the Academic Bill of Rights threatens to "snuff out all controversial discussion in the classroom" by presenting faculty "with an impossible dilemma: either play it safe or risk administrative censure by saying something that might offend an overly sensitive student."[68]

Moreover, the Academic Bill of Rights seeks to implement its goal of neutrality in teaching by requiring universities to recruit faculty "with a view toward fostering a plurality of methodologies and perspectives," thereby creating a risk that faculty will be hired based on their political beliefs, notwithstanding the bill's own prohibition on precisely such behavior. This risk is exacerbated by modern telecommunications technology. In the past, most scholarship was published in academic journals and books that were not widely available, and criticism (generally from scholars) appeared in similar venues. Now, however, almost everything that faculty write is available online, and commentary by both other scholars and the public (including highly ideological segments of the public) is distributed widely through social media, blogs, and other electronic outlets. Although such commentary, even when vitriolic and unfair, is not itself a violation of academic freedom, its widespread availability, including occasional appearances on mainstream media, may well serve to intimidate some faculty.

Finally, by seeking (so far unsuccessfully) the enactment of laws similar to the Academic Bill of Rights by Congress and several state legislatures, its supporters invite the kind of outside interference, from both legislatures and courts, that is inconsistent with academic freedom. Here, as in so many debates concerning academic freedom, the issue is not only what the proper principles are, but who gets to enforce them. Academic freedom is based on the institutional autonomy of universities. The Academic Bill of Rights, in its purported effort to strengthen academic freedom, would in fact weaken if not destroy it.[69]

Coming from the other direction, the AAUP's vision of academic freedom has been encumbered by the addition of multiple policies, procedures, rules, and prohibitions, as a ship accumulates barnacles. The AAUP, of course, deserves great credit for having put academic freedom on the map and having investigated and reported on a number of important cases involving significant

violations of its principles. However, there is hardly any aspect of university life on which the AAUP has not expressed an opinion and which, according to the AAUP, is not an aspect of academic freedom. These include such diverse matters as detailed procedures relating to the renewal or nonrenewal of appointments, dismissal and suspension, including the permissible grounds for such action, standards for notices of non-reappointment, the use of collegiality as a criterion for faculty evaluation, posttenure review, the status of part-time faculty, non–tenure track appointments and the status of such faculty, the use of arbitration in cases of dismissal, operating guidelines for layoffs in cases of financial exigency, and so on.[70] This development is understandable as the AAUP has worked over many years to further the interests of faculty.

Nevertheless, to link to academic freedom every policy and procedure that a professional association or labor organization might want for its members is to drain the concept of all meaning and to lend credence to the unfortunate view of some that academic freedom is no more than special pleading on behalf of a privileged elite. Because there are and will continue to be real and serious threats to academic freedom, it is important to all who care about universities to be as clear as possible about its meaning, to exercise restraint in its invocation, and to support true claims with vigor.

NOTES

1. Jefferson to William Roscoe Lipscomb, in *The Writings of Thomas Jefferson*, ed. Andrew A. Lipscomb and Albert E. Bergh (Washington, D.C.: Thomas Jefferson Memorial Association of the United States, 1903–1904), 15: 303.
2. The literature on the history of academic freedom is large. One of the best works is Richard Hofstadter and William P. Metzger, *The Development of Academic Freedom in the United States* (New York: Columbia University Press, 1955).
3. American Association of University Professors, "1915 Declaration of Principles," in *Policy Documents and Reports*, 10th ed. (Washington, D.C.: AAUP, 2006), 291–301, www.aaup.org/AAUP/pubsres/policydocs/contents/1915.htm (hereafter referred to as *AAUP Documents*).
4. J. Peter Byrne, "Academic Freedom: A 'Special Concern of the First Amendment,'" *Yale Law Journal* 99 (1989): 257.
5. Robert Post, "Academic Freedom: Its History and Evolution Within the UC System," (paper presented at the Academic Freedom Forum, June 11, 2003), www.universityofcalifornia.edu/senate/committees/ucaf/afforum/post.pdf.
6. Ibid.
7. *AAUP Documents*, 3–7, www.aaup.org/AAUP/pubsres/policydocs/contents/1940statement.htm.

8. Jonathan R. Cole, *The Great American University: Its Rise to Preeminence, Its Indispensable National Role, and Why It Must Be Protected* (New York: Perseus, 2009), 135.
9. Statement of Robert M. Hutchins, associate director of the Ford Foundation, November 25, 1952, in Hearings Before the House Select Committee to Investigate Tax-exempt Foundations and Comparable Organizations, pursuant to H.Res. 561, 82d Cong., 2d Sess.
10. There is a tension in the "1940 Statement" on this point. On the one hand, it states that when faculty "speak or write as citizens, they should be free from institutional censorship or discipline." On the other hand, it states that "their special position in the community imposes special obligations" and that "as scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances" and therefore "should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate they are not speaking for the institution." The 1940 interpretations to the statement do nothing to resolve this tension, stating that "if the administration of a college or university feels that a teacher has not observed the[se] admonitions . . . and believes that the extramural utterances of the teacher have been such as to raise grave doubts concerning the teacher's fitness for his or her position, it may proceed to file charges," but in doing so "the administration should remember that teachers are citizens and should be accorded the freedom of citizens." It then concludes with the following warning: "In such cases the administration must assume full responsibility, and the American Association of University Professors and the Association of American Colleges are free to make an investigation." However, the 1970 interpretive comments go on to provide further limitations on the enforcement of those "admonitions," including the following quotation from a 1964 Committee A statement: "The controlling principle is that a faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness for his or her position. Extramural utterances rarely bear upon the faculty member's fitness for the position. Moreover, a final decision should take into account the faculty member's entire record as a teacher and scholar." *AAUP Documents*, 5–6. It thus appears that the current position of the AAUP is that a faculty member's extramural utterances as a citizen should very rarely be the basis for disciplinary charges.
11. Byrne, "Academic Freedom: A 'Special Concern of the First Amendment,'" 99 Yale L.J. 251, 264 (1989). Professor Byrne argues more generally that the meaning and purposes of academic freedom are distinct from those of the First Amendment, although he supports constitutional protection of academic freedom to the extent necessary to protect universities from political interference with their academic judgments. See also William Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, revised and reprinted in *The Concept of Academic Freedom*, ed. E. Pincoffs (1975), 60.
12. But see Cal. Educ. Code §9436, which protects students (but not faculty) at private colleges and universities from any rule or disciplinary sanction based solely on conduct or speech outside the campus or facility that would be protected from governmental restriction under the First Amendment of the U.S. Constitution or article 1 of the California Constitution.

13. See Pickering v. Bd. of Ed., 391 U.S. 563, 568 (1968). Many of the public employee cases, like *Pickering*, involve primary or secondary school teachers. Courts generally recognize that such schools present a different context from universities, if for no other reason than the age of the students. Accordingly, in applying the balancing test, they generally accord greater First Amendment rights to faculty (and students) in university settings than in public schools. What courts often miss, however, is the fact that only university faculty, and not public school teachers, enjoy academic freedom. Accordingly, it should rarely be the case that speech by university faculty on matters of public concern can be seen as disruptive of the efficient administration of the institution.
14. See Connick v. Myers, 461 U.S. 138, 146–47 (1983). The court defined a matter of "public concern" as one "fairly considered as relating to any matter of political, social, or other concern to the community." Ibid. at 146. This requirement reflects "the common sense realization that government offices could not function if every employment decision became a constitutional matter." Ibid. at 143. However, as discussed later, the application of this principle to concrete facts has produced widely different results.
15. See, e.g., Gorum v. Sessoms, 561 F.3d 179, 185–86 (3d Cir. 2009) (statements in connection with counseling students and student activities); Savage v. Gee, 716 F.Supp.2d 709, 718 (S.D. Ohio 2010) (librarian's recommendation of a book for freshman orientation); Isenalumhe v. McDuffie, 697 F.Supp.2d 367, 378–79 (E.D.N.Y. 2010) (faculty member's complaints to union representatives and grievance officer, accusations that another professor interfered in committee matters, and other complaints about internal matters to higher-ups within department, college, and university); Munn-Goins v. Bd. of T. of Bladen Cmty. College, 658 F.Supp.2d 713, 728 (E.D.N.C. 2009) (faculty member's request for and distribution of salary information). But see Jackson v. Leighton, 168 F.3d 903, 910 (6th Cir. 1999) (professors' comments on administrative decisions regarding university resources held to be matters of public concern); Yohn v. Coleman, 639 F.Supp.2d 776, 786 (E.D. Mich. 2009) (dentistry professor's comments on alleged lowering of academic standards held to be a matter of public concern).
16. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).
17. Ibid.
18. Ibid., 438 (internal quotes omitted).
19. Ibid., 425.
20. There have been a considerable number of lower court decisions applying *Garcetti*, but only a small number have dealt with faculty at public universities. For a summary of those cases, see Leonard M. Niehoff, "Peculiar Marketplace: Applying Garcetti v. Ceballos in the Public Higher Education Context," *Journal of College and University Law* 35 (2008): 75. For a pre-*Garcetti* case that provides a strong endorsement of the right of a faculty member to speak on a controversial matter without reprisal by his college, see Levin v. Harleston, 52 F.3d 9 (2d Cir. 1995).

21. See, e.g., Demers v. Austin,___ F.3d__,____, Slip op. at 11-13 (9th Cir., Jan. 29, 2014); *Gorum*, 561 F.3d at 187; Renkin v. Gregory, 541 F.3d 769, 774 (7th Cir. 2008) (dispute over research grant); Hong v. Grant, 516 F. Supp. 2d 1158 (C.D. Cal. 2007) (criticism of department chair and dean); *Isenalumhe*, 697 F.Supp.2d at 378; Ezuma v. City Univ. of N.Y., 665 F.Supp.2d 116, 129–30 (E.D.N.Y. 2009) (transmittal of complaint about sexual harassment). Cf. Fusco v. Sonoma County Junior College Dist., 2009 U.S. Dist. LEXIS 11 91431, at *6 (N.D. Cal. Sept. 30, 2009) (court refused to dismiss faculty member's First Amendment claim where complaint did not establish that her attempts to place certain matters on the agenda for department meetings were pursuant to her official duties). Courts have generally held that speech by teachers in the K–12 context was made pursuant to their official duties. See Weintraub v. Bd. of Educ., 593 F.3d 196 (2d Cir. 2010) (complaints about the handling of student discipline in public secondary school); Fox v. Traverse City Area Pub. Sch. Bd. of Educ., 605 F.3d 345, 348–350 (6th Cir. 2010) (elementary school teacher's complaints about workload); Lamb v. Booneville Sch. Dist., 2010 U.S. Dist. LEXIS 9728 (N.D. Miss. Feb. 3, 2010) (special education teacher's complaints about corporal punishment). But see Reinhardt v. Albuquerque Pub. Sch. Bd. of Educ., 595 F.3d 1126, 1137 (10th Cir. 2010) (complaints of wrongdoing by speech pathologist in public school system not made pursuant to her duties); Evans-Marshall v. Board of Education of Tipp City Exempted Village School, 428 F.3d 223, 230 (6th Cir. 2005) (teacher comments on curricular and pedagogical decisions protected by First Amendment).
22. See Adams v. Tr. of Univ. of North Carolina, 630 F.3d 550, 561–62 (4th Cir. 2011) (non-scholarly columns and articles published outside the university are protected by the First Amendment even though they were subsequently submitted by faculty member in support of application for promotion). See also Niehoff, "Peculiar Marketplace," 82–84. This distinction creates an odd incentive for faculty members at public universities (and other state employees) to voice their complaints outside of the university (or chain of command), rather than within. If the statements relate to a matter of public concern, the faculty are more likely to be protected by the First Amendment. Furthermore, this distinction seems arbitrary in other ways. It suggests that faculty members are speaking pursuant to their official duties when they write an article in a scholarly journal or give a speech at a professional gathering, but not when they write an article in a popular magazine or give a speech at a political meeting.
23. See, e.g., *Renkin*, 541 F.3d at 774; *Hong*, 516 F.Supp.2d at 1166.
24. In some of these cases, the court held that the speech related to scholarship and teaching. See *Demers*, *Slip* op. at 13–16; *Adams*, 640 F.3d at 562–64; Kerr v. Hurd, 694 F.Supp.2d 817, 843 (S.D. Ohio 2010); Sheldon v. Dhillon, 2009 U.S. Dist. LEXIS 110275, at *12 (N.D Cal. Nov. 25, 2009). In others, the court recognized the exception for speech relating to classroom teaching but held it was not applicable. Pigee v. Carl Sandburg College, 464 F.3d 667, 672 (7th Cir. 2006); *Savage*, 716 F.Supp.2d at 718.
25. *Savage*, 716 F.Supp.2d at 718. In a pre-*Garcetti* case, one court held that faculty members had engaged in speech related to matters of public concern, and therefore were protected by the First Amendment, in connection with objects displaced in a history exhibit. See Burnham v. Ianni, 119 F.3d 668, 679–80 (8th Cir. 1997). However, in a secondary school context, a court held that an art teacher's statements to his class about the portfolio requirements of college art programs, including the necessity for providing sketches of male and female nudes, were not protected by the First Amendment. *Panse v. Eastwood*, 2007 U.S. Dist. LEXIS 55080, at *12–13 (S.D.N.Y. July 20, 2007).

26. *Demers*, Slip op. at 23.
27. In *Adams*, 640 F.3d at 564–66, the Fourth Circuit easily concluded that the speech involved a matter of public concern, since the speech in question was writings and advocacy on clearly public issues, not the typical sort of scholarship or classroom teaching. In one pre-*Garcetti* case, a court held that there was no First Amendment protection for faculty speech in the classroom, because it did not relate to a matter of public concern. See Rubin v. Ikenberry, 933 F.Supp. 1425, 1443 (C.D. Ill. 1996). Another court reached the opposite conclusion. See Hardy v. Jefferson Community College, 260 F.3d 671, 679 (6th Cir. 2001).
28. See discussion at pp. 258–259 below.
29. For a thoughtful argument in favor of extending the protection of the First Amendment to faculty speech relating to its role in the academic governance of universities, see Judith Areen, "Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance", 97 *Geo. L.J.* 945, (2009), 985–1000. As that argument makes clear, however, such protection requires a careful analysis of whether or not a particular kind of speech relates to academic governance—a task that is far from easy. We believe that the Supreme Court is more likely to protect speech relating to such governance issues as the evaluation of scholarship and curriculum by finding it within the exception for scholarship and teaching rather than creating a new and separate protected category for speech relating to academic governance.
30. As the Supreme Court recognized in upholding the free speech rights of students: "The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this nation's dedication to safeguarding academic freedom." Healy v. James, 408 U.S. 169, 180–81 (1972), quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).
31. See, e.g., Levin v. Harleston, 966 F.2d 85 (2d Cir. 1992) (college violated professor's right to free speech in creating alternative section of his class and investigating his conduct as a result of articles and speeches arguing that blacks are less intelligent than whites).
32. Areen, supra note 28, at 987 n. 240.
33. See Jeffries v. Harleston, 52 F.3d 9, 14–15 (2d Cir. 1994) (distinguishing removal of department chair from dismissal of tenured professor).
34. It is precisely in such areas as these where universities most resemble governmental agencies and where the need for managerial authority to achieve effective and efficient administration becomes paramount. See Areen, supra note 28, at 989; Clarke v. Holmes, 474 F.2d 928, 931 (7th Cir. 1972); *Ezuma*, 665 F.Supp.2d at 130–31.
35. Byrne, "Academic Freedom: A 'Special Concern of the First Amendment,'" 262; see also Byrne, supra note 28, at 100 ("Student free speech rights against universities reflect political values rather than academic ones.").

36. See, e.g., Rosenberger v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819 (1995) (State university, which pays for the printing expenses of other student publications, violates the First Amendment rights of students in refusing to pay for the printing expenses of a student publication because it primarily promotes or manifests a particular belief in or about a deity or an ultimate reality.); Widmar v. Vincent, 454 U.S. 263 (1981) (State university, which makes its facilities generally available for the activities of registered student groups, violates First Amendment rights of students in closing its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion.); Healy v. James, 408 U.S. 169 (1972) (State university violates First Amendment rights of students in refusing to recognize student political organization because of its views.). Students have similar, although somewhat more circumscribed rights in public schools. See, e.g., Bd. of Educ. v. Pico, 457 U.S. 853 (1982) (Local school boards violate the First Amendment rights of students in removing books from library shelves solely because they dislike the ideas contained in those books and seek by their removal to prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion.); Tinker v. Des Moines Indep. Comty. Sch. Dist., 393 U.S. 503 (1969) (School policy violates First Amendment rights of students in prohibiting junior and senior high school students from wearing armbands in protest of the Vietnam War.).
37. See, e.g., DeJohn v. Temple Univ., 537 F.3d 301 (3d Cir. 2008); Bair v. Shippensburg University, 280 F.Supp.2d 357 (M.D. Pa. 2003); Booher v. Bd. of Regents, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. Jul. 21, 1998); Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1182–85 (6th Cir. 1995).
38. Board of Regents of the University of Wisconsin System v. Southworth, 529 U.S. 217 (2000).
39. Ibid. at 233.
40. The Joint Statement on Rights and Freedoms of Students, issued by the AAUP, the United States Student Association, the Association of American Colleges and Universities, the National Association of Student Personnel Administrators, and the National Association for Women in Education, includes the following provisions:

> The professor in the classroom and in conference should encourage free discussion, inquiry, and expression. Student performance should be evaluated solely on an academic basis, not on opinions or conduct in matters unrelated to academic standards.
>
> 1. *Protection of Freedom of Expression* Students should be free to take reasoned exception to the data or views offered in any course of study and to reserve judgment about matters of opinion, but they are responsible for learning the content of any course of study for which they are enrolled.
> 2. *Protection Against Improper Academic Evaluation* Students should have protection through orderly procedures against prejudiced or capricious academic evaluation. At the same time, they are responsible for maintaining standards of academic performance established for each course in which they are enrolled. (*AAUP Documents*, 262)

41. See, e.g., Grayned v. City of Rockford, 408 U.S. 104, 117–21 (1972); *Tinker*, 393 U.S. at 513.
42. Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).
43. Ibid. at 273.
44. See Brown v. Li, 308 F.3d 939 (9th Cir. 2002), where the court upheld the refusal of a faculty committee to approve a master's thesis unless the student removed the "disacknowledgements" section because it did not meet professional standards. The court applied to a university setting the principles of Hazelwood, holding that "the First Amendment does not require an educator to change the assignment to suit the student's opinion or to approve the work of a student that, in his or her judgment, fails to meet a legitimate academic standard." Ibid. at 949.
45. Association of American Colleges and Universities Board of Directors, "Academic Freedom and Educational Responsibility," January 6, 2006, www.aacu.org/about/statements/academic_freedom.cfm (internal quotes omitted). See also Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004). In that case, a Mormon student objected to certain language she was required to say in connection with classroom acting exercises. The District Court granted summary judgment in favor of the defendants and dismissed the case. The Court of Appeals held that the *Hazelwood* standard requires only that restrictions on a student's right to free expression in the classroom be reasonable and that courts will not override a professor's judgment unless it is a substantial departure from accepted academic norms or "where the proffered goal or methodology was a sham pretext for an impermissible ulterior motive." Ibid. at 1293. The Court of Appeals remanded the case to the District Court because there was a genuine issue of material fact as to whether the department requirement that the script be strictly adhered to was based on legitimate pedagogical reasons or was a pretext for religious discrimination. Ibid. at 1295.
46. For a summary of the case law involving the tension between faculty and student rights, see Cheryl A. Cameron, Laura E. Meyers, and Steven G. Olswang, "Academic Bills of Rights: Conflict in the Classroom," *Journal of College and University Law* 31 (2005): 243.
47. See, e.g., Bonnell v. Lorenzo, 241 F.3d 800, 823–24 (6th Cir. 2001); Martin v. Parrish, 805 F.2d 583, 584 n.2, 586 (5th Cir. 1986); *Rubin*, 933 F.Supp. at 1442.
48. See, e.g., *Hardy*, 260 F.3d at 679 (Instructor used and solicited from students derogatory expressions pertaining to race, sex, and sexual orientation in connection with a lecture and discussion in a communications class about words that have historically served the interests of the dominant culture in violation against policy prohibiting the use of offensive language in class.); Silva v. University of New Hampshire, 888 F.Supp. 293, 313 (D.N.H. 1994) (Writing instructor used sexually suggestive language and metaphors in explaining aspects of writing in violation of sexual harassment policy.)
49. Consider the following example that does not involve profanity, sex, religion, or other hot-button issues. A professor's style of questioning and criticizing students is harsh, and many of them find it difficult if not impossible to learn from him. Students complain bitterly. Those who can avoid his classes do so. Those who cannot perform poorly compared with their peers in other classes. Despite efforts to counsel him by

other faculty and administrators, the faculty member refuses to change, arguing that his pedagogical method is entirely legitimate. His department's personnel committee eventually decides not to reappoint him. Would not judicial second-guessing of that result violate the core principles of academic freedom?

50. See, e.g., Cohen v. San Bernardino Valley College, 92 F.3d 968, 972 (9th Cir. 1996). In light of its holding on the vagueness issue, the court declined "to define today the precise contours of the protection the First Amendment provides the classroom speech of college professors." Ibid. at 971. The opinion contains no reference to any of the case law relating to the First Amendment rights of public employees. See also *Dambrot*, 55 F.3d at 1182–85, where the Sixth Circuit upheld a First Amendment challenge to the university's discriminatory harassment policy brought by both a basketball coach and students. Nevertheless, the court went on to hold that the termination of the coach for use of the word "nigger" in a locker room pep talk was permissible, because his speech did not involve a matter of public concern and was not protected by academic freedom. Ibid. at 1185–91.
51. For example, in Hayut v. State Univ. N.Y., 352 F.3d 733 (2d Cir. 2003), the court found that a professor's classroom comments to a female student were sufficiently offensive, severe, and pervasive that a reasonable person could conclude that he had created a hostile environment. The professor repeatedly called the student "Monica" because of a purported resemblance to Monica Lewinsky and would ask her in class about "her weekend with Bill" and make other sexually suggestive remarks such as "be quiet Monica, I will give you a cigar later." The professor did not argue that his classroom comments were protected by academic freedom, and thus the court did not express a view on the availability of such a defense. Ibid. at 745. The AAUP, in its "Report on Sexual Harassment—Suggested Policy and Procedures for Handling Complaints," offers the view that sexual harassment may include classroom speech that is reasonably regarded as offensive, substantially impairs the academic opportunity of students, is persistent and pervasive, and is not germane to the subject matter. *AAUP Documents*, 209.
52. See, e.g., Yacovelli v. Moser, 2004 WL 1144183 (M.D.N.C. May 20, 2004) (upheld university's assignment of a book about the Qu'ran in freshman orientation program); Calvary Bible Presbyterian Church of Seattle v. Univ. of Washington, 436 P.2d 189 (Wash. 1967) (upheld university's course in the Bible as Literature).
53. See Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991), where the court upheld restrictions on the speech of an assistant professor of health, physical education, and recreation prohibiting him from interjecting his religious beliefs and/or preferences during instructional time periods or conducting optional classes in which a "Christian perspective" of an academic topic is delivered. The court held that the First Amendment right to free speech of the faculty member, which it found did not include a distinct right to academic freedom, was outweighed by the authority of the university to establish curriculum. The court declined to reach the Establishment Clause issue. Although the decision does not specifically state that plaintiff's speech was not related to the subject matter of the course, it would appear to underlie its reasoning; otherwise, it is hard to see why the general authority of the university to establish curriculum allows it to prohibit certain classroom speech of a faculty member consistent with the First Amendment.

54. For a recent example, see the procedures established at the City University of New York: www.cuny.edu/about/administration/offices/la/PROCEDURES_FOR_HANDLING_STUDENT_COMPLAINTS.pdf.
55. *AAUP Documents*, 135–40. Although jointly formulated by the three organizations, each took a different action with respect to the "Statement on Government." The AAUP's council adopted it, and the AAUP's membership endorsed it. The board of directors of the American Council on Education issued a statement in which it "recognizes the statement as a significant step forward in the clarification of the respective roles of governing boards, faculties, and administrations" and "commends it to the institutions which are members of the Council." Similarly, the Executive Committee of the Association of Governing Boards issued a statement in which it "recognizes the statement as a significant step forward in the clarification of the respective roles of governing boards, faculties, and administrations," and "commends it to the governing boards which are members of the Association."
56 http://agb.org/statement-board-responsibility-institutional-governance. The statement was revised and updated as the AGB's "Statement on Board Responsibility for Institutional Governance" in 2010, to which the above citation refers. However, the language quoted in the text appears in both the 1998 and 2010 statements.
57. Areen, *supra* note 28, at 964–66.
58. Minnesota Board for Community Colleges v. Knight, 465 U.S. 271 (1984).
59. The issue arose in an unusual context. Minnesota law required public employees to bargain over the terms and conditions of employment and further required their employers to exchange views on subjects relating to employment that were outside the scope of mandatory bargaining only with the exclusive representatives selected by the employees. The law was challenged by faculty members at a community college who wanted to discuss academic matters directly with their college administration. Although again recognizing the arguments in favor of the value of faculty participation in governance, the court held there was no constitutional right to do so. Ibid. at 288.
60. Quite apart from what is necessary for academic freedom, faculty participation in governance is an appropriate way to reach the best and most informed decisions, to ensure the necessary support from those who actually deliver the services provided by universities, and to create an atmosphere conducive to the enthusiastic pursuit of scholarship and teaching. These reasons also support some faculty participation in such "nonacademic" matters as budget and facilities, where the expertise of the faculty may not always be relevant and a more corporate style of governance may seem appropriate. In addition, decisions in even such financial and managerial areas often have a direct and significant impact on scholarship and teaching.
61. *AAUP Documents*, 139.
62. Cole, *The Great American University*, 136

63. Cole, *The Great American University*, 136, as quoted from Clark Kerr, *The Uses of the University*, 5th ed. (Cambridge: Harvard University Press, 2001), 28.
64. Stanley Fish, "Faculty Governance in Idaho," *New York Times*, June 6, 2011, http://opinionator.blogs.nytimes.com/2011/06/06/faculty-governance-in-idaho.
65. See, e.g., Carley v. Arizona Bd. of Regents, 153 P.2d 1099 (Ariz. Ct. App. 1987) (rejecting claim by faculty member that the university violated his constitutional rights by taking into account negative student evaluations of his teaching in deciding not to renew his contract).
66. American Historical Association, *The Academic Bill of Rights*, www.studentsforacademicfreedom.org/abor.html.
67. Similar student bills of rights have been introduced in Congress and in several state legislatures. See Cameron, Meyers, and Olswang, "Academic Bills of Rights: Conflict in the Classroom," 243–47. So far none has been enacted.
68. David Beito, Ralph E. Luker, and Robert K. C. Johnson, "The AHA's Double Standard on Academic Freedom," *Perspectives on History* (March 2006), www.historians.org/Perspectives/issues/2006/0603/0603vie2.cfm.
69. For a more detailed critique of the Academic Bill of Rights, see the "Statement on the Academic Bill of Rights of Committee A of the AAUP," www.aaup.org/AAUP/comm/rep/A/abor.htm.
70. See, generally, *AAUP Documents*, passim. Many of the AAUP's recommendations are thoughtful. However, the connection of many such recommendations to academic freedom is not always clear or well established. Moreover, where there is little or no link between particular AAUP policies and academic freedom, it does not seem appropriate for it to enforce them through investigations, reports, and ultimately censure, especially at universities that established different procedures and policies in consultation or collective bargaining with their own faculty.

13

ACADEMIC FREEDOM AND THE BOYCOTT OF ISRAELI UNIVERSITIES

STANLEY FISH

1

THE BOOK-LENGTH STUDY from which this chapter is excerpted begins by noting that the literature of academic freedom is a literature of persistent and basic questions.

Is academic freedom a subset of the First Amendment and therefore something that affords legal protection to those who qualify as academics? Or is academic freedom a subset of freedom in the larger philosophical sense and therefore a political rather than a legal project? Or (a third possibility) is academic freedom a less exalted concept, neither a legal right nor a philosophical imperative, but the name of a guild desire, the desire to be free from external monitoring and discipline in the workplace. (This, of course, is the desire of all professions.) If that is all there is to it—a claim of special privilege—what, if anything justifies affirming the claim? Do academics who work in public universities enjoy a status superior to that of other public employees? Are academics, unlike other employees, free to criticize their superiors without fear of retaliation? Does academic freedom attach to the university or to the individual professor? Do students have academic freedom rights? Do classroom teachers have an academic freedom right to depart from strictly academic concerns?

As I explored these questions, each of which has a literature of its own, I noticed that the answers to them varied depending on whether academic