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First Amendment Showdown: Intellectual Diversity Mandates and the Academic Marketplace

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[*321] In the parlance of the Supreme Court of the United States, the university classroom is a quintessential marketplace of ideas. [n1] Exposure to the robust exchange of ideas, said to take place there, plays a vital role in the nation's future as evidenced in the development of its next generation of leaders. [n2] "To impose any straight jacket" upon this marketplace, the Court held, would imperil this future, stagnating and halting progress. [n3]

[*322] In 1957 and 1967, when the Supreme Court was crafting this argument, the feared straight jacket included government-imposed employment dismissals for the content of classroom lectures as well as membership in recognized subversive organizations. [n4] Such sanctions, the Court reasoned, would ultimately chill academic discussion and inhibit scholarship. [n5] For only a classroom largely free of government interference could secure a marketplace conducive to diverse, robust debate and the production of new discoveries and advancements.

Forty years later, national activists, including David Horowitz, and organizations, such as the American Council of Trustees and Alumni, view the classroom in a much different light. They contend that "professors indoctrinate students in left-wing ideology and penalize undergraduates with conservative views." [n6] As a result, they have been calling on state legislatures and university administrators to adopt policies and report on steps taken to encourage intellectual diversity and protect political and cultural minorities from faculty bias and academic retribution in the classroom and other university settings. [n7] In response, lawmakers in several states have introduced measures designed to encourage intellectual diversity in the university system, [n8] while trustees at two universities have either approved statements that address extraneous classroom speech and/or instituted streamlined procedures for student complaints regarding such conduct. [n9] In [*323] Pennsylvania, a special committee of the state's legislature spent a year investigating "complaints that liberal professors had treated conservative students unfairly" and recommended that state universities "ensure that students' rights to free speech are protected." [n10] Pennsylvania universities have also been the target of two lawsuits that have been filed for policies and actions students allege violated their First Amendments rights through the suppression of intolerant speech and a campaign of retribution for ideological differences. [n11]

These actions occurred after the American Council on Education and twenty-nine other higher education organizations issued "a statement of principles upon which academic rights and responsibilities are based." [n12] Among the key principles included in the statement is a commitment to encourage debate over complex and difficult issues in an open and tolerant environment as well as access to a "clear institutional process" by "any member of the campus community" for unfair treatment on academic matters. [n13] The statement, a response to the "increasing criticism for a lack of commitment to political and intellectual pluralism" on college campuses, [n14] drew criticism of its own from the American Federation of Teachers and some members of the America Association of University Professors -- an organization that signed on to the statement -- for weakening to defend against lawmakers and activists who seek to meddle in academe. [n15]

[*324] Meddling in academe has now largely taken the form of a government-imposed annual report on the specific measures an institution is taking to ensure intellectual diversity and the free

exchange of ideas. [n16] Among the measures to be included in the report are steps the institution is taking to:

. Incorporate intellectual diversity into institutional statements, grievance procedures and activities on diversity;
. Include intellectual diversity concerns in the institution's guidelines on teaching and program development;
. Include intellectual diversity issues in student course evaluations;
. Develop hiring, tenure and promotion policies that protect individuals against political viewpoint discrimination and track any reported grievances in that regard. [n17]

To fulfill these measures, the American Council on Trustees and Alumni recommends amending faculty handbooks to "make it clear that professors should not use the classroom for proselytizing, should present alternative points of view fairly, should assign readings representing multiple views, [and] treat students who have different points of view with respect." [n18] Students who believe they have been "discriminated against because of their political views" should be able to "file formal grievances against professors who abuse 'faculty authority' by pressuring students 'into supporting a political or social cause.'" [n19]

[*325] So what has happened to the academic marketplace [n20] of ideas since the late 1960s? Is academe in need of a hands-on government policy to induce and ensure diversity of viewpoint in the classroom and other academic settings? At the core of this debate is a power struggle over who will ultimately govern the university. Some fear that political bodies will take over the responsibility of making curricular and hiring decisions [n21] and enforcing specific rules of fairness and decorum on college campuses. [n22] In a speech before the Association of the Bar of the City of New York, Lee Bollinger, president of Columbia University, called on universities to "stand firm in insisting" that the academy "must remain a system of self-governance." [n23] But who would win a constitutional showdown between the academy and those seeking to infuse academic discourse with alternative viewpoints?

Based on an analysis of the First Amendment concerns at stake in this ongoing controversy, this article concludes that university administrators should have the upper hand in such a constitutional challenge given the specific characteristics and selective nature of the academic marketplace. [n24] Despite Supreme Court parlance to the contrary, the academic marketplace simply does not function as a place of open exchange and robust discussion. [n25] As a result, forced inclusion of specific perspectives and viewpoints runs counter to the nature of a university and distorts its ability to eradicate flawed concepts, theories, ideas and viewpoints from its curriculum and the scholarship it produces. [n26] A university's power to control its operations -- namely access to its limited public forums, the content of the education it provides and the speech required for the proper functioning of university programs -- lies at [*326] the center of this debate. And while the head-on collision between a university and its legislative funding source present complicated First Amendment issues, this article argues that courts will most likely defer to the judgment of university administrators in a constitutional challenge to an intellectual diversity mandate. [n27]

The analysis upon which this conclusion was reached begins with an overview of the theoretical characteristics and relationship between the Holmesian notion of the ideas marketplace and an academic marketplace. The article next explores a university's ability to control access to the various "forums" it manages, then examines the protection provided by the employee speech and academic freedom doctrines on participants in this dispute. Finally, the article examines the ability of a legislature to place restrictions on speech in exchange for the funds it provides a governmental program. The article concludes that the level of autonomy provided by these areas of First Amendment law should give administrators the upper hand in a constitutional challenge.

MARKETPLACE OF IDEAS

Embedded in American jurisprudence since Justice Oliver Wendell Holmes introduced the concept in his dissent in Abrams v. United States, [n28] the marketplace of ideas theory rests on the premise that the proper evolution of intellectual, political, scientific and philosophical thought can only be achieved if the exercise of speech is uninhibited by governmental interference. Government suppression of speech is, according to this concept, more dangerous to the proper functioning of society than ideas -- even those ideas the vast majority believes are harmful, false and "fraught with evil." [n29] Such ideas are not to be feared because the marketplace is self-correcting. In an unregulated marketplace of ideas, full and free discussion will eventually expose harmful ideas for what they are, and a rational citizenry will eventually reject them. The marketplace model, rooted in laissez-faire economic theory, maintains that truth will emerge in the long run. [n30] But, as economists have pointed out, people live in the short run, [n31] where the inherent inequality in the marketplace manifests itself.

[*327] Scholarly critics of the Holmesian notion of the marketplace have recognized the "inequality in the power to communicate ideas." [n32] In 1967, Jerome A. Barron argued that while First Amendment law provides protection for expression once it has come to the fore, it is "indifferent to creating opportunities for expression." [n33] This indifference prevents "novel and unpopular ideas" from ever reaching the marketplace [n34] and "perpetuates the freedom of [the] few" who can obtain access to it. [n35] For Barron, access to the marketplace was largely controlled by the mass media. The First Amendment, which provides the media with editorial control, became a functioning rationale for a communications industry that needed to repress unpalatable ideas in order to maximize profits. [n36] The system, Barron contended, created a marketplace which operated in a manner largely averse to securing uninhibited debate on public issues. [n37]

Barron's critique still resonates as multiple entrenched interests exert control over and conflict with the Holmesian notion of the marketplace. [n38] These dominant groups have "relatively complete access to the market" [n39] and, as a result, have a greater opportunity to reach an extended audience and shape public debate. [n40] Large majorities of individuals and organizations, whose access is restricted, experience little success at reaching a large audience and, therefore, view the market process as inherently biased and flawed. [n41] In order to correct this shortcoming, a number of scholars have called for "some form of governmentally enforced right of access" that would provide adequate entry to the marketplace for those otherwise shut out of the process. [n42]

Government-mandated access into a marketplace is largely at issue in the intellectual diversity debate. Supporters of legislative action cite studies that show a "marked political imbalance among college faculty" [*328] as evidence of a malfunctioning marketplace. [n43] Results from one such study indicate that a "sharp shift to the left has taken place among college faculty in recent years." [n44] The study reported that 72% of professors teaching at American universities and colleges identify themselves as liberal or left of center, whereas 15% identify themselves as conservative or right of center. [n45] This figure represents a sharp increase from a 1984 Carnegie study that found 39% of faculty members identified themselves as liberal and 34% identified themselves as conservative. [n46] When compared to a Harris Poll on the political leanings of the general public, the figure is further skewed, as, in both 1999 and 2004, 18% of Americans defined themselves as liberal, whereas 37% (1999) and 34% (2004) identified themselves as conservative. [n47] As to party affiliation, 50% of faculty members surveyed identified themselves as Democrats and 11% identified themselves as Republican. [n48] The largest disparity in left v. right was seen among faculty in English literature, where 88% identified as liberal and 3% as conservative. [n49]

The charge that liberal or left-leaning thinkers dominate universities was also demonstrated in the attitudes of American college faculty on specific social and political issues. The results revealed that 88% favor greater environmental protection, even at the cost of price increases or job losses; 84% are pro-choice; 67% believe a homosexual lifestyle is as acceptable as a heterosexual lifestyle; 75% endorse cohabitation without marital intensions; 72% favor government action to reduce income inequality; and 66% believe government should work to ensure full employment. [n50]

Proponents of government intervention fear that the imbalance in ideology will unduly influence a generation of students, indoctrinating them with a "politically correct" point of view. [n51] This fear coincides with the findings of scholars who argue that dominant values in which a public has been "indoctrinated or socialized will prevail, and speakers [*329] with stature, influence, and skill will still be more persuasive than those without" such qualities. [n52] In other words, market outputs are biased in favor of the dominant values of certain individuals who are able to exercise particular influence when they communicate. [n53] Correction of this imbalance, then, demands not only greater access to the marketplace but also an enhanced degree of stature, influence and skill for new entrants. [n54] A system, which would guarantee equal access without a means to elevate the stature of new entrants, would prove insufficient to correct marketplace bias as it would create access for individuals who simply have little ability to persuade an audience. [n55] However, equal access and stature do not necessarily guarantee that the viewpoints held by a few will prevail over the viewpoints held by the majority. [n56]

In a university, as in the marketplace at large, the central commitment is to the discovery of truth. But unlike the Holmesian marketplace, truth in the academy is viewed largely as a provisional and evolutionary expression of "knowledge, precepts, or hypotheses tentatively established" [n57] through disinterested inquiry and the process of peer review. [n58] Ideally, in this environment, ideas that constrain rational discussion or have been rejected through a repeated process [*330] of methodological investigation and analysis have no value or status. [n59] This criterion forms a barrier to entry into the academic marketplace and functions as a yardstick against which ideas and viewpoints are measured. Within the academic marketplace, then, all ideas are not equal.

This deviation from the Holmesian notion of the marketplace manifested itself in the debate concerning campus hate speech codes.

An outgrowth of a series of racist incidents on college campuses in the late 1980s, campus hate speech codes were an attempt to restrict harmful speech and maintain a nonhostile learning environment conducive to producing an equal educational opportunity for all students. [n60] By the early 1990s, restrictions on offensive speech flourished on college and university campuses, and support for punishing such speech was unprecedented. [n61] This movement, interestingly, came on the heels of a trend toward greater protection of offensive speech [n62] as major civil rights organizations as well as the courts concluded that the "interests of racial minorities and powerless groups were best protected through the broadest, most content-neutral protection of speech." [n63]

Scholarly examination of the campus speech code movement has exposed the contrasting purposes and characteristics of these two marketplaces. The Holmesian marketplace, which was designed to foster [*331] democratic objectives through public discourse, is perpetually open to participation, question and reevaluation. [n64] By contrast, the primary function of discourse in the academic marketplace is "'to discover and disseminate knowledge by means of teaching and research.'" [n65] This function supports the educational purpose of the academy and relies upon the free exchange of ideas to accomplish its objectives. But while public discourse in the academic marketplace is valued, it is valued only to a point, and discourse that is incompatible with the academy's commitment to advance knowledge and truth may well be censored or excluded. [n66]

In the context of hate speech, scholars have argued that racial insults and the like have no status or value among academic discourse [n67] given the inability of such speech to "establish, improve, or criticize any proposition or object of inquiry." [n68] Racist speech is "communicated solely for the purpose of harassing, humiliating, or degrading a victim," [n69] and possesses no "truth value" [n70] and thus is not able to "form part of the truth-seeking dialogue" [n71] of the academy. While the pursuit of truth, in the academic context, requires unfettered access to all ideas no matter how offensive, this pursuit is also tempered by "fidelity to reason and respect for method and procedures" [n72] and precludes any commitment to tolerate expression incompatible with academic goals. [n73]

Within the speech code debate, the academic marketplace has been characterized as something of a hybrid forum or special kind of community, [n74] where "individuals learn to express themselves in acceptable, civil terms." [n75] In this type of environment, "higher levels of rationality and civility" [n76] are required of speakers in an effort to acquire the [*332] self-restraint necessary to function in a civilized, pluralistic society. [n77] This depiction of the academic marketplace takes into account the significant role diversity in race, ethnicity and culture play within the academy. [n78] Efforts to promote diversity have been linked to America's nongovernmental accreditation system, in which the vast majority of higher education institutions choose to participate and on which federal student aid eligibility depends. [n79] These efforts are also reflected in recent gains in college enrollment among female and minority students, a trend, with regard to women, that is expected to continue until 2016, according to the U.S. Department of Education's National Center for Education Statistics. [n80]

More than a decade ago, Professor Samuel Walker commented on the changes such efforts have had on the campus community. "Campuses," he wrote, "represent a special environment where groups that are relatively powerless in the larger society have been able to mobilize considerable power based not only on their own numbers but on the coalitions they have forged with other groups and allies from the 'majority' community." [n81] Effective coalitions have been formed among minority groups, and are actively supported by "left-wing white students" and passively supported by "many other unaffiliated students." [n82] At the same time, Professor Walker explained, advocates of free speech, such as the American Civil Liberties Union, have not seriously challenged such coalitions or politically correct discourse requirements because they have been organizationally weak on campus. [n83] "The resulting coalition," he wrote, "has far more power on campus than any of the constituent groups have in the larger society." [n84]

In many ways, the academic marketplace is more of a social and economic creation cabined by prevailing conceptions of what constitutes a legitimate exchange of ideas than an equal-access public square where wide open and robust debate on public issues takes place. Consequently, [*333] it is not free of market imperfections. Like other economic marketplaces, it is unavoidably biased in favor of those with the resources and stature to control it. Those individuals and groups able to exert control over the academic marketplace enjoy an enormously disparate opportunity to peddle their ideas to an often captive audience even though the ideas posited are not necessarily reflective of their relative acceptance in the larger society. While critics point to such disparate access as evidence that a regulatory regime is needed to correct market imperfections and redistribute communicative opportunity, in economic terms such individuals and groups do not exert monopoly power over the idea market.

A monopoly in the marketplace of ideas is said to occur where "a single individual (or firm) has control over the majority of avenues of communication, where a small number of firms have the same control, or where time limitations grant a speaker exclusive ability to address a particular audience." [n85] Examples include situations where one or two firms owned all television access and television was the sole method of disseminating information to viewers or where an individual convinced a group to commit an act of violence before any opposing viewpoints could be heard. [n86] While idea markets are subject to potential monopolies in certain circumstances, [n87] a natural monopoly in an idea market would be extremely rare given the proliferation of communication outlets or sufficient substitutes and the resulting low information barriers made possible by Internet-based search engines that are necessary to ascertain the merit of an idea. Certainly within the academic marketplace, sufficient substitutes exist even for those students who seek a more conservative ideology. [n88] According to recent enrollment figures, conservative, faith-based institutions are experiencing unprecedented growth. Evangelical schools belonging to the Council of Christian Colleges and Universities reported a 70% increase from 1990 to 2004 compared to a [*334] 13% increase for all public institutions and 28% for all private colleges over the same period. [n89]

Aside from access issues, what advocates of regulation seem to fear the most about the academic marketplace are its perceived externalities, that is, the effects on third parties and society from the exchange process. In economic parlance, the classic example of a negative externality is pollution. [n90] Consumers demand certain products, the production of which produces air or water pollution. Third parties and society are negatively affected by the polluted air and water that

results. In such a situation, government intervention, which mandates that the producer install a pollution abatement system, for example, may be appropriate to correct this defect in the market. Negative externalities in the idea markets may also occur. A classic example is when speech is used to compel harmful conduct, such as incitement to violence or destruction of property. In the intellectual diversity debate, it can be surmised that left-leaning academic indoctrination could ultimately impact cultural and political norms as generations of graduates armed with liberal ideas and so-called politically correct notions begin to participate in the ideas market. However, this supposition assumes that society is harmed from liberal ideas and politically correct notions in a manner similar to pollution or incitement to violence and that such indoctrination takes place, that is, that diversity of thought is basically nonexistent within the entire academic system and that academic speech is capable of unduly influencing a student's thought process to a degree necessary for indoctrination to occur. Both of these assumptions are difficult, at best, to defend. In economic terms, liberal ideology, even assuming that graduates have internalized it to the degree necessary to sway the ideas market, does not rise to the level of a negative externality. Furthermore, statistics show that while so-called liberal thought dominates the academic marketplace, [n91] the system is not closed to conservative viewpoints and institutions. [n92]

Commentators caution against using economic theory as a means to understand and explain Holmes' marketplace of ideas. [n93] Although the Supreme Court has been reluctant to adhere to economic theory when [*335] deciding free speech issues, [n94] use of the theory in such disputes invariably focuses attention on disparities and externalities and provides justification for governmental intervention to redistribute communicative opportunity. [n95] The Court's hesitancy in this regard may come from the observation that the market for ideas and the market for goods and services do not function in a similar fashion. Economic concepts such as supply and demand, scarcity of resources, substitution effects, price, and consumer choice do not operate in the ideas market the way they do in markets for goods and services. [n96] Ideas often get consumed in ways not replicated for material goods and services. For example, the production and consumption of an idea is not generated in response to demand and does not deplete the resources available to the producer of the idea or the supply of the idea to other consumers. [n97] Consumers of ideas do not necessarily seek out ideas that best serve their personal needs. In deciding what to believe, consumers often take into account the desires, needs, opinions and experiences of other people. [n98] They may also adopt ideas that defy current consensus and are, thus, very costly to hold. [n99] Holding a genuine belief, therefore, "[E] ntails a quality of personal identification and (at least temporary) commitment that is approximated by only the most unusual of consumer choices." [n100] The result is a market-place distorted by cultural affinities and psychological predispositions as well as by the fact that some ideas are more easily packaged and articulated than others. [n101]

As a segment of the ideas market, the academic marketplace is distorted by the educational mission of the university as well as the university's commitment to a rational pursuit of truth and the intellectual development of its students. These commitments constrain the production and consumption of ideas. In an academic marketplace, ideas are produced primarily for other scholars and students who understand and evaluate those ideas "within a tradition of knowledge, [*336] shared assumptions and arguments about methodology and criteria, and common objectives of exploration or discovery." [n102] In this market-place, speech is "rigidly formalistic." [n103] That is, "Every lecture or article must presuppose the history and current canon of the discipline; every departure from common understandings must be explained and justified." [n104]

Scholars who reach conclusions that challenge the basic suppositions of a discipline are often held to higher standards of competence in order to maintain the coherence of a discipline. [n105] However, those who successfully establish a new perspective often become leaders within the discipline. [n106]

Supporters of the intellectual diversity movement have raised objections to disciplinary coherence. They contend that individual disciplines, which were once distinct, are now becoming homogenized around a core set of political values and a set list of topics, namely "race, class, gender, sexuality, and the 'social construction identity'; globalization, capitalism, and U.S. 'hegemony; the ubiquity of oppression and the destruction of the environment." [n107] Faculty, they say, are too often telling students what to think about present day issues. [n108] Ideologically slanted classroom speech that claims that the status quo is "patriarchal, racist, hegemonic, and capitalist" and must be critiqued in order to facilitate a necessary social transformation has supplanted survey courses that ensured exposure to general areas of knowledge. [n109] The academic marketplace, they contend, should foster disciplinary and viewpoint diversity [n110] and an open and free exchange of ideas in the classroom that permits students to think for themselves. [n111] Moreover faculty scholarship should be reviewed for "accuracy, impartiality, and probity" regardless of the discipline or methodological tradition. [n112]

The arguments put forth from advocates of the intellectual diversity movement are based on a flawed view of the academic marketplace. As a segment of the ideas market, the academic marketplace is more [*337] analogous to Professor Barron's news media environment than to the neutral environment of free and voluntary exchange envisioned by the Holmesian notion of the marketplace. The academic marketplace simply does not function as an open public forum where all ideas are equal and the barriers to entry are virtually nonexistent. As one commentator argued, describing the academic marketplace as "peculiarly the 'marketplace of ideas'" [n113] "obscures more than it clarifies." [n114] When this Holmesian notion is applied to the classroom, it "falsely suggest [s] that teaching normally involves a free exchange of ideas among equals." [n115] When it is applied to the development of disciplinary knowledge, it fails to account for the fact that ideas in the academic marketplace "achieve eminence only to the extent that competent scholars accept them upon due and unconstrained examination." [n116]

Confusion regarding the marketplace metaphor is not new. Despite its repeated appearance in Supreme Court opinions, judicial references to it "are virtually devoid of definitions of the term or explanations as to how the model works." [n117] The metaphor, which has been used in virtually every area of First Amendment jurisprudence to bolster free expression, [n118] "is far from being accepted as a workable means of protecting speech" by nonjurists and scholars. [n119] Critics contend that the theory operates on false assumptions. Among the most common are that "everyone has access to the market" and that "truth is objective and discoverable rather than subjective and chosen or created." [n120] However, such criticisms are "almost universally" based on the idea of a single marketplace that is open to everyone and into which all ideas are dumped. [n121] This image of the marketplace is not supported by First Amendment jurisprudence, which has recognized a multitude of mini-marketplaces from distinct places such as classrooms and mail systems to types of media to categories of speech. [n122] In First Amendment jurisprudence, each of these marketplaces comes to the Court with "its own dynamics, parameters, [*338] regulatory scheme, and audience." [n123] As a result, ideas don't enter an all-encompassing

marketplace where they battle it out with a whole host of other ideas but rather enter a particular marketplace where they compete with other ideas in a more limited and controlled manner. [n124]

For many, the principal distinguishing characteristic of the academic marketplace is unfettered expressive freedom. [n125] However, this point of view does not take into account the realities of that marketplace. The academic marketplace functions neither as an economic marketplace driven by laws of supply and demand nor as a wide-open, uninhibited marketplace where multitudes of differing ideas can clash. At its core, it is a closed community of scholars and administrators committed to expression that advances knowledge. Knowledge, in this community, is largely based on the collective judgment of those scholars and administrators who whose work conforms to the standards set and accepted by the academic marketplace. Members who are granted access to this ideas market are expected to embrace the collective judgment of their peers and engage in contemplative and rational discussions regarding the areas of knowledge in and the established critical perspectives of their discipline. Licensing all expression or granting unrestricted access to the academic marketplace, however, simply does not foster this philosophy.

ACCESS TO VARIOUS UNIVERSITY "FORUMS"

The recognition of a series of mini-marketplaces has allowed First Amendment jurisprudence to vary, depending on the marketplace in question. [n126] In its physical form, the academic marketplace is best characterized as an amalgamation of diverse places that are, most likely, spread across a large area. From its football stadium to its classrooms and administrative offices, the academic marketplace constitutes a government-owned community that is governed for First Amendment purposes by the public forum doctrine. The Court developed this doctrine to adjudicate issues of access to and expressive conduct on government property. In order to engage in public forum analysis, a court must first [*339] identify the place or forum to which the speaker is seeking access. For example, if a speaker seeks general access to any and all areas of a campus, then the forum, for First Amendment analysis purposes, encompasses the entire campus. But when a speaker seeks access to a more limited forum, such as a classroom or an internal mail system, that particular place is the appropriate forum for analysis regardless of whether the place has an actual physical or spatial form. [n127] From the Court's application of the public forum doctrine, it is clear that a variety of forums can exist within a single piece of governmental property. [n128]

Under the public forum doctrine, the degree to which government can constitutionally control access to and restrict expression occurring on its property will depend upon the degree to which the specific place to which the speaker seeks to gain access is deemed a public or nonpublic forum. [n129] In determining the nature of a forum, courts have generally divided government property into three categories: traditional public, designated public and nonpublic forums. [n130] Distinctions between these forums are based upon the "physical characteristics of the property, including its location; . . . the objective use and purposes of the property; . . . and government intent and policy with respect to the property, which may be evidenced by its historic and traditional treatment." [n131] In places traditionally devoted to public assembly and debate, such as public streets, sidewalks and parks, as well as places intentionally designated by government fiat as an open public forum, [n132] government's ability to regulate expressive activity is subjected to

the highest scrutiny. [n133] In these forums, content-based restrictions on speech, including speaker-identity based exclusions, are valid only if the regulation is necessary to serve a compelling government interest and is [*340] narrowly drawn to achieve that interest. [n134] In addition, content-neutral time, place and manner restrictions on expressive activities are permitted as long as the regulation is narrowly tailored to serve a significant government interest and ample alternative channels of communication exist. [n135]

Public property that is not deemed a traditional public forum or a designated open public forum is considered a nonpublic forum [n136] and is governed by a different standard. [n137] Government may restrict access to or limit expressive activity in a nonpublic forum as long as the regulation is reasonable in light of the purpose of the forum and the surrounding circumstances. [n138] And while the regulation need not be the most reasonable or the only reasonable limitation, [n139] "reasonable grounds for limiting access to a nonpublic forum . . . will not save a regulation that is in reality a facade for viewpoint-discrimination." [n140] A nonpublic forum distinction, therefore, would allow government to exclude a speaker who would disrupt such a forum and impede its effectiveness for its intended purpose as long as the exclusion was based on viewpoint-neutral criteria. [n141]

While the forum analysis traditionally has recognized three categories, the law has become somewhat murky by the Court's use of a fourth designation, the limited public forum, [n142] and questions concerning the precise distinction, if any, between a limited public forum and a designated public forum or nonpublic forum. [n143] This ambiguity has [*341] even hampered the ability of litigants to accurately and explicitly determine the category of forum to which they are seeking or denying access. [n144] Regardless of the exact term used, courts have recognized government's ability to open a nonpublic forum for unlimited or limited expressive conduct. When government creates a limited public forum, it restricts expressive activity to certain kinds of speakers or groups or the discussion of certain topics. [n145] When it creates an unlimited public forum, expressive activity is not restricted to a particular subject or speaker; instead the forum is open for indiscriminate public use. In practice, however, government rarely creates such a forum and thus the terms designated and limited public forum are, today, used largely interchangeably to refer to a nonpublic forum that has been opened only to a certain class of speakers and/or for the discussion of a particular subject. [n146]

Once government creates a limited public forum, it is under no obligation to retain it for the purposes for which it was initially established. The Court has held that unlike with a traditional public forum, [*342] government is "not required to indefinitely retain the open character" of the forums it creates. [n147] Thus a forum initially designated for a specific limited use can later be closed or modified to permit an alternative limited use. This provision gives government the power to "alter the parameters of the forum at any time, so long as those parameters are reasonable and viewpoint-neutral." [n148] Under the public forum doctrine, it is clear that a university would have the authority, for example, to set aside a classroom during a certain period of time for discussion of current events by all students. However, if the university concludes, for the sake of argument, that contentious and racist speech is occurring around the issue of immigration, what is the likelihood it could legitimately change the designation of the forum to exclude that subject matter or prohibit certain groups who are more prone to discussing that subject from gaining access?

A lack of First Amendment constraints in the public forum doctrine has, on the one hand, given government the "ability to build discriminatory criteria into the very definition or purpose of the limited public forum." [n149] Even when relying on definitions of viewpoint supplied by the Court, such as expression that communicates an offensive or disfavored attitude [n150] or speech representing a particular perspective, [n151] an exclusionary forum policy or practice "can easily be recast by the state as innocent boundary-drawing necessary to preserve the forum for its intended purpose." [n152] On the other hand, restrictions that prohibit access to a forum by an entire group that holds a particular position on an issue can legitimately be perceived as viewpoint discrimination. The inherent difficulty of distinguishing between unconstitutional viewpoint discrimination and legitimate speaker- or subject-based discrimination was recognized by the Court in Rosenberger v. Rector & Visitors of the University of Virginia. [n153] In the case, the Court acknowledged that viewpoint discrimination is but a subset of the more general phenomenon of content discrimination and that the line between permissible content discrimination and impermissible viewpoint discrimination "is not a precise one " [n154]

[*343] When government opens a nonpublic forum to limited use it must abide by the boundaries it has set for that forum. These boundaries as well as the circumstances surrounding the case are used to determine whether the actual rationale for the restriction was based on the ideology, opinion or perspective of the speaker. [n155] In a series of cases involving restricted access to educational facilities for religious groups, the forum's exclusionary boundaries were defined in broad terms. Educational facilities were prohibited from being used for religious activities or by any groups for religious purposes. [n156] These exclusionary boundaries were thought to be viewpoint neutral because they could be applied in an even-handed way to all uses of public educational property for any religious purpose regardless of orientation or ideology. [n157] The various educational institutions contended, in one way or another, that they were seeking to exclude religious thought from the limited public forum in order to preserve the secular educational mission of the institution involved. [n158] This action is consistent with the Court's public forum doctrine, which gives government explicit authority to legally preserve the property under its control for the use to which it is dedicated. [n159] But while the educational institutions were classifying religious thought as an area of inquiry or subject matter, the Court contended that it is also a perspective or viewpoint on a wide range of topics that were permitted to be discussed in the established limited public forums. [n160] Therefore, by excluding religious groups or speakers who had a religious purpose for seeking entry into the limited forum, government was actually discriminating on basis of viewpoint. The fact that "all religions and all uses for religious purposes are treated alike," the Court said, "does not answer the critical question [of] whether [the exclusion] discriminates on basis of viewpoint." [n161]

[*344] So what about the hypothetical posed earlier involving the topic of immigration? Elimination of any group professing a pro-or conimmigration stance from the limited public forum created would, according to the Rosenberger Court, skew the debate. [n162] In Rosenberger, the Court said that debate is not bipolar. For example, antireligious speech is not the only response to religious speech. Instead debate on a topic involves multiple perspectives, including political, economic and social perspectives in addition to religious and antireligious. [n163] To exclude all groups with a demonstrated ideology on immigration, for example, while leaving room for multiple other voices would skew the marketplace in multiple ways. [n164] For a group's ideology on immigration could impact its viewpoints on a host of other related issues, from

agricultural subsidies to terrorism. To exclude those groups or the topic of immigration itself would be to exclude an immigration-based viewpoint from debate on a series of topics related to it. Furthermore, if the university, in an attempt to eliminate racist or contentious speech, excluded expression that insults or provokes violence, hatred, contempt or similar emotions, this, too, could be considered viewpoint-specific, as it would prohibit a racist or bigoted perspective but not a tolerant ideology. [n165] At this rate, almost any explicit subject-based or speaker-based restriction could be regarded as viewpoint specific and thus unconstitutional under the public forum analysis.

In Board of Regents of the University of Wisconsin System v. South-worth, [n166] the Court avoided the question of whether it would consider an exclusion of politically partisan speech to be viewpoint discrimination. [n167] At issue was a mandatory university student fee that was used to support registered student organizations. [n168] Several students objected to the policy, arguing that it forced them to support speech with which they disagreed. [n169] The Court found that the "standard of viewpoint neutrality found in the public forum cases" to be controlling in this case. [n170] Although the policy stated that fee funds could not be used for politically partisan speech, [n171] fees were used to fund such groups as the College Democrats and College Republicans, among other politically partisan [*345] groups. [n172] The Court concluded that the policy was viewpoint neutral without specifically addressing whether the exclusion would be considered viewpoint discrimination, that is, partisan versus nonpartisan speech, if the university had abided by the letter of the policy. [n173] Under the Court's "far-reaching formulation of viewpoint discrimination," one commentator contends, "politics could never be restricted as a subject matter in a limited public forum, because speech that is not political is, by definition, apolitical. By simply funding the Chess Club, the university could be seen as favoring a nonpartisan world view." [n174]

In spite of this line of reasoning regarding viewpoint discrimination, the Court has upheld restrictions on political speech under its public forum analysis. In Greer v. Spock, [n175] the challenged regulation explicitly excluded "demonstrations, picketing, sit-ins, protest marches, political speeches and similar activities" from the Fort Dix Military Reservation. [n176] The regulation, which was rigidly [n177] and evenhandedly [n178] enforced, was intended to keep official military activities "wholly free of entanglement with partisan political campaigns of any kind." [n179] The Court wrote, "Such a policy is wholly consistent with the American constitutional tradition of a politically-neutral military establishment." [n180]

The Court continued this line of reasoning in Cornelius v. NAACP. [n181] At issue in Cornelius was a presidential order that excluded certain "legal defense and political advocacy organizations" from participating in an annual charity drive aimed at federal employees and conducted in the federal workplace during working hours. [n182] The government argued that the fund raising campaign was intended to "provide a means for traditional health and welfare charities to solicit contributions in the federal workplace" [n183] and that excluding legal defense and political advocacy organizations was reasonable in light of the "likely . . . consensus among employees that traditional health and welfare charities are worthwhile." [n184] In addition, the government wished to "avoid the reality [*346] and appearance of ... favoritism or entanglement" with organizations "seeking to affect the outcome of elections or the determination of public policy" [n185] as well as any controversy that would disrupt the workplace

and adversely affect the fund drive. [n186] Although the fund drive provided access to organizations such as the World Wildlife Fund and Wilderness Society that did not provide health and welfare services, the Court up-held the regulation, contending that the policy was reasonable in light of the purpose of the fund drive and that the justifications for the exclusions were "facially neutral." [n187] However, the Court admitted that justifications, such as a concern to avoid controversy, might actually conceal a viewpoint bias. [n188] Nonetheless, the Court declined to decide whether such a bias existed, leaving the excluded groups free to demonstrate on remand that government's restrictions were "impermissibly motivated by a desire to suppress a particular point of view." [n189]

So how can the Court's findings of viewpoint discrimination in cases involving the exclusion of religious activities from a limited public forum be squared against its decisions upholding the elimination of political speech from similar forums? The answer may very well turn on the established function performed by the forum. Court cases suggest that a lighter version of the viewpoint discrimination test is applied to restrictions that exist primarily for the attainment of legitimate administrative or institutional purposes. Although an administrative or institutional function is not a specific criterion for distinguishing among forums, restrictions in such forums [n190] are often upheld as long as they [*347] are facially neutral or evenhandedly applied, [n191] whereas courts have rejected such a justification [n192] in forums where the primary function is to facilitate discussion, albeit in a limited manner. [n193] When the purpose of the forum is to facilitate discussion on multiple topics in a wide-ranging and often unstructured manner, the Court is likely to find that the exclusion of an entire speaker or subject category constitutes viewpoint discrimination because such a category may also constitute a perspective on permitted forum topics [n194] or the category itself is technically not placed off limits for other speakers. [n195] However, this often is not the case with forums designed to facilitate an administrative or institutional function because such forums are generally established under more specific and narrow guidelines that routinely and unavoidably [*348] constrain speech on the basis of both its content and viewpoint. [n196] While this functional dichotomy is good news for a military base, for example, which for administrative purposes must maintain "loyalty, discipline, [and] morale" [n197] and insulate itself from any appearance of partisanship, [n198] it is often troublesome for universities, which primarily seek to facilitate a wide range of discussion on diverse and often controversial subjects. In extracurricular activities, like the one discussed in the above scenario, it would be difficult, at best, for a university to constitutionally limit access based on a speaker or subject-matter category since the purpose of the forum would be to encourage discussion on a widerange of current issues. Nevertheless, the functional dichotomy present in forum analysis will most likely favor a university's authority to place limits on access to the classroom.

The question of access to the classroom is at the center of the intellectual diversity debate as supporters of this movement seek to mandate the inclusion of intellectual diversity in student course evaluations, grievance procedures and guidelines on teaching and program development. Such a move would, in practice, mandate access to a classroom for viewpoints otherwise excluded from this forum. [n199] But unlike an extracurricular activity, a classroom and its related course are established for a precise and narrow purpose and constitute the very product provided by the university. As a result, a university would most likely be given wide latitude to control access to this forum, as such control would likely be regarded as a reasonable administrative or institutional function. [n200] In his concurrence in Widmar v. Vincent, Justice John Paul Stevens

noted that universities routinely engage in a variety of content decisions in the execution of their learning and teaching missions: "They select books for inclusion in the library, they hire professors on the basis of their academic philosophies, they select courses for inclusion in the curriculum, and they reward scholars for what they have written." [n201] [*349] As one commentator noted, such decisions are regularly based on view-point. For example, "Historians who deny the Holocaust are not likely to receive appointments to reputable departments, [and] students who deny the legitimacy of the taxing power of the federal government are not likely to receive high grades in law schools. [n202] While both decisions would have the effect of discriminating against a particular viewpoint, such discrimination would most likely be deemed immaterial as long as it was legitimately related to the administrative function of the educational mission of the university. [n203]

When it comes to legitimate pedagogical concerns and the subsequent implication of an educational institution's reputation and resources, the Court has noted that it is likely to defer to the judgment of academic administrators even in matters pertaining to the reasonable regulation of speech activities. [n204] Such deference is due "the multitude of academic decisions that are made daily by faculty members of public educational institutions" because those decisions "require 'an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.'" [n205] The Court's approach in the adjudication of legitimate pedagogical issues rests on a view of the academic marketplace as a communal and economic creation cabined by established professional conceptions of what constitutes the legitimate exchange of ideas. In this regard, the use of government property for activities encompassing legitimate pedagogical interests constitutes a nonpublic forum, where, for institutional purposes, university personnel are routinely called upon to make a variety of viewpoint discriminatory decisions.

[*350] UNIVERSITY CONTROL OF ACADEMIC SPEECH

At the center of the debate over intellectual diversity mandates lies the question of the extent of control a university may constitutionally exert over the speech that resides in the academic marketplace. In Rosenberger, the Court reiterated the principle that "when the State is the speaker, it may make content-based choices." [n206] This principle permits a university to "determine [] the content of the education it provides." [n207] This principle also extends to government's role as a public employer and its ability to regulate the speech of its employees. Public employee speech doctrine is governed to a large extent by the balancing test set forth in Pickering v. Board of Education. [n208] In Pickering, the Court recognized that the "State has interests as an employer in regulating the speech of its employees." [n209] The problem, the Court contended, is to "arrive at a balance between the interest of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." [n210]

Building on Pickering, the Court in Connick v. Myers [n211] instituted a two-part balancing test that denied a First Amendment cause of action to employees whose speech did not touch upon matters of public concern. [n212] For those employees who spoke on matters of public concern, the Court determined whether, given the nature of the expression, the government had a reasonable justification for its disciplinary actions. [n213] The Court noted that a government employer need

not allow disruption of the workplace and destruction of working relationships before taking action. [n214] Under the balancing test, "[R]easonable predictions of disruption" [n215] as well as basic interference with the "effective functioning of the public employer's enterprise," such as "[i]nterference with work, personnel relationships, or the speaker's job performance," constitute strong state interests. [n216] Furthermore, predictions of harm used to justify restrictions on employee speech are consistently given a wide degree [*351] of deference by the Court, especially when close working relationships are required to fulfill public responsibilities. [n217]

While the Pickering-Connick test requires that courts balance the free speech interests of an employee speaking out as a citizen on matters of public concern against the government's interest in effectively and efficiently managing and administering the public services it provides through its employees, [n218] it offers little guidance as to whether or how the test applies in circumstances where the government employee in the course of ordinary job duties speaks upon a matter of public concern. [n219] In Garcetti v. Ceballos, [n220] the Court answered that question when it held that public employees who make statements "pursuant to their official duties . . . are not speaking as citizens for First Amendment purposes." [n221] In such circumstances, the "Constitution does not insulate their communications from employer discipline." [n222] The Court said its holding in Garcetti "simply reflects the exercise of employer control over what the employer itself has commissioned or created" and is consistent with the underlying principle that affords government employers "sufficient discretion to manage their operations," [n223] despite the fact that it effectively isolates all speech which falls within the scope of an employee's job responsibilities from Constitutional scrutiny. [n224]

The amount of control a university may exercise over the speech of its faculty was not specifically addressed in Garcetti. In fact, the Court noted it would not decide whether the Garcetti holding would apply in the same manner to a case involving speech related to academic scholarship or classroom instruction [n225] -- two areas where teachers speak and write on matters of public concern "pursuant to official duties" [n226] and two areas of academic speech at issue in the intellectual diversity debate. In the realm of employee speech, academic speech presents a unique challenge. On the one hand, academic expression can be viewed as a "teacher's stock in trade, the commodity she sells to her employer in exchange for a salary." [n227] This expression constitutes both the skill set for which public educational employers pay and the product that they [*352] subsequently sell to incoming students. As such, it is inevitably a part of the teacher's official duties as well as the educational institution's intellectual enterprise. Under the employee speech doctrine, employers are entitled to control expression made pursuant to an employee's official duties. [n228] Regulation of job-related speech is viewed as control over what an employer has commissioned or created itself. [n229] The employee speech doctrine recognizes a university's interest in controlling classroom speech and maintaining adherence by its instructors to the subject matter of the courses they have been hired to teach. [n230] Speech found to be unrelated or not germane to the subject matter of a particular course could constitutionally be restricted by the university. [n231] As a result, the employee speech doctrine has been used to uphold the termination of a cosmetology instructor for distributing religious pamphlets on the sinfulness of homosexuality in a classroom setting, [n232] the suspension of an English language and literature professor for using obscene and vulgar language in the classroom, [n233] a prohibition on religious classroom speech by an assistant professor of exercise physiology, [n234] the termination of an economics instructor for use of profane language in the classroom, [n235] and the

termination of a nontenured assistant English professor for her choice of teaching methods and philosophy. [n236] It has also been employed in the area of academic inquiry to uphold a restriction on Internet access of sexually-explicit research materials [n237] and disciplinary action for the fabrication of data. [n238]

[*353] On the other hand, courts have recognized that the application of the employee speech doctrine to the academic marketplace requires an appreciation of the field of higher education and the role it plays in the advancement of knowledge and development of intellectual thought. [n239] This recognition has resulted in the much-debated concept of academic freedom. [n240] While the idea of academic freedom was first mentioned in a dissent by Justice William O. Douglas in Adler v. Board of Education, [n241] it wasn't until Sweezy v. New Hampshire [n242] that the concept was articulated by a plurality of the Court.

At issue in Sweezy were the constitutional limits of the government's inquiry into the political beliefs and associations of its citizens. Part of the government's investigation focused on Paul Sweezy's guest lectures at the University of New Hampshire. When Sweezy refused to answer questions concerning his lecture, he was incarcerated for contempt, and the case ensued. [n243] A plurality of four justices contended that the investigation was "an invasion of petitioner's liberties in the areas of academic freedom and political expression" -- two areas in which the "government should be extremely reticent to tread." [n244] The significance of academic freedom in American universities is "almost self-evident," the justices wrote. [n245] "To impose any strait jacket upon the intellectual leaders in our colleges and universities" would stagnate the development of new discoveries. [n246] Scholarship, they said, "cannot flourish in an atmosphere of suspicion and distrust." [n247] In this respect, "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding." [n248] The concept of academic freedom was coupled with the guarantees of the First Amendment ten years later in Keyishian v. Board of Regents. [n249] In Keyishian, the Court feared that [*354] the vagueness of a New York statute, which disqualified from state employment "subversive" persons, might chill academic speech and inhibit scholarship. [n250] "Our Nation is deeply committed to safeguarding academic freedom," [n251] the Court wrote. "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." [n252]

While Sweezy and Keyishian stand as the Court's landmark academic freedom cases, [n253] the Court handed down several other cases decided during this time that touched upon that freedom. [n254] In each case, the potential infringement on faculty interests came from McCarthy-era state statutes aimed at barring potential subversives from the faculties of public schools and universities. While some cases involved the disclosure of organizational memberships both past and present [n255] and others involved state-imposed loyalty oaths or affidavits, [n256] all could be said to involve restrictions on state employees rights as private citizens to speak and associate. [n257] As such, all except one were declared unconstitutional. [n258] Three were struck down under the doctrines of overbreadth and vagueness, [n259] and two were deemed an arbitrary assertion of government power and thus a violation of due process of law. [n260] Although the Court discussed or made reference to academic freedom in four of the six cases, academic freedom was not held to be dispositive in any of the [*355] cases. Instead the concept was primarily used, as it was in Sweezy and Keyishian, to underscore the important place academic freedom holds within the far-reaching constitutional guarantees of freedom of speech and association. [n261]

The Court's "exuberant praise" of the value of academic freedom has made the legal reach of the right appear "soaring and expansive." [n262] Not surprisingly, academic plaintiffs have been quick to assert that a constitutional protection of academic freedom insulates them against restrictions and disciplinary measures for academic speech. [n263] But while many courts continue to pay homage to this "amorphous" [n264] freedom, [n265] the Supreme Court has never afforded academic instructors an exclusive First Amendment right under this concept. [n266] To do so, courts have noted, would be to confer upon a limited class of individuals a special [*356] constitutional right that would shield their communication from governmental and judicial oversight. [n267] And yet, as one court observed, "To suggest that the First Amendment, as a matter of law, is never implicated when a professor speaks in class, is fantastic." [n268]

Confusion over the term "academic freedom" stems from the Court's failure to fully define the concept or to at least denote whether the words have a meaning in legal contexts that are different from its usage in academe. In the academy, the term traditionally had been understood as a personal right of a faculty member against "ignorant" interference by university administrators and trustees. [n269] In the Court's First Amendment parlance, however, the term has been understood as encompassing both individual and institutional freedom. [n270] How the same right can protect both the professor and the university is unclear. [n271] Courts, which have had to grapple with the inherent tension between these two components of academic freedom, [n272] have noted that when both parties claim a constitutional right to academic freedom these "two freedoms are in conflict." [n273] The resolution of the two freedoms is important because it determines the assignment of legal rights, which in turn determine the scope of choices available to each party and the degree to which each party is exposed to the choices of others. [n274] It can be said that every assignment of rights "both increases and decreases freedom, though typically for different people." [n275] The resolution of legal [*357] conflict and the subsequent assignment of rights serves to channel externalities, that is, benefits and harms, in one way or the other depending on the values of those who have participated and prevailed in each stage of the legal struggle. [n276]

Courts have recognized that both the individual and institution are implicated by the concept of academic freedom. However, when it comes to associating the concept with First Amendment guarantees, courts have largely regarded the concept as an "institutional right of selfgovernance in academic affairs." [n277] This may be due, in part, to the development of the employee speech doctrine, which affords all government employees protection against dismissal and disciplinary action for the exercise of First Amendment rights. In 1968, when the Court first recognized the First Amendment speech rights of public employees, [n278] it did so in a case involving a high school teacher who wrote a letter published in the local newspaper criticizing school officials for their handling of school revenue. In its resolution of the case, the Court defined two areas where the government's interest as an employer would be given priority over the academic speech of the teacher -- one, if the teacher's speech impeded the "proper performance of his daily duties in the classroom," or, two, if it interfered with "the regular operation" of the school. [n279]

Subsequently, courts have concluded that the university may exercise extensive control over its educational enterprise. This control includes the power to promulgate rules and regulations, [n280] institute proper disciplinary action, [n281] select and dismiss its faculty, [n282] determine the content

[*358] of curricular offerings [n283] and accepted methods of instruction and class conduct, [n284] and regulate the placement of faculty artwork. [n285]

But a university's control is not absolute. Under the employee speech doctrine, the line is drawn at speech that is "directed toward an issue of public concern" and where the interest in speaking outweighs the university's interest in regulating or restricting the speech. [n286] Within the academic realm, "academic debates, pursuits, and inquiries" [n287] as well as classroom instruction often fall within the "Supreme Court's broad conception of 'public concern,'" especially where the essence of the academic's role is to "prepare students for their place in society as responsible citizens" [n288] or where the academic "'seeks to inform, edify, or entertain'" an audience through the discussion of "'ideas, narratives, concepts, imagery, opinions--scientific, political, or aesthetic.'" [n289] In cases where a faculty member is engaging in professional speech that is germane to the subject matter, the member's academic freedom will most likely outweigh the university's interest in regulating speech when no evidence exists to suggest the speech is having a negative impact upon the efficiency of the institution's operation. [n290] To establish a negative impact, courts consider whether the faculty member's comments "meaningfully interfere" with the performance of the member's job duties or the university's general operations, undermine the legitimate educational goals or mission of the university, create disharmony or conflict or impair discipline among students and coworkers, or undermine the working relationship within a department. [n291] The fact that the speech in question did not "actually disrupt the employer's operations" will not necessarily save it from constitutional restriction or regulation. [n292] Under the employee speech doctrine, a "reasonable belief" that the speech at issue "would interfere with the employer's operations" may establish a countervailing government interest that would override the academic's free [*359] speech interest. [n293] The existence of "undifferentiated fear," [n294] "apprehension of disturbance" [n295] or the desire by the administration to avoid the "'discomfort and unpleasantness that always accompany' a controversial subject" would, however, fall short of overcoming the free speech interest an academic in such a situation maintains. [n296]

As Garcetti indicates [n297] and commentators have noted, the "Court has never defined precisely the relationship between the protection of academic freedom and the regulation of public employee speech." [n298] However, the Court noticeably signaled that the employee speech doctrine applies equally to academic and nonacademic plaintiffs when it vacated a decision by the Second U.S. Circuit Court of Appeals holding that a faculty member's First Amendment rights were violated when university officials instituted a disciplinary measure for anti-Semitic and racist remarks made during a public address off-campus. [n299] Without comment on the First Amendment issue at stake in Jeffries v. Harleston, [n300] the Court remanded the case to the court of appeals for further consideration in light of Waters v. Churchill, [n301] a Supreme Court plurality decision involving the dismissal of a public employee for workplace speech in a nonacademic setting. [n302] On reconsideration, the Second Circuit overturned its original decision and upheld the removal of Professor Leonard Jeffries Jr., from his position as department chair in retaliation for his remarks. [n303] The vacated judgment suggests that the First Amendment rights claimed by academic employees do not extend any farther than the free speech rights afforded to all public employees speaking on matters of public concern. [n304] The First Amendment is only implicated in [*360] employee speech cases when the employee is speaking on a matter of public concern. Likewise, legal analysis of "what constitutes a matter of public concern and what raises academic

freedom concerns [are] of essentially the same character." [n305] For both public concern and academic freedom, the "linchpin of the inquiry is . . . the extent to which the speech advances an idea transcending personal interest or opinion which impacts our social and/or political lives." [n306] As a result, both academic and nonacademic plaintiffs seeking to establish that a government-initiated disciplinary action violated their free speech rights must demonstrate that the speech at issue both "involved a matter of public concern" [n307] and was a "substantial or motivating factor" in the government's disciplinary action. [n308] Correspondingly, academic defendants, like other governmental defendants seeking to escape liability for such an action, must demonstrate that regardless of the speech in question they would have instituted the same disciplinary measure [n309] or that the employee's speech interfered or reasonably threatened to interfere [n310] with the "effective and efficient fulfillment" of the government's responsibilities to the public. [n311]

Taken together, academic freedom and the employee speech doctrine afford a university a great deal of power over the content of the education it provides. From curricular offerings to the selection and dismissal of faculty, courts have recognized and largely deferred to an institution's right of self-governance. [n312] Deference is due given a university's duty to "serve its own interests as well as those if its professors" [n313] and the fact that academic decisions require "expert evaluation of cumulative information." [n314] Academic assessments, the Court has recognized, require "complex educational judgments" that "lie[] primarily within the expertise of the university." [n315] As a result, courts are not to determine [*361] "what is or is not germane to the ideas to be pursued in an institution of higher learning." [n316] That is:

When judges are asked to review the substance of a genuinely academic decision, . . . they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment. [n317]

The intellectual diversity movement, which seeks to mandate guidelines on classroom content and program development as well as on the selection, tenure and promotion process, threatens to substantially erode an institution's academic freedom and loosen its control over the management and administration of its services. Movement advocates argue that a disproportionate percentage of left-leaning faculty members are pushing their values on students and colleagues and skewing the educational process. [n318] Classroom speech, they contend, is ideologically slanted as professors frequently insert their political views into their courses, regardless of the subject matter taught. [n319] Additionally, ideological intolerance has become institutionalized as evidenced by politically-sensitized curricular offerings, notably race, class, gender, sexuality and social justice studies; [n320] extra-curricular programs designed to foster appreciation for multi-cultural differences; [n321] and diversity hiring initiatives. [n322] In short, advocates argue that universities are pushing a politically correct agenda on students in the name of critical thinking. [n323] Advocates point to specific courses and course descriptions listed in university catalogues as proof of this agenda. [n324] Among the ideas proffered in such courses that advocates want countered are that "institutionalized racism exists;" [n325] problems in income, racial, ethnic and gender inequality and heterosexism are natural outgrowths of the existing social structure; [n326] students should be sensitized to issues [*362] facing multi-cultural groups; [n327] U.S. "'culture covertly and overtly condones the abuse of women by their intimate partners;'" [n328] and "'[p]oor

people and people of color comprise the majority of those imprisoned [in the U.S.] due to the war on drugs and racial and economic bias in policing and sentencing.'" [n329]

Classroom speech, curricular offerings, extra-curricular programs, and hiring practices and initiatives represent the core of an institution's intellectual enterprise. These basic academic decisions have "'long been regarded as among the essential prerogatives and freedoms of the university administration.'" [n330] Courts, which have been careful not insert themselves as "ersatz deans or educators," [n331] have recognized time and again that intrusion into the management and administration of a university's intellectual enterprise runs counter to constitutional law, [n332] and, as a result, have largely deferred to the judgment of the university in content-based disputes between a faculty member and the institution. [n333] In disputes where a faculty member is acting as a course instructor, courts have noted that the educational judgment of an instructor can be questioned and redirected by the university. [n334] The authority to question an instructor's educational judgment would also apply to conservative faculty members actively supported by intellectual diversity advocates. This authority could effectively nullify the impact such a hire would most likely have on substantive curricular changes and neutralize the attempt by the intellectual diversity movement to infuse the academy with alternative viewpoints. Moreover, the intrusion into a university's affairs supported by advocates backing legislative measures designed to promote intellectual diversity could easily be viewed [*363] as interfering with the "effective and efficient" [n335] fulfillment of educational process. Thus the question becomes to whom will the court defer in a legislative-administrative tug of war, where "government" is both the speaker and the regulator.

UNIVERSITY INDEPENDENCE FROM LEGISLATIVE OVERSIGHT

In 1982, the Seventh Circuit noted that

Case law considering the standard to be applied where the issue is academic freedom of the university to be free of governmental interference, as opposed to academic freedom of the individual teacher to be free of restraints from the university administration, is surprisingly sparse. But what precedent there is at the Supreme Court level suggests that to prevail over academic freedom the interests of the government must be strong and the extent of intrusion carefully limited. [n336]

Nearly a decade later, the Supreme Court acknowledged that the "university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment." [n337] While the Court's academic freedom and employee speech cases can be interpreted as providing the academy with an extensive degree of autonomy on matters of academic self-governance, [n338] a constitutional challenge involving a legislative enactment mandating intellectual diversity would pit the university's interest in academic self-governance against a legislature's power to place conditions on the funding it provides to government programs. The First Amendment and academic freedom would be implicated should the

university attempt to establish that an intellectual diversity statute violated its constitutional right of free speech.

While Justice Potter Stewart declared that the First Amendment does not confer upon state or federal institutions the same protection against [*364] governmental interference it provides media organizations, [n339] court decisions have largely "vindicated, rather than restricted, government's prerogative to speak and emphasized the importance of government's contributions to the marketplace of ideas." [n340] The Supreme Court, in particular, has recognized that a university speaks when it "determines the content of the education it provides" [n341] and that academic freedom is implicated when government attempts to "control or direct the content of the speech engaged in by the university or those affiliated with it." [n342] Yet, the Court has also explained that government can, without violating the Constitution, selectively fund a program according to subjective criteria in order to encourage certain speech activities it believes to be in the public interest. [n343] The freedom for government to engage in viewpoint-based speech-selection choices materializes when government subsidizes the speech of others as a means of transmitting or promoting a message it favors. [n344] In such circumstances, government is viewed as a speaker--not a regulator--and the consequences of legislative imprecision, ambiguity and subjectivity are seen as constitutionally insignificant even though a similar action by government in its regulator-role would raise substantial First Amendment concerns. [n345]

The head-on collision between a university and its legislative funding source would present complicated First Amendment issues which have not been precisely defined by the Court [n346] and implicate government's contradictory roles within the marketplace. In its traditional role as regulator, government is distrusted. Its participation in the speech market is primarily viewed as an attempt to monopolize debate by inhibiting, displacing or punishing competing ideas or information. As a result, government involvement in programs and forums set aside to encourage a diversity of views from private speakers is constitutionally suspect. Whether such involvement takes place through the subsidization of speech or the management of public property, viewpoint-based restrictions directed at these programs and forums are seen [*365] as improper and held to strict judicial scrutiny. [n347] Heightened constitutional scrutiny, however, is incompatible with certain roles government organizations and speakers perform. [n348] The Court has noted that government-supported public television stations, libraries, arts organizations and family planning clinics must engage in content-based, speech-selection decisions. [n349] First Amendment challenges to such decisions, whether from a private speaker or government-assisted organization, often turn on the function of the program in question and the role the government-speaker performs in the dissemination of program-directed speech.

As noted earlier, government enjoys broad discretion to make viewpoint-based choices when it speaks. [n350] Broad discretion is also warranted when government's purpose in funding a program is to promote a specific message. In such instances, the legislature establishes a program to promote one idea over another, thus actively participating in the marketplace of ideas through the segregation of speech activities specifically tied to a government subsidy. [n351] Through its funded-program, professionals are, in a sense, hired to convey government's message or to use their professional judgment to dispense funds to individual speakers based on the speaker's ability to convey the ideas supported by the program. [n352] Individual program participants are, therefore, not coerced to disseminate the message, but are free to choose whether to participate in

the program, knowing the limitations on speech that arise from participation. [n353] Individuals who choose to participate are viewed as disseminators of government ideas or scripted professional speech. Much like employee speech, program-participant speech is representational and does not necessarily reflect the individual's own expressive intentions. [n354] Consequently, the legislative-funding source is given broad discretion to define the program's limits because, in the end, it is directly accountable to the electorate and the political process for the advocacy it funds. [n355]

[*366] Government also funds programs that fulfill traditional public information missions. Public libraries, for example, are established to facilitate "learning and cultural enrichment," [n356] public television stations are expected to air programming that serves the public interest, [n357] and legal aid services provide legal advice in noncriminal matters to individuals who otherwise could not afford such assistance. [n358] When a legislature funds a program intended to bring a diverse array of knowledge and information to the public, professionals are hired to manage the program and make the necessary editorial choices. [n359] In such a program, the informational pool is usually so vast that pre-established legislative criteria for speech selection are, for the most part, unworkable. As a result, speech activities are not segregated according to the funding source, [n360] and government is not viewed as intending to convey or promote one idea over another through the establishment of the program. [n361] Given that government is not seeking to participate in the marketplace, the legislative-funding source is not directly implicated by or held accountable for the speech selected. For example, the electorate does not assume that a legislature approved of every book in a public library or every program aired on public television. Moreover, in some instances, programs are established to advocate against the government interest. [n362] As a result, program operators are often viewed as independent speech-selectors, who function largely free from governmental control. [n363] The speech selected and ultimately disseminated by the program represents a professional judgment by the program's operators on the value of the speech activity to the public it serves. [n364] Consequently, the program's operators are given broad discretion to use their professional editorial judgment to make content-based speech-selection decisions. [n365]

A legislative measure mandating intellectual diversity would, in effect, require a university to actively incorporate conservative viewpoints into its program offerings. [n366] Viewpoint-based legislation is held to strict scrutiny review if it is directed at a program set aside to encourage a [*367] diversity of views from private speakers. [n367] For the most part, universities do not function as open public forums. [n368] Instead, they are designed, much like a public library, as a social good dedicated to facilitating learning and scholarship. The social utility of the nation's universities has repeatedly been recognized by the Court. Justices have touted the fundamental role universities play in the functioning of the nation and the continued development of its future leaders, [n369] who gain "'new maturity and understanding'" [n370] when widely exposed to the robust exchange of a multitude of ideas rather than to "'any kind of authoritative selection.'" [n371] Laws, therefore, that obstruct the free and unconstrained exchange of ideas in this "traditional sphere of free expression" [n372] or "cast a pall of orthodoxy over the classroom" are not constitutionally tolerated. [n373]

The educational purpose of a university and the social utility it provides sets traditional university programs [n374] apart from government-funded programs that promote one idea over another. Programs dedicated to teaching and scholarship bring vast amounts of information to

students, scholars and interested members of the public. Legislation that attempts to tie funding to a specific speech activity, such as classroom speech, for example, would be largely unworkable because universities also rely on tuition, philanthropic gifts and grant dollars to fund to such speech. Legislative-directed funding that cannot be specifically tied to the government-mandated speech directive has, in some cases, failed a First Amendment challenge. [n375] To overcome this potential constitutional barrier, a university would need to be able to limit the use of legislative funds for courses designed especially to promote intellectual diversity. [n376] Since legislative funds don't cover the full cost of the education provided and curriculum offerings could not effectively be segregated into government-funded and university-funded, a university may be compelled to use its other funding sources to fund government-mandated speech. A lack of clarity regarding government's intention to [*368] participate in the marketplace as a speaker through the distribution of public funds would result.

A regulation that selectively funds a speech activity is not necessarily unconstitutional, however, just because government does not speak itself or subsidize the transmittal of a message it favors. [n377] In United States v. American Library Association, [n378] two government-funded programs designed to assist public libraries in acquiring Internet access were upheld against a First Amendment challenge [n379] even though the legislature did not seek to communicate a specific message through the funding of the programs. [n380] The programs, the Court explained, "were intended to help public libraries fulfill their traditional role of obtaining material of requisite and appropriate quality for educational and information purposes." [n381] The fact that they required libraries to install software to block pornographic material in order to obtain the funding did not violate the First Amendment because "public libraries have traditionally excluded pornographic material from their other collections." [n382] Therefore, "Congress could reasonably impose a parallel limitation on its Internet assistance programs." [n383]

A program's traditional role can also limit the power of the government to impose funding-based speech-selection restrictions. In Legal Services Corporation v. Velazquez, [n384] the Court struck down as violative of the First Amendment a funding restriction that prohibited attorneys from representing clients in an "effort to amend or otherwise challenge existing welfare law." [n385] The restriction, which was imposed by the Legal Services Corporation, an entity created by Congress to distribute government funds to local grantee organizations for the purpose of providing free legal assistance to indigent clients, [n386] basically prevented an attorney representing an indigent client seeking welfare benefits from arguing that a "state statute conflicts with a federal statute or that either a state or federal statute by its terms or in its application" violates the Constitution. [n387] The Court concluded that the program was "designed to [*369] facilitate private speech, not to promote a governmental message," given the fact that LSC-funded attorneys spoke on behalf of their clients and lawyers defending the decision to deny welfare benefits delivered the government's message. [n388] The restriction, which effectively proscribed specific legal advice and assistance, in effect, distorted the traditional role of the participating attorneys and "prohibit [ed] speech necessary to the proper functioning" of the program. [n389]

The proper functioning of the program at issue in Velazquez sets it apart from challenged programs in other subsidized speech cases. In Velazquez, the proper role of the grant recipients is to "advocate against the Government." [n390] Thus an assumption is conveyed that LSC-funded attorneys are free of state control. [n391] This assumption is not present with programs funding

public libraries, for example, or establishing Title X family planning clinics. [n392] Such programs "have no comparable role that pits them against the Government." [n393] Instead, the speech restricted in these programs lies outside the scope of the program established by government. [n394] In Velazquez, by contrast, the speech restricted fell within the scope of the program. The Court explained that while Congress was not required to fund the LSC program or, when funded, provide a whole range of litigation services, once the scope of the program was determined, Congress could not "exclude certain vital theories and ideas" included within that scope. [n395]

Government regulations that seek to control an existing medium of expression in ways that distort its usual functioning often run afoul of the First Amendment. [n396] When such regulations are challenged, the Court examines the medium's accepted usage to determine whether the particular restrictions on speech are "necessary for the program's purposes and limitations." [n397] The First Amendment, the Court has said, prohibits government from using a medium in "an unconventional way [*370] to suppress speech inherent" in its nature. [n398] Without a doubt, diversity of thought is inherent in the nature of the university. To foster intellectual diversity, universities recruit individuals who have been trained at competing and divergent institutions and whose area of expertise rounds out an academic department's curricular and scholarly products. They seek international perspectives and a diversified student and faculty body. And they develop an environment where ideas are challenged and refined through a process of peer review. The process of peer review works to assure that academic decisions are made "objectively on the basis of frank and unrestrained critiques and discussions" and plays a "vital role in the proper and efficient functioning" of a university's educational responsibilities. [n399] It also helps to eradicate the inclusion of flawed concepts, theories, ideas and viewpoints from a university's curriculum and the scholarship it produces. Forced inclusion of specific perspectives and viewpoints runs counter to the nature of a university, and distorts the traditional role of higher education. As Justice Felix Frankfurter observed, a university must be free to "determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." [n400]

Justice Frankfurter's observation, which has been, in effect, espoused in a number of Supreme Court opinions, [n401] regards university actors as independent speech-selectors who function largely free from governmental control. The content selected and ultimately disseminated through curricular offerings and scholarly pursuits represents a professional judgment by the university's academicians on the value of the communication to the discipline it serves. Academicians, therefore, are not disseminators of government ideas or scripted professional speech. They function as instructors and scholars whose proper role may well include the evaluation of government administrations, policies and actions. Such evaluations may also lead an academic to openly challenge or advocate against a defined governmental interest or program. As a result, a court would most likely defer to a university's professional editorial judgment in making content-based speech-selection decisions. Legislative regulations that would arguably mandate the inclusion of [*371] conservative viewpoints [n402] would; therefore, most likely conflict with the First Amendment even though diversity of thought, like the exclusion of pornographic material from public libraries, is necessary to the proper functioning of a university. A legislative-directive that given the present academic environment would effectively require the inclusion of conservative viewpoints is closely analogous to Congress mandating the exclusion of specific theories and ideas from welfare litigation and should be viewed as such by

the Court. Universities are not designed to foster wide-open diversity of thought in a manner analogous to the public square. Instead, they are established to foster and disseminate academic truths. [n403] The central problem, therefore, with the intellectual diversity pursuit is its penchant for the inclusion of alternative viewpoints within the body of knowledge provided by a university regardless of whether those viewpoints have academic validity. To mandate such an inclusion is to influence the selection of speech that constitutes the inherent nature of the university and lies squarely within the scope of its control.

CONCLUSION

The exclusion of ideas from what the Court has termed a "traditional sphere of free expression" [n404] has led to a call by the intellectual diversity movement for government intervention in the academic marketplace. At the end of the day, intellectual diversity advocates would like to see the inclusion of conservative ideas and points of view reflected in course curriculum and classroom discussion. They also support hiring and tenure policies that increase the representation of conservative faculty members in the nation's universities. The insertion of conservative ideas into academic discourse would, in their opinion, strengthen the education American universities provide by increasing the diversity of viewpoints to which students are exposed. [n405] This contention, then, is based on the premise that a multiplicity of viewpoints is as beneficial to the classroom as it is to society. But the academic marketplace is not analogous to the open marketplace of ideas. It is erroneous to conclude that a university functions like an open marketplace actively engaged in the free and [*372] robust exchange of ideas. In such a marketplace, all ideas are valued given their ability to produce conflict and contradiction and provoke vehement and, at times, caustic debate. In the long run, truth is expected to emerge, but in the short run, harmful ideas and faulty propositions may rule the day. This short run prospect, however, is not conducive to the primary function of a university, which is "'to discover and disseminate knowledge by means of teaching and research.'" [n406] While this function supports a university's commitment to the rational and disciplined pursuit of truth and the intellectual development of its students, it also constrains the production and consumption of ideas present in the academic marketplace. It is illogical, then, to assess the value and effectiveness of academic discourse by its ability to produce a multiplicity of views and perspectives. While intellectual diversity is valued in the academic marketplace, it is valued only to a point. Consequently, ideas that conflict with the established collective judgment and critical perspective of a discipline are most often excluded from academic debate and classroom discussion.

First Amendment case law, which has often perpetuated the view of an academic marketplace as widely diverse, [n407] has also given university administrators extensive control when it comes to granting access to or restricting expression occurring within a nonpublic forum established for managerial or institutional purposes. [n408] For example, at many institutions, course content decisions are subjected to institutional oversight by curriculum committees in an effort to ensure that course offerings fit within the university's programmatic goals and educational mission. [n409] Viewpoint-based decisions regarding the conception and development of an institution's course offerings as well as the composition and teaching assignments of its faculty would most likely be given deferential treatment by the courts, considering the central function these components play in the overall administration of the university.

The First Amendment also affords a university a substantial amount of control over the speech that takes place within classrooms. While faculty members are given a wide latitude to engage in professional classroom speech that is germane to the course topic and may employ [*373] innovative teaching methods which can be demonstrated as beneficial to the learning process, the university retains disciplinary control over classroom tactics and speech that interferes or reasonably threatens to interfere with the effective and efficient fulfillment of the educational process. [n410] In short, the judgment of an instructor can be questioned and redirected by the university regardless of the instructor's political or professional leanings. University administrators who, for example, view the mission of higher education as fostering the advancement of a tolerant society and politically correct mindset may likely question the pedagogical judgment of faculty members who do not share this view, especially if that judgment is reflected in class discussions and assignments. Accordingly, even though intellectual diversity advocates secure positions on the faculty of universities, there is no guarantee their viewpoints will infiltrate the curriculum.

Because academic assessments require "complex educational judgments" that "lie [] primarily within the expertise of the university," [n411] courts have recognized and largely deferred to an institution's right of self-governance. [n412] Legislation which requires the production of an annual report outlining measures a university has implemented to infuse alternative viewpoints into classroom discussion and the academic mindset, would substantially erode an institution's administrative authority to effectively manage its intellectual enterprise. Such an enactment would, at present, amount to a government-mandated inclusion of conservative viewpoints into the curriculum and scholarship a university produces, and present complex First Amendment issues that could ultimately pit a university interest in academic self-governance against a legislature's power to place conditions on the funding it provides to government programs. Because the legislation so squarely impacts the managerial function of the education mission of the university, it would most likely run afoul of the First Amendment.

As with access and employee speech issues, the First Amendment provides added free speech protection for a university when the institution is attempting to secure the effective and efficient operation of its enterprise. A university, then, is in a stronger First Amendment position when exerting its right to engage in or restrict speech necessary for the proper functioning of its educational enterprise. In such a position, university administrators would most likely be viewed as [*374] independent speech-selectors, [n413] analogous to public broadcasters who "retain the right to use [their] editorial judgment to exclude certain speech" [n414] in order to effectively operate the television station and disseminate the broadcast message. [n415] To conclude otherwise would allow legislative control of a medium in ways that would distort its usual functioning. [n416] The dynamics of a university system, like the dynamics of a broadcast system, give administrators the right to use their professional judgment to exclude certain ideas and viewpoints from the institution's educational message so that the education students receive is more effectively delivered. [n417]

A university simply could not fulfill its educational mission if the content of its programs was restricted or regulated through some government-funding mechanism. A university does not speak for its legislative funding source and cannot achieve its objectives if mandated to espouse a government-approved message. Subsequently, it must operate largely free from government

control to meet its educational goals and satisfy its public interest purpose. As with other independently operated public institutions, not every decision, course offering or faculty hire will meet with unanimous or even over-whelming public approval. But, like the greater marketplace, the academic marketplace is perpetually in a state of flux in its quest for the truth. Courses intellectual diversity advocates often complain about, such as race, class, gender and sexuality classes, [n418] are a part of this self-correcting evolution [n419] as are present-day centers devoted to the study of Western civilization, America's founding and free market economics. [n420]

[*375] While the academic marketplace is largely averse to securing uninhibited debate on public issues and providing low barriers to entry, it is susceptible to general shifts in political and public attitudes. The Social and Political Views of American Professors, a recent study by two sociologists, found that younger faculty members have moved decidedly to the center. [n421] Professors aged 26-35 account for the highest percentage of moderates and the lowest percentage of liberals and conservatives and "provide further support for the idea that in recent years the trend has been toward increasing moderatism." [n422] By contrast, "Self-described liberals" are most prevalent among professors aged 50-64, "who were teenagers or young adults in the 1960s" while faculty members aged 65 and older comprise the largest number of conservatives on campus. [n423] The study also found that the most liberal professors on issues of sex and gender were the youngest (26-35) followed by faculty members aged 50-64. [n424] This holds true for the public at large. A recent Pew Research Center study showed "declining support for traditional or conservative social values, in such areas as homosexuality and the role of women in society," regardless of political party affiliation. [n425] Since 1987, Republicans, Democrats and independents all have become substantially less conservative on social values. [n426] The decline in social conservatism, the study concluded, is being hastened by changed generational attitudes, "as each new age cohort has come into adulthood with less conservative views on [these] questions than did their predecessors." [n427] It is very likely, then, that this shift in public attitudes would also be reflected in studies focusing on the academy. [n428]

The liberal indoctrination of today's college student is difficult at best to pin on university professors. A Pew Research Center study on Gen Nexters (18-25) found that while this generation is the "most tolerant" of any on "social issues, such as immigration, race and homosexuality," [n429] its members also maintain extremely close contact with their [*376] parents and family, identify "getting rich" as one of their life's top goals, largely reject the notion that government is inefficient and wasteful, and are more likely than other generations to support the privatization of Social Security. [n430] In short, "[T]heir views defy easy categorization," [n431] as do the views of university faculty members and administrators. For example, much of the contention that university professors are over-whelmingly liberal comes from voter registration and voting patterns studies. [n432] Commentators have pointed out that this type of research is very misleading because it equates Democratic identification with liberalism and fails to account for ideological shifts in party politics. [n433] These commentators conclude that party affiliation studies "may say less about the political orientation of faculty and more about the growing conservatism of the Republican Party." [n434] Academics, then, may look more liberal to Republicans -- not because the political orientation of the faculty have moved to the left, but rather that the Republican Party has moved significantly farther to the right. [n435]

In the end, public universities were created to provide an expertise that government simply does not possess. That expertise, while benefiting society in numerous ways, [n436] has been and will continue to be used by faculty members -- liberal, centrist and conservative -- in ways that those with other political orientations might not like. [n437] To mandate the inclusion of a certain political orientation or point of view in order to appease outside interests runs counter to the educational mission of a university and defies First Amendment jurisprudence. First Amendment case law surrounding this issue clearly gives administrators a wide degree of authority over the operation of the university. That authority includes the right to determine curricular content and the professional make up of the faculty. For administrators to back away from exerting this authority is to indicate that they do not believe in the academic judgments of their faculty and the benefits to society a college education produces. From individual economic benefits that translate into lower unemployment and poverty rates to healthier lifestyles and increased levels of volunteerism and voter participation, obtaining a [*377] college education is good for society. [n438] But perhaps the greatest benefit to society is in the overwhelming importance college graduates place on trying to understand the opinions of others. [n439] So rather than indoctrinating U.S. college students to think one way, research indicates that a college education actually opens one's mind to the differing opinions of others.

Given all that American universities contribute to the formation of a tolerant civic society, the challenge the intellectual diversity movement poses to the goals of higher education should be openly contested. But such a challenge cannot be seriously combated if higher education is viewed as an extension of the Holmesian notion of the marketplace of ideas. The presupposition of such a marketplace is that each participant is possessed of the full capacity for individual choice. [n440] This is simply not the case in the academic marketplace. Universities, therefore, need to demonstrate that the nonpublic forum created by government for the attainment of an educated citizenry is governed by professional academics who base institutional content and hiring decisions on a transparent process founded on established peer-review standards and the collective judgment of faculty and administrators.

In the end, the resolution of this issue will ultimately result in the enhancement of rights for some and the diminishment of rights for others. Speech activities within the academic marketplace, then, will decidedly favor the values of those who have prevailed in this struggle. If, as this article concludes, the resolution favors the academy, the degree to which faculty, students and others are subjected to the choices of administrators and administrative committees would increase as the rights of these groups decrease. On the other hand, if intellectual diversity advocates are successful in pushing forth legislation that requires mechanisms for the enhancement of conservative viewpoints, university actors as well as students would be subjected to the choices and values of these outside actors. Regardless of the outcome, students appear to have the least amount of freedom in the academic marketplace, and are the most vulnerable to the choices of others. It is, therefore, incumbent upon legislators, administrators and others making administrative decisions to use their authority responsibly. Academic content decisions must be based on sound educational principles, which are clearly articulated so that students are fully aware of the choices and values to [*378] which they will be exposed. Given the unique position within the ideas market, courts have placed higher education and the fact that every assignment of free speech rights for some produces a chilling effect for others, legislators, advocates and university actors should eschew any desirability to diminish a student's capacity to

reason and communicate. Such desirability runs counter to the distinct purpose of higher education, which ideally functions to enhance rational thought and discussion and, thereby, sustains the very abilities that form the foundation of First Amendment freedom. [n441]

FOOTNOTES:

n1 Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

n2 Id.

n3 Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion).

n4 At issue in Sweezy and Keyishian was the constitutional limit of the government's inquiry into the political beliefs and associations of its public employees. Part of the government's investigation focused on Paul Sweezy's lectures at the University of New Hampshire as well as his knowledge of the Progressive Party and its adherents. 354 U.S. at 248. Keyishian involved "a plan, formulated partly in statutes and partly in administrative regulations" that conditioned dismissal on membership in any listed "subversive" organization as well as the failure to provide information regarding the content of classroom speech. 385 U.S. at 592-94.

n5 See Keyishian, 385 U.S. at 603-04; Sweezy, 354 U.S. at 250.

n6 Robin Wilson, CUNY Approves Steps for Dealing With Complaints About Professors' Conduct, CHRON. HIGHER EDUC., Feb. 1, 2007, available at http://chronicle.com/daily/2007/02/2007020105n.htm.

n7 See id. See also David Horowitz, After the Academic Bill of Rights, CHRON. HIGHER EDUC., Nov. 10, 2006, available at http://chronicle.com/weekly/v53/i12/12b02001.htm; John F. Zipp & Rudy Fenwick, Is the Academy a Liberal Hegemony? The Political Orientations and Educational Values of Professors, 70 PUB. OPINION Q. 304, 305 (2006).

n8 In the States, CHRON. HIGHER EDUC., Feb. 9, 2007, available at http://chronicle.com/weekly/v53/i23/23a02201.htm. See also H.R. 154, 2007-08 Sess. (Ga. 2007); H.R. 213, 94th Gen. Assem., 1st Reg. Sess. (Mo. 2007); H.R. 525, 2007 Sess. (Mont. 2007).

n9 See Student and Faculty Academic Rights and Responsibilities, TEMPLE UNIVERSITY BOARD OF TRUSTEES POLICIES AND PROCEDURES MANUAL, Aug. 1, 2006, available at http://policies.temple.edu/getdoc.asp?policy_no=03.70.02; Procedures for Handling Student Complaints About Faculty Conduct in Academic Settings, THE CITY UNIVERSITY OF NEW YORK-STUDENT COMPLAINT PROCEDURE, available at http://64.233.167.104/search?q-=cache:r0NVYrj1PEQJ:www1.cuny.edu/portal_ur/cmo/i/7/3/student_complaint_procedures.pdf+CUNY+student+complaint+procedure&h1=en&ct=clnk&cd=3&gl=us. See also Mark Eyerly, Academic Freedom at Temple, CHRON. HIGHER EDUC., Dec. 15, 2006, available at http://chronicle.com/weekly/v53/i17/17b01801.htm; David Horowitz, After the Academic Bill of Rights, CHRON. HIGHER EDUC., Nov. 10, 2006, available at

http://chronicle.com/weekly/v53/i12/12b02001.htm; Wilson, supra note 6, http://chronicle.com/daily/2007/02/2007020105n.htm.

n10 Robin Wilson, Pennsylvania Panel Issues Report on Political Bias on Campuses, CHRON. HIGHER EDUC., Nov. 10, 2006, available at http://chronicle.com/weekly/v53/i14/14a03001.htm.

n11 See Jennifer Jacobson, Twin Lawsuits Accuse Penn State and Temple Universities of Using 'Speech Codes' to Stifle Students' Rights, CHRON. HIGHER EDUC., Feb. 24, 2006, available at http://chronicle.com/daily/2006/02/2006022402n.htm.

n12 Statement on Academic Rights and Responsibilities Offered by Higher Education Community, AM. COUNCIL ON EDUC., June 23, 2005, available at http://chronicle.com/daily/2006/02/2006022402n.htm [hereafter Offered by Higher Education].

n13 Statement on Academic Rights and Responsibilities, AM. COUNCIL ON EDUC., June 23, 2005, available at http://chronicle.com/daily/2006/02/2006022402n.htm [hereafter Academic Rights and Responsibilities].

n14 Offered by Higher Education Community, supra note 12.

n15 See Jennifer Jacobson, Statement on Rights Criticized as Weak, CHRON. HIGHER EDUC., July 15, 2005, available at http://chronicle.com/weekly/v51/i45/45a02201.htm. The ACE's statement was cited in a report on intellectual diversity prepared by American Council of Trustees and Alumni as evidence supporting the ACTA's call for increasing ideological diversity on college campuses. See Intellectual Diversity: Time for Action, AM. COUNCIL TRUSTEES & ALUMNI, Dec. 2005, at 8-9, available at http://www.goacta.org/publications/reports.html [hereafter Intellectual Diversity].

n16 See H.R. 525, 2007ess. (Mont. 2007); H.R. 154, 2007-08 Sess. (Ga. 2007); H.R. 213, 94th Gen. Assem., 1st Reg. Sess. (Mo. 2007). The bills contain the same language and are drawn from the list of "practical suggestions" in Intellectual Diversity, supra note 15, at 11-16.

n17 See H.R. 525, 2007 Sess. (Mont. 2007). See also H.R. 154, 2007-08 Sess. (Ga. 2007); H.R. 213, 94th Gen. Assem., 1st Reg. Sess. (Mo. 2007).

n18 Intellectual Diversity, supra note 15, at 13

n19 Id. (quoting James Romoser, Middle East Studies: University Response to Controversy Focuses on Systemic Failures, COLUM. SPECTATOR, May 9, 2005 available at media.www.columbiaspectator.com/mediaistorage/paper865/news/2005/05/09/YearInReview/Middle.East.Studies.University.Response.To.Controversy.Focuses.On.Systemic.Failu-2030759.shtml?sourcedomain=www.columbiaspectator.com&MIIHost=media.collegepublisher.com).

n20 Because the focus of this article is on First Amendment jurisprudence and government intervention in a public institution of higher education, the use of the term "academic marketplace" refers to the speech activities and content decisions that occur on the campuses of such institutions, including classroom speech, course selection, and disciplinary knowledge and scholarship. For ease of reference, public institutions of higher education will be referred to as "universities." This designation does not include private institutions of higher education or public and private primary and secondary schools.

n21 See Stanley Fish, "Intellectual Diversity": The Trojan Horse of a Dark Design, CHRON. HIGHER EDUC., Feb. 13, 2004, available at http://chronicle.com/weekly/v50/i23/23b01301.htm.

n22 See Jennifer Jacobson, What Makes David Run, CHRON. HIGHER EDUC., May 6, 2005, available at http://chronicle.com/weekly/v51/i35/35a00801.htm.

n23 Lee C. Bollinger, Academic Freedom and the Scholarly Temperament, 60 CBA RECORD 326, 341 (2005).

n24 See infra text accompanying notes 404-41.

n25 See infra text accompanying notes 57-125.

n26 See infra text accompanying notes 396-403.

n27 See infra text accompanying notes 204-05, 228-38, 277-85, 312-17.

n28 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

n29 Whitney v. California 274 U.S. 357, 375 (Brandies, J., concurring)

n30 See Abrams, 250 U.S. at 630

n31 See Lawrence M. Friedman, Erewhon: The Coming of Global Legal Order, 37 STAN. J. INT'L L. 347, 361 (2001).

n32 Jerome A. Barron, Access to the Press--A New First Amendment Right, 80 HARV. L. REV. 1641, 1647 (1967). See also Vincent Blasi, Holmes and the Marketplace of Ideas, 2004 SUP. CT. REV. 1, 7; Paul H. Brietzke, How and Why the Marketplace of Ideas Fails, 31 VAL. U.L. REV. 951, 953-58; Friedman, supra note 32; Stanley Ingber, The Marketplace of Ideas: A Legitimizing Myth, 1984 DUKE L.J. 1, 17 (1984); Martin H. Redish & Kirk J. Kaludis, The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma, 93 NW. U.L. REV. 1083, 1083-84 (1999).

n33 Barron, supra note 32, at 1641.

n34 Id. at 1641

n35 Id. at 1657.

n36 Id at 1642, 1660-61.

n37 Id. at 1657.

n38 See, e.g., Redish & Kaludis, supra note 32, at 1083-84.

n39 Ingber, supra note 32, at 49.

n40 See Ingber, supra note 32, at 49; Redish & Kaludis, supra note 32, at 1983-84.

n41 See Ingber, supra note 32, at 49.

n42 Redish & Kaludis, supra note 32, at 1084.

n43 Intellectual Diversity, supra note 15, at 2.

n44 Stanley Rothman et al., Politics and Professional Advancement Among College Faculty, THE FORUM, 2005, at 4, available at http://www.bepress.com/forum/vol3/issliart2.

n45 Id. The study was based on data from the 1999 North American Academic Study Survey of students, faculty and administers at colleges and universities in the United States and Canada. The sample is of 1,643 full-time faculty members drawn from 183 universities and colleges and contains responses from eighty-one doctoral, fifty-nine comprehensive and forth-three liberal arts institutions. Id. at 3-4

n46 Id. at 4.

n47 Id.

n48 Id. at 5

n49 Id. at 6.

n50 Id. at 7.

n51 Intellectual Diversity, supra note 15, at 3-4.

n52 Ingber, supra note 32, at 54.

n53 See id.t 55.

n54 See id. at 54-55.

n55 See id

n56 See id. at 52-54.

n57 J. Peter Byrne, Racial Insults and Free Speech Within the University, 79 GEO. L.J. 399, 419 (1991).

n58 See David M. Rabban, A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment, in FREEDOM AND TENURE IN THE ACADEMY 234 (William W. Van Alstyne ed., 1993) [hereinafter Rabban, Functional Analysis] (explaining that according to the 1915 Declaration of Principles questions regarding the validity of academic inquiry are to be judged by professional peers); Mark L. Adams, The Quest for Tenure: Job Security and Academic Freedom, 56 CATH. U.L. REV. 67, 81 (2006) (asserting that "objective, disinterested inquiry tested by the scientific method or subjected to peer review serves as the foundational principle of the modern university"); Emily M. Calhoun, Academic Freedom: Disciplinary Lessons from Hogwarts, 77 U. COLO. L. REV. 843, 850-51 (2006) (detailing the process of peer review and importance of established disciplinary scholars in measuring the quality of academic inquiry); Ailsa W. Chang, Note: Resuscitating the Constitutional "Theory" of Academic Freedom: a Search for a Standard Beyond Pickering and Connick, 53 STAN. L. REV. 915, 953 (2001) (explaining that peer review serves as a check on subjective and incompetent scholarship and teaching); David M. Rabban, Does Academic Freedom Limit Faculty Autonomy?, 66 TEx. L. REV. 1405, 1413 (1988) [hereinafter Rabban, Faculty Autonomy] (explaining that the 1915 Declaration of Principles stresses that "all true universities ... are designed to advance knowledge by safeguarding the free inquiry of impartial teachers and scholars").

n59 See Adams, supra note 58, at 80-81; Byrne, supra note 57, at 419-20; Calhoun, supra note 58, at 849-51; Chang, supra note 58, at 953; Rabban, Faculty Autonomy, supra note 58, at 1421.

n60 See SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY 129, 136-141 (1994).

n61 Id. at 127. See also TIMOTHY C. SHIELL, CAMPUS HATE SPEECH ON TRIAL 48-49 (1998). Both Walker and Shiell cite a 1990 survey of 355 colleges and universities by The Carnegie Fund for the Advancement of Teaching that estimated that 60% of all colleges and universities had a policy on racial harassment and another 11% were considering such policies. See SHIELL, id. at 48; WALKER, supra note 60, at 127. David L. Hudson of the Freedom Forum First Amendment Center said the time period witnessed an "amazing rise" in campus speech codes. See David L. Hudson Jr., Hate Speech & Campus Speech Codes, First Amendment Center, available at http://www.firstamendmentcenter.org/speech/pubcollegekopic.aspx?topic=campus_speech_codes. Hudson and Shiell both also cited a 1994 survey reported by Arti Korwar of the First Amendment Institute that showed more than 350 public colleges and universities regulated some form of hate speech. See SHIELL, supra note 61, at 49; Hudson, supra note 61.

n62 WALKER, supra note 60, at 113. Walker is referring to a twenty-six-year time frame that began in 1952 with Beauharnais v. Illinois, 343 U.S. 250, a Supreme Court case that upheld the constitutionality of an Illinois group libel law, and ended in 1978 with Collin v. Smith, 578 F. 2d 1197 7th Cir. 1978), an opinion that struck down a municipal ordinance that prohibited the dissemination of hate speech. Given the precedent set in Beauharnais, the outcome of Collin could have been very different. What ensued in the intervening years was an expansion of First Amendment rights from such decisions as New York Times v. Sullivan, 376 U.S. 254 (1964) and Cohen v. California, 403 U.S. 15 (1971). See id. at 101-26.

n63 Id. at 126.

n64 See Robert C. Post, Racist Speech, Democracy, and the First Amendment, 32 Wm. & MARY L. REV. 267, 318 (1991).

n65 Id. at 322 (quoting Report of the Committee on Freedom of Expression at Yale, 4 HUM. RTS. 357, 357 (1975)).

n66 See Richard A. Glenn & Otis H. Stephens, Campus Hate Speech and Equal Protection: Competing Constitutional Values, 6 WIDENER J. PUB. L. 349, 362-63 (1997); Post, supra note 64, at 318.

n67 See Byrne, supra note 57, at 419-20; Glenn & Stephens, supra note 66, at 363; Post, supra note 64, at 325.

n68 Byrne, supra note 57, at 419.

n69 Post, supra note 64, at 324.

n70 Byrne, supra note 57, at 419.

n71 Post, supra note 64, at 324.

n72 Id.

n73 See Byrne, supra note 57, at 419.

n74 See Glenn & Stephens, supra note 66, at 362; Post, supra note 64, at 322.

n75 Post, supra note 64, at 320. See also Glenn & Stephens, supra note 66, at 362.

n76 Glenn & Stephens, supra note 66, at 362.

n77 See Post, supra note 64, at 320.

n78 See id.

n79 See Burton Bollag, Opening the Door on Accreditation, CHRON. HIGHER EDUC., July 16, 2004, available at http://chronicle.com/weekly/v50/i45/45a02201.htm; Roger Clegg, Faculty Hiring Preferences and the Law, CHRON. HIGHER EDUC., May 19, 2006, available at http://chronicle.com/weekly/v52/i37/37b01301.htm; Katherine Mangan, Education Dept. Will Challenge Law-School Accreditor's Diversity Standard, CHRON. HIGHER EDUC., Jan. 19, 2007, available at http://chronicle.com/weekly/v53/i20/20a02301.htm.

n80 The Condition of Education 2007, U.S. DEPARTMENT OF EDUCATION 29-30, available at http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2007064.

n81 WALKER, supra note 60, at 16.

n82 Id.

n83 Id.

n84 Id.

n85 Darren Bush, The "Marketplace of Ideas:" Is Judge Posner Chasing Don Quixote's Windmills?, 32 ARIZ. ST. L.J. 1107, 1115 (2000).

n86 Id. at 1115-16.

n87 Id. at 1116.

n88 The Carnegie Foundation for the Advancement of Teaching lists more than 4,300 post-secondary institutions in the United States. See Carnegie Foundation for the Advancement of Teaching, Carnegie Classifications FAQ, 2006, available at www.carnegiefoundation.org/about/sub.asp?key=18&subkey=405#1.2.1. According to the Council for Christian Colleges and Universities, about 900 of these institutions describe themselves as "religiously-affiliated" and 102 are "intentionally Christ-centered" and members of the CCCU. See Council for Christian Colleges and Universities, Members, 2007, available at http://www.cccu.org/aboutimembers.asp. In addition, each year Young America's Foundation releases its top ten list of conservative colleges. See Young America's Foundation, 2006-2007 Top Ten Conservative Colleges, available at http://media.yaforg/latest/2006_2007_top_ten.cfm.

n89 See G. Jeffrey MacDonald, Rising Tide of Applications Lifts Fortunes of Christian Colleges, WASH. POST, Mar. 21, 2006, available at www.washingtonpost.com/wpdyn/content/article/2006/03/24/AR2006032401280_pfhtml; Jennifer Peltz, Faithfully Attaining a Lofty Stature, COUNCIL FOR CHRISTIAN C. & U., May 28, 2006, available at www.cccu.org/news/contentlD.56,childContentld.93/default.asp.

n90 See Bush, supra note 85, at 1116.

n91 See text accompanying supra notes 44-50.

n92 See text accompanying supra notes 88-89.

n93 See Blasi, supra note 32, at 12; Bush, supra note 85, at 1146-47.

n94 See Bush, supra note 85, at 1146-47. Bush cites, for example, Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969) and Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). Although the evidence of monopoly power was more compelling in the Miami Herald case than in Red Lion Broadcasting, the Court refused to uphold a right of reply requirement on the newspaper. A similar right of reply requirement was upheld as constitutional when applied against Red Lion even though the broadcaster did not control a large portion of the broadcast spectrum. See id. at 1121-25.

n95 See Blasi, supra note 32, at 7.

n96 See id. at 8-1

n97 See id. at 8-9, 12.

n98 See id. at 11.

n99 See id. at 10.

n100 Id. at 11.

n101 Id. at 7.

n102 J. Peter Byrne, Academic Freedom: A "Special Concern of the First Amendment," 99 YALE L.J. 251, 258 (1989).

n103 Id.

n104 Id.

n105 See id. at 284.

n106 See id.

n107 w Many Ward Churchills?, AM. COUNCIL TRUSTEES & ALUMNI, May 2006, at 3, available at http://wwwgoacta.org/publications/reports.html [hereafter Ward Churchills].

n108 Id.

n109 Id. at 3-4.

n110 Id. at 37.

n111 Id. at 33.

n112 Id. at 37.

n113 Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

n114 Byrne, supra note 102, at 296.

n115 Id. at 297.

n116 Id. at 296-97.

n117 W. Wat Hopkins, The Supreme Court Defines the Marketplace of Ideas, 73 JOURNALISM & MASS COMM. Q. 40, 42 (1996).

n118 Id. at 41.

n119 Id. at 44.

n120 Id. Other commonly held criticisms are that "truth is always among the ideas in the marketplace and always survives" and that "people are basically rational and, therefore, are able to perceive the truth." Id.

n121 Id. at 45.

n122 Id. at 48.

n123 Id. at 48. Broadcasting facilities, local communities, commercial speech, political speech, mail systems, school classrooms and libraries, state fairs, scholarly conferences and lectures, and picketing have all been identified as a single ideas market. See id.

n124 See id. at 45.

n125 See Rodney A. Smolla, Academic Freedom, Hate Speech, and the Idea of a University, 53 L. & CONTEMP. PROBS. 195, 216 (1990).

n126 See Hopkins, supra note 117, at 46.

n127 See Cornelius v. NAACP Legal Def. & Educ. Fund Inc., 473 U.S. 788, 801 (1985). In Cornelius, the "place" or forum at issue was the Combined Federal Campaign, an annual charitable fund raising drive, and its attendant literature even though the tangible "property" involved in the case was the federal workplace. See id. at 800-01. In Perry Educ. Assn. v. Perry Local Educators' Ass'n., the Court determined that the forum in question constituted a school's internal mail system and the teachers' mailboxes. Even though the "internal mail system" lacked a physical form. 460 U.S. 37, 46 (1983).

n128 See Nathan W. Kellum, If It Looks Like a Duck . . . Tradition Public Forum Status of Open Areas on Public University Campuses, 33 HASTINGS CONST. L. Q. 1, 35 (2005).

n129 See Cornelius, 473 U.S. at 797.

n130 See Faith Ctr. Church v. Glover, 480 F.3d 891, 907 (9th Cir. 2006)

n131 Warren v. Fairfax County, 196 F.3d 186, 191 (4th Cir. 1999) (citations omitted).

n132 A public forum is not created by "inaction, or by permitting limited discourse," Cornelius, 473 U.S. at 802, or by permitting members of the public to freely visit a place owned or operated by the government, Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 680 (1992). To create a public forum, government must "intentionally (Tenn a nontraditional forum for public discourse." Cornelius, 473 U.S. at 802.

n133 ISKCON, 505 U.S. at 678.

n134 See Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998); Cornelius, 473 U.S. at 800; Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983).

n135 See Perry, 460 U.S. at 45.

n136 See DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 965 (9th Cir. 1999).

n137 See Perry, 460 U.S. at 46.

n138 See Cornelius, 473 U.S. at 808-09.

n139 See id. at 808

n140 Id. at 811.

n141 See id.

n142 Although the public forum doctrine was fully defined in 1983 in Perry Education Ass'n. v. Perry Local Educators' Ass'n., the Court first held that government property was a limited public forum some twelve year later in Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995).Prior to Rosenberger, the Court had only occasionally referred to government property as a limited public forum or limited open forum. See Matthew D. McGill, Unleashing the Limited Public Forum: A Modest Revision to a Dysfunctional Doctrine, 52 STAN. L. REV. 929, 930 n.7 (2000). See also Gilles v. Blanchard, 477 F.3d 466, 473-74 (7th Cir. 2007).

n143 See Bowman v. White, 444 F.3d 967, 975 (8th Cir. 2006); Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 76 n.4 (1st Cir. 2004); Chiu v. Plano Indep. Sch. Dist., 260 F. 3d 330, 345-46 (5th Cir. 2001); DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 965 n.4 (9th Cir. 1999). In Ridley, the court pointed out that the term "limited public forum" has been used as a synonym for "designated public forum" and also for "nonpublic forum." 390 F.3d at 76 n.4. In New York Magazine v. Metro. Trans. Auth., the Second U.S. Circuit Court of Appeals seemed to be suggesting that a limited public forum is both a designated and nonpublic forum when it described a limited public forum as a "sub-category of the designated public forum, where the government 'opens a nonpublic forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects.' Exclusions of speech under this category," the Second Circuit wrote, "are treated the same as exclusions under non-public fora." 136 F.3d 123, 128 n.2. (2d Cir. 2006) (citations omitted).

n144 In DiLoreto, for example, the court wrote, "Mr. DiLoreto contends that the fence was a limited public forum, but it is not clear whether he uses 'limited public forum' to refer to a designated public forum subject to heightened scrutiny, or to a type of nonpublic forum that is subject to the reasonableness standard." 196 F.3d at 965. In Ridley, the plaintiffs argued that Massachusetts Bay Transportation Authority created a designated public forum because it had accepted a range of advertisements on its vehicles and in its stations. The MBTA argued that it created, at the most, a limited public forum, which it argued is the equivalent of a nonpublic forum. 390 F.3d at 77.

n145 In Good News Club v. Milford Central School, the Court explained that when a state creates a limited public forum, it is "not required to and does not allow persons to engage in every type of speech." 533 U.S. 98, 106 (2001). In Rosenberger v. Rector & Visitors of the Univ. of Va., the Court noted that the "necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics." 515 U.S. 819, 829 (1995). In Cornelius, the Court said that government could control access to a "nonpublic forum" based on "subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." 473 U.S. 788, 806 (1985). Lower courts are reading these and other decisions as recognizing government's authority to create a forum that is open to certain groups or speakers and/or for the discussion of specific topics or subjects. See, e.g., Faith Ctr. Church v. Glover, 480 F.3d 891, 908 (9th Cir. 2006); Bowman, 444 F.3d at 976; New York Magazine, 136 F.3d at 128 n.2; Warren v. Fairfax County, 196 F.3d 186, 193 (4th Cir. 1999).

n146 McGill, supra note 142, at 935.

n147 Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 46 (1983).

n148 McGill, supra note 142, at 938.

n149 Robert C. Post, Between Governance and Management: The History and Theory of the Public Forum, 34 UCLA L. REV. 1713, 1753 (1987)

n150 See, e.g., Texas v. Johnson, 491 U.S. 397, 414 (1988).

n151 See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).

n152 Nicole B. Casarez, Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination, 64 ALB. L. REV. 501, 523 (2000).

n153 515 U.S. 819 (1995).

n154 Id. at 830-31.

n155 See id. at 829.

n156 See Good News Club v. Milford Cent. Sch., 533 U.S. 98, 104, 107 (2001); Rosenberger, 515 U.S. at 825; Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 387 (1993); Widmar v. Vincent, 454 U.S. 263, 265 (1981).

n157 See Rosenberger, 515 U.S. at 830-31; Lamb's Chapel, 508 U.S. at 393. In Rosenberger, the dissent argued that because university guidelines, which prohibit any activity that "primarily promotes or manifests a particular belief(s) in or about a deity or an ultimate reality," apply to the entire universe of religious speech, including both anti-religious and religious expression, the university was not engaging in viewpoint discrimination. Rosenberger, 515 U.S. at 965-66 (Souter, J., dissenting).

n158 See Good News, 533 U.S. at 107; Rosenberger, 515 U.S. at 824; Widmar, 454 U.S. at 268, 270.

n159 See, e.g., Rosenberger, 515 U.S. at 829 (quoting Lamb's Chapel, 508 U.S. at 390).

n160 See Good News, 533 U.S. at 109; Rosenberger, 515 U.S. at 831; Lamb's Chapel, 508 U.S. at 393-94; Widmar, 454 U.S. at 273.

n161 Lamb's Chapel, 508 U.S. at 393.

n162 See 515 U.S. at 831.

n163 Id.

n164 Id. at 831-32.

n165 See R.A.V. v. City of St. Paul, 505 U.S. 377, 392 (1992).

n166 529 U.S. 217 (2000).

n167 Id. at 226.

n168 Id. at 222-23.

n169 Id. at 227.

n170 Id. at 230

n171 Id. at 225-26.

n172 Id. at 223

n173 Id. at 233-34.

n174 Casarez, supra note 152, at 532.

n175 424 U.S. 828 (1976).

n176 Id. at 831.

n177 Id.

n178 Id. at 839.

n179 Id.

n180 Id.

n181 473 U.S. 788 (1985). Only seven justices participated in the ruling. The vote was 4-3.

n182 Id. at 790.

n183 Id. at 806.

n184 Id. at 807.

n185 Id.

n186 Id.

n187 Id. at 812-13.

n188 Id. at 812.

n189 Id. at 813.

n190 Regulations designed to further administrative or institutional functions include selective access restrictions to a public broadcast program (Ark. Educ. Television Comm. v. Forbes, 523 U.S. 666, 683 (1998) (upholding the regulation as a "reasonable, viewpoint-neutral exercise of journalistic discretion")); federal workplace charity drive (Cornelius v. NAACP, 473 U.S. 788, 809 (1985) (upholding the regulation as a reasonable means of "avoiding controversy that may disrupt the workplace" and adversely affect the success of the campaign)); internal mail system (Perry Educ. Ass'n. v. Perry Local Educators' Ass'n, 460 U.S. 37, 52 (1983) (upholding the regulation as a "means of insuring labor peace" within a public school district)); military base (Greer v. Spock, 424 U.S. 828, 840 (1976) (upholding the regulation as way to maintain "loyalty, discipline, [and] morale")); advertising space on a public transit system (Ridley v. Massachusetts Bay Transportation Authority, 390 F.3d 65, 93 (1st Cir. 2004) (upholding a regulation as a means of "maximizing revenue" while "not reducing ridership through offensive advertisements")); mail delivery system (Chiu v. Plano Independent Sch. Dist., 260 F.3d 330, 356 (5th Cir. 2001) (upholding a regulation as a reasonable attempt to provide information relating to programs or services for students)); advertising space on a high school's baseball field (Diloreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958,966-67 (9th Cir. 1999) (uphold a regulation as a reasonable means to raise revenue while avoiding potential controversy or disruption)).

n191 See Forbes, 523 U.S. at 682-83 (finding that the restriction was based on facially neutral criteria); Cornelius, 473 U.S. at 812 (finding that the justifications for the restriction were facially neutral); Perry, 460 U.S. at 49 (finding no intent to favor one viewpoint over another); Greer, 424 U.S. at 839 (1976) (finding that the policy has been "objectively and evenhandedly applied"); Ridley, 390 F.3d at 91 (finding that the regulation was "not intended to give one side an advantage over another" and was evenhandedly applied to "all advertisers on all sides of all questions"); Chiu, 260 F.3d at 356 (finding that the "subject matter of flyer ... is not of a similar character to any previous use of school mail delivery system"); Diloreto, 196 F.3d at 968 (finding nothing in the record that indicated the forum had been open to the subject of religion).

n192 See Good News Club v. Milford Cent. Sch., 533 U.S. 98, 10-3-04, 120 (2001) (rejecting as impermissible viewpoint discrimination the exclusion of all groups which are religious in nature from a secular educational forum); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 825, 831-32 (1995) (finding viewpoint discrimination even though guidelines exclude an entire category of religious activity without reference to religious viewpoint); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393 (1993) (finding that the regulation constitutes viewpoint discrimination even though it "had been, and would be, applied in the same way to all uses of school property for religious purpose"); Widmar v. Vincent, 454 U.S. 263, 269-70 (1981) (finding that government must satisfy strict scrutiny review to justify its exclusion of a student group from a forum generally open for use by student groups); Hills v. Scottsdale Unified Sch. Dist., 329 F.3d 1044, 1051-53 (9th Cir. 2003) (finding that the exclusion of any material of a religious nature from a distribution system constitutes viewpoint discrimination).

n193 See Good News Club, 533 U.S. at 108 (involving a limited public forum that was open to "activities that serve a variety of purposes, including events 'pertaining to the welfare of the community'"); Rosenberger, 515 U.S. at 824 (involving a student activities fund established by the university to "support a broad range of extracurricular student activities that 'are related to the educational purpose of the University'"); Lamb's Chapel, 508 U.S. at 386 (involving the use of school property for "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community"); Widmar, 454 U.S. at 264 (involving state university facilities "generally available for activities of registered student groups"); Hills, 329 F.3d at 1047 (involving a policy and practice of distributing or displaying of brochures and other promotional literature as a "'community service' for parents and children").

n194 See, e.g., Rosenberger, 515 U.S. at 831.

n195 See, e.g., Lamb's Chapel, 508 U.S. at 393-94.

n196 See Robert C. Post, Subsidized Speech, 106 YALE L.J. 151, 166 (1996).

n197 Greer v. Spock, 424 U.S 828, 840 (1976).

n198 Id. at 839. This line of reasoning was most recently applied in Sussman v. Crawford, 488 F.3d 136 (2d Cir. 2007). In Sussman, plaintiffs sought to compel the U.S. Military Academy at West Point to allow a demonstration by approximately 1,000 protestors during a graduation ceremony at which Vice President Richard Cheney was delivering a commencement address. Id. at 138. The court said the restriction was constitutional because it was evenhandedly applied to all groups of protestors. Id. at 140-41.

n199 The use of the word "classroom" refers to a specific course offered by a university at a particular time, date and place.

n200 See Widmar v. Vincent, 454 U.S. 263, 276 (1981); Univ. of Cal. Regents v. Bakke, 438 U.S. 265, 312 (1978) (plurality opinion); Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

n201 Widmar, 454 U.S. at 278 (Stevens, J., concurring).

n202 Post, supra note 196, at 166.

n203 Id. at 167.

n204 See Grutter v. Bollinger, 539 U.S. 306, 328 (2003) (noting the Court's tradition of giving a degree of deference to a university's academic decisions); Univ. of Pa. v. Equal Employment Opportunity Comm'n, 493 U.S. 182, 199 (1990) (noting the "importance of avoiding second-guessing of legitimate academic judgments"); Hazelwood v. Kuhlemeier, 484 U.S. 260, 273 (1988) (holding that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long s their actions are reasonably related to legitimate pedagogical concerns"); Univ. of Mich. Regents v. Ewing, 474 U.S. 214, 226 (1985) (noting that the Court is reluctant to "trench on the prerogatives of state and local educational institutions."); Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 96 n.6 (1978) (Powell, J., concurring) (noting that "University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation").

n205 Ewing, 474 U.S. at 226 (quoting Horowitz, 435 U.S. at 90)

n206 515 U.S. 819, 833 (1995).

n207 Id.

n208 391 U.S. 563 (1968).

n209 Id. at 568.

n210 Id.

n211 461 U.S. 138 (1983).

n212 Id. at 147.

n213 Id. at 150.

n214 Id. at 152.

n215 Waters v. Churchill, 511 U.S. 661, 673 (1994) (plurality opinion)

n216 Rankin v. McPherson, 483 U.S. 378, 388 (1987).

n217 See Waters, 511 U.S. at 673; Connick, 461 U.S. at 151-52.

n218 See Connick, 461 U.S. at 150; Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

n219 See Garcetti v. Ceballos, 126 S. Ct. 1951, 1973 (2006) (Breyer, J., dissenting).

n220 126 S. Ct. 1951 (2006).

n221 Id. at 1960.

n222 Id.

n223 Id.

n224 Id. at 1965 (Souter, J., dissenting).

n225 Id. at 1962.

n226 Id. at 1960.

n227 Mayer v. Monroe County Cmty. Sch. Corp., 474 F.3d 477, 479 (7th Cir. 2007).

n228 Garcetti, 126 S. Ct. at 1960.

n229 Id.

n230 See Piggee v. Carl Sandburg Coll., 464 F.3d 667, 672 (7th Cir. 2006). See also Pickering v. Bd. of Educ., 391 U.S. 563, 572-73 (1968) (noting that a school district's interest as an employer would be given priority if a teacher's speech impeded the "proper performance of his daily duties in the classroom" or interfered with "the regular operation" of the school)

n231 See Piggee, 464 F.3d at 672; Bonnell v. Lorenzo, 241 F.3d 800, 821 (6th Cir. 2001); Bishop v. Aronov, 926 F.2d 1066, 1076-77 (11th Cir. 1991).

n232 See Piggee, 464 F.3d at 671-72.

n233 See Bonnell, 241 F.3d at 820-21, 823-24.

n234 See Bishop, 926 F.2d at 1077.

n235 See Martin v. Parrish, 805 F.2d 583, 584-85 (5th Cir. 1986).

n236 See Hetrick v. Martin, 480 F.2d 705, 709 (6th Cir. 1973).

n237 See Urofsky v. Gilmore, 216 F.3d 401, 409 (4th Cir. 2000) (en banc).

n238 See Pugel v. Bd. of Trs. of Univ. of Illinois, 378 F.3d 659, 668 (7th Cir. 2004). Although not the specific focus of this article, courts have also used the employee speech doctrine to uphold the dismissal of a vice president for criticizing potentially illegal or unethical behaviors of college officials (see Vila v. Padron, 484 F.3d 1334, 1340 (11th Cir. 2007)); the termination of men's head basketball coach for post-game comments (see Richardson v. Sugg, 448 F.3d 1046, 1063 (8th Cir. 2006)); disciplinary action for anti-Semitic and racist remarks made by a professor in a public address (see Jeffries v. Harleston, 52 F.3d 9, 13 (2d Cir. 1995)); termination of men's head basketball coach for racist remarks made in the locker room (see Dambrot v. Cent. Michigan Univ., 55 F.3d 1177, 1191 (6th Cir. 1995)).

n239 See Piggee v. Carl Sandburg College, 464 F.3d 667, 670-71 (7th Cir. 2006); Bonnell v. Lorenzo, 241 F.3d 800, 822-23 (6th Cir. 2001); Bishop, 926 F.2d at 1075. See also Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

n240 See, e.g., Urofsky, 216 F.3d at 410-15.

n241 342 U.S. 485 (1952). In his dissent, Douglas argued that the "very threat" that a teacher may be called upon to defend past memberships and associations "is certain to raise havoc with academic freedom." Id. at 509 (Douglas, J., dissenting).

n242 354 U.S. 234 (1957) (plurality opinion).

n243 Id. at 243-44.

n244 Id. at 250.

n245 Id.

n246 Id.

n247 Id.

n248 Id.

n249 385 U.S. 589 (1967).

n250 Id. at 603-04.

n251 Id. at 603.

n252 Id

n253 See Richard H. Hiers, New Restrictions on Academic Free Speech: Jeffries v. Harleston II, J.C. & U.L. 217, 224 (1995).

n254 See Whitehill v. Elkins, 389 U.S. 54 (1967); Baggett v. Bullitt, 377 U.S. 360 (1964); Shelton v. Tucker, 364 U.S. 479 (1960); Barenblatt v. United States, 360 U.S. 109 (1959); Slochower v. Bd. of Higher Educ., 350 U.S. 551 (1956); Wieman v. Updegraff, 34 U.S. 183 (1952).

n255 See Shelton, 364 U.S. at 480; Barenblatt, 360 U.S. at 114; Slochower, 350 U.S. at 553.

n256 See Whitehill, 389 U.S. at 55; Baggett, 377 U.S. at 361; Wieman, 34 U.S. at 184.

n257 See Minn. State Bd. for Cmty. Colleges v. Knight, 465 U.S. 271, 287 (1984) (noting that cases, such as Keyishian, Shelton and Sweezy, "involved individuals' rights to express their views and to associate with others for communicative purposes");Urofsky v. Gilmore, 216 F.3d 401, 413 (4th Cir. 2000) (noting that "several other cases decided at roughly the same time as Sweezy involved restrictions on state employees' rights as private citizens to speak and associate").

n258 In Barenblatt, a five-member majority upheld a college teacher's conviction for refusing to answer questions before a subcommittee of the House Committee on Un-America Activities as to his membership in and affiliation with the Communist Party. 360 U.S. at 113. The Court found that, unlike in Sweezy, Congress did not exceed its authority to investigate Communist activity in the field of education. Id. at 129, 133. Such an investigation was related to the right of self-preservation and was not directed at controlling what is being taught. Id. at 128, 130.

n259 Whitehill, 389 U.S. at 62; Baggett, 377 U.S. at 369, 371; Shelton, 364 U.S. at 490.

n260 Slochower, 350 U.S. at 559; Wieman, 34 U.S. at 191.

n261 See Whitehill, 389 U.S. at 59-60 (recognizing that laws which abridge the First Amendment rights of teachers are "hostile to academic freedom"); Shelton v. Tucker, 364 U.S. 479, 487 (1960) (contending that the "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools"); Barenblatt, 360 U.S. at 112 (noting that the areas of academic teaching and learning exist within a "constitutionally protected domain"). Furthermore, citing Wieman, Sweezy, Shelton and Keyishian, the Court concluded in 2003 that it has "long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." Grutter v. Bollinger, 539 U.S. 306, 330 (2003). Note, in Baggett, the Court only briefly mentioned the concept when it noted that the academic

freedom interests of students are protected by a "judgment in favor of the teaching personnel." Baggett v. Bullitt, 377 U.S. 360, 366 n.5 (1964).

n262 Byrne, supra note 102, at 291.

n263 See Bonnell v. Lorenzo, 241 F.3d 800, 821 (6th Cir. 2001); Urofsky v. Gilmore, 216 F.3d 401, 409 (4th Cir. 2000); Martin v. Parrish, 805 F. 2d 583, 584 (6th Cir. 1986); Hetrick v. Martin, 480 F.2d 705, 707 (6th Cir. 1973).

n264 Hetrick, 480 F.2d at 709. See Dow Chemical Co. v. Allen, 672 F.2d 1262, 1275 (7th Cir. 1982) (noting that the "precise contours of the concept of academic freedom are difficult to define").

n265 See, e.g., Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 680 (6th Cir. 2001) (contending that the "argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction, is totally unpersuasive"); Bonnell, 241 F.3d at 823 (noting that a "professor's rights to academic freedom and freedom of expression are paramount in the academic setting"); Bishop v. Aronov, 926 F.2d 1066, 1076 (11th Cir. 1991) (noting that the court is "mindful of the invaluable role academic freedom play in our public schools, particularly at the post-secondary level"); Minarcini v. Strongsville City Sch. Dist., 541 F.2d 577, 582 (6th Cir. 1976) (contending that the First Amendment's protection of academic freedom extends into the classroom)

n266 See Minn. State Bd. for Cmty. Colleges v. Knight, 465 U.S. 271, 288 (1984) (noting that no constitutional right exists for faculty to participate in institutional policymaking even when "assuming that speech rights guaranteed by the First Amendment take on a special meaning in an academic setting"); Urofsky, 216 F.3d at 414 (noting that the Supreme Court has "never recognized that professors possess a First Amendment right of academic freedom to determine for themselves the content of their courses and scholarship, despite opportunities to do so"); Bishop, 926 F.2d at 1075 (noting that no support exists to "conclude that academic freedom is an independent First Amendment right").

n267 See Bonnell, 241 F.3d at 824; Urofsky, 216 F.2d at 411 n.13; Hetrick, 480 F.2d at 709.

n268 Scallet v. Rosenblum, 911 F. Supp. 999, 1013-14 (W.D. Va. 1996).

n269 Byrne, supra note 102, at 279, 292.

n270 The Court has recognized that academic freedom thrives on both the "independent and uninhibited exchange of ideas among teachers and students" and the "autonomous decisionmaking by the academy." Univ. of Mich. Regents v. Ewing, 474 U.S. 214, 226 n.12 (1985).

n271 See Byrne, supra note 102, at 257.

n272 See Rabban, Functional Analysis, supra note 58, at 230.

n273 Piarowski, v. Prairie State Coll., 759 F.2d 625, 629 (7th Cir. 1985). See also Bonnell v. Lorenzo, 241 F.3d 800, 823 (6th Cir. 2001); Parate v. Isibor, 868 F.2d 821, 826 (6th Cir. 1989). Commentators have also acknowledged this problem. See, e.g., Byrne, supra note 102, at 257; Elizabeth Mertz, The Burden of Proof and Academic Freedom: Protection for Institution or Individual?, 82 Nw. U.L. REV. 492, 493 (1988); Stacy E. Smith, Who Owns Academic Freedom?: The Standard for Academic Free Speech at Public Universities, 59 WASH. & LEE L. REV. 299, 313 (2001).

n274 See Nancy J. Whitmore, The Evolution of the Intermediate Scrutiny Standard and the Rise of the Bottleneck "Rule" in the Turner Decisions, 8 COMM. L. & POL'Y 25, 37 (2003).

n275 Warren J. Samuels, Interrelations Between Legal and Economic Processes, 14 J.L. & ECON. 435, 441 (1972).

n276 See Whitmore, supra note 274, at 38.

n277 Urofsky v. Gilmore, 216 F.2d 401, 412 (4th Cir. 2000). See also Grutter v. Bollinger, 539 U.S. 306, 328-30 (2003) (holding a law school has a compelling interest in attaining a diverse student body based on a First Amendment protection of educational autonomy); Univ. of California Regents v. Bakke, 438 U.S. 265, 312 (1978) (plurality opinion) (noting that while academic freedom is not "a specifically enumerated constitutional right," it is a "special concern of the First Amendment," which encompasses the "freedom of a university to make its own judgments" regarding the education it provides).

n278 See Pickering v. Bd. of Educ., 391 U.S. 563 (1968). See also Hiers, supra note 253, at 218; Smith, supra note 273, at 326.

n279 Pickering, 391 U.S. at 572-73.

n280 See Healy v. James, 408 U.S. 169, 192 (1972) (quoting Esteban v. Cent. Mo. State Coll., 415 F.2d 1077, 1089 (8th Cir. 1969)).

n281 See id.

n282 See Univ. of Pennsylvania v. Equal Employment Opportunity Comm'n., 493 U.S. 182, 198 (1990); Parate v. Isibor, 868 F.2d 821, 827 (6th Cir. 1989); Equal Employment Opportunity Comm'n. v. Univ. of Notre Dame Du Lac, 715 F.2d 331, 336 (7th Cir. 1983).

n283 See Piggee v. Carl Sandburg Coll., 464 F.3d 667, 671 (7th Cir. 2006); Bishop v. Aronov, 926 F.2d 1066, 1076-77 (11th Cir. 1991).

n284 See Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1190 (6th Cir. 1995); Parate, 868 F.2d at 827; Martin v. Parrish, 805 F.2d 583, 585-86 (5th Cir. 1986); Hetrick v. Martin, 480 F.2d 705, 709 (6th Cir. 1973).

n285 See Piarowski v. Prairie State Coll., 759 F.2d 625, 632-33 (7th Cir.1985).

n286 Hardy v. Jefferson Cmty. Coll. and Kentucky Cmty. and Technical Sys., 260 F.3d 671, 678 (6th Cir. 2001) (citing Pickering, 391 U.S. 5631, 568 (1968)

n287 Trejo v. Shoben, 319 F.3d 878, 884 (7th Cir. 2003).

n288 Hardy, 260 F.2d. at 679.

n289 Trejo, 319 F.3d at 884 (quoting Swank v. Smart, 898 F.2d 1247, 1251 (7th Cir. 1990)).

n290 See Hardy, 260 F.3d at 679, 681.

n291 Id. at 680-81.

n292 Jeffries v. Harleston, 52 F.3d 9, 12 (2d Cir. 1995) [hereafter Jeffries II].

n293 Id.

n294 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1968). See also Hardy, 260 F.3d. at 682; Burnham v. Ianni, 119 F.3d 668, 679 (8th Cir. 1997) (en bane)

n295 Id.

n296 Hardy, 260 F.3d. at 682 (quoting Tinker, 393 U.S. at 509).

n297 See supra text accompanying note 225.

n298 Smith, supra note 273, at 336. See Alisa W Chang, Resuscitating the Constitutional "Theory" of Academic Freedom: A Search For a Standard Beyond Pickering and Connick, 53 STAN. L. REV. 915, 919 (2001); Karen C. Daly, Balancing Act: Teachers' Classroom Speech and the First Amendment, 30 J.L. & EDUC. 1, 2-3 (2001); Hiers, supra note 253, at 218.

n299 See Jeffries v. Harleston, 52 F.3d 9, 10 (2d Cir. 1995).

n300 21 F.3d 1238 (2d Cir. 1994) [hereafter Jeffries I].

n301 511 U.S. 661 (1994) (plurality).

n302 Id. at 664.

n303 Jeffries II, 52 F.3d 9, 10 (2d Cir. 1995).

n304 In Urofsky v. Gilmore, the court of appeals indicated that the "academic freedom of an individual professor" has been subsumed by the "protection against dismissal for the exercise of First Amendment rights" provided under the employee speech doctrine. 216 F.3d 401, 415 (4th Cir. 2000).

n305 Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1188 (6th Cir. 1995).

n306 Id.

n307 Connick v. Myers, 461 U.S. 138, 146 (1983). See Jeffries v. Harleston, 21 F.3d 1238, 1245 (2d Cir. 1994).

n308 Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). See also Jeffries I, 21 F.3d 1238, 1245 (2d Cir. 1994).

n309 See Mt. Healthy, 429 U.S. at 286. See also Jeffries I, 21 F.3d at 1246.

n310 See Jeffries v. Harleston, 52 F.3d 9, 12-13 (2d Cir. 1995). See also Waters v. Churchill, 511 U.S. 661, 673 (1994) (plurality opinion).

n311 Connick, 461 U.S. at 150. See also Jeffries I, 21 F.3d at 1246.

n312 See supra text accompanying notes 204-05, 228-38, 277-85.

n313 Bishop v. Aronov, 926 F.2d 1066, 1075 (11th Cir. 1991).

n314 Bd. of Curators of Univ. of Missouri v. Horowitz, 435 U.S. 78, 90 (1978).

n315 Grutter v. Bollinger, 539 U.S. 306, 328 (2003). See also Equal Employment Opportunity Comm'n. v. Univ. of Notre Dame Du Lac, 715 F.2d 331, 336 (7th Cir. 1983) (arguing that academic assessments are best performed through a process of peer review).

n316 Univ. of Wisconsin Regents v. Southworth, 529 U.S. 217, 232 (2000).

n317 Univ. of Michigan Regents v. Ewing, 474 U.S. 214, 225 (1985).

n318 See Zipp & Fenwick, supra note 7, at 305.

n319 See Intellectual Diversity, supra note 15, at 6.

n320 See Ward Churchills, supra note 107, at 5-25.

n321 See id. at 31.

n322 See id. at 30-31.

n323 See id. at 3; Intellectual Diversity, supra note 15, at 3.

n324 See Ward Churchills, supra note 107, at 5-25.

n325 Id. at 5.

n326 Id. at 5-6.

n327 Id. at 10.

n328 Id. at 14 (quoting a course on "Domestic Violence" offered by Vassar College).

n329 Id. at 18 (quoting an introductory seminar in African-American and Africana Diaspora Studies offered at Williams College).

n330 Equal Employment Opportunity Comm'n. v. Univ. of Notre Dame Du Lac, 715 F.2d 331, 336 (7th Cir. 1983) (quoting Martin v. Helstad, 699 F.2d 387, 397 (7th Cir. 1983) (concurring opinion))

n331 Bishop v. Aronov, 926 F.2d 1066, 1075 (11th Cir. 1991). See also Univ. of Michigan Regents v. Ewing, 474 U.S. 214, 226 (1985); Parate v. Isibor, 868 F.2d 821, 826-27 (6th Cir. 1989).

n332 See, e.g., Grutter v. Bollinger, 539 U.S. 306, 328-30 (2003); Ewing, 474 U.S. at 226 n.12; Univ. of California Regents v. Bakke, 438 U.S. 265, 312 (1978) (plurality opinion); Urokfsy v. Gilmore, 216 F.3d 401, 414 (4th Cir. 2000); Bishop, 926 F.2d at 1075; Notre Dame Du Lac, 715 F.2d at 336.

n333 See supra text accompanying notes 228-38, 277-85, 312-17.

n334 See Bishop, 926 F.2d at 1076-77. See also Piggee v. Carl Sandburg Coll., 464 F.3d 667, 671 (7th Cir. 2006); Bonnell v. Lorenzo, 241 F.3d 800, 820 (6th Cir. 2001); Parate, 868 F.2d at 827; Hetrick v. Martin, 480 F.2d 705, 707 (6th Cir. 1973).

n335 Connick, 461 U.S. at 150.

n336 Dow Chemical Co. v. Allen, 672 F.2d 1262, 1275 (7th Cir. 1982) (citing Sweezy v. New Hampshire, 354 U.S. 234, 251 (1957); Keyishian v. Bd. of Regents, 385 U.S. 589, 604-05 (1967)).

n337 Rust v. Sullivan, 500 U.S. 173, 200 (1991) (citing Keyishian, 385 U.S. at 603, 605-06).

n338 See supra text accompanying notes 277-334

n339 Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 139 & n.7 (Stewart, J., concurring).

n340 David Fagundes, State Actors as First Amendment Speakers, 100 Nw. U. L. REV. 1637, 1643 (2006).

n341 Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995).

n342 Univ. of Pennsylvania v. Equal Employment Opportunity Comm'n, 493 U.S. 182, 197 (1990).

n343 See Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587-88 (1998); Rust v. Sullivan, 500 U.S. 173, 193 (1991).

n344 See Legal Services Corp. v. Velazquez, 531 U.S. 533, 541-42 (2001); Rosenberger, 515 U.S. at 834; Rust, 500 U.S. at 194.

n345 See Finley, 514 U.S. at 588-90.

n346 See Univ. of Pennsylvania, 515 U.S. at 198 n.6.

n347 See, e.g., Rosenberger, 515 U.S. at 834.

n348 See United States v. American Library Ass'n., 539 U.S. 194, 205 (2003) (plurality opinion); Finley, 524 U.S. at 585; Arkansas Educ. Television Comm'n, v. Forbes, 523 U.S. 666, 672-73 (1998).

n349 See American Library Ass'n., 539 U.S. at 204-05; Finley, 524 U.S. at 585; Forbes, 523 U.S. at 673-74; Rust, 500 U.S. at 193-94.

n350 See supra text accompanying notes 206-24.

n351 See American Library Ass'n., 539 U.S. at 211-12; Finley, 524 U.S. at 573-77, 585; Rust, 500 U.S. at 177, 193-94, 196.

n352 See Finley, 524 U.S. at 572; Rust, 500 U.S. at 196, 199.

n353 See American Library Ass'n., 539 U.S. at 212; Rust, 500 U.S. at 199.

n354 See Rust, 500 U.S. at 198-99.

n355 See Legal Services Corp. v. Velazquez, 531 U.S. 533, 541 (2001); Rust, 500 U.S. at 194.

n356 American Library Ass'n., 539 U.S. at 203.

n357 See Arkansas Educ. Television Comm'n, v. Forbes, 523 U.S. 666, 674 (1998).

n358 See Velazquez, 531 U.S. at 536.

n359 See American Library Ass'n., 539 U.S. at 204-05; Forbes, 523 U.S. at 673-74.

n360 See Rust, 500 U.S. at 197.

n361 See Velazquez, 531 U.S. at 542-43; Forbes, 523 U.S. at 673-74.

n362 See American Library Ass'n., 539 U.S. at 213.

n363 See Velazquez, 531 U.S. at 542; Forbes, 523 U.S. at 673-74.

n364 See American Library Ass'n., 539 U.S. at 204; Velazquez, 531 U.S. at 542-45.

n365 See American Library Ass'n., 539 U.S. at 204-05; Velazquez, 531 U.S. at 548; Forbes, 523 U.S. at 673-74.

n366 See supra text accompanying notes 107-09, 318-29.

n367 See supra text accompanying notes 190-95.

n368 See supra text accompanying notes 196-205.

n369 See Rust v. Sullivan, 500 U.S. 173, 200 (1991); Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion).

n370 Keyishian, 385 U.S. at 603 (quoting Sweezy, 354 U.S. at 250).

n371 Id. (quoting United States v. Associated Press, 52 F. Supp 362, 372 (S.D.N.Y. 1943).

n372 Rust, 500 U.S. at 200.

n373 Keyishian, 385 U.S. at 603.

n374 These programs involve both teaching and scholarship and are at the center of the intellectual diversity debate.

n375 See Rust, 500 U.S. at 197; FCC v. League of Women Voters, 468 U.S. 364, 399-401 (1984).

n376 See Rust, 500 U.S. at 197.

n377 See United States v. American Library Ass'n., 539 U.S. 194, 213 n.7 (2003) (plurality opinion).

n378 539 U.S. 194 (2003) (plurality opinion).

n379 Id. at 199, 214.

n380 Id. at 228 (Stevens, J., dissenting).

n381 Id. at 211.

n382 Id. at 212.

n383 Id.

n384 531 U.S. 533 (2001).

n385 Id. at 536-37.

n386 Id. at 536.

n387 Id. at 537.

n388 Id. at 542.

n389 Id. at 544.

n390 United States v. American Library Ass'n., 539 U.S. 194, 213 (2003) (plurality opinion) (emphasis in original).

n391 Id.

n392 See id.; Velazquez, 531 U.S. at 541.

n393 American Library Ass'n., 539 U.S. at 213.

n394 See Velazquez, 531 U.S. at 541.

n395 Id. at 548. For example, the Legal Services Corporation Act proscribed the use of funds in criminal proceedings, litigation involving nontherapeutic abortions, secondary school desegregation, military desertion or violations of the Selective Service statute. Id. at 537. An LSC-funded attorney would be prohibited from representing a client in litigation falling within these proscribed areas.

n396 See id. at 543.

n397 Id.

n398 Id.

n399 Equal Employment Opportunity Comm'n. v. Univ. of Notre Dame Du Lac, 715 F.2d 331, 336 (7th Cir. 1983) (quoting Martin v. Helstad, 699 F.2d 387, 397 (7th Cir. 1983) (concurring opinion).

n400 Sweezy v. New Hampshire, 354 U.S. 234, 263 (Frankfurter, J., concurring).

n401 See, e.g., Grutter v. Bollinger, 539 U.S. 306, 328-30 (2003); Univ. of Michigan Regents v. Ewing, 474 U.S. 214, 225-26, n.11-12 (1985); Bd. of Curators, Univ. of Missouri v. Horowitz, 435 U.S. 78, 96 n.6 (1978) (Powell, J., concurring); Univ. of California Regents v. Bakke, 438 U.S. 265, 312 (1978) (plurality opinion).

n402 See supra text accompanying notes 320-29 for a sample of the viewpoints intellectual diversity advocates find troubling and point to as evidence of a left-leaning ideological slant that professors are using to push their political agendas on students.

n403 See supra text accompanying notes 57-73, 102-106.

n404 Rust v. Sullivan, 500 U.S. 173, 200 (1991) (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

n405 See Intellectual Diversity, supra note 15, at 4.

n406 Post, supra note 64, at 322 (quoting Report of the Committee on Freedom of Expression at Yale, 4 HUM. RTS. 357, 357 (1975)).

n407 See, e.g., Grutter v. Bollinger, 539 U.S. 306, 330 (2003); Univ. of Wisconsin Regents v. Southworth, 529 U.S. 217, 231-33 (2000); Rust, 500 U.S. at 200; Univ. of California Regents v. Bakke, 438 U.S. 265, 312-13 (1978); Keyishian, 385 U.S. at 603.

n408 See supra text accompanying notes 190-205.

n409 See Freedom in the Classroom, AM. ASS'N. OF UNIV. PROFESSORS, Sept.-Oct. 2007, at 56, available at http://www.aaup.org/AAUP/comm/rep/A/class.htm.

n410 See supra text accompanying notes 277-311.

n411 Grutter v. Bollinger, 539 U.S. 306, 328 (2002).

n412 See supra text accompanying notes 312-17.

n413 The same holds true for faculty members as well. Faculty members who have been hired based on their expertise are in a much stronger position when they can demonstrate that the classroom speech and teaching methods they employ are effective and efficient means of achieving the educational outcomes set by the university.

n414 Legal Services Corp. v. Velazquez, 531 U.S. 533, 543 (2001).

n415 In Arkansas Educ. Television Comm'n v. Forbes, the Court analogizes broadcasters, who must choose among speakers expressing different viewpoints, with university administrators, who must select speakers for commencement or a lecture series, and public schools that prescribe their curriculum. 523 U.S. 666, 674 (1998).

n416 See Velazquez, 531 U.S. at 543.

n417 See id.

n418 See Ward Churchills, supra note 107, at 3-4.

n419 The inclusion of black studies, for example, was a response to a multi-racial movement for social justice that was aided by "white philanthropic organizations." See Noliwe M. Rooks, The Beginnings of Black Studies, CHRON. HIGHER EDUC., Feb. 10, 2006, at B8-B9.

n420 See Scott Jaschik, Hoover in the Heartland, INSIDE HIGHER EDUC., Sept. 20, 2007, available at http://www.insidehighered.com/news/2007/09/20/illinois; Robin Wilson, New Centers Bring Tradition to Study of U.S. History, CHRON. HIGHER EDUC., Mar. 16, 2007, available at http://chronicle.com/weekly/v53/i28/28a01002.htm.

n421 See Neil Gross & Solon Simmons, The Social and Political Views of American Professors, Working Paper, Sept. 24, 2007, at 29-30, available at http://www.insidehighered.com/layout/set/print/news/2007/10/08/politics.

n422 Id. at 29.

n423 Id.

n424 Id. at 50.

n425 Trends in Political Values and Core Attitudes: 1987-2007: Political Landscape More Favorable to Democrats, PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, Mar. 22, 2007, at 36, available at http://people-press.org/reports/display.php3?ReportID=312.

n426 See id.

n427 Id. The biggest generation gap, however, remains between the Baby Boomers (19461964) and those who came before them. Id.

n428 See supra text accompanying note 50.

n429 A Portrait of "Generation Next": How Young People View Their Lives, Futures and Politics, PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, Jan. 9, 2007, at 3, available at http://people-press.org/reports/display.php3?ReportID=300.

n430 See id. at 3-6.

n431 Id. at 4.

n432 See Zipp & Fenwick, supra note 7, at 305-06.

n433 Id. at 316.

n434 Id.

n435 Id.

n436 See infra text accompanying notes 438-39.

n437 See Zipp & Fenwick, supra note 7, at 320.

n438 See Sandy Baum & Jennifer Ma, Education Pays 2007: The Benefits of Higher Education for Individuals and Society, COLLEGE BOARD, 2007, at 2, 12, 18-23, 25-27, available at http://www.collegeboard.com/press/releases/185478.html.

n439 See id. at 2, 28.

n440 See Erznoznik v. City of Jacksonville, 422 U.S. 205, 214 n.11 (1975).

n441 See Ashcroft v. Free Speech Coalition, 535 U.S. 234, 253 (2002) (explaining that the "right to think is the beginning of freedom ... and speech is the beginning of thought")