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Academic Discretion and the Constitution: The Fundamentals for Public Higher Education

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ACADEMIC DISCRETION AND THE CONSTITUTION: THE FUNDAMENTALS FOR PUBLIC HIGHER EDUCATION

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I. INTRODUCTION

Public institutions of higher education, their faculty, administrators, and board members have proven to be a fertile source for the civil rights litigator in the development of constitutional rights.[1] Not surprisingly, education law reporters and journals are reporting increasing numbers of case decisions in the context of higher education.[2] Yet, many educators suffer the mistaken notion that academic judgment is outside the scope of judicial review.[3] While some judicial deference is given to academic discretion, it is by no means conclusive in the face of a constitutional challenge.

The terms "free speech," "academic freedom," "due process," and "equal protection" are not just theoretical legal terms which are applicable only in courtrooms. They have real and direct consequence to the educator and the public institution's resources. Beyond the grim prospect of substantial liability, the indirect costs of

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This article has been adapted from remarks which were prepared by Mr. Forch for the Attorney General's Law Conference for Public Higher Education. The remarks are general and reflect personal views on the state of the law which are not necessarily the legal opinion of the Attorney General. They are principally designed for the educator; however, they are of benefit as a primer to a lawyer called upon to represent a public educator.

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1. For example, the Office of the Attorney General of the Commonwealth of Virginia handles an estimated fifty cases each year involving public education defendants.

2. *See, e.g.*, Menacker, *A Review of Supreme Court Reasoning in Cases of Expression, Due Process and Equal Protection*, 63 PHI DELTA KAPPAN 188 (1981); Sendor, *Advice for Lawsuit-Weary Board Members: Learn These Lessons About Labor Relations, Liquor and Legislative Laxity*, 170 AM. SCH. BD. J. 34 (1983).

3. *See* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969) (neither teachers nor students shed their constitutional rights at the schoolhouse door).

even successful litigation cannot be ignored.[4]

Unlike the insular institutions of the past dedicated exclusively to research and instruction, today's institutions serve the public interest as landlords, employers, grant recipients, and investors. Many operate or regulate bookstores, barbershops, airstrips, child care centers, dining facilities, and athletic programs. Many seek the broadest national reputation possible within available resources.[5] Given our litigious climate and the diversity and breadth of our academic institutions, a misunderstanding by the educator of his or her responsibility under the law is manifestly precarious. An appreciation for and understanding of basic constitutional rights is absolutely essential.

In the interest of preventive law, this article will generally examine the educator's risk of personal liability for constitutional infractions, and attempt to provide understandable definitions for constitutional principles frequently raised in challenges to academic discretion.

II. Judicial Standard for Determination of Personal Liability

Necessarily, any discussion of legal vulnerability is, and should be, sobering. Civil rights litigation always creates monetary exposure. A typical plaintiff will seek to recover his or her court costs, attorney's fees, back pay, compensatory damages, and interest.[6]

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4. If there is one truism about litigation involving higher education and constitutional issues, it is this: the victory is always sweet, but the costs dear. Valuable time and resources are diverted from instruction and research to litigation defense. An entire department within an institution, including secretarial staff, may be subpoenaed for a two- or three-day trial. Very little positive production takes place in preparation for trial, and the collegiate spirit of an academic institution can be irreparably fractured. Departmental harmony disappears as employees are frequently pitted against each other, memoranda are traded, and rumors abound.

Recently, the author defended an academic institution in a case in which the plaintiff introduced 278 memoranda at trial which, at best, can be described as involving internal bickering among employees. The memoranda had no positive effects for the institution; they succeeded only in promoting internal discord.

5. *See* Barile v. University of Va., 2 Ohio App. 3d 233, ____, 441 N.E.2d 608, 612 (1981) (The University of Virginia was held subject to Ohio law because it had actively recruited in Ohio an athlete subsequently injured while participating in one of the University's athletic programs. Ohio law was applicable despite the fact that the institution had no "offices, classrooms, phones, employees or 'resident representatives' " in that state.).

6. In a recent Michigan case, a trial judge awarded a professor, who had unconstitutionally been denied tenure, a total of $45,696.00 in back pay, $15,585.22 in prejudgment inter-

The aggregate exposure can be, and usually is, quite substantial. Furthermore, the risk of personal liability is ever present in civil rights litigation.[7] The United States Supreme Court has recently recognized that even punitive damages are potentially recoverable from public officials and employees.[8] A finding of maliciousness or evil intent on the part of the educator is not necessary; acting with a "reckless or callous disregard for the plaintiff's rights"[9] will justify an award of punitive damages.

There is an unavoidable risk that public educators and officials will be intimidated by the potential legal consequences of a difficult decision. Such feelings have both a positive and negative effect — negative in the sense of intimidation, positive in the sense of promoting serious reflection. The sense of intimidation is understandable, but unjustified. So long as educators are acting reasonably and in good faith, they need not fear personal liability from making the tough decision which unwittingly results in the deprivation of a constitutional right. The judicial standard is not so unreasonable. The law is designed not only to protect an individual's constitutional rights, but also to preserve and safeguard the administrator's right and responsibility to manage an institution efficiently and effectively. The law recognizes that good faith mistakes will be made and that the public interest in education will not be served if personal liability attaches for every constitutional error made in the good faith performance of duty. Consequently, educators enjoy a special privilege under the law known as "qualified immunity" to personal liability. As the Supreme Court enunciated

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est, and $23,158.55 for litigation costs and legal fees; these sums were to be paid by individual college officials. Stern v. Shouldice, 706 F.2d 742, 744 (6th Cir. 1983). The professor had alleged that the tenure denial was really in retaliation for his criticism of the administration, while the college contended that he was dismissed for his uncooperative attitude. *Id.* at 745-46. The appellate court affirmed the award of costs and legal fees, but reversed the award of back pay and interest since the professor had demanded those items only from the college. *Id.* at 751.

7. Scheuer v. Rhodes, 416 U.S. 232, 238 (1974).

8. Smith v. Wade, 103 S. Ct. 1625, 1628-29 (1983).

9. *Id.* at 1637. In *Smith,* an inmate assaulted by cellmates brought an action under 42 U.S.C. § 1983 against a prison guard. The Supreme Court stated: "[W]e assume, and hope, that most officials are guided primarily by the underlying standards of federal substantive law — both out of devotion to duty, and in the interest of avoiding liability for compensatory damages." *Smith,* 103 S. Ct. at 1637. Since the common law allowed recovery of punitive damages for malicious intent or reckless indifference, the Court found no reason not to hold state officials liable on the same basis "once the protected sphere of privilege is exceeded." *Id.* at 1640.

in *Wood v. Strickland*:[10]

> Liability for damages for every action which is found subsequently to have been violative of . . . constitutional rights and to have caused compensable injury would unfairly impose upon the school decisionmaker the burden of mistakes made in good faith in the course of exercising his discretion within the scope of his official duties. . . .
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> . . . We think there must be a degree of immunity if the work of the schools is to go forward; and . . . the immunity must be such that public school officials understand that action taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished. . . .[11]

In virtually every case in which a constitutional violation has been demonstrated, the fundamental question was whether the defendant knew or should have known under the circumstances that his or her decision violated the constitutional guarantee.[12] It is never enough to say "I didn't know I was doing wrong" if a reasonably prudent person would have known; pleas of ignorance are no excuse when ignorance is unreasonable. "Such a standard neither imposes an unfair burden upon a person assuming a responsible public office. . . nor an unwarranted burden in light of the value which civil rights have in our legal system."[13] Nevertheless, the decisionmaker is neither held to the standard of knowledge pos-

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10. 420 U.S. 308, 319-21 (1975).

11. *Id.* at 319-21.

12. The *Wood* Court held that an official would not be immune from liability if he knew or reasonably should have known that his action would violate the plaintiff's constitutional rights or if he acted with malicious intent to deprive the plaintiff of his rights. *Id.* at 322. The *Wood* "reasonable man" standard was reaffirmed in Harlow v. Fitzgerald, 102 S. Ct. 2727 (1982).

In *Harlow*, an Air Force officer sued two presidential aides for their alleged roles in discharging him after he gave unfavorable testimony to a congressional defense committee. The Supreme Court noted that "[t]he subjective element of the good faith defense frequently has proved incompatible with our admonition . . . that insubstantial claims should not proceed to trial" and concluded that "bare allegations of malice" were not sufficient to defeat immunity. *Id.* at 2737-38. The Court stated that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 2738. *See also* McElveen v. County of Prince William, No. 82-6679 (4th Cir. Jan. 26, 1984).

13. 420 U.S. at 322.

sessed by a constitutional lawyer nor expected to predict the evolution of constitutional law.[14] He is, however, presumed in law to know basic constitutional rights.[15]

III. Constitutional Rights

A. *Protections Afforded by the First Amendment*

1. Freedom of Speech

The first amendment to the United States Constitution flatly prohibits government from "abridging the freedom of speech."[16] In the vernacular, "free speech" essentially can be equated with governmental "tolerance."

a. Pure Belief

The public educator must tolerate a broad array of personal opinions and beliefs no matter how bizarre or foreign to his way of thinking. In the field of education, the Supreme Court has repeatedly recognized that an academic institution must operate as a marketplace for diverse principles, ideas, and beliefs.[17] An individual's personal beliefs must not serve as the motivating reason for denying or withdrawing a right, privilege, or benefit.[18] For example, the denial of promotion or tenure to a faculty member, even though no right exists thereto, must not be premised upon the faculty member's ideology or outside organizational affiliations.[19]

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14. 102 S. Ct. at 2739. A reasonably competent public official should know the law governing his conduct unless the law is not clearly established. *Id. See also* Stern v. Shouldice, 706 F.2d 742, 749 (6th Cir. 1983) (reasonable person would have known that existing case law protected plaintiff's speech, and thus, college officials were not immune from liability).

15. The "good faith" defense presumes that school personnel know and respect the "basic unquestioned constitutional rights of [their] charges." 420 U.S. at 322. Given the evolutionary nature of constitutional law, there is always room to debate whether the right at stake is a settled, unquestionable right — which the educator should have known. The Supreme Court has not listed those basic rights. Nonetheless, there are certain rudimentary, fundamental principles of law of which educators must be cognizant.

16. U.S. Const. amend. I.

17. *See, e.g.*, Widman v. Vincent, 454 U.S. 263, 267 n.5 (1981) (quoting Healy v. James, 408 U.S. 169, 180 (1972)); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

18. Perry v. Sindermann, 408 U.S. 593, 597 (1972).

For first amendment purposes, the distinction between "right" and "privilege" is immaterial. Van Alstyne, *The Demise of the Right - Privilege Distinction in Constitutional Law*, 91 Harv. L. Rev. 1439 (1968).

19. *Cf.* Elrod v. Burns, 427 U.S. 347 (1976) (plaintiff cannot be discharged from employment because he was not affiliated with the Democratic party); Keating v. Carey, 706 F.2d

The recent case of *Ollman v. Toll*[20] is illustrative. In *Ollman*, a Marxist professor brought a lawsuit against the University of Maryland for refusing to grant him the chair of the department of government and sociology. The plaintiff claimed that the personnel decision was the result of public pressure over his socialist philosophy. The University contended that its judgment was based upon the professor's lack of academic accomplishments and administrative experience.[21] The judicial analysis reveals that when "mixed motives"[22] allegedly underlie a particular decision, a court will closely examine all the relevant evidence to determine if the institution's explanation is legitimate or pretextual for unconstitutional motives.[23] The institution's explanation is not simply "rubber-stamped" by the judiciary, but scrutinized to ensure that academic, not unconstitutional, reasons genuinely motivated the institution's decision.

Recent federal decisions regarding student organizations underscore the importance that the judiciary places upon the uninhibited expression of ideas on campus. An institution could not deny equal use of its facilities to a student group generally known for its adherence to subversive principles merely because the institution deemed the group's views abhorrent to its own philosophy.[24] Moreover, once a public institution chooses to finance a student organization or a campus newspaper, the "privilege" of financial support may not be withdrawn solely because of personal disagreement

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377 (2d Cir. 1983) (plaintiff cannot be fired because of affiliation with the Republican party).

20. 518 F. Supp. 1196 (D. Md. 1981), *aff'd*, 704 F.2d 139 (4th Cir. 1983) (per curiam).

21. *Ollman*, 518 F. Supp at 1214-18.

22. "Mixed motives" arise when an employee is punished for engaging in activities protected by the Constitution or by statute, but a legitimate business reason also exists for the employer's action. Boich v. Federal Mine Safety & Health Review Comm'n, 704 F.2d 275, 279 (6th Cir. 1983).

23. In cases involving violations of constitutional rights, the plaintiff must prove that his activity was constitutionally protected and was a "substantial or motivating factor" in his discharge. Once this prima facie case is established, the burden ordinarily shifts to the defense to prove that it would have dismissed the employee even without the protected activity. Stern v. Shouldice, 706 F.2d 742, 747 (6th Cir. 1983) (citing Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)).

24. Healy v. James, 408 U.S. 169, 187-88 (1972); Aman v. Handler, 653 F.2d 41, 44, 46 (1st Cir. 1981). An institution may require a student group to abide by reasonable and uniformly-applied rules designed to insure safety and order. For example, in *Aman*, a student organization identified with Reverend Moon and the Unification Church could have been denied the use of the school's facilities if a reasonable basis existed to conclude that the group's conduct would likely disrupt the education of other students. *Id.* at 44.

with the group's positions or editorial policies.[25] When an institution disagrees with a student newspaper's policy, rather than withdraw support and risk perilous litigation, it should require the newspaper to print an appropriate disclaimer.

b. Expressive Conduct

Expressive conduct is a shorthand way of referring to any conduct taken in furtherance of, or because of, one's beliefs. Unlike pure belief, expressive conduct is not, and never has been, absolutely protected by the right of free speech.[26] To determine whether a restriction on expressive conduct is constitutional, the courts traditionally balance the public interest in the message which the conduct is intended to convey against the resulting or likely injury to the governmental interest at stake.[27] If as a result of the expressive conduct there would be little or no injury to government, the plaintiff usually wins.[28] Conversely, if the expressive conduct causes, or is likely to cause, a material interference with or disruption to a legitimate governmental function or purpose, the plaintiff usually loses irrespective of the value of the public comment.[29] A summary review of the leading cases demonstrates the application of this case-by-case balancing approach.

In *United States v. O'Brien*,[30] the United States Supreme Court examined whether the burning of draft cards was conduct protected by the first amendment. Such conduct was obviously designed to convey opposition to the Vietnam War, unquestionably a matter of intense public interest.[31] Nonetheless, the Court held that this form of "free speech" conduct was not protected. The Court reasoned that if such conduct were permitted, the greater

25. Joyner v. Whiting, 477 F.2d 456, 460 (4th Cir. 1973).

26. United States v. O'Brien, 391 U.S. 367, 376 (1968). *See* Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 647 (1981) (The right to communicate one's views is subject to reasonable time, place, and manner restrictions.); Adderly v. Florida, 385 U.S. 39, 48 (1966) (The guarantees of the first amendment have never given a person the right to express himself wherever and however he pleases.).

27. Pickering v. Board of Educ. 391 U.S. 563, 568 (1968).

28. *E.g.*, United States v. Grace, 103 S. Ct. 1702 (1983); Carey v. Brown, 447 U.S. 455 (1980).

29. *E.g.*, Greer v. Spock, 424 U.S. 828 (1976); United States v. O'Brien, 391 U.S. 367 (1968).

30. 391 U.S. 367 (1968).

31. The defendant stated that he had burned the draft card publicly to change people's views about war, the selective service system, and the armed forces. *Id.* at 370.

public interest in national defense would be undermined.[32] Thus, actual or potential injury to a legitimate governmental function outweighed the individual's right to protest in this manner.[33]

In contrast, the Court, in *United States v. Grace*,[34] held that the government could not prohibit public distribution of leaflets on the sidewalks surrounding the Supreme Court building absent evidence that such distribution would likely obstruct access to the building or interfere with the orderly administration of justice. Since the government had no facts to show how the distribution of leaflets would interfere with its functions, the distribution of leaflets had to be tolerated.[35]

Cases arising in the educational setting are equally illustrative. In *Sword v. Fox*,[36] the Fourth Circuit Court of Appeals upheld disciplinary actions against students who conducted unauthorized demonstrations inside a school administration building. In reaching its decision, the court noted that "a regulation which prohibits demonstrations within . . . college buildings 'measurably contribute(s) to the maintenance of order and decorum within the educational system' and represents 'a reasonable exercise of the power and discretion' of the college authorities."[37] Merely because expressive conduct would be peaceful does not give one the right to protest wherever on campus he or she chooses.[38] On the other hand, in *Tinker v. Des Moines Independent Community School District*,[39] the Supreme Court ruled that students could not be disciplined for wearing black arm bands at school in protest of national policy toward the Vietnam hostilities. Such "expressive conduct" had to be tolerated because the school was unable to show any material dis-

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32. *Id.* at 381-82.

33. The Court indicated that a governmental regulation which impacts upon first amendment rights is justified if it furthers a material governmental interest unrelated to the suppression of free expression, and if it is the least restrictive means of promoting that interest. *Id.* at 377.

34. 103 S. Ct. 1702 (1983).

35. *Id.* at 1708-10.

36. 446 F.2d 1091 (4th Cir.), *cert. denied*, 404 U.S. 994 (1971).

37. *Id.* at 1098 (quoting Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535, 544-45 (S.D.N.Y. 1968)). *See also* Adamian v. Jacobsen, 523 F.2d 929 (9th Cir. 1975), *aff'd after remand sub nom.* Adamian v. Lombardi, 608 F.2d 1224 (9th Cir. 1979) (dismissal of college professor who led unauthorized demonstration during ceremonies at college stadium upheld), *cert. denied*, 446 U.S. 938 (1980).

38. 446 F.2d at 1098. The court acknowledged the overriding importance of the government interest in maintaining order and concentrated on the reasonableness of the regulation designed to effectuate that interest.

39. 393 U.S. 503 (1969).

ruption to its educational mission or the instruction of other students.[40]

This balancing of individual and governmental interests also appears in cases in which school employees have been disciplined or fired for criticizing their governmental employers. Employee criticisms, even false criticisms that are not maliciously contrived, on issues of public interest are protected if such criticisms do not materially undermine or interfere with the performance of the employee's duties, impair an expected close working relationship, or violate a confidence. In other words, absent real and tangible harm to an institution, employee criticisms of the institution's policies or operations must be tolerated. The seminal case in the area, *Pickering v. Board of Education*,[41] demonstrates the general proposition.

In *Pickering*, a teacher had written a letter to the local newspaper criticizing the governing school board's allocation of funds and a proposed bond sale. The teacher's protestations were premised upon false data, and, unfortunately, the matter was also erroneously reported in the local paper. Believing the incorrect report had unjustifiably impugned its reputation, the board fired the teacher. The Supreme Court held that the firing violated the teacher's right of free speech. Apparently, a pivotal factor in the Court's decision was that the inaccurate report did not impede the teacher's performance of his duties or materially interfere with the regular operations of the school.[42] Furthermore, the criticisms were not personally directed at anyone with whom the teacher would normally associate on a daily basis, nor was there any unauthorized disclosure of confidential information.[43] Accordingly, as there was no resulting material damage to the institution, the board could not constitutionally dismiss the teacher for the public, but false, criticism of its policies.[44] The advisable approach is for the institu-

40. *Id.* at 508-09.

41. 391 U.S. 563 (1968).

42. *Id.* at 572-73. The fact that the false statements were not knowingly or recklessly made was crucial to the outcome of the case. The court stated: "[A]bsent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." *Id.* at 574.

43. *Id.* at 569, 572.

44. Other cases also illustrate the law governing public school employee criticisms. In Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979), the Court ruled that a teacher could not be fired for privately charging her governing board with alleged racist policies. Conversely, in Patterson v. Ramsey, 413 F. Supp. 523 (D. Md. 1976), *aff'd*, 552 F.2d 117 (4th Cir. 1977), the firing of a school superintendent who publicly criticized a proposed

tion to set the record straight publicly.

Institutions may regulate expressive conduct which is insubordinate or in defiance of legitimate job requirements. In *Shaw v. Board of Trustees*,[45] for example, the termination of faculty who publicly protested the abolishment of tenure by refusing to participate in mandatory workshops and commencement exercises was upheld. Furthermore, the Supreme Court recently affirmed the firing of a government attorney for internally distributing a questionnaire on employee morale among his co-workers.[46] The Court noted that not only was the questionnaire prepared and distributed on government time, but it was also "sowing the seeds" of discord, thereby undermining the interest of the public employer in efficient and harmonious operations.[47] The Court also observed that when a public employee speaks upon matters of personal interest, such as contract terms, rather than on matters of public interest, "a federal court is [usually] not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."[48] Bickering among co-workers over employment terms and conditions that results in a divisive workplace need not be endured by the public employer in the name of free speech.[49]

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governing board program and provided the board with false information concerning the program was upheld. Even though the public criticism concerned a matter of legitimate public interest, the superintendent was expected to work closely with the board, and the board relied directly on the superintendent to advance board policies and to provide accurate data. *Patterson*, 413 F. Supp. at 547. Hence, a close and confidential working relationship was impaired. Likewise, in Roseman v. Indiana Univ. of Pa., 520 F.2d 1364 (3d Cir. 1975), *cert. denied*, 424 U.S. 921 (1976), the nonrenewal of a nontenured professor's contract was upheld, in part because the false statements made by the professor against her department head had disrupted the working relationships within the department. *Roseman*, 520 F.2d at 1368.

45. 549 F.2d 929, 932-33 (4th Cir. 1976).

46. Connick v. Myers, 103 S. Ct. 1684 (1983).

47. *Id.* at 1693.

48. *Id.* at 1690. The Court emphasized the fact that the questionnaire concerned matters of public interest "in only a most limited sense" and could be "characterized as an employee grievance concerning internal office policy" since it emerged after a dispute between the parties. *Id.* at 1693-94.

49. *Id. See also* Chitwood v. Feaster, 468 F.2d 359, 361 (4th Cir. 1972) ("A college has a right to expect a teacher to follow instructions and to work cooperatively and harmoniously with the head of the department."); Mahaffey v. Kansas Bd. of Regents, 562 F. Supp. 887 (D. Kan. 1983) (Complaints about salary increases, office space, and control of office equipment are not entitled to free speech protection.).

2. Academic Freedom

"Academic freedom" is a term which is little understood, seldom defined, and loosely referred to in academia. Its values — the freedoms of thought and inquiry — undergird the constitutional guarantee of freedom of speech. As a consequence, although the Constitution does not expressly guarantee the right to academic freedom, it is afforded protection coextensive with and under the first amendment.[50]

No academic constituency has a monopoly on academic freedom. Academic freedom exists for the protection of faculty in their quest for truth, for the institution's equal interest in learning and efficient operations, and principally for the overall public interest in education.[51] The principle of academic freedom, like the principle of freedom of speech, requires a weighing of competing interests to determine which best promotes the overall public good.

Employee conduct in the name of academic freedom which interferes with a legitimate purpose of the institution need not be disregarded or ignored.[52] For example, academic freedom does not immunize any employee from reasonable performance reviews or invest faculty with unbridled control over what occurs in the classroom. Nor does it delegate supervisory control of an institution to its employees. The termination of a teacher's employment for continually overemphasizing in class, against reasonable instructions to the contrary, a particular subtopic of a college survey course and/or counseling students without authority does not violate the teacher's first amendment rights.[53] The same result was reached where an institution considered a professor's teaching philosophy

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50. The Supreme Court in Keyishian v. Board of Regents, 385 U.S. 589 (1967) stated:

> Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

Id. at 603.

51. *Id. See also* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). The principle of academic freedom is typically implicated when governmental authority extraneous to the institution seeks to chill the educative process. The application of that principle, as between teacher and employing institution, is less apparent since both have real and direct interests in academic freedom.

52. *See* Dean v. Timpson Indep. School Dist., 486 F. Supp. 302 (E.D. Tex. 1979); Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970).

53. Clark v. Holmes, 474 F.2d 928, 931 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973).

to be incompatible with its own teaching aims.[54] Thus, although academic freedom generally permits a teacher to expose others to different philosophies and ways of thinking, it does not absolutely insulate an instructor from reasonable institutional regulations or policies.[55] The judicial doctrine of academic freedom, where it recognizes rights, also recognizes pedagogical responsibility.[56]

3. Recent Supreme Court Decisions

Three recent United States Supreme Court cases demonstrate the pervasive reach of the first amendment into every facet of academic life. In *Widmar v. Vincent*,[57] the Court examined the right of religious student groups to use public college facilities on an equal basis with other secular student groups. Rebuffing the notion that permitting such access would constitute governmental approval of a particular religious belief, the Court held that student religious groups must be given equal access when the governmental advancement of religion is only incidental.[58] Allowing the use of facilities by an array of student groups does not constitute an endorsement by the institution of any single belief; to the contrary, it constitutes a toleration of the institution's internal diversity.

In the second case, *Board of Education v. Pico*,[59] the Court considered the extent to which the first amendment governs the removal of books from public libraries. In *Pico*, a local school board ordered its school librarian to remove specific books from the library shelves.[60] Although the case was remanded to the trial court for additional findings as to the board's motivation, the majority view seems to hold that the removal of a library book because of the author's beliefs raised a constitutional issue. The Court had difficulty with the board's decision in the case because the board members themselves had not reviewed the books in question; had ignored the literary advice of experts, librarians, and teachers; and had departed from normal review procedures. Under such circumstances, a reasonable suspicion arises that the board's decision may

54. Hetrick v. Martin, 480 F.2d 705, 708 (6th Cir.), *cert. denied*, 414 U.S. 1075 (1973).

55. *See, e.g.*, Kay v. Board of Higher Educ., 173 Misc. 943, 18 N.Y.S.2d 821 (Sup. Ct. 1940).

56. Note, *Developments in the Law — Academic Freedom*, 81 HARV. L. REV. 1045, 1065-1128 (1968).

57. 454 U.S. 263 (1981).

58. *Id.* at 273-75.

59. 102 S. Ct. 2799 (1982).

60. *Id.* at 2802-03.

have been influenced by factors unrelated to educational suitability.[61] If, upon remand, the evidence demonstrates that the board decision was premised upon legitimate educational factors, such as a finding of relevance to course content, quality, or cost, the school board should prevail.

The third case, *Perry Educational Ass'n v. Perry Local Educator's Ass'n*,[62] examines the right of private organizations to use public school facilities for the purpose of conducting their expressive activities. The Court concluded that limiting access to public school property for only internal functions is permissible. Mere public ownership of property does not furnish citizens the right to use it for expressive activity. Until school authorities dedicate, officially or by practice, a facility for use as a public forum, outside groups have no constitutional right to claim its use to advance their individual beliefs.[63] Once school property is opened for expression, school authorities may not selectively deny future use thereof solely on the basis of the content of the message to be broadcast, absent a factual showing that such speech activity will likely result in disorder or material interference with the school's operation. Nonetheless, school authorities may always regulate the time, place, and manner of speech activity on their campuses through reasonable and uniform standards designed to promote order and safety.[64]

B. *Protections Afforded by the Fourteenth Amendment*

1. Due Process

The fourteenth amendment to the United States Constitution provides, in pertinent part, that "[no] State [shall] deprive any person of life, liberty, or property, without due process of law."[65] In other words, due process simply means fundamental fairness. Before a public institution may impinge upon any person's liberty or property, it must employ fair procedures designed to minimize the risk of mistake. Although the due process clause has a substantive value, the application of substantive due process to academic discretion is unlikely. The courts simply will not engage in a com-

61. *Id.* at 2811-12.
62. 103 S. Ct. 948 (1983).
63. *Id.* at 955.
64. *Id.*
65. U.S. CONST. amend. XIV, § 1.

parative inquiry into academic considerations which do not implicate positive constitutional rights.[66]

a. Liberty or Property

As a threshold inquiry, liberty or property interests must be implicated by the governmental employer.[67] If no such interests exist, there is no constitutional requirement for procedural due process; however, responsible government should provide, as a policy judgment, at least some form of informal procedural review. Nonetheless, when an educational institution terminates an "at-will" employee, declines to renew the contract of a nontenured teacher, or decides not to promote or confer tenure upon a professor, due process procedures are generally not required by the Constitution. The affected employee, having no contractual or statutory entitlement to employment, promotion, or tenure, technically has no property interest thereto; he possesses only unilateral expectations.[68]

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66. Clark v. Whiting, 607 F.2d 634 (4th Cir. 1979).

67. Paul v. Davis, 424 U.S. 693, 710 (1976); Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

If a property or liberty interest is protected under state law or the Bill of Rights, a court will apply the balancing test established in Mathews v. Eldridge, 424 U.S. 319 (1976), to decide which procedural safeguards are required. According to the *Mathews* Court:

> [The] identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

Naturally, the procedures mandated in each case will vary as a result of the application of this balancing test.

68. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564 (1972); Robertson v. Rogers, 679 F.2d 1090 (4th Cir. 1982) (continuous renewal of teacher's contract for eleven years pursuant to a series of two-year contracts does not create a protected property interest); Harrison v. Ayers, 673 F.2d 724 (4th Cir. 1982) (no property or liberty interest in continued employment exists for nontenured faculty member); Kilcoyne v. Morgan, 664 F.2d 940 (4th Cir. 1981) (employment for an additional year beyond probationary period does not create de facto tenure), *cert. denied*, 456 U.S. 928 (1982); Sheppard v. West Virginia Bd. of Regents, 516 F.2d 826 (4th Cir. 1975) (no implied right to tenure adheres with one year extension of contract at end of probationary period); *see also* Tyler v. College of William & Mary, 429 F. Supp. 29 (E.D. Va. 1977) (The doctrine of de facto tenure has little chance of success where an institution has a defined tenure system and clearly provides that tenure may be conferred *only* by the affirmative act of the board.).

On the other hand, once a property interest has vested, whether through the conferral of tenure or promotion or other contract right, due process must be observed before the interest can be taken. For example, the decision to terminate a "for term" or tenured employee before the expiration date of the contract may be reached only through a process designed to minimize wrong or mistaken judgment. The Fourth Circuit Court of Appeals has recently held that state classified employees in Virginia, after successfully completing the requisite probationary period of employment, have, under Virginia law, property interests requiring procedural due process before termination of employment.[69]

Even though no property interest may be at stake, due process is constitutionally required if a person's liberty is threatened by the institution. Although decisions not to renew contracts of employment or to confer tenure may adversely impact upon one's future job prospects, such decisions standing alone do not implicate liberty as that term is defined by the Supreme Court.[70] Liberty is generally affected when government publicly stigmatizes a person's reputation, integrity, or honor, if the stigmatization is associated with the loss of employment or some other "tangible" interest.[71] Under such circumstances, due process generally requires an opportunity for a "name-clearing" hearing before the employer publicly releases stigmatizing reasons causing loss of employment.[72] The mere announcement of the nonrenewal of a contract, however, would not implicate constitutional due process. In *Ledford v. De-*

In a case decided this year, a court held that an institution did not have to provide a hearing to a teacher when it denied him a salary increase and office space, because he had no contractual or statutory right to them. Mahaffey v. Kansas Bd. of Regents, 562 F. Supp. 887, 889-90 (D. Kan. 1983).

69. Detweiler v. Commonwealth, 705 F.2d 557, 559-60 (4th Cir. 1983).

70. *Roth,* 408 U.S. at 575. The Court in *Roth* stated that no attempt had been made to define with exactness the word "liberty" but noted that

> [w]ithout doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God . . ., and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.

Id. at 572 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

71. The Supreme Court "has never held that the mere defamation of an individual, whether by branding him disloyal or otherwise, was sufficient to invoke the guarantees of procedural due process absent an accompanying loss of government employment." Paul v. Davis, 424 U.S. at 706. "[R]eputation alone, apart from some more tangible interests such as employment, is [not] . . . 'liberty' or 'property'. . . ." *Id.* at 701.

72. Codd v. Velger, 429 U.S. 624, 627-28 (1977) (per curiam).

lancey,[73] the Fourth Circuit held that when a state agency makes its personnel files available to prospective employers, and the file contains false information stigmatizing an employee's good name, the employee has a cause of action under section 1983[74] for a violation of his or her constitutional rights.[75] It is generally unwise to disclose or discuss publicly the reasons or charges which led to the dismissal of a student or college employee since possible defamation and due process liability may arise if the charge or reason is subsequently proven false.

b. Due Process Requirements

Assuming the existence of a liberty or property interest, the institution must furnish procedural safeguards designed to avoid mistaken deprivations of such interests. Fairness is the keynote.[76] When there are no fair procedures, the chances for erroneous judgments are greatly increased. The law does not specify blanket procedural safeguards that must be followed in every case. In order to provide a fair hearing to both sides, flexibility and common sense are essential.

In very general terms, due process minimally requires but three elements — notice, a meaningful opportunity to be heard, and an impartial decisionmaker. The obvious purpose of notice is to provide the individual with the reasons why his liberty or property interest is threatened in order that he can meaningfully respond.[77]

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73. 612 F.2d 883 (4th Cir. 1980).

74. 42 U.S.C. § 1983 (1976 & Supp. V 1981).

75. *Ledford*, 612 F.2d at 886-87.

76. Two cases, one dated 1928 and the other 1942, are illustrative of the unfairness which procedural due process is intended to prevent. In the first case, officials of Syracuse University dismissed a student solely because she was not a "typical Syracuse girl." No other reasons or facts were provided. Anthony v. Syracuse Univ., 224 A.D. 487, 489, 231 N.Y.S. 435, 437 (1928). In the other case, University of Tennessee officials would not permit a dismissed student to question her accusers because "honorable students do not like to be known as snoopers and informers." State *ex rel* Sherman v. Hyman, 180 Tenn. 99, ____, 171 S.W.2d 822, 826 (1942), *cert. denied*, 319 U.S. 748 (1943).

Although the institutions prevailed in both cases, they would not have been victorious under the current notion of due process. The Supreme Court has since acknowledged that mere failure to employ fairness in the decisionmaking process may overshadow the substantive decision. Carey v. Piphus, 435 U.S. 247, 266 (1978). The University of North Carolina was recently ordered to readmit a nursing student until due process was observed; she had been dismissed for cheating. Jones v. Board of Governors, 557 F. Supp. 263 (W.D.N.C.), *aff'd*, 704 F.2d 713 (4th Cir. 1983).

77. If the reasons for the termination of the interest are not provided in the notice, they will have to be furnished later and at a time sufficiently in advance of any scheduled hearing

Hidden reasons, even if legitimate, risk the possibility of not being heard later when litigation arises. The notice need not be exhaustive in covering all of the underlying factual detail; stating the specific reason(s) and providing a brief summary of the controlling or pivotal facts are sufficient.

What constitutes a "meaningful" opportunity to respond manifestly will depend upon the circumstances of each case.[78] As a general rule, when the penalty to be received is severe, such as loss of employment, formal administrative hearings are the rule. When the potential sanction does not involve any long-term taking of property or deprivation of liberty (for example, brief suspensions), due process generally requires only that there be an informal, but meaningful, "give-and-take between student and disciplinarian."[79]

When hearings are conducted, courtroom procedures and rules of evidence are inapplicable.[80] Common sense and fairness alone govern. Neither side should be given an advantage over the other; both sides should have an equal opportunity to present the facts. Furthermore, considering opinion or hearsay at the hearing is not improper so long as the decision is based on credible facts.

The final and most important element of due process is impartiality. The decisionmaker must have no personal or pecuniary interest in the issue at stake, although general knowledge of the issue in advance of the hearing does not automatically disqualify him.[81] If there is any question concerning whether pre-hearing knowledge

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so that a meaningful opportunity to respond is available. Perry v. Sindermann, 408 U.S. 593, 601 (1972).

78. The Supreme Court in Board of Curators v. Horowitz, 435 U.S. 78 (1978), examined the extent to which due process principles govern academic dismissals of students. The Court held that such dismissals do not require full-blown adversarial hearings; if the student has been meaningfully apprised of the academic standards and has had at least an informal opportunity to respond, due process has been satisfied. Since the student in this case had been meaningfully reviewed by a number of committees throughout her education and since there was no dispute as to the relevant academic expectations, due process did not entitle her to an adversarial hearing before the ultimate decisionmaker. *Id.* at 85, 86 & n.3. As a matter of sound judicial policy and common sense, the Court observed that adversary hearings would be inappropriate for administratively testing academic judgments. *Id.* at 90.

For a survey of institutional procedural requirements in student dismissals for academic and misconduct reasons, *see* Golden, *Procedural Due Process for Students at Public Colleges and Universities*, 11 J.L. & EDUC. 337 (1982).

79. Goss v. Lopez, 419 U.S. 565, 584 (1975).

80. Mathews v. Eldridge, 424 U.S. at 348-49.

81. Bowens v. North Carolina Dep't of Human Resources, No. 82-1329 (4th Cir. June 23, 1983).

has reached such proportions as to preclude a fair assessment of both sides,[82] the college or university should seek a substitute decisionmaker acceptable to both sides, since a public institution should always be sensitive to the appearance of impartiality.

Two recent cases are noteworthy. In *Tug Valley Recovery Center v. Watt*,[83] the Fourth Circuit held that absent a showing of personal bias, a violation of due process does not arise simply because the employer appoints the decisionmaker or because the decisionmaker has a particular speciality, competence, or philosophy.[84] The same court, in *Detweiler v. Commonwealth*,[85] found that a supervisor had violated due process by subtly intimidating an employee so that she would not testify on the plaintiff's behalf at a post-discharge hearing.[86] As a matter of fundamental fairness, public employers may not utilize their powers, directly or indirectly, to influence the outcome of a decision.

As a practical matter, institutions ought not depend upon technical considerations of "property" or "liberty," but focus on fairness. From a managerial viewpoint, government should always be in a position to explain and defend its actions. From a tactical viewpoint, although due process may not require reasons and a hearing, the failure to provide them naturally creates suspicion about an institution's true motivations which a jury may later find difficult to understand.

2. Equal Protection of the Law

The fourteenth amendment to the Constitution also prohibits a state from "deny[ing] to any person . . . the equal protection of the laws."[87] Government must treat people uniformly, without regard to artificial factors having no bearing on, or relevance to, the matter under consideration.[88] In the vernacular, the fourteenth amendment's mandate is "evenhandedness." Its mandate is applicable not only to legislative acts but also to any public institutional decision concerning the adoption or implementation of academic

82. This is always a fact determination to be made by the trier of fact.
83. 703 F.2d 796 (4th Cir. 1983).
84. *Id.* at 801-02.
85. 705 F.2d 557 (4th Cir. 1983).
86. *Id.* at 561-62.
87. U.S. CONST. amend. XIV, §1.
88. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 343-44 (1949).

standards, personnel rules, or administrative regulations or directives. Institutions which fail to treat similarly situated people in the same manner are inviting lawsuits alleging discriminatory treatment.[89]

The law protects and preserves the broad authority of academic institutions to establish academic standards and policies.[90] For example, institutions may set minimum criteria for faculty promotions, requisite probationary periods before tenure review, passing grades for courses, courses required for graduation, and maximum percentages of tenured faculty within a given department. Moreover, the fourteenth amendment does not prevent administrators from modifying longstanding standards or adopting more demanding ones for prospective application.[91] Equal protection does not divest higher education officials of their discretionary authority. It commands that such authority be implemented evenhandedly. Any departures from adopted standards should be made solely for legitimate, well-documented business reasons. Exceptions made out of friendship or sympathy will invite subsequent legal difficulties.

In *Hubbard v. John Tyler Community College*,[92] a nursing student was not permitted to graduate because she had failed one required course by two points and had received a grade of zero in another. Although her plight evoked sympathy, her lawsuit was quickly dismissed. Because the college had applied its published standard in a uniform way, the judge declared that it was not the court's function to decide the appropriate passing grade or "second-guess" the academic evaluation.[93] Had the plaintiff claimed that the grading policy was not applied uniformly to all similarly situated nursing students or that her grade was influenced by race, age, sex, or some other irrelevant factor, the court would have scrutinized the school's decision.[94] The *Hubbard* decision exemplifies sound traditional jurisprudence. Although it may be a fine point to

89. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

90. Rizzo v. Goode, 423 U.S. 362, 378 (1976) (citing Cafeteria Workers v. McElroy, 367 U.S. 886, 896 (1960)).

91. Lewandoski v. Vermont State Colleges, ___ Vt. ___, ___, 457 A.2d 1384, 1388-89 (1983).

92. 455 F. Supp. 753 (E.D. Va. 1978).

93. *Id.* at 755-56.

94. *See, e.g.*, Clark v. Whiting, 607 F.2d 634, 640-41 (4th Cir. 1979) (The court declined to compare the quality and the quantity of published scholarly articles of college faculty members who had been granted or denied promotion because determination of such matters "is not reviewable in federal court on any ground other than racial or sex discrimination or a First Amendment violation.").

some, the court's function is not to judge the wisdom of the academic decision, but to look for unconstitutional motivation.

In *Kunda v. Muhlenberg College*,[95] a teacher was denied tenure purportedly because she lacked a master's degree. An examination of the facts revealed, however, that unlike her male counterparts, she was not told of the degree requirement. Furthermore, several males had been promoted without the degree. On the basis of such circumstances, the court concluded that the tenure criteria served as a "cover" for unlawful sex discrimination and awarded the teacher tenure.[96] Here, administrative authority was not applied evenhandedly. As a consequence, the academic judgment was rejected as a pretext.

School administrators should also be generally familiar with the myriad of congressional legislation prohibiting discrimination.[97] Among these measures are Title VII of the Civil Rights Act of 1964, which outlaws race, color, sex, national origin, and religious discrimination in employment;[98] Title VI, which prohibits discrimination on the basis of race, color, and national origin in any college program receiving federal financial assistance;[99] Title IX, which proscribes discrimination on the basis of sex in federally-assisted programs;[100] section 504 of the Rehabilitation Act of 1973, which prohibits discrimination against otherwise qualified handicapped persons in any institutional program receiving federal aid;[101] and the Age Discrimination in Employment Act, which makes it unlawful to discriminate against any individual on the basis of age unless

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95. 621 F.2d 532 (3d Cir. 1980).

96. *Id.* at 546-47. Many college administrators view the award of tenure as "judicial activism" at its worst. The courts do understand the importance of tenure as evidenced by the Fourth Circuit's statement that "[t]enure is a privilege, an honor, a distinctive honor, which is not to be accorded to all . . . professors. It is a very high recognition of merit [and] the ultimate reward for . . . academic excellence." Smith v. University of N.C., 632 F.2d 316, 345 (4th Cir. 1980) (quoting Johnson v. University of Pittsburgh, 435 F. Supp. 1328, 1353 (W.D. Pa. 1977)).

Because of the long-term value associated with tenure and the underlying academic judgments which have to be made, courts are naturally reluctant to reverse tenure decisions. Nonetheless, when the law is violated, the court must provide full redress. Usually if an individual's credentials are still in dispute, a court will not award tenure but will return the matter to the institution for a proper assessment.

97. A thorough, in-depth discussion of these enactments is beyond the scope of this article, but the mention of them is intended to inform the reader of their existence.

98. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. V 1981).

99. 42 U.S.C. §§ 2000d to 2000d-6 (1976 & Supp. V 1981).

100. 20 U.S.C. §§ 1681-1686 (1976).

101. 29 U.S.C. § 794 (1976 & Supp. V 1981).

age is a bona fide occupational qualification reasonably necessary to the normal operation of a particular business.[102]

There is probably an irresistible impulse on the part of educators to feel utterly overwhelmed by all of this legal "mumbo jumbo." The impulse is understandable, but dangerous. When one considers that the purpose of these legislative enactments is to further the same policy that underlies the equal protection clause — evenhandedness without regard to irrelevant personal characteristics — understanding one's legal responsibility should be more manageable.

IV. Conclusion

The basic principles underlying the constitutional rights of free speech, due process, and equal protection — tolerance, fairness, and evenhandedness — are the cornerstones for the way in which we expect government to govern. Such terms can be debated in hard cases, but the terminology is readily understandable. Knowing that the law is predicated on common sense, or the rule of reason, educators should not fear the application of obscure or recondite legal principles.

102. 29 U.S.C. §§ 621-634 (1976 & Supp. V 1981).