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Legislators in the Classroom: Why State Legislatures Cannot Decide Higher Education Curricula

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COMMENTS

LEGISLATORS IN THE CLASSROOM: WHY STATE LEGISLATURES CANNOT DECIDE HIGHER EDUCATION CURRICULA

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INTRODUCTION

On December 4, 2003, a Michigan state legislator introduced an amendment to the state constitution that would give the legislature authority to determine how public universities can spend their appropriated money.[1] Michigan, a state whose constitution serves as the model for many other states regarding higher education,[2] has the most autonomous public higher education system in the country.[3]

1. *See* H.J. Res. R, 2003 Leg., Reg. Sess. (Mich. 2003) (providing "for legislative oversight of institutions of higher education"), *available at* http://www.michigan-legislature.org/documents/2003-2004/jointresolutionintroduced/house/pdf/2003-HIJR-R.pdf. The amendment requires a two-thirds vote in both chambers before it reaches Michigan voters. *See* Judy Putnam, *Power Play: Official Seeks Control in School Affairs*, GRAND RAPIDS PRESS, Dec. 7, 2003, at A27 (pointing out that the amendment, once adopted, would allow the legislature to create laws controlling university spending).

2. *See* David Aronofsky, *Voters Wisely Reject Proposed Constitutional Amendment 30 to Eliminate Montana Board of Regents*, 58 MONT. L. REV. 333, 338, 342 (1997) (noting that Montana and "a number of other states adopted the Michigan constitutional autonomy model").

3. *See id.* at 338 n.16 (recognizing that Michigan is at the forefront of states with regard to the level of autonomy given to institutions of higher learning); *see also id.* at 341-42 (asserting that the Michigan Supreme Court continuously defends Michigan's public university autonomy from State encroachment and mentioning that Michigan's constitution requires the popular election of the university boards to

Constitutionally separate from the executive and legislative branches of government, Michigan universities have enjoyed a long history of independence from governmental influence[4] and consider the amendment a real threat.[5]

Representative Jack Hoogendyk, a rookie Republican legislator named "most conservative" House member in 2003,[6] is the primary sponsor of both this amendment[7] as well as an earlier resolution endangering university autonomy by giving the legislature more university oversight.[8] The earlier resolution came in response to more than sixty university courses Representative Hoogendyk believes deserve greater scrutiny, covering such topics as homosexuality, gender, and diversity.[9] Within the past two years, legislatures in

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further shield the universities from political influence).

4. The Michigan legislature may decide how much money it appropriates to public universities. *See* MICH. CONST. art. VIII, § 4. The state constitution, however, allows the university boards of trustees to decide how to spend the money. *See* § 5 ("Each board shall have general supervision of its institution and the control and direction of all expenditures from the institution's funds."); *see also* Putnam, *supra* note 1, at A27 (quoting University of Michigan President Mary Sue Coleman, who pointed out that Michigan "universities have been the envy of many across the country").

5. *See* Putnam, *supra* note 1, at A27 (quoting Mike Boulus, executive director of the Presidents Council, State Universities of Michigan, who claimed that the amendment may diminish autonomy and, therefore, hinder the development of universities). The Amendment would end university independence. Not only could the legislature make course funding conditional, but it could also require universities to give a detailed account of their internal decision-making. *See Lawmakers Unwisely Grab for Power Over State Colleges*, DETROIT NEWS, Dec. 19, 2003, *at* http://www.detnews.com/2003/editorial/0312/21/a14-13016.htm (on file with the American University Law Review). By losing independence, universities will struggle to explore unpopular societal issues without political interference. *Id.* In fact, this fear of political sway is what originally prompted most state legislatures to create, through their constitutions, an autonomous university system. *See* Aronofsky, *supra* note 2, at 341.

6. *See* News Release, House Republican Communications Services, Hoogendyk named most conservative House member (Sept. 23, 2003) (explaining that Hoogendyk's roll call voting score was a "perfect conservative rating" and that to Hoogendyk, "a conservative is someone who fights for smaller government and the protection of traditional values"), *at* http://www.gophouse.com/Members/HOOGENDYK/Releases/Releases/09_23_03_conservative_member.htm (on file with the American University Law Review).

7. Putnam, *supra* note 1, at A27.

8. *See* H. Res. 141, 2003 Leg., Reg. Sess. (Mich. 2003) (urging "Michigan's public universities to reexamine all class offerings and refrain from offering classes or university-sanctioned activities that promote or facilitate participation in a sexual lifestyle or practices other than heterosexual monogamy"), *available at* http://www.michiganlegislature.org/documents/2003-2004/journal/house/htm/2-003-HJ-10-14-074.htm. HR 141 is now in the Committee on Higher Education. *Id.*

9. Representative Hoogendyk targeted courses such as Central Michigan University's "Society and Sex," "Women, Crime and Deviance," "The Family," and "Discrimination: Roots and Impact on Children's Development." *See* Tiffany L. Woods, *CMU Officials Defend Classes on 'Hit List*,' CENT. MICH. LIFE, Sept. 29, 2003, *at* http://www.cm-life.com/vnews/display.v/ART/2003/09/29/3f77bc33c0d79 (on file with the American University Law Review). Other classes Hoogendyk is more closely

North Carolina,[10] Kansas,[11] and Missouri[12] have also attempted to gain greater control over curriculum decisions by withdrawing funding from universities for non-compliance with legislators' views of what constitutes appropriate university course topics. Currently, the federal government is even taking steps to assert greater control over curricula in higher education international studies programs.[13]

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examining include "Studies in Film and Gender," "History of Sexuality Since the 18th Century," "The Individual, Marriage and the Family," and "Lesbian, Bisexual, and Gay Studies: Psychological and Cultural Issues." *See* Brian Charlton, *Rep. Works to Restrict Sexuality Curriculum*, STATE NEWS, Aug. 26, 2003, *at* http://www.statenews.com/article.phtml?pk=18602 (on file with the American University Law Review).

10. In 2002, the North Carolina legislature attempted to amend the state budget bill to deny funding for "any course or summer reading program in any religion unless all other known religions are offered in an equal or incremental way" in response to the suggested summer reading of Michael Sells's "Approaching the Qur'an" for incoming freshmen to UNC. However, students were not compelled to read the book and there was no penalty for failing to complete the reading assignment. *See* North Carolina House Budget Resolution § 9.5A (2002), *available at* http://www.ncga.state.nc.us/Sessions/2001/Bills/Senate/HTML/S1115v5.html; *see also Summer Reading Causes Controversy at UNC*, USA TODAY, Aug. 16, 2002, *available at* http://www.usatoday.com/news/nation/2002-08-16-unc-reading_x.htm. Three unnamed freshmen at the University brought a suit against UNC in federal court arguing that the assignment of the book violated the separation of church and state. *See* Yacovelli v. Moffit, No. 1:02CV596, 2004 WL 1144183, at *15 (M.D.N.C. May 20, 2004) (denying an injunction and holding that a state university providing the option for students to discuss the culture of a religious group is not a violation of the Establishment Clause).

11. In 2003, a Kansas representative presented a proviso withholding funding from university departments that buy or use "obscene" materials and specifically sought to cut more than $3.1 million from the University of Kansas for allowing a professor to use sexually explicit materials in his sexual education class. The Governor vetoed the provision as "an inappropriate use of legislative powers designed to impinge upon academic freedom." *See Kansas Governor Vetoes Amendment Attacking Course Content*, AAUP STATE LEGISLATIVE AND PUBLIC AFFAIRS (2003), *at* http://www.aaup.org/govrel/States/statindx.htm (on file with the American University Law Review). As a compromise, the legislature instead passed a bill requiring universities to create and publicize policies dealing with sexually explicit materials used in the curriculum. The new bill prohibits legislative oversight of the universities' policies, thus leaving the curriculum decisions in the hands of the universities. *See* Chris Moon, *Universities Could See Policy Changes Regarding Sexually Explicit Materials*, CAPITAL-JOURNAL ONLINE, May 5, 2003, *at* http://www.cjonline.com/stories/050303/leg_sex.shtml (on file with the American University Law Review).

12. In 2002, the Missouri legislature voted to cut $100,000 from the University of Missouri-Kansas City's budget for the institution's support of a political science professor who wrote an article about sexual politics and pedophilia. In addition, the legislature cut $50,000 (reduced from an initial proposal to cut $5 million) in response to a university-run television station policy prohibiting on-air personalities from wearing symbols supporting a political, religious, etc. cause. *See* Mark F. Smith, *Improper Activities*, ACADEME, Nov.-Dec. 2002, *available at* http://www.aaup.org/publications/Academe/2002/02nd/02ndgr.htm.

13. *See* Milan Gagnon et al., *Uncle Sam Goes to Class: Controversial Higher Education Bill Toes the Line of Censorship and Academic Freedom*, GOLDEN GATE XPRESS ONLINE, Dec. 15, 2003 (explaining that HR 3077 seeks to create an advisory board to oversee federally funded international studies and foreign language programs to "better

These actions are unusual because, historically, many state legislatures have played no role in curriculum decisions in higher education.[14]

This Comment examines the legal implications of state legislatures controlling university curricula. Part I looks at the legislative arguments in favor of these provisions which rely on the notion that states create and taxpayers fund public universities, meaning that the First Amendment applies differently than in the traditional context, which presumably allows governments to make judgments based on content. Part I also discusses Supreme Court and other federal cases that show why universities are distinguishable from other government created institutions, thus rendering the legislatures' arguments weaker. Part II looks at the protection the First Amendment provides for three primary university "actors," namely professors, students, and the university itself.[15] This section concludes that there is likely a First Amendment academic freedom protecting universities' curriculum decisions. Part III examines some arguments universities could make if they do have a right to challenge the actions of the legislatures and recommends that courts should recognize the fact that curriculum decisions are best left to the universities. This Comment concludes that the arguments in favor of legislative oversight are not applicable in matters of university curriculum decisions because universities are different from other publicly-funded institutions. As a result, these

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meet America's national and international security needs" and to "ensure appropriate use of taxpayer funds"), *at* http://xpress.sfsu.edu/archives/news/-000496.html.

14. *See* Mary Burgan, *Academic Freedom in a World of Moral Crises*, CHRON. HIGHER EDUC., Sept. 6, 2002, at B20 ("Ever since the founding of most land-grant institutions . . . state legislatures have refrained from using state dollars to encourage or inhibit the teaching or discussion of certain ideas on individual campuses."), *available at* http://www.aaup.org/statements/archives/Speeches/2002/02MABop.htm.

15. Regarding legislative interference with university curriculum decisions, there is no case law directly on point. *See* David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 272-73 (1990). Rather, scholars and cases discuss professors' First Amendment rights against universities and other public officials. *See, e.g.*, Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third "Essential Freedom"*, 45 STAN. L. REV. 1835, 1837 (1993) ("[Academic freedom] protects quite expansively the scholarly enterprise from outside interference (grand juries, witch-hunting public officials, funding agencies, and other assorted patrons, critics, and 'do-gooders'), but only grants limited protection to professors' intramural speech or classroom activities against institutional interests."); *see also* ACADEMIC FREEDOM AND TENURE: 1940 STATEMENT OF PRINCIPLES AND 1970 INTERPRETIVE COMMENTS, *reprinted in* AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS (AAUP), POLICY DOCUMENTS & REPORTS 3 (6th ed. 1989) (defining academic freedom as including three components, all of which concern the academic freedom of university professors and not the institution); discussion *infra* Part II.C.

bodies should be afforded the academic freedom to make curriculum decisions without legislative interference.

I. ALTHOUGH STATE-CREATED AND TAXPAYER-FUNDED, UNIVERSITIES ARE DIFFERENT FROM OTHER PUBLIC INSTITUTIONS

The creation and maintenance of schooling is in the hands of the states.[16] While states have traditionally[17] left higher education curriculum choices to the universities and professors,[18] the largest sources of financial support for universities are state governments,[19] which create universities, like other government institutions, to achieve certain goals and functions.[20] Section A discusses why this state allocation of funding provided by taxpayers may subject universities to the applicable rules for government-funded institutions which would give legislatures authority to control higher education curricula. Section B, however, explains that the Supreme

16. *See* Kevin G. Welner, *Locking Up the Marketplace of Ideas and Locking Out School Reform: Courts' Imprudent Treatment of Controversial Teaching in America's Public Schools*, 50 UCLA L. REV. 959, 994 (2003) (pointing out that although schools are made up of "an amalgam of federal, state, and local governmental actors," the federal government typically plays a limited role "in the administration and control of schooling"); *see also* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

17. University autonomy was strongest following the McCarthy era. *See* Rebecca Gose Lynch, *Pawns of the State or Priests of Democracy? Analyzing Professors' Academic Freedom Rights Within the State's Managerial Realm*, 91 CAL. L. REV. 1061, 1067-71 (2003) (explaining that McCarthyism spawned courts' use of academic freedom as a protection for professor speech); *see also* William G. Buss, *Academic Freedom and Freedom of Speech: Communicating the Curriculum*, 2 J. GENDER RACE & JUST. 213, 222 (1999) (identifying the McCarthy-era mistreatment of teachers to include loyalty oaths, penalties for Communist party or other suspect organization membership, and in depth investigation by governmental committees).

18. *See* Burgan, *supra* note 14; Rabban, *supra* note 15, at 280 (noting that in the post-McCarthy era, universities have decided key issues without direct government interference). *See generally* Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1286 (1988) (suggesting that the newfound legal protection came from "the lack of a promising legal theory by which to bring a violation of academic freedom . . . under the stern 'shall nots' of the Constitution"). Along with common law protection, many states also granted constitutional autonomy to universities. *See infra* note 47.

19. *See* Valerie Brown, *A Comparative Analysis of College Autonomy in Selected States*, 60 ED. LAW REP. 299, 300 (1990) (recognizing that because public universities receive financial support from the government and were created to serve a public purpose, there must be a balancing of academic autonomy and public accountability); *see also* discussion and accompanying notes *infra* Part I.A.

20. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 330-34 (2003) (identifying the development of future leaders as an important function of public higher education). *See generally* Brown, *supra* note 19 (providing specific examples of state initiatives aimed to improve university management and discussing the results of such initiatives).

Court views universities differently from other government-created entities and concludes that the rules likely do not apply.

A. Legislatures' Arguments for Control of Curricula

The most common argument in support of legislative oversight of university curricula is that taxpayers may oppose certain courses on religious or moral grounds,[21] and therefore, it is the duty of the legislature to act on taxpayers' behalves[22] in order to ensure that universities use the appropriated money on education as opposed to advocacy.[23] The National Center for Education Statistics reports that more than half of public university funding come directly from federal, state and local taxpayers.[24] Taxpayers also provide much of the tuition, as about sixty percent of undergraduates receive financial aid.[25] Representative Jack Hoogendyk, who sponsored the Michigan constitutional amendment, argues that in response to the University of Michigan class "How to be Gay: Male Homosexuality and Initiation,"[26] "[i]t's time to put our foot down and say 'not with my tax dollars.'"[27] In addition, state legislatures are currently attempting to

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21. *See* 135 CONG. REC. S8088 (daily ed. July 26, 1989) (statement of Sen. Jesse Helms) ("Americans for the most part are moral, decent people and they have the right not to be denigrated, offended, or mocked with their own tax dollars.").

22. *See* Sterling v. Regents of the Univ. of Mich., 68 N.W. 253, 255 (Mich. 1896) ("The argument by which legislatures have hitherto convinced themselves that it was their duty to legislate universities to death is this: 'It is a state institution, and we are the direct representatives of the people, and therefore it is expected of us; it is our right. The people have an interest in this thing, and we must attend to it.'"). Disagreeing with this argument, the *Sterling* court held that the state legislature was without power to legislate in matters of university management. *Id.* at 258.

23. *See* George Archibald, *'How to be Gay' Course Draws Fire at Michigan*, WASH. TIMES, Aug. 18, 2003 (discussing family-values lobbyist Gary Glenn, who argues that University of Michigan professor David M. Halperin and the university "are guilty of perpetrating a fraud against UM students and the people of Michigan [with] propaganda statements about so-called cultural studies and academic freedom" and that they advocate "queer studies" using tax dollars), *available at* http://washingtontimes.com/national/20030818-122317-3268r.htm.

24. *See* Neal McCluskey, *Taxation U.*, NAT'L REV. ONLINE, Nov. 4, 2003 (stating that only 18.5% of public university revenue comes from tuition and other student fees), *at* www.nationalreview.com/nrof_comment/mccluskey200311040825.asp (on file with the American University Law Review). In addition, McCluskey says that taxpayers also provide 16.4% of private college funds (about $12 billion). *Id.*

25. *See id.* (observing that in 2002, university students received more than $40 billion worth of grants from federal and state governments and universities in addition to government provided loans).

26. Representative Hoogendyk refers to this class as the case in point of the "militant, gay/lesbian/transgender/bisexual agenda." *See* Peter Luke, *Culture Wars in Michigan Get Some Fuel*, DECLARATION FOUND. (Sept. 2, 2003), *at* http://www.declaration.net/news.asp?docID=3658&y=2003 (on file with the American University Law Review).

27. *Id.* Taxpayers, however, likely do not have standing to complain about curricula they do not agree with. In *Doremus v. Board of Education*, 342 U.S. 429 (1952), the Court looked at whether a state taxpayer (the parent of a public school

participate more closely in public university decision-making because of financial strains and the resultant pressures for stronger accountability by taxpayers and tuition-paying students.[28]

Legislatures also argue that, because the state funds universities, legislatures have full authority to decide, and thereby regulate, what courses universities, which are merely "speaking" for the state, can offer.[29] As a result, legislatures argue, states may make content-based funding decisions to encourage activities that the legislature deems to be in the public interest.[30] Therefore, the First Amendment applies differently to government institutions, such as public universities,[31] than to public discourse by individuals where content-based censorship is generally forbidden.[32]

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student) had standing to contest a state statute that required the reading of the Bible at the opening of every public school day. *Id.* at 432-33. The Court found that "the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference" and therefore the requisite injury was lacking. *Id.* at 434-35.

28. *See* John Buntin, *Setting Colleges Free*, GOVERNING, Sept. 2003, at 18, 19 (describing how state legislators are frustrated because they do not know what public university students are learning). "In the last fiscal year, state and local governments in the United States spent $66 billion on higher education, but policy makers who start asking questions about what governments get for their investment soon make a startling discovery: No one really knows." *Id.* As a result, some state legislatures are basing funding on performance, but often the performance tests are arbitrary and political. *Id.* at 20. In addition, it is rare indeed when a student graduates in four years. For example, a 1996 survey found that just thirty-four percent of public university students finish in four years. *See* Kate O'Beirne, *The Six-Year Plan*, NAT'L REV. ONLINE, Apr. 22, 2002, (discussing the increasing trend for students at public universities to take five or six years to obtain their degrees), *at* http://www.national review.com/flashback/flashback-kob051002.asp (on file with the American University Law Review).

29. "Who pays the piper calls the tune." This proverb seems to justify the recent actions by state legislatures to gain greater control over higher education curriculum by conditioning funding. *See* Martin D. Snyder, *A Question of Autonomy: The View from Salzburg*, ACADEME, May-June 2002 (questioning how universities competing for scarce financial resources can also preserve their autonomy), *available at* http://www.aaup.org/publications/Academe/2002/02mj/02mjsny.htm).

30. *See* Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 164 (1996) ("[T]he state can regulate speech within public educational institutions so as to achieve the purposes of education."); *see also* Rosenberger v. Rector, 515 U.S. 819, 833 (1995) (explaining that the state is not obligated to fund alternative activities).

31. *See* Post, *supra* note 30, at 164. Courts suggest that "[r]estrictions on speech by public employees in their capacity as employees are analogous to restrictions on government funded speech." *See* Urofsky v. Gilmore, 216 F.3d 401, 408 n.6 (4th Cir. 2000). In each situation, the government is entitled to monitor and control the content of the speech because it has "purchased" the speech. *See* Post, *supra* note 30, at 164.

32. *See* Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Disclosure*, 64 U. COLO. L. REV. 1109, 1128 (1993) ("Public discourse merits unique constitutional protection because it is the process through which the democratic 'self,' the agent of self-government, is itself constituted through the reconciliation of individual and collective autonomy.").

In addition, the state is a significant participant in the "marketplace of ideas."[33] On many occasions states are speaking; on other occasions, states subsidize or fund speech devoid of the assertion that the funded speech is the states' message.[34] Traditionally, states and local governments have had ultimate control of the curriculum in elementary and secondary ("K-12") schools.[35] One justification for state and local government control is the belief that K-12 schools are the inculcators of social values,[36] and case law repeatedly reinforces this notion.[37] In elementary and secondary education, curriculum guidelines are generally narrow because administrators and local government officials consider curricula to be state-sponsored speech.[38] Legislatures argue that K-12 and higher education are indistinguishable in that both public institutions are speaking on

33. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1927) (recognizing that the classroom should foster exposure to a diversity of ideas, thereby enriching the learning experience).

34. *See* JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW: CASES, COMMENTS, QUESTIONS 877 (9th ed. 2001) (noting that the government may financially support artistic or scientific speech in a manner where there is no claim that the resulting message represents the government).

35. *See id.* (explaining that authority is usually in the hands of local school districts or boards of education, which then delegate some authority to individual schools); *see also* Epperson v. Ark., 393 U.S. 97, 106-08 (1968) (reiterating that a state legislature has an "undoubted right to prescribe the curriculum for its public schools" in K-12).

36. Ambach v. Norwick, 441 U.S. 68, 76-77 (1979) (explaining that courts, citizens, and social scientists perceive public education as "inculcating fundamental values necessary to the maintenance of a democratic political system"). Some scholars insist that these "fundamental values" include the availability of information so students are exposed to diverse ideas. *See generally* Susan H. Bitensky, *A Contemporary Proposal for Reconciling the Free Speech Clause with Curricular Values Inculcation in the Public Schools*, 70 NOTRE DAME L. REV. 769, 770-72 (1995) (positing that, in reality, there are two approaches in K-12: inculcative, where specific values are identified and taught to students, and noninculcative, where the focus is on "reasoning about values while avoiding the transmission of any definite moral statement").

37. *See* Bitensky, *supra* note 36, at 797 (suggesting that "to inculcate or not to inculcate" has never been a question as the Court has repeatedly been receptive to values inculcation at the K-12 level); *see, e.g.*, *Ambach*, 441 U.S. at 78-79 (finding that a New York statute forbidding public school employment to aliens was constitutionally valid because New York had a legitimate interest in advancing students' "perceptions and values" and shaping "the attitudes of students toward government, the political process, and a citizen's social responsibilities"); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925) ("No question is raised concerning the power of the State reasonably to regulate all schools, . . . to require . . . that teachers shall be of good moral character and patriotic disposition, [and] that certain studies plainly essential to good citizenship must be taught."); *see also Ambach*, 441 U.S. at 86 n.6 (Blackmun, J., dissenting) ("[T]he inculcation of fundamental values by our public schools is necessary to the maintenance of a democratic political system.").

38. *See* discussion and accompanying notes *infra* Part I.B.2 (discussing case law holding that curriculum control at the K-12 level is permissible if aimed at speech that is state-sponsored).

behalf of the state and, therefore, curriculum control is necessary in higher education.[39]

In addition, governments do not have a duty to provide financial support to foster free speech.[40] One Michigan representative equates the debate over control of state-funded university courses to the controversy over state-funded abortion, which enjoys no constitutional right to state funding.[41] In other words, because there is no constitutional entitlement to government funding for universities,[42] there is no violation of a right if legislatures refuse to fund a certain class.[43] Furthermore, operating under the premise that tuition is "real" private money and not public tax money, legislatures imply that tuition, rather than state funds, would pay for universities that offer controversial courses.[44] Finally, legislatures argue that they

39. *See supra* notes 1, 8, 10-12 and accompanying text.

40. *See* Regan v. Taxation With Representation of Wash., 461 U.S. 540, 542 n.1, 550-51 (1983) (holding that although charitable contributions are free speech activities, the government could classify contributions to veteran's organizations engaged in lobbying as deductible but could deny deductions for contributions made to other organizations (religious, educational, charitable, scientific) if they engaged in lobbying activities); *see also* Rust v. Sullivan, 500 U.S. 173, 191, 203 (1991) (upholding regulations limiting the beneficiaries of government family planning service grants from offering services related to abortion).

41. Ted Roelofs, *Bill Puts College Classes in the Hot Seat*, GRAND RAPIDS PRESS, Aug. 22, 2003, at A1.

42. Most public universities are entirely state created.

43. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 310, 322-23 (1980) (finding that although the choice to have an abortion is a constitutionally protected right, it does not follow that the government is bound to provide the financial resources for an abortion); Maher v. Roe, 432 U.S. 464, 473-74 (1977) (upholding a government program that funded childbirth but denied funding for non-therapeutic abortions and noting that the government may choose to favor childbirth over abortion and, if so, allocate public funds accordingly). Similarly, state legislatures argue that there is nothing constitutionally wrong with legislatures making university funding conditional upon the universities conforming their curriculum to what legislators deem to be in the public interest. *See, e.g.*, Charlton, *supra* note 9 (explaining that the Michigan Constitution gives the state legislature discretion regarding how much state funds to allocate to public universities and discussing Rep. Hoogendyk's proposed constitutional amendment which would enable the legislature to refuse to fund courses it deems to be inappropriate for higher education and to withhold funding from public universities that refuse to submit detailed course descriptions for review by the legislature). *But see* J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 328 (1989) ("Even attempts by the legislature to tie substantive conditions to specific appropriations have been set aside when found to interfere with general operations of the university.").

44. *See* Charlton, *supra* note 9 (discussing the sentiments of legislatures that taxpayers are concerned with the allocation of tax dollars to universities that offer nontraditional courses). Not including room and board, books, etc., in 2003, the average tuition at a four-year public university was more than $4,000, and more than $18,000 at a private university. *See* REPRESENTATIVE JOHN A. BOEHNER AND REPRESENTATIVE HOWARD P. MCKEON, THE COLLEGE COST CRISIS: A CONGRESSIONAL ANALYSIS OF COLLEGE COSTS AND IMPLICATIONS FOR AMERICA'S HIGHER EDUCATION SYSTEM, at 1-2, 6 (Sept. 4, 2003) (emphasizing that Americans think higher education is not accountable enough to the "consumers of higher education:" parents,

have a duty to take action when an offered course violates the Establishment Clause[45] or uses obscene material.[46]

B. The Traditional Arguments for State Control Are Distinguishable

Some scholars argue that when states have constitutions that establish public universities as a separate branch of government,[47] this automatically prohibits legislative efforts to take part in internal academic affairs.[48] University autonomy in governance stems from

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students and taxpayers). This argument quickly fails, however, because the state does not require students to attend a specific school or enroll in a specific class; rather it is left to the parents and students to decide where to attend and which courses to take. *See* Mark J. Fiore, *Trampling the "Marketplace of Ideas": The Case Against Extending* Hazelwood *to College Campuses*, 150 U. PA. L. REV. 1915, 1955-58 (2002) (explaining that university students possess much more freedom than K-12 students, whose education is compulsory); *see also* Jonathan R. Alger, *From Father to Big Brother: Applying K-12 Law to Colleges*, ACADEME, Jan.-Feb. 1999 (pointing out that prospective students decide whether or not to enroll in a university and where to do so), *available at* http://www.aaup.org/publications/Academe/1999/99jf/LW_JF99.HTM.

45. *See* North Carolina example *supra* note 10.

46. *See* Kansas example *supra* note 11; *see also* Scott Rothschild, *Senator Broadens Attack on Professor*, LAWRENCE JOURNAL-WORLD, May 3, 2003 (asserting that Kansas Senator Susan Wagle believed that a University of Kansas professor used obscene videos and language in his class "Human Sexuality in Everyday Life"), *available at* http://www.ljworld.com/section/kusexclass/storypr/130597. Senator Wagle then attempted to cut $3.1 million in funding from University of Kansas' School of Social Welfare on the grounds that the professor used obscene videos in his class "Human Sexuality in Everyday Life." *Id.* The state can punish obscene speech because it has no communicative value and it may restrict speech having a clear and present danger of imminent disturbance. *See* Miller v. California, 413 U.S. 15, 18-19, 24 (1973) (finding that in determining whether material is obscene, courts must ask whether "the average person, applying contemporary community standards" would find that the material: (1) appeals to the prurient interest; (2) offensively depicts statutorily defined sexual conduct; and (3) "lacks serious literary, artistic, political, or scientific value"). Obviously if the curriculum used obscene material, the courses and materials are likely to be excluded. However, most universities have detailed curriculum review procedures already in place to address these potential issues. *See, e.g.*, Marisa Kwiatkowski, *Pseudo University Board of Trustees*, 38 GRAND VALLEY LANTHORN 7 (2003) (writing that Michigan's Grand Valley State University has a complex course review system, and that "[i]f a course was really that bad, it would not make it through all of [the] stages"), *available at* http://www.lanthorn.com/archives.asp?aid=2846; Charlton, *supra* note 9 (discussing Michigan State University Trustee David Porteous' view that MSU's review process "works pretty well and has withstood the test of time").

47. Several state constitutional provisions give public universities an independent legal status. *See, e.g.*, ALA. CONST. art. XIV, § 264; CAL. CONST. art. IX, § 9; GA. CONST. art. VIII, § 4; HAW. CONST. art. X, § 6; IDAHO CONST. art. IX, § 10; LA. CONST. art. VIII, §§ 5-7; MICH. CONST. art. VIII, §§ 4, 5; MINN. CONST. art. XIII, § 3; MONT. CONST. art. X, § 9; NEB. CONST. art. VII, § 10; NEV. CONST. art. XI, § 4; OKLA. CONST. art. XIII, § 8. However, other state statutes limit autonomy. *See, e.g.*, COLO. CONST. art. IX, § 12; MO. CONST. art. IX; N.M. CONST. art. XII, § 13; S.D. CONST. art. XIV, § 3; UTAH CONST. art. X, § 4.

48. As mentioned in the Introduction, because the Michigan Constitution and common law mandate public university independence, the legislature is left with amending the constitution to take part in curriculum decisions. *See* Rabban, *supra*

state constitutions,[49] cases,[50] and tradition.[51] Even accepting the constitutional autonomy argument as true, it is still not clear whether universities in states that do not provide for autonomy[52] have any rights against the state legislature. This section analyzes this issue by contrasting universities with other government institutions, including secondary and elementary schools, and concludes that legislatures cannot treat public universities like other publicly-funded entities.

note 15, at 272 (noting that when state constitutions establish the public university system as a separate branch of government, state courts have interpreted the constitution to prevent state legislatures from attempting to dictate the location of academic departments or fix the percentage of out-of-state students); *see also* Byrne, *supra* note 43, at 327 (noting that in states where public universities have independent legal status, several state courts have struck down state statutes that attempt to impose legislative control over academic decision-making). *But see* Rabban, *supra* note 15, at 272 ("But in the majority of states, in which no constitutional separation of powers exists to protect the state university, it seems difficult to argue that the First Amendment poses a bar to such legislative decisions.").

49. *See* Brown, *supra* note 19, at 301-10 (indicating that many state constitutions establish university autonomy through governing boards (Boards of Regents, Trustees, etc.)). At least twelve state constitutions guarantee autonomy for public universities. *See supra* note 47.

50. *See, e.g.*, Opinion of the Justices, 417 So. 2d 946, 947 (Ala. 1982) (stating that the legislature may not eliminate the trustees' university management discretion through a statute); Levi v. Univ. of Hawaii, 628 P.2d 1026, 1029 (Haw. 1981) (finding that regents have sole authority on internal management issues); Dreps v. Bd. of Regents, 139 P.2d 467, 473 (Idaho 1943) (holding that the state constitution prohibits the legislature from interfering in the Board of Regents' employment decisions); Regents of the Univ. of Mich. v. Michigan, 203 N.W.2d 871, 886 (Mich. Ct. App. 1973) (reaffirming that the framers of the Michigan Constitution intended regents, acting as an independent authority, to be free from legislative interference in the operation of universities); King v. Bd. of Regents, 200 P.2d 221, 238 (Nev. 1948) (stating that the legislative creation of a mandatory advisory committee to the regents is invalid as it infringes on the regents' sole authority over university management). *But see, e.g.*, First Equity Corp. v. Utah State Univ., 544 P.2d 887, 889, 892 (Utah 1975) (holding that the state university corporation exists exclusively as an instrument for the state governance of the university).

51. Creators modeled the first American universities after German institutions, where the concept of "lehrfreiheit" (freedom to teach and research) had utmost importance. *See* Gail Sorenson & Andrew S. LaManque, *The Application of* Hazelwood v. Kuhlmeier *in College Litigation*, 22 J.C. & U.L. 971, 974-75 (1996) (pointing out that the concepts of "lernfreiheit" (freedom to learn) and "freiheit der wissenschaft" ("freedom of the academy") were left out of the American Association of University Professors' definition of academic freedom). Rather than placing emphasis on character formation, the early German universities valued intellectual exploration. *See* John A. Beach, *The Management and Governance of Academic Institutions*, 12 J.C. & U.L. 301, 307-08 (1985).

52. *See, e.g.*, Prince v. Bd. of Educ., 543 P.2d 1176, 1182 (N.M. 1975) (interpreting the New Mexico Constitution to guarantee exclusive state control over public schools constructed by the state on leased lands, including control of curriculum).

1. Universities, in their purpose and goals, are different from other governmental institutions

Institutions of higher education are not like other governmental institutions, whose objectives include carrying out the desires of the legislative and executive branch.[53] Rather, the traditional mission of universities is to prepare future leaders by exposing students to the "marketplace of ideas,"[54] where critical inquiry of society and government is the norm. The Supreme Court,[55] academic organizations[56] and the international community[57] continue to reinforce the need for protecting the "robust exchange of ideas"[58] that occurs in higher education.

Even though universities exist solely as a state creation and are therefore responsible for serving the public interest,[59] public universities are vastly different from other state-created institutions.[60]

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53. *See* Brown, *supra* note 19, at 310 (emphasizing characteristics that distinguish universities from other governmental agencies, such as decentralized governance, diverse subject matter and teaching styles that vary from classroom to classroom, and absence of hierarchical organization).

54. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (stressing the importance of educating students "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"); *see also* Rosenberger v. Rector, 515 U.S. 819, 835 (1995) ("[T]he State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.").

55. *See* discussion *infra* Part II.A (providing examples of Supreme Court decisions indicating that universities are most likely entitled to First Amendment protections regarding curriculum decisions).

56. *See, e.g.*, NATIONAL EDUCATION ASSOCIATION, NEA POLICY STATEMENT: CURRICULUM REFORM (June 1998) (explaining that university "curriculum . . . should be designed to prepare all students for effective citizenship and participation in an increasingly diverse multicultural and multiracial society"), *available at* http://www.nea.org/he/policy4.html.

57. The importance of academic freedom for universities has been recognized in several international documents. These documents avow the significance of autonomy in higher education and verify the fundamental requirement that universities remain responsive to the needs of society. *See, e.g.*, LIMA DECLARATION ON ACADEMIC FREEDOM AND AUTONOMY OF INSTITUTIONS OF HIGHER EDUCATION (Sept. 10, 1988) (stating that "'autonomy' means the independence of the institutions of higher education from the State and all other forces of society, to make decisions regarding . . . its policies of education, research, extension work and other related activities"), *available at* http://www.hrw.org/reports98/indonesia2/Borneote-13.htm (on file with the American University Law Review); *see also Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 13*, U.N. ESCOR, 21st Sess., at ¶ 38, U.N. Doc. E/C.12/1999/10 (1999) ("The right to education can only be enjoyed if accompanied by the academic freedom of staff and students."), *available at* http://www.unhchr.ch/tbs/doc.nsf/0/ae1a0b126d068e868025683c003c8b3b?.

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

59. *See* Beach, *supra* note 51, at 312 (arguing that ultimately, only public policy and the Constitution provide any limitation on state control of university governance).

60. *Id.* at 310-11 (pointing out that the state attorney general does not have a duty to represent the public university).

For example, unlike other state agencies having the responsibility to apply government established procedure and policy statewide, university success relies upon flexibility, individuality in scholarship, teaching and research, and variety in academic disciplines.[61] Because the public interest in education is disseminating knowledge, discovering new information, and critically analyzing ideas, strict content-based regulation by state legislatures would only stifle these goals.[62] In addition, decentralized governance and freedom from political interference are strong traditions in public university systems.[63] Finally, rather than having a hierarchical organization like a typical state agency, a university is a "complex collegial body built around individual talents."[64] Because universities are different in structure and purpose from typical state created institutions, strong arguments exist that the normal rules for legislative control do not apply.

2. Universities are different from elementary and secondary schools

Not only do universities differ from other government institutions, but higher education is also different than K-12 education. In *Hazelwood School District v. Kuhlmeier*,[65] the Supreme Court held that censorship of a school newspaper curriculum[66] by a high school was

61. Brown, *supra* note 19, at 310. As with other state-funded entities, such as the press, public debate occurs in universities. *See, e.g.*, David Cole, *Symposium: Art, Distribution, & the State: Perspectives in the National Endowment for the Arts*, 17 CARDOZO ARTS & ENT. L.J. 705, 721 (1999) (discussing government subsidization of speech activity of organizations such as broadcast media, political organizations, advocacy groups, and public and private universities and noting that "every serious substantial aspect of free speech in this country is supported by government dollars").

62. If state legislatures can restrict funding to only those courses they deem appropriate, there will be much less public debate in universities, which defeats a primary basis for the creation and existence of these institutions. *See* 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."). *See generally* Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1272 (1988) (analyzing the history of the concept of academic freedom in the United States and noting that the American Association of University Professors has emphasized that academic freedom is an essential characteristic of a college or university, and "the one grace it dare[s] not lose without losing everything").

63. *See* Aronofsky, *supra* note 2, at 339-45 (citing *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), in which the Court rejected the New Hampshire legislature's creation of a state overseer board for the purpose of assisting with campus governance). Aronofsky points out that the Court's concern for autonomy was not confined to private schools).

64. Brown, *supra* note 19, at 310.

65. 484 U.S. 260 (1988).

66. *Id.* at 262, 271 (defining curriculum as activities "supervised by faculty members and designed to impart knowledge or skills to student participants and audiences").

permissible because the regulated speech was "school sponsored."[67] The Court found that K-12 schools may exercise "editorial control over the style and content of student speech in school-sponsored expressive activities"[68] as long as the regulations are "reasonably related to legitimate pedagogical concerns."[69] While several federal courts have extended *Hazelwood* to teacher speech,[70] no court has yet applied the principle to higher education.[71]

One plausible reason why courts have not extended the *Hazelwood* premise to university curriculum is that K-12 and higher education institutions are fundamentally different from each other. Whereas in *Epperson v. Arkansas*[72] the Court held that state legislatures have an "undoubted right to prescribe the curriculum for its public schools" in K-12,[73] there is no case law supporting the same "undoubted right" of legislatures in higher education.

One explanation for this difference is the age and maturity of the students attending the respective educational institutions. In *Hazelwood*, the Court partly based its decision on the fact that K-12 students are young and impressionable.[74] Conversely, the Supreme Court has described university students as "young adults" who are

67. *Id.* at 270-71 (holding also that schools and classrooms are not public forums).

68. *Id.* at 273.

69. *Id.*

70. *See, e.g.*, Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 366, 368-70 (4th Cir. 1996) (quoting *Hazelwood*, 484 U.S. at 271) (finding that a public high school teacher has no First Amendment right to take part in the composition of school curriculum by selecting and producing a play because "students, parents, and members of the public might reasonably perceive [the production of the play "Independence"] to bear the imprimatur of the school").

71. *See* Kincaid v. Gibson, 236 F.3d 342, 346 n.5 (6th Cir. 2001) ("Because we find that a forum analysis requires that the yearbook be analyzed as a limited public forum — rather than a nonpublic forum — we agree with the parties that *Hazelwood* has little application to this case.").

72. 393 U.S. 97 (1968).

73. *Id.* at 107 (noting, however, that this right does not allow a school to deem something a violation in a manner that would violate the First Amendment). When the school attempted to prohibit a teacher from teaching evolution, the Court invalidated the school's decision because it was solely motivated by the desire to only teach the Christian theory of the origin of humankind. *Id.* at 107-08.

74. *See Hazelwood*, 484 U.S. at 272 ("A school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting."); *see also* Sch. Dist. v. Ball, 473 U.S. 373, 385 (1985) (characterizing secondary and elementary school students as "impressionable youngsters"), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997). *But see* Bd. of Educ. v. Mergens, 496 U.S. 226, 250-51 (1990) (stating that "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis").

"less impressionable than younger students."[75] Moreover, states mandate that K-12 education is compulsory,[76] creating a "captive audience"[77] in elementary and secondary schools. University students, however, have many choices; not only the choice as to whether or not to obtain a higher education, but also which university to attend, what classes to enroll in once they get there, and which professors to take when a particular class is taught by more than one instructor.[78]

More importantly, the purposes behind the educational institutions also differ. Whereas states typically have a strong interest in value inculcation and the preparation of individuals for participation as citizens,[79] the goal of higher education is to expose students to new ideas and to allow for the critical questioning of these ideas. For example, in *Grutter v. Bollinger*,[80] the Court reinforced the importance to students of exposure to the "marketplace of ideas"[81] by reiterating the benefits of diversity in education, the determination of which involves "complex educational judgments . . . primarily within the expertise of the university."[82] Finally, educational experts maintain that the curricular inclusion of controversial issues and

75. Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981).

76. *See, e.g.*, Mark G. Yudof, *Three Faces of Academic Freedom*, 32 LOY. L. REV. 831, 836 (1987) (mentioning that states have drawn the line for student autonomy and maturity by creating public schools and imposing compulsory attendance laws at the K-12 level); *see also* Fiore, *supra* note 44, at 1957 (explaining that university attendance is not mandatory and suggesting that college and high school students are not comparable for First Amendment purposes).

77. *See* MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 250 (4th ed. 2002) (pointing out that students in K-12 schools cannot avoid public school teachers' expressed beliefs and values).

78. *See* Edwards v. Aguillard, 482 U.S. 578, 584 n.5 (1987) ("The potential for undue influence is far less significant with regard to college students who voluntarily enroll in courses.").

79. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (expressing the view that the purpose of public education is to inculcate those fundamental values essential to democracy, and that courts must balance First Amendment rights against the societal interest in teaching school children proper behavior); *see also* Ambach v. Norwick, 441 U.S. 68, 76-80 (1979) (determining that a State may assume that all teachers have an obligation to promote civic ideals in their classrooms). The *Ambach* Court explained "[t]he importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of values on which our society rests, long has been recognized by our decisions." *Id.* at 76-77. *But see* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511-12 (1969) (striking down a school's ban on armbands used to protest the Vietnam War and warning courts to prevent schools from becoming "enclaves of totalitarianism" by limiting state control); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (striking down the mandatory recitation of the Pledge of Allegiance).

80. 539 U.S. 306 (2003).

81. In *Abrams v. United States*, Justice Holmes first mentioned the "marketplace of ideas," finding that "the ultimate good desired is better reached by free trade in ideas." 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

82. *Grutter*, 539 U.S. at 328.

experience with diversity promotes the development of necessary life skills.[83]

Therefore, although universities clearly "speak" using government funds, public universities, unlike K-12 schools, are speaking neither on the government's behalf, nor as the government's representative when they establish curricula.[84] For example, because K-12 schools "speak" more on the government's behalf than independently,[85] there are limitations on what the state can teach in K-12 schools because the state must remain neutral regarding religion and political controversy.[86] Yet public colleges and universities are free to offer religious, theological, or political courses. That universities speak less for the government than K-12 and other government institutions is a strong argument against legislatures' ability to control university curriculum.

3. The legislatures' actions could be void for vagueness

Although generally no constitutional right to public funding exists,[87] the Supreme Court has suggested that this notion is inapplicable to public universities. *Rust v. Sullivan*[88] stands for the proposition that the state, to advocate its policies, can appropriate

83. *See* Welner, *supra* note 16, at 961-62 (suggesting that such skills include critical thinking and interpersonal skills, as well as "skills needed for effective participation as a citizen in a democracy"). In addition, public universities, but not public elementary or secondary schools, can offer courses on religion or theology without violating the Establishment Clause. *See* Widmar v. Vincent, 454 U.S. 263, 271 (1981).

84. *See* Randall P. Bezanson, *Institutional Speech*, 80 IOWA L. REV. 735, 752 (1995) ("[W]e ordinarily understand the speech of a professor in a university to represent his or her own opinion."); *cf. infra* Part II.C.1 (discussing the differences between university professors and K-12 teachers).

85. *See* Alger, *supra* note 44 (arguing that courts should not treat K-12 schools and higher education institutions in the same way and highlighting differences between them, including the idea that the state is the speaker in K-12 activities); *see, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270-72 (1988) (noting that schools have more control over promoting school-sponsored speech such as theatrical productions or newspapers because the speech may be attributed and, therefore, reflect upon the school as an institution); Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 371 (4th Cir. 1996) (recognizing that local authorities should set K-12 curriculum because they are responsible for its content).

86. David Moshman, *Academic Freedom: Students Rights and Faculty Responsibilities*, *in* PRESERVING INTELLECTUAL FREEDOM 26, 29 (Jean E. Brown ed., 1994).

87. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 310, 322-23 (1980) (finding that although the choice to have an abortion is a constitutionally protected right, it does not follow that the government is bound to provide the financial resources for an abortion); Maher v. Roe, 432 U.S. 464, 473-74 (1977) (upholding a government program that funded childbirth but denied funding for non-therapeutic abortions and noting that the government may choose to favor childbirth over abortion and, if so, allocate public funds accordingly).

88. 500 U.S. 173 (1991).

funds according to what it believes to be in the best interest of the public.[89] Yet, in *Rust*, the Court in dicta noted:

> "[T]he university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment."[90]

This statement suggests that the arguments applying to publicly-funded speech may not be relevant in a university setting.[91] Accordingly, placing curriculum decisions in the legislature would insufficiently guide universities and, as a result, be void for vagueness.[92] *Rust* only reinforces the argument that universities are unique government institutions, and, therefore, legislatures may have less control over universities than they have over other publicly-funded institutions.

4. Universities, like public radio stations, are exempt from the allowable governmental restraints on other publicly-funded institutions

First Amendment violations normally do not occur when the state specifically targets its own institution because of the views it expresses.[93] In 1984, however, the Supreme Court in *Federal*

89. *Id.* at 200 (holding that government regulations prohibiting doctors working in a federally funded family planning program from discussing abortions with pregnant women do not violate the free speech of doctors and patients).

90. *Id.* (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

91. *But see* Buss, *supra* note 17, at 259 ("Because the Court's example was not talking about professorial speech that communicates the curriculum but only extramural political speech, the *Rust* Court's academic freedom rhetoric must be kept in perspective.").

92. *See* NAACP v. Button, 371 U.S. 415, 432-33 (1963) (explaining that courts may apply the vagueness doctrine to regulatory laws that may have unfavorable consequences). Despite the fact that this doctrine is typically applied to criminal laws, it may also be applied to statutes and regulations that would withhold funding to regulate the content of university curricula because losing funding would be an unfavorable consequence. *Id. See* Buss, *supra* note 17, at 269 ("A law that gives insufficient guidance to enable a person subject to its requirement to conform his or her behavior to the law is unenforceable."). In this respect, courses that may pass legislative scrutiny under one administration may be eliminated during another. Such failure on the part of the legislature to provide a standard of conduct coupled with the high risk of arbitrary enforcement could foreseeably violate the vagueness doctrine. *See also* Jean E. Brown & Elaine C. Stephens, *Being Proactive, Not Waiting for the Censor*, *in* PRESERVING INTELLECTUAL FREEDOM 125, 125 (Jean E. Brown ed., 1994) (arguing that the consequence of censorship is that professors "become overly cautious and create an atmosphere of nervous concern that inhibits their best professional judgment").

93. *See* discussion *supra* Part I.A (discussing recent state legislative arguments that they may legitimately control the curricula of public schools).

Communications Commission v. League of Women Voters[94] held that Congress may not condition funding for public radio stations on broadcasters' agreements to avoid controversial subjects or to promote particular viewpoints.[95] The Court based its decision on the fact that "broadcasters are engaged in a vital and independent form of communicative activity."[96] The Court's acknowledgment of journalistic freedom is similar to the Court's recognition of academic freedom,[97] a concept discussed in Part II of this Comment below. A previous case, *Red Lion Broadcasting v. FCC*,[98] gave radio stations an intermediate status between state actors and public discourse.[99] For example, in *Red Lion*, rather than granting broadcasters First Amendment rights, the Court found "the right of the viewers and listeners" to be "paramount,"[100] and still found the governmental actions limiting subject matter in violation. Accordingly, another way of looking at this issue is to examine whether the universities are independent public opinion participants or instrumentalities of the state[101] and whether the focus should be on the rights of the universities to speak or the rights of the students to learn.[102] Part II examines these issues more closely.

Like public radio stations, universities exist to expose their students (the "listeners") to a variety of ideas, and similarly, too much regulation may endanger universities' core objectives. Thus, although there is little case law directly on point, a strong argument can be made that universities, like public radio stations, are

94. 468 U.S. 364 (1984).

95. *Id.* at 407, 414 (examining the constitutionality of an FCC regulation forbidding "editorializing" by broadcasters receiving government grants).

96. *Id.* at 378.

97. *See* Rabban, *supra* note 15, at 273 (highlighting the fact that in *League of Women Voters* both the majority and the dissent agreed that Congress may not condition station funding on recipients' promise to advance certain viewpoints or avoid certain subjects); *see also League of Women Voters*, 468 U.S. at 407 (Rehnquist, J., dissenting) (asserting that Congress may not impose content or viewpoint restrictions without a rational basis); *id.* at 414 (Stevens, J., dissenting) ("[T]he citizen's right to speak may not be conditioned upon the sovereign's agreement with what the speaker intends to say.").

98. 395 U.S. 367 (1969).

99. *See id.* at 390 ("Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium."); *see also* Post, *supra* note 30, at 159 (explaining the *Red Lion* Court conceptualized broadcasters as "public trustees" and not "independent and private participants in public discourse").

100. *Red Lion*, 395 U.S. at 390.

101. *See* Post, *supra* note 30, at 152 (noting that the question could be whether funding should be considered "government regulations imposed on persons" or "a form of government participation in the marketplace of ideas").

102. *See* discussion *infra* Part II.B (discussing the right of the students to receive a variety of ideas and that such exposure enhances the quality of education).

distinguishable from other state-funded institutions and, therefore, are not subject to legislative control.

II. PROTECTING FIRST AMENDMENT INTERESTS

In addition to the Supreme Court's recognition that universities are unique institutions, the Court and others acknowledge the university community's academic freedom, which protects internal decisions and warrants deference. The primary justification for greater autonomy in higher education is the protection of universities as "peculiarly the 'market place of ideas.'"[103] Two types of academic freedom in America have developed over time to promote and protect the fundamental mission of higher education: (1) the individual academic freedom of professors and faculty and (2) the institutional academic freedom of the university to govern its own affairs. Academic freedom stems from several sources, including the 1940 American Association of University Professors' Statement ("AAUP Statement"),[104] state constitutions that provide independence for institutions of higher education,[105] and Supreme Court decisions.[106] The most famous mention of First Amendment protection for academic freedom appeared in *Keyishian v. Board of Regents*,[107] in which the Court deemed unconstitutional statutes calling for the dismissal of professors who taught Marxism.[108] The Court declared that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us . . . . [and] [t]hat freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[109] The international legal community also endorses this notion,[110] which, given the Supreme Court's

103. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

104. *See* AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE WITH 1970 INTERPRETIVE COMMENTS [hereinafter AAUP Statement] (arguing that academic freedom is essential to achieving the common good through the free search for and exposition of the truth) *available at* http://www.aaup.org/statements/Redbook/1940stat.htm (last updated Apr. 2003).

105. *See supra* note 47.

106. *See, e.g.*, *infra* Part II.A.1.

107. 385 U.S. 589 (1967).

108. *Id.* at 609-10.

109. *Id.* at 603.

110. *See* Javier H. Rubinstein, *International Law's New Importance in the U.S.: The Supreme Court's Latest Term Provides the Most Recent Example*, NAT'L L.J., Sept. 15, 2003, at 16 (arguing that courts need to develop a uniform framework for applying international law due to the rising frequency and necessity in matters before courts).

increasing references to international law in its opinions,[111] lends additional support to this argument.[112]

While the Supreme Court recognizes the importance of professorial and institutional academic freedom, it has offered no clear guidelines for deciding such cases.[113] In addition, debate continues over whether academic freedom applies to both professors and institutions.[114] The following sections examine the potential protection the First Amendment provides for university actors (students, professors, and universities) in matters of curriculum decisions.

A. The University

Courts recognize a First Amendment protection for universities. In each of the examples of legislative action relating to curricula mentioned in the Introduction of this Comment, universities have stood behind their professors and classes, and the legislatures attempt to deny funding to universities as institutions.[115] The

111. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (remarking that the majority's opinion corresponded with "the international understanding of the office of affirmative action" and referencing the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women); Lawrence v. Texas, 539 U.S. 558, 573 (2003) (relying partially upon the refusal of other nations to make homosexual conduct criminal when overturning *Bowers v. Hardwick*); Atkins v. Virginia, 536 U.S. 304, 316 (2002) (noting the overwhelming disapproval "within the world community" of applying the death penalty to mentally retarded offenders); Paquete Habana, 175 U.S. 677, 700 (1900) ("[I]nternational law is part of our law . . . where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators. . . ."); United States v. Smith, 18 U.S. 153, 160-61 (1820) (holding that international law "may be ascertained by consulting the work of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law").

112. Academic freedom in America is partially modeled after the traditional European protections granted to universities. *See* Beach, *supra* note 51, at 308. European universities tend to possess definite legal protections. For instance, the German constitution provides that alongside freedom of speech, "art and scholarship, research and teaching shall be free." GG art. 5.

113. *See* Lynch, *supra* note 17, at 1070-71 (listing the different approaches courts use, including the public forum analysis, First Amendment standards, government subsidy or employee analysis, and other court created standards of academic freedom).

114. *See id.* at 1072 (contrasting Professor Finkin's "individual" academic freedom approach to Professor Byrne's "institutional" academic freedom approach).

115. Professorial speech is closely tied to university speech. *See* Elizabeth Mertz, *The Burden of Proof and Academic Freedom: Protection for Institution or Individual?*, 82 NW. U. L. REV. 492, 518 (1988) ("[U]niversities have an interest in defending the rights of individual academics, for it is only in their role as defenders of those rights that universities can claim any special constitutional status."); *see also* Lynch, *supra* note 17, at 1103 ("[O]ne type of freedom is often impossible without the other. A

universities are backed by several cases that support the protection of institutional autonomy to decide internal affairs.[116] The terms institutional autonomy and institutional academic freedom describe the system of self-government that has long been considered the "right and responsibility"[117] of both private and public institutions of higher education.[118] Although not absolute,[119] this autonomy provides the necessary independence[120] for universities to serve society by generating new ideas and providing a credible medium for social criticism. The following subsections examine the Supreme Court's acknowledgement of university academic freedom and the deference courts give to many internal university matters.

1. The First Amendment protects academic freedom and institutional autonomy

Evidence of the Supreme Court's recognition of a First Amendment protection for university action comes from several

professor's freedom means little if her university is shackled by the whim of the state, and a university's freedom means little if its professors are pawns of the state."); *infra* Part II.C.4 (arguing that university endorsement of a professor's curriculum most likely extends the academic freedom of the university to the professor and thereby protects the professor's choice of curriculum).

116. *See* Metzger, *supra* note 18, at 1318-19 (explaining that the Court has supported academic freedom as an extension of the freedom of speech and assembly clauses of the First Amendment, as well as the due process clause of the Fourteenth Amendment); *see also* Urofsky v. Gilmore, 216 F.3d 401, 412 (4th Cir. 2000) (pointing out that to the extent that the Court has constitutionalized a right of academic freedom, the Court "appears to have recognized only an institutional right of self-governance in academic affairs"). *But see* Buss, *supra* note 17, at 231 ("The argument that institutional academic freedom is protected by the First Amendment seems even more clearly mistaken than the claim of First Amendment protection for individual academic freedom.").

117. *See* Snyder, *supra* note 29 (explaining that autonomy does not mean absolute autonomy but reasonable autonomy). The word "autonomy" originates from Greek "self" and "law or customary usage." *Id.*

118. *See* Brown, *supra* note 19, at 299-300 (citing the Carnegie Commission on Higher Education, Governance of Higher Education, Six Priority Problems at 17-18 (1973)). Brown explains that institutional autonomy consists of three parts. *Id.* First, there is the "intellectual" autonomy, which involves the protection of academic freedom of speech of faculty and students. *Id.* Second, universities have "academic" autonomy regarding course offerings. *Id.* Finally, universities have the "administrative" autonomy in personnel and finance matters. *Id.*

119. *See* Donna R. Euben, *Academic Freedom of Individual Professors and Higher Education Institutions: The Current Legal Landscape* (May 2002) (clarifying that the decisions must hinge on academic grounds and require "the exclusion of governmental intervention in the intellectual life of a university"), *available at* http://www.aaup.org/Com-a/aeuben.HTM.

120. *See* Sorenson & LaManque, *supra* note 51, at 976 (1996) (pointing out that university autonomy "can be seen as an 'external' defense of academic freedom, one that while protecting the institution from outside encroachment, might permit undue institutional domination over faculty academic freedom interests"). While a valid point, this issue is not examined in this Comment.

important cases. In his concurring opinion in *Sweezy v. State*,[121] Justice Frankfurter set out the "four essential freedoms" of universities to determine "who may teach, what may be taught, how it shall be taught, and who may be admitted to study." [122] Later, Justice Powell discussed the right of universities to make their own decisions regarding these "four essential freedoms" in *Regents of the University of California v. Bakke*,[123] suggesting that universities' interests in academic freedom justified the use of affirmative action.[124] In *Griswold v. Connecticut*,[125] the Court found that the right of freedom of speech "includes not only the right to utter or to print, but . . . freedom of inquiry, freedom of thought, and freedom to teach —– indeed the freedom of the entire university community."[126] In *Tinker v. Des Moines Independent Community School District*,[127] the Court rejected the "principle that a State might so conduct its schools as to 'foster a homogeneous people.'"[128] These cases reveal the Supreme Court's obvious concern for preserving public universities' position as institutions free from governmental and political influence. The following subsections look at how this Court, and others, have acted on this concern, most notably by deferring to university decisions.

a. Courts' continued deference to public university internal decision-making

On numerous occasions the Supreme Court has recognized the value of respecting internal educational decisions,[129] the most recent and important example being *Grutter v. Bollinger*.[130] In *Grutter*, Justice O'Connor noted the Court's "tradition of giving a degree of

121. 354 U.S. 234, 245 (1957) (finding the New Hampshire legislature in violation of the First Amendment for impeding on academic freedom by inquiring into the contents of a university professor's lecture).

122. *Id.* at 263 ("It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment, and creation.") (Frankfurter, J., concurring).

123. 438 U.S. 265 (1978).

124. *See id.* at 312 (finding that universities may consider race in admissions practices); *see also* Yudof, *supra* note 76, at 855 (explaining that Powell's opinion does not seem to turn on the fact that the university is public).

125. 381 U.S. 479 (1965).

126. *Id.* at 482.

127. 393 U.S. 503 (1969).

128. *Id.* at 511 (quoting Meyer v. Nebraska, 262 U.S. 390, 402 (1923)).

129. *See, e.g.*, Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214 (1985) (holding that the University of Michigan's refusal to allow a student to retake an exam was not actionable).

130. 539 U.S. 306, 329 (2003) (explaining that the Court has "long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition").

deference to a university's academic decisions within constitutionally prescribed limits."[131] Other federal courts have also followed the practice of giving deference to universities with respect to internal institutional matters.[132] For example, in *Linnemeir v. Board of Trustees of Purdue University (IPFW)*,[133] the Seventh Circuit decided a case where Indiana taxpayers and legislators attempted to force the public university to cancel the production of a controversial play about blasphemy.[134] The court upheld the university's right to stage this production, explaining that "[a]cademic freedom and states' rights, alike demand deference to educational judgments that are not invidious."[135] Recently, the Third Circuit in *Forum for Academic and Institutional Rights v. Rumsfeld*[136] held that law schools have a First Amendment right to convey a message that opposes discrimination against gays by excluding military recruiters, even against a congressional act requiring active assistance.[137] The court's finding of a First Amendment expressive right for law schools was based upon the reality that higher education institutions deserve deference because "universities and law schools 'occupy a special niche in our constitutional tradition.'"[138] These opinions, combined with the *Grutter* opinion's strong recognition of institutional academic

131. *Id.*

132. *See generally* Linnemeir v. Bd. of Trs. of Purdue Univ., 260 F.3d 757, 760 (7th Cir. 2001) ("Classrooms are not public forums; but the school authorities and the teachers, not the courts, decide whether classroom instruction shall include works by blasphemers."); Urofsky v. Gilmore, 216 F.3d 401, 410 (4th Cir. 2000) (explaining that any right of academic freedom "inheres in the University, not in individual professors"); Feldman v. Ho, 171 F.3d 494, 495 (7th Cir. 1999) ("A university's academic independence is protected by the Constitution, just like a faculty member's own speech."); Bishop v. Aranov, 926 F.2d 1066, 1075 (11th Cir. 1991) ("Federal judges should not be ersatz deans or educators. In this regard, we trust that the University will serve its own interests as well as those of its professors in pursuit of academic freedom."); Parate v. Isibor, 868 F.2d 821, 826 (6th Cir. 1989) (quoting Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226, 226 n.12 (1985)) ("Academic freedom thrives not only on the robust and uninhibited exchange of ideas between the individual professor and his students, but also on the 'autonomous decision-making [of] . . . the academy itself.'").

133. 260 F.3d 757 (7th Cir. 2001).

134. *Id.* at 758.

135. *Id.* at 760.

136. 390 F.3d 219 (3d Cir. 2004).

137. *Id.* at 233, 246. This case challenged the Solomon Amendment, which required the Department of Defense to deny federal funding to institutions of higher education that prohibited military representatives from accessing the schools for recruiting purposes. *Id.* at 225. The court points out that the members of Congress who voted against this amendment based their opposition on academic freedom grounds. *Id.* at 226.

138. *Id.* at 233 n.13 (2004) (citing *Grutter v. Bollinger*, *Sweezy v. New Hampshire*, and *Regents of the Univ. of Mich. v. Ewing*).

freedom suggests that the deference courts give universities also extends to legislative matters.

b. The Supreme Court's disapproval of "content-based" regulation and deference towards "legitimate academic decision-making"

Although the Supreme Court has not explicitly stated whether curriculum decisions warrant deference, cases suggest that the Court would likely respect these actions. In 1990, the Court decided *University of Pennsylvania v. EEOC*,[139] and by ruling on whether universities enjoy a special privilege against disclosure of peer review materials in tenure decisions,[140] gave a clearer depiction of the boundaries of institutional academic freedom. Although the University of Pennsylvania is a private educational institution,[141] the Court spoke of situations when the "government attempts to direct the content of speech at public educational institutions" and asserted that "complicated First Amendment issues are presented because [the] government is simultaneously both speaker and regulator."[142]

The Court reasoned that in academic freedom cases such as *Keyishian* and *Sweezy*, the government tried to control the content of university speech.[143] Using *Keyishian* as an example of such content-based regulation, the Court discussed how the government incorrectly attempted to "substitute" its own teacher employment criteria for that already in use by universities, therefore "directly and completely usurping the discretion of each institution."[144] The Court concluded by suggesting that courts have long emphasized that they give deference to universities with regard to "legitimate academic judgments."[145] A curriculum very likely falls within the boundaries of a "genuinely academic decision,"[146] thus warranting deference by

139. 493 U.S. 182 (1990). In this case, when the university refused tenure to an associate professor, she filed a complaint with the Equal Employment Opportunity Commission on the grounds that the decision was the product of unlawful sexual discrimination. *Id.* at 185.

140. *Id.* at 184 (examining whether the privilege could be based on common law or the First Amendment). The Court held that Congressional intent was lacking to create a privilege against disclosure and also that an academic freedom protection could not be extended in this case because the situation did not involve "content" regulation and the infringement was too attenuated and speculative. *Id.* at 189-90, 197-201.

141. *Id.* at 185.

142. *Id.* at 198 n.6 (citations omitted).

143. *Id.* at 197.

144. *Id.* at 198.

145. *Id.* at 199 (quoting Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985)).

146. *Id.* For example, teaching employment criteria is an example of a "genuinely academic decision." *Id.* at 198.

courts and legislatures alike. Therefore, there is a strong argument that public universities have a right to decide their own curricula, free from legislative influence.

2. Legislatures are interfering with the institutional academic freedom of universities to decide their own curricula

The previous subsections examined how the Supreme Court acknowledges the importance of public university autonomy in decision-making, suggesting that with regard to curriculum decisions, which are internal, legislatures should defer to the university. Specifically, the Court in *University of Pennsylvania* seemed to recognize a First Amendment protection for universities against legislative attempts to control the content of university speech and the selection of instructors.[147] Although no court has clearly defined the scope of institutional academic freedom,[148] curriculum decisions likely fall into the description of both self-governance and content of university speech.

In conclusion, the academic freedom defined by case law suggests some limitations on legislatures' power to regulate public universities. Based on *University of Pennsylvania* (which defines "who may teach" as within the scope)[149] and *Grutter v. Bollinger* (which defines who may study),[150] it appears that the Court finds institutional decisions that implicate the universities' educational functions and fall within *Sweezy*'s "four essential freedoms"[151] to trigger protected areas of academic freedom. Since the curriculum is a determination of *Sweezy*'s "what may be taught" and "how it may be taught,"[152] there is a strong argument that the Court recognizes deference to curriculum decisions as well. Public universities likely have a First Amendment right to create and implement curricula, and consequently, legislative control over curricula violates university autonomy and academic freedom under the First Amendment.

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147. *See id.* (noting with relief that the facts of the case preclude the Court from defining any such right). The principle behind *University of Pennsylvania* likely extends to public institutions as well. *See also* NEIL HAMILTON, ZEALOTRY AND ACADEMIC FREEDOM: A LEGAL AND HISTORICAL PERSPECTIVE 159, 191-92 (1995) (pointing out that this academic freedom likely does not extend to the case when a university restricts professors' contractual, statutory or constitutional speech).

148. *See* Rabban, *supra* note 15, at 271 (describing judicial "reiteration" of academic freedom as containing "substantial ambiguity").

149. 493 U.S. at 198.

150. 539 U.S. 306, 341-43 (2003).

151. Sweezy v. State, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (citation omitted); *see* Rabban, *supra* note 15, at 271-72 (noting that "What may be taught" is one of the four freedoms).

152. *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring) (citation omitted).

B. The Students

Legislative control of curricula may also violate the First Amendment rights of students attending public universities. The following sections look at how the Supreme Court rejects state influence in education when there is a danger of creating homogeneity. In addition, case law suggests that students have a right of exposure to controversial ideas in education. This section concludes that the Court's recent declaration of the importance of diversity in education provides a strong argument that legislative control impedes upon university students' First Amendment rights.

1. The Supreme Court's uneasiness about homogeneity

Like the Michigan example in the Introduction, state legislative control of curricula can result in the elimination of courses about topics that individual legislators deem inappropriate.[153] One of the primary reasons for compulsory K-12 education is the exposure of children to the attitudes, knowledge and behaviors that society regards as important.[154] Scholars, however, suggest that restricting what is taught in schools violates the "learning rights" of students.[155] To guarantee the uncontrolled flow of ideas and information in the school "marketplace of ideas,"[156] students require both a right to speak and to hear.[157] However, if legislatures can decide what ideas may enter the public education "marketplace," there is a real possibility of molding students into one homogenous people,[158] a

153. *See supra* notes 1, 8, 10-12 and accompanying text.

154. *See* ROBERT WHEELER LANE, BEYOND THE SCHOOLHOUSE GATE: FREE SPEECH AND THE INCULCATION OF VALUES 31 (1995) (discussing the emphasis on compulsory education as a tool to integrate children into society and explaining that the Supreme Court has recognized an "intermediate constitutional status" for schoolchildren, which requires both protection and autonomy).

155. *See generally* NATIONAL COUNCIL OF TEACHERS OF ENGLISH, PRESERVING INTELLECTUAL FREEDOM: FIGHTING CENSORSHIP IN OUR SCHOOLS 32 (Jean E. Brown ed., 1994). A scholar suggests that when making the connection between the First Amendment and learning, the rationales for the First Amendment must be taken into account. *See* Moshman, *supra* note 86, at 29. ("[R]espect for personal dignity, promotion of truth, and protection of democracy . . . are generally acknowledged.").

156. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (recognizing that a diverse learning environment prevents a stunted educational experience).

157. *See* Moshman, *supra* note 86, at 32 (discussing students' First Amendment rights, which encompass freedom of belief and expression, access to ideas and limitations on inculcation); *see also* Lane, *supra* note 154, at 86 (reiterating that schools should "ensure the free flow of information and ideas").

158. *See* Moshman, *supra* note 86, at 30 (explaining the different positions regarding the role of schools as tools to integrate students into society and balancing this concept with inculcation).

danger warned against by Justice Fortas in *Tinker v. Des Moines Independent Community School District.*[159]

Tinker[160] stands for the principle that K-12 students have a right to create, maintain and express their own beliefs so long as they do not substantially disrupt class work or the rights of other students.[161] The Court asserted that in the American system, "state-operated schools may not be enclaves of totalitarianism"[162] and that "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."[163] The Court's emphasis on the harm in creating "a homogenous people"[164] likely, and more conclusively, extends to university students because they are more like adults.[165] By limiting what courses universities may offer based upon legislators' personal perceptions of what is appropriate for adult students, legislative control of higher education curricula runs the risk of producing the dreaded homogenous citizenry.

2. Access to information and ideas: a right to receive

Besides the Supreme Court's aversion to a homogenous citizenry as a justification for legislative noninvolvement, another issue is whether the First Amendment grants university students the "right to receive" third party information. While most of the case law deals with high school students' access to controversial library books,[166] the Court has

159. 393 U.S. 503, 511 (1969) (citing Meyer v. Nebraska, 262 U.S. 390, 402 (1923)) (highlighting that a state may not "so conduct its schools as to 'foster a homogeneous people'").

160. *Id.* at 513-14 (holding unlawful the suspension of high school students who wore black armbands to protest the Vietnam War).

161. *Id.* at 514. Student expression can be restricted only if it can be shown that the "action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509. *But see* Lief H. Carter, *Mind-Control Applications of the Constitutional Law of Censorship, in* PRESERVING INTELLECTUAL FREEDOM 205, 210 (Jean E. Brown ed., 1994) (pointing out that *Hazelwood School District v. Kuhlmeier* practically overruled the *Tinker* "substantial disruption" standard by applying a "rational basis" test); *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (distinguishing between punishing student expression from supporting student expression and holding that a school does not violate the First Amendment if it controls the content of school-sponsored student speech provided that the reason for doing so is "reasonably related to legitimate pedagogical concerns").

162. *Tinker*, 393 U.S. at 511.

163. *Id.*

164. *Id.*

165. *See infra* Part II.B.2.

166. *See* Lane, *supra* note 154, at 130 (explaining that most of the controversy has erupted around the removal of books from high school libraries); *see, e.g.*, In Presidents Council, Dist. 25 v. Cmty. Sch. Bd. No. 25, 457 F.2d 289, 291-92 (2d Cir. 1972) (upholding a school board's decision to remove a book said to contain offensive and sexual language on the basis of the board's authority to prescribe the curriculum). *But see* Minarcini v. Strongsville City Sch. Dist., 541 F.2d 577, 582-83

found a right to receive this kind of information for adults in several areas,[167] and therefore, university students likely have a right of access to educational sources such as classes.[168] The primary case addressing access to library books is *Board of Education, Island Trees Union Free School District v. Pico*.[169] In finding that a school board violates high school students' First Amendment rights by removing controversial books from the library merely out of disagreement with the content of the books,[170] the *Pico* plurality opinion partially based its reasoning on the First Amendment's purpose of offering access to the "marketplace of ideas."[171] In his opinion, Justice Brennan found the ability to receive information from third parties crucial to safeguarding students from the "pall of orthodoxy" cast by school officials.[172] *Pico* better supports university (rather than high school) students' right to receive information because university students, as adults, need not be shielded from controversial ideas and materials.[173]

An Eighth Circuit case, *Pratt v. Independent School District No. 83*,[174] provides some insight as to how courts approach the issue of student rights. In *Pratt*, parents of some high school students petitioned the school board to eliminate from the curriculum the film "The Lottery."[175] Although teachers and students defended the film, the school board removed it from the curriculum.[176] Three students brought suit, and the Eighth Circuit affirmed the lower court ruling, forbidding school officials from imposing a "'pall of orthodoxy' on

(6th Cir. 1976) (invalidating the school board's decision to remove books from the library merely because the board found the books to be objectionable and recognizing the students' right to receive the information).

167. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (recognizing a right of access to "social, political, aesthetic, moral, and other ideas"); *see also* Lane, *supra* note 154, at 136.

168. *See* Moshman, *supra* note 86, at 32 (describing students' right of "access to ideas and sources" without content-based restrictions and inculcation interfering with that access); *cf.* Board of Educ. v. Pico, 457 U.S. 853, 871-71 (1982) (plurality) (holding that a school board's removal of books from the school library based on the board's disagreement with the content of the books violated students' First Amendment rights). However, the *Pico* Court distinguished between curriculum and library books. *Id.* at 861-62, 869.

169. 457 U.S. 853 (1982) (plurality).

170. *Id.* at 871-71.

171. Pico, 457 U.S. at 867; *see* Lane, *supra* note 154, at 136-37 (depicting access to the marketplace as "the right to receive opinions and information [which] follows 'ineluctably' from the sender's right to send them").

172. *Pico*, 457 U.S. at 870 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

173. *See* Buss, *supra* note 17, at 276.

174. 670 F.2d 771 (8th Cir. 1982).

175. A film based on the 1948 short story by Shirley Jackson in which, each year, small town citizens must select a person to be stoned to death. *Id.* at 773.

176. *Id.* at 773-74.

classroom instruction which implicates the state in the propagation of a particular religious or ideological viewpoint."[177] Similar to the Michigan example,[178] the "[o]pponents of "The Lottery" focused primarily on the purported religious and ideological impact" of the curriculum choice.[179] The court found the students' "right to receive information and to be exposed to controversial ideas—a fundamental First Amendment right."[180]

The fact that *Pratt* and *Pico* dealt with high school students only strengthens the case against legislative curriculum control over public universities, where the students are older and more mature than high school students.[181] In fact, law and society tend to accept the view that university students are adults.[182] In addition, the goals behind K-12 and higher education differ vastly.[183] Specifically, if the objective of higher education is to expose students to a wide range of ideas so that they may be better prepared for the future,[184] what better way to fend off the "enclaves of totalitarianism"[185] than to guarantee students the right to receive controversial ideas so they can make up their own minds?

177. *Id.* at 776 (citations omitted).
178. *See supra* notes 1, 8-9 and accompanying text.
179. *Pratt*, 670 F.2d at 776-77 (referring to the opponents arguments as "value-laden").
180. *Id.* at 779 (proposing that a harmful precedent would be set if the films were banned simply because people opposed the ideological theme). *But see* Lane, *supra* note 154, at 152 (arguing that the Eighth Circuit erred by disregarding the "taste, values, morality, and sensitivities of the school board" as not legitimate grounds and making this a First Amendment issue rather than a curriculum decision issue). Lane also argues that the right to receive information granted to adults should not be broadened to cover high school students. *Id.*
181. *See* discussion and accompanying notes *supra* Part I.B.2 (discussing the differences between high school and university students).
182. University students have much more freedom than K-12 students. They live away from home and often pay their own tuition and housing. In addition, university students have stronger legal rights, such as the right to get married and to serve in the military. *See* Kincaid v. Gibson, 191 F.3d 719, 731 n.1 (6th Cir. 1999) (Cole, J., concurring in part and dissenting in part) ("Most students are at least eighteen years old when they enter college, an age at which society affords them some of the same rights as adults (i.e. the right to vote)."), *vacated by* 197 F.3d 828 (6th Cir. 1999).
183. *See supra* Part I.B.2.
184. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (recognizing that diversity of ideas contributes to the strengths of the nation's leaders).
185. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

3. Diversity is a compelling governmental interest

Scholars,[186] students,[187] and the Supreme Court[188] recognize the importance of diversity of students and ideas in education. The goal of higher education is to train future leaders "through wide exposure to that robust exchange of ideas."[189] Statistics indicate that the environment most conducive to learning and developing is one in which students have access to a variety of viewpoints and then have the freedom to both adopt and discuss their own opinions.[190] Recently, the Supreme Court in *Grutter v. Bollinger*[191] deferred to the University of Michigan Law School's decision with respect to including diversity as a factor in admission procedures because "diversity is essential to its educational mission."[192] In fact, the Court found diversity to be so compelling an interest that it overrides the Equal Protection Clause and allows universities to exclude qualified students based upon race.[193] *Grutter* and other cases[194] strongly support the argument that legislatures must defer to educational judgments by universities in curriculum matters that promote the "robust exchange of ideas"[195] among students.

While it is true that state legislatures do not directly censor student speech by telling universities what classes they can offer, these directives do eliminate the right of students to "shop" and select courses that produce a diversified education. In *Lamont v. Postmaster General*,[196] in which the Court invalidated a federal statute that forbade the delivery of "communist political propaganda" unless the

186. *See, e.g.*, Hugh Agee, *Literature, Intellectual Freedom, and the Ecology of the Imagination*, *in* PRESERVING INTELLECTUAL FREEDOM 53, 62 (Jean E. Brown ed., 1994) (stating that education "will be limited if we allow censors to dictate how and with what resources we operate in our schools . . . [t]his is a significant part of our stewardship obligation if the ecology of the imagination is to be a moving force in our society").

187. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 487-88 (1954) (litigating for the right to integrate schools to have equal educational opportunities).

188. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 327-30 (2003) (finding that a school has a compelling interest in maintaining a diverse student body because of the educational and social benefits that arise out of that diversity).

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

190. *See, e.g.*, Gregory A. Clarick, Note, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. REV. 693, 723 (1990) (arguing that too much emphasis on skills may limit students' ability to think independently in the future).

191. 539 U.S. 306 (2003).

192. *Id.* at 333-34 (noting that as to diversity, the "benefits are not theoretical but real").

193. *Id.* at 328-29.

194. *See supra* Part II.A.1.

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

196. 381 U.S. 301 (1965).

recipient specifically requested delivery in writing,[197] Justice Brennan, in his concurrence, wrote: "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."[198] Legislative determination as to which courses are appropriate for higher education contravenes the purposes of higher education, which include exposing students to a wide range of new ideas and allowing students to think critically about the ideas.[199]

C. The Faculty

Legislative control of curricula may also violate the First Amendment rights of public university professors. The following sections look at how university professors are different than K-12 teachers and other state employees by discussing the development of professorial academic freedom, a concept that makes university professors unique state employees. The section concludes that although professors have a weak argument in opposition to legislative oversight of curricula, the First Amendment protection for university academic freedom likely safeguards professorial curriculum decisions as well.

1. Professors are different from K-12 teachers

When a professor designs and teaches a course, she acts in her professional capacity as a state employee and is indeed accountable to both the university and the state.[200] The unique nature of a university working environment, however, differs from other places of public employment,[201] such as a secondary school.[202] The educational

197. *Id.* at 307 ("[The] addressee is likely to feel some inhibition in sending for literature which the federal officials have condemned . . . .").

198. *Id.* at 308 (Brennan, J., concurring).

199. *See, e.g.*, Keyishian, 385 U.S. at 603 ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools.") (citations omitted). If amended, the Michigan Constitution would allow the legislature to create one homogenous people by forbidding classes about controversial ideas, a danger the Court warns against in *Tinker*. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969).

200. *See* Anna L. Rossi, *The Exception to the Rule: Government Employers' Right to Restrict Free Speech of Employees*, 29 J.C. & U.L. 719, 731 n.88 ("Public school teachers and state college or university professors may not usually think of themselves as government employees, but for many legal purposes they are."). University faculty can accurately be described as agents of the state and are therefore responsible for serving the state's objectives. *See* Buss, *supra* note 17, at 217 (explaining that the state delegates to teachers the authority to "communicate the curriculum").

201. *See supra* Part I.B.1 (discussing the difference between universities and other state agencies in terms of structure and purpose).

functions of K-12 teachers and university professors are dissimilar in some respects. Whereas parents and students may consider elementary and secondary school teachers to be role models[203] and may count on them to teach the grade levels and subjects and courses assigned by their schools within the curriculum determined by state and local governments,[204] university professors have considerable autonomy when choosing teaching and research topics.[205] Besides having more freedom in curriculum decisions, university professors also have a stronger First Amendment academic freedom interest, as the following subsection discusses.

2. The development of professorial academic freedom

To address the special expressive concerns of professors, in 1915 academics created the American Association of University Professors ("AAUP"), which set forth a definition of academic freedom for professors. The AAUP definition of faculty self-governance grants professors freedom from university employer intrusion into teaching, research, and intra and extramural expressions.[206] Many universities have adopted this definition in employment contracts,[207] and courts, including the Supreme Court, have referenced the 1940 version of the AAUP Statement in their opinions.[208] In 1952, the dissenting

202. Unlike in universities, state and local governments have long dictated the curriculum to K-12 teachers. *See supra* Part I.B.2.

203. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 584 (1987) (finding that the State has "great authority and coercive power . . . because of the students' emulation of teachers as role models"); Epperson v. Ark., 393 U.S. 97, 112, 114 (1968) (Black, J., concurring) (arguing that school authorities have the right to limit a school teacher's academic freedom to a certain degree); *see also* Lynch, *supra* note 17, at 1083 (suggesting that when the school goal is inculcation of civility and other values, the teacher is a role model).

204. *See* Yudof, *supra* note 76, at 836 (finding that professors are expected to independently study, research, and teach different areas within their fields while school teachers must follow a set curriculum).

205. *Id.* The reason is that in higher education, the goal is to promote public discourse and critical inquiry. *See* Lynch, *supra* note 17, at 1084 (discussing the different levels of academic freedom a professor may have depending on the goals of the university); Hamilton, *supra* note 147, at 192 (stating that a university may not rely on the fact that it is academically free from government control to restrict a professor's academic speech).

206. *See* AAUP Statement, *supra* note 104 ("[A] faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness for his or her position."). *But see* Rossi, *supra* note 200, at 731 ("[P]rofessors at public universities . . . have only those speech rights that governmental employees have . . . .").

207. *See* AAUP Statement, *supra* note 104 (listing the endorsers of the 1940 Statement of Principles on Academic Freedom and Tenure).

208. *See, e.g.*, Roemer v. Bd. of Pub. Works, 426 U.S. 736, 756 (1976) (commenting that colleges abide by the AAUP's 1940 Statement); Tilton v. Richardson, 403 U.S. 672, 681-82 (1971) (finding that several colleges and universities had an "atmosphere of academic freedom rather than religious indoctrination" evidenced, for example,

opinion in *Adler v. Board of Education*[209] first mentioned academic freedom for teachers. In challenging the Feinberg Law,[210] which rendered ineligible for public teaching any member of an organization characterized as advocating the overthrow of the government by illegal means,[211] Justice Douglas declared that a "system of spying and surveillance . . . cannot go hand in hand with academic freedom."[212] However, not until the late 1960s did any real constitutional protection for the academic speech of public university professors develop.[213] Since then, there has been a continuous recognition of academic freedom for professors.[214] Whether this academic freedom extends to protection from legislative oversight of curriculum is unclear. Accordingly, the next section examines whether existing tests apply when legislatures want to control university professors' curriculum choices.

3. The Pickering *and* Connick *tests*

Absent university support, case law probably does not support professors' claim to a First Amendment right to establish curricula free from legislative oversight. In *Pickering v. Board of Education*,[215] the Supreme Court held that the First Amendment protects a professor's speech as long as it addresses a matter of public concern.[216] The

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that "[a]ll four institutions . . . subscribe to the 1940 Statement of Principles on Academic Freedom and Tenure endorsed" by the AAUP).

209. 342 U.S. 485, 508 (1952) (Douglas, J., dissenting), *overruled in part by* Keyshian v. Bd. of Regents, 385 U.S. 589 (1967).

210. *See* N.Y. EDUCATION LAW § 3022 (McKinney 1949).

211. *See Adler*, 342 U.S. at 492.

212. *Id.* at 510-11 (Douglas, J., dissenting).

213. *See* Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (finding teachers may not be dismissed for speaking on matters of public concern); *see also* Hamilton, *supra* note 147, at 195 (stating that until the late 1960s courts were unwilling to offer teachers "constitutional protection for freedom of speech"). *But see* Buss, *supra* note 17, at 220 (arguing the First Amendment does not give teachers a constitutionally protected right of academic freedom).

214. This academic freedom is typically subject to university requirements and objectives. The university seeks to achieve its mission by hiring faculty. Without the authority to somewhat control the speech of professors, the educational mission of universities may be impeded. *See* Yudof, *supra* note 76, at 838 (presenting a hypothetical of a demography professor spending his class time on the topic of university mismanagement); *see also* Chris Hoofnagle, *Matters of Public Concern and the Public University Professor*, 27 J.C. & U.L. 669, 689-90 (2001) (stating that judges are unlikely to protect a professor's academic freedom regarding issues such as "academic standards, teaching methods, and choice of classroom materials and curriculum"). However, in the examples mentioned in the Introduction, universities have fully supported the professors' curriculum decisions. *See supra* Introduction and accompanying footnotes.

215. 391 U.S. 563 (1968).

216. *Id.* at 575 (finding the board of education had unlawfully fired a teacher for writing a newspaper article that criticized the school's greater use of funds for athletics); *see also* Urofsky v. Gilmore, 216 F.3d 401, 406 (4th Cir. 2000) (stating that

Pickering Court applied a balancing test in which it examined "the interest of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees."[217]

Although this test is only valid when public educators are speaking as citizens,[218] in 1983, in *Connick v. Meyers*,[219] the Court addressed situations in which employees are speaking as employees and not as private citizens.[220] In the analysis, the Court set forth a two-step test: whether the public employee's speech is a matter of public importance;[221] and if so, whether the employer's interest in "promoting the efficiency of the public service it performs" is greater than the employee's interest in speaking on the matter.[222]

Recently, in *Urofsky v. Gilmore*,[223] the Fourth Circuit specifically dealt with public university professorial speech and decided that professors, when speaking on matters of public concern, must have been acting as private citizens rather than as public employees.[224] The court in *Urofsky* found that the Virginia legislature's prohibition of public employee access[225] to sexually explicit materials available through the Internet on state-owned computers was valid.[226] The court reasoned that because the state "purchases" professor speech by hiring them and providing Internet access, the state could control

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the court must look at the relatedness of the speech to the speaker's employment duties).

217. *Pickering*, 391 U.S. at 568.

218. *Id.*

219. 461 U.S. 138 (1983).

220. In *Connick*, an assistant district attorney subject to transfer circulated a questionnaire about work issues in her office and was fired. *Id.* at 138.

221. *Id.* at 146-48 (defining a matter of public concern as any expression that may "be fairly considered as relating to any matter of political, social or other concern to the community," and "must be determined by the content, form, and context of a given statement"). The employee's speech most likely fails the test if not a matter of public concern. *Id.* at 147. *See also* Hamilton, *supra* note 147, at 197 (describing the Supreme Court's analysis in *Connick v. Meyers*).

222. *Connick*, 461 U.S. at 142-43. When examining the second prong of the test, a court should look at a number of factors. *Id.* at 150. For example, deference is typically awarded to the employer's judgment, and the manner, place and time of the speech, as well as the context of the speech, are all relevant. *Id.* at 151-53. Finally, the public employer must offer evidence that the employee's speech disrupts or undermines the operations. *Id.* at 154.

223. 216 F.3d 401 (4th Cir. 2000).

224. *Id.* at 409.

225. The court considered the access in regard to a professor's capacity as employees. *Id.*

226. *Id.* at 404. Six public college and university professors in Virginia brought suit. The exception to the Virginia statute was if the access was "required in conjunction with a bona fide, agency-approved research project or other agency-approved undertaking." *Id.*

the expression related to its purchase.[227] The court deduced that to find otherwise, public university professors would have "a First Amendment right to dictate to the state how they will do their jobs."[228] In other words, the *Urofsky* court decided that professors are merely "pawns of the state."[229] However, the court did find that an academic freedom right "inheres in the [u]niversity."[230] Although *Urofsky* sits in stark contrast to prior public concern case law[231] and does not specifically address professor speech in the context of curriculum, the case supports state control of the content of public employee speech, and likely professorial choice of curriculum as well.[232]

In addition, it is unclear whether curriculum is even a "matter of public concern." The cases that apply *Connick* to university settings tend to be situations where university professors publish or speak on controversial issues outside of the classroom.[233] Public education is, by nature, an arena for public debate, therefore employee speech regarding curriculum would seem to satisfy the first part of *Connick*.[234] Yet when curriculum choice is at issue, cases like *Urofsky* overwhelmingly indicate that the academic freedom of the

227. *Id.* at 407.
228. *Id.*
229. *See* Lynch, *supra* note 17, at 1064, 1073 (arguing that the *Urofsky* decision reveals the confusion over and pressing necessity for guidelines in academic freedom analysis).
230. *See Urofsky*, 216 F.3d at 410, 415 n.17 (noting "the Act leaves decisions concerning subjects of faculty research in the hands of the institution").
231. *See* Hoofnagle, *supra* note 214, at 687 (arguing that *Urofsky* "relies on a false analogy, and concludes erroneously that protecting job-related speech would empower employees to ignore their employer's wishes or act in defiance of their directions"). In addition, with four dissenting judges and the chief judge (in a concurring opinion) writing to disagree with the majority's rejection of the First Amendment protection for academic freedom, it may be unlikely that other courts will follow the *Urofsky* court. *See* David M. Rabban, *Academic Freedom, Individual or Institutional?*, ACADEME, Nov.-Dec. 2001, *available at* http://www.aaup.org/publications/Academe/2001/01nd/01ndrab.htm); *see also* Lynch, *supra* note 17, at 1100 (finding the *Urofsky* holding "clearly wrong" because the court's automatic deference to the state is contrary to the Supreme Court's many declarations that public employees do not lose their First Amendment rights completely).
232. *See Urofsky*, 216 F.3d at 404 (holding that state regulation of public employee speech does not violate First Amendment speech rights).
233. *See, e.g.*, Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 368-69 (4th Cir. 1996) (finding that because a high school drama teacher's choice of a play was made in her position as a public employee, her choice was not a matter of public concern); Mahaffey v. Kan. Bd. of Regents, 562 F. Supp. 887, 890 (D. Kan. 1983) (finding no public concern in a professor's complaint about salary, job perks and position).
234. *See* Hamilton, *supra* note 147, at 201 (noting that a broad range of topics relating to public education may be considered matters of public concern for purposes of the *Connick* test, including admission standards policies, curriculum decisions, or grading policies). *But see* Buss, *supra* note 17, at 240 (arguing that what should make up the curriculum differs from "the speaking that is necessary to implement the curriculum").

institution, but not that of the professor, protects classroom material and curriculum choice.[235] That is, a university may reasonably control the curriculum decisions of professors and, therefore, speech rights of professors are subject to university agreement.[236] However, in the Michigan, Kansas, and North Carolina examples,[237] the universities have accepted and supported the curriculum choices of the professors.[238] Thus, neither the *Pickering* nor *Connick* tests need apply when internal university decision-making has already accepted professor curriculum choices.[239] Similarly, legislatures attempting to use these tests as a basis for curriculum control will fail for the same reason.

4. University academic freedom protects professors' curriculum decisions

Although the First Amendment prevents the government from restricting the expressions of private actors, the Constitution does very little to forbid the states from imposing ideas about what is best for the public, hiring people to convey these ideas, and requiring them to do their jobs.[240] On numerous levels it can be argued that

235. *See, e.g.*, *Urofsky*, 216 F.3d at 410 (holding that the right of academic freedom inheres in the university as an institution, not in professors as individuals); Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 493 (3d Cir. 1998) (finding that a professor had no First Amendment protection to decide a curriculum that differed from what the university ordered).

236. *See, e.g.*, Bishop v. Aronov, 926 F.2d 1066, 1078 (11th Cir. 1991) (holding that a university may restrict the content of curriculum conveyed during class time). The reasoning behind such rulings is commonly that "affording constitutional protection to these issues would keep the institution from defining and performing its educational mission." *See* Hoofnagle, *supra* note 214, at 690.

237. *See supra* notes 1, 8, 10-12 and accompanying text.

238. *See, e.g.*, Joan Wallach Scott, *For the Record: Higher Education and Middle Eastern Studies Following September 11, 2001, Four Presidents Speak Out for Academic Freedom*, ACADEME Nov.-Dec. 2002 (noting that a strong commitment to academic freedom has led to staunch support of professor curriculum choice by university presidents), *available at* http://www.aaup.org/publications/Academe/2002/02nd/02ndffr.htm.

239. Scholars suggest that *Pickering* and *Connick* are not applicable to curriculum decisions for other reasons as well. *See* Buss, *supra* note 17, at 239 ("Applying the Pickering-Connick test to the teacher in the classroom as the communicator of a curriculum to students is a classic example of trying to use a tool designed for one purpose in the performance of an entirely different task and one for which it is not suited.").

240. *See* Moshman, *supra* note 86, at 29 (arguing that although the First Amendment does not forbid government entities from imposing their viewpoint on curricula choice, narrow specification of what curricula a teacher may teach may prove detrimental to the quality of education). Academic employment contracts often include protection for professor speech. *See, e.g.*, Greene v. Howard Univ., 412 F.2d 1128, 1135 (D.C. Cir. 1969) (holding that the faculty handbook guides the faculty/university relationship); *see also* Jim Jackson, *Express and Implied Contractual Rights to Academic Freedom in the United States*, 22 HAMLINE L. REV. 467, 498 (1999) (arguing that academic freedom is a legal concept with bases in contract and constitutional law which empower the traditions of universities in America). Through an employment contract, universities may grant a broader academic

university professors are different from other government employees, however, it is difficult to argue that a constricted specification of what a university professor can teach really poses a First Amendment threat.[241] Rather, narrow curriculum guidelines most likely endanger university students' First Amendment rights, as discussed previously.[242] There is debate as to whether professors have academic freedom rights even against their universities,[243] leaving it unlikely that professors have rights against state legislatures in matters of curriculum. Thus, professorial academic freedom provides the least support for the argument that legislatures cannot determine university curriculum. Yet the *Urofsky* court, while denying rights to professors, recognized that "subjects of faculty research [are] in the hands of the institution,"[244] implying that if the university agrees with professors' choices, the professors likely have First Amendment protection. Because the freedom of speech of professors is naturally intertwined with the academic freedom of the university when it comes to matters of curriculum, the First Amendment likely protects professorial freedom to create curriculum as long as universities support their curriculum decisions.

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freedom for professors than what the Constitution seems to provide. In addition, scholars argue that it is more difficult to fire tenured professors for controversial speech in class, in writing, and in public. *See* Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, 53 LAW & CONTEMP. PROBS. 325, 328 (1990). Although none of the cases mentioned in the Introduction resulted in the dismissal of professors, it is foreseeable that legislative pressure (through funding or otherwise) on a university could result in dismissal. The 1973 Commission on Academic Tenure suggests that dismissal can occur only when there is (1) proven dishonesty or ineptitude, (2) significant disregard for duty, and (3) personal conduct that prevents a professor from performing her duties of employment. *Id.* (citing COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION, FACULTY TENURE 75 (1973)). However, employment contracts are created by and subject to state law, so this argument will likely fail.

241. Universities basically have the authority to restrict curriculum decisions by professors. *See* Moshman, *supra* note 86, at 29; *see, e.g.*, Edwards v. Cal. Univ. of Penn., 156 F.3d 488, 491 (3d Cir. 1998) (concluding that the First Amendment grants the university, and not the professor, the academic freedom to decide "what will be taught in the classroom").

242. *See supra* Part II.B.

243. *See* Rossi, *supra* note 200, at 719, 731 (indicating that public universities have extensive authority to restrict professor speech and that academic freedom "is a doctrine with no clear definition"). *But see* Buss, *supra* note 17, at 237 (suggesting that if extended to teachers, the *Hazelwood* test might offer some degree of protection for teacher speech regarding debate about the curriculum). Buss reasons that protection probably exists as long as the acting party is attempting to suppress controversial ideas and is not just acting to preserve its educational objectives. *Id.*

244. Urofsky v. Gilmore, 216 F.3d 401, 415 n.17 (4th Cir. 2000).

III. RECOMMENDATION: LEGISLATURES SHOULD STAY OUT OF UNIVERSITY CLASSROOMS

This Comment seeks to discover whether public universities have any rights in matters of curriculum choice against the legislatures responsible for their creation and funding. The notion that the First Amendment protects public universities' freedom to select curricula assumes that a university, as a state actor, "has constitutional rights enforceable against its creator and paymaster."[245] If universities and students do have rights under the First Amendment, these rights trump the state legislatures' authority to establish curricula in public universities because of the Supremacy Clause.[246]

There are some possible arguments universities can make if they do have a First Amendment right to challenge attempts by the legislature to control university curricula. First, there is a distinction between permissible content discrimination to preserve the purposes of the government-created institution and impermissible viewpoint discrimination targeted at speech considered to be within the limitations of the institution.[247] As this Comment explains, there are strong arguments that universities have some rights against state legislatures to make internal decisions, including curriculum determination. When state legislatures dictate what courses universities may offer, legislatures are impermissibly discriminating based upon viewpoint[248] because states are not allowed to "discriminate invidiously . . . in such a way as to aim at the suppression of dangerous ideas."[249]

Second, the universities could argue that since *Lawrence v. Texas*[250] overturned *Bowers v. Hardwick*,[251] courts may be less willing to allow states to legislate morality.[252] The *Lawrence* Court referenced how

245. *See* Metzger, *supra* note 18, at 1318. However, a state-created entity, such as a university, can have rights that go beyond the control of its creator.

246. U.S. CONST. art. VI., cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land . . . .").

247. *See* Rosenberger v. Rector, 515 U.S. 819, 829-32 (1995) (applying this distinction to hold that the denial of funding to a Christian student newspaper amounted to viewpoint discrimination).

248. *Id.* at 830 ("[I]deologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts.").

249. Regan v. Taxation With Representation of Washington, 461 U.S. 540, 548 (1983).

250. 539 U.S. 558, 578 (2003) (finding state laws that criminalize sodomy to be in violation of the Due Process Clause of the Fourteenth Amendment).

251. 478 U.S. 186 (1986).

252. The *Lawrence* Court explained that United States laws "afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Lawrence*, 539 U.S. at 574.

other nations have affirmed the "right of homosexual adults to engage in intimate, consensual conduct."[253] Perhaps universities could use this change in perception to argue that there is no legitimate governmental purpose in forbidding discussion and education on this issue as well.

This Comment recommends that legislatures refrain from interfering with university curriculum decisions. The Supreme Court has recognized that educational decisions are better left to educational experts,[254] and by insulating the universities from legislative interference,[255] it becomes more likely that decisions will be based on educational rather than political concerns. In the recent examples, it appears that the legislatures are mistaking "study for advocacy"[256] and are too willing to argue that offering a course on a controversial topic such as homosexuality means the same thing as condoning it.[257] Yet there are already safeguards in place: students can "vote with their feet" and not enroll in courses they disagree with, and university curriculum review boards can continue to monitor the

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Further, "[b]eliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Id.* (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)).

253. *Id.* at 576 (explaining that the European Court of Human Rights discounted *Bowers* and its reasoning).

254. *See* Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985) (quoting Bd. of Curators of the Univ. of Mo. v. Horowitz 435 U.S. 78, 90 (1978)) (emphasizing that curriculum decisions require "an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decision-making").

255. *See* Burgan, *supra* note 14 (arguing these actions "insert politicians into administration of a university by using the power of the purse to censor the curriculum").

256. *See* Smith, *supra* note 12 (examining the actions of the North Carolina House of Representatives, which proposed a state budget bill that denies funding to academic courses that emphasize religion unless all religions ere represented in an equal manner); *see also* Morris Sullivan, *Trampling the Last Taboo,* IMPACT PRESS, June-July 2002 (pointing out that just because a university professor studies and teaches about fascism does not mean that she is a fascist), *at* http://impactpress.com/articles/junjul02/mirkin6702.html (on file with the American University Law Review); James North, *American Higher Education: Once a Success Story, in* ACADEMIC FREEDOM 3: EDUCATION AND HUMAN RIGHTS 191, 200-01 (John Daniel et al. eds., 1995) ("Nor have the conservatives tried to explain why surveys show that most American college students remain moderate, indeed more conservative than their predecessors back in the 1960s and 1970s, despite the brainwashing they are supposed to be undergoing.").

257. In the North Carolina example, the legislature accused the University of advocating for Islam simply because the University assigned a book about the Qur'an for incoming freshmen. *See supra* note 10; *see also* Kristen Brustad, *Academic Freedom Under Attack* (Sept. 24, 2002) (arguing that the recent trend reflects "a growing misconception that college education should not entail introducing students to anything that challenges their basic beliefs"), *available at* http://www.emory.edu/ACAD_EXCHANGE/2003/febmar/brustad.html.

curricula.[258] Rather than asking whether taxpayers should be paying to support courses they do not agree with, the question should be whether taxpayers should be paying to support the free exchange of ideas.

CONCLUSION

Upon assessing the ability of a state legislature to interfere with university matters in 1896, one judge questioned, "[w]hat permanency would there be in an institution thus subject to the caprice and will of every legislature?"[259] There are a multitude of reasons why state legislatures may not disregard the traditionally understood institutional functions of public universities[260] and why they are constrained by the First Amendment to defer to the expressive purposes that have always been linked to universities.[261] Foremost, the arguments for state control of publicly-funded institutions are distinguishable because universities are unique to other publicly-funded institutions. In addition, *Grutter v. Bollinger* and other cases demonstrate that courts increasingly defer under the First Amendment to internal university decisions, which likely includes curriculum decisions. Underlying this issue is also the reality that courts recognize the importance and advantages of protecting and promoting diversity in universities.[262] For these reasons, state legislatures must not decide higher education curricula.

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258. *See* Scott, *supra* note 238 (noting that at the University of California Berkeley, undergraduate students can choose which writing seminar to enroll in based on course topic). The University of California Berkeley also has a faculty committee dedicated to supervising all offered courses and curricula. *Id.*

259. Sterling v. Regents of the Univ. of Mich., 68 N.W. 253, 257 (Mich. 1896) (concluding that the framers of the 1850 constitution meant to create a system that promoted excellence through the insulation of the governance of the university).

260. *See* Rabban, *supra* note 15, at 276 (arguing that state legislatures probably could not suddenly declare that universities were to be maintained solely for value inculcation rather than for critical inquiry).

261. *Id.* at 278.

262. Grutter v. Bollinger, 539 U.S. 306, 333-34 (2003) ("These benefits are not theoretical but real . . . the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.").