ACADEMIC FREEDOM

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From Professional Norm to First Amendment Right

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NOTE TO READERS

My web page, https://law.utexas.edu/faculty/david-rabban/academic-freedom, contains charts that provide an overview and comparison of the legal decisions discussed in this book. The charts list the decisions, summarize their facts, and identify the source of the threat to academic freedom, the subject of expression, the competing interests to academic freedom, the legal issues addressed by the judges, and the results.

ACADEMIC FREEDOM

Introduction

In this book, I provide the first comprehensive synthesis of the extensive case law addressing academic freedom and the First Amendment at American universities. Responding to the judicial decisions, I develop a theory of academic freedom as a distinctive subset of First Amendment law. Beyond rethinking existing case law, the theory helps analyze many current disputes over academic freedom that are likely to generate litigation in the future. In developing the theory, I rely on key justifications for academic freedom as a professional norm, dating from the 1915 Declaration of Principles by the American Association of University Professors (AAUP) and elaborated over the following century within the academic world.

Ever since debates over evolutionary theories in the late nineteenth century, issues of academic freedom and free speech at American universities have received widespread attention from the public as well as within universities themselves. Very few of these issues reached the judiciary before the 1950s, when the Supreme Court began applying the First Amendment to the speech of college professors in cases reflecting general concerns about subversive activities throughout American institutions during the Cold War. Whereas the constitutions of many other countries refer explicitly to academic freedom, the US Constitution does not. The protection of expression in the First Amendment addresses freedom of speech, freedom of the press, freedom of assembly, and freedom to petition. In *Sweezy v. New Hampshire,* decided in 1957, the Supreme Court for the first time identified "academic freedom" as a First Amendment right, differentiating it from "political expression."[1] In *Keyishian v. Board of Regents* ten years later, it called academic freedom "a special concern of the First Amendment."[2] Initially identified as a right of professors, judges subsequently extended the First

Amendment protection of academic freedom to universities as institutions and occasionally indicated that it might cover students as well.

Litigation has raised issues about academic freedom and the First Amendment in an increasing variety of contexts. Many of the cases brought by professors have challenged federal and state laws. Some examples include laws that preclude teaching Darwinian theories of evolution and require teaching "creation science"; laws that limit access to research material, such as sexually explicit material on the internet and the use of abortive fetal tissue to study Alzheimer's disease; and laws that require approval from government funding agencies before publishing research. Professors have challenged surreptitious police surveillance of classes, grand jury questions about classroom discussion of drug policy, and government subpoenas for oral histories from members of the Irish Republican Army gathered by researchers who promised confidentiality to the participants.

In addition to challenging government regulation, professors have brought claims against administrators and trustees. Some have claimed retaliation for expressing controversial ideas in class, such as the value of diversity, the existence of sex-based differences in mental abilities, or the merits of vaginal delivery over cesarean procedures. Cases have asserted that professors had legitimate pedagogical reasons for assigning material that contained offensive and vulgar language, including racist and sexist epithets, and for conducting classroom discussions in which these words were used by students as well as professors. Professors have also denied the university's right to preclude unorthodox teaching methods or to change the grades they have assigned. They have challenged administrative requirements that mandated curricular coverage, teaching upper-level language courses in the foreign language, following a grading curve, distributing a syllabus, conducting student course evaluations, and using gender-neutral pronouns in class.

Beyond the classroom, professors have claimed that universities retaliated against them for speech about university affairs. Professors have condemned the university for not implementing an effective ethnic studies program, opposed the university's efforts to promote diversity and multiculturalism, and bemoaned grade inflation. They have also criticized administrators for poor fundraising, financial mismanagement, and violating university regulations that required participation by professors in making new appointments.

Professors have maintained that retaliation by administrators and trustees extended to speech off campus, such as publications by a philosophy professor asserting that the lower IQ scores of Blacks explain their low percentage in philosophy departments and demonstrate the futility of affirmative action programs. Professors have also claimed that their expression of Marxist or conservative political views, opposition to American involvement in the Vietnam War, support for the civil rights movement, collaboration with the CIA, and criticism of the US Army Corps of Engineers for its response to Hurricane Katrina provoked administrators and trustees to deny appointment.

Universities have asserted their own right of institutional academic freedom, often to justify actions about which professors complained. Institutional academic freedom, they claim, protects against the disclosure of confidential peer review material gathered while considering the appointment and tenure of faculty and limits judicial review of the ultimate decisions, even when professors allege violations of their own First Amendment rights or unlawful employment discrimination. Universities have claimed institutional academic freedom to justify the use of affirmative action in admitting students and the denial of admission to students from a religious high school whose curriculum had not prepared them for college work. They have relied on it to discipline or expel students who had not met academic standards or who had violated campus rules regulating offensive speech. One university asserted its institutional academic freedom to defend the right of students to perform a play that depicted Jesus as a homosexual, opposing a lawsuit brought by citizens who maintained that by permitting this performance the university had endorsed anti-Christian beliefs. Based on general First Amendment doctrines, universities have maintained that they had the right to decide whether student organizations could use campus facilities and to impose a mandatory student activity fee on students that would be distributed to student extracurricular organizations having a wide range of ideological goals.

Universities have relied on institutional academic freedom and general First Amendment doctrines to challenge laws that restricted their discretion in other contexts. One university attacked a licensing law that gave a government agency authority to determine whether a university could grant degrees. Institutional academic freedom and general First Amendment doctrines, other universities maintained, invalidated a law denying federal

funds to universities that applied their antidiscrimination policies to limit access of military recruiters to campus during the period when homosexuals could not enlist. Relying on general First Amendment doctrines, universities have resisted attempts by members of the public to express themselves on university property.

In response to many of these cases and numerous others, some Supreme Court decisions and hundreds of lower-court decisions have recognized academic freedom as a First Amendment right. The First Amendment applies only to state action. Judges have largely rejected efforts to expand the concept of state action to the activities of nominally private universities. The First Amendment protection for academic freedom, therefore, applies to legislative and executive actions that affect professors and universities, and to disputes between professors and administrators or trustees at public universities. But it does not apply to disputes within private universities, although some private universities voluntarily agree to follow the requirements of the First Amendment. Unfortunately, judges have not clarified the meaning of academic freedom or explained its relationship to other First Amendment rights. Scholars, and often judges themselves, have accurately observed that these decisions are frustratingly inconsistent and confusing.

Just as courts began incorporating academic freedom within the First Amendment in the 1950s, they have developed since the 1960s a distinctive analysis of the First Amendment rights of public employees, helpfully labeled "employee-speech jurisprudence" by Justice Kennedy.[3] Judges often apply general First Amendment law, employee-speech jurisprudence, and the First Amendment law of academic freedom interchangeably in identical or similar contexts, sometimes even in the same case. They have variously asserted that general First Amendment law and employee-speech jurisprudence apply with greater force in universities, apply in particular ways, or do not apply at all. Other opinions add further layers of complication and confusion. Some refer only to the First Amendment generally or to employee-speech jurisprudence while ignoring issues of academic freedom that are clearly presented. By contrast, an occasional opinion refers to academic freedom when none of its meanings seem relevant and only general First Amendment law or employee-speech jurisprudence seems applicable.

The most fundamental questions remain unresolved, often barely discussed or even raised, either in the decisions themselves or in academic scholarship. Is academic freedom really a distinctive liberty, "a special

concern of the First Amendment"? If so, how is it distinctive or special compared to general First Amendment rights? Are some general First Amendment concepts and doctrines—such as "the marketplace of ideas," content and viewpoint neutrality, and the concept of a public forum—inapplicable to, or even inconsistent with, academic freedom in universities? Rather than a public marketplace of ideas committed to content and viewpoint neutrality, doesn't a university appropriately limit speech based on academic standards as determined by academic experts? To what extent does or should the First Amendment law governing public employees cover those public employees who are professors at state universities? Does or should the requirement that the speech of public employees address a matter of "public concern" to qualify for First Amendment protection apply to professors, whose academic speech may make huge contributions to specialized disciplines that are inaccessible or uninteresting to members of the general public? Does the exclusion from First Amendment protection of speech by public employees "pursuant to their official duties" apply to professors, whose most significant official duties are scholarship and teaching? To what decisions does institutional academic freedom apply? Who exercises institutional academic freedom on behalf of universities? Does institutional academic freedom have different meanings for public than for private universities? Do student interests in learning justify a distinctive First Amendment right of academic freedom for them? If so, what is its scope? How does it differ from the academic freedom of professors?

Overview

The organization of this book reflects two major goals. My first goal is to organize and classify the morass of case law about academic freedom and the First Amendment at American universities. No such study currently exists. Though drawn from the cases themselves, the classifications are my own, not ones necessarily identified by the judges in their opinions. Like an initial restatement in any substantive area of the law, this organization of the vast and messy case law should impose some clarity on existing law while also highlighting key areas of confusion. Informed by this analysis of case law, which reveals the inherent difficulties in applying general First Amendment law and employee-speech jurisprudence to universities, my second goal is to develop a theory of academic freedom as a distinctive First Amendment right. The case law provides realistic examples of issues the

theory must address and contexts for illustrating how it would operate in practice. The theory would also apply to many current controversies, such as legislative restrictions on teaching "critical race theory," nonrenewal of a professor's appointment for showing a portrait of the Prophet Muhammad in class, university restrictions on the freedom of professors to receive funding from corporate or government sources, and university mandates of "trigger warnings" and "diversity statements."

The policy statements and legal briefs of the AAUP feature prominently both in my analysis of case law and in my development of a theory of academic freedom as a distinctive First Amendment right. Established in 1915, the AAUP has been the principal expositor and defender of academic freedom in the United States. Its founding document, the 1915 Declaration of Principles, was the first major American justification of academic freedom and remains broadly influential throughout the academic world a century later. Though not a legal document, it provides a convincing theoretical justification of academic freedom that is compatible with and can inform analysis of academic freedom as a First Amendment right. Subsequent AAUP policy statements, sometimes formulated jointly with associations of universities and trustees, provide additional guidance in developing a First Amendment theory of academic freedom.

Since the Supreme Court initially recognized academic freedom as a First Amendment right in the 1950s, the AAUP has filed many amicus briefs attempting to translate its policy positions into legal arguments. It has probably participated more than any other organization in cases raising issues of academic freedom. In analyzing AAUP policies and briefs, I draw on my experience as a lawyer in the AAUP's national office from 1976 through 1982 and, after becoming a law professor, as the AAUP's general counsel from 1998 to 2006 and chair of its Committee on Academic Freedom and Tenure from 2006 to 2012. Though I generally agree with AAUP positions, I reject some significant ones, as I indicate throughout this book. In analyzing the meaning of academic freedom, I also draw on important past and contemporary scholarship.

The book begins with two chapters of historical background. In Chapter 1, I analyze the treatment of academic freedom in the AAUP's 1915 Declaration. In Chapter 2, I discuss how the American judiciary had applied other provisions of the Constitution to the university long before it gave academic freedom constitutional meaning by associating it with the First

Amendment. Initially through the impairment of contracts clause in the early nineteenth century, and later through the due process clause of the Fourteenth Amendment ratified after the Civil War, courts addressed issues that since the 1950s have arisen under the different constitutional terminology of the First Amendment. In Chapter 3, I turn to the book's central subject: the meaning of academic freedom as a First Amendment right.

In Chapters 3 through 6, I discuss academic freedom as a First Amendment right of professors. Chapter 3 explores its emergence in Supreme Court decisions during the 1950s and 1960s. Chapter 4 analyzes its development in subsequent Supreme Court and many lower-court decisions. Chapter 5 indicates that this right, while widely recognized, has also been widely ignored in cases applying general First Amendment doctrines and employee-speech jurisprudence to speech by professors. Responding to many issues posed by the case law, I then propose, in Chapter 6, a theory of academic freedom as a distinctive First Amendment right of professors.

Following the discussion of professors and similarly reviewing the case law before proposing a theory, I explore in Chapter 7 the institutional academic freedom of universities. I examine the Supreme Court and lower-court decisions that, most noticeably since the late 1970s, extended the First Amendment right of academic freedom from professors to universities as institutions. In Chapter 8, again responding to case law, I justify a distinctive First Amendment right of academic freedom for universities as well as professors. Chapter 9 asks whether institutional academic freedom can justify limits on free speech, focusing on the regulation of offensive speech on educational grounds and on access to university property. Observing that the academic freedom of professors and universities can conflict, I suggest in Chapter 10 how judges can resolve these cases. In Chapter 11, I consider the possible extension of a First Amendment right of academic freedom to students.

A Theory of Academic Freedom as a Distinctive First Amendment Right

A convincing theory of academic freedom as a distinctive First Amendment right must differentiate academic freedom from general First Amendment rights of free speech while explaining why academic freedom fits within

the First Amendment. If academic freedom is the same thing as free speech, there is no need for a separate theory of academic freedom. Yet if academic freedom is different from free speech, its distinctive meaning must be connected to the First Amendment. The societal value of the contribution to knowledge through the expert academic speech of professors, the classic justification for academic freedom in the 1915 Declaration, provides the basis for treating it as a distinctive category of First Amendment analysis. The distinctive meaning of academic freedom is connected to the First Amendment because it fosters two central First Amendment values recognized by courts in a wide range of cases, including in cases arising at universities: the production and dissemination of knowledge, and the contribution of free expression to democratic citizenship.

The 1915 Declaration defined academic freedom as the freedom of professors to perform their essential function of pursuing knowledge and conveying the results of their expert study to students, colleagues, and the broader society. Any indication that professors could be disciplined because people without academic training disagreed with their scholarly views, it stressed, would undermine confidence in the integrity of their work. People would understandably worry that professors had altered their academic judgments to avoid discipline. The 1915 Declaration also took pains to emphasize that academic freedom is not an absolute right of individual professors. It acknowledged that professors should be subject to discipline when their expression violates academic norms. Yet it insisted that only fellow professors have the expertise to determine and apply these norms, adding that involvement by others would raise legitimate suspicions of improper motivations. Peer review thus became a key component of academic freedom.

Without referring specifically to the 1915 Declaration, William Van Alstyne used a similar analysis of academic freedom in his brilliant theoretical essay "The Specific Theory of Academic Freedom and the General Issue of Civil Liberty."[4] Written in 1972 in an attempt to resolve confusion about the status of academic freedom as a First Amendment right, Van Alstyne's convincing distinction between a specific First Amendment right of academic freedom and general First Amendment rights of political expression has gone unheeded by the courts even as the widely lamented lack of clarity among the judicial decisions has persisted and proliferated. In this book, I follow Van Alstyne's distinction, develop the analysis of academic freedom

as a distinctive subset of First Amendment law, and apply this analysis to many factual contexts, most of which have arisen in the half century since Van Alstyne's pioneering essay.

Grounding First Amendment academic freedom on the societal contribution of expert academic speech has important implications for its relationship to the general First Amendment right of free speech and to employee-speech jurisprudence. The general First Amendment right of free speech protects the right of all citizens to express themselves about a broad range of subjects. It requires content and viewpoint neutrality in "the marketplace of ideas." The specific First Amendment right of academic freedom primarily protects the right of a limited group of people within universities to pursue and convey their expert knowledge. It does not extend to content or viewpoints that fail to meet academic standards as determined by faculty peers. *Whereas the general First Amendment right of free speech is individualistic and egalitarian, the specific First Amendment right of academic freedom is communitarian and meritocratic.*

Employee-speech jurisprudence limits First Amendment protection to speech about matters of public concern that are not made pursuant to an employee's official duties. The First Amendment right of academic freedom protects the expression of expert speech in scholarship and teaching, the core official duties of professors, even if that speech is not about a matter of public concern.

Academic freedom provides both more and less protection for professors than the general right of free speech provides for citizens or employee-speech jurisprudence provides for public employees. As Van Alstyne stressed in his theoretical essay, academic freedom gives professors more protection for their expert academic speech, but it subjects them to discipline for failing to meet academic standards that do not apply to others.

Just as the 1915 Declaration focused on the academic freedom of professors, a theory of academic freedom as a distinctive First Amendment right applies most easily to them. Beyond protecting scholarship and teaching, this right extends to speech by professors about institutional educational policy. Yet it does not cover the political speech of professors unless it relates to their academic expertise. The assertion by the 1915 Declaration that academic freedom protects all political expression by professors is inconsistent with its own emphasis on the societal value of academic expertise as the justification for academic freedom. With respect to expression outside

their expertise, professors should be governed by the First Amendment law of free speech that applies to all citizens and the employee-speech jurisprudence that applies to all public employees.

The centrality of peer review to academic freedom suggests that the First Amendment right of academic freedom should not only protect speech on peer review committees, but also require that universities establish them and provide basic procedural rights for faculty under review. As judges and commentators have often observed in many contexts, substantive First Amendment rights depend on procedural protections. It is also plausible to maintain that the substantive right of professors to speak about the educational policies of universities should require structures of faculty governance in which these policies are discussed, though it would not be a significant mistake to reject this view.

In addition to recognizing academic freedom as a First Amendment right of professors, courts have attributed First Amendment rights of academic freedom to universities as institutions and, much more tentatively, to students. The 1915 Declaration limited academic freedom to professors. It might have been wiser similarly to limit academic freedom as a First Amendment right. Perhaps terms such as "educational autonomy" and "freedom to learn" could have more effectively identified the educational interests of universities and students that merit distinctive First Amendment protection. But it is plausible to analyze these interests under the rubric of institutional and student academic freedom.

The ability of independent universities to protect the academic freedom of professors from external interference, highlighted in both the 1915 Declaration and in judicial decisions, provides the strongest justification for institutional academic freedom. Grounding institutional academic freedom in its instrumental support for the academic freedom of professors connects it to the context in which the concept of academic freedom first arose and most convincingly applies. It also makes sense to include the educational policy decisions of universities within institutional academic freedom because these decisions affect the production and dissemination of knowledge and the training of students for democratic citizenship, the general First Amendment interests that support academic freedom. Because many university decisions are not related to educational policy, institutional academic freedom is not a general right of university autonomy. Determining what constitutes an educational decision by a university, therefore, is as cru-

cial to institutional academic freedom as determining what constitutes expert speech by a professor is to individual academic freedom. And just as general First Amendment doctrines could protect the political speech of professors that is outside their academic expertise, the First Amendment doctrine of freedom of association or the liberty and property clauses of the Fourteenth Amendment could protect the autonomy of universities to make decisions on grounds that are not educational.

The validity of an institutional claim to academic freedom may depend on who makes the decision on behalf of the university. Many educational decisions, especially those related to appointment and tenure, are within the primary responsibility of the faculty, subject to limited administrative and board review. Broader issues of educational policy, by contrast, are within the primary responsibility of the administration and governing board, though faculty should have meaningful input.

In many instances, the extent of institutional academic freedom from state action applies equally to public and private universities. Public as well as private universities should have institutional academic freedom from state regulation of the content of teaching and scholarship. State interests in national security, public health, prevention of fraud, and enforcing laws that protect freedom of expression and prohibit employment discrimination may justify limits on the institutional academic freedom of private as well as public universities. But in some matters, the state should have more authority to regulate public universities than private ones. A state legislature should be able to decide whether to fund a research university, an agricultural college, or a community college. Legislative requirements that a public university serve a broad or elite student body, enroll a certain percentage of state residents, or admit all high school graduates in the top 10 percent of their class seem reasonable. So does legislation compelling public universities to teach courses in state history or the US Constitution, though it would violate the academic freedom of professors if the legislation restricted the materials they could assign or the academic views they could express. But I do not think the legislature should be able to impose any of these decisions on private universities.

The theoretical analysis developed in this book should resolve many disputes about whether a claim raises a First Amendment issue of academic freedom. Some disputes, however, present conflicts between plausible academic freedom claims by professors and universities. In response

to a professor's assertion that the university violated academic freedom in denying tenure, the university could claim that it exercised its institutional academic freedom over the selection of faculty while making the decision on valid academic grounds. As judges often concede, they are not competent to evaluate the academic merits. But they are competent to determine whether stated reasons are pretexts. And if a case turns on analysis of the academic merits, judges should defer to the determinations of expert faculty peers, ordering peer review if it has not already occurred and overruling it only when there is compelling evidence that the peer review failed to meet academic standards or resulted in a decision that violated the law.

The extension of academic freedom beyond its core protection of the scholarship and teaching of professors can include student interests in learning as well as institutional interests in educational policy. Students lack the academic expertise that is the foundation of the academic freedom of professors and, particularly as undergraduates, rarely participate in the production of knowledge. But student interests in learning at public universities implicate the First Amendment interests of disseminating knowledge and education for democratic citizenship.

In the classroom, student academic freedom is constrained but not precluded by the academic freedom of professors to make expert judgments about the relevance, quality, and pedagogical value of student speech. If students meet academic standards, they should be able to express views about the subject matter of a class even if they challenge the professor. Students should not be subject to indoctrination, harassment through speech, and other abusive speech that interferes with their ability to learn, even if similar speech off campus would be protected by general First Amendment doctrines. Students are entitled to competent instruction. Student academic freedom plausibly encompasses these student interests in learning. Students, like professors, should have academic freedom for their speech about matters of educational policy. Extracurricular activities, as both educators and judges have observed, constitute "a second curriculum" in which learning occurs. Student academic freedom should protect student journalists and actors. It should also extend to student participation in extracurricular organizations engaged in political and other ideological activity, which contributes to their education for democratic citizenship. Just as academic expertise provides the basis for faculty but not student academic freedom, the educational benefit of extracurricular political activities provides the basis

for student academic freedom that is not available for bringing political expression by professors within their academic freedom.

This book should enable readers to reach their own conclusions about how to apply the First Amendment to the educational functions of universities. They can evaluate the variety of judicial approaches in the case law I discuss, and my theoretical justification of academic freedom as a distinctive First Amendment right.

As the case law reveals, to some extent general First Amendment law and employee-speech jurisprudence can be interpreted to recognize interests in academic freedom. For example, in balancing employee interests in speech against employer interests in efficiency, some judges have concluded that university professors have more discretion than other employees to criticize their colleagues and administrators. Beyond selecting from alternative approaches within the existing case law, it is possible to incorporate additional consideration of academic freedom into traditional First Amendment analysis. Points I make while developing a theory of academic freedom as a distinctive First Amendment right, such as the importance of peer review in evaluating academic expression, could inform the application of general First Amendment law and employee-speech jurisprudence to the university.

Yet some doctrines of general First Amendment law and employee-speech jurisprudence are impediments to the educational functions of academic speech in universities. The fundamental First Amendment doctrines of content and viewpoint neutrality, as Justices Stevens and Souter have pointed out, are in tension with the legitimate interests of universities in preferring some ideas over others while making decisions about the merits of candidates for appointment and tenure and of courses to include in the curriculum. Judges have varied in their willingness to treat speech by professors as "matters of public concern" eligible for First Amendment protection, but it is difficult to extend even a broad interpretation of public concern to subjects of esoteric academic interest. The greatest impediment to academic speech comes from the rule that the First Amendment does not protect speech by public employees made "pursuant to their official duties." The official duties of professors most obviously consist of scholarship and teaching. In announcing the "official duties" test, the Supreme Court left open a possible exception for professors. But it has never resolved this issue, and lower courts have differed about whether to recognize an exception.

These difficulties with general First Amendment law and employee-speech jurisprudence highlight the promise of a clarified and developed First Amendment law of academic freedom. Just as employee-speech jurisprudence emerged as a subset of First Amendment law to address the distinctive First Amendment issues that arise in the context of public employment, a First Amendment theory of academic freedom can address the distinctive First Amendment issues that arise in universities. Beyond providing a convincing basis for protecting academic speech left vulnerable by broader areas of First Amendment law, a theory of academic freedom as a distinctive First Amendment right directs attention to the important issues at stake in the regulation of academic speech. For example, even if a judge would reach the same result, it makes more sense to ask whether academic speech by professors meets academic standards than to ask whether it is about a matter of public or private concern. I hope in this book to demonstrate the value of academic freedom as a distinctive subset of First Amendment law by developing its theory and illustrating how it would apply in practice.

1

Defining Academic Freedom in the AAUP's 1915 Declaration

The "1915 Declaration of Principles on Academic Freedom and Academic Tenure" by the newly formed AAUP remains the most thorough and influential analysis of academic freedom in the United States.[1] It established the meaning of academic freedom as a professional norm within the academic community decades before the Supreme Court identified it as a First Amendment right. Familiarity with academic freedom as a professional norm helps evaluate its subsequent emergence as a First Amendment right. More specifically, the detailed and sophisticated treatment of academic freedom in the 1915 Declaration provides useful guidance for remedying the unelaborated and often confusing judicial application of the First Amendment to academic freedom.

Three key features of the 1915 Declaration are particularly relevant for legal analysis. It justifies academic freedom by tying it to the function of professors in universities. It emphasizes the vital role of peer review in monitoring academic freedom. And it extends the scope of academic freedom to the general political expression of professors.

Legal analysis of the First Amendment right of academic freedom should adopt the justification for academic freedom and the focus on peer review from the 1915 Declaration. But it should reject the extension of academic freedom to general political expression, which was controversial among the framers of the 1915 Declaration and is inconsistent with the Declaration's own justification for academic freedom. Subsequent policy statements by the AAUP have elaborated the application of academic freedom to general political expression without revisiting its initial unconvincing extension in the 1915 Declaration. Pointing out the

underlying inconsistency between the justification for academic freedom and its extension to general political expression should help resolve legal confusion about the relationship between free speech and academic freedom in current First Amendment law.

The 1915 Declaration defines academic freedom as the freedom of professors to perform their essential function of pursuing knowledge and conveying the results of their expert study to students, colleagues, and the broader society. Any indication that professors could be disciplined because people without academic training disagree with their scholarly views, it stresses, would interfere with this function by undermining confidence in the integrity of their work. People would understandably worry that professors had altered their academic judgments to avoid punishment. Legal decisions occasionally make this point, but rarely rely on it as the fundamental justification for academic freedom.

The 1915 Declaration also takes pains to emphasize that academic freedom is not an absolute right of individual professors. Speech that fails to meet academic standards, it recognizes, is not the expert academic expression that merits the protection of academic freedom. Yet it insists that only fellow professors have the expertise to determine and apply these standards. Peer review thus became a key component of academic freedom. Judges have occasionally recognized the importance of peer review. But they have not treated it as essential in analyzing the First Amendment right of academic freedom. Interpreting the First Amendment right of academic freedom to require a role for peer review would address the concern of many judges and commentators about the lack of judicial competence to resolve academic disputes. It would encourage judicial deference to expert faculty peers to determine whether faculty speech meets the academic standards that justify the protection of academic freedom.

The justification for academic freedom in the 1915 Declaration—the societal interest in protecting the expression of academic expertise by professors—does not apply to general political expression unrelated to their specialties. Academic freedom should be recognized as a distinctive First Amendment right limited to expert academic speech. This distinctive right should be differentiated from the general First Amendment right of free speech about matters of public concern equally shared by all citizens, including professors when they are speaking on subjects beyond their expertise.

The Historical Background of the 1915 Declaration

The conception of academic freedom formulated in the 1915 Declaration derived from the intellectual ramifications of Darwinian evolutionary thought, the experiences of American professors who had studied in Germany, and the growing interest of American professors, often influenced by philosophical pragmatism and political progressivism, in applying their academic expertise to contemporary social issues.[2] They believed that the search for truth was a continuous process in which apparent errors must be tolerated because truth is never definitively known or even knowable.[3]

Yet they maintained that this search must be pursued by competent experts who followed the procedures of academic disciplines. Stressing that the expert search for truth precludes commitments to competing values, they associated it with ideological neutrality. These views about the search for truth affected pedagogy as well as research. Rather than the traditional transmission of truths from professor to student through recitation, professors engaged students as active learners through class discussions and laboratories. Conflicts with trustees who opposed evolutionary theory prompted professors to establish links with colleagues at other universities and to assert their academic competence in justifying resistance to administrative interference with their work.[4]

The German research university, with its established traditions of academic freedom, was an important model for American professors in the decades before World War I. Many American professors, including many members of the committee that drafted the 1915 Declaration, had studied in Germany. They sought commitments to research and academic freedom in the American universities to which they returned. American professors increasingly viewed academic freedom as the essential attribute of a university, as it was in Germany. Yet the German conception of academic freedom did not adapt easily to the United States. In Germany, academic freedom protected a professor's scholarship and teaching against interference from the state. But Germany lacked a strong commitment to general rights of political expression, and academic freedom did not apply to speech by professors outside the university. The powerful boards of trustees that governed American universities did not exist in Germany, where professors themselves largely operated the university. American

professors wanted the protection for scholarship and teaching available in Germany, but they also wanted to prevent universities from restricting their external expression. The strong influence of philosophical pragmatism and progressive political thought in the United States encouraged professors to share their academic expertise with the general public and more specifically to advise public officials.[5] Professors tried to construct a theory of academic freedom that addressed these interests and concerns.

During the last decades of the nineteenth century, wealthy businessmen increasingly dominated the boards of trustees at American universities while professors in the emerging social sciences addressed their academic expertise to the analysis and remediation of social problems.[6] These simultaneous developments triggered many of the disputes over academic freedom that stimulated both the founding of the AAUP and its 1915 Declaration. The disputes arose especially when the academic views of professors challenged the concrete interests, and not just the general ideology, of trustees. Yet some trustees vigorously supported academic freedom, and disputes over academic freedom did not always pit conservative trustees against progressive professors. Some boards of trustees and administrators fired conservative professors and replaced them with populists. Conservative as well as progressive professors supported academic freedom and became activists on its behalf.[7]

The forced resignation in 1900 of Edward Ross, an economist at Stanford University, prompted the first investigation by an organization of professors into conflicts within universities over faculty speech. Stanford had only one trustee, Jane Stanford, the widow of its founder. She put pressure on Stanford's president, David Starr Jordan, to fire Ross. Already displeased with Ross when he supported the presidential campaign of William Jennings Bryan in 1896, Mrs. Stanford demanded his firing when he advocated a ban on immigration of Chinese workers, who had labored on the railroads that formed the basis for the Stanford fortune. Jordan had recruited Ross to the Stanford faculty and tried to convince Mrs. Stanford that he should be retained. But he ultimately acceded to her insistence that he must be dismissed. The American Economic Association decided to investigate the dismissal of Ross. Edwin R. A. Seligman, a professor of economics at Columbia University, chaired the investigating committee and wrote its report, which condemned Mrs. Stanford for using her opposition to Ross's ideas to force his dismissal.[8] The report stated that the allegations against Mrs. Stanford raised issues of freedom of speech, but it did not refer

specifically to academic freedom. Jordan, it stressed, had never indicated that Ross "in his utterances on the silver question, on coolie immigration, or on municipal ownership, overstepped the limits of professional propriety."[9]

The next major investigation of a campus controversy by academic disciplinary societies occurred in 1913, when a joint committee of the American Psychological Association and the American Philosophical Association concluded that the president of Lafayette College had forced a professor to resign because his teaching did not conform to the doctrines of the Presbyterian Church.[10] Arthur O. Lovejoy, who had resigned from Stanford in protest against Ross's dismissal,[11] chaired the joint committee. This report, like the Ross report, did not refer to academic freedom.[12]

In December 1913, three associations of social scientists—the American Economic Association, the American Sociological Society, and the American Political Science Association—coordinated to pass identical resolutions establishing committees on academic freedom and tenure that would cooperate with each other. The three separate committees combined into a single joint committee in June 1914.[13] The joint committee decided at its first meeting to write a statement of principles on academic freedom as well as to investigate individual cases.[14] Its preliminary report, published in the March 1915 issue of the *American Economic Review,* raised many issues that the AAUP's 1915 Declaration would soon address.[15] Seligman, the primary author of the preliminary report and of the 1915 Declaration, believed that that the newly founded AAUP, which had its organizational meeting in January 1915, was more suited to sponsoring the document than a joint committee of disciplinary associations.[16]

Following discussions with Seligman and with the approval of other members of the joint committee of the three social science associations, John Dewey, the first president of the AAUP and a professor of philosophy at Columbia, established its first committee, the Committee on Academic Freedom and Academic Tenure. The new AAUP committee, chaired by Seligman, would write a report that built on the joint committee's preliminary one. Dewey appointed fifteen members, seven of the nine members of the joint committee and professors from additional academic disciplines.[17] Seligman drafted the report, as he had the preliminary one, circulated it to the full committee in late November 1915, and after revisions presented it to the AAUP's second annual meeting in January 1916. Following substantial debate, the annual meeting approved the report, which became known as the 1915 Declaration.

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