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Colleges and Universities - Constitutional Law: Professor's Assignment of Grades to Students is Symbolic Communication Protected by the First Amendment

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COLLEGES AND UNIVERSITIES—CONSTITUTIONAL LAW: PROFESSOR'S ASSIGNMENT OF GRADES TO STUDENTS IS SYMBOLIC COMMUNICATION PROTECTED BY THE FIRST AMENDMENT

During the 1982-83 academic year, Natthu Parate, a nontenured associate professor in the Tennessee State University Civil Engineering Department, was ordered by Edward Isibor, the Dean of the College, to change a student's grade from a "B" to an "A."[1] When Parate refused to comply with the Dean's request, the Dean insulted Parate and advised him that his employment contract might not be renewed.[2] Fearing reprisals, Parate complied with the Dean's request by changing the student's grade and by signing a memorandum stating that he had changed the grading standard for the course.[3] During the next two academic years, the Dean and Michael Samuchin, the Head of the Department of Civil Engineering, challenged Parate's grading standards in other courses, criticized his teaching methods in conferences and in front of students in class, removed Parate as the teacher of one class, and issued low performance evaluations of Parate.[4] In

1. Parate v Isibor, 868 F.2d 821, 823 (6th Cir. 1989). Two students had requested that their grades be changed from a "B" to an "A" in a "Groundwater and Seepage" course on the grounds that extenuating circumstances had diminished their performances in the class. *Id.* at 824. Parate granted one student's request because of the nature of the student's excuse and because that student had performed better on the midterm examination than on the final examination. *Id.* However, Parate refused the other student's request because of the student's previously falsified excuses and because Parate had watched the student cheat on the final examination. *Id.* After listening to Parate's explanations, both the Head of the Civil Engineering Department and the Associate Dean of the School of Engineering and Technology agreed with Parate's decision. *Id.* However, the student whose request was denied was Nigerian and appealed to the Dean of the School of Engineering and Technology, who was also Nigerian. *Id.* at 23-24. The Dean ordered Parate to change the Nigerian student's grade and to sign a memorandum indicating that Parate was changing his grading standard. *Id.* at 24.

2. *Id.* After Parate refused to change the student's grade and sign a memorandum changing his grading standards, the Dean specifically told Parate that Parate did not know how to teach, questioned Parate's academic credentials, and informed Parate that it was probable that Parate's contract at Tennessee State University would not be renewed. *Id.*

3. *Id.* Initially, Parate attempted to comply with the Dean's request by noting on the memorandum that he was changing his grading standard "as per instructions from Dean and Department Head at meeting." *Id.* However, the Department Head returned to Parate later in the day with a retyped copy of the memorandum noting the grade alterations and warned Parate that the Dean would negatively affect Parate's evaluations unless Parate signed the unaltered memorandum. *Id.* Consequently, Parate signed the retyped memorandum, using a signature different from his usual one to signify that he was being coerced into signing. *Id.* The Department Head returned with a third copy of the memorandum, which Parate signed out of fear of repercussions from the Dean. *Id.* The final memorandum indicated that Parate was adopting a new grading standard under which a score of 86 qualified as an "A." *Id.* Under the old grading standard, a score of 86 was a "B." *Id.*

4. *Id.* In addition Parate was denied appropriate reimbursement for professional and travel expenses, which stymied his research and professional advancements. *Id.* The

March, 1985, Parate received a letter terminating his appointment at the end of the 1985-86 academic year.[5] In April, 1986, Parate filed a cause of action pursuant to 42 U.S.C. § 1983 against the Dean, the Head of the Department, Tennessee State University, and the Board of Regents of the State University and Community College System of Tennessee.[6] In the complaint, Parate alleged violations of his right to academic freedom under the first amendment.[7] The district court dismissed Parate's 42 U.S.C. § 1983 claims with prejudice and granted summary judgment for the defendants.[8] The Court of Appeals for the Sixth Circuit reversed in part, affirmed in part, and *held* that Parate's first amendment rights were violated when he was ordered to change the student's grade.[9] *Parate v. Isibor*, 868 F.2d 821 (6th Cir. 1989).

President of Tennessee State University, acting on recommendations by the Dean and the Department Head, chose not to renew Parate's teaching appointment. *Id.*

5. *Id.* at 824-825. In the termination letter, the President of Tennessee State University indicated that Parate could request a statement of the reasons for his nonrenewal from Michael Samuchin, the Head of the Department of Civil Engineering. *Id.* at 825. Although Parate requested such a statement, Samuchin never responded. *Id.*

On September 16, 1985, Parate met with the Dean to reconcile their differences. *Id.* In that meeting, the Dean informed Parate that the teaching contract might be renewed if Parate's teaching performance improved, but that Parate would always have to obey the Dean. *Id.* However, the situation worsened when later that year three more students, two of them Nigerian, complained to the Dean about grades received from Parate in a "Statics" course. *Id.* Within a few days of the students' complaints, the Dean and the Department Head attended Parate's "Statics" class and criticized his teaching methods in front of his students. *Id.* The Dean then removed Parate from his post as teacher of the "Statics" course, but insisted that Parate continue to attend the class as a student. *Id.* After five or six class meetings, Parate was directed not to attend the class at all, and faculty observers attended all of Parate's other classes. *Id.*

6. *Id.* An amended complaint, filed in June, 1986, named the President of Tennessee State University, rather than Tennessee State University, and the Chancellor of the Board of Regents, rather than the Board of Regents, as defendants in the suit. *Id.*

See 42 U.S.C. § 1983 (1988) (providing a private cause of action for individuals who are deprived of any constitutional right, privilege, or immunity, when that deprivation occurred under color of statute, ordinance, regulation, custom, or usage).

7. Parate v. Isibor, 868 F.2d 821, 825 (6th Cir. 1989). Parate also alleged violations of his liberty and due process interests under the fourteenth amendment. *Id.* In addition, Parate alleged state law claims for defamation, interference with his right to work, retaliatory discharge, and intentional infliction of emotional distress. *Id.* Parate sought preliminary and injunctive relief in addition to damages. *Id.* at 826.

8. *Id.* at 823. The district court dismissed with prejudice Parate's first and fourteenth amendment claims stemming from the defendants' insistence that Parate alter grades in the Groundwater and Seepage course and the defendants' interference with Parate's teaching methods in the Statics course. *Id. See* Parate v. Isibor, No. 3-86-0311, slip op. at 9 (M.D. Tenn. Aug. 28, 1987). In addition, the district court dismissed the pendent state law claims without prejudice. *Parate*, 868 F.2d at 823.

9. *Id.* at 830. However, the court of appeals affirmed the district court's decision that Parate's first amendment rights were not violated in the "Statics" course incident involving the Dean's open criticism of Parate's teaching methods. *Id.* at 831.

In addition, the court of appeals affirmed the district court's dismissal of Parate's fourteenth amendment substantive due process claim. *Id.* at 833. Parate claimed that the defendants had deprived him of his liberty interest by illegitimately interfering with his teaching career at Tennessee State University. *Id.* at 831. However, the court of appeals found that Parate had suffered no liberty interest violation because he was being barred only from teaching at Tennessee State University, not at every other university. *Id.* at 832.

Traditionally, the courts have been reluctant to interfere with the administration of state and local educational institutions.[10] Courts have deemed that interference with educational administration decisions is warranted only where constitutionally protected rights are implicated.[11] Therefore, courts will not interfere with employment decisions of educational administrators except where constitutionally protected rights, such as those protected by the first amendment, are at issue.[12] In the educational forum, constitutional rights are often implicated through issues of academic freedom.[13]

In America, academic freedom is based on the same concept of creating a "free marketplace of ideas" that underlies each American citizen's right to free speech under the first amendment.[14] In *Keyishian v. Board of Regents*,[15] the United States

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See Board of Regents v. Roth, 408 U.S. 564 (1972) (holding that a liberty interest is violated if a stigma is attached to the individual's employment options).

In considering Parate's request for a preliminary injunction against his dismissal from Tennessee State University, the court of appeals noted that because almost two years had passed since Parate had been employed by Tennessee State University, Parate's request for an injunction had become moot. *Parate*, 868 F.2d at 833.

10. Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214, 226 & n.12 (1985) (federal court is not the appropriate forum to make university decisions, because the court lacks both the expertise and the immediate access to the problems involved to be able to make an informed decision).

11. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (professor could not be fired because he refused to sign a statement that he was not a communist, because such a dismissal would be a violation of the professor's constitutionally protected free speech). *See also* Orr v. Trinter, 444 F.2d 128, 135 (6th Cir. 1971) (university employment decisions are an internal concern and may not be superseded by the courts unless a dismissal has occurred because an instructor has exercised a constitutionally protected right such as free speech), *cert. denied*, 408 U.S. 943 (1972).

12. *See* Hetrick v. Martin, 480 F.2d 705, 708 (6th Cir. 1973) (institution could decide not to renew contract because instructor's teaching philosophy and manner were not conducive to the institution's goals), *cert. denied*, 414 U.S. 1075 (1973).

13. *See* Smith, *Constitutional Rights of Students, Their Families, and Teachers in the Public Schools*, 10 CAMPBELL L. REV. 353, 385 (1988) (first amendment protects teacher's freedom to decide assignments and methods of teaching); U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances").

14. *See* Mertz, *The Burden of Proof and Academic Freedom: Protection for Institution or Individual?*, 82 NW. U.L. REV. 492, 492-93 (1988). Just as the first amendment favors free speech by the individual, academic freedom generally favors the speech of the individual professor. *Id.* The ideological basis of academic freedom is from the German policy of "lehrfreiheit" or teaching freedom, which allows teachers to choose the content of their lectures and to publish their findings of research without fear of state or church reproof. *See* Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1269 (1988). The German concept of academic freedom did not mean unlimited freedom for the professor; for instance, the professor was not exempt from loyalty to the state. *Id.* at 1270. *See* Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (teacher does not relinquish his individual free speech rights when addressing issues of public concern). *Pickering* is the seminal case of teacher's first amendment rights in the United States, which established that there is no general standard of academic freedom for a teacher, but rather a series of factors which must be included in any evaluation of a professor's academic freedom. *Id.* Several factors which are considered when determining

Supreme Court held that academic freedom is necessary because the first amendment encourages a variety of viewpoints in the classroom rather than "a pall of orthodoxy."[16] The Court recognized that a free flow of ideas between teachers and students, and between students, cannot occur when teachers are forced to confine discussions and curricula to formats established by decision-makers outside the classroom.[17] Thus, it is important that academic freedom extend to primary and secondary teachers, as well as to college teachers, because it is an essential element of the free flow of ideas that is necessary for effective education.[18]

Although it is essential that teachers have academic freedom in their classrooms, academic freedom is not a privilege reserved solely for the teacher.[19] Instead, academic freedom consists of two potentially conflicting freedoms: (1) the academic freedom for the individual teacher to teach without institutional interference; and (2) the academic freedom for the institution to govern without governmental interference.[20] Both aspects of academic freedom are needed to assure what have been called the "four essential freedoms of the university" which are "who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[21] Because of the potentially conflicting interests of admin-

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if a teacher's speech is protected by the first amendment are whether the issue is of public concern, whether the speech is obscene, or whether the topic will lead to employment disharmony. *See* Ryan, *Teacher Free Speech in the Public Schools: Just When You Thought It Was Safe to Talk*, 67 NEB. L. REV. 695, 698 (1988).

15. 385 U.S. 589 (1967).

16. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (teacher could not be fired for his refusal to sign a statement that he was not a communist because such coercion would inhibit the free flow of ideas in the classroom).

17. Rabban, *Does Academic Freedom Limit Faculty Autonomy?*, 66 TEX. L. REV. 1405, 1409 (1988). Although academic freedom protects the free flow of ideas within the classroom, academic freedom does not insulate the teacher from having to comply with institutional norms. *Id.*

18. *See* Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323, 1324 (1988) (academic freedom has been embraced by the American Association of University Professors as an essential element of American academia); Getman & Mintz, *Forward: Academic Freedom in a Changing Society*, 66 TEX. L. REV. 1247, 1251 (1988) (academic freedom extends into the laboratory to provide researchers the needed freedom to adequately research and report their findings).

19. Kohlburn, *The Double-Edged Sword of Academic Freedom: Cutting the Scales of Justice in Title VII Litigation*, 65 WASH. U.L.Q. 445, 449 (1987) (courts must always recognize that academic freedom extends to the institution, as well as to the individual teacher). *But see* Mertz, *supra* note 14, at 519 (generally, the individual professor, rather than the institution, receives the benefit of protection by the first amendment).

20. Piarowski v. Illinois Community College Dist., 759 F.2d 625 (7th Cir. 1985) (institution had the right to restrict teacher's exhibition of art because the works were racially offensive and sexually explicit), *cert. denied*, 474 U.S. 1007 (1985). *See* Kohlburn, *supra* note 19, at 449.

21. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (first amendment protects individual professors in their choice of what to teach, but it also protects the institution in deciding who should teach, who should learn, and what the curriculum should be).

istrators and teachers, compromise is needed to achieve a balance between the individual teacher's right to choose course content and teaching methods and the institution's right to supervise the practices within the institution.[22]

The balance of academic freedom rights does not always shift in favor of the teacher.[23] The important issue in striking a balance of academic freedom is whether the controversy between the teacher and the institution involves the infringement of one of the teacher's constitutionally protected rights.[24] Academic freedom will not necessarily protect the teacher from supervision or dismissal by administrators.[25] However, when supervision interferes with the teacher's legitimate exercise of free expression, or a dismissal arises from a teacher's exercise of a constitutionally protected right, such as free speech, then the balance shifts in favor of the teacher.[26] For example, a teacher has no cause of action for being denied tenure if the institution's reason for the denial is based on the nonconformity of the teacher's teaching methods to the institution's standards.[27] However, the teacher has a cause of action against the institution if the institution's standards restrict the free flow of ideas in the classroom, or the teacher's exercise of

22. Lovelace v. Southeastern Mass. Univ., 793 F.2d 419, 426 (1st Cir. 1986) (first amendment protection does not make a teacher sovereign or immune to an institution's decisions regarding grading policies). *See* Smith, *supra* note 13 (instructor has freedom over assignments and teaching methods, as long as they fall within professional boundaries and institutional standards).

23. Mertz, *supra* note 14, at 519. The academic freedom adheres to the institution, or to the individual, depending on who is defending the free flow of diverse ideas. *Id.*

24. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 281-82 (1977) (teacher's conduct of fighting with other teachers and making obscene gestures to students was not free expression protected by the constitution). *See generally* Mertz, *supra* note 14 (dealing with the necessary burden of proof in showing violation of an instructor's academic freedom).

25. *See* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 283 (1977) (because teacher's conduct of fighting with other teachers and making obscene gestures to students were not free expression protected by the constitution, they were legitimate grounds for dismissal); Vasquez v. City of Hamtramck, 757 F.2d 771, 773 (6th Cir. 1985) (no constitutionally valid claim exists for every small harassment by a state).

26. Orr v. Trinter, 444 F.2d 128, 132 (6th Cir. 1971) (institution can dismiss a nontenured teacher for any reason, except for the teacher's exercise of a constitutionally protected right), *cert. denied*, 408 U.S. 943 (1972). *See also* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (teacher must establish that exercise of a constitutionally protected right was motivating factor behind dismissal).

27. Hetrick v. Martin, 480 F.2d 705, 708-09 (6th Cir. 1973), *cert. denied*, 408 U.S. 943 (1973). In *Hetrick*, the Court of Appeals for the Sixth Circuit held that an institution could deny tenure to a teacher, thereby punishing the teacher, because the teacher's instructional methods were not adaptable to that institution's academic goals. *Id.*

See, e.g., Lovelace v. Southeastern Massachusetts University, 793 F.2d 419, 425 (1st Cir. 1986). Although the teacher's refusal to lower his grading standards may have been the cause of dismissal, the institution was within its rights to dismiss the teacher for failure to conform to institutional standards, because the teacher's grading policy is not protected by the constitution. *Id.*

free expression.[28]

To qualify for constitutional protection, the teacher's expression must be expressive or communicative.[29] In order to be expressive or communicative, the expression must be a statement or conduct which is both clearly intended and widely understood to convey a message to other people.[30] Conduct which is expressive or communicative in nonacademic settings has been recognized consistently as symbolic communication protected by the first amendment.[31] For example, in *Texas v. Johnson*,[32] the Supreme Court held that the burning of an American flag during a demonstration which coincided with the Republican National Convention clearly was intended as communication, and was widely understood as communication, and, therefore, was deserving of first amendment protection.[33]

Similarly, the Court has recognized and protected symbolic communication in the academic forum as well as in the public forum.[34] In *Tinker v. Des Moines Independent Community School*

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28. *See* Sweezy v. New Hampshire, 354 U.S. 234, 254 (1957) (an instructor cannot be barred from employment on the basis of membership in an organization); Megill v. Bd. of Regents of the State of Fla., 541 F.2d 1073, 1080-81 (5th Cir. 1976) (nonrenewal may not be based on individual's exercise of first amendment rights); Epperson V. Arkansas, 393 U.S. 97, 109 (1968) (Court invalidated a state law that would endanger a teacher's position for teaching Darwinism, which the Court found to be a valid exercise of the constitutionally protected right of free expression).

29. Fowler v. Bd. of Educ., 819 F.2d 657, 664 (6th Cir. 1987) (teacher's showing of the film "Pink Floyd—The Wall" was not protected because it was neither expressive nor communicative), *cert. denied*, 484 U.S. 906 (1987).

30. Spence v. Washington, 418 U.S. 405, 410-411 (1974) (display of an American flag, upside down, with a peace symbol taped on it was recognized as an expressive activity protected by the first amendment). In addition to being expressive or communicative, the expression must conform to guidelines for protected academic speech, such as being a subject of public concern, and not being obscene or fighting words. *See The Fraser Balancing Test: Leaving Cohen's Jacket at the Schoolhouse Gate*, 52 MO. L. REV. 913, 915 (1987) (the current Fraser balancing test requires that indecent language employed on school premises must be balanced by the state's interest of an objective beyond maintaining control over the school personnel and students).

See generally Ryan, *supra* note 14, at 712-16 (teacher's speech must be of public concern in order for it to be guaranteed to be constitutionally protected; otherwise there are no guarantees that the speech falls within the protected range).

31. Friedman, *Why Do You Speak That Way? Symbolic Expression Reconsidered*, 15 HASTINGS CONST. L.Q. 587, 588-89 (1988) (five major motivations for using expressive conduct for communication rather than spoken communication are that expressive conduct better encapsulates an idea; it is more socially acceptable; it attracts media attention; it creates a greater feeling of self-fulfillment; and it facilitates other forms of speech).

32. 109 S.Ct. 2533 (1989).

33. Texas v. Johnson, 109 S.Ct. 2533, 2547-49 (1989). *See also* Monroe v. State Court of Fulton County, 739 F.2d 568, 572 (11th Cir. 1984) (if the burning of a flag as part of a larger demonstration was likely to convey a message, then the action could be viewed as symbolic communication protected by the first amendment).

34. *See, e.g.*, Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 514 (1969) (students' wearing of black armbands was found to be expressive conduct protected by the first amendment).

District,[35] the Court held that students' wearing of black armbands to protest the Vietnam War was expressive conduct entitled to first amendment protection because the protest occurred during a period of demonstrations against the War and because the message conveyed by the students' black arm bands was clearly intended and widely understood as communication.[36] Similarly, in *Brown v. Louisiana*,[37] the Court held that black students' staging of a protest sit-in in a segregated library was symbolic speech protected by the first amendment, because the action occurred at a time and place that made the conduct clearly intended to be and widely understood as conveying a message.[38] The Supreme Court has held that if an action in an academic forum conveys a message that is intended to be a communication and is widely understood to be a communication by those who observe it, then that action is symbolic expression protected by the first amendment.[39]

In addition to protecting the freedom to verbally or symbolically express one's own ideas, the first amendment guarantees that a person may not be forced to communicate someone else's ideas through compelled speech.[40] For example, in *Wooley v. Maynard*,[41] the Supreme Court held that the State of New Hampshire could not compel its residents to participate in the dissemination of an ideological message by forcing them to display state license plates which carried the motto "Live Free or Die."[42]

Courts also have considered the question of first amendment protection against compelled speech in the academic forum.[43] Courts have found that if an administrator has censored or com-

35. 393 U.S. 503 (1969).

36. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 514 (1969).

37. 383 U.S. 131 (1966).

38. Brown v. Louisiana, 383 U.S. 131, 141-42 (1966).

39. *See* Fowler v. Board of Educ., 819 F.2d 657, 662 (6th Cir. 1987) (teacher's showing of a film was not protected because the teacher could not have intended it to be expressive or communicative conduct, since the teacher had not previously viewed the film), *cert. denied*, 108 S.Ct. 502 (1987).

40. *See* Smith, *supra* note 13, at 362 (teacher can say what he believes as long as he does not force the students into accepting those beliefs); Riley v. National Fed'n. of the Blind of North Carolina, 108 S.Ct. 2667, 2669-70 (1988) (compelling a speaker to reveal specific information alters that person's speech and violates the speaker's constitutional right of free expression).

41. 430 U.S. 705 (1977).

42. Wooley v. Maynard, 430 U.S. 705, 713 (1977) (display of the message on the license plates was compelling residents to participate in disseminating an idea that they may find abhorent).

43. *See* Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (teacher could not be dismissed for refusing to sign that he was not a communist, because the first amendment protects against compelling a person to make a statement about his beliefs and encourages a marketplace of ideas); Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (teachers do not relinquish their individual constitutional rights, such as free expression, when they become teachers); Epperson v. Arkansas, 393 U.S. 97, 109 (1968) (Court invalidated a state law that

pelled alteration of a teacher's course content or method of teaching, then the teacher's constitutionally protected right to free expression may have been violated.[44]

In *Hillis v. Stephen F. Austin State University*,[45] the Court of Appeals for the Fifth Circuit considered whether a teacher had been dismissed due to his refusal to comply with an administrator's directive to alter a student's grade.[46] The *Hillis* court noted that the administrator had solved the conflict between the institution and the teacher by altering the student's grade himself, without compelling the teacher to change the grade.[47] In addition, the *Hillis* court found that the assignment of the grade to the student was not a teaching method protected by academic freedom.[48] Therefore, the *Hillis* court held that the administrative alteration of the letter grade assigned by the teacher was not a violation of the teacher's free expression protected by the first amendment.[49]

However, in *Parate v. Isibor*,[50] the Court of Appeals for the Sixth Circuit found that a teacher's right of free expression had been violated when he was compelled to alter a student's letter grade.[51] Parate claimed that his academic freedom, protected by the first amendment, was violated when the Dean coerced him into changing a student's grade from a "B" to an "A."[52] The court of appeals held that by ordering Parate to change the student's grade, rather than by administratively changing the grade themselves, the Dean and the Head of the Department unconstitutionally compelled Parate's speech to his student.[53]

The court of appeals arrived at its conclusion by first reviewing the district court's dismissal of Parate's first amendment

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would endanger a teacher's position for teaching Darwinism which the Court found to be a valid exercise of the constitutionally protected right of free expression).

44. *See* Smith, *supra* note 13, at 398 (teacher has freedom over assignments and teaching methods, as long as they fall within professional boundaries and institutional standards).

45. 665 F.2d 547 (5th Cir. 1982).

46. Hillis v. Stephen F. Austin State Univ., 665 F.2d 547, 552 (5th Cir. 1982).

47. *Id.* at 553. In *Hillis*, the teacher had been ordered by an administrator to enroll a student and give her a grade of "B," rather than the "grade withheld" ranking which the teacher had assigned to the student. *Id.* After the teacher refused to alter the grade, the administrator changed the grade on the records himself. *Id.*

48. *Id.*

49. *Id.* (altering a grade administratively was within the institution's perogative).

50. 868 F.2d 821 (6th Cir. 1989).

51. Parate v. Isibor, 868 F.2d 821, 827 (6th Cir. 1989). *Contra* Hillis v. Stephen F. Austin State Univ., 665 F.2d 547, 553 (5th Cir. 1982)(teacher's assignment of a letter grade was not a "teaching method" protected by academic freedom), *cert. denied*, 457 U.S. 1106 (1982).

52. *Parate*, 868 F.2d. at 829. For a discussion of Parate's additional claims, see *supra* notes 7-8.

53. *Parate*, 868 F.2d at 830.

claim.[54] The court of appeals found that the district court had misconstrued Parate's first amendment claim as being a request for a guarantee that the student would receive the "B" grade which Parate had assigned originally.[55] Relying on precedent, the district court had found that Parate did not have a constitutionally protected interest in the grade that the student ultimately received.[56] Therefore, the district court was able to conclude that a professor's being compelled to change a grade did not qualify as a constitutional violation of the professor's rights, because the professor had no constitutionally protected right in the grade itself.[57]

Although the court of appeals agreed that Parate did not have a constitutional interest in the final grade that the student actually received, the court held that Parate's first amendment rights were violated when he was compelled to change the grade because he was compelled to make a specific communication to the student.[58] The court of appeals noted that the district court's dismissal of Parate's first amendment claims was based on the decision in *Hillis v. Stephen F. Austin State University* that the assignment of grades does not constitute a teaching method protected by academic freedom.[59] However, the court of appeals distinguished *Hillis* on its facts, noting that the teacher in that case was not compelled to personally change a student's grade and, therefore, was not compelled to change his own communication to the student.[60] Rather, the court of appeals noted that in *Hillis* the teacher's constitutional rights were not violated because the student's grade was changed by the administrators.[61] The court of appeals stated that

54. *Id.* at 829. *See* Parate v. Isibor, No. 3-86- 0311, slip op. (M.D. Tenn. Aug. 28, 1987).

55. *Id.* at 827 (the district court had miscontrued Parate as claiming a constitutionally protected interest in the grade that the student actually received, rather than as claiming to be compelled against his professional judgment to assign a higher grade to the student).

56. *Id.* at 829-30 (citing Hillis v. Stephen F Austin State Univ., 665 F.2d 547 (5th Cir. 1982) (grades were not a teaching method protected by academic freedom), *cert. denied* 457 U.S. 1106 (1982).

57. *Parate*, 868 F.2d. at 829.

58. *Id.*

59. *Id.* at 828. *See* Hillis v. Stephen F. Austin State Univ., 665 F.2d 547, 549 (5th Cir. 1982) (administrative alteration of a grade was within the institution's prerogative), *cert. denied*, 457 U.S. 1106 (1982).

60. *Id.* at 829 (citing Hillis v. Stephen F. Austin State Univ., 665 F.2d 547 (5th Cir. 1982), *cert. denied*, 457 U.S. 1106 (1982)).

61. *Id.* at 829 (citing Hillis v. Stephen F. Austin State Univ., 665 F.2d 547, 552 (5th Cir. 1982), *cert. denied*, 457 U.S. 1106 (1982)). In *Parate*, the court of appeals distinguished Lovelace v. Southeastern Mass. Univ., 793 F.2d 419, 425 (1st. Cir. 1986), because that case dealt with a teacher's noncompliance with the grading criteria of the institution, rather than with administrative coercion to change a specific grade in order to benefit a student. *Id.* at 829. In addition, the court of appeals distinguished Hetrick v. Martin, 480 F.2d 705, 708-09 (6th Cir. 1973), *cert. denied*, 414 U.S. 1075 (1973), because *Hetrick* dealt with a dismissal due to a teacher's noncompliance with the institution's teaching standards. *Id.* at 830.

if the administrators had changed the student's grade themselves, rather than compelling Parate to change it, no violation of Parate's rights would have occurred.[62]

However, the court of appeals found that because the administrators compelled Parate to alter the grade, rather than administratively altering the grade themselves to settle the dispute, the administrators chose an unduly burdensome and constitutionally infirm remedy to solve the problem, thereby violating Parate's constitutional rights protected by the first amendment.[63] The court of appeals concluded that a professor has no constitutional interest in the final grade that the student ultimately receives; thus, the administration has the authority to alter a student's grade, as long as the administration does not coerce the professor into performing the alteration.[64]

The court of appeals next examined Parate's second claim that the defendants had violated Parate's academic freedom by publicly criticising his teaching on one occasion and by removing him as teacher of the "Statics" course.[65] The court of appeals noted that although an individual teacher's academic freedom protects him from arbitrary interference, university administrators do have the right to evaluate and instruct teachers.[66] In addition, the court of appeals recognized that courts can not intervene in administrative decisions, unless basic constitutional rights are at issue.[67] The court of appeals noted that although the Dean's behavior was unprofessional, it did not rise to the level of a constitutional violation.[68] The court of appeals held that the Dean's behavior did not violate Parate's first amendment right to academic freedom because Parate was not denied an open and free exchange with his

62. *Parate*, 868 F.2d at 830. *See* Hillis v. Stephen F. Austin State Univ., 665 F.2d 547, 553 (5th Cir. 1982) (the administrator changed the grade in question, thereby avoiding a violation of the professor's rights), *cert. denied*, 457 U.S. 1106 (1982).

63. *Parate*, 868 F.2d at 830.

64. *Id.*

65. *Id.* A few days after two Nigerian students had complained to Parate about the grades that he had given them in the "Statics" course, the Dean entered Parate's classroom unannounced and interrupted Parate's teaching by shouting criticisms from the back of the room. *Id.* at 824.

66. *Id. See* Megill v. Bd. of Regents of Fla., 541 F.2d 1073, 1077 (5th Cir. 1976) (holding that states may grant power to university administrators with unfettered discretion, and that the Board of Regents could dismiss the teacher for any reason that did not violate his constitutional rights).

67. *Parate*, 868 F.2d at 830. *See* Hetrick v. Martin, 480 F.2d 705, 708 (6th Cir. 1973) (to justify court intervention in an administrative matter, the administration's actions would have to be very restrictive, "shock the conscience," or affect the professor's constitutional rights), *cert. denied*, 414 U.S. 1075 (1973).

68. *Parate*, 868 F.2d at 830. The court of appeals agreed with the district court's finding that the Dean's actions of criticizing Parate did not exceed the level of a tort of defamation. *Id.* at 831.

students at any time, which is the basic goal behind the first amendment protection of academic freedom.[69] Furthermore, the court of appeals held that the Dean's criticism, as an isolated incident, could not have significantly interfered with the free flow of ideas.[70] Therefore, the court of appeals held that Parate, as a teacher subject to supervision, had no first amendment right to be free from the criticism of his administrators.[71]

Analogizing from the court of appeal's holding that a teacher's assignment of a grade is protected communication, first amendment protection can be extended to other types of communication that require professional evaluations of other people.[72] These evaluations might include educational evaluations of former or current students, recommendations for graduate study programs or for post-graduation employment, or formal discussions of other faculty members for purposes of distributing scholarships, awards, or tenure.[73] The *Parate v. Isibor* decision would imply that a professor could not be coerced into altering his professional evaluations, although an administrator could alter the evaluations under his own administrative authority.[74]

The same first amendment analysis that was used in *Parate* could be used for other professions that are protected directly by the first amendment, such as the communications media.[75] For example, the decision would imply that a reporter could not be compelled by an editor or publisher to alter his communication to the public.[76] Conversely, the editor or publisher could alter the communication himself, although not under the guise of the reporter.[77]

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69. *Id.* *See, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (one of the justifications of academic freedom is to make the classroom into a marketplace of ideas).

70. Parate, 868 F.2d at 831. At the end of this incident, the only one where the Dean openly criticized Parate in front of students during class time, the Dean removed Parate as the teacher of the course. *Id.* at 825.

71. *Id.* at 831. Although Parate claimed that the administrators' supervision and criticism was illegitimate because his contract for the following year had already been terminated, the court of appeals found that Parate had no right to be free from supervisory authority. *Id.*

72. *See* Univ. of Pa. v. E.E.O.C., 110 S.Ct. 577, 585 (1990) (arguments made for academia could be applied to other fora that further speech and learning).

73. Univ. of Pa. v. E.E.O.C., 110 S.Ct. 577, 586 (1990) (academic discussions involving tenure need to be frank in order to be effective). *See* Kohlburn, *supra* note 19, at 464 (important decisions, such as tenure recommendations, require protection of academic freedom to preserve frankness about colleagues).

74. *See generally* Kohlburn, *supra* note 19, at 464 (identifying various types of communication in the academic forum that should be protected by the first amendment).

75. *See generally* Friedman, *supra* note 31, at 588-91 (regarding constitutional protection of symbolic expression in nonacademic fora).

76. *Id.* at 597-98.

77. *Id.* at 593 (the extent of first amendment protection of various types of symbolic

Although *Parate v. Isibor* is a Sixth Circuit case, and thus not controlling law in North Dakota, this decision could be used in North Dakota to establish a similar precedent.[78] For example, *Parate* could be used to support a teacher's academic freedom in situations regarding speech or conduct compelled by an administrator against the teacher's beliefs.[79]

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communication should depend on why the individual has chosen that medium for expression).

78. *See generally* Smith, *supra* note 13 at 355 (examining the broad range of topics covered by a teacher's academic freedom, many of which are timely issues ripe for adjudication).

79. *See* Mertz, *supra* note 14, at 498 (the heaviest burden of proof generally is carried by the institution when the rights of a teacher and an institution conflict).