Washington and Lee Law Review

Volume 63 | Issue 3 Article 7

Summer 6-1-2006

Academic Freedom on the Rack: Stretching Academic Freedom Beyond Its Constitutional Limits in FAIR v. Rumsfeld

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Academic Freedom on the Rack: Stretching Academic Freedom Beyond Its Constitutional Limits in *FAIR v. Rumsfeld*[1]

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1. *See* Rumsfeld v. Forum for Academic & Inst. Rights, 126 S. Ct. 1297, 1313 (2006) ("In this case, FAIR has attempted to stretch a number of First Amendment doctrines well beyond the sort of activities these doctrines protect.").

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I. Introduction

Academic freedom and religious freedom have one root in common: both are based upon the freedom of conscience, hence neither can flourish in a community that has no respect for human individuality.[2]

In 1990, the Association of American Law Schools (AALS) added sexual orientation to its nondiscrimination policy, setting the stage for a battle between America's law schools and the United States military.[3] Members of AALS must conform to this nondiscrimination policy, which prohibits law schools from assisting recruiters who screen student applicants by their sexual orientation.[4] The military's "Don't Ask Don't Tell Policy" brings Judge Advocate General (JAG) recruiters under this ban.[5] Alarmed by law schools' attempts to deny JAG officers access to the career services offered to other legal

2. RICHARD HOFSTADTER, ACADEMIC FREEDOM IN THE AGE OF THE COLLEGE 62 (1996).

3. *See* Brief for the Association of American Law Schools at 4, as Amici Curiae Supporting Respondents, Rumsfeld v. Forum for Academic & Inst. Rights, 126 S. Ct. 1297 (2006) (No. 04-1152) ("[T]he AALS House of Representatives voted unanimously to amend the AALS Bylaws in 1990 to include sexual orientation in the nondiscrimination policy."). Documents related to the *FAIR v. Rumsfeld* case are available at http://www.law.georgetown.edu/solomon/FAIRvRUMSFELD.html.

4. *See* Brief for the Association of American Law Schools at 2, as Amici Curiae Supporting Appellants, Forum for Academic & Inst. Rights v. Rumsfeld, 390 F.3d 219 (3d Cir. 2004) (No. 03-4433) ("The AALS and its member schools believe so strongly in the value of non-discrimination that they have adopted a rule that failure to comply with this mandate, absent any exemptions, results in a loss of AALS membership.").

5. *See* Abigail K. Holland, Note, *The High Price of Equality: The Effect of the Solomon Amendment on Law Schools' First Amendment Rights*, 38 SUFFOLK U. L. REV. 855, 870 (2005) ("Due to the military's 'Don't Ask Don't Tell' policy regarding homosexuals in the military, law schools have refused to subsidize the military's on-campus recruitment efforts.").

employers, Congress passed legislation, known as the Solomon Amendment, to remedy this perceived discrimination against military recruiters.[6]

The Solomon Amendment denies federal funds to universities that refuse to provide military recruiters the same access to students and career services that they grant to other employers.[7] Covering funding from a wide range of government entities, the Solomon Amendment may cost universities a significant amount of federal money.[8] Agencies covered by the Solomon Amendment include the Departments of Defense, Labor, Health and Human Services, Education, Homeland Security, and Transportation.[9] If any part of a university, such as a law school, fails to provide military recruiters the access and services it provides to other employers, the entire university becomes ineligible to receive these federal funds.[10]

On September 19, 2003, the Forum for Academic and Institutional Rights (FAIR), the Society for American Law Teachers (SALT), and several individual plaintiffs filed suit against Secretary of Defense Donald Rumsfeld and other government officials, seeking a preliminary injunction to enjoin enforcement of the Solomon Amendment.[11] FAIR is "an association of 36 law schools and law faculties whose mission is to promote academic freedom and to support educational institutions [in] opposing discrimination."[12] FAIR's membership consists of twelve institutions, half of which are public, and twenty-four faculties, only six of which are private.[13] Public law schools or

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6. *See* Brief for Congressman Richard Pombo et al. at 11, as Amici Curiae Supporting Petitioners, Rumsfeld v. Forum for Academic & Inst. Rights, 126 S. Ct. 1297 (2006) (No. 04-1152) ("The military requires the 'best and the brightest' for each of its occupation specialties . . . because these missions implicate life or death situations. . . . If Respondents succeed, equal access will be denied to 92 percent of law graduates currently attending American Association of Law School member institutions.")

7. *See* Paul M. Smith et al., *Courtside*, 23 COMM. LAW. 23, 24 (Spring 2005) ("[T]he Solomon Amendment denies federal funds to any institution of higher education that does not provide military recruiters with access to its campus and students on par with the access available to other employers.").

8. *See id.* (stating that the Solomon Amendment could cost universities "hundreds of millions of dollars in federal funds").

9. *See id.* (listing the governmental funding targeted by the Solomon Amendment).

10. *See id.* (noting that the Solomon Amendment "penalizes a parent university for the actions of any of its subelements, such as its law school").

11. *See* Forum for Academic & Institutional Rights, *Summary of FAIR's Litigation*, http://www.law.georgetown.edu/solomon/FAIRsummary.html (last visited June 4, 2006) (describing FAIR's litigation) (on file with the Washington and Lee Law Review).

12. Forum for Academic & Institutional Rights, *Join FAIR*, http://www.law.georgetown.edu/solomon/joinFAIR.html (last visited June 4, 2006) (on file with the Washington and Lee Law Review).

13. *See* Forum for Academic & Institutional Rights, *FAIR Participating Law Schools*,

their faculties thus compose two-thirds of FAIR's membership. The law schools claimed that the Solomon Amendment violated their First Amendment rights of academic freedom, freedom of speech, and freedom of expressive association.[14] They also claimed that the Solomon Amendment violates the unconstitutional conditions doctrine, the First Amendment prohibition on viewpoint discrimination, and the void-for-vagueness doctrine.[15]

Judge John Lifland of the United States District Court for the District of New Jersey denied FAIR's motion for a preliminary injunction, finding it unlikely that FAIR's constitutional claims would succeed.[16] Judge Lifland viewed academic freedom as a parasitic doctrine that is "not cognizable without a foundational free speech or associational right."[17] Because he found no violation of FAIR's free speech or associational freedoms, Judge Lifland ignored FAIR's academic freedom claims.[18]

On appeal, a divided panel of the Third Circuit granted FAIR a preliminary injunction.[19] Judge Thomas Ambro's opinion focuses on the law schools' free speech and associational rights, characterizing the Solomon Amendment as an unconstitutional condition that forces law schools to adopt a message incompatible with their "educational objectives."[20] The Third Circuit referred to academic freedom in a footnote merely to emphasize the importance

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http://www.law.georgetown.edu/Solomon/participating_schools.html (last visited June 4, 2006) (listing the members of FAIR who are willing to be named publicly and giving the total number of faculties and institutions which are public) (on file with the Washington and Lee Law Review).

14. *See* Brief for Appellants at 19, Forum for Academic & Inst. Rights v. Rumsfeld, 390 F.3d 219 (3d Cir. 2004) (No. 03-4433) ("[T]he government hit not one, but three distinct First Amendment rights (academic freedom, free speech, and freedom of expressive association) . . . .").

15. *See id.* (alleging that the government "violated three distinct First Amendment doctrines (the doctrine of unconstitutional conditions, the prohibition against viewpoint discrimination, and the void-for-vagueness doctrine)").

16. *See* Forum for Academic & Inst. Rights, Inc., v. Rumsfeld, 291 F. Supp. 2d 269, 301 (D.N.J. 2003) ("For the reasons explained herein, the Solomon Amendment does not transgress constitutional boundaries.").

17. *Id.* at 303.

18. *See id.* at 310 ("[T]he presence of the military on campus does not significantly intrude upon the law schools' ability to express their views, thus presenting a very different situation than those considered in *Dale* or *Hurley*.").

19. *See* Forum for Academic & Inst. Rights v. Rumsfeld, 390 F.3d 219, 246 (3d Cir. 2004) ("We reverse and remand for the District Court to enter a preliminary injunction against enforcement of the Solomon Amendment.").

20. *Id.*

of granting deference to the law schools' associational determination of what impairs their own expression.[21]

The Supreme Court granted certiorari and heard arguments on the case on December 6, 2005.[22] On March 6, 2006, the Court upheld the Solomon Amendment, finding that it did not violate the law schools' freedoms of speech and association, or the unconstitutional conditions doctrine.[23] The Supreme Court found that the First Amendment would not inhibit Congress, under its power to raise and support armies, from directly requiring access for military recruiters to American law schools.[24] Because the equal access requirements of the Solomon Amendment could be imposed directly, these conditions could not violate the First Amendment as a prerequisite to the receipt of federal funds.[25] Consequently, the Court did not find it necessary to address the law schools' constitutional academic freedom claims. Thus, the FAIR case left important questions concerning the First Amendment right of academic freedom, which were raised by FAIR's argumentation, unresolved.

Courts gave academic freedom only the slightest of roles in their treatment of FAIR's challenge to the Solomon Amendment.[26] As FAIR recognized, however, academic freedom lay at the heart of its claims.[27] This Note discusses FAIR's academic freedom arguments only as they apply to public schools. Furthermore, it does not address law schools' academic freedom claims in relation to the power of Congress or the needs of the military. Instead, this Note seeks to delineate the limits of the First Amendment right of institutional

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21. *See id.* at 233 n.13 ("The Supreme Court's academic freedom jurisprudence thus underscores the importance of *Dale* deference in our case.").

22. *See* Rumsfeld v. Forum for Academic & Inst. Rights, 544 U.S. 1017, 1017 (2005) (granting certiorari); Forum for Academic and Institutional Rights, *supra* note 11 (providing a timeline of FAIR's litigation).

23. *See* Rumsfeld v. Forum for Academic & Inst. Rights, 126 S. Ct. 1297, 1313 (2006) ("Because Congress could require law schools to provide equal access to military recruiters without violating the schools' freedom of speech or association, the Court of Appeals erred . . . .").

24. *See id.* at 1306 (noting that Congress's power to raise and support armies is "broad and sweeping" and stating that there is no dispute that this power "includes the authority to require campus access for military recruiters") (citations omitted).

25. *See id.* at 1307 ("Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds.").

26. *See supra* notes 16–25 and accompanying text (describing the role of academic freedom in court opinions during the course of the FAIR litigation).

27. *See* Paul Horwitz, Grutter's *First Amendment*, 46 B.C. L. REV. 461, 519 (2005) ("FAIR and its fellow plaintiffs have said that academic freedom comprises 'the principal basis of the[ir] legal challenge.'") (citations omitted).

academic freedom. It does so first by defining the purposes and functions of constitutional academic freedom generally. Second, it juxtaposes FAIR's institutional academic freedom arguments with these core principles, as well as professors' and students' more clearly defined academic freedom rights.

The Court has carved out a prominent place for the First Amendment freedom of association in recent cases such as *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*[28] and *Boy Scouts of America v. Dale*.[29] Because First Amendment rights are highly contextual, however, it is unclear how the freedom of association applies to public universities.[30] As FAIR's associational claims failed, public universities are likely to return to constitutional academic freedom to uphold regulations, like nondiscrimination policies, which adversely affect students' intellectual autonomy. Addressing law schools' academic freedom arguments is thus crucial because academic freedom is the one constitutional right universities may always claim nudges a constitutional balancing test in their favor.

Constitutional academic freedom, however, may not be used to exclude or marginalize speakers because of the viewpoints they represent. The overriding goal of the Court's academic freedom jurisprudence is to protect the integrity of the learning process by ensuring individuals' freedoms of speech and thought. The Court's insulation of the academic realm has been carefully crafted to preserve a wide marketplace of ideas that individuals may utilize in an autonomous search for truth. As a result, the Court has granted substantial academic freedom rights to students as a bulwark against ideological coercion. Because of constitutional academic freedom's foundation in the concept of ideological neutrality, this Note argues that it applies only to public schools. Furthermore, this Note maintains that constitutional academic freedom cannot justify public universities' attempt to erect a trade barrier against viewpoints their faculties find to be objectionable.

Law schools' treatment of military recruiters is not the only instance in which the academy has attempted to marginalize or bar dissenting voices from college campuses. Public universities all over the United States have

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28. Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 581 (1995) (finding that the government could not change a private parade organization's message by forcing it to include a homosexual group in its parade).

29. Boy Scouts of Am. v. Dale, 530 U.S. 640, 661 (2000) (upholding the Boy Scouts' right to exclude a homosexual scout master who would undermine the communication of the Boy Scouts' view that homosexuality is immoral).

30. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) ("First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students.").

derecognized religious students groups, alleging that they violate the same kind of nondiscrimination policies used to justify the exclusion of military recruiters.[31] These institutional attempts at ideological coercion extend further to grading graduate students in education on their commitment to "social justice" and requiring students in social work programs to participate in internships designed to promote "progressive social change."[32] Speech codes have also been enacted at many public universities that prohibit expression that could conceivably give offense on the basis of gender, sexual orientation, race, or other categories.[33] This Note uses law schools' claims against the military as a vehicle to discuss the importance of students' academic freedom rights in maintaining their intellectual autonomy. The same analysis would apply, however, to any attempt by public universities' to enforce a moral or political view.

Part II of this Note briefly explores the historical origins of academic freedom, its beginnings in the United States, and the justifications the Supreme Court has offered for effectively incorporating academic freedom into the First Amendment. Part III summarizes the development of constitutional academic freedom and describes how it applies to teachers, students, and universities as institutions. It argues that constitutional academic freedom, as opposed to professional academic freedom, applies only in the context of public universities. Part IV then outlines FAIR and its amici's academic freedom claims.[34] Finally, Part V explains why

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31. *See* Mark Andrew Snider, Note, *Viewpoint Discrimination by Public Universities: Student Religious Organizations and Violations of University Nondiscrimination Policies*, 61 WASH. & LEE L. REV. 841, 843 (2004) (describing this discrimination against some religious groups); Brief for the Christian Legal Society at 11–12, as Amici Curiae Supporting Neither Party, Rumsfeld v. Forum for Academic & Inst. Rights, 126 S. Ct. 1297 (2006) (No. 04-1152) (same).

32. John Leo, *Class(room) Warriors*, U.S. NEWS & WORLD REP., Oct. 5, 2005, http://www.usnews.com/usnews/opinion/articles/051024/24john.htm (last visited June 4, 2006) (on file with the Washington and Lee Law Review); Robin Wilson, *Course Requirement or Loyalty Test?*, CHRON. HIGHER EDUC., Dec. 16, 2005, http://chronicle.com/weekly/v52/i17/17a01001.htm (last visited June 4, 2006) (on file with the Washington and Lee Law Review).

33. *See* Wendy McElroy, *Campus Conscience Police?*, FOX NEWS, Dec. 20, 2005, http://www.foxnews.com/story/0,2933,179321,00.html ("Speech codes prohibit expression that could give offense on the basis of gender, sexual orientation, race or other historical disadvantage . . . . The guidelines are often so vague as to prohibit the open discussion of issues like affirmative action or religious objections to homosexuality.") (last visited June 4, 2006) (on file with the Washington and Lee Law Review).

34. In this Note the terms "FAIR" and "law schools" are used interchangeably. This is appropriate as FAIR is a corporation formed to advance the collective goals of individual law schools or their faculties.

constitutional academic freedom does not permit public law schools to exclude competing viewpoints from the academic sphere.

II. Overview of Academic Freedom

Constitutional academic freedom suddenly emerged in the Supreme Court's jurisprudence, springing much like Athena from the forehead of Zeus, in the 1950s.[35] Of course, the theory that a university possesses certain freedoms and immunities from external influences is much older. This Part briefly outlines academic freedom's historical roots, its origins in the United States, and the basis for the Supreme Court's assertion of its critical importance for American society.

A. Historical Academic Freedom

Medieval universities utilized the reputations of their scholars and their semi-ecclesiastical corporate status to gain independence from both secular rulers and ecclesiastical princes.[36] By playing the competing forces of church and state against each other, groups of scholars garnered the right to govern themselves in most internal matters.[37] These teachers' authority over the educational process gave birth to the concept of academic freedom.

The rights enjoyed by universities in nineteenth-century Germany form the basis of the modern conception of academic freedom in the United States.[38]

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35. *See* Barenblatt v. United States, 360 U.S. 109, 113 (1959) (questioning a teacher's conviction for contempt of Congress for failing to disclose whether he had ever been a member of the Communist Party); Sweezy v. New Hampshire, 354 U.S. 234, 254–55 (1957) (invalidating a professor's conviction for contempt for refusing to answer questions pertaining to his lectures, advocacy of socialism, and familiarity with a socialist political organization); Wieman v. Updegraff, 344 U.S. 183, 191 (1952) (striking down a loyalty oath requirement for employees of a state college in Oklahoma); Adler v. Bd. of Educ., 342 U.S. 485, 489–91 (1952) (concerning the dismissal of public school employees in New York who advocated, or were members of organizations who advocated, the overthrow of the government by unlawful means).

36. *See* J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 267 (1989) (describing medieval English universities as corporations that were able to gain autonomy by playing the crown and church against each other); HOFSTADTER, *supra* note 2, at 121–22 ("Both the church principle of ecclesiastical independence and the guild principle of corporate self-government provided the universities . . . with dominant models of autonomy.").

37. *See* HOFSTADTER, *supra* note 2, at 6 ("In internal matters the universities had the prerogative of self-government.").

38. *See* Todd A. DeMitchell, *Academic Freedom—Whose Rights: The Professor's or the University's?*, 168 EDUC. LAW. REP. 1, 3 (2002) (describing how Americans who had studied at

German universities at that time were exclusively public and the state shielded them from regional and sectarian pressures.[39] German states maintained the power to set universities' budgets, create new chairs, appoint professors, and establish the overlying scheme of instruction.[40] Faculties had the right to elect academic officials, appoint lecturers, and nominate professors.[41] Three specific freedoms associated with these institutions coalesced to form the modern paradigm of academic freedom: (1) *Lehrfreiheit*, the professors' freedom to teach and research; (2) *Lernfreiheit*, the students' freedom to learn; and (3) *Freiheit der Wissenschaft*, the university's freedom to govern its own internal affairs.[42] Over nine thousand Americans studied at German universities during this period, returning home with first-hand experience of the benefits these liberties provided.[43]

B. Professional Academic Freedom

The American Association of University Professors' (AAUP) 1915 Declaration of Principles (Declaration) serves as the seminal statement of professional academic freedom in the United States.[44] Although the

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German universities sought to remodel universities in the United States in the German image); Horwitz, *supra* note 27, at 474 (discussing the significant influence of German universities on the American conception of academic freedom).

39. *See* RICHARD HOFSTADTER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 385 (1955) (stating that in Germany the "universities belonged to the state, which protected them against local and sectarian pressures").

40. *See id.* ("The state drew up the budgets, created new chairs, appointed professors, and framed the general scheme of instruction.").

41. *See id.* ("[T]he election of academic officials, the appointment of lecturers . . . and the nomination of professors were powers enjoyed by the faculty.").

42. *See* Clisby Louise Hall Barrow, *Academic Freedom and the University Title VII Suit after* University of Pennsylvania v. EEOC *and* Brown v. Trustees of Boston University, 43 VAND. L. REV. 1571, 1579–80 (1990) (summarizing the German model of academic freedom as encompassing *Lehrfreiheit*, *Lernfreiheit*, and *Freiheit der Wissenschaft*); Gail Sorenson & Andrew S. LaManque, *The Application of* Hazelwood v. Kuhlmeier *in College Litigation*, 22 J.C. & U.L. 971, 974–75 (1996) (same).

43. *See* HOFSTADTER, *supra* note 39, at 367 ("More than nine thousand Americans studied at German universities in the nineteenth century. Through these students . . . the methods and ideals of the German university were transported into this country.").

44. *See* David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 232 (1990) (characterizing the 1915 Declaration as the "foundation for the nonlegal understanding of academic freedom within the academic world"); Horwitz, *supra* note 27, at 475 (stating that academic freedom in the United States had its "proper birth . . . with the establishment of the American Association of University Professors . . . [and] its 1915 Declaration of Principles");

Declaration refers both to *Lehrfreiheit* and to *Lernfreiheit*, it explicitly asserts only professors' freedoms of thought, inquiry, discussion, and teaching.[45] The Declaration justifies professors' special rights by their usefulness to society in furthering the unfettered quest for truth, as well as in teaching citizens self-critical, considered, and prescient judgment.[46] The drafters of the Declaration recognized that these professorial rights have the "corresponding duties" of conducting competent, patient, and sincere inquiry, exposing students to both sides of controversial topics, and ultimately training students to think for themselves.[47] Excluding non-experts from control over the educational sphere, in the drafters' minds, eliminated the possibility that partisan objectives would intercede in the educational process.[48]

The AAUP remains the primary expositor of academic freedom in the United States to this day.[49] In 1940, the AAUP drafted a Statement of Principles on Academic Freedom and Tenure (Statement) that lays out its current views. The Statement serves as a more general exposition of the ideas expressed in the Declaration, grounding the importance of academic freedom in the common good.[50] Society's welfare depends upon the "free search for truth and its free exposition"—hence the importance of professors' freedom of

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Byrne, *supra* note 36, at 277 (labeling the Declaration "the most influential statement of the case for academic freedom").

45. *See* AM. ASS'N OF UNIV. PROFESSORS, POLICY DOCUMENTS & REPORTS 292 (9th ed. 2001) (pointing out that academic freedom has traditionally applied to the freedom of the teacher and the student, while establishing the intention of the drafters to deal only with the former).

46. *See id.* at 297 ("One of [the university's] most characteristic functions in a democratic society is to help make public opinion more self-critical and more circumspect, to check the more hasty and unconsidered impulses of popular feeling, to train the democracy to the habit of looking before and after.").

47. *See id.* at 298 (expounding upon the "correlative obligations" associated with teachers' academic freedom).

48. *See id.* (finding it "inadmissible that the power of determining when departures from the requirements of the scientific spirit and method have occurred, should be vested in bodies not composed of members of the academic profession"). The Declaration also notes that if the profession should prove unwilling "to prevent the freedom which it claims in the name of science from being used as a shelter for inefficiency, for superficiality, or for uncritical and intemperate partisanship" that it is certain that this "task will be performed by others." *Id.*

49. *See* Brief for the American Association of University Professors at 1–3, as Amici Curiae Supporting Appellants, Forum for Academic & Inst. Rights v. Rumsfeld, 390 F.3d 219 (3d Cir. 2004) (No. 03–4433) (describing the AAUP's role in establishing academic freedom in the United States).

50. *See* AM. ASS'N OF UNIV. PROFESSORS, *supra* note 45, at 3 ("Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole.").

teaching and students' freedom of learning.[51] Professors' rights are the central concern of the Statement, which consist of the freedom of teaching and research, as well as the right to be free from censure for extracurricular speech.[52] The Statement asserts "duties correlative with [these] rights," but these duties are left undefined.[53] In addition, the 1940 Statement places new emphasis on economic security as a prerequisite for professors' successful fulfillment of their obligations to society.[54]

C. Why Academic Freedom Matters

The Supreme Court has labeled academic freedom a "special concern of the First Amendment."[55] It has justified this special treatment of the nation's public educational sphere by its utility to American society as a whole.[56] To understand why the Supreme Court believes academic freedom is important, however, one must first appreciate the Court's view of the overarching goals of the First Amendment and how the Court believes academic freedom furthers these fundamental principles.

The overriding theme of the Court's academic freedom jurisprudence is respect for the political and ideological freedom of the individual.[57] Justice

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51. *Id.*; *see also id.* ("Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning.").

52. *See id.* at 3–4 (listing the rights of teachers to academic freedom and tenure).

53. *Id.* The AAUP's 1970 interpretive comments on the 1940 Statement do highlight the importance of the AAUP's 1966 Statement on Professional Ethics in describing these professorial "responsibilities." *Id.* at 5.

54. *See id.* at 4 (describing the AAUP's view of "acceptable academic practice" in regard to tenure).

55. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978); Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

56. *See Keyishian*, 385 U.S. at 603 ("Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.")

57. *See* Healy v. James, 408 U.S. 169, 188 (1972) ("'[T]he freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish.'" (quoting Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 137 (1961) (Black, J., dissenting))); *Keyishian*, 385 U.S. at 603 ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection.") (citations omitted); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) ("[A] fundamental principle of a democratic society is political freedom of the individual."); Adler v. Bd. of Educ., 342 U.S. 485, 511 (1952) (Douglas, J., dissenting) ("The Framers knew the danger of dogmatism; they also knew the strength that comes when the mind is free, when ideas may be pursued wherever they lead. We forget these

Black expressed this understanding of the First Amendment as a fundamental "policy" or "belief that government should leave the mind and spirit of man absolutely free."[58] In order for this freedom to be realized, each individual must have a broad range of views—or a marketplace of ideas—from which to choose, as choice without options is meaningless.[59] Enabling individuals to engage in this autonomous search for truth is a primary function of the First Amendment.[60]

Intellectual controversy is inherently good, not only because it gives life to liberty of inquiry, but also because it shapes the intellectual process of those exposed to it in important ways. Awareness of a broad spectrum of views inculcates the versatility of thought, independence, and vigor that characterize Americans and which the Court views as a unique source of national strength.[61] Maintaining diverse viewpoints is conditioned, however, upon government's neutrality in the realm of ideas and public respect for the high value the First Amendment places on individuals' freedom of conscience.[62]

The First Amendment preserves government neutrality by denying the state the power to "do anything to hinder or destroy the capacity of individuals and groups to seek converts and votes for any cause, however radical or unpalatable their principles might seem under the accepted notion of the

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teachings of the First Amendment when we sustain this law.").

58. *Adler*, 342 U.S. at 497 (Black, J., dissenting).

59. *See Healy*, 408 U.S. at 180 (emphasizing the "peculiar[]" nature of the college classroom as a "marketplace of ideas" from which students may choose); *Keyishian*, 385 U.S at 603 (same).

60. *See Keyishian*, 385 U.S. at 603 ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection.") (citations omitted); *Adler*, 342 U.S. at 511 (Douglas, J., dissenting) ("[I]t was the pursuit of truth which the First Amendment was designed to protect.").

61. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 866 (1982) (citing the "independence and vigor of Americans who grow up and live in this . . . often disputatious society"); *Adler*, 342 U.S. at 511 (Douglas, J., dissenting) ("A school system producing students trained as robots threatens to rob a generation of the versatility that has been perhaps our greatest distinction.").

62. *See* Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 317 (1984) (Stevens, J., dissenting) (describing an "equality of status in the field of ideas" that government must respect); *Pico*, 457 U.S. at 879 (Blackmun, J., concurring) ("[I]f educators intentionally may eliminate all diversity of thought, the school will strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.") (citations omitted); *Healy*, 408 U.S. at 188 ("[T]he freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish.") (citations omitted); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("'The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.'" (quoting Watson v. Jones 80 U.S. 679, 728 (1871))).

time."[63] Appropriately, the Court has identified the invitation to dispute as a primary function of this freedom of speech.[64] Society will not tolerate dispute, however, unless Americans both recognize and appreciate the importance of individual intellectual freedom.[65]

Citizens learn the importance of this fundamental liberty in public schools.[66] The Court sees public schools as the forum in which individuals imbibe the tolerance for conflicting views, which in turn enables them to pass this value on to successive generations.[67] The importance of each new generation learning this fundamental principle justifies the Court's assertion of the value of academic freedom to American society as a whole.[68]

For academic freedom to be effective, however, public schools must foster a unique environment dedicated to free inquiry and expression.[69]

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63. Barenblatt v. United States, 360 U.S. 109, 151 (1959) (Black, J., dissenting); *see also* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence.").

64. *See* Jones v. State Bd. of Educ., 397 U.S. 31, 33 (1970) ("'[A] function of free speech under our system of government is to invite dispute.'" (quoting Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949))).

65. *See Pico*, 457 U.S. at 879 (Blackmun, J., concurring) ("[I]f educators intentionally may eliminate all diversity of thought, the school will strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.") (citations omitted).

66. *See id.* (stating the need for students to be exposed to diversity of thought in order to appreciate the basic principles of American government); *Knight*, 465 U.S. at 296 (Brennan, J., dissenting) ("[P]rotecting the free exchange of ideas within our schools is of profound importance in promoting an open society.").

67. *See* Grutter v. Bollinger, 539 U.S. 306, 307 (2003) (quoting *Bakke*); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978) ("[T]he nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.") (citations omitted); Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection.") (citations omitted).

68. *See* Minn. State. Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 296 (1984) (Brennan, J., dissenting) ("[P]rotecting the free exchange of ideas within our schools is of profound importance in promoting an open society."); Adler v. Bd. of Educ., 342 U.S. 485, 511 (1952) (Douglas, J., dissenting) ("A school system producing students trained as robots threatens to rob a generation of the versatility that has been perhaps our greatest distinction.").

69. *See Grutter*, 539 U.S. at 329 (summarizing these principles as the "expansive freedoms of speech and thought associated with the university environment"); *Knight*, 465 U.S. at 293 (Marshall, J., concurring) (stating that universities have the "responsibility to advance the frontiers of knowledge through unfettered inquiry and debate"); *Keyishian*, 385 U.S. at 603 (citing *Sweezy*); Jones v. State Bd. of Educ., 397 U.S. 31, 34 (1970) (Douglas, J., dissenting) (characterizing universities as a "fitting place for the dissemination of a wide spectrum of

Hence, as Justice Frankfurter stated in his foundational opinion in *Sweezy v. New Hampshire*:[70]

> A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest. A university is characterized by the spirit of free inquiry, its ideal being the ideal of Socrates—to follow the argument where it leads. This implies the right to examine, question, modify or reject traditional ideas and beliefs. Dogma and hypothesis are incompatible, and the concept of an immutable doctrine is repugnant to the spirit of a university. The concern of its scholars is not merely to add and revise facts in relation to an accepted framework, but to be ever examining and modifying the framework itself.[71]

Only if public universities remain true to their mission to be marketplaces of ideas will students acquire the respect for dissent and individual intellectual autonomy that make the American system of government possible.[72]

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ideas"); Sweezy v. New Hampshire, 345 U.S. 234, 250 (1957) ("Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.").

70. *See* Sweezy v. New Hampshire, 354 U.S. 234, 254–55 (1957) (finding that the Due Process Clause precluded Sweezy from being held in contempt for refusing to testify about his university lectures and knowledge of the Progressive Party of New Hampshire). In *Sweezy*, the Court considered the validity of a professor's contempt conviction for refusing to testify in regard to his socialist political leanings and familiarity with the Progressive Party of New Hampshire. *Id.* at 238–44. The Attorney General of New Hampshire subpoenaed Sweezy to testify on two separate occasions. *Id.* at 238. He refused to testify to questions relating to his university lectures and knowledge of the Progressive Party of New Hampshire. *Id.* at 248. A state court held Sweezy in contempt. *Id.* at 244–45. Noting the expansive definition of "subversive persons" in the New Hampshire statute, the Court found that its scope went "well beyond" those intending to alter the nation's form of government by force or violence. *Id.* at 246. The Court found the statute's definition of "subversive organizations" similarly broad. *Id.* at 247. Because the sole basis of the Attorney General's inquiry was to scrutinize the professor as an individual, the court determined that there had been an invasion of Sweezy's "liberties in the areas of academic freedom and political expression." *Id.* at 250. The Court concluded that because there was no indication that the legislature actually wanted the information that the attorney general had elicited from Sweezy, the Due Process Clause of the Fourteenth Amendment disallowed the use of the contempt power in this case. *Id.* at 254–55.

71. *Id.* at 262–63 (Frankfurter, J., concurring).

72. *See Grutter*, 539 U.S. at 331 ("This Court has long recognized that education . . . is the very foundation of good citizenship.") (citations omitted); Bd. of Educ. v. Pico, 457 U.S. 853, 877 (1982) (Blackmun, J., concurring) (quoting *Barnette*); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) ("Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction.").

III. Constitutional Academic Freedom

The Court has used constitutional academic freedom to halt blatant invasions of individual liberty in the academic context. Consequently, the focus of academic freedom has shifted through the years to reflect the class of individuals currently held in the crosshairs of governmental power. When the Court confronted its first academic freedom cases, its precedents provided for less protection to speech than at present.[73] Until the twentieth century the Supreme Court's encounters with the First Amendment had been rare. The Court's view of First Amendment freedoms, even in the late 1950s, was somewhat restrictive.[74] Speech found contrary to the public welfare, the peace, or the foundations of governmental authority was less likely to be protected.[75] The first academic freedom cases, which concerned the rights of teachers, arose as one of the first chinks in the armor of this narrow conception of individuals' freedom to hold and effectively advocate their views.

A. The Teacher

The Supreme Court introduced constitutional academic freedom to the law in the 1950s and 1960s to circumscribe government's targeting of public school teachers and professors with socialist sympathies or communist views.[76]

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73. *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 655, 668, 670 (1925) (ruling that the state's "right of self preservation" justified upholding Gitlow's conviction for criminal anarchy for writing a document entitled the Left Wing Manifesto and publishing a newspaper called *The Revolutionary Age*); Debs v. United States, 249 U.S. 211, 214–15 (1919) (finding that if one purpose of speech is opposition to a specific war, and the natural effect of that expression is to obstruct military recruiting, that the speech is not protected by the First Amendment).

74. For example, the Court did not adopt an imminency requirement for the proscription of advocacy of illegal activity or the use of force, thereby overruling *Whitney*, until its decision in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

75. *See* Whitney v. California, 274 U.S. 357, 371 (1927) ("[A] State in the exercise of its police power may punish those who abuse this freedom [of speech] by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government . . . .").

76. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 609–10 (1967) (invalidating a New York statute making treasonable or seditious words grounds for removal from the public school system or state employment); Whitehill v. Elkins, 389 U.S. 54, 60–62 (1967) (disapproving a loyalty oath applied to teachers); Barenblatt v. United States, 360 U.S. 109, 113 (1959) (questioning a teacher's conviction for contempt of Congress for failing to disclose whether he had ever been a member of the Communist Party); Sweezy v. New Hampshire, 354 U.S. 234, 254–55 (1957) (invalidating a professor's conviction for contempt for refusing to answer questions pertaining to his lectures, advocacy of socialism, and familiarity with a socialist political organization); Wieman v. Updegraff, 344 U.S. 183, 191 (1952) (striking down a loyalty

Concerned that instructors were inculcating their students with revolutionary ideas, both state and local governments began to intervene actively in the academic realm.[77] Initially the Court's academic freedom cases involved loyalty oaths, contempt proceedings for failure to disclose knowledge of or participation in socialist groups, and statutes making treasonable or seditious words grounds for removal from public employment.[78] Consequently, these cases tend to focus on the individual teacher's First Amendment freedoms of association, belief, and speech.

While the Court did not always intervene to protect teachers' intellectual freedoms, several Justices began to articulate the broad grant of autonomy of advocacy and belief now associated with the First Amendment.[79] Justice Black's dissent in *Barenblatt v. United States*,[80] which upheld a professor's contempt conviction for failing to disclose whether he had ever been a member of the Communist party, exemplifies these defenses of intellectual freedom.[81]

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oath requirement for employees of a state college in Oklahoma); Adler v. Bd. of Educ., 342 U.S. 485, 488–91 (1952) (concerning the dismissal of public school employees in New York who advocated or were members of organizations who advocated the overthrow of government by unlawful means).

77. *See supra* note 76 (citing cases that reveal government efforts to remove teachers with socialist or communist views).

78. *See supra* note 76 (summarizing the issues presented in the academic freedoms cases of the 1950s and 1960s).

79. Justices Hugo Black and William Douglas were particularly active in this regard. *See infra* notes 80–84 and accompanying text (offering examples of their defense of an unfettered individual search for truth).

80. *See* Barenblatt v. United States, 360 U.S. 109, 134 (1959) (upholding Barenblatt's conviction for contempt for failing to answer questions concerning his political beliefs and association with the Communist Party). The issue in *Barenblatt* was whether Congress could compel a teacher to testify as to his membership in the Communist Party during an inquiry into Communist infiltration of the field of education. *Id.* at 113. Barenblatt asserted that Congress had no authority to question him on his political beliefs or associational activities and refused to answer questions regarding his affiliations and knowledge of the Communist Party. *Id.* at 114. The Court found that Congress had granted the Un-American Activities Committee "pervasive authority to investigate Communist activities in this country," that the field of education had not been excluded from its purview, that Barenblatt had knowledge of the nature of the inquiry, and that the questions posed to him were relevant to the investigation at issue. *Id.* at 118, 121, 124–25. Further, the Court determined that a balancing of the private and public interests in the case had to be resolved in favor of the government based on Congress's "wide power to legislate in the field of Communist activity" and the Court's long-standing refusal to view "the Communist Party as an ordinary political party." *Id.* at 127–28. Ultimately, the Court found the national interest in "self preservation" justified upholding Barenblatt's conviction. *Id.* at 128, 134.

81. Another example of these early defenses of individual belief and inquiry is found in Justice Douglas's dissent in *Adler v. Board of Education*, 342 U.S. 485, 510–11 (1952), in which he states:

> [S]pying and surveillance with its accompanying reports and trials cannot go hand

In *Barenblatt*, Justice Black denied that government has the power to proscribe ideas.[82] Instead, he maintained that "the only constitutional way our Government can preserve itself is to leave its people the fullest possible freedom to praise, criticize or discuss, as they see fit, all governmental policies and to suggest, if they desire, that even its most fundamental postulates are bad and should be changed."[83] The rhetoric set forth in this era reflects these Justices' interest in assuring that teachers and professors would not be discharged for expressing their "philosophical, political, or ideological beliefs."[84]

The Court has also recognized that academic freedom extends First Amendment principles of autonomous inquiry into the employment relationship between college level instructors and the state.[85] Dicta in cases covering a wide time span and diverse issues address these prerogatives of professors, which include the freedoms of teaching and research. Ranging from the 1950s to the year 2000, relevant cases deal with questions as to whether professors are managerial employees,[86] the right of professors to counsel the state on employment policies,[87] and the content of the science curriculum in public schools.[88] Affirming professors' right to direct their own research and teaching

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in hand with academic freedom. It produces standardized thought, not the pursuit of truth. Yet it was the pursuit of truth which the First Amendment was designed to protect. A system which directly or inevitably has that effect is alien to our system and should be struck down. Its survival is a real threat to our way of life. We need be bold and adventuresome in our thinking to survive.

82. *See Barenblatt*, 360 U.S. at 145 (Black, J., dissenting) ("I . . . deny that ideas can be proscribed under our Constitution.").

83. *Id.* at 145–46 (Black, J., dissenting).

84. Bd. of Regents v. Roth, 408 U.S. 564, 581 (1972) (Douglas, J., dissenting).

85. *See* Univ. of Penn. v. EEOC, 493 U.S. 182, 198 n.6 (1990) ("Where, as was the situation in the academic-freedom cases, government attempts to direct the content of speech at public educational institutions, complicated First Amendment issues are presented because government is simultaneously both speaker and regulator.").

86. *See* NLRB v. Yeshiva Univ., 444 U.S. 672, 700 (1980) ("[T]he notion that a faculty member's professional competence could depend on his undivided loyalty to management is antithetical to the whole concept of academic freedom. Faculty members are judged by their employer on . . . their teaching and scholarship, not on the compatibility of their advice with administration policy.").

87. *See* Minn. State. Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 296 (1984) (Brennan, J., dissenting) ("[W]e have not hesitated to strike down laws that effectively inhibit the free discussion of novel or controversial ideas . . . or that directly prohibit the teaching of unpopular subject matter.") (citations omitted).

88. *See* Edwards v. Augillard, 482 U.S. 578, 586 (1987) (stating that "academic freedom . . . might, in common parlance, be understood as referring to enhancing the freedom of teachers to teach what they will").

so often in dicta, the Court now seems to take these aspects of teachers' academic freedom for granted. Justice Souter, for example, described this facet of constitutional academic freedom in 2000 as the "autonomy that bars legislatures (and courts) from imposing conditions on the spectrum of subjects taught and viewpoints expressed in college teaching."[89]

B. The Student

The Supreme Court has applied constitutional academic freedom not only to teachers but also to students in public schools at both the secondary and university level.[90] More than a decade before the early academic freedom cases, the Court established students' rights to freedom of conscience by striking down a law requiring them to salute the American flag.[91] Justice Jackson, in his opinion for the Court, explained that if there is "any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[92] Later, in *Barenblatt*, the Court explicitly recognized that this principle mandated recognizing students' "learning-freedom" as the natural "corollary" to

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89. Bd. of Regents v. Southworth, 529 U.S. 217, 239 (2000) (Souter, J., concurring). Despite academic freedom's popular association with the rights of professors, the Supreme Court's constitutional academic freedom jurisprudence more clearly defines the rights of students than it does the rights of their teachers. *Compare supra* Part III.A (laying out the Court's portrayal of the constitutional academic freedom rights of professors), *with infra* Part III.B (summarizing the Court's description of the constitutional academic freedom rights of students).

90. *See Edwards*, 482 U.S. at 588 n.8 ("The dissent concludes that the Act's purpose was to protect the academic freedom of students, and not that of teachers. Such a view is not at odds with our conclusion . . . ."); Healy v. James, 408 U.S. 169, 197 (1972) (Douglas, J., concurring) ("Students as well as faculty are entitled to credentials in their search for truth."); Baggett v. Bullitt, 377 U.S. 360, 366 n.5 (1964) ("[T]he interests of the students at the University in academic freedom are fully protected . . . ."); Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1985) ("Academic freedom thrives . . . on the independent and uninhibited exchange of ideas among teachers and students . . . ."); Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) ("Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."); Whitehill v. Elkins, 389 U.S. 54, 60 (1967) (citing *Sweezy*); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) ("Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.").

91. *See* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (establishing that students could not be compelled to salute or pledge allegiance to the United States flag).

92. *Id.*

"academic teaching-freedom."[93] In *Keyishian v. Board of Regents*,[94] a 1967 case concerning the dismissal of two college instructors for failing to divulge whether they had ever been Communists, the Court expounded on academic freedom generally.[95] The *Keyishian* Court labeled academic freedom a "special concern of the First Amendment."[96] Explaining that academic freedom is "of transcendent value to all of us and not merely the teachers concerned" and that "the classroom is peculiarly the 'marketplace of ideas,'" the Court suggested that constitutional academic freedom applied to students.[97] Not until the 1970s, however, would the Court elaborate upon the full extent of students' academic freedom.

Societal conflict surrounding the Vietnam War first prompted the Court to revisit students' academic freedom rights. In *Tinker v. Des Moines Independent Community School District*,[98] a case concerning secondary

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93. Barenblatt v. United States, 360 U.S. 109, 112 (1959).

94. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 606 (1967) (ruling that membership in an organization that advocates unlawful activity is not a sufficient basis for excluding an individual from public employment). In *Keyishian*, the Court examined the validity of the dismissal of two teachers by the public University of New York for refusing to divulge whether they were or had ever been Communists. *Id.* at 592. New York passed the Feinberg Law, which required the State Board of Regents to promulgate regulations for the disqualification and removal of persons in the public school system who engaged in treasonable or seditious speech or activity, or who were members of "subversive organizations." *Id.* at 593–94. The University dismissed Keyishian, a professor, as well as another individual, who was a librarian and part-time lecturer in English, for failure to comply with a policy that required them to sign a statement that they were not Communists, or if they had ever been Communists that they had revealed this fact. *Id.* at 592. The Court found the statute's definitions of "treasonable" and "seditious" to be unconstitutionally vague. *Id.* at 598–99. Justice Brennan found it particularly significant that a teacher could not reasonably determine "just where the line is drawn between 'seditious' and nonseditious utterances and acts." *Id.* at 599. Placing particular emphasis on academic freedom, the Court ruled that although the government's purpose was legitimate, it could not pursue this legitimate end by means that broadly stifled fundamental liberties when more narrowly tailored means were available. *Id.* at 602. The Court declared that membership in an organization, without specific intent to further its unlawful aims, is not a sufficient constitutional basis for exclusion from employment by the state. *Id.* at 606.

95. *See supra* note 94 (detailing the Court's holding in *Keyishian*).

96. *Keyishian*, 385 U.S. at 603.

97. *Id.*

98. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (finding students' silent war protest, while at school, to be speech protected by the First Amendment). *Tinker* presented the question of whether a public school could constitutionally ban students from wearing black armbands on school premises in symbolic opposition to the Vietnam War. *Id.* at 504. A group of students objecting to the Vietnam War decided to voice support for a truce by wearing black armbands and fasting on two predetermined dates. *Id.* Principals in Des Moines became aware of the plan and declared that students who refused to remove their armbands while at school would be suspended. *Id.* School officials suspended five students for wearing the armbands and promptly sent them home. *Id.* at 508. The Court explained that

students' war protest involving the wearing of black armbands, the Court made clear that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[99] *Tinker* established that "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."[100] As a result, students are free to express their views unless doing so "materially and substantially" interferes with appropriate school discipline or collides with the rights of others.[101]

Three years later the Court took up college students' academic freedoms in *Healy v. James*.[102] *Healy* involved a suit by Students for a Democratic Society against a public university for refusing to recognize the group as an official student organization because of its virulent antiwar views.[103] Recognizing the possible conflict between a university's autonomous decisionmaking and the

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students and teachers do not loose their constitutional rights in the school environment. *Id.* at 506. The Court characterized the wearing of armbands here as "entirely divorced" from disruptive conduct and thus closely akin to "pure speech." *Id.* at 505. Finding that an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression," the Court ruled that prohibitions of expression must be based on more than a desire to avoid the tension that inevitably accompanies an unpopular viewpoint. *Id.* at 508–09. Prohibitions on student speech may not be viewpoint specific. *Id.* at 511. Because the students' actions did not constitute a "substantial disruption of or material interference with school activities," the Court upheld the students' right to protest. *Id.* at 514.

99. *Id.* at 506.

100. *Id.* at 511.

101. *Id.* at 513.

102. *See* Healy v. James, 408 U.S. 169, 187–88 (1972) (finding that a state university could not deny official recognition to a student group based upon the viewpoint its members wished to express). The question presented in *Healy* was whether Central Connecticut State College (CCSC) could deny recognized status to a group called Students for a Democratic Society (SDS) based upon opposition to the group's ideology, a likely connection to a national organization that had disrupted other college campuses nationally, and other unspecific fears of interference with school activities. *Id.* at 172–76. The students involved properly prepared an application for official recognition at CCSC, stating that the aims of the group were to provide a forum for discussion and self-education for students to bring about constructive change and to provide a coordinating body for relating problems of leftist students with others. *Id.* at 172. The president of the university found the group's philosophy antithetical to the school's policies. *Id.* at 174–75. The Court found that the denial of official recognition seriously hindered the organization's "existence and growth." *Id.* at 176. The Court stressed the constitutional significance of an academic environment offering "the widest latitude for free expression and debate consonant with the maintenance of order." *Id.* at 171. Justice Powell found that the college had imposed a form of prior restraint upon its students' freedom of association. *Id.* at 181, 184. The Court stated that the government may not "restrict speech or association simply because it finds the views expressed by any group to be abhorrent." *Id.* at 187–88. Ultimately, the Court determined that the burden rested on the college to prove that official recognition of SDS was not appropriate and remanded the case. *Id.* at 184, 194.

103. *See id.* at 173–76 (discussing the nature of the school's objections to the student group).

"widest latitude for free expression and debate consonant with the maintenance of order," the Court declared that when these interests conflict the First Amendment "strikes the required balance."[104] *Healy* thus makes clear that a state university may not "restrict speech or association simply because it finds the views expressed by any group to be abhorrent."[105] Justice Powell's opinion in *Healy* further emphasized that all of students' First Amendment freedoms, including that of association, apply in full force within public universities.[106]

In the late 1960s and 1980s, the Court began to actualize a facet of student academic freedom more finely tailored to the academic context—what the Court in *Barenblatt* termed "learning-freedom."[107] The Court sowed the seeds of the freedom to learn in the 1920s by invalidating state statutes banning the instruction of children in foreign languages.[108] *Tinker* re-characterized these prohibitions on learning as "unconstitutionally interfer[ing] with the liberty of teacher, student, and parent."[109] The famous case of *Griswold v. Connecticut*[110] further laid down a categorical prohibition on government "contract[ing] the spectrum of available knowledge," which further reinforced this principle.[111] Thereafter, several Justices, in cases involving secondary schools, located within the First Amendment a "guarantee of free communication," or the "right to hear, to learn, [and] to know."[112] By 1982, a majority of the Court asserted that the Court's precedents recognized students' "right to receive information and ideas" and utilized this right in overruling a school board's decision to

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104. *Id.* at 171.

105. *Id.* at 187–88.

106. *See id.* at 180 ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.").

107. Barenblatt v. United States, 360 U.S. 109, 112 (1958).

108. *See* Bartels v. Iowa, 262 U.S. 404, 409 (1923) (overturning a conviction for teaching German in light of *Meyer*); Meyer v. Nebraska, 262 U.S. 390, 402–03 (1923) (invalidating Meyer's conviction for teaching German to a child under a statute that forbade instructing children in foreign languages).

109. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

110. Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (finding a Connecticut law forbidding use of contraceptives unconstitutionally intruded upon married couples' right of privacy).

111. *Id.*

112. Presidents Council, Dist. 25 v. Cmty. Sch. Dist., 409 U.S. 998, 999 (1972) (Douglas, J., dissenting from denial of certiorari) ("The First Amendment involves not only the right to speak and publish but also the right to hear, to learn, to know."); Epperson v. Arkansas, 393 U.S. 97, 116 (1968) (Stewart, J., concurring) (noting the "guarantees of free communication contained in the First Amendment, and made applicable to the States by the Fourteenth").

remove certain books from secondary school libraries.[113] Thus, the Court has indicated, as Justice Douglas stated in *Healy*, that "[s]tudents as well as faculty are entitled to credentials [or certain rights] in their search for truth."[114]

C. The University

The Court's vision of constitutional academic freedom has never focused solely on individual rights. In fact, Justice Frankfurter's influential opinion in *Sweezy*, which serves as the basis of the Court's academic freedom jurisprudence, set forth the "four essential freedoms of a university."[115] These freedoms, which are often repeated in the Court's university cases, consist of the freedom to determine "on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[116] Academic freedom, in its institutional guise, traditionally applies to these rights, which grant educational experts the corporate ability to govern the aspects of university life most intimately related to the educational process.

In more recent cases, the Court's notion of institutional academic freedom has expanded beyond a recognition of the four explicit freedoms of universities, to include a generalized principle of deference to a university's academic decisions.[117] For example, in *Regents of the University of California v. Bakke*,[118] involving a challenge to a state medical school's race-conscious

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113. Bd. of Educ. v. Pico, 457 U.S. 853, 866–67 (1982); *see also id.* at 867 ("[W]e have held in a variety of contexts 'the Constitution protects the right to receive information and ideas.'" (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969))).

114. Healy v. James, 408 U.S. 169, 197 (1972) (Douglas, J., concurring).

115. Grutter v. Bollinger, 539 U.S. 306, 363 (2003) (Thomas, J., concurring in part and dissenting in part); Bd. of Regents v. Southworth, 529 U.S. 217, 238 (2000) (Souter, J., concurring); Widmar v. Vincent, 454 U.S. 263, 279 n.2 (1981) (Stevens, J., concurring); Univ. of Penn. v. EEOC, 493 U.S. 182, 196 (1990); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978); Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

116. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957).

117. *See* Grutter v. Bollinger, 539 U.S. 306, 328 (2003) ("Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits."); Univ. of Penn. v. EEOC, 493 U.S. 182, 199 (1990) ("[C]ourts have stressed the importance of avoiding second-guessing of legitimate academic judgments."); *Epperson*, 393 U.S. at 104 ("Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."); *Sweezy*, 354 U.S. at 250 ("We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread.").

118. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978) (finding the admissions policy at the Medical School of the University of California at Davis

admissions program, the Court highlighted "[t]he freedom of a university to make its own judgments as to education."[119] Even in cases where the Court has not sided with the university, it has gone to great pains to affirm this "respect for *legitimate* academic decisionmaking."[120] The majority opinion in *Grutter v. Bollinger*, another challenge to race-conscious admissions, represents the most sweeping example of this deference, which Justice O'Connor described as effectuating the "constitutional dimension . . . of educational autonomy."[121] Respect for this autonomy has led the Court to defer increasingly to universities' academic judgment on matters affecting the university community.[122]

While this deference to academic judgment is substantial, it is not absolute.[123] As the Court has recognized, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[124] Students' First Amendment freedoms have been singled out for special protection within this environment.[125] A choice by school authorities must be a truly academic decision, and thus consonant with educational expertise, to receive deference from a court.[126] The Supreme Court has resisted school officials' efforts to extend such deference to decisions that

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unconstitutional but upholding the use of race in state schools' admissions decisions).

119. *Id.* at 312.

120. Univ. of Penn. v. EEOC, 493 U.S. 182, 199 (1990).

121. *Grutter*, 539 U.S. at 329.

122. The four dissenting Justices in *Grutter* commented extensively on the "unprecedented deference" the majority granted to the law school. *Id.* at 362 (Thomas, J., dissenting and concurring in part); *see also id.* at 380 (Rehnquist, J., dissenting) ("Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference."); *id.* at 388–89 (Kennedy, J., dissenting) ("The Court, in a review that is nothing short of perfunctory, accepts the University of Michigan Law School's assurances that its admissions process meets with constitutional requirements.").

123. *See* Sweezy v. New Hampshire, 354 U.S. 234, 262 (1957) ("Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling.").

124. Healy v. James, 408 U.S. 169, 180 (1972); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969); Epperson v. Arkansas, 393 U.S. 97, 104 (1968); Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967); Shelton v. Tucker, 364 U.S. 479, 487 (1960).

125. *See Epperson*, 393 U.S. at 104 ("Our courts . . . have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief.").

126. *See* Univ. of Penn. v. EEOC, 493 U.S. 182, 199 (1990) ("[C]ourts have stressed the importance of avoiding second-guessing of legitimate academic judgments. . . . Nothing we say today should be understood as a retreat from this principle of respect for *legitimate* academic decisionmaking.").

unnecessarily inhibit students' First Amendment freedoms.[127] This resistance is at its height when the school attempts to regulate voluntary learning activities that take place outside of the compulsory environment of the classroom.[128]

D. Understanding Academic Freedom

The Supreme Court has never stated whether constitutional academic freedom applies to private universities.[129] The Court, however, has never applied constitutional academic freedom to a private school.[130] While no

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127. *See* Healy v. James, 408 U.S. 169, 187–88 (1972) (finding that government may not "restrict speech or association simply because it finds the views expressed by any group to be abhorrent"); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (ruling that school officials' expulsion of students for wearing armbands to protest the Vietnam War violated the students' First Amendment rights); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.").

128. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 869 (1982) ("Petitioners might well defend their claim of absolute discretion in matters of curriculum . . . . But we think that petitioners' reliance upon that duty is misplaced where . . . they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom . . . .").

129. *See* Rabban, *supra* note 44, at 266–67 ("The Court has never had to resolve whether constitutional academic freedom has different meanings at private than at public universities, but it did recognize this issue in University of Pennsylvania [sic], its only major decision involving an academic freedom claim by a private university.").

130. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 311 (2003) (bringing suit against the University of Michigan); Bd. of Regents v. Southworth, 529 U.S. 217, 221 (2000) (regarding a suit brought against the University of Wisconsin); Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 215 (1985) (concerning a suit brought against the University of Michigan); *Pico*, 457 U.S. at 856 (bringing suit against the Board of Education of the Island Trees Union Free School District No. 26); Widmar v. Vincent, 454 U.S. 263, 263 (1981) (regarding an action taken by the University of Missouri at Kansas City); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 269 (1978) (concerning a suit brought against the University of California); *Healy*, 408 U.S. at 172 (bringing suit against Central Connecticut State College); *Tinker*, 393 U.S. at 504 (regarding an act of the Des Moines School District); *Epperson*, 393 U.S. at 98 (concerning the science curriculum in Arkansas's public schools); Keyishian v. Bd. of Regents, 385 U.S. 589, 591 (1967) (bringing suit against the State University of New York); Barenblatt v. United States, 360 U.S. 109, 114 (1958) (regarding Barenblatt's activities while at the University of Michigan); Sweezy v. New Hampshire, 354 U.S. 234, 243 (1957) (concerning a professor's lecture at the University of New Hampshire); Adler v. Bd. of Educ., 342 U.S. 485, 487 (1952) (bringing suit against the Board of Education of the City of New York); *see also* NLRB v. Yeshiva University, 444 U.S. 672, 700 (1980) (discussing professional academic freedom, rather than constitutional academic freedom, in characterizing professors at a private university as managerial employees); *Univ. of Penn.*, 493 U.S. at 199 (refusing to recognize an "*expanded*" academic freedom right to shield a private university's tenure review files).

definitive answer to this question is possible, it is worth addressing because the result may substantially strengthen or weaken law schools' and universities' First Amendment claims.[131] FAIR asserted academic freedom, freedom of speech, and the freedom of association as three separate shields against governmental interference in universities' internal affairs.[132] This section argues that constitutional academic freedom applies only to public universities and that public schools do not possess additional associational rights.

Constitutional academic freedom gains coherence as a First Amendment doctrine only in its application to public schools. The Court's conception of constitutional academic freedom encompasses three distinct groups—professors, students, and universities as institutions.[133] Professors and students necessarily possess the First Amendment rights of free speech and association all citizens hold against governmental coercion. What sets professors' and students' academic freedoms apart from these other First Amendment rights is context—academic freedom is asserted against the government in the context of public schools.[134] These rights are meaningless when applied to private universities because there is no state actor involved.[135]

Only public schools need constitutional academic freedom to be insulated from direct government control, thus enabling them to exercise the four

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131. It is clear, however, that professional academic freedom applies to both public and private universities. *See* Rabban, *supra* note 44, at 231 (stating that the professional conception of academic freedom "applies equally in public and private universities"). *But see* DeMitchell, *supra* note 38, at 18 ("Alleged violations of academic freedom in the private sector are typically adjudicated using contract law and not constitution [sic] law. Academic freedom is a special concern of the First Amendment and not contract law.").

132. *See* Brief for Appellants, *supra* note 14, at 30 ("[T]he government regulation in this case calls into play three distinct constitutional rights—academic freedom, freedom of speech, and freedom of expressive association.").

133. *See supra* Part III.A–C (detailing the Court's application of constitutional academic freedom to professors, students, and universities).

134. *See supra* note 130 (listing the public schools involved in the Court's academic freedom cases). *But see* Barenblatt v. United States, 360 U.S. 109, 115 (1958) (regarding Barenblatt's conviction for contempt of Congress); Sweezy v. New Hampshire, 354 U.S. 234, 243 (1957) (concerning Sweezy's contempt conviction for refusing to answer questions posed by the New Hampshire Attorney General). *Barenblatt* and *Sweezy* did not involve cases against public schools, although they involved events at public universities. They have been described, however, as free speech cases. *See, e.g.*, Horwitz, *supra* note 27, at 483 (stating that the court's "clear concern" in *Sweezy* was "regulation of speech . . . in an academic context"); Rebecca Gose Lynch, Note, *Pawns of the State or Priests of Democracy?*, 91 CAL. L. REV. 1061, 1082 (2003) ("Where a court determines that a professor's speech . . . constitutes citizen speech in which the state lacks any special interest, the claim is not properly one of academic freedom but rather one of freedom of speech generally.").

135. *See* Rabban, *supra* note 44, at 231 ("In private universities . . . state action applies only to claims by professors and universities against the state.").

essential freedoms of a university.[136] Individuals in private schools possess the primary First Amendment rights of freedom of speech, association, and in some cases religion, which effectively insulates them from governmental interference.[137] The Court's recent exposition of the freedom of association in *Dale*, which focused "on expressive associations rather than the act of associating itself,"[138] provides private schools with particularly strong protection against government attempts to commandeer their expression for governmental purposes.[139]

Public schools lack this associational protection because, as arms of the state, they are subject to the general principle that the government may not assert constitutional rights against itself. Institutional academic freedom exists to grant a measure of associational autonomy to public schools in carrying out their core academic functions.[140] Academic freedom is thus unique because it is "the only constitutional right exercised by state actors."[141] Professors' constitutional academic freedom allows them, as state actors, to assert constitutional rights against the state.[142] Similarly, the constitutional academic freedom of universities as institutions allows public universities, as governmental entities, to preclude other government actors from interfering with purely academic affairs.[143]

Public institutions are further subject to governmental norms of ideological neutrality that set them apart from their private peers.[144] They

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136. *See supra* Part III.C (discussing the four essential freedoms of a university).

137. *See* Rabban, *supra* note 44, at 300 ("Independent constitutional rights . . . may protect the autonomy of private universities . . . . But these additional constitutional rights, because they do not address the distinctive functions of professors and universities, should not fall under the rubric of academic freedom.").

138. Daniel A. Farber, *Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483, 1485 (2001).

139. *See* Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1842 (2001) ("[A]ssociations . . . mediate between persons and the state; and the First Amendment denies to government any right or power to standardize belief or impose orthodoxy by commandeering such expression or transmission.").

140. *See* Byrne, *supra* note 36, at 300 ("A state university is a unique state entity in that it enjoys federal constitutional rights against the state itself.").

141. *Id.*

142. *See* Cheryl A. Cameron et al., *Academic Bills of Rights: Conflict in the Classroom*, 31 J.C. & U.L. 243, 248 (2005) ("Constitutional academic freedom can only be claimed by faculty at governmental institutions.").

143. *See supra* Part III.C (describing the four essential freedoms of a university).

144. *See* Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("'The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.'" (quoting Watson v. Jones 80 U.S. 679, 728 (1871))).

have "less discretion than private universities in selecting educational purposes that arguably deviate from democratic values" because such a deviation would "violate the [F]irst [A]mendment obligations of public universities to diversity of thought."[145] The Supreme Court has justified constitutional academic freedom in terms of this ideological neutrality principle and thus tailored it to the unique function of public schools.[146] Conceptualizing the institutional rights of public and private universities in the same way, therefore, is fundamentally misleading. The freedoms of universities to determine who shall teach, what shall be taught, how it shall be taught, and who shall be admitted to study mean substantially different things in the public and private context, at least as far as the Constitution is concerned. Institutional academic freedom gives public universities great latitude in this regard, but it does not give them rights equal to those possessed by private schools.[147]

Ultimately, "the only constant for academic freedom is the public institution."[148] Professors and students in private schools possess general First Amendment protection against government invasion of their intellectual liberties.[149] After *Dale*, private schools may claim similar generally applicable associational rights.[150] Constitutional academic freedom applies only when the government is "simultaneously both speaker and regulator."[151] Only public universities meet this description, asserting limited associational rights against the government, while regulating the expression of professors and students as arms of the state.[152]

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145. Rabban, *supra* note 44, at 268.

146. *See supra* Part II.C (explaining the rationales the Court has used to justify constitutional academic freedom); Lynch, *supra* note 134, at 1090 ("[T]he Supreme Court has justified the concept [of constitutional academic freedom] by reference to particular missions of public educational institutions.").

147. *See* Rabban, *supra* note 44, at 268 (stating that public universities are "bound by the [F]irst [A]mendment in their relationships with faculty and students").

148. DeMitchell, *supra* note 38, at 18.

149. Professors in private schools also enjoy professional academic freedom rights as a matter of contract. *See id.* ("Alleged violations of academic freedom in the private sector are typically adjudicated using contract law and not constitution [sic] law.").

150. *See* Farber, *supra* note 138, at 1496 (commenting that in *Hurley* and *Dale* the Court focused on "protecting the expression of organizations, rather than on protecting the desire of the members to combine their voices"); *see also* Horwitz, *supra* note 27, at 520 (noting that the Third Circuit drew on an aggressive reading of *Dale* to strike down the Solomon Amendment).

151. Univ. of Penn. v. EEOC, 493 U.S. 182, 198 n.6 (1990).

152. *See* Rabban, *supra* note 44, at 231 ("[P]ublic universities may invoke the [F]irst [A]mendment to assert independence from the states that create them, and simultaneously are themselves state institutions constrained by the [F]irst [A]mendment.").

IV. Academic Freedom and the Law Schools

Although both the district court and Third Circuit gave academic freedom little weight in their constitutional analysis, FAIR once described academic freedom as "the principal basis" of its claims.[153] Law schools' conception of academic freedom centers upon an aggressive notion of institutional sovereignty, actualized through the four essential freedoms of a university and a more generalized principle of universities' autonomy from the state.[154] This Part summarizes law schools' claims concerning the two essential freedoms of a university that are arguably infringed by the Solomon Amendment—the freedom to determine what shall be taught and how it shall be taught—as well as law schools' general claims to deference from the Court.

A. Setting the Stage

Most law schools have made the institutional decision that discrimination in employment against homosexuals is immoral and unacceptable because sexual practices bear no relation to individuals' suitability for employment.[155] Consequently, they have instituted nondiscrimination policies that prohibit recruiters who discriminate on the grounds of sexual orientation from using law schools' offices of career services.[156] Law schools asserted that these nondiscrimination policies have pedagogical significance because law professors deliberately seek to inculcate their students with nondiscriminatory views.[157]

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153. Horwitz, *supra* note 27, at 519.

154. *See id.* at 521 (commenting that FAIR's claims draw heavily off of an institutional autonomy reading of academic freedom rooted in the Supreme Court's decision in *Grutter*).

155. *See* Complaint at 3, Forum for Academic & Inst. Rights, Inc. v. Rumsfeld, 291 F. Supp. 2d 269 (D.N.J. 2003) (03 Civ. 4433) (stating that sexual orientation bears "no relation to merit").

156. *See* Brief for the Respondents in Opposition to Certiorari at 19, Rumsfeld v. Forum for Academic & Inst. Rights, No. 04-1152 (Sup. Ct. Mar. 30, 2005) ("No . . . employer can enjoy a law school's recruiting assistance without certifying that it does not discriminate.").

157. *See* Second Amended Complaint at 2, Forum for Academic & Inst. Rights, Inc. v. Rumsfeld, 291 F. Supp. 2d 269 (D.N.J. 2003) (03 Civ. 4433) (stating that military recruiters' discriminatory message "violates the core values [law schools] inculcate in their students and faculty."); Brief for Appellants, *supra* note 14, at 16 (explaining that law schools' nondiscrimination policies are "designed to inculcate values and to shape the pedagogical environment"); Brief for the Respondents in Opposition to Certiorari, *supra* note 156, at 1 (asserting that law schools have "long been . . . institutions with a mission to inculcate a set of values in their students").

B. What May Be Taught

Law schools viewed assisting the recruiting efforts of military recruiters as overturning faculties' pedagogical determination of what to teach. Describing themselves as "normative institutions," law schools claimed that they have made the educational decision to teach their students a fundamental principle—"do not discriminate, do not assist others who discriminate," "no exceptions."[158] The Solomon Amendment, however, requires law schools to offer military recruiters the same recruitment services they provide to other employers in order to keep large amounts of government funding. FAIR's members viewed teaching nondiscrimination values, while furthering discriminatory recruiting on campus, as effectively preventing law schools from teaching nondiscrimination at all.[159] In essence, law schools claimed that military recruiting on campus results in a curriculum change.[160] Because faculties' decision to adopt nondiscrimination policies is part of a larger effort to inculcate students with nondiscrimination values, law schools asserted that the implementation of nondiscrimination policies represents an "exercise of academic judgment" protected by universities' academic freedom to determine what to teach.[161]

FAIR also contended that homosexual students cannot hear law schools' nondiscrimination message because of the "static" caused by the military's discriminatory activity.[162] Instead of receiving the law schools' message, FAIR asserted that students are told that discrimination on the basis of sexual orientation is not as serious as other forms of illegal discrimination.[163] Law

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158. Brief for the Respondents at 28, Rumsfeld v. Forum for Academic & Inst. Rights, 126 S. Ct. 1297 (2006) (No. 04-1152).

159. *See* Reply Brief for Appellants at 13, Forum for Academic & Inst. Rights v. Rumsfeld, 390 F.3d 219 (3d Cir. 2004) (No. 03-4433) (asserting the "unremarkable position that when a school aspires to teach a lesson, the lesson is more effectively communicated when the messenger is not demonstrably hypocritical"); Brief for the Respondents, *supra* note 158, at 14 (commenting that some have determined that because of the military recruiters' presence "the schools are not committed to antidiscrimination, and that the law schools have lost credibility to preach values of equality, justice, and human dignity").

160. *See* Memorandum of Law in Opposition to Defendants' Motion to Dismiss at 6–7, Forum for Academic & Inst. Rights, Inc. v. Rumsfeld, 291 F. Supp. 2d 269 (D.N.J. 2003) (03 Civ. 4433) (asserting that law faculty are being denied "the fulfillment of [their] educational mission and the meaningful exercise of [their] own rights of academic freedom").

161. Brief for the American Association of University Professors, *supra* note 49, at 8.

162. Memorandum of Law in Opposition to Defendants' Motion to Dismiss, *supra* note 160, at 6.

163. *See* Brief for Student/Faculty Alliance for Military Equality (SAME) at 21, as Amici Curiae Supporting Respondents, Rumsfeld v. Forum for Academic & Inst. Rights, 126 S. Ct. 1297 (2006) (No. 04-1152) ("[S]tudents are told that discrimination on the basis of sexual

schools wished to communicate that employment with the Armed Forces is less honorable or desirable than employment with other on-campus recruiters, who do not discriminate on the basis of sexual orientation.[164] They believed the Solomon Amendment precludes the transfer of this idea from "a willing speaker . . . to a willing listener," thus undermining their decision regarding what to teach.[165]

C. *How It Shall Be Taught*

FAIR presented law schools' nondiscrimination policies as the means law faculties have chosen to teach nondiscrimination values to their students.[166] In FAIR's view, the Solomon Amendment prevents law schools from refusing to aid military recruiters. Thus, it hinders law faculties from actualizing the pedagogical principle that "legal education turns as much on modeling professional values as it does on formal classroom training."[167] In effect, FAIR contended that the enforcement of the law schools' nondiscrimination policies provides students with an "institutional teacher[]" of law schools' normative values.[168] Law schools argued that instruction at this level is lost when they must abide military recruiters' discrimination.

Law schools also asserted that universities' freedom to determine how their lessons are taught gives them extensive control over their schools' educational environment.[169] Law schools' stated goal is to create an atmosphere conducive to open discourse, in which individuals feel equal and

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orientation is negotiable. As explained by recent graduate Michael Kavey, the message currently transmitted is that discrimination based on sexual orientation is less objectionable than other forms of discrimination.").

164. *See* Brief for the Association of American Law Schools, *supra* note 3, at 8, 23 (explaining that AALS has established a "fundamental policy condemning discrimination" because law schools "abhor" "the military's recruiting message").

165. Brief for Student/Faculty Alliance for Military Equality, *supra* note 163, at 21.

166. *See* Complaint, *supra* note 155, at 9 ("The message of diversity and tolerance is communicated by law schools through . . . their policies.").

167. Brief for American Association of University Professors at 12, as Amici Curiae Supporting Respondents, Rumsfeld v. Forum for Academic & Inst. Rights, 126 S. Ct. 1297 (2006) (No. 04-1152).

168. Brief for the American Association of University Professors, *supra* note 49, at 19.

169. *See* Brief for Columbia University et al. at 19–20, as Amici Curiae Supporting Respondents, Rumsfeld v. Forum for Academic & Inst. Rights, 126 S. Ct. 1297 (2006) (No. 04-1152) ("The Court has recognized that decisions occurring outside of the classroom can affect the institutional atmosphere of the university, and '[i]t is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation.'") (citations omitted).

respected, and where students are judged solely on the merits of their ideas.[170] In order for this environment to exist, law schools believe they must offer special protection to homosexual students. FAIR argued that these students are otherwise less likely to assert their views because of the animosity they have experienced in other contexts.[171]

Law schools asserted that the introduction of military recruiters onto campus shatters the protective environment law schools have constructed for their homosexual students. FAIR contended that the military's recruiting practices introduced a foreign element of inequality to campus that effectively stifled homosexual students' expression.[172] In other words, homosexual students would no longer feel the safety that allows them to effectively express their views.[173] As a result, universities' character as facilitator of a wide spectrum of ideas is lost. Therefore, law schools argued that academic freedom must extend "beyond teaching and research narrowly understood" to include "the standards and methods . . . faculties bring to bear in shaping the educational environment outside the classroom."[174] Law schools thus claimed that the freedom to determine how to teach grants them almost total authority over campus activities, including the right to select the kind of "extracurricular student speech that is or is not germane to the ideas to be pursued in an institution of higher learning."[175]

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170. *See* Second Amended Complaint, Forum for Academic & Inst. Rights, *supra* note 157, at 4 ("Only this Court can restore the open environment of equality, mutual respect, and dignity that law professors and law students have grown to cherish and expect."); Brief for Appellants, *supra* note 14, at 20–21 (explaining that law schools seek to create an environment conducive to "open and honest discourse" where students are "judged [solely] on the merits of their ideas").

171. *See* Brief for Student/Faculty Alliance for Military Equality (SAME), *supra* note 163, at 20 ("The message of nondiscrimination is crucial to the law school's academic environment, which was for some students the first place where they could freely express their personal opinions."); Brief for the Association of American Law Schools, *supra* note 3, at 26 (indicating that "individuals with a diversity of backgrounds enrich the discourse and educational energy in a classroom" and that such "individuals will not participate freely unless their school accords them equal respect, dignity, and protection from discrimination").

172. *See* Brief for the Association of American Law Schools, *supra* note 3, at 19 ("[A]betting a discriminatory employer's recruiting efforts undermines the values of the Law School, and significantly interferes with the quality of the Law School's educational environment.").

173. *See* Memorandum of Law in Opposition to Defendants' Motion to Dismiss, *supra* note 160, at 6 (claiming that members of the Society of Law Teachers (SALT) have been "deprived of the ability to engage in the free and open discourse that flows naturally in an environment where all participants feel equally free to exchange ideas").

174. Brief for American Association of University Professors, *supra* note 167, at 3–4.

175. Brief for the American Association of University Professors, *supra* note 49, at 13.

D. University Autonomy

FAIR stressed that universities are so important to the wellbeing of society that the Court has recognized that their First Amendment freedoms are "substantively different . . . and broader" than those of similar expressive groups.[176] Law schools claimed that the Court has placed particular emphasis on insulating the academy from external interference.[177] As a result, they asserted that universities rights are "more pronounced and more rigorously safeguarded than the same rights in other contexts."[178]

The law schools argued that this special protection is manifested in the Court's reluctance to interfere with the academy's "autonomous decision-making."[179] Academic judgment is at its height when it involves an educational matter and represents faculties' reasoned application of their academic expertise.[180] Because law schools believe that the adoption of nondiscrimination policies meets both of these criteria, they suggested that these policies were protected by "the First Amendment right to academic freedom."[181] Consequently, FAIR asserted that any attempt by the government to hinder the comprehensive application of law schools' nondiscrimination policies must fail.

In sum, FAIR claimed that the Solomon Amendment violates law schools' constitutional academic freedom rights in two different ways. First, it interferes with the right of universities to determine what and how to teach. Second, it violates a more general principle of university independence, actualized by the Court's grant of substantial deference to university's autonomous decisionmaking.

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176. Brief for Appellants, *supra* note 14, at 22.

177. *See* Brief for Columbia University et al., *supra* note 169, at 19 (summarizing the Court's precedents as mandating "great respect for faculty's professional judgment" when others attack their decisions regarding how best to advance the university's academic mission).

178. Brief for Appellants, *supra* note 14, at 22

179. Brief for Robert A. Burt et al. at 18, as Amici Curiae Supporting Respondents, Rumsfeld v. Forum for Academic & Inst. Rights, 126 S. Ct. 1297 (2006) (No. 04-1152).

180. *See* Brief for Columbia University et al., *supra* note 169, at 4 (emphasizing the *Grutter* Court's "deference to the university's views of how best to shape its educational atmosphere and to advance its mission"); Brief for the American Association of University Professors, *supra* note 49, at 8 (describing the schools' nondiscrimination policies as "a result of considered deliberation by the law schools' faculties" and "an exercise of academic judgment on the part of the faculties of the law schools concerned" and thus covered by the "First Amendment right to academic freedom").

181. Brief for the American Association of University Professors, *supra* note 49, at 8.

V. Stretching Academic Freedom

Academic freedom formed a central bulwark of the law schools' argumentation.[182] However, the law schools' assessment of both the Solomon Amendment and constitutional academic freedom is deeply flawed. This Part attempts to show that neither public policy, First Amendment principles, nor the Court's academic freedom case law support law schools' attempts to exclude or marginalize speakers with whom they happen to disagree.

A. Academic Freedom & Public Policy

The public policy justification for both professional and constitutional academic freedom has always been related to the benefits academic freedom provides to society as a whole.[183] The AAUP in its early years characterized the benefits of professional academic freedom as furthering democracy by teaching citizens to think and by providing neutral expert opinion for public consumption.[184] Later, the Supreme Court justified incorporating academic freedom into the First Amendment in much the same way.[185] First, academic freedom promotes the search for truth by training individuals to think for themselves. Justice Marshall described this aspect of a university's role as "the dual responsibility to advance . . . knowledge through unfettered inquiry and debate . . . and to produce a citizenry willing and able to involve itself in the governance of the polity."[186] Second, academic freedom in public schools introduces students to ideological dispute, thus impressing upon them the value of intellectual autonomy.[187]

The type of university FAIR described does not benefit society in either of these ways. Law schools seemed to view universities as little more than the

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182. *See* Horwitz, *supra* note 27, at 518 (noting that FAIR's complaint is "replete with language about law schools' educational missions, the 'pedagogical value' of the schools' policy regarding on-campus recruiters . . . and the schools' interest in nurtur[ing] the sort of environment for free and open discourse that is the hallmark of the academy") (citations omitted).

183. *See supra* Part II.B–C (exploring the rationales offered to justify academic freedom).

184. *See supra* Part II.B (discussing the AAUP's initial justifications for academic freedom).

185. *See supra* Part II.C (explaining why the Supreme Court believes academic freedom is important for American society).

186. Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 293 (1984) (Marshall, J., concurring).

187. *See supra* Part II.C (detailing the importance of intellectual autonomy and mental flexibility to the Court's conception of constitutional academic freedom).

instruments of their faculty in furthering a divisive ideological agenda.[188] Thus, they emphasized the private, rather than the public, utility of universities. Instead of focusing on teaching students to think, law schools emphasized their right to inculcate students with their ideal that any discrimination on the basis of sexual orientation is wrong.[189] Competing views are discredited by process of elimination.[190] Rejecting the marketplace of ideas model, law schools, in this context, associated ideological dispute with offense[191] or verbal static that hinders the inculcation of their moral truth.[192] FAIR's member schools thus sought to teach students not to respect intellectual autonomy but to associate ideological neutrality with hypocrisy.[193] Law schools have thus claimed all the rights of constitutional academic freedom without accepting any of its corresponding social responsibilities.

In order to make their associational claims more convincing, law schools presented themselves as the type of proprietary schools that the AAUP's 1915 Declaration recognized could never legitimately claim the benefits of academic freedom. The drafters of the Declaration drew a fundamental distinction between such "proprietary" universities and "ordinary institutions of learning."[194] Proprietary schools are "designed for the propagation of specific doctrines," while ordinary institutions recognize academic freedom and do not impose "restrictions upon . . . intellectual

188. *See, e.g.*, Brief for Appellants, *supra* note 14, at 2 ("The purpose of these anti-discrimination policies is to teach law students that invidious discrimination is a moral wrong . . . ."); Brief for the Respondents, *supra* note 158, at 3 ("Law schools are, and define themselves as normative institutions.").

189. *See* Brief for Appellants, *supra* note 14, at 16 (stating that law schools' nondiscrimination policies are "designed to inculcate values"); Brief for the Respondents, *supra* note 158, at 28 ("The academy is a normative institution. By adopting and living by an antidiscrimination policy, a law school instills a lesson in its students and its community: 'We do not discriminate. We do not assist other who discriminate. No exceptions.'").

190. *See* Brief for the Respondents in Opposition to Certiorari, *supra* note 156, at 19 ("Law schools have established an even stronger right to exclude the unwelcome messenger from their forum than either the parade organizers or the Boy Scouts.").

191. *See id.* at 14 (stating that law schools find the military's recruiting message "deeply offensive").

192. Memorandum of Law in Opposition to Defendants' Motion to Dismiss, *supra* note 160, at 6 (claiming that students "cannot hear the law schools' message of non-discrimination free from the static caused by the Solomon Amendment").

193. *See* Brief for Appellants, *supra* note 14, at 14 (citing "student expressions of cynicism and cries of hypocrisy when the lessons turn to topics such as equality, [and] human dignity" as necessitating law schools' enforcement of discrimination policies against military recruiters).

194. AM. ASS'N OF UNIV. PROFESSORS, *supra* note 45, at 293.

freedom."[195] The AAUP's 1940 Statement, which forms the foundation of its current view of academic freedom, maintained this distinction, declaring that universities entitled to academic freedom are "conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole."[196]

Although they all presumably represent nonsectarian institutions, FAIR's members attempted to redefine themselves as "normative" or proprietary schools in order to justify their enforcement of a moral view.[197] Academic freedom in the United States arose in an age in which the vast majority of scholars were dedicated to the scientific model and saw themselves as engaged in an incremental search for truth.[198] When it comes to the question of selectivity based upon sexual orientation, however, law schools have chosen to trade this search for truth for dogmatism and critical inquiry for the indoctrination of a moral view.[199] Society has little reason to grant public privileges to schools that claim such a sectarian purpose. As the drafters of the AAUP's Declaration recognized, proprietary institutions are "strictly bound . . . to a propagandist duty" and may not "appeal[] to the general public for support."[200] In other words, FAIR's members do not merit academic freedom privileges because they are not performing the important social function of teaching students to judge policies and events for themselves.[201] Public policy, therefore, does not support granting constitutional academic freedom rights to universities that seek to inculcate moral or political truths.

In sum, academic freedom rights are justified by their utility to society as a whole. FAIR's vision of academic freedom only profits law schools as private institutions in furthering their own ideological ends. Public policy, therefore, does not support law schools' claims to institutional autonomy. In fact, law schools' abrogation of their traditional social functions would seem to invite more external regulation of their internal affairs, not less.

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195. *Id.*

196. *Id.* at 3.

197. Brief for the Respondents, *supra* note 158, at 3.

198. *See* AM. ASS'N OF UNIV. PROFESSORS, *supra* note 45, at 295 ("[T]he first condition of progress is complete and unlimited freedom to pursue inquiry and publish its results. Such freedom is the breath in the nostrils of all scientific activity.").

199. *See* Brief for the Respondents, *supra* note 158, at 29 ("Thou shalt not assist discrimination.").

200. AM. ASS'N OF UNIV. PROFESSORS, *supra* note 45, at 293.

201. *See id.* at 297 (highlighting universities' function in making "public opinion more self-critical and more circumspect").

B. First Amendment Principles

There are two primary applications of the First Amendment—the way it applies to government actors and the way it applies to everyone else. Private individuals and groups may utilize the First Amendment to promote their views through speech and association free from governmental interference.[202] They exercise these freedoms against the government in its regulatory capacity, which the First Amendment commands to be ideologically neutral.[203] Thus, First Amendment rights are not normally ascribed to government actors. Public universities' exercise of academic freedom is a special case.[204] Public universities' particular mission, to serve as society's unconstrained marketplaces of ideas, justifies this exceptional treatment.[205] Constitutional academic freedom, therefore, shields public universities from direct state control, enabling them to embody physically the First Amendment principle of governmental neutrality in the realm of ideas.

Law schools' conception of constitutional academic freedom eviscerates this ideological neutrality.[206] Because academic freedom gained constitutional significance as a special concern of the First Amendment, however, any legitimate interpretation of this right will reflect essential First Amendment values.[207] As applied to the government as regulator, the First Amendment embodies the principle that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[208] Prescribing an orthodox opinion, however, is exactly what public law schools in the FAIR case attempted to do. FAIR recognized that the morality of discriminating against homosexuals in employment is one of the "most divisive . . . issues of

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202. *But see* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) ("[P]ublic education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction.").

203. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.").

204. *See* Byrne, *supra* note 36, at 300 ("A state university is a unique state entity in that it enjoys federal constitutional rights against the state itself.").

205. *See supra* Part III.D (explaining the special nature and function of public universities).

206. *See* Brief for Appellants, *supra* note 14, at 25 ("The District Court had no doubt that law schools' recruiting policies are a means of inculcating the law schools' value system . . . .").

207. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (characterizing academic freedom as an unenumerated "special concern of the First Amendment"); Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (same).

208. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

our time."[209] Nonetheless, law schools have instituted nondiscrimination policies that enforce their belief that this form of employment discrimination is wrong.[210] Law professors, as individuals, are certainly entitled to this belief. It is a moral opinion, however, with which reasonable people can and do disagree. As arms of the state, public law schools may not force students to "confess by word or act their faith" in nondiscrimination policies.[211]

Academic freedom, as a First Amendment doctrine, cannot justify the enforcement of law schools' moral views. FAIR's members made very clear that they believe assisting discrimination against homosexuals, in any way, is wrong.[212] Therefore, employers who run afoul of these policies are banned from on-campus recruiting.[213] Public law schools, however, have no power to prescribe orthodox views regarding homosexuality or any other matter of opinion.[214] If the First Amendment's mandate of governmental neutrality in the realm of ideas has any meaning, students may not be denied employment opportunities because their morality does not mirror that of their teachers. The First Amendment gives students the right to decide moral issues for themselves.[215] Therefore, public law schools may not construct an artificial marketplace of ideas by sifting out potential employers who express viewpoints with which they disagree. Fostering competing ideas on campus may make some students uncomfortable.[216] For "[a]ny word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we

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209. Brief for the Respondents, *supra* note 158, at 1.

210. *See id.* at 19 ("The lesson is not just about the injustice of discrimination, but also about the immorality of assisting others who discriminate.").

211. *Barnette*, 319 U.S. at 642.

212. *See* Brief for the Respondents, *supra* note 158, at 4 ("[A]ffirmatively assisting the discrimination of others is immoral."); *id.* at 28 ("We do not assist others who discriminate. No exceptions.").

213. *See id.* at 5 ("[L]aw schools will not provide these communicative services to any employer . . . that discriminates on any other basis that the law school considers invidious.").

214. *See* Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston, 515 U.S. 557, 579 (1995) ("The very idea that . . . speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to . . . a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis.").

215. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.").

216. *See* Part IV.C. (describing law schools' belief that they must offer special protection to homosexual students). *But see Hurley*, 515 U.S. at 574 ("[T]he point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.").

must take this risk."[217] Therefore, academic freedom, as a First Amendment right, cannot support law schools' viewpoint discrimination.

In short, the First Amendment's command that government remain neutral in the realm of ideas constrains public law schools as it does every other branch of government. Enforcing moral orthodoxy regarding a controversial matter of opinion violates this neutrality principle. Accordingly, constitutional academic freedom is incapable of supporting law schools' exclusion of dissenting moral views.

C. Academic Freedom Case Law

Law schools' assertion of near total control over every aspect of the academic environment is constitutionally problematic. FAIR's academic freedom analysis is unconvincing because it fails to take into account that different constitutional rights apply to its private and public school members or that its interpretation of constitutional academic freedom would nullify students' longstanding First Amendment rights. This section attempts to show that both of these considerations argue against the acceptance of law schools' view of constitutional academic freedom.

1. The Public-Private Distinction

The law schools' academic freedom claims are unpersuasive because they fail to account for the different constitutional rights that apply to public and private universities. FAIR is a private organization composed of both public and private law schools or their faculties.[218] Members of FAIR claimed that the Solomon Amendment infringed their academic freedom and associational rights.[219] However, the Supreme Court has never applied constitutional

217. Bd. of Educ. v. Pico, 457 U.S. 853, 866 (1982).

218. *See supra* Part I (describing FAIR's nature and membership); *see also* Forum for Academic & Institutional Rights, *supra* note 13 (listing the total number of faculties and institutions which are public). The members of FAIR identified publicly are the faculties of the schools of law of Capital University, Chicago-Kent College, the City University of New York, DePaul University, the University of the District of Columbia, Fordham University, Georgetown University, Hofstra University, the John Marshall School of Law, the University of Minnesota, Pace University, the University of Puerto Rico, Roger Williams University, the University of San Francisco, Stanford University, Suffolk University, Washington University, Whittier Law School, as well as the institutions of George Washington University Law School, Golden Gate University School of Law, New York Law School, New York University School of Law, Northeastern University School of Law, and Vermont Law School. *Id.*

219. *See* Brief for Appellants, *supra* note 14, at 30 ("[T]he government regulation in this

academic freedom to private universities, nor the freedom of association to public schools.[220] As has been explained earlier, institutional constitutional academic freedom and associational rights are mutually exclusive.[221]

Constitutional academic freedom insulates public universities from direct state control in order to prevent partisan politics from skewing the marketplace of ideas and thus individuals' autonomous search for truth. The Court has ascribed constitutional academic freedom rights to public universities because they may not claim the associational freedoms that provide private universities with this protection.[222] Public schools lack associational rights because they are subject to governmental norms of ideological neutrality, which effectively prevent them from adopting and enforcing a particular viewpoint. Conversely, private universities do not need constitutional academic freedom because they naturally possess ordinary First Amendment protections against government interference.[223] This includes the right of association, which the Third Circuit deemed potent enough on its own to justify the invalidation of the Solomon Amendment.[224] FAIR thus exaggerated law schools' First Amendment interests by asserting duplicative rights. Law schools may assert either constitutional academic freedom or associational rights against government interference, but they may not claim both.

Public law school professors could argue that they are asserting their personal associational freedom in excluding recruiters who screen student applicants by their sexual orientation. Any such association would necessarily be completely private in nature, however, and could not bind public universities as institutions or the students within their walls. It is

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case calls into play three distinct constitutional rights—academic freedom, freedom of speech, and freedom of expressive association.").

220. *See supra* Part III.D (explaining the different constitutional rights of public and private universities); *see also* Grutter v. Bollinger, 539 U.S. 306, 329 (2003) ("[G]iven the importance 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.") (emphasis added).

221. *See supra* Part III.D (explicating why constitutional academic freedom should be viewed as a limited form of the freedom of association granted to public universities).

222. *See supra* Part III.D (describing the different rights that apply to public and private schools).

223. *See supra* Part III.C–D (discussing public universities' insulation from governmental interference).

224. *See* Forum for Academic & Inst. Rights v. Rumsfeld, 390 F.3d 219, 246 (3d Cir. 2004) ("We rely on the doctrines of expressive association and compelled speech to conclude that FAIR has made the requisite showing of a likelihood of success on the merits in support of its motion for a preliminary injunction.").

beyond question that associations of government employees cannot assume total control over government entities, thus invalidating the constitutional rights all citizens hold against their government.[225] In their institutional capacity, public law schools are subject to the same First Amendment constraint of governmental neutrality in the realm of ideas that binds every other branch of government.[226]

Because FAIR is a private organization and the Court has only applied constitutional academic freedom to government entities, its ability to raise constitutional academic freedom claims is questionable.[227] In the future, the Court could determine that government funding subjects private universities to some governmental norms.[228] In any case, FAIR's claims to constitutional academic freedom are worth addressing because any public university could validly raise them at any time. Because this Note argues that constitutional academic freedom rights are not cognizable outside of the public school context, it broaches academic freedom only as applied to those members of FAIR that represent public schools.

To summarize, constitutional academic freedom applies only to public universities as a grant of limited autonomy to the academic arm of the state. Constitutional academic freedom thus fulfills a function substantially similar to that the freedom of association provides private schools. As a result, law schools may not claim both associational and constitutional academic freedoms.

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225. *Cf.* Brief for the Christian Legal Society, *supra* note 31, at 8 (questioning how "lower courts [would] adjudicate the free speech claims asserted *against* public institutions *by* . . . unwanted speakers" if public law schools have the right of expressive association).

226. *See* Christian Legal Society v. Walker, 453 F.3d 853, 867 (7th Cir. 2006) (ordering the issuance of a preliminary injunction to restore the Christian Legal Society's status as a registered student organization, which was revoked because Southern Illinois University alleged this group violated its nondiscrimination policies).

227. *See supra* Part I (discussing the nature and membership of FAIR).

228. *See* Bd. of Regents v. Roth, 408 U.S. 564, 581 (1972) (Douglas, J., dissenting) (suggesting that private schools might be subjected to public school norms if through "financing or other umbilical cords they become instrumentalities of the State"); *see also* Marty B. Lorenzo, *Race-Conscious Diversity Admissions Programs: Furthering a Compelling Interest*, 2 MICH. J. RACE & L. 361, 384 n.116 (1997) ("[P]rivate schools that receive federal funding most likely must adhere to Title VI."); John D. Lamb, *The Real Affirmative Action Babies: Legacy Preferences at Harvard and Yale*, 26 COLUM. J.L. & SOC. PROBS. 491, 507 (1993) (stating that the Department of Education's construction of Title VI of the Civil Rights Act prohibits "action that has the effect of discriminating against persons due to race, religion, or national origin"). Private schools could be subject to governmental neutrality norms through statute. It could be argued, for example, that private law schools' disparate treatment of students whose morality differs from their own, for religious reasons, constitutes discrimination based on religion in violation of Title VI.

2. The Essential Freedoms of a University

Law schools maintained that the Solomon Amendment trespasses upon universities' traditional rights to determine what and how to teach. They viewed assisting the military's discriminatory recruiting as irreparably impairing their ability to communicate nondiscrimination values.[229] However, all recruiting is "discriminatory" in that certain students are hired and others are not. Most often these decisions are based upon students' school affiliation, geographic ties, personal connections, and other factors that are arguably as poor predictors of students' job performance as their sexual orientation. Law schools, however, fail to explain why discriminating against students based on their sexual orientation is more harmful to their pedagogical designs than the discrimination they tolerate, which is based on a host of other immaterial grounds. Such inconsistency suggests that law schools are really only concerned about discrimination against certain favored groups.[230]

FAIR asserted that facilitating military recruiting effectively prevents law schools from teaching nondiscrimination values.[231] By their very nature, voluntary learning activities that take place outside of the classroom, in this case interviews with military recruiters, do not affect what professors teach. The Solomon Amendment does not preclude professors from dedicating all of their classroom hours, from torts to civil procedure, to expounding upon their vision of nondiscrimination.[232] Consequently, the Solomon Amendment cannot be said to inhibit the transmission of the law schools' message. FAIR's true complaint, therefore, must center on something other than the impact of discriminatory speakers upon what law schools teach.

Law schools' real concern is that students will not accept their nondiscrimination message as readily if competing viewpoints are available.[233] Constitutional academic freedom, however, does not give universities the power to enforce students' acceptance of their views. The danger of competing conceptions of truth is inherent in the Court's model of the public university as

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229. *See supra* Part IV (presenting FAIR's academic freedom arguments).

230. A few law schools have attempted to address this problem by instituting a lottery system to place students in initial interviews with legal recruiters. *See, e.g.*, Brief for 56 Columbia Law School Faculty Members at 2, as Amici Curiae Supporting Respondents, Rumsfeld v. Forum for Academic & Inst. Rights, No. 04-1152 (Sup. Ct. Sept. 21, 2005) (describing Columbia's lottery system for assigning screening interviews to students and employers).

231. *See supra* Part IV.B (summarizing this argument).

232. *See supra* Part I (summarizing the effects of the Solomon Amendment).

233. *See* Brief for Appellants, *supra* note 14, at 13 (stating that "[t]he message is not getting through").

society's marketplace of ideas.[234] In this unique forum ideas vie continually for acceptance, leaving individuals free to choose what they believe for themselves.[235] Law schools' failure to convince undecided students of the rightness of their view, to change the stance of those who disagree, or to persuade those who agree with them of their sincerity does not mean that the law schools' message has been changed.[236] Instead, it reflects the simple fact that students have not accepted the "lesson" law schools wish to teach.[237] Therefore, fostering dissenting voices on campus does not impair law schools' constitutional academic freedom to determine what to teach.

FAIR also contended that the Solomon Amendment prevents law schools from determining how their lessons are taught.[238] Law schools posit that excluding dissenting speakers, at an institutional level, is the means they have chosen to teach nondiscrimination values.[239] However, the First Amendment constrains public law schools from discriminating against speakers on the basis of viewpoint.[240] The Solomon Amendment does nothing more than promote the ideological neutrality the Constitution demands. Public law schools cannot reasonably claim that the right to determine how to teach allows them to circumvent the Constitution's ban on government's prescription of orthodoxy in matters of opinion.[241] Accordingly, constitutional academic freedom cannot

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234. *See supra* Part II.C (summarizing the Court's justification of constitutional academic freedom).

235. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) ("[T]he classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection.") (citations omitted).

236. *See* Brief for Appellants, *supra* note 14, at 14 ("Faculty attest to student expressions of cynicism and cries of hypocrisy when the lessons turn to topics such as equality, human dignity, and other underpinnings of a just society.").

237. Students who wish to interview with military recruiters have necessarily rejected FAIR's view of discrimination. That does not mean that they have not heard the law schools' message. It simply indicates that they have not accepted it. The same is true of students who oppose the "Don't Ask Don't Tell Policy" and decry their schools' purported support of military recruiters.

238. *See supra* Part IV.C (summarizing this argument).

239. *See* Brief for the American Association of University Professors, *supra* note 49, at 19 (presenting the theory that law schools serve as "institutional teachers of professional responsibility.").

240. *See* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) ("[P]ublic education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction.").

241. *See id.* at 642 ("[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

justify the destruction of public universities' nature as society's free marketplaces of ideas.

In essence, law schools are concerned not with how their students are *taught* but with what their students *do*.[242] Law schools' power over instruction inside the classroom and their authority over students' voluntary learning activities outside of the classroom, however, are two very different things. FAIR's true grievance was not that dissenting voices changed how law schools teach but that these speakers' presence on campus allows students to exhibit openly their rejection of law schools' nondiscriminatory lesson. Law professors may well find some students' ideological stance distasteful.[243] The First Amendment, however, gives law students the right to judge the morality of distinctions based on sexual orientation for themselves.[244] Contravention of students' moral autonomy cannot form part of law schools' constitutional academic freedom to determine how to teach.

In sum, the Solomon Amendment affects not what law schools teach or how they teach it but what students are able to show they believe by whom they choose to associate with outside of the classroom walls. Law schools sought to protect not their pedagogy but their sensibilities by marginalizing or excluding speakers, here military recruiters, who violated their moral norms. However, because public law schools cannot prescribe moral orthodoxy, excluding dissenting viewpoints is never a legitimate pedagogical concern. Consequently, the Solomon Amendment does not violate public schools' rights to institutional academic freedom.

3. The Academic Environment

Law schools asserted a broad right of control over the school environment as part of their right to determine how to teach, including the ability to regulate extensively student activity outside the classroom.[245] The Court, however, has

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242. *Cf.* Rumsfeld v. Forum for Academic & Inst. Rights, 126 S. Ct. 1297, 1307 (2006) ("[T]he Solomon Amendment regulates conduct, not speech. It affects what law schools must *do* . . . not what they may or may not *say*.").

243. Supplemental Brief for Appellants at 10, Forum for Academic & Inst. Rights v. Rumsfeld, 390 F.3d 219 (3d Cir. 2004) (No. 03-4433) (relating the government's allegation that "potential recruits were harassed and detained by protestors; and their pictures were displayed throughout the school on a poster entitled 'Face of Complicity'").

244. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.").

245. *See supra* Part IV.C (summarizing this argument); Brief for American Association of University Professors, *supra* note 167, at 9 ("Academic freedom extends also to admissions,

made it clear that students do not shed their constitutional freedoms by enrolling in a public school.[246] While public school officials have wide-ranging power over the classroom environment, their authority even there is not absolute.[247] Outside of the compulsory environment of the classroom, this authority is even more limited.[248]

In *Board of Education v. Pico*, the Court rejected a secondary school's sweeping claims to control over students' voluntary learning activities outside of the classroom.[249] Three justices in dissent, although they disagreed with the Court's holding in the secondary school context, affirmed that the government is subject to greater educational restrictions in the university setting.[250] Public schools' assertion of total authority over the recruiters students contact on campus would fail First Amendment scrutiny even in the high school context. University students naturally possess even greater personal and intellectual freedoms. Thus, students' academic freedom limits the ability of public law schools to control opportunities for education and association outside of the classroom walls.[251]

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extracurricular activities, evaluation criteria, and the academic values that universities seek to impart to their students throughout the educational environment. The Solomon Amendment improperly displaces academic freedom in this larger sense.").

246. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teacher shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."); Shelton v. Tucker, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

247. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 862 (1982) ("Our adjudication of the present case thus does not intrude into the classroom, or into the compulsory courses taught there."); *Tinker*, 393 U.S. at 512 ("A student's rights, therefore, do not embrace merely the classroom hours."); *see also* Hazelwood v. Kuhlmeier, 484 U.S. 260, 270–71 (1988) (distinguishing between a school's regulation of students' "personal expression that happens to occur on . . . school premises" and "educators' authority over school-sponsored . . . expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school").

248. *See Pico*, 457 U.S. at 869 (finding the school board's belief that its authority to inculcate values extended beyond the "compulsory environment of the classroom" "misplaced").

249. *See id.* ("Petitioners might well defend their . . . absolute discretion in matters of curriculum by reliance upon their duty to inculcate . . . values. . . . [R]eliance upon that duty is misplaced where . . . their claim of absolute discretion [extends] beyond the compulsory environment of the classroom, into the . . . library and the . . . voluntary inquiry that there holds sway.").

250. *See id.* at 920 (Rehnquist, J., dissenting) ("It must also be recognized that the government as educator is subject to fewer strictures when operating an elementary and secondary school system than when operating an institution of higher learning.").

251. *See* Healy v. James, 408 U.S. 169, 187–88 (1972) (stating that a public university may not "restrict speech or association simply because it finds the views expressed by any group to be abhorrent").

Furthermore, the interests law schools have asserted to justify their almost total control over the university environment cannot withstand First Amendment scrutiny.[252] Public law schools may not proscribe ideas in order to eliminate the discomfort some students may feel as a result of their exposure to conflicting views.[253] Constitutional academic freedom has been enforced by the Court to protect the expression of unpopular viewpoints.[254] Therefore, First Amendment academic freedom cannot support the efforts of public university officials to filter unsettling ideas from the educational sphere.

Law schools claimed that their exclusion of ideas, in the form of military recruiters, enables them to construct a veritable Eden in which all students feel equal and are judged solely on the merits of their ideas.[255] Enforcement of moral orthodoxy, however, makes such a utopian environment impossible. Inequality necessarily results from law schools' nondiscrimination policies because some students are bound to disagree with their institutions' moral views. Rather than providing a neutral platform for the exchange of ideas, as is their constitutional mandate, FAIR's public school members have decided to enforce a moral truth.[256] In this context, these schools are simply incapable of judging students who disagree with their moral perspective on the merits of their ideas. Regardless of their reasoning, law schools have established that certain students are wrong and others are right.[257] Constitutional academic freedom, which seeks to establish a marketplace of ideas from which

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252. *See supra* Part IV.C (summarizing FAIR's claims to control over the academic environment).

253. *See* Brief for the Association of American Law Schools, *supra* note 3, at 26 (indicating that "individuals with a diversity of backgrounds enrich the discourse and educational energy in a classroom" and that such "individuals will not participate freely unless their school accords them equal respect, dignity, and protection from discrimination").

254. *See supra* Part III.A–B (discussing national and state governments' targeting of professors with socialist or communist views and school officials' hostility to secondary schools students' protest of the Vietnam War).

255. *See* Memorandum of Law in Opposition to Defendants' Motion to Dismiss, *supra* note 160, at 6 (claiming that FAIR's members have been "deprived of the ability to engage in the free and open discourse that flows naturally in an environment where all participants feel equally free to exchange ideas"); Brief for Appellants, *supra* note 14, at 20–21 (stating that the law schools have attempted to construct an environment in which students are "judged on the merits of their ideas and not on bases that the law school assures them are irrelevant").

256. *But see* Cameron et al., *supra* note 142, at 270 (summarizing AAUP documents stating that professors should not "introduce into their teaching controversial matter which has no relation to their subject . . . [or] evaluate students on . . . irrelevant matters such as personality, race, religion, degree of political activism, or personal beliefs") (citations omitted).

257. *See* Brief for the Respondents, *supra* note 158, at 29 ("Thou shalt not assist discrimination.").

individuals may freely choose, cannot support the establishment and enforcement of moral orthodoxy by an arm of the state.[258]

Furthermore, some students' disagreement with law schools' view of nondiscrimination is grounded in deeply held religious beliefs.[259] Law schools tell these students not only that their ideas are wrong but that their religion is wrong.[260] The First Amendment, however, requires public schools to be neutral between "religion and religion, and between religion and nonreligion."[261] The derecognition of religious student groups in recent years, however, shows that public law schools are anything but "neutral in matters of religious theory, doctrine, and practice."[262] Constitutional academic freedom, as a First Amendment doctrine, cannot justify conduct that contravenes the Free Exercise or Establishment clauses, which form part of the core of the First Amendment. Consequently, constitutional academic freedom cannot support public schools' hostility towards some students' religious beliefs.[263]

In short, the Court instituted constitutional academic freedom not only to preserve universities' character as marketplaces of ideas but to protect students' ability to choose from these competing viewpoints. Law schools have sculpted their presentation of institutional academic freedom, however, to allow them to exclude ideas they find unpalatable from campus, thus inhibiting the autonomous inquiry of students with differing views. Students' own constitutional freedoms prohibit such attempts by public schools to inhibit students' intellectual and moral autonomy.

4. Deference

FAIR emphasized the Court's recognition of a general principle of university autonomy and argued that this principle requires that courts grant

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258. *See supra* Part II.C (discussing the rationale informing the Court's academic freedom case law).

259. *See* Brief for the Christian Legal Society, *supra* note 31, at 13, (discussing law schools' hostility to some religious students' view of homosexuality, which is grounded in "sincere religious beliefs").

260. *See, e.g.*, Brief for Robert A. Burt et al., *supra* note 179, at 15 ("The military, the Boy Scouts and some religious institutions continue to openly and deliberately discriminate against gays, lesbians, and bisexuals.").

261. Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

262. *Id.* at 103–04.

263. *See* Brief for the Christian Legal Society, *supra* note 31, at 11–12 (describing public law schools' hostility towards religious student groups because they allegedly discriminate on the basis of religion and sexual orientation).

substantial deference to universities' independent judgments.[264] The Court, however, has never deferred automatically to a university's assertion of the valid application of its own expertise.[265] Judicial deference hinges upon the Court's independent determination that a university's decision is a result of "*legitimate* academic decisionmaking."[266]

Furthermore, the deference the Court has granted universities' decisionmaking has never been greater than that which it has applied to other government agencies within their respective realms of expertise. Law schools' claim of the Court's extreme deference to academic judgment is an illusion formed by FAIR's dual assertion of academic freedom and associational rights. The Third Circuit made this clear when it stated that the Court's academic freedom jurisprudence underscored the importance of granting deference to law schools' independent determination of what impairs their associational expression.[267] As has been noted previously, however, the Court has never applied constitutional academic freedom to private universities nor the right of association to public schools. Because these First Amendment rights serve the same general purpose—in two different contexts—FAIR's claims to extraordinary insulation from external regulation are essentially baseless.[268]

Law schools' emphasis of the moral nature of their quarrel with those they see as discriminators reveals that their nondiscrimination policies are not the result of legitimate academic decisionmaking. At its core, law schools' hostility toward those who do not share their ideological views is based upon moral indignation and not academic judgment.[269] For example, law schools utilized a surprising number of religious terms in staking out their legal position. They described the communication of their nondiscrimination values in terms of

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264. *See supra* Part IV.C (presenting FAIR's claims to institutional autonomy). *But see supra* Part III.C (describing the limits the Court has placed upon deference to academic judgment).

265. *See* Brief for Columbia University et al., *supra* note 169, at 22 (stating that the Court's precedent recognizes "the importance of judicial deference to the university's views of how best to shape its educational atmosphere and to advance its mission").

266. Univ. of Penn. v. EEOC, 493 U.S. 182, 199 (1990).

267. *See* Forum for Academic & Inst. Rights v. Rumsfeld, 390 F.3d 219, 233 n.13 (3d Cir. 2004) ("The Supreme Court's academic freedom jurisprudence thus underscores the importance of *Dale* deference in our case.").

268. *See supra* Parts III.D, V.C.1 (explaining how the institutional academic freedom of public schools serves essentially the same purposes as private schools' right of association).

269. *See, e.g.*, Complaint, *supra* note 155, at 3 ("[I]nvidious discrimination is a moral wrong . . . ."); Brief for Appellants, *supra* note 14, at 2 ("The purpose of these anti-discrimination policies is to teach law students that invidious discrimination is a moral wrong . . . ."); Brief for the Respondents, *supra* note 158, at 4 ("As law schools see it, affirmatively assisting the discrimination of others is immoral.").

preaching, reformulated their nondiscrimination policies in the guise of commandments, and further characterized their belief in terms of an article of faith.[270] Members of the academy, however, possess no special competence to declare moral truth. Individual morality consists of an inherently subjective ordering of competing values that has but a secondary relationship to logical analysis. The promulgation of nondiscrimination policies thus falls well outside the realm of academic expertise. Consequently, law schools' enforcement of nondiscrimination policies should not be given deference by a court.[271]

In brief, universities have never received greater deference from the Court than any other government agency within its sphere of competence. Deference to universities' decisionmaking hinges upon a valid application of professorial expertise. Universities' nondiscrimination policies are not a function of legitimate academic decisionmaking. Consequently, their enforcement of nondiscrimination policies is particularly undeserving of judicial respect.

5. Academic Freedom of the Student

The Court has envisioned universities as institutional guardians of an almost sacrosanct realm dedicated to freedom of inquiry and expression.[272] Instead of fostering an environment conducive to autonomous intellectual inquiry, law schools stated that it is their mission to inculcate students with a moral view.[273] The Court, however, developed constitutional academic freedom to protect two things—universities' character as true marketplaces of ideas and individuals' freedom of speech and thought.[274] Consequently,

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270. *See* Brief for Appellants, *supra* note 14, at 13 ("[T]he law school has lost credibility to *preach* values of equality, justice, and human dignity.") (emphasis added); Brief for the Respondents, *supra* note 158, at 29–30 (describing the law schools' moral position as "*Thou shalt not* assist discrimination" and stating that the "refusal to assist discriminatory employers . . . has been an explicit and earnest *article of faith* among law schools for decades") (emphasis added).

271. *See supra* Part III.C (examining the limitations the Court has placed on granting deference to universities' decisions).

272. *See supra* Part II.C (sketching the Court's vision of the underlying basis for constitutional academic freedom).

273. *See* Brief for the Respondents in Opposition to Certiorari, *supra* note 156, at 1 (stating that law schools have "long been institutions with a mission to inculcate a set of values in their students").

274. *See supra* Part II.C (describing the importance of these factors to the Court's view of constitutional academic freedom).

constitutional academic freedom cannot support public universities' marginalization and exclusion of those with competing moral viewpoints.

Furthermore, public universities' institutional academic freedom rights cannot justify the infraction of students' own academic freedoms, which the Court has erected as a bulwark against ideological coercion.[275] Law schools posited that academic freedom gives them the right to control what their students see and hear, not only in the classroom but in the academic environment as a whole.[276] Encasing students in a zone in which they may only hear the law schools' message, however, is not a constitutional way for law schools to convince law students of the correctness of their nondiscrimination views. *Tinker* established that "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."[277] Institutional academic freedom, therefore, cannot give public universities the right to construct a stacked marketplace of ideas, limited to the moral viewpoints law faculties find to be acceptable.

Public universities are subject to the fundamental limitation the First Amendment imposes on all coercive governmental power—the individual right to choose. As the Court stated in a different context, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[278] "The way to preserve [equality] . . . is not to punish those who feel differently about these matters. It is to persuade them that they are wrong."[279] This persuasion, however, must take place in a true marketplace of ideas that provides a full spectrum of viewpoints.[280] Constitutional academic freedom may give law professors the opportunity to convince students of the correctness of their moral views, but it does not empower them to enforce these views on students who continue to disagree.

Furthermore, the Court has affirmed students' "right to receive information and ideas."[281] The Court has justified this right as a "necessary predicate to the recipient's meaningful exercise of his own rights of speech,

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275. *See supra* Part III.B (summarizing the Court's student academic freedom cases).

276. *See* Brief for the American Association of University Professors, *supra* note 49, at 19 ("[T]he total learning environment influences what students learn.") (citations omitted).

277. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

278. Texas v. Johnson, 491 U.S. 397, 414 (1989).

279. *Id.* at 419.

280. *See* Healy v. James, 408 U.S. 169, 180 (1972) ("The College classroom with its surrounding environs is peculiarly the 'marketplace of ideas'. . . ."); Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) ("[T]he classroom is peculiarly the 'marketplace of ideas.'").

281. Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982).

press, and political freedom."[282] Because political speech forms the core of the First Amendment, it is important to consider the political ramifications of public universities' selective exclusion of views. In seeking to inculcate students with a moral viewpoint, law schools engage in much more than a theoretical discussion of the value of nondiscrimination. Rather, they hope to indoctrinate students with a truth that necessarily entails sweeping political consequences. Depriving students who are considering the appropriateness of the "Don't Ask Don't Tell Policy," or those who disagree with law schools' position, of the ability to hear contrasting opinions denies these students a political freedom. As such, it impairs students' ability to decide this important issue for themselves. The First Amendment was "fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[283] It cannot support the elimination of ideas in order to indoctrinate students with a positive view of the political and social changes desired by professors in public universities, who are agents of the state.[284] Students' academic and political freedoms mandate that public law schools, at the very least, tolerate the ideas their students wish to hear and express.[285]

Denying access and services to recruiters who do not share law schools' moral ideology also impinges upon students' freedom to learn through the exercise of their associational rights. *Healy* clearly held that public universities may not "restrict speech or association simply because they find the views expressed by any group to be abhorrent."[286] FAIR's public school members have excluded "discriminatory" voices precisely because they find their message offensive and abhorrent.[287] Students' ability to engage in speech and

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282. *Id.*

283. Roth v. United States, 354 U.S. 476, 484 (1957).

284. *But see* Brief for the Respondents, *supra* note 158, at 3 ("Law schools are, and define themselves as normative institutions. They aspire to shape future lawyers who can profoundly change our society, its mores and values . . . and who will urge their visions of justice on society at large.").

285. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969) (stating that students "may not be confined to the expression of those sentiments that are officially approved" and noting that "school officials cannot suppress expressions of feelings with which they do not wish to contend") (citations omitted). *But see* Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 573 (1995) (noting that the First Amendment allows private groups to choose "what not to say").

286. Healy v. James, 408 U.S. 169, 187–88 (1972).

287. *See* Brief for the Respondents in Opposition to Certiorari, *supra* note 156, at 14 (describing JAG officers' conversations with students as disseminating "a recruiting message that [FAIR] finds deeply offensive"); Brief for the Respondents, *supra* note 158, at 32 (stating that the law schools find the military's discrimination against homosexuals "abhorrent").

association with some legal recruiters through employment is thus restricted because law schools find these students' moral views to be repugnant. When universities' interests in institutional control conflict with students' free expression, however, "the First Amendment . . . strikes the required balance" and students' freedoms of belief and expression prevail.[288]

In summary, the Court has always understood constitutional academic freedom to maximize intellectual autonomy and freedom of expression. In keeping with this goal, it has granted students substantial academic freedom rights. Public law schools' claims to absolute authority over the school environment are thus unconvincing because the exercise of this authority would necessarily infringe upon students' own First Amendment rights.

D. Summary of Arguments

Both public policy and the First Amendment principle of governmental neutrality in the realm of ideas mandate that public universities operate as zones of free expression, allowing students to reap the benefits of exposure to diverse views. Experiencing this marketplace teaches students the fundamental worth of the intellectual autonomy and versatility of thought promoted by the First Amendment. Constitutional academic freedom cannot support claims of university autonomy framed to promote the exclusion of ideas from campus or the coercion of students to act in accordance with beliefs they do not hold. Any court should reject an interpretation of constitutional academic freedom that directly contradicts the public policy and constitutional bases for granting this right in the first place.

By asserting the duplicative rights of constitutional academic freedom and the freedom of association, law schools have stated that their First Amendment rights are greater than those of any other group. The Court, however, has never conjoined these rights in its prior cases and, properly conceived, they are mutually exclusive. Law schools' claim to greater institutional autonomy than other groups thus has superficial appeal but no real substance.

The constitutional academic freedom rights of FAIR's public members are not implicated by contravention of public universities' nondiscrimination policies because these policies are not the product of legitimate academic decisionmaking. Students' academic freedom rights are implicated, however, by law schools' marginalization of students who hold differing moral, political, and religious views. Consequently, academic freedom has an important role to

288. *Healy*, 408 U.S. at 171.

play in rejecting, rather than upholding, law schools' enforcement of moral or political truths.

VI. Conclusion

Because the district court and the Third Circuit grounded their analysis solely in the Supreme Court's free speech and associational case law, the Supreme Court did not even consider FAIR's academic freedom claims. Law schools' case against the military was a relatively easy one to resolve on free speech and associational grounds, as the Solomon Amendment does not significantly affect law schools' message, nor force them to accept members they do not want.[289] The crucial question that remains is how courts should analyze dissenting students' rights and these students' effect upon their schools' institutional nondiscrimination message.

Public universities are likely to return to constitutional academic freedom and associational rights to justify marginalization and or exclusion of student speakers with competing moral views.[290] As a constitutional doctrine, however, academic freedom is incapable of supporting the suppression of ideas. In fact, constitutional academic freedom provides the answer to the pressing question of whether public universities or these dissenting student voices should prevail. It does this by clarifying public schools' constitutional duty to remain unconstrained marketplaces of ideas and by elucidating the limited application of the freedom of association to public schools.

Stretching constitutional academic freedom beyond all limits, law schools have developed a theory of academic freedom that, in tandem with associational rights, gives them a blank check of authority over the educational sphere.[291] Law schools have only been able to effect this transformation,

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289. *See* Rumsfeld v. Forum for Academic & Inst. Rights, 126 S. Ct. 1297, 1309, 1312 (2006) (stating that the "military's message does not affect the law schools' speech" and that the "Solomon Amendment does not force a law school to accept members it does not desire").

290. *See* Inside Higher Education, Slapped by the Supremes, http://www.insidehighered.com/news/2006/03/07/supreme (last visited June 10, 2006) (quoting Carl Monk, the Executive Director of the Association of American Law Schools, as saying that the Supreme Court's ruling in *FAIR* "undermines law schools' ability to teach and advance their own values") (on file with the Washington and Lee Law Review); Andrew Mangino, *Law School Keeps Up Protests of JAG*, YALE DAILY NEWS, Oct. 3 2006, http://www.yaledailynews.com/Article.aspx?ArticleID=33540 (last visited Oct. 4, 2006) (noting that the Yale Law School faculty voted to "press on" with its "lawsuit protesting the Solomon Amendment" despite the Supreme Court's ruling in *FAIR*) (on file with the Washington and Lee Law Review).

291. *Cf.* Rumsfeld v. Forum for Academic & Inst. Rights, 126 S. Ct. 1297, 1313 (2006) ("In this case, FAIR has attempted to stretch a number of First Amendment doctrines well beyond the sort of activities these doctrines protect.").

however, by loosing constitutional academic freedom from its public policy and First Amendment moorings. Law schools have attempted to set constitutional academic freedom to drift with no justification or purpose, apart from that which they have charted for it. Thus, law schools' interpretation of institutional academic freedom boils down to nothing less than an argument of deference for deference's sake.

Few would argue that law schools' nondiscrimination policies stem from anything but the best of intentions. Unfortunately, these good intentions have led law schools to assert the untenable position that students' display of ideas with which they agree is valued First Amendment protest, yet students' demonstration of opinions which they dislike serves only to further invidious discrimination.[292] If meeting with dissenting speakers in an environment that is so openly hostile to contrasting viewpoints is not a form of First Amendment protest, however, nothing is.

The law never grants substantial privileges unless they serve an important public purpose. Constitutional academic freedom applies to universities that serve society by maintaining a true marketplace of ideas. In keeping with this goal, constitutional academic freedom is granted only to public institutions constrained by governmental norms of ideological neutrality. Thus, constitutional academic freedom belongs to universities that limit their role to teaching students "how to think, not what to think."[293]

Historically, the focus of constitutional academic freedom has shifted to reflect the class of individuals held in the crosshairs of governmental power. As universities' treatment of military recruiters, religious student groups, and others who disagree with their teachers' moral or political views amply demonstrates, today it is students' intellectual freedoms that are primarily at risk.[294] Although academic freedom is explicitly cited in only thirty-four

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292. *See supra* Part V.B (explaining how FAIR's nondiscrimination policy necessarily targets students with dissenting moral views). Students who wish to interview with military recruiters have been subject to "verbal abuse and harassment" by faculty and students and have had their pictures posted under the caption "Face of Complicity." Supplemental Brief for Appellants, *supra* note 253, at 10–11. Law schools call this "student protest." *Id.* at 11

293. News-Record.com, *Greensboro Sit-Ins: Launch of a Civil Rights Movement*, http://www.sitins.com/keyplayers.shtml (last visited June 10, 2006) (on file with the Washington and Lee Law Review). This was the response of Warmoth T. Gibbs, the President of North Carolina Agricultural and Technical University, when he was asked by city officials, during the Civil Rights Era, to prevent students from engaging in sit-ins by keeping them on campus.

294. *See* Christian Legal Society v. Walker, 453 F.3d 853, 858 (3d Cir. 2006) (showing that public universities have denied recognized status to student groups who disagree with their moral views); Christian Legal Society v. Kane, No. 04-04484, 2005 WL 850864, at *1–2 (N.D. Cal. Apr. 12, 2005) (same); Alpha Iota Omega v. Moeser, No. Civ. 1:04CV00765, 2005 WL

Supreme Court cases, Justices in ten of these decisions have recognized aspects of students' academic or learning freedom.[295] Consequently, there is no question that students possess constitutional protection against ideological coercion.

Lower courts' misunderstanding and disregard of constitutional academic freedom and the impact of university action on students suggest that it is increasingly necessary for the Supreme Court to clarify its academic freedom case law and students' right to intellectual autonomy. Otherwise, erosion of students' First Amendment freedoms, in the public school context, is certain to continue. As FAIR's members have so amply demonstrated, many universities have lost sight of the inherent value of freedom of belief and thought. It is high time the Court reminded American universities that reverence for individual intellectual autonomy is what the First Amendment, and thus constitutional academic freedom, is really all about.

1720903, at *1 (M.D.N.C. Mar. 2, 2005) (same); *see also* Burt v. Rumsfeld, 354 F.Supp.2d 156, 172 n.20 (D. Conn. 2005) (justifying the exclusion of military recruiters by revealing that Yale Law School banned the Christian Legal Society from using campus services when it refused to "subscribe" to the school's nondiscrimination policy).

295. *See* Edwards v. Aguillard, 482 U.S. 578, 588 n.8 (1987) ("The dissent concludes that the Act's purpose was to protect the academic freedom of students, and not that of teachers. Such a view is not at odds with our conclusion . . . ."); Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1985) ("Academic freedom thrives . . . on the independent and uninhibited exchange of ideas among teachers and students . . . ."); Bd. of Educ. v. Pico, 457 U.S. 853, 867–68 (1982) ("[T]his Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression. . . . [S]tudents too are beneficiaries of this principle . . . ."); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) ("Our Nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned."); Presidents Council, District 25 v. Cmty. Sch. Bd., 409 U.S. 998, 999 (1972) (Douglas, J., dissenting) ("The First Amendment involves not only the right to speak and publish but also the right to hear, to learn, to know. And this Court has recognized that this right to know is nowhere more vital than in our schools and universities . . . ."); Healy v. James, 408 U.S. 169, 180 (1972) ("The College classroom with its surrounding environs is peculiarly the 'marketplace of ideas' . . . ."); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969) ("[S]tate-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students."); Whitehill v. Elkins, 389 U.S. 54, 60 (1967) ("Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."); Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (stating that academic freedom is a "special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom"); Baggett v. Bullitt, 377 U.S. 360, 366 n.5 (1964) ("[T]he interests of the students at the University in academic freedom are fully protected by a judgment in favor of the teaching personnel . . . .").