

Academic Abstention in the USA

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Introduction

In June 1999, I did legal research for cases nationwide involving a student suing a university regarding rejection of the student's thesis or dissertation, and subsequent denial of a master's or doctoral degree. During July-September 1999, I did legal research for cases nationwide involving academic freedom,¹ such as a professor suing a university over denial of tenure. In both of these legal research projects — involving my reading of more than 70 reported cases involving student v. university disputes and more than 90 reported cases involving professor v. university disputes — the university nearly always won. In fact, the university often won a summary judgment motion, which prevented the plaintiff from presenting testimony to the court and obtaining a fair hearing of his/her dispute with a university.

In reading law review articles on education law during 1999, I found an article by Professor Nordin,² who gave the name *academic abstention* to the doctrine that judges will defer to schools and universities in disputes involving purely academic matters. In legal jargon, *abstention* indicates the refusal of judges to resolve disputes where the court has jurisdiction.

In December 1999, I did legal research for cases nationwide involving allegations of educational malpractice by schools or colleges.³ Of the more than 80 reported appellate cases involving allegations of educational malpractice, I found that the school or college won all but one of these cases, which is another demonstration of the power of the academic abstention doctrine. In my essay on educational malpractice, I demolished the judicial excuses for saying that educational decisions in elementary school and high school are too difficult for courts to review.

In January-February 2011, I did legal research for cases on due process rights of students in disciplinary hearings at state colleges.⁴ Not only are such due process rights for students much weaker than for defendants in a criminal case, but also courts are *not* interested in reviewing punishment of students. In March 2011, I did legal research for cases involving alleged “state

¹ Ronald B. Standler, *Academic Freedom*, <http://www.rbs2.com/afree.htm> , (Oct 1999).

² Virginia Davis Nordin, “The Contract to Educate,” 8 J. COLLEGE & UNIVERSITY LAW 141 (1981).

³ Ronald B. Standler, *Educational Malpractice in the USA*, <http://www.rbs2.com/edumal.htm> , (Jan 2000).

⁴ Ronald B. Standler, *Legal Right to Have an Attorney at College Disciplinary Hearings in the USA*, <http://www.rbs2.com/eatty.pdf> , (Mar 2011).

action” by private colleges in Massachusetts, New York, and Pennsylvania.⁵ I found no enthusiasm for finding state action by private schools or colleges, even when a government provided all of the funding for the school. I suggest that limited due process rights for students at state colleges, and refusal to find “state action” by private colleges, effectively extends academic abstention to disciplinary matters involving students.

As I remark in the conclusion of this essay, at page 65 below, the doctrine of academic abstention is the most important doctrine in education law in the USA. The impact of academic abstention is simple: the school or college always wins any dispute about purely academic matters, no matter how grave the injustice to the pupil, student, or professor.

word usage

In this essay, I use the terms *college* and *university* interchangeably. In education law, *schools* are distinguishable from *colleges*, because *pupils* in schools are children but *students* in colleges are adults, and also because *teachers* in schools have lower academic credentials than *professors* in colleges. See the discussion in my essays on academic freedom, <http://www.rbs2.com/afree.htm> , and due process rights of students, at <http://www.rbs2.com/eatty.pdf> .

There are many judicial opinions that state that courts will not review the substance of purely academic decisions, without defining *academic decisions*. Such academic decisions include determining the grade in a class, approving a thesis or dissertation, suspending or expelling a student for poor academic performance, establishing requirements for graduation, denial of tenure to a professor for either inadequate teaching or inadequate scholarly research, etc. In contrast to academic decisions, there are disciplinary decisions that involve either alleged violation of rules (e.g., plagiarism, cheating on examinations) or alleged harm to the college or to other students (e.g., theft, assault, vandalism, disruption of class, etc.).

organization

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook*.

Because part of the intended audience for this essay is professors and students, who may not have convenient access to a law library, I have included longer quotations from judicial opinions than the conventional terse quotations in scholarly journals.

⁵ Ronald B. Standler, *Possibility of “State Action” by Private Colleges in the USA*, <http://www.rbs2.com/esa.pdf> , (April 2011).

disclaimer

This essay presents general information about an interesting topic in law, but is *not* legal advice for your specific problem. See my disclaimer at <http://www.rbs2.com/disclaim.htm> . Instead of doing amateur legal analysis, potential plaintiffs are encouraged to seek advice of an attorney who is both (1) licensed to practice law in the state where the school or college is located and (2) knowledgeable about education law. Readers are cautioned that the law changes with time, and a correct statement of past law may not be valid in the future.

Modern Cases Involving Students

There are numerous cases in which appellate courts have stated that judges will not review purely academic decisions made by professors or college faculty committees. The word “modern” in the title of this section means after the late 1960s, when the doctrine of *in loco parentis* was no longer valid law, as discussed below, at page 53.

U.S. Supreme Court

Epperson (1968)

In 1968, the U.S. Supreme Court considered an appeal from Arkansas involving teaching of evolution in public schools. The Court tersely recognized that the judicial system will not intervene in conflicts in school systems that do not “implicate basic constitutional values.”

Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. [FN13] On the other hand, '(t)he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools,' *Shelton v. Tucker*, 364 U.S. 479, 487, 81 S.Ct. 247, 251, 5 L.Ed.2d 231 (1960). As this Court said in *Keyishian v. Board of Regents*, the First Amendment 'does not tolerate laws that cast a pall of orthodoxy over the classroom.' 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629 (1967).

FN13. See the discussion in *Developments in The Law — Academic Freedom*, 81 HARV.L.REV. 1045, 1051-1055 (1968).

Epperson v. State of Arkansas, 393 U.S. 97, 104-105 (1968).

In practice, the Court has decided cases involving First Amendment protections for pupils, students, and faculty, as well as their due process rights (i.e., Fifth and Fourteenth Amendments), however the Court refuses to decide purely academic matters.

Goss (1975)

In 1975, the U.S. Supreme Court heard a case involving a ten-day suspension of a group of high school pupils in Columbus, Ohio. The Court held that it was a violation of due process to suspend the pupils without a hearing. The reason for the suspensions apparently involved allegedly disruptive behavior of pupils during Black History Week.⁶ The U.S. Supreme Court wrote a few paragraphs about hearings in schools, which have been frequently quoted by lower courts:

We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.

On the other hand, requiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect. He may then determine himself to summon the accuser, permit cross-examination, and allow the student to present his own witnesses. In more difficult cases, he may permit counsel. In any event, his discretion will be more informed and we think the risk of error substantially reduced.

....

We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.

Goss v. Lopez, 419 U.S. 565, 583-584 (1975).

Note that these remarks in *Goss* are in a case involving suspension for disciplinary reasons, *not* for academic reasons. And *Goss* involves a temporary (e.g., 10 day) suspension, *not* permanent expulsion. When *Goss* is applied to permanent expulsion of college students, the expulsion is *not* a “teaching process”,⁷ but as a way of removing candidates who are unworthy of a college degree. They may be unworthy as a result of misconduct (e.g., plagiarism, cheating on exams), for failure to make passing grade(s) in their classes, or failure to write a satisfactory thesis or dissertation.

⁶ *Lopez v. Williams*, 372 F.Supp. 1279, 1284-90 (S.D.Ohio 1973).

⁷ *Goss v. Lopez*, 419 U.S. at 583.

A similar case, involving expulsion of black students at the Alabama State College for unspecified misconduct (i.e., sit-ins during civil rights protests), is *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961), *cert.den.*, 368 U.S. 930 (1961).

Strickland (1975)

Pupils, 16 y old, were expelled from a public high school for serving alcoholic beverages at a school activity, in violation of school rules. The pupils sued in federal court and the trial judge directed a verdict for the school. The U.S. Court of Appeals reversed, but the U.S. Supreme Court reversed the Court of Appeals. The U.S. Supreme Court wrote:

Given the fact that there was evidence supporting the charge against respondents, the contrary judgment of the Court of Appeals is improvident. It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion. Public high school students do have substantive and procedural rights while at school. See *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943); *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). But § 1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations. The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members and § 1983 was not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees. See *Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S.Ct. 266, 270, 21 L.Ed.2d 228 (1968); *Tinker*, *supra*, 393 U.S. at 507, 89 S.Ct. at 736. *Wood v. Strickland*, 420 U.S. 308, 326 (1975).

Horowitz (1978)

In 1978, the U.S. Supreme Court heard an appeal of a student who had been expelled from medical school for poor academic performance. In reviewing the law, the Court elaborated on the distinction in *Goss* between (1) dismissing a student for disciplinary reasons and (2) dismissing a student for academic reasons.

Since the issue first arose 50 years ago, state and lower federal courts have recognized that there are distinct differences between decisions to suspend or dismiss a student for disciplinary purposes and similar actions taken for academic reasons which may call for hearings in connection with the former but not the latter. Thus, in *Barnard v. Inhabitants of Shelburne*, 216 Mass. 19, 102 N.E. 1095 (1913), the Supreme Judicial Court of Massachusetts rejected an argument, based on several earlier decisions requiring a hearing in disciplinary contexts, that school officials must also grant a hearing before excluding a student on academic grounds. According to the court, disciplinary cases have

“no application. Misconduct is a very different matter from failure to attain a standard of excellence in studies. A determination as to the fact involves investigation of a quite different kind. A public hearing may be regarded as helpful to the ascertainment of misconduct and useless or harmful in finding out the truth as to scholarship.”

Id., at 22-23, 102 N.E., at 1097.

A similar conclusion has been reached by the other state courts to consider the issue. See, e. g., *Mustell v. Rose*, 282 Ala. 358, 367, 211 So.2d 489, 498, cert. denied, 393 U.S. 936, 89 S.Ct. 297, 21 L.Ed.2d 272 (1968); cf. *Foley v. Benedict*, 122 Tex. 193, 55 S.W.2d 805 (1932). Indeed, until the instant decision by the Court of Appeals for the Eighth Circuit, the Courts of Appeals were also unanimous in concluding that dismissals for academic (as opposed to disciplinary) cause do not necessitate a hearing before the school's decisionmaking body. See *Mahavongsanan v. Hall*, 529 F.2d 448 (CA5 1976); [footnote omitted] *Gaspar v. Bruton*, 513 F.2d 843 (CA10 1975). [footnote omitted] These prior decisions of state and federal courts, over a period of 60 years, unanimously holding that formal hearings before decisionmaking bodies need not be held in the case of academic dismissals, cannot be rejected lightly. Cf. *Snyder v. Massachusetts*, 291 U.S. 97, 118-119, 131-132, 54 S.Ct. 330, 336-337, 341-342, 78 L.Ed. 674 (1934); *Powell v. Alabama*, 287 U.S. 45, 69-71, 53 S.Ct. 55, 64-65, 77 L.Ed. 158 (1932); *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31, 43 S.Ct. 9, 10, 67 L.Ed. 107 (1922).

Reason, furthermore, clearly supports the perception of these decisions. A school is an academic institution, not a courtroom or administrative hearing room. In *Goss*, this Court felt that suspensions of students for disciplinary reasons have a sufficient resemblance to traditional judicial and administrative factfinding to call for a "hearing" before the relevant school authority.

....

Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative fact-finding proceedings to which we have traditionally attached a full-hearing requirement. In *Goss*, the school's decision to suspend the students rested on factual conclusions that the individual students had participated in demonstrations that had disrupted classes, attacked a police officer, or caused physical damage to school property. The requirement of a hearing, where the student could present his side of the factual issue, could under such circumstances "provide a meaningful hedge against erroneous action." *Ibid.* The decision to dismiss respondent, by comparison, rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.

Under such circumstances, we decline to ignore the historic judgment of educators and thereby formalize the academic dismissal process by requiring a hearing. The educational process is not by nature adversary; instead it centers around a continuing relationship between faculty and students, "one in which the teacher must occupy many roles — educator, adviser, friend, and, at times, parent-substitute." *Goss v. Lopez*, 419 U.S., at 594, 95 S.Ct., at 746 (Powell, J., dissenting). This is especially true as one advances through the varying regimes of the educational system, and the instruction becomes both more individualized and more specialized. In *Goss*, this Court concluded that the value of some form of hearing in a disciplinary context outweighs any resulting harm to the academic environment. Influencing

this conclusion was clearly the belief that disciplinary proceedings, in which the teacher must decide whether to punish a student for disruptive or insubordinate behavior, may automatically bring an adversary flavor to the normal student-teacher relationship. The same conclusion does not follow in the academic context. We decline to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship. We recognize, as did the Massachusetts Supreme Judicial Court over 60 years ago, that a hearing may be "useless or harmful in finding out the truth as to scholarship." *Barnard v. Inhabitants of Shelburne*, 216 Mass., at 23, 102 N.E., at 1097. *Board of Curators of University of Missouri v. Horowitz*, 435 U.S. 78, 87-90 (1978).

The U.S. Supreme Court tersely remarked:

Courts are particularly ill-equipped to evaluate academic performance. The factors discussed in Part II⁸ with respect to procedural due process speak *a fortiori* here and warn against any such judicial intrusion into academic decisionmaking. [footnote omitted]
Horowitz, 435 U.S. at 92.

The U.S. Supreme Court in *Horowitz* tersely remarked that academic decisions of a university could be reversed by a judge if the academic decision was "clearly arbitrary or capricious".

In practice, it is almost impossible for a student to prove that a professor or university made a decision for arbitrary or capricious reasons. And, if a student manages to prove an arbitrary or capricious reason, the court will only order the university to provide the student with [another] hearing.

... a number of lower courts have implied in dictum that academic dismissals from state institutions can be enjoined if "shown to be clearly arbitrary or capricious." *Mahavongsanan v. Hall*, 529 F.2d, at 449. See *Gaspar v. Bruton*, 513 F.2d, at 850, and citations therein.
Horowitz, 435 U.S. at 91.

Following the citations, the only mention in *Mahavongsanan* of the "arbitrary and capricious" standard is in the summary of the arguments of the parties, but the U.S. Court of Appeals does not consider this standard, because the case was decided by removing the District Court's "confusion" between "disciplinary actions by educational institutions on the one hand, and academic decisions on the other hand."⁹ However, *Gaspar* has some relevant text:

Governing officials of a school required to examine students and determine whether they have performed the conditions entitling them to a diploma or other evidence of a completion of the course of study, exercise quasi judicial functions. In such capacity, their decisions are conclusive, providing that their action has been in good faith and not arbitrary. 6 A.L.R. 1533 and cases cited therein.

In *Barnard v. Inhabitants of Shelburne*, 216 Mass. 19, 102 N.E. 1095 (1913), the Court held that a student challenging the determination of the school committee that he be excluded from attendance for failure to maintain a proper standard of scholarship has the burden of showing bad faith on the part of the school committee by evidence and not merely by surmise, conjecture or speculation. The Court observed that the issue did not involve disciplinary conduct but rather academic conduct and that in matters involving educational

⁸ Some of Part II of the majority opinion was quoted, above, in this essay.

⁹ *Mahavongsanan v. Hall*, 529 F.2d 448, 449 (5th Cir. 1976).

delinquencies of students the final determination vests in those public officials charged with the performance of that important determination. We agree.

Courts have historically refrained from interfering with the authority vested in school officials to drop a student from the rolls for failure to attain or maintain prescribed scholastic rating (whether judged by objective and/or subjective standards), absent a clear showing that the officials have acted arbitrarily or have abused the discretionary authority vested in them.

39 A.L.R. 1019; *Foley v. Benedict et al.*, 122 Tex. 193, 55 S.W.2d 805 (1932); Anno. 86 A.L.R. 484.

Gaspar v. Bruton, 513 F.2d 843, 850 (10thCir. 1975).

The U.S. Supreme Court's decision in *Horowitz* is easily criticized on at least two grounds: (1) the Court's distinction between expulsion for disciplinary reasons and academic reasons is illusory¹⁰ and (2) the Court's description of the student-professor relationship as always *nonadversary* is *unrealistically idealized*.¹¹ Further, the Court may have misstated the facts of the *Horowitz* case, which may have involved discrimination against her because of her lifestyle.¹²

Ewing (1985)

In 1985, the U.S. Supreme Court again found itself hearing an appeal of a student who had been expelled from medical school for poor academic performance.

When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. [FN11] Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment. Cf. *Youngberg v. Romeo*, 457 U.S. 307, 323, 102 S.Ct. 2452, 2462, 73 L.Ed.2d 28 (1982).

FN11. "University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation." *Board of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78, 96, n. 6, 98 S.Ct. 948, 958, n. 6, 55 L.Ed.2d 124 (1978) (POWELL, J., concurring). See *id.*, at 90-92, 98 S.Ct., at 955-956 (opinion of the Court).

Considerations of profound importance counsel restrained judicial review of the substance of academic decisions. Added to our concern for lack of standards is a reluctance to trench on the prerogatives of state and local educational institutions and our

¹⁰ Fernand N. Dutille, "Disciplinary Versus Academic Sanctions in Higher Education: A Doomed Dichotomy?" 29 JOURNAL COLLEGE AND UNIVERSITY LAW 619 (2003). See also William G. Buss, "Easy Cases Make Bad Law: Academic Expulsion and the Uncertain Law of Procedural Due Process," 65 IOWA LAW REVIEW 1, 7-13 (Oct 1979).

¹¹ William G. Buss, "Easy Cases Make Bad Law: Academic Expulsion and the Uncertain Law of Procedural Due Process," 65 IOWA LAW REVIEW 1, 13, 82-84 (Oct 1979).

¹² William G. Buss, "Easy Cases Make Bad Law: Academic Expulsion and the Uncertain Law of Procedural Due Process," 65 IOWA LAW REVIEW 1, 19-21, also n. 113 (Oct 1979).

responsibility to safeguard their academic freedom, “a special concern of the First Amendment.” *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629 (1967).[FN12] If a “federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies,” *Bishop v. Wood*, 426 U.S. 341, 349, 96 S.Ct. 2074, 2079, 48 L.Ed.2d 684 (1976), far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions — decisions that require “an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.” *Board of Curators, Univ. of Mo. v. Horowitz*, 435 U.S., at 89–90, 98 S.Ct., at 954–955.

[FN12] Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, see *Keyishian v. Board of Regents*, 385 U.S., at 603, 87 S.Ct., at 683; *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 77 S.Ct. 1203, 1211, 1 L.Ed.2d 1311 (1957) (opinion of WARREN, C.J.), but also, and somewhat inconsistently, on **autonomous**¹³ decisionmaking by the academy itself, see *University of California Regents v. Bakke*, 438 U.S. 265, 312, 98 S.Ct. 2733, 2759, 57 L.Ed.2d 750 (1978) (opinion of POWELL, J.); *Sweezy v. New Hampshire*, 354 U.S., at 263, 77 S.Ct., at 1218 (FRANKFURTER, J., concurring in result). Discretion to determine, on academic grounds, who may be admitted to study, has been described as one of “the four essential freedoms” of a university. *University of California Regents v. Bakke*, 438 U.S., at 312, 98 S.Ct., at 2759 (opinion of POWELL, J.) (quoting *Sweezy v. New Hampshire*, supra, 354 U.S., at 263, 77 S.Ct., at 1218 (FRANKFURTER, J., concurring in result)) (internal quotations omitted).

Regents of University of Michigan v. Ewing, 474 U.S. 214, 225-226 (1985).

In his concurring opinion, Justice Powell concluded:

I agree fully with the Court's emphasis on the respect and deference that courts should accord academic decisions made by the appropriate university authorities. In view of Ewing's academic record that the Court charitably characterizes as “unfortunate,” this is a case that never should have been litigated. After a 4-day trial in a District Court, the case was reviewed by the Court of Appeals for the Sixth Circuit, and now is the subject of a decision of the United States Supreme Court. Judicial review of academic decisions, including those with respect to the admission or dismissal of students, is rarely appropriate, particularly where orderly administrative procedures are followed — as in this case. [footnote citing 3 cases omitted]

Ewing, 474 U.S. at 230 (Powell, J., concurring).

Kuhlmeier (1988)

In 1988, the U.S. Supreme Court considered a case involving censorship of a newspaper produced by pupils in a public high school:

This standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges. See, e.g., *Board of Education of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176, 208, 102 S.Ct. 3034, 3051, 73 L.Ed.2d 690 (1982); *Wood v. Strickland*, 420 U.S. 308, 326, 95 S.Ct. 992, 1003, 43 L.Ed.2d 214 (1975); *Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S.Ct. 266, 270, 21 L.Ed.2d 228 (1968). It is only when the

¹³ Boldface by Standler.

decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so "directly and sharply implicate[d]," *ibid.*, as to require judicial intervention to protect students' constitutional rights. [FN7]

FN7. A number of lower federal courts have similarly recognized that educators' decisions with regard to the content of school-sponsored newspapers, dramatic productions, and other expressive activities are entitled to substantial deference. See, e.g., *Nicholson v. Board of Education, Torrance Unified School Dist.*, 682 F.2d 858 (CA9 1982); *Seyfried v. Walton*, 668 F.2d 214 (CA3 1981); *Trachtman v. Anker*, 563 F.2d 512 (CA2 1977), cert. denied, 435 U.S. 925, 98 S.Ct. 1491, 55 L.Ed.2d 519 (1978); *Frasca v. Andrews*, 463 F.Supp. 1043 (EDNY 1979). We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level. *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

Grutter v. Bollinger (2003)

In a concurring opinion, Justice Frankfurter listed the right to decide who should be admitted to study at a college as one of "the four essential [academic] freedoms" possessed by a college.¹⁴ In later years, the U.S. Supreme Court considered several cases concerning racial preferences in the admission of students to colleges. In one of these admission cases, the U.S. Supreme Court repeated its deference to the college's decision in purely academic matters.

The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits. See *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985); *Board of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 96, n. 6, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978); *Bakke*, 438 U.S., at 319, n. 53, 98 S.Ct. 2733 (opinion of Powell, J.).

We have 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. See, e.g., *Wieman v. Updegraff*, 344 U.S. 183, 195, 73 S.Ct. 215, 97 L.Ed. 216 (1952) (Frankfurter, J., concurring); *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957); *Shelton v. Tucker*, 364 U.S. 479, 487, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960); *Keyishian v. Board of Regents of Univ. of State of N. Y.*, 385 U.S., at 603, 87 S.Ct. 675. In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: "The freedom of a university to make its own judgments as to education includes the selection of its student body." *Bakke*, supra, at 312, 98 S.Ct. 2733. From this premise, Justice Powell reasoned that by claiming "the right to select those students who will contribute the most to the 'robust exchange of ideas,'" a university "seek[s] to achieve a goal that is of paramount importance in the fulfillment of its

¹⁴ *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the result) (quoting a statement "of senior scholars from the University of Cape Town and the University of the Witwatersrand," South Africa.).

mission.” 438 U.S., at 313, 98 S.Ct. 2733 (quoting *Keyishian v. Board of Regents of Univ. of State of N. Y.*, supra, at 603, 87 S.Ct. 675). Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that “good faith” on the part of a university is “presumed” absent “a showing to the contrary.” 438 U.S., at 318-319, 98 S.Ct. 2733.

Grutter v. Bollinger, 539 U.S. 306, 328-329 (2003).

Other Courts in the USA

There are many hundreds of reported cases in the USA involving either student v. college or professor v. college. The cases quoted below are among the few judicial opinions to comment on *why* judges refuse to decide purely academic matters, such as grading, acceptability of a thesis or dissertation, qualifications of a professor for tenure, etc.

Connelly (D.Vt. 1965)

In 1964, Connelly was expelled from the College of Medicine at the University of Vermont for poor grades in his required classes. Connelly sued in U.S. District Court, alleging that his work was satisfactory and the professor was prejudiced against Connelly. The judge in the U.S. District Court summarized the applicable law:

Where a medical student has been dismissed for a failure to attain a proper standard of scholarship, two questions may be involved; the first is, was the student in fact delinquent in his studies or unfit for the practice of medicine? The second question is, were the school authorities motivated by malice or bad faith in dismissing the student, or did they act arbitrarily or capriciously? In general, the first question is not a matter for judicial review. However, a student dismissal motivated by bad faith, arbitrariness or capriciousness may be actionable.

In *Barnard v. Inhabitants of Shelburne*, 216 Mass. 19, 102 N.E. 1095 (1913) a high school student was dismissed for failure to attain a proper standard of scholarship. The trial court submitted the case to the jury on the theory that it had power to question whether in fact the plaintiff was delinquent in his studies, and the jury found that he was not. In reversing, the Supreme Judicial Court of Massachusetts said,

So long as the school committee act in good faith[,] their conduct in formulating and applying standards and making decisions touching this matter is not subject to review by any other tribunal. It is obvious that efficiency of instruction depends in no small degree upon this feature of our school system. It is an educational question, the final determination of which is vested by law in the public officials charged with the performance of that important duty.¹⁵

The only issue for the jury, said the court, was “whether the exclusion of the plaintiff from the High School was an act of bad faith by the school committee.”¹⁶

¹⁵ *Barnard v. Inhabitants of Shelburne*, 216 Mass. at 21, 102 N.E. at 1096.

¹⁶ *Barnard v. Inhabitants of Shelburne*, 216 Mass. at 22, 102 N.E. at 1097.

This rule has been stated in a variety of ways by a number of courts. It has been said that courts do not interfere with the management of a school's internal affairs unless 'there has been a manifest abuse of discretion or where (the school officials') action has been arbitrary or unlawful,' *State ex rel. Sherman v. Hyman*, 180 Tenn. 99, 171 S.W.2d 822, *cert. den.* 319 U.S. 748, 63 S.Ct. 1158, 87 L.Ed. 1703 (1942), or unless the school authorities have acted 'arbitrarily or capriciously', *Frank v. Marquette University*, 209 Wis. 372, 245 N.W. 125 (1932), or unless they have abused their discretion, *Coffelt v. Nicholson*, 224 Ark. 176, 272 S.W.2d 309 (1954), *People ex rel. Bluett v. Board of Trustees of University of Illinois*, 10 Ill.App.2d 207, 134 N.E.2d 635, 58 A.L.R.2d 899 (1956), or acted in 'bad faith', *Barnard v. Inhabitants of Shelburne*, *supra*, and see 222 Mass. 76, 109 N.E. 818 (same case).

The effect of these decisions is to give the school authorities absolute discretion in determining whether a student has been delinquent in his studies, and to place the burden on the student of showing that his dismissal was motivated by arbitrariness, capriciousness or bad faith. The reason for this rule is that in matters of scholarship, the school authorities are uniquely qualified by training and experience to judge the qualifications of a student, and efficiency of instruction depends in no small degree upon the school faculty's freedom from interference from other noneducational tribunals. It is only when the school authorities abuse this discretion that a court may interfere with their decision to dismiss a student.

In *West v. Board of Trustees of Miami University*, 41 Ohio App. 367, 181 N.E. 144 (1931), the plaintiff was dismissed from the University Normal School during her second term because she had not acquired enough credits. She appealed to the Academic Council of the University and then to the Faculty, the University's governing body. Thereafter she sought an injunction in the state court. After holding that the University rule providing for the number of credits required to advance with the student's class was valid and reasonable, the Court said,

It is clear that the faculty, consisting of the teaching body of the institution, must be the tribunal, under the direction and controlling jurisdiction of the trustees, to pass upon the fitness of the students to continue their study of the courses selected and required.¹⁷

In *Dehaan v. Brandeis University*, D.C., 150 F.Supp. 626 (1957), the plaintiff sought to enjoin the University from withholding a scholarship and from refusal to permit him to renew his registration. The University by a regulation set forth in its general catalogue, reserved "the right to sever the connection of any student with the university for appropriate reason."

In dismissing for failure to state a claim upon which relief could be granted the Court stated:

The problem of what constitutes an appropriate reason must clearly be left to those authorities charged with the duty of maintaining the standards and discipline of the school. (citations omitted). The court is in a poor position indeed to substitute its judgment for that of the university, particularly in this case which involved a graduate student enrolled in a very small department where the major part of instruction is given on an individual and personal basis.¹⁸

The Court continued:

¹⁷ *West v. Board of Trustees of Miami University and Miami Normal School*, 41 Ohio App. at 384, 181 N.E. at 150.

¹⁸ *Dehaan v. Brandeis University*, 150 F.Supp. at 627.

The plaintiff's qualifications as a scholar and prospective teacher can be judged only by his professors who must have complete autonomy in their decision concerning the qualities of his work and his good character.¹⁹

In *Edde v. Columbia University*, 8 Misc.2d 795, 168 N.Y.S.2d 643 (1957), a candidate for the degree of doctor of philosophy at Columbia University whose dissertation had been rejected conditionally, with the proviso that he could revise it, sought a court order to reinstate him as a certified candidate for the degree, 'and to have him finally examined on the basis of his dissertation as it now stands.' The New York Supreme Court, after noting that it was not established that the rejection of the dissertation was arbitrary, capricious or unreasonable, said,

[It was within the discretion of the University's proper authorities to reject petitioner's doctoral dissertation. There is ample evidence to support the refusal of the dissertation, and it is not established that the rejection was arbitrary, capricious or unreasonable.]²⁰ The court may not substitute its own opinion as to the merits of a doctoral dissertation for that of the faculty members whom the University has selected to make a determination as to the quality of the dissertation. [cites to 3 cases omitted]²¹

The rule of judicial nonintervention in scholastic affairs is particularly applicable in the case of a medical school. A medical school must be the judge of the qualifications of its students to be granted a degree; [“]Courts are not supposed to be learned in medicine and are not qualified to pass opinion as to the attainments of a student in medicine.[”] *People ex rel. Pacella v. Bennett Medical College*, 205 Ill.App. 324 [(Ill.App. 1917)].

Connelly v. University of Vt. and State Agr. College, 244 F.Supp. 156, 159-161 (D.Vt. 1965).

Connelly states the long-standing rule that courts will not hear disputes involving purely academic decisions, unless it is alleged that the decision was made neither with malice, bad faith, arbitrarily, nor capriciously.

In *Connelly*, the Plaintiff had alleged “... that the agent of defendant's College of Medicine who taught plaintiff from July 1 to July 16, 1964 decided early in said period that he would not give plaintiff a passing grade in said Pediatric-Obstetrics course regardless of his prior work in the Spring and regardless of the quality of his work in said make up period.” That allegation was enough to defeat the University's motion to dismiss Plaintiff's Complaint. The final paragraphs warns Plaintiff of the court's limited power:

It should be emphasized that this Court will not pass on the issue of whether the plaintiff should have passed or failed his pediatrics-obstetrics course, or whether he is qualified to practice medicine. This must and can only be determined by an appropriate department or

¹⁹ *Dehaan v. Brandeis University*, 150 F.Supp. at 627-628.

²⁰ This part of *Edde* was not quoted in *Connelly*.

²¹ *Edde v. Columbia University in City of New York*, 8 Misc.2d at 795, 168 N.Y.S.2d at 644 (N.Y.Sup. 2 Dec 1957), *aff'd without opinion*, 175 N.Y.S.2d 556 (N.Y.A.D. 1 Dept. 17 June 1958), *appeal dismissed*, 156 N.E.2d 458, 182 N.Y.S.2d 829 (N.Y. 8 Jan 1959), *cert. den.*, 359 U.S. 956, 79 S.Ct. 744, 3 L.Ed.2d 763 (30 Mar 1959).

committee of the defendant's College of Medicine. *Barnard v. Inhabitants of Shelburne*, supra, *Edde v. Columbia University*, supra. Therefore, should the plaintiff prevail on the issue of whether the defendant acted arbitrarily, capriciously or in bad faith, this Court will then order the defendant University to give the plaintiff a fair and impartial hearing on his dismissal order.

Therefore it is ordered that the motions of defendant to dismiss and for Summary Judgment under Rule 56, F.R.C.P. be and hereby are denied. The case is to be set for hearing on the limited issue of whether the defendant University acted arbitrarily, capriciously, or in bad faith in dismissing the plaintiff.

Connelly, 244 F.Supp.at 161.

There is no further opinion in Westlaw for this case, so it is not known whether Connelly prevailed. Recognize that even if Connelly “won” in court, all he could win would be another hearing at the University.

Lieberman v. Marshall (Fla. 1970)

In 1970, the Florida Supreme Court considered an injunction prohibiting meetings of Students for a Democratic Society (SDS) at Florida State University.

At the outset, certain basic principles should be considered. The powers and responsibilities of The Board of Regents, a university president, or principal of a public school, are awesome and extensive. **The administrator has wide discretion in dealing with the requirements of campus order and discipline, and with the time, place, and manner of extracurricular lectures. This Court will not ordinarily review the wisdom with which that discretion is exercised.** But this Court will review the exercise of governmental power where there is a tenable claim that it has been exercised in a manner inconsistent with the Constitution. See *Brooks v. Auburn University*, 296 F.Supp. 188 (M.D.Ala. 1969).

A college education is no longer a luxury for the wealthy, but is regarded as a necessity for most high school graduates. College students today, through the television, radio, and news media, are usually well-informed in national affairs and reliant. Unfortunately, many limit their interests to rights and privileges to the extent of ignoring their duties and responsibilities to our Great American Heritage. Be that as it may, the State cannot condition the granting of a college education, even though a privilege,²² upon the renunciation of constitutional rights. *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961). See *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).

Lieberman v. Marshall, 236 So.2d 120, 123 (Fla. 1970).

This holding by the Florida Supreme Court is a correct statement of law: courts will not “review the wisdom” of academic decisions, unless a constitutional right is allegedly violated by the college.

²² The parenthetical remark, “even though a privilege”, is now irrelevant. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 404-406 (1963); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (citing cases); *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972) (“The Court has fully and finally rejected the wooden distinction between ‘rights’ and ‘privileges’ [citations omitted]”).

Paynter (N.Y.Sup. 1971)

New York University, a private college, canceled 19 days of classes in 1970 owing to riots on campus in protest of the entry of U.S. troops into Cambodia. The father of a student sued in small claims court for a refund of \$277, the prorata share of tuition he had paid for his son's education. The small claims court found for the father on a straightforward breach of contract theory, plus three printed pages of gratuitous political rhetoric.²³ The appellate court, in an amazingly terse opinion, reversed:

Private colleges and universities are governed on the principle of self-regulation, free to a large degree, from judicial restraints (Education Law, § 226, subd. 10), and they have inherent authority to maintain order on their campuses. In the light of the events on the defendant's campus and in college communities throughout the country on May 4th to 5th, 1970, the court erred in substituting its judgment for that of the University administrators and in concluding that the University was unjustified in suspending classes for the time remaining in the school year prior to the examination period. Moreover, while in a strict sense, a student contracts with a college or university for a number of courses to be given during the academic year, the services rendered by the university cannot be measured by the time spent in a classroom. The circumstances of the relationship permit the implication that the professor or the college may make minor changes in this regard. The insubstantial change made in the schedule of classes does not permit a recovery of tuition. We conclude that substantial justice was not done between the parties 'according to the rules and principles of substantive law' (New York City Civil Court Act, § 1807).

Paynter v. New York University, 319 N.Y.S.2d 893, 894 (N.Y.Sup.App.Term 2 April 1971) (per curiam).

A similar case is *Zumbrun v. University of Southern California*, 101 Cal.Rptr. 499 (Cal.App. 2 Dist. 18 Apr 1972) (Student sued for refund of \$ 518 tuition when professor canceled classes and joined faculty strike that "protested U.S. foreign policy in Cambodia").

Keys (S.D.Tex. 1973)

In 1973, a U.S. District Court heard a dispute involving a former law student who wanted (1) two failing grades removed from his transcript and (2) readmission to law school. The trial judge dismissed Plaintiff's claims.

Still another reason consideration of plaintiff's cause is inappropriate by this forum is the belief that this case calls for judicial abstention. The doctrine of judicial abstention has been fashioned by federal courts sitting in equity to achieve a more principled allocation of business between the state and federal judiciaries and to minimize unnecessary conflict between those systems. *Egner v. Texas City Independent School District*, [338 F.Supp. 931] at 940. Federal courts should not interfere or substitute their judgment and authority for that of local and state school authorities unless such action is clearly warranted to protect rights guaranteed by the Constitution. No such rights are present here. The gravamen of plaintiff's complaints

²³ *Paynter v. New York University*, 314 N.Y.S.2d 676 (N.Y.City Civ.Ct. 14 Oct 1970).

is the basic unfairness of grading systems employed by two individual professors. It is difficult to imagine an area of academic life more suitable for judicial abstention. The assignment of grades to a particular examination must be left to the discretion of the instructor. He should be given the unfettered opportunity to assess a student's performance and determine if it attains a standard of scholarship required by that professor for a satisfactory grade. The federal judiciary should not adjudicate the soundness of a professor's grading system, nor make a factual determination of the fairness of the individual grades. Such an inquiry would necessarily entail the complete substitution of a court evaluation of a complainant's level of achievement in the subject under review, and the standard by which such achievement should be measured, for that of the professor. It would be difficult to prove by reason, logic or common sense that the federal judiciary is either competent, or more competent, to make such an assessment.

Keys v. Sawyer, 353 F.Supp. 936, 939-940 (S.D.Tex. 1973),

aff'd without opinion, 496 F.2d 876 (5th Cir. 1974), *cert. den.*, 419 U.S. 901 (1974).

The trial judge also could have ruled against Plaintiff, because Plaintiff had voluntarily withdrew from law school instead of pursuing administrative remedies at that law school.²⁴ Still another reason to rule against Plaintiff was *res judicata* from Plaintiff's previous litigation.²⁵ The judge concluded "plaintiff's claims in their entirety are so deficient as to warrant their condemnation as frivolous. Therefore, these causes of action being totally devoid of any merit should be, and hereby are, dismissed."²⁶

Note that the judge in *Keys* specifically mentioned the word "abstention" in a dispute over grades at a school or college.

Greenhill (8thCir. 1975)

In 1974, a U.S. District Court in Iowa considered a case in which a student, Greenhill, was dismissed from medical school because of poor academic performance. Because the medical school was operated by the State of Iowa, Greenhill sued in federal court, alleging violations of his civil rights. The trial judge reviewed the law:

... the cases are clear that notice and hearing are not required when a student is dismissed for failure to meet academic standards. The leading case is *Connelly v. University of Vermont and State Agricultural College* (D.Vt., 1965), 244 F.Supp. 156, 159. See *Brookins v. Bonnell* (E.D.Pa., 1973), 362 F.Supp. 379, 382; *Wong v. Regents of the University of California* (1971), 15 Cal.App.3rd 823, 93 Cal.Rptr. 502, 508; *Militana v. University of Miami* (Fla., 1970), 236 So.2d 162, 164; *Cieboter v. O'Connell* (Fla., 1970), 236 So.2d 470, 472-473; *Mustell v. Rose* (1968), 282 Ala. 358, 211 So.2d 489, 498. Although most of these citations preceded *Board of Regents v. Roth* [408 U.S. 564 (1972)], the Court's reluctance, thus far, to enter into the academic field and dispute a decision by those particularly qualified

²⁴ *Keys v. Sawyer*, 353 F.Supp. at 939.

²⁵ *Keys v. Sawyer*, 353 F.Supp. at 940-941.

²⁶ *Keys v. Sawyer*, 353 F.Supp. at 941.

to make it, persuades me that the United States Supreme Court would not require a due process hearing under these circumstances.

The cases cited above also stand for the proposition that the courts will not review a decision of the school authorities relating to the academic qualifications of the students. See also: *Depperman v. University of Kentucky* (E.D.Ky., 1974), 371 F.Supp. 73, 76; *Foley v. Benedict* (1932), 122 Tex. 193, 55 S.W.2d 805, 809; *West v. Board of Trustees of Miami University, etc.* (1931), 41 Ohio App. 367, 181 N.E. 144; *Barnard v. Inhabitants of Shelbourne* (1915), 222 Mass. 76, 109 N.E. 818; *Gleason v. University of Minnesota* (1908), 104 Minn. 359, 116 N.W. 650; *Miller v. Dailey* (1902), 136 Cal. 212, 68 P. 1029.

However, plaintiff is not without remedy when it is alleged that a decision by the school authorities to dismiss a student, supposedly for academic deficiencies, was in fact made arbitrarily and capriciously and in bad faith. Plaintiff may, as in the instant case, bring an action so alleging and the Court will receive and consider evidence on this issue. See the above cited cases.

Greenhill v. Bailey, 378 F.Supp. 632, 633 (S.D.Iowa 1974).

The trial judge found that the University's decision was *neither* arbitrary *nor* capricious:

The Court has been unable to reconcile the concept of the school authorities' 'absolute discretion' to dismiss a student for failure to meet academic standards with a review by the court of the academic record to determine whether the decision was arbitrary and capricious because the academic record shows he should have passed. The courts would appear to be encroaching on the area we have repeatedly stated is reserved to the academicians. There is nothing in the record to suggest that the dismissal was motivated by animosity or ill will. To the contrary plaintiff appears to have been well liked. Plaintiff is asking the Court to look at the evidence of his scholastic ability; find the judgment of the school authorities is not supported by the evidence; and find their action arbitrary, capricious and in bad faith. The courts have thus far declined to usurp his function. In my opinion there must be some positive evidence of ill will or bad motive before the Court could hold the action arbitrary, capricious or in bad faith. The absence of such evidence coupled with the authorities' discretion to determine scholastic grades requires a decision in favor of defendants.

Perhaps this conclusion should end this case, however, it is also my opinion that the plaintiff has failed to meet the burden of proving his dismissal was arbitrary and capricious and in bad faith under the evidence presented concerning his medical school record.

Greenhill, 378 F.Supp. at 635.

The trial judge ruled in favor of the University.

However, the District Court's decision in *Greenhill* was reversed by the U.S. Court of Appeals, because *Greenhill's* dismissal from the University of Iowa Medical School "was accompanied by notification of the Liaison Committee of the Association of American Medical Colleges in Washington, D.C., that *Greenhill* lacked 'intellectual ability' or had insufficiently prepared his course work."²⁷ That notice made it unlikely that any other medical school would accept *Greenhill* as a student. The Court of Appeals held that the University had imposed a stigma on *Greenhill* that foreclosed his ability to take advantage of opportunities to study at other medical schools. For that reason, the U.S. Court of Appeals ordered the University to provide more due process (i.e., notice and opportunity to rebut) to *Greenhill*, before dismissing him.

²⁷ *Greenhill v. Bailey*, 519 F.2d 5, 8 (8th Cir. 1975).

We stop short, however, of requiring full trial-type procedures in such situations. A graduate or professional school is, after all, the best judge of its students' academic performance and their ability to master the required curriculum. The presence of attorneys or the imposition of rigid rules of cross-examination at a hearing for a student like Greenhill would serve no useful purpose, notwithstanding that the dismissal in question may be of permanent duration. [footnote omitted] But an "informal give-and-take" between the student and the administrative body dismissing him and foreclosing his opportunity to gain admission at all comparable institutions would not unduly burden the educational process and would, at least, give the student "the opportunity to characterize his conduct and put it in what he deems the proper context." *Goss v. Lopez*, supra, 419 U.S. at 584, 95 S.Ct. at 741.

Greenhill v. Bailey, 519 F.2d 5, 9 (8th Cir. 1975).

The U.S Court of Appeals also held that the arbitrary and capricious standard applied:

For a court to overturn a student's dismissal on substantive grounds it must find that such dismissal was arbitrary and capricious. See *Keys v. Sawyer*, 353 F.Supp. 936 (S.D.Tex. 1973); *Connelly v. University of Vermont and State Agricultural College*, 244 F.Supp. 156 (D.Vt. 1965). That standard is a narrow one, to be applied only where administrative action "is not supportable on any rational basis" or where it is "willful and unreasoning action, without consideration and in disregard of the facts or circumstances of the case." *First National Bank v. Smith*, 508 F.2d 1371, 1376 (8th Cir. 1974). Educational institutions can judge a student's performance better than can a court of law, particularly in an advanced field such as the study of medicine. *Depperman v. University of Kentucky*, 371 F.Supp. 73, 76 (E.D.Ky. 1974); *Connelly v. University of Vermont and State Agricultural College*, supra, 244 F.Supp. at 160-61. Only the most compelling evidence of arbitrary or capricious conduct would warrant our interference with the performance evaluation (grades) of a dismissed student made by his teachers.

Greenhill, 519 F.2d at 10, n. 12.

This is one of a very few cases in which a student won. Note that the court did *not* order the University to reinstate Greenhill. The court only ordered the University to provide a hearing at the University and give Greenhill an attempt to rebut the evidence for his dismissal.

My opinion is that the U.S. Court of Appeals in *Greenhill* misunderstood *Roth* about stigma. The stigma in *Roth* refers to dismissal for reason of dishonesty or immorality,²⁸ not incompetence.²⁹ Thus, I believe that the U.S. Court of Appeals decision in *Greenhill* is wrong.

Gaspar (10thCir. 1975)

In 1975, the U.S. Court of Appeal for Oklahoma tersely wrote:

The courts are not equipped to review academic records based upon academic standards within the particular knowledge, experience and expertise of academicians. Thus, when presented with a challenge that the school authorities suspended or dismissed a student for failure re academic standards, the court may grant relief, as a practical matter, only in those cases where the student presents positive evidence of ill will or bad motive. As so succinctly pointed out in *Greenhill v. Bailey*, 378 F.Supp. 632, 635 (S.D.Iowa 1974), "The absence of such evidence coupled with the authorities' discretion to determine scholastic grades requires a decision in favor of defendants."

In *Connelly v. University of Vermont and State Agricultural College*, 244 F.Supp. 156 (D.C.Vt. 1965), the Court held:

Whether the plaintiff should or should not have received a passing grade for the period in question is a matter wholly within the jurisdiction of the school authorities, who alone are qualified to make such a determination.

244 F.Supp. 156 at 161.

Gaspar v. Bruton, 513 F.2d 843, 851 (10thCir. 1975).

²⁸ *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 573 (1972) ("It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For '(w)here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' [citations omitted] In such a case, due process would accord an opportunity to refute the charge before University officials. [FN12] In the present case, however, there is no suggestion whatever that the respondent's 'good name, reputation, honor, or integrity' is at stake."). See also *Winegar v. Des Moines Independent Community School Dist.*, 20 F.3d 895, 899 (8thCir. 1994) ("The requisite stigma has generally been found when an employer has accused an employee of dishonesty, immorality, criminality, racism, and the like.").

²⁹ *Buchholz v. Aldaya*, 210 F.3d 862, 866 (8th Cir. 2000) ("a plaintiff is not deprived of [her] liberty interest when the employer has alleged merely improper or inadequate performance, incompetence, neglect of duty or malfeasance." *Ludwig v. Board of Trustees of Ferris State Univ.*, 123 F.3d 404, 410 (6th Cir. 1997)).

Olsson (N.Y. 1980)

In 1976, a student wanted the court to compel The City University of New York to award the student a master's degree. The student won in both the trial court and first appellate court,³⁰ because the student had relied on erroneous information from a professor about the scoring of a comprehensive examination. While the student passed the exam under the standards announced by the professor, the University used different standards and failed the student. Four years later, the highest court in New York State reversed, saying that the college had met its obligation by offering (1) to expunge the failing result from the student's transcript, and (2) giving the student two more chances to take the comprehensive exam. The highest court in New York State wrote:

While it is true that in the ordinary case, a principal must answer for the misstatements of his agent when the latter is clothed with a mantle of apparent authority [citation omitted], such hornbook rules cannot be applied mechanically where the "principal" is an educational institution and the result would be to override a determination concerning a student's academic qualifications. Because such determinations rest in most cases upon the subjective professional judgment of trained educators, the courts have quite properly exercised the utmost restraint in applying traditional legal rules to disputes within the academic community [cites to six cases omitted].

This judicial reluctance to intervene in controversies involving academic standards is founded upon sound considerations of public policy. **When an educational institution issues a diploma to one of its students, it is, in effect, certifying to society that the student possesses all of the knowledge and skills that are required by his chosen discipline.**³¹ In order for society to be able to have complete confidence in the credentials dispensed by academic institutions, however, it is essential that the decisions surrounding the issuance of these credentials be left to the sound judgment of the professional educators who monitor the progress of their students on a regular basis. Indeed, the value of these credentials from the point of view of society would be seriously undermined if the courts were to abandon their long-standing practice of restraint in this area and instead began to utilize traditional equitable estoppel principles as a basis for requiring institutions to confer diplomas upon those who have been deemed to be unqualified.

Olsson v. Board of Higher Ed., 402 N.E.2d 1150, 1152-53 (N.Y. 20 Feb 1980).

Note that the court will *not* "apply mechanically" rules of law developed for commercial transactions to cases involving student v. university disputes, which is another way to define academic abstention.

³⁰ *Olsson v. Board of Higher Ed. of City of New York*, 412 N.Y.S.2d 615 (N.Y.A.D. 1 Dept. 30 Jan 1979).

³¹ Boldface added by Standler.

The boldfaced sentence above about a college's diploma certifying a student's competence has been quoted in a small number of cases, mostly in New York state:

- *Dalton v. Educational Testing Service*, 663 N.E.2d 289, 294 (N.Y. 1995) (“This reluctance to interfere with the exercise of academic discretion is motivated by sound considerations of public policy. [quoting *Olsson*]”).
- *Bender v. Alderson Broaddus College*, 575 S.E.2d 112, 116 (W.Va. 2002) (“The New York Court of Appeals aptly summarized the public policy basis for showing judicial deference in this regard by saying: [quoting *Olsson*]”);
- *A. v. C. College*, 863 F.Supp. 156, 158, n.1 (S.D.N.Y. 1994) (“Deference to administrative decisions in the educational context is greatest where necessarily subjective judgments of professional educators are involved, as in the case of grading, [citing two cases], since the institution certifies to society by way of a diploma that the student ‘possesses all of the knowledge and skills that are required by the chosen discipline.’ [citing *Matter of Levy*, 450 N.Y.S.2d 574, 575 (N.Y.A.D. 1982), which cites *Olsson*.]”).

Because the school or college is accredited to award diplomas — and to certify to society that such diplomas were genuinely earned — such recognition would justify judicial deference to the school or college in formulating academic requirements, such as content of a class syllabus, or criteria for selection of faculty members. However, should such deference extend to allegations that the college's policy was applied in an inconsistent or unfair way, for arbitrary or capricious reasons? I see a distinction between (1) formulating academic requirements and (2) making academic judgments about individual students (e.g., grading examinations, determining acceptability of thesis or dissertation).

In *Olsson*, the highest court in New York State admitted the *possibility* of a court ordering a college to award a degree, but *only* if the student had demonstrated his competence.

In summary, it must be stressed that the judicial awarding of an academic diploma is an extreme remedy which should be reserved for the most egregious of circumstances. In light of the serious policy considerations which militate against judicial intervention in academic disputes, the courts should shun the “diploma by estoppel” doctrine whenever there is some question as to whether the student seeking relief has actually demonstrated his competence in accordance with the standards devised by the appropriate school authorities. Additionally, the courts should be particularly cautious in applying the doctrine in cases such as this, where a less drastic remedy, such as retesting, may be employed without seriously disrupting the student's academic or professional career.

Olsson, 402 N.E.2d at 1154.

This rejection of “diploma by estoppel” effectively overrules three earlier cases in New York State in which courts ordered a college to grant a degree.³²

³² *People ex rel. Cecil v. Bellevue Hospital Medical College*, 14 N.Y.S. 490 (N.Y.Sup.Gen.Term 15 May 1891), *aff'd without opinion*, 28 N.E. 253 (N.Y. 25 June 1891); *Blank v. Board of Higher Ed. of City of New York*, 273 N.Y.S.2d 796 (N.Y.Sup. 28 Sep 1966); *Healy v. Larsson*, 323 N.Y.S.2d 625 (N.Y.Sup. 5 Apr 1971), *aff'd without opinion*, 348 N.Y.S.2d 971 (N.Y.A.D. 3 Dept. 18 Oct 1973), *aff'd without opinion*, 318 N.E.2d 608, 360 N.Y.S.2d 419 (N.Y. 7 Oct 1974). See Robert Faulkner, Note, “Judicial Deference to University Decisions Not to Grant Degrees, Certificates, and Credit — The

Maas (Wash.App. 1980)

In 1980, a court in Washington state refused to order a law school to grant a degree to a student, after she was expelled for failing to maintain a cumulative 2.2 grade point average.

As a general rule, the courts will not interfere with purely academic decisions of a university. *Mahavongsanan v. Hall*, 529 F.2d 448 (5th Cir. 1976); *Jansen v. Emory University*, 440 F.Supp. 1060 (N.D.Ga. 1977), *aff'd* 579 F.2d 45 (5th Cir. 1978); *Keys v. Sawyer*, 353 F.Supp. 936 (S.D.Tex. 1973), *aff'd* 496 F.2d 876 (5th Cir. 1974); see also *Board of Curators of University of Missouri v. Horowitz*, 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978). Professors in the position of making academic decisions will not be second-guessed by the courts. Where a university acts in an arbitrary and capricious fashion or in bad faith, then courts generally have accepted review of these decisions. *Depperman v. University of Kentucky*, 371 F.Supp. 73 (E.D.Ky. 1974); *Connelly v. University of Vermont and State Agricultural College*, 244 F.Supp. 156 (D.Vt. 1965).

....

The decision to award or not award a degree, and based upon what criteria, is one uniquely within the academic sphere. The courts should abstain from interference in this process unless arbitrary and capricious decision making or bad faith is present. Decisions arrived at honestly and with due consideration are not arbitrary and capricious. *McDonald v. Hogness*, 92 Wash.2d 431, 598 P.2d 707 (1979), *cert. denied* 445 U.S. 962, 100 S.Ct. 1650,

....

Maas v. Corporation of Gonzaga University, 618 P.2d 106, 109 (Wash.App. Div. 3 7 Oct 1980), *review denied*, 95 Wash.2d 1002, 1981 WL 190756 (Wash. 1981).

Susan M. (N.Y. 1990)

In 1988, the New York Law School gave Susan M. a D grade in the Corporations class and then expelled her for poor academic performance. She sued and the trial court dismissed her Complaint, but the first appellate court reversed.³³ The highest court in New York State unanimously reversed, writing:

Strong policy considerations militate against the intervention of courts in controversies relating to an educational institution's judgment of a student's academic performance. [citations to four cases omitted] Unlike disciplinary actions taken against a student [citation omitted], institutional assessments of a student's academic performance, whether in the form of particular grades received or actions taken because a student has been judged to be scholastically deficient, necessarily involve academic determinations requiring the special expertise of educators (*Board of Curators v. Horowitz*, 435 U.S. at 90, 98 S.Ct. at 955, *supra*). These determinations play a legitimate and important role in the academic setting

Fiduciary Alternative," 40 SYRACUSE LAW REVIEW 837, 853 (1989) (discussing *Blank* and *Healey* in light of *Olsson*).

³³ *Susan M v. New York Law School*, 544 N.Y.S.2d 829 (N.Y.A.D. 1 Dept. 3 Aug 1989).

since it is by determining that a student's academic performance satisfies the standards set by the institution, and ultimately, by conferring a diploma upon a student who satisfies the institution's course of study, that the institution, in effect, certifies to society that the student possesses the knowledge and skills required by the chosen discipline. [citations to three cases omitted] Thus, to preserve the integrity of the credentials conferred by educational institutions, the courts have long been reluctant to intervene in controversies involving purely academic determinations (*Matter of Olsson v. Board of Higher Educ.*, 49 N.Y.2d, at 413, 426 N.Y.S.2d 248, 402 N.E.2d 1150, *supra*).

Accordingly, although we have emphasized that the determinations of educational institutions as to the academic performance of their students are not completely beyond the scope of judicial review [citing two cases], that review is limited to the question of whether the challenged determination was arbitrary and capricious, irrational, made in bad faith or contrary to Constitution or statute [citing two cases]. This standard has rarely been satisfied in the context of challenges to academic determinations because the courts have repeatedly refused to become involved in the pedagogical evaluation of academic performance. Thus, we have declined, in the absence of bad faith, to compel a university to award a diploma where a student alleged that he had failed a final comprehensive exam because of his reliance on the professor's misstatement as to how the exam would be graded (*Matter of Olsson v. Board of Higher Educ.*, *supra*), or to compel a medical school to permit a student who had failed a number of courses to repeat a year (*Matter of Patti Ann H. v. New York Med. Coll.*, 88 A.D.2d 296, 453 N.Y.S.2d 196, *aff'd*, 58 N.Y.2d 734, 459 N.Y.S.2d 27, 445 N.E.2d 203, *supra*), and we have concluded that a college did not act arbitrarily in refusing to "round off" a senior's grade so that she might graduate [citing five cases].

As a general rule, judicial review of grading disputes would inappropriately involve the courts in the very core of academic and educational decision making. Moreover, to so involve the courts in assessing the propriety of particular grades would promote litigation by countless unsuccessful students and thus undermine the credibility of the academic determinations of educational institutions. We conclude, therefore, that, in the absence of demonstrated bad faith, arbitrariness, capriciousness, irrationality or a constitutional or statutory violation, a student's challenge to a particular grade or other academic determination relating to a genuine substantive evaluation of the student's academic capabilities, is beyond the scope of judicial review (see, *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225, 106 S.Ct. 507, 513, 88 L.Ed.2d 523; *Morpurgo v. United States*, 437 F.Supp. 1135, *supra*; *Connelly v. University of Vt.*, 244 F.Supp. 156, *supra*).

Susan M. v. New York Law School, 556 N.E.2d 1104, 1106-1107 (N.Y. 1990).

One would think that a judge in a court of law should be competent to evaluate a grade in an introductory law school class. In the particular case of *Susan M.*, the grading dispute involves her answer to one question that was worth 30% of the exam grade. The problem called for application of Delaware law and Susan M. correctly applied Delaware law. At the end of her answer, Susan M. added a paragraph about New York law "to get extra credit", but her answer there was incorrect. That much is beyond dispute. The professor argued that she had given two answers, one correct and one incorrect, so the professor gave her a score of *zero* on that one question.³⁴ I think it is capricious to give a zero score when the student correctly answered the question that was asked on the exam. One could argue endlessly over how much partial credit to give her, but

³⁴ *Susan M.*, 544 N.Y.S.2d at 830-831 (N.Y.A.D. 1989), *rev'd*, 556 N.E.2d at 1106 (N.Y. 1990).

I think zero partial credit is ridiculously harsh and indefensible.³⁵ I agree with the intermediate appellate court's analysis.³⁶

The professor apparently also deducted points from her exam score because Susan M. wrote her answers "in the style of a first-year student."³⁷ Because her answer was not quoted in the judicial opinions, we can not independently evaluate this remark by her professor. The remark may have been an insulting comment for which little — if any — credit should be deducted from her score.

André (N.Y.App. 1996)

In a 1994 New York State case, two college students were advised by the Chairman of the Computer Science department that a particular graduate-level computer programming class was suitable for their meager³⁸ mathematical background. In fact, the class was far above the students' ability to comprehend. The students sued in small claims court and won a refund of the \$855 tuition they paid, refund of the \$30 cost of the textbook, \$115 damages under state deceptive business practices statute, and \$1000 punitive damages.³⁹ An appellate court reversed by a 2 to 1 vote, holding that the students' claims were really a form of "educational malpractice", which, regardless of whether in tort or in contract, was not actionable in New York as a matter of public policy. The appellate court gave an explanation of why it did not want to consider the merits of the case:

In the instant case, the plaintiffs' causes of action for breach of contract are based upon defendant's alleged failure to deliver the course described in the University's Catalog and as represented by Dr. Murthy during their consultation. The plaintiffs' testimony at trial in substance was that although the course was described as a basic Pascal programming course in the Catalog and Dr. Murthy had assured them that their math background would be sufficient, it was taught at an advanced level, and the Pascal textbook chosen by Professor

³⁵ Personally, I think somewhere between 50% and 90% credit is reasonable, depending on how one awards partial credit. The half-credit is justified by saying she gave two answers: one correct and one incorrect and averaging them. More credit is given by recognizing that she gave the correct answer to the question that was asked on the exam, which answer should contain most of the credit.

³⁶ *Susan M.*, 544 N.Y.S.2d at 832 (N.Y.A.D. 1989) ("At issue is not what grade petitioner should have received but whether the grade received was arbitrary and capricious; not whether petitioner deserved a C+ instead of a D in Corporations but whether she deserved a zero on this particular essay; not the quality of petitioner's answer but the rationality of the professor's grading. We remand to respondent for further consideration of petitioner's grade in Corporations."), *rev'd*, (N.Y. 1990).

³⁷ *Susan M.*, 556 N.E.2d at 1106.

³⁸ One of the Plaintiffs had a B.A. English literature, while André has a M.A. in Film. 655 N.Y.S.2d at 778. These majors did not require them to take advanced mathematics classes.

³⁹ *André v. Pace University*, 618 N.Y.S.2d 975 (N.Y.City Ct. 1994).

Zahn inappropriately focused on math and science based problems which were beyond their level of comprehension. It is clear that the essence of plaintiffs' breach of contract claim necessarily entails an evaluation of the adequacy and quality of the textbook used and the effectiveness of the pedagogical method chosen by the professor to teach the graduate Pascal programming class. In order to determine whether "Condensed Pascal" was inappropriate because of its focus on math and science based problems, this court would be required to examine not only "Condensed Pascal", and its earlier, allegedly simpler version, but also other possible available textbooks on Pascal programming language, and to conduct a comparative analytical review in order to ascertain their relative merits and appropriateness for this particular course. Additionally the court would be engaged in a comprehensive review of a myriad of educational and pedagogical factors, as well as administrative policies that enter into the consideration of whether the method of instruction and choice of textbook was appropriate, or preferable, for a graduate level course in Pascal programming language leading up to a Graduate Certificate in Programming. Such inquiry would constitute a clear "judicial displacement of complex educational determinations" (*Paladino v. Adelphi University*, 89 A.D.2d 85, 90, 454 N.Y.S.2d 868 supra) that is best left to the educational community. *André v. Pace University*, 655 N.Y.S.2d 777, 779-780 (N.Y.App. 1996).

Not only did Plaintiffs lose their case, but also each had to pay the remaining \$800 in tuition to Pace University.⁴⁰ Before the plaintiffs sued the University, the Dean had made a conciliatory offer to the grieved students. The trial court wrote:

Nonetheless Dr. Merritt did offer a tuition credit and admission to a future session of the Pascal Course taught by someone other than Professor Zahn. The plaintiffs rejected this offer and demanded a full refund of \$885 which included the cost of the Pascal Textbook. At this point Dr. Merritt accused the plaintiffs of being "consumers and not students".

André, 618 N.Y.S.2d at 978.

And the appellate court wrote:

On November 1, 1993, the students met with Dean Susan Merritt and requested a refund of the tuition paid. Dean Merritt informed them that this was against school refund policy, but offered a tuition credit for a subsequent semester in which another instructor would be teaching the course. The plaintiffs refused and thereafter each commenced an action to recover the sum of \$885,

André, 655 N.Y.S.2d at 778.

Zukle (9thCir. 1999)

Just as civil rights legislation created new legal rights that professors could use in challenging denial of tenure (e.g., see *Dixon*, below at page 44), the Americans with Disabilities Act, 42 U.S.C. § 12131-12133 (enacted 1990) also created new legal rights for students and professors. Zuckle, a medical student with a learning disability, sued the University of California, Davis School of Medicine for dismissing her for academic reasons. The District Court dismissed her Complaint on a summary judgment motion and the U.S. Court of Appeals affirmed. The U.S. Court of Appeals wrote the following text about judicial deference to academic decisions:

⁴⁰ *André*, 655 N.Y.S.2d at 778.

Before turning to the merits of Zukle's claims, we must decide whether we should accord deference to academic decisions made by the school in the context of an ADA or Rehabilitation Act claim, an issue of first impression in this circuit.

In *Regents of the Univ. of Michigan v. Ewing*, the Supreme Court analyzed the issue of the deference a court should extend to an educational institution's decision in the due process context. See 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985). In *Ewing*, the plaintiff-medical student challenged his dismissal from medical school as arbitrary and capricious in violation of his substantive due process rights. See *id.* at 217, 106 S.Ct. 507. The Court held that:

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

Id. at 225, 106 S.Ct. 507 (footnote omitted).

While the Court made this statement in the context of a due process violation claim, a majority of circuits have extended judicial deference to an educational institution's academic decisions in ADA and Rehabilitation Act cases. See *Doe v. New York Univ.*, 666 F.2d 761 (2d Cir. 1981); *McGregor v. Louisiana State Univ. Bd. of Supervisors*, 3 F.3d 850 (5th Cir. 1993); *Wynne v. Tufts Univ. Sch. of Med. ("Wynne I")*, 932 F.2d 19 (1st Cir. 1991). [FN13] *But see Pushkin v. Regents of the Univ. of Colorado*, 658 F.2d 1372 (10th Cir. 1981) (refusing to adopt deferential, rational basis test in evaluating educational institution's decisions in Rehabilitation Act case). These courts noted the limited ability of courts, "as contrasted to that of experienced educational administrators and professionals," to determine whether a student "would meet reasonable standards for academic and professional achievement established by a university," and have concluded that "[c]ourts are particularly ill-equipped to evaluate academic performance." *Doe*, 666 F.2d at 775-76 (quoting *Board of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 92, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978)).

FN13. Each circuit has, however, developed its own formulation of the deference standard. Compare *Doe*, 666 F.2d at 776 (holding that in determining whether a plaintiff is otherwise qualified to attend medical school, "considerable judicial deference must be paid to the evaluation made by the institution itself, absent proof that its standards and its application of them serve no other purpose than to deny an education to handicapped persons." (emphasis added)), with *McGregor*, 3 F.3d at 859 ("[A]bsent evidence of discriminatory intent or disparate impact, we must accord reasonable deference to the [school's] academic decisions." (emphasis added)).

We agree with the First, Second and Fifth circuits that an educational institution's academic decisions are entitled to deference. Thus, while we recognize that the ultimate determination of whether an individual is otherwise qualified must be made by the court, we will extend judicial deference "to the evaluation made by the institution itself, absent proof that its standards and its application of them serve no purpose other than to deny an education to handicapped persons." *Doe*, 666 F.2d at 776.

Deference is also appropriately accorded an educational institution's determination that a reasonable accommodation is not available. Therefore, we agree with the First Circuit that "a court's duty is to first find the basic facts, giving due deference to the school, and then to evaluate whether those facts add up to a professional, academic judgment that reasonable accommodation is not available." *Wynne I*, 932 F.2d at 27-28; see also *McGregor*, 3 F.3d at

859 (the court must "accord deference to [the school's] decisions not to modify its programs [when] the proposed modifications entail academic decisions").

We recognize that extending deference to educational institutions must not impede our obligation to enforce the ADA and the Rehabilitation Act. Thus, we must be careful not to allow academic decisions to disguise truly discriminatory requirements. The educational institution has a "real obligation ... to seek suitable means of reasonably accommodating a handicapped person and to submit a factual record indicating that it conscientiously carried out this statutory obligation." *Wynne I*, 932 F.2d at 25-26. Once the educational institution has fulfilled this obligation, however, we will defer to its academic decisions.

Zukle v. Regents of University of California, 166 F.3d 1041, 1047-1048 (9th Cir. 1999).

See also *Wong v. Regents of University of California*, 192 F.3d 807, 817-818 (9th Cir. 1999).

Hennessey (1st Cir. 1999)

Hennessey was an education major at Salem State College in Massachusetts, who was required by the college to complete a practicum teaching in a school classroom. He was assigned to teach fourth grade at Horace Mann Elementary School, Melrose, Massachusetts. After several incidents involving Hennessey's intense Christian beliefs, the principal at the Elementary School refused to allow him to continue teaching there. That led to a failing grade in his practicum, which resulted in expulsion from the teacher certification program at Salem State College. Without attending any hearings at Salem State College, he sued in federal court, alleging First Amendment, due process, and equal protection violations. The District Court granted summary judgment for defendants. Hennessey appealed, and the U.S. Court of Appeals affirmed:

The appellant claims that Salem State failed to accord him both procedural and substantive due process when it removed him from the teacher certification program. "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). In an effort to satisfy this criterion, the appellant classifies Salem State's denial of an opportunity to obtain certification through its program as a deprivation of a constitutionally protected property interest, presumably one deriving from an implied contractual right to continue in that program.

The theoretical underpinnings of this gambit are shaky. The Supreme Court has not yet decided whether a student at a state university has a constitutionally protected property interest in continued enrollment. See *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 223, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985) (assuming the existence of such an interest, but leaving the question open); *Board of Curators v. Horowitz*, 435 U.S. 78, 84-85, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978) (same). In any case, the claim to such a property interest is dubious, see *Ewing*, 474 U.S. at 229, 106 S.Ct. 507 (Powell, J., concurring), FN3 and in this case it seems especially tenuous because Salem State did not expel the appellant, but merely precluded him from continuing in a particular program. In an abundance of caution, however, we assume for argument's sake that the appellant possessed a constitutionally protected property interest in completing the teacher certification program.

FN3. To be sure, this court has stated that a college "student's interest in pursuing an education is included within the fourteenth amendment's protection of liberty and property." *Gorman v. University of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988). We did not

mean to suggest, however, that due process is implicated each time a student at a public school receives a failing grade or is denied admission to a limited-enrollment class. Rather, this general statement must be read in context. Gorman challenged his disciplinary suspension from a state university, see *id.* at 11-12, not his removal from a particular program for academic failings, and in the very next sentence of the opinion, the panel limited the import of the quoted passage to cases in which students faced “expulsion or suspension from a public educational institution” on disciplinary grounds. *Id.* at 12.

On this assumption, we turn next to the question of what process is due. Although that determination is context contingent, there are some overall benchmarks. A hearing — or the offer of one — usually is necessary when a school takes serious disciplinary action against a student. See *Goss v. Lopez*, 419 U.S. 565, 579, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). By contrast, academic sanctions customarily are left to academic channels and do not require a hearing as a matter of constitutional right. See *Horowitz*, 435 U.S. at 90, 98 S.Ct. 948; see generally *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 158-59 (5th Cir. 1961) (contrasting dismissal for misconduct, which requires a hearing, with academic dismissal, which does not). The threshold step, then, is to classify Salem State's action as “disciplinary” or “academic.”

When Salem State removed the appellant from the certification program, it advanced two reasons: (1) he received a failing grade in his practicum, and (2) he had not satisfied four of the common teaching competencies required for certification by the MDOE. On the surface, these reasons seem quintessentially scholastic, but the appellant complains that they were merely a pretext for disciplinary action. He relies principally on two props to support this allegation.

....

Nor does the virtual certainty that the Salem State faculty considered the appellant's problems at Horace Mann when adjudging his performance “incomplete” and assigning him failing grades in various teacher competencies transform its academic decision into a disciplinary one. In this regard, the appellant complains that the reasons [principal] DeLucia gave for terminating the practicum involved his conduct, not his competence, and thus were disciplinary in nature. This complaint is groundless. The appellant's conduct at Horace Mann had academic significance because it spoke volumes about his capacity to function professionally in a public school setting. Bearing this in mind, we find no factual information of a significantly probative nature that suggests that Salem State's decision to fail the appellant rested on anything other than the faculty's academic judgment that he had neither completed the required assignments nor demonstrated the practical qualities necessary to perform efficaciously as a public school teacher. Although this judgment by its nature had a subjective cast, it nonetheless fell well within the sphere of constitutionally permissible academic decisionmaking. See [*Horowitz*, 435 U.S.] at 90, 98 S.Ct. 948. *Hennessy v. City of Melrose*, 194 F.3d 237, 249-251 (1st Cir. 1999).

Bender (W.Va. 2002)

In 2002, the West Virginia Supreme Court heard a case brought by a nursing student who alleged a college breached its contract with her by changing its grading scale (i.e., the minimum score for a C grade was raised from 70% to 75%) during her four-year program. Because she had grades between 70% and 75% in one class, she had to repeat that class, but it was offered only once per year. As a result, she went past the five-year limit to pass all of the required classes, and she was expelled from the nursing program. The trial court granted summary judgment to the college and the West Virginia Supreme Court affirmed.

Initially we note that this Court previously has adopted the mainstream position that judicial review of purely academic decisions of a post-secondary school is decidedly limited. *North v. W.Va. Bd. of Regents*, 175 W.Va. 179, 184-85, 332 S.E.2d 141, 146-47 (1985). The New York Court of Appeals aptly summarized the public policy basis for showing judicial deference in this regard by saying:

When an educational institution issues a diploma to one of its students, it is, in effect, certifying to society that the student possesses all of the knowledge and skills that are required by his chosen discipline. In order for society to be able to have complete confidence in the credentials dispensed by academic institutions, however, it is essential that the decisions surrounding the issuance of these credentials be left to the sound judgment of the professional educators who monitor the progress of their students on a regular basis.

Olsson v. Board of Higher Ed., 49 N.Y.2d 408, 426 N.Y.S.2d 248, 402 N.E.2d 1150, 1153 (1980). Some federal courts have observed that the judiciary is particularly ill-equipped to evaluate a school's academic decisions with respect to the health care field. *See, e.g., Doherty v. Southern Coll. of Optometry*, 862 F.2d 570 (6th Cir. 1988); *Jansen v. Emory Univ.*, 440 F.Supp. 1060 (N.D.Ga. 1977), *aff'd*, 579 F.2d 45 (5th Cir. 1978); *Connelly v. Univ. of Vermont and State Agric. Coll.*, 244 F.Supp. 156 (D.Vt. 1965).

The foregoing notwithstanding, this Court has not condoned absolute judicial deference with regard to academic decisions made by institutions of higher education. We announced in *North v. West Virginia Board of Regents*, 175 W.Va. 179, 332 S.E.2d 141 (1985), when judicial review of such decisions is appropriate by saying in syllabus point three that:

[3.] The initial responsibility for determining the competence and suitability of persons to engage in professional careers lies with the professional schools themselves and if the conduct of educators is not high-handed, arbitrary or capricious, the courts of this state should give substantial deference to the discretion of officials of colleges and universities with respect to academic dismissals and such decisions are not ordinarily reviewable by the courts.

Id. at 181, 332 S.E.2d at 143. In other words, when faced with a claim that the actions of a university or college with regard to academic decisions are arbitrary and capricious, then the historical deference granted by courts to the judgment of higher education institutions is set aside. [FN8] Although the controversy in *North* concerned the dismissal of a medical student from a public institution, we see no reason why the same arbitrary and capricious standard should not apply to the comparable decisions of a private institution. A number of jurisdictions have adopted this position. *See, e.g., Ishibashi v. Gonzaga Univ.*, 101 Wash.App. 1078, 2000 WL 1156899 (Aug. 11, 2000); *Goodwin v. Keuka Coll.*, 929 F.Supp. 90, (W.D.N.Y. 1995); *Frederick v. Northwestern Univ. Dental School*, 247 Ill.App.3d 464, 187 Ill.Dec. 174, 617 N.E.2d 382 (1993); *Love v. Duke Univ.*, 776 F.Supp.

1070 (M.D.N.C. 1991); *Babcock v. New Orleans Baptist Theological Seminary*, 554 So.2d 90 (La.Ct.App. 1989); *Abbariao v. Hamline Univ. School of Law*, 258 N.W.2d 108 (Minn. 1977); *DeMarco v. Univ. of Health Sciences/Chicago Medical School*, 40 Ill.App.3d 474, 352 N.E.2d 356 (1976); *Frank v. Marquette Univ.*, 209 Wis. 372, 245 N.W. 125 (1932). Consequently we hold that legal challenges to academic decisions of private institutions of higher education are subject to judicial review under an arbitrary and capricious standard. Therefore, we find as a matter of law that the lower court in the instant case applied the correct standard of review.

FN8. We recognize that courts have adopted different standards of review when educators' decisions are based upon disciplinary rather than academic matters. Only the latter arises in the case before us.

Bender v. Alderson Broaddus College, 575 S.E.2d 112, 116-117 (W.Va. 2002).

The majority opinion upheld the college's right to change the grading scale changes because "of concern for the enhancement of the student's educational experience as well as advancement of the institution's reputation and goals." *Ibid.* at 118. The majority concluded: "... the actions of the college in modifying and implementing the modification of its grade scale were not unreasonable, arbitrary or capricious." *Ibid.*

Justice McGraw dissented with an opinion that makes interesting reading for those of us who are opposed to such rigid application of academic abstention:

Ms. Bender started a challenging nursing program under certain conditions, and I believe she should have been able to complete the program under the same conditions that applied when she started. Ms. Bender signed up, if you will, for a ten mile race, but during the running of it, the school decided to add an extra mile. While a Marine Corps drill instructor might make such a change for psychological reasons, I don't think the school should have been able to do that to Ms. Bender.

....

But in spite of the scheduling obstacles created by the school, Ms. Bender still completed the program, and would have successfully graduated if the school had applied the same rules her last semester that it had established at the beginning. Instead, Ms. Bender finds herself with her degree not quite complete, and with no opportunity to complete it. After spending several years of her life working toward the goal of a degree, she has been told by the school to try something else.

....

My comments in no way imply that a school should not have the ability to change the requirements of one of its programs. Education is a constantly changing endeavor, and schools must be free to incorporate new advances into their existing curriculum. However, if a school does make such a change, I feel it should allow students who began their study before that change to finish under the old rules, or it should at least make some allowance when that change prevents a student from graduating.

In short, I think that the school made a deal with Ms. Bender when it enrolled her and took her tuition money, and she should have had the benefit of that deal throughout her

studies. The majority indicates that Ms. Bender held up her end, and I believe the school should have been required to hold up its end as well. *Bender*, 575 S.E.2d at 118-119 (McGraw, J., dissenting).

Cases Involving Professor v. College

Cases involving a dispute between a professor and a college are more complicated than student v. college cases for two reasons. First, the legal rule of at-will employment means that *untenured* professors can be dismissed for *any* reason, even a “morally repugnant” reason, and a court will generally *not* protect the discharged professor.⁴¹ Second, academic freedom allegedly protects professors (but *not* students).⁴² In addition, the mysterious, and rarely explained, doctrine of academic abstention stops judges from examining purely academic decisions of colleges, such as decisions to end the employment of a faculty member with allegedly poor teaching or poor scholarly research. There are three theoretical exceptions to academic abstention: (1) when a college has acted in an arbitrary or capricious way,⁴³ a standard that is almost impossible for a professor to prove in court, (2) when a college has discriminated against a professor on grounds of race, gender, religion, or national origin, or (3) when a state college has retaliated against a professor who used his constitutional rights, typically the First Amendment guarantee of freedom of speech.

⁴¹ Ronald B. Standler, *History of At-Will Employment Law in the USA*, <http://www.rbs2.com/atwill.htm> (2000). See also *Smith v. Atlas Off-Shore Boat Service, Inc.*, 653 F.2d 1057, 1060-61 (5th Cir. 1981) (“At common law, an employer may discharge his at-will employee “for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong. [footnote omitted]”); *Feemster v. BJ-Titan Services Co./Titan Services, Inc.*, 873 F.2d 91, 92 (5th Cir. 1989) (“In *Smith* we acknowledged that the seaman was employed at will and that employment-at-will may be terminated for any or no reason, including a morally reprehensible reason.”).

⁴² Ronald B. Standler, *Academic Freedom*, <http://www.rbs2.com/afree.htm> , (Oct 1999).

⁴³ See, e.g., *Newman v. Commonwealth of Massachusetts*, 884 F.2d 19, 25 (1st Cir. 1989) (“We are persuaded that at the time defendants acted it was clearly established in our circuit that school authorities who make an arbitrary and capricious decision significantly affecting a tenured teacher’s employment status are liable for a substantive due process violation.”); *Clinger v. New Mexico Highlands University, Bd. of Regents*, 215 F.3d 1162, 1167-68 (10th Cir. 2000).

U.S. Supreme Court

In a 1976 case about employment of a city police officer, the U.S. Supreme Court held that federal courts would *not* even try to adjudicate allegations of unfair or wrongful termination of employment by government, unless the ex-employee alleged violation of a right in the U.S. Constitution:

The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. [footnote omitted] We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.

Bishop v. Wood, 426 U.S. 341, 349-350 (1976), *overruled in part on other grounds*, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 540-541 (1985).

Some of these words from *Bishop v. Wood* are quoted with approval by:

- *Clark v. Whiting*, 607 F.2d 634, 639 (4th Cir. 1979).
- *Kaiser v. Board of Police and Fire Com'rs of City of Wauwatosa*, 311 N.W.2d 646, 650 (Wis. 1981).
- *Fagiano v. Police Bd. of City of Chicago*, 456 N.E.2d 27, 34 (Ill. 1983).
- *Neubauer v. City of McAllen, Tex.*, 766 F.2d 1567, 1579 (5th Cir. 1985).
- *Huang v. Board of Governors of University of North Carolina*, 902 F.2d 1134, 1142 (4th Cir. 1990).
- *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 129 (1992) (“The Due Process Clause ‘is not a guarantee against incorrect or ill-advised personnel decisions.’ ”).
- *Thomasson v. Perry*, 80 F.3d 915, 927 (4th Cir. 1996), *cert. den.*, 519 U.S. 948 (1996).
- *Burton v. Town of Littleton*, 426 F.3d 9, 18 (1st Cir. 2005).

In 1984 case about gender discrimination at a law firm, a concurring opinion at the U.S. Supreme Court tersely mentioned the judges will defer to decisions of colleges, when the college has terminated the employment of a professor.

With respect to laws that prevent discrimination, much depends upon the standards by which the courts examine private decisions that are an exercise of the right of association. For example, the Courts of Appeals generally have acknowledged that respect for academic freedom requires some deference to the judgment of schools and universities as to the qualifications of professors, particularly those considered for tenured positions. *Lieberman v. Gant*, 630 F.2d 60, 67-68 (CA2 1980); *Kunda v. Muhlenberg College*, 621 F.2d 532, 547-548 (CA3 1980). Cf. *University of California Regents v. Bakke*, 438 U.S. 265, 311-315, 98 S.Ct. 2733, 2759- 2761, 57 L.Ed.2d 750 (1978) (opinion of Justice POWELL). The present case, before us on a motion to dismiss for lack of subject-matter jurisdiction, does not present such an issue.

Hishon v. King & Spalding, 467 U.S. 69, 80, n. 4 (1984) (Powell, J. concurring).

In a 1990 case, the University of Pennsylvania, a private university, was ordered to produce confidential peer review materials in a dispute where a professor alleged she was denied tenure on the basis of her race, gender, and national origin.

Also, the cases upon which petitioner places emphasis involved *direct* infringements on the asserted right to "determine for itself on academic grounds who may teach." In *Keyishian*, for example, government was attempting to *substitute* its teaching employment criteria for those already in place at the academic institutions, directly and completely usurping the discretion of each institution. In contrast, the EEOC subpoena at issue here effects no such usurpation. The Commission is not providing criteria that petitioner *must* use in selecting teachers. Nor is it preventing the University from using any criteria it may wish to use, except those — including race, sex, and national origin — that are proscribed under Title VII. [FN7] In keeping with Title VII's preservation of employers' remaining freedom of choice, see *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion), courts have stressed the importance of avoiding second-guessing of legitimate academic judgments. This Court itself has cautioned that "judges ... asked to review the substance of a genuinely academic decision ... should show great respect for the faculty's professional judgment." *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225, 106 S.Ct. 507, 513, 88 L.Ed.2d 523 (1985). Nothing we say today should be understood as a retreat from this principle of respect for *legitimate* academic decisionmaking.

FN7. Petitioner does not argue in this case that race, sex, and national origin constitute "academic grounds" for the purposes of its claimed First Amendment right to academic freedom. Cf. *Regents of University of California v. Bakke*, 438 U.S. 265, 312-313, 98 S.Ct. 2733, 2759-2760, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.).
University of Pennsylvania v. E.E.O.C., 493 U.S. 182, 198-199 (1990).

The U.S. Supreme Court's citation of *Ewing*, which was a student vs. university case, in a case involving a professor vs. university shows that either (1) academic abstention is the same regardless of whether the plaintiff is a student or professor, or (2) the justices on the U.S. Supreme Court are clueless about academic abstention.

Other Courts in the USA

Lewis (N.D.Ill. 1969)

A black professor of business sued for discrimination because he had not been promoted from associate professor to full professor. In 1969, a U.S. District Court granted summary judgment for the college.

III. Justiciability

The judiciary is not the appropriate forum for decisions involving academic rank. A professor's value depends upon his creativity, his rapport with students and colleagues, his teaching ability, and numerous other intangible qualities which cannot be measured by objective standards. As stated in *Application of Lombardi*, 18 A.D.2d 444, [445-446] 240 N.Y.S.2d 119, 121 (App.Div. 1963) [footnote omitted]:

[...] promotions in the advanced academic ranks are not determined solely by lapse of time and record qualifications consisting of advanced degrees and written works. They (Plaintiff) admit that the more elusive qualifications of teaching ability, administrative capacity and creative inspiration are relevant. [...] It should be readily evident that such qualifications are not mechanically measurable nor susceptible to visual comparison with conclusive result.

Compare *Daly v. Pedersen*, 278 F.Supp. 88, 90 (D.Minn. 1967). Since the courts are not qualified to make such evaluations,[FN5] judicial review is only proper if the plaintiff can clearly demonstrate illegal discrimination.

FN5. Compare *Donnelly v. United States*, 134 F.Supp. 635, 636, 133 Ct.Cl. 120, 122 (1955), in which the Court of Claims refused to interfere with the military's failure to promote an enlisted man. See also *Johnson v. United States*, 280 F.2d 856, 858, 150 Ct.Cl. 747, 751 (1960) [plaintiff had been convicted by court-martial and reduced in rank].

IV. Conclusion

The record lacks any evidence of racial prejudice against the plaintiff.

Moreover, promotion decisions made by a college's faculty, administration and governing board are not normally justiciable. These determinations depend upon evaluations of intangibles such as scholarship, teaching ability, service to the profession, and potential contribution to the institution. A full professorship may not be obtained solely by long tenure, good behavior, or the accumulation of academic degrees. Instead, it is the highest honor a university can confer upon a colleague.

Accordingly, I have today entered an order granting summary judgment for the defendants.

Lewis v. Chicago State College, 299 F.Supp. 1357, 1359-1360 (N.D.Ill. 1969).

Green (5thCir. 1973)

Lola Beth Green, an associate professor of English at Texas Tech Univ., brought a gender discrimination case after the University refused to promote her to full professor. The trial judge found for the University.

Texas Tech University has established definite criteria for evaluating a person's eligibility for promotion in teaching rank. The criteria for promotion to full professor are especially exacting, as that is the highest faculty status which can be awarded by a university. The Court finds that these criteria are reasonable, that they bear a rational relationship to the duties of a full professor, and that they were reasonably applied in this case. They call for careful evaluation of (a) teaching ability, (b) publications and scholarly activity, and (c) service to the community and to the University. It is undisputed that such evaluations are necessarily judgmental, and the Court will not substitute its judgment for the rational and well-considered judgment of those possessing expertise in the field.

The Court finds that plaintiff's application for promotion was given complete and thorough consideration at each step as it passed through the channels prescribed by the University for review of such matters. Testimony from those who were called on to review plaintiff's application, including members of the Board of Regents, the President of the University, the Dean of the College of Education, the Vice President for Academic Affairs and several of plaintiff's colleagues in the English Department, made it evident to the Court

that plaintiff's case was given as fair and impartial a hearing as could have been required. Each of defendants' witnesses, including one woman who was on a committee which reviewed plaintiff's application and who is herself a full professor, testified that the decision not to promote was based solely on the facts of plaintiff's record, with no thought being given to her sex. The Court finds that no malice, ill-will, caprice or abuse of discretion played a part in the formulation of any decision concerning plaintiff. The witnesses were unanimous in their testimony that their recommendations would have been the same had the applicant been a man with the same qualifications. Promotion to the status of full professor cannot be merited solely by longevity and the numerical accumulation of advanced degrees and written works. The factors to be considered are not susceptible of quantitative measurement, but must be weighed qualitatively in accordance with established guide lines.

This Court has been shown no evidence that the denial of plaintiff's promotion was based on sex discrimination or on any other constitutionally prohibited ground, but was in fact based solely on the evidence considered by the proper authorities as to her qualifications under the established criteria for such a promotion. Decisions of this nature that have been made by the proper authorities of a university, including its administrators and its governing board, are not justiciable in the absence of abuse of discretion, capricious action or discrimination of such a nature as to constitute a violation or deprivation of constitutional rights. *Lewis v. Chicago State College*, 299 F.Supp. 1357 (D.C.N.D.Ill. 1969). None of the above elements are here present.

Green v. Board of Regents of Texas Tech University, 335 F.Supp. 249, 250-251 (N.D.Tex. 1971).

The U.S. Court of Appeals affirmed and tersely remarked:

The findings and decision of academic administrative bodies are to be upheld by the courts when reached by correct procedures and supported by substantial evidence. *Duke v. North Texas State University*, 469 F.2d 829 (5th Cir. 1972); *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970).

Green v. Board of Regents of Texas Tech University, 474 F.2d 594, 595 (5th Cir. 1973).

Faro (2d Cir. 1974)

Maria Diaz Faro had been working at New York University as a research scientist since 1965, with her salary coming from research grants and contracts. In the summer of 1971, she was offered an appointment as a Research Associate Professor, on a nontenure track. She wanted a tenured position. The University terminated her employment at the end of 1973, because of lack of research funds to support her. In August 1973, Dr. Faro sued under the 1964 Civil Rights Act, 42 U.S.C. § 2000e et. seq., alleging gender discrimination. The U.S. District Court found for the University and the U.S. Court of Appeals affirmed.

The U.S. District Court wrote:

The defendant has been far from heartless in its termination of Dr. Faro. Various officials of the University have attempted to aid her in a search for a position at another institution but to no avail. The University's Medical School is presently going through a period of difficult financial strain and officials have explained this to plaintiff, pointing out that the circumstances require the termination of her research. The University, however, has offered the plaintiff part-time employment in her old position as an assistant (or perhaps, more correctly, laboratory assistant) in the Gross Anatomy course on a part-time basis.

Faro v. New York University, 1973 WL 238 at *3 (S.D.N.Y. 1973).

The U.S. Court of Appeals wrote:

Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision. Dr. Faro would remove any subjective judgments by her faculty colleagues in the decision-making process by having the courts examine 'the university's recruitment, compensation, promotion and termination and by analyzing the way these procedures are applied to the claimant personally' (Appl'ts Br. p. 26). All this information she would obtain 'through extensive discovery, either by the EEOC or the litigant herself' (Id.). This argument might well lend itself to a *reductio ad absurdum* rebuttal. Such a procedure, in effect, would require a faculty committee charged with recommending or withholding advancements or tenure appointments to subject itself to a court inquiry at the behest of unsuccessful and disgruntled candidates as to why the unsuccessful was not as well qualified as the successful. This decision would then be passed on by a Court of Appeals or even the Supreme Court. The process might be simplified by a legislative enactment that no faculty appointment or advancement could be made without the committee obtaining a declaratory judgment naming the successful candidate after notice to all contending candidates to present their credentials for court inspection and decision. This would give 'due process' to all contenders, regardless of sex, to advance their 'I'm just as good as you are' arguments. But such a procedure would require a discriminating analysis of the qualifications of each candidate for hiring or advancement, taking into consideration his or her educational experience, the specifications of the particular position open and, of great importance, the personality of the candidate.

In practically all walks of life, especially in business and the professions, someone must be charged with the ultimate responsibility of making a final decision — even as are the courts. The computer, highly developed though it be, is not yet qualified to digest the punch cards of an entire faculty and advise the waiting and expectant onlookers of its decision as to hiring or promotion. Even were it so capable, a new rule would have to be added to appellate rules entitled 'Appeal from a Computer.'

As to 'irreparable harm,' Dr. Faro is in no way different from hundreds of others who find that they have to make adjustments in life when the opening desired by them does not open. This situation is not confined to medical schools. Of a hypothetical twenty equally brilliant law school graduates in a law office, one is selected to become a partner. Extensive discovery would reveal that the other nineteen were almost equally well qualified. Fifty junior bank officers all aspire to become a vice-president — one is selected. And, of course, even judges are plagued by the difficulty of decision in selecting law clerks out of the many equally well qualified.

Faro v. New York University, 502 F.2d 1229, 1231-32 (2dCir. 1974).

Four years after *Faro*, the Second Circuit discussed the impact of *Faro*:

In recent years, many courts have cited the *Faro* opinion for the broad proposition that courts should exercise minimal scrutiny of college and university employment practices.[FN8] Other courts, while not citing *Faro*, have concurred in its sentiments.[FN9]

FN8. See, E. g., *Huang v. College of the Holy Cross*, 436 F.Supp. 639, 653 (D.Mass. 1977); *Johnson v. University of Pittsburgh*, 435 F.Supp. 1328, 1353-54 (W.D.Pa. 1977); *Cussler v. University of Maryland*, 430 F.Supp. 602, 605-06 (D.Md. 1977); *Peters v. Middlebury College*, 409 F.Supp. 857, 868 (D.Vt. 1976); *Labat v. Board of Education*, 401 F.Supp. 753, 757 (S.D.N.Y. 1975); *Moore v. Kibbee*, 381 F.Supp. 834, 839 (E.D.N.Y. 1974).

FN9. See, E. g., *Megill v. Board of Regents of the State of Florida*, 541 F.2d 1073 (5th Cir. 1976); *Stebbins v. Weaver*, 537 F.2d 939, 943 (7th Cir. 1976), *cert. denied*, 429 U.S. 1041, 97 S.Ct. 741, 50 L.Ed.2d 753 (1977); *Duke v. North Texas State University*, 469 F.2d 829, 838 (5th Cir. 1972), *cert. denied*, 412 U.S. 932, 93 S.Ct. 2760, 37 L.Ed.2d 160 (1973); *EEOC v. Tufts Institution of Learning*, 421 F.Supp. 152, 158 (D.Mass. 1975); *Keddie v. Pennsylvania State University*, 412 F.Supp. 1264, 1270 (M.D.Pa. 1976); *Green v. Board of Regents of Texas Tech University*, 335 F.Supp. 249, 251 (N.D.Tex. 1971), *aff'd* 474 F.2d 594 (5th Cir. 1973); *Lewis v. Chicago State College*, 299 F.Supp. 1357, 1360 (N.D.Ill. 1969).

This anti-interventionist policy has rendered colleges and universities virtually immune to charges of employment bias, at least when that bias is not expressed overtly. We fear, however, that the common-sense position we took in *Faro*, namely that courts must be ever-mindful of relative institutional competences, has been pressed beyond all reasonable limits, and may be employed to undercut the explicit legislative intent of the Civil Rights Act of 1964. In affirming here, we do not rely on any such policy of self-abnegation where colleges are concerned.

Powell v. Syracuse University, 580 F.2d 1150, 1153 (2d Cir. 1978), *cert. den.*, 439 U.S. 984 (1978).

Powell went on to explain that judicial deference to universities was *not* absolute:

Accordingly, while we remain mindful of the undesirability of judicial attempts to second-guess the professional judgments of faculty peers, we agree with the First Circuit when it "caution(ed) against permitting judicial deference to result in judicial abdication of a responsibility entrusted to the courts by Congress. That responsibility is simply to provide a forum for the litigation of complaints of . . . discrimination in institutions of higher learning as readily as for other Title VII suits." *Sweeney v. Board of Trustees of Keene State College*, 569 F.2d 169, 176, 177 (1st Cir., 1978). See also *Egelston v. State University College at Geneseo*, 535 F.2d 752 (2d Cir. 1976).

It is our task, then, to steer a careful course between excessive intervention in the affairs of the university and the unwarranted tolerance of unlawful behavior. *Faro* does not, and was never intended to, indicate that academic freedom embraces the freedom to discriminate.

Powell, 580 F.2d at 1154.

Johnson (W.D.Pa. 1977)

In 1977, a federal district court judge wrote the following in a case involving a female biochemistry professor who was denied tenure at the University of Pittsburgh, which is part of the state government of Pennsylvania.

1. The Court Is not a Super Tenure Committee to Pass on Qualifications for and Grants of Tenure in Colleges and Universities

We start with the proposition that tenure is a privilege, an honor, a distinctive honor, which is not to be accorded to all assistant professors. It is a very high recognition of merit. It is the ultimate reward for scientific and academic excellence. It is to be awarded in the course of search for fundamental merit. See Posvar 8338, 8340 and 8374. Such decision by its very nature cannot be made by a court but must be made by the faculty, the administration

and trustees of the university. See the late Chief Judge Sheriden in *Keddie v. Penn State University*, 412 F.Supp. 1264 (M.D.Pa. 1976), *Faro v. N.Y.U.*, 502 F.2d 1229 and *Cussler v. University of Maryland*, supra, which involved a new department head brought in to strengthen a weak department.

The Court of Appeals for the Second Circuit in *Faro* had this to say

“Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision. Dr. Faro would remove any subjective judgments by her faculty colleagues in the decision-making process by having the courts examine 'the university's recruitment, compensation, promotion and termination and by analyzing the way these procedures are applied to the claimant personally' (Appl't's Br. p. 26). All this information she would obtain 'through extensive discovery, either by the EEOC or the litigant herself' (Id.). This argument might well lend itself to a reductio ad absurdum rebuttal. Such a procedure, in effect, would require a faculty committee charged with recommending or withholding advancements or tenure appointments to subject itself to a court inquiry at the behest of unsuccessful and disgruntled candidates as to why the unsuccessful was not as well qualified as the successful. This decision would then be passed on by a Court of Appeals or even the Supreme Court. The process might be simplified by a legislative enactment that no faculty appointment or advancement could be made without the committee obtaining a declaratory judgment naming the successful candidate after notice to all contending candidates to present their credentials for court inspection and decision. This would give 'due process' to all contenders, regardless of sex, to advance their 'I'm just as good as you are' arguments.”

[*Faro v. New York University*, 502 F.2d 1229, 1231-32 (2nd Cir. 1974).]

Again in *Peters v. Middlebury College*, 409 F.Supp. 857 (D.Vt. 1976), the court pointed out that a professor's value cannot be measured by objective standards and went on to say:

An evaluation of one's teaching ability is necessarily a matter of judgment.

A professor's value depends upon his creativity, his rapport with students and colleagues, his teaching ability, and numerous other intangible qualities which cannot be measured by objective standards. *Lewis v. Chicago State College*, 299 F.Supp. 1357 (N.D.Ill.E.D. 1969).'

These considerations have induced reluctance in the courts to override the “rational and well-considered judgment of those possessing expertise in the field.” *Green v. Board of Regents of Texas Tech. University*, 335 F.Supp. 249, 250 (N.D.Tex. 1971), *aff'd*, 474 F.2d 594 (5th Cir. 1973). Absent an impermissible discrimination, the federal courts will not intrude to supervise faculty appointments and tenure. *Faro v. New York University*, 502 F.2d 1229 (2d Cir. 1974); *Lewis v. Chicago State College*, supra.

[*Peters*, 409 F.Supp. at 868.]

In *Peters* as in the instant case the court determined that the evidence presented by the plaintiff constituted a prima facie case but then held that the reasons given by the institution for non promotion showed that by a preponderance of the evidence she was not professionally qualified for tenure and that the reasons given were not pretextual, and that there was substantial evidence to show that plaintiff's teaching was not satisfactory. See also *Mosby v. Webster College*, 423 F.Supp. 615 (E.D.Mo. 1976) finding that there had been a good faith

judgment that plaintiff did not meet the standards of the college for the job in her performance as a teacher; and *Labat v. Board of Higher Education of N.Y.C.*, 401 F.Supp. 753 (S.D.N.Y. 1975) pointing out tenure is a life contract to age 70 and of great significance to the candidate as well as the university and that such decisions are least suited for federal court supervision.

Plaintiff has pointed to no case in the federal system in a proceeding under Title VII where the court has ordered a college professor to be promoted and be given tenure over the judgment of the professionals in academia. The principles above cited are recognized unanimously by all the courts, with the qualification of course “absent impermissible sex discrimination”.

Johnson v. University of Pittsburgh, 435 F.Supp. 1328, 1353-54 (W.D.Pa. 1977).

The trial judge tersely noted that

As pointed out the decisions as to the weight to be given these respective criteria and the extent to which a given assistant professor meets them or falls short is a matter which primarily must be handled by the tenured faculty who are in the best position to make these judgments. See *Peters v. Middlebury College*, supra.

It is also true that the court should not be involved in constantly reviewing the multitude of personnel decisions made daily by public agencies even though the individual decision subject to review may be mistaken or actually bad. See *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) and also *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975) where the court said: “It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion.”

Johnson, 435 F.Supp. at 1357.

One wonders if courts will not protect professors from “mistaken or actually bad” decisions by university administrators, then who will protect professors?

The trial judge was also overwhelmed by the technical evidence in a case involving a biochemistry professor.

Trial on the merits occupied the court for a period of 74 days during seventeen weeks. 12,085 pages of testimony were taken, 73 witnesses were heard some of them being on the stand for many days and close to 1,000 exhibits were received in evidence.

During the trial, the court has been required to make excursions through the very frontiers of human knowledge in the ever advancing field of biochemistry. The case is also an example of the devastating effects of sex discrimination cases of this kind against universities upon the work and calendars of the United States courts, and the commitments and time of trial counsel. Attempts to curtail the case proved fruitless in view of plaintiff's claim, for which there appeared to be a reasonable basis that because of sex discrimination males had been hired and promoted in her department who were less qualified than she was to receive promotion and tenure. This necessitated the examination of the professional credentials of numerous professors, a task for which the court like probably most federal judges was ill suited. The case of *Cussler v. University of Md.*, 430 F.Supp. 602 (D.Md. 1977) is another illustration of the problems posed by a case of this kind.

Johnson, 435 F.Supp. at 1332.

The trial judge concluded:

On the one hand we have the important problem as to whether sex discrimination is operating to the detriment of women in the halls of academia. If so Congress has mandated that it must be eradicated. Colleges and universities must understand this and guide themselves accordingly. On the other hand we also have the important question as to whether the federal courts are to take over the matter of promotion and tenure for college professors when experts in the academic field agree that such should not occur. In determining qualifications in such circumstances the court is way beyond its field of expertise and in the absence of a clear carrying of the burden of proof by the plaintiff, we must leave such decisions to the PhDs in academia.

Johnson, 435 F.Supp. at 1371.

The Westlaw database does not contain any further opinion for *Johnson*.

Kunda (3dCir. 1980)

Connie Rae Kunda, a physical education instructor, won her gender discrimination case against Muhlenberg College in Pennsylvania. In affirming the trial court, the U.S. Court of Appeals wrote the following:

On the other hand, it is beyond cavil that generally faculty employment decisions comprehend discretionary academic determinations which do entail review of the intellectual work product of the candidate. That decision is most effectively made within the university and although there may be tension between the faculty and the administration on their relative roles and responsibilities, it is generally acknowledged that the faculty has at least the initial, if not the primary, responsibility for judging candidates. "(T)he peer review system has evolved as the most reliable method for assuring promotion of the candidates best qualified to serve the needs of the institution." *Johnson v. University of Pittsburgh*, 435 F.Supp. 1328, 1346 (W.D.Pa. 1977).

Wherever the responsibility lies within the institution, it is clear that courts must be vigilant not to intrude into that determination, and should not substitute their judgment for that of the college with respect to the qualifications of faculty members for promotion and tenure. Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professionals, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges. In the cases cited by appellant in support of the independence of the institution, an adverse judgment about the qualifications of the individual involved for the position in question had been made by the professionals, faculty, administration or both. It was those adverse judgments that the courts refused to re-examine. See, e. g., *Johnson v. University of Pittsburgh*, supra; *Huang v. College of the Holy Cross*, 436 F.Supp. 639 (D.Mass. 1977); *EEOC v. Tufts Institution of Learning*, 421 F.Supp. 152 (D.Mass. 1975). [footnote omitted] But see *Sweeney v. Board of Trustees of Keene State College*, 604 F.2d 106 (1st Cir. 1979). (on remand from 439 U.S. 24, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978)).

The distinguishing feature in this case is that Kunda's achievements, qualifications, and prospects were not in dispute. She was considered qualified by the unanimous vote of both faculty committees which evaluated her teaching, research and creative work, and college and public service. Her department chairman consistently evaluated her as qualified. Even Dean

Secor, who did not affirmatively recommend Kunda, commented favorably on her performance, which he rated as “justify(ing) a permanent appointment.”
Kunda v. Muhlenberg College, 621 F.2d 532, 547-548 (3d Cir. 1980).

Pyo (D.N.J. 1985)

In 1985, a U.S. District Court heard a case involving alleged gender and/or racial discrimination against a woman art professor at a state college. The judge observed:

Courts have struggled, however, with the application of Title VII to the academic setting and, more often than not, have undertaken no more than a deferential review of tenure decisions, in contrast to the rather aggressive review of employment decisions involving blue collar workers. While the cases pay much lip service to the goal of eradicating employment discrimination, wherever found, they are also replete with language to the effect that courts are not to serve as “super tenure committees.” See, e.g., *Johnson v. University of Pittsburgh*, 435 F.Supp. 1328, 1354 (W.D.Pa. 1977); *Keddie v. Pennsylvania State University*, 412 F.Supp. 1264 (M.D.Pa. 1976); *Faro v. New York University*, 502 F.2d 1229 (2d Cir. 1974). Courts, seldom having made a factual finding of discrimination, have almost never had to reach the question of appropriate remedies. Even the *Kunda* court, which upheld a finding of discrimination and a conditional tenure remedy, stated:

[I]t is beyond cavil that generally faculty employment decisions comprehend discretionary academic determinations which do entail review of the intellectual work product of the candidate. That decision is most effectively made within the university * * * *

Wherever the responsibility lies within the institution, it is clear that courts must be vigilant not to intrude into that determination, and should not substitute their judgment for that of the college with respect to the qualifications of faculty members for promotion and tenure. Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, *and unless they can be shown to have been used as a mechanism to obscure discrimination*, they must be left for evaluation by the professionals * * * *

621 F.2d at 547-48 (emphasis added). The Second Circuit has recently elaborated on why tenure decisions are so difficult for a court to become involved in. Tenure decisions, the court stated, entail lifetime commitments in terms of salary and interpersonal relationships; they are often non-competitive, in the sense that one candidate is not always or necessarily chosen over another: in some years, or within some divisions, no candidate may be granted tenure, or all candidates may be granted tenure; decisions are often decentralized and may involve as well many levels of decision-making; they involve an unusually large mix of factors, from the subjective qualities of the candidate to institutional priorities having nothing to do with the candidate; and finally, tenure decisions are a source of unusually great disagreement for decision-makers. Moreover, because of all these factors, statistical evidence may be less useful to the plaintiff than in other contexts. See *Zahorik v. Cornell University*, 729 F.2d 85 (2d Cir. 1984).

Pyo v. Stockton State College, 603 F.Supp. 1278, 1281-82 (D.N.J. 1985).

Ruth Dixon (N.J. 1988)

In 1988, the Supreme Court of New Jersey heard a case involving denial of tenure to Ruth Dixon, a black female assistant professor, on grounds of “insufficient evidence of distinction in teaching, creativity and research.” She had sued, alleging racial and gender discrimination. When the state university refused to provide her with confidential peer review materials during discovery, an administrative law judge — affirmed by two appellate courts⁴⁴ — ordered the university to provide the materials, with appropriate protective orders (i.e., making the material confidential and not disclosed outside of judicial proceedings in Dixon’s case). What I find remarkable in this case is the judicial comments about balancing (1) the public interest in academic freedom and confidential peer review that allegedly ensures quality of professors and (2) “*public* policy favoring disclosure and eradication of discriminatory treatment in employment.”⁴⁵ The first appellate opinion says:

... we turn to the academic freedom privilege sought to be invoked by Rutgers. We are urged to establish this evidentiary privilege because, without confidentiality, the reliability and integrity of the peer review system used for faculty promotion and tenure assertedly would be seriously and substantially impaired, thereby undermining the excellence of the faculty and the consequent excellence of the university. It is argued that the attainment of such professorial quality is a societal value which transcends the search for the truth concerning the committee's action on Dixon's application for promotion.

There can be no question as to the worthiness of Rutgers' being staffed by an excellent faculty. Nor that, normally, the pursuit of such excellence should be furthered by a system which controls the advancement of the faculty by means of confidential internal and external peer evaluations. *See Snitow v. Rutgers University*, 103 N.J. 116, 122, 510 A.2d 1118 (1986). Also, we do not quarrel with the observation that confidentiality has been recognized by the courts as playing an important role in appropriate circumstances. [citations to 3 cases omitted]

But, we do not agree that the public interest which is served by the confidentiality of the promotion packets of the faculty of Rutgers outweighs the competing interest of disclosure of discriminatory treatment. The eradication of unlawful discrimination from our society has always been of predominant concern in our State. *Peper v. Princeton Univ. Bd. of Trustees*, 77 N.J. 55, 80, 389 A.2d 465 (1978). Our aversion to such disparate treatment in an employment setting was noted by the observation in *Peper* that “[e]mployment discrimination due to sex or any other invidious classification is peculiarly repugnant in a society which prides itself on judging each individual by his or her merits.” *Id.* at 80, 389 A.2d 465. The Legislature likewise has recognized discrimination as a public injury. *See David v. Vesta Co.*, 45 N.J. 301, 212 A.2d 345 (1965); *N.J.S.A.* 10:5-3. Cloaking the peer review process with an evidentiary privilege of nondisclosure, in the face of a charge of a discriminatory practice,

⁴⁴ *Dixon v. Rutgers, The State University of New Jersey*, 521 A.2d 1315 (N.J.Super.A.D. 1987), *aff'd*, 541 A.2d 1046 (N.J. 1988).

⁴⁵ *Dixon*, 541 A.2d at 1056 (“In the instant case we must balance the *public* interest in maintaining a confidential peer review process that protects the university's academic freedom against our State's strong *public* policy favoring disclosure and eradication of discriminatory treatment in employment.”).

would be repugnant to the public policy against discrimination as well as contrary to the public interest in providing a remedy for this type of injury. Unchecked discrimination in a university environment presents no less a public injury than such conduct in other settings. Constitutional as well as statutory rights are implicated. See *Peper*, 77 N.J. at 81, 389 A.2d 465.

Moreover, invoking the suggested privilege would severely interfere with the search for truth in denying access to relevant evidence. One of the most important sources of evidence in demonstrating discrimination is comparative materials. *Id.* at 84-85, 389 A.2d 465. See also *O'Connor v. Peru State College*, 781 F.2d 632, 636 (8 Cir. 1986); *E.E.O.C. v. Franklin and Marshall College*, 775 F.2d 110, 117 (3 Cir. 1985), *cert. den.* 476 U.S. 1163, 106 S.Ct. 2288, 90 L.Ed.2d 729 (1986). While comparisons may be more difficult in the case of academic employment decisions, such evidence seemingly would be essential to a determination as to whether disparate treatment was rendered. See *Namenwirth v. Board of Regents*, 769 F.2d 1235, 1241 (7 Cir. 1985), *cert. den.* 474 U.S. 1061, 106 S.Ct. 807, 88 L.Ed.2d 782 (1986). It is evident that a full disclosure of the relative qualifications of Eng, Jones and Dixon and the peer review materials as contained in their promotion packets is necessary to the factual inquiry of whether discrimination had been a factor in Dixon's promotion rejection. See *E.E.O.C. v. Franklin and Marshall College*, 775 F.2d at 116. To preclude the evidentiary use of this material would require Dixon to chase an invisible quarry. It would also effectively deny her the opportunity to demonstrate employment discrimination as evidence of qualifications considered by PRC is not available from other sources. We perceive no merit in Rutgers' contention that differences in job responsibilities and disciplines between these three academicians vitiate the relevancy of the comparison. *Dixon v. Rutgers, The State University of New Jersey*, 521 A.2d 1315, 1317-1318 (N.J.Super. 1987).

The attempt to ground the asserted privilege in the concerns of academic freedom is also unpersuasive. While academic freedom should allow a university "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study," [Citation omitted.] *Regents of the University of California v. Bakke*, 438 U.S. 265, 312, 98 S.Ct. 2733, 2759, 57 L.Ed.2d 750 (1978), and "no decision can more fully implicate an institution's academic responsibility than the decision to hire, or promote, and retain faculty," *Snitow v. Rutgers University*, 103 N.J. at 123, a claim of discrimination relates to a decision made on other than academic grounds. Academic freedom does not encompass disparate treatment in acting upon faculty promotions or the shielding of records which might reveal evidence of discrimination. To so extend the concept "would give any institution of higher learning a *carte blanche* to practice discrimination of all types." *In re Dinnan*, 661 F.2d at 431.

Dixon, 521 A.2d at 1319 (N.J.Super. 1987).

The state supreme court affirmed, saying:

In order to determine whether sufficiently compelling reasons exist to create a new privilege, we must balance the interests that the proposed academic freedom privilege would further and the plaintiff's competing interest in obtaining information to support a *prima facie* case of sex discrimination.

Both Rutgers and *amicus curiae* Princeton University urge this Court to invoke a qualified academic freedom privilege to preclude the evidentiary use of the confidential materials. According to the universities, the reliability and integrity of the peer review system for faculty promotion and tenure depend on the confidentiality of both internal and external evaluations. Without a qualified academic freedom privilege, the universities argue, the peer

review system would be seriously and substantially impaired, thereby undermining the excellence of their faculties and the consequent excellence of their institutions. More specifically, they are concerned that allowing disclosure of confidential peer review materials will discourage candid evaluations by a tenure candidate's peers, including evaluators from other institutions. In sum, the universities consider disclosure of the type requested here to be uncharacteristically intrusive in light of the judiciary's general reluctance to interfere in university affairs.

The concept of academic freedom that the university invokes in support of its claim of privilege is not unfamiliar to the judiciary. The public interest in promoting higher education reflects the view that it "perform[s] an essential social function ...," *State v. Schmid*, 84 N.J. 535, 566, 423 A.2d 615 (1980), by promoting "the pursuit of truth, the discovery of new knowledge through scholarship and research, teaching and general development of students, and the transmission of knowledge and learning to society at large." *Id.* at 565, 423 A.2d 615 (quoting Princeton University Regulations); see *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629, 640 (1967) ("academic freedom ... is of transcendent value to all of us ... [as t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ..."). As a result of this interest, courts have developed a concept of "[a]cademic freedom, [which,] though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 312, 98 S.Ct. 2733, 2759, 57 L.Ed.2d 750, 785 (1978), quoted in *Snitow v. Rutgers Univ.*, 103 N.J. 116, 122, 510 A.2d 1118 (1986). The extent of this academic freedom concept was charted thirty years ago by Justice Frankfurter in his oft-quoted concurrence in *Sweezy v. New Hampshire*, 354 U.S. 234, 263, 77 S.Ct. 1203, 1218, 1 L.Ed.2d 1311, 1332 (1957), when he spoke of "four essential freedoms" of universities, namely, the freedom to determine for themselves "on academic grounds who may teach, what may be taught, how it shall be taught and who may be admitted to study."

In addressing the issue of academic freedom this Court has recognized the essential role that the selection of faculty plays in the development of academic institutions. In *Snitow*, *supra*, 103 N.J. at 123, 510 A.2d 1118, we noted that "[n]o decision can more fully implicate an institution's academic responsibility than the decision to hire, promote, and retain teaching faculty." Since this selection process involves "[d]eterminations about such matters as teaching ability, research scholarship, and professional stature [that] are subjective, and [also] ... often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges," courts have traditionally been "vigilant not to intrude" into this area to the extent that such specialized knowledge is required. *Kunda v. Muhlenberg College*, *supra*, 621 F.2d at 548. Thus this Court has acknowledged and supported university peer review systems that make use of such specialized knowledge, noting that they provide "the most reliable method for assuring promotion of the candidates best qualified to serve the needs of ... [educational] institution [s]." *Snitow*, *supra*, 103 N.J. at 122, 510 A.2d 1118.

Dixon v. Rutgers, The State University of New Jersey, 541 A.2d 1046, 1054-1055 (N.J. 1988).

One justice of the New Jersey Supreme Court wrote a separate concurring opinion:

Perhaps Judge Oakes of the Second Circuit expressed the competing interests best when he stated that recognition of a privilege reflects a balance

... carefully designed to protect confidentiality and encourage a candid peer review process. It strikes an appropriate balance between academic freedom and educational excellence on the one hand and individual rights to fair consideration on the other, so that courts may steer the "careful course between excessive

intervention in the affairs of the university and the unwarranted tolerance of unlawful behavior” [mentioned in *Powell v. Syracuse University*, 580 F.2d 1150, 1154 (2d Cir.), *cert. denied*, 439 U.S. 984, 99 S.Ct. 576, 58 L.Ed.2d 656 (1978).] *Gray v. Board of Higher Educ.*, 692 F.2d 901, 907-08 (2d Cir. 1982).

I would steer that careful course by recognizing, as I think the Court does, discretion in the court or tribunal to view the requested materials to determine whether they are necessary to establish the plaintiff's claim. If the court concludes that the requested materials are relevant, protective measures should be taken to delete such identifying information as would destroy the confidentiality of peer review and to prevent the further dissemination of the materials. I recognize that “enforcement of laws that ban discrimination will [not] always be without cost to other values, including constitutional rights * * * [but] respect for academic freedom requires some deference to the judgment of schools and universities as to the qualifications of professors, particularly those considered for tenure positions.” *Hishon v. King & Spalding*, 467 U.S. 69, 80 n. 4, 104 S.Ct. 2229, 2236 n. 4, 81 L.Ed.2d 59, 70 n. 4 (1984) (Powell, J., concurring).

What we must avoid at all costs is the pursuit of mediocrity that can result from judicially supervised academic decisions. Tenure and promotion processes invariably involve the most solemn educational actions of a university. *Snitow v. Rutgers Univ.*, 103 N.J. 116, 123, 510 A.2d 1118 (1986). Courts that recognize the qualified academic privilege “seek to foster frank and candid evaluation of candidates by their colleagues during hiring and tenure review committee deliberations.” R. Allen & C. Hazelwood, “Preserving the Confidentiality of Internal Corporate Investigations,” 12 *J.Corp.L.* 355, 362 n. 63 (1987). What they seek to avoid are the vapid generalities and euphemisms that supplant “telling it like it is.” *Dixon*, 541 A.2d at 1062 (N.J. 1988) (O’Hern, J. concurring).

Justice O’Hern’s remark, quoted above, about “What we must avoid at all costs is the pursuit of mediocrity that can result from judicially supervised academic decisions.” is the closest that *Dixon* comes to recognizing academic abstention.

While *Dixon* could be read as standing for the erosion of academic abstention, I see academic abstention as irrelevant in *Dixon*. *Dixon* had made a prima facie case of illegal discrimination and sought evidence to prove her case. *Dixon* alleged that the University had denied her tenure because of racial and/or gender discrimination, which criteria are *not* protected by academic abstention, because they are *not* academic reasons.

Dixon would not have occurred prior to the year 1950. The civil rights movement and subsequent legislation created new legal rights that changed the absolute deference that courts would give employers under the doctrine of at-will employment, which holds that employers can terminate employment for *any* reason, even an immoral reason.

Bishop (11thCir. 1991)

In 1991, a U.S. Court of Appeal heard a case involving an assistant professor at the University of Alabama, who the administration had admonished not to mention his religious beliefs during his classes on exercise physiology.

Though we are mindful of the invaluable role academic freedom plays in our public schools, particularly at the post-secondary level, we do not find support to conclude that academic freedom is an independent First Amendment right. And, in any event, we cannot supplant our discretion for that of the University. 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. University officials are undoubtedly aware that quality faculty members will be hard to attract and retain if they are to be shackled in much of what they do.

Bishop v. Aronov, 926 F.2d 1066, 1075 (11thCir. 1991), *cert. den.*, 505 U.S. 1218 (1992).

The final two sentences in this quotation from the U.S. Court of Appeals is an astounding display of naivety — an unsupported belief that enlightened self-interest will stop university administrators from abusing faculty. Despite the remark about “judges should not be ersatz deans”, the court *did* evaluate the content of the university’s prohibition of Prof. Bishop’s speech and whether it violated the First Amendment guarantee of religious freedom. The court properly made this evaluation because protection of the First Amendment freedom is a legitimate function of courts, unlike — according to academic abstention doctrine — decisions in purely academic matters.

Jiminez (4thCir. 1995)

In 1995, the U.S. Court of Appeals wrote in a case involving alleged racial discrimination against a professor at a private college:

We commence with the premise that while Title VII is available to aggrieved professors, we review professorial employment decisions with great trepidation. *See Fields v. Clark Univ.*, 966 F.2d 49, 54 (1stCir. 1992), *cert. denied*, 506 U.S. 1052, 113 S.Ct. 976, 122 L.Ed.2d 130 (1993); *Brousard-Norcross v. Augustana College Ass'n*, 935 F.2d 974, 975-76 (8thCir. 1991); *Zahorik v. Cornell Univ.*, 729 F.2d 85, 92-93 (2dCir. 1984); *Kunda v. Muhlenberg College*, 621 F.2d 532, 548 (3dCir. 1980). We must be ever vigilant in observing that we do not “sit as a ‘super personnel council’ to review tenure decisions,” *Brousard-Norcross*, 935 F.2d at 976, always cognizant of the fact that professorial appointments necessarily involve “subjective and scholarly judgments,” with which we have been reluctant to interfere, *Smith v. University of North Carolina*, 632 F.2d 316, 345-47 (4thCir. 1980). Aptly articulating this rubric, the Third Circuit cogently cautioned:

[C]ourts must be vigilant not to intrude into [tenure] determination[s], and should not substitute their judgment for that of the college with respect to the qualifications of faculty members for promotion and tenure. Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professional, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges.

Kunda, 621 F.2d at 548. The federal courts have adhered consistently to the principle that they operate with reticence and restraint regarding tenure-type decisions. See, e.g., *Bina v. Providence College*, 39 F.3d 21, 26 (1stCir. 1994), *cert. denied*, 514 U.S. 1038, 115 S.Ct. 1406, 131 L.Ed.2d 292 (1995); *Lieberman v. Gant*, 630 F.2d 60, 67 (2dCir. 1980). Our review is narrow, being limited to determining "whether the appointment or promotion was denied because of a discriminatory reason." *Smith*, 632 F.2d at 346. In other employment contexts, we have explained that Title VII is not a vehicle for substituting the judgment of a court for that of the employer. See *EEOC v. Clay Printing Co.*, 955 F.2d 936, 946 (4thCir. 1992) (noting that the federal courts should "not ... direct the business practices of any company"). Title VII, therefore, is not a medium through which the judiciary may impose professorial employment decisions on academic institutions.

Jiminez v. Mary Washington College, 57 F.3d 369, 376-377 (4thCir. 1995), *cert. den.*, 516 U.S. 944 (1995).

Quoted with approval in *Saleh v. Upadhyay*, 11 Fed.Appx. 241, 260 (4thCir. 2001).

Kolbrin (8thCir. 1997)

A dismissed lecturer sued the University of Minnesota, alleging gender discrimination. A U.S. Court of Appeals wrote: the court will

accord a high degree of deference to the judgment of university decision-makers regarding candidates' qualifications for academic positions. [citations omitted] To prevail, the plaintiff must show something more than a mere dispute over her qualifications for the position. [quoting *Kobrin v. University of Minnesota*, 34 F.3d 698, 704, n.4 (8thCir. 1994)].

Kobrin v. University of Minnesota, 121 F.3d 408, 414 (8thCir. 1997), *cert. den.*, 522 U.S. 1113 (1998).

conclusion about professors

Back in the year 1952, Justice Frankfurter wrote a concurring opinion to a U.S. Supreme Court case that declared that professors had academic freedom, to protect their ability to be "priests of our democracy".

To regard teachers — in our entire educational system, from the primary grades to the university — as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or State government.

Wieman v. Updegraff, 344 U.S. 183, 196-197 (1952) (Frankfurter, J., concurring).

The hyperbole in this and other academic freedom cases decided by the U.S. Supreme Court in the 1950s and 1960s served as a false promise to professors for many tens of years. In reality, nontenured professors are ordinary employees with no special legal protections. As this essay explains, the doctrine of academic abstention prevents courts from inquiring into any improper termination of a professor's employment, except in a few cases in which the professor's constitutional rights are clearly implicated.

Professors are grateful to academic abstention when it causes courts not to meddle with professors' decisions about grading, expulsions for academic reasons, and curriculum. Ironically, the same academic abstention means that courts will also not meddle with personnel decisions made for alleged academic reasons (e.g., quality of teaching or scholarly research by a professor). Therefore, courts will generally *not* protect professors from mistreatment by either the administration or by their colleagues.

Law Review Articles

I prefer to work from primary sources, such as the judicial opinions quoted above. However, there are many law review articles about aspects of education law that mention academic abstention.

There is a long history that recognizes that judges will defer to teachers and professors in matters of purely academic matters. For example, in 1937, an article in a law review remarked:

... where a case is brought presenting the consequences of an interference with academic freedom in justiciable form, and petitioning for an accepted mode of legal relief, the plaintiff faces the added barrier of a profession of judicial reluctance to intervene in the internal affairs of an educational institution, an attitude which is said to limit the court to an examination of the authority, not the propriety, of administrative action.

anonymous, "Academic Freedom and the Law", 46 YALE LAW JOURNAL 670, 671 (1937).

Reluctant to upset the administrative rulings of university authorities, most courts have denied recovery of damages for breach of contract [between professor and university] even where dismissal was unjustified

Id. at 672-673.

On the whole, the courts are reluctant to interfere; and even where judicial review is permitted, courts tend to give great weight to the findings of school authorities on facts and to pass only upon the adequacy of those facts in law to sustain the dismissal [of a teacher in a public school].

Id. at 685.

And a 1968 law review article remarked:

... the courts have traditionally been reluctant to intrude upon the domain of educational affairs, not only in recognition of their lack of institutional competence in such matters, but also out of respect for the autonomy of educational institutions.

anonymous, "Developments in the Law: Academic Freedom", 81 HARVARD LAW REVIEW 1045, 1050 (1968).⁴⁶

Unfortunately, despite the limitations placed on the board by the tenure laws, the statutes often are broadly construed, and school boards are thus allowed to exercise rather extensive and often unnecessary control over teachers' activities both within and without the classroom.

Id. at 1095.

... in view of the hospitable attitude which the courts generally have manifested toward school board actions, the teacher's prospects for success might be greater before an arbitrator.

Id. at 1125.

As explained below, at page 58, judges sometimes profess to be intellectually incompetent to decide matters of grading, acceptability of a thesis or dissertation, or otherwise decide the academic competence of a student. In 1973, a law student precisely explained why such alleged incompetence should not prevent judicial review of decisions made by university faculty.

There is a significant difference between supervision of substantive decisionmaking and review of the process by which decisions are reached. Though courts lack the expertise to formulate educational policy, they are competent to judge the fairness of a private association's expulsion procedures. Courts are not qualified ... to determine the qualifications of physicians or the academic standards of universities, ... but they can review the expulsions of ... doctors from medical societies, universities from accrediting associations....
[three footnotes omitted]

David M. Rabban, Note, "Judicial Review of the University-Student Relationship: Expulsion and Governance," 26 STANFORD LAW REVIEW 95, 113 (Nov 1973).

In 1979, Prof. Nordin gave the name *academic abstention* to the doctrine of judicial deference to schools and universities,⁴⁷ and she provided a thoughtful analysis of this doctrine.⁴⁸ Prof. Nordin appears to be the first person to use the label *academic abstention* for what had been recognized for many years by experts on education law in the USA.

A few years later, Prof. Katz in a seminal article on academic freedom for professors, also noticed that courts do not protect untenured professors in purely academic disputes with a university:

The question of which institution [i.e., legislature, judiciary, executive] has the authority to scrutinize, criticize, and "penalize" the written or oral expressions of faculty members on academic subjects has one answer: that authority lies solely within the educational institution,

⁴⁶ This article by anonymous law students at Harvard Law School was cited by the U.S. Supreme Court in *Epperson v. State of Ark.*, 393 U.S. 97, 104, n. 13 (1968) and *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506, n. 2 (1969).

⁴⁷ Virginia Davis Nordin, personal communication, 4 Nov 1999.

⁴⁸ Harry T. Edwards and Virginia Davis Nordin, HIGHER EDUCATION AND THE LAW, at pp. 14-17, 601-604, Institute for Educational Management at Harvard University (1979); Virginia Davis Nordin, "The Contract to Educate", 8 J. COLLEGE & UNIVERSITY LAW 141 (1981).

not the legislature, judiciary, or even executive branches of government Evidently, the judiciary has not and will not side with individual faculty members in disputes of this nature. If the issue is the protection to be accorded a truly provocative classroom utterance, there is little reason to expect the faculty member to prevail. And there is even less reason to believe the judiciary will review scholarly writing for evidence of first amendment violations.

In sum, if speech or writing are on "academic subjects," their contents are subject to institutional review, free of judicial oversight. If classroom utterances are on nonacademic or unassigned subjects, they can be penalized because the professor is not doing her or his assigned job.

Katheryn Katz, "The First Amendment's Protection of Expressive Activity in the University Classroom: A Constitutional Myth," 16 UNIV. CALIF. DAVIS LAW REVIEW 857, 927-928 (Summer 1983).

In 1989, Prof. Byrne agreed that, legally, institutional academic freedom is a consequence of a poorly articulated doctrine called academic abstention, in which courts have traditionally avoided reviewing the merits of decisions about grades, curriculum, awarding degrees, or granting tenure to teachers or professors.⁴⁹

Justifications for Academic Abstention

1. ecclesiastical courts

Academic abstention seems to have come from medieval law, in which European universities and scholars were subject to the jurisdiction of ecclesiastical courts, not civil courts.⁵⁰ Having scholars subject to ecclesiastical courts was reasonable in medieval times because (1) universities were operated by a church and (2) professors were priests in that church. Having civil courts decline to hear academic disputes was reasonable when grieved students and faculty had a forum in ecclesiastical courts. However reasonable it may have been in medieval times, the doctrine of academic abstention is an anachronism in the USA, because ecclesiastical courts have never been recognized by the government in the USA.

Early colleges in the USA were under the control of a church. Perhaps judges deferred to these colleges, because of the First Amendment to the U.S. Constitution that prohibits government endorsement or entanglement in religious matters. However, most of the U.S. Supreme Court cases on the subject of religious freedom were written *long after* academic abstention was firmly in place, so it is doubtful that the First Amendment was the source of academic abstention.

A more plausible explanation might be that early American judges knew that English civil courts did not get involved in academic disputes, and the American judges simply copied English

⁴⁹ J. Peter Byrne, "Academic Freedom", 99 YALE LAW JOURNAL 251, 323-327 (1989).

⁵⁰ Virginia Davis Nordin, "The Contract to Educate", 8 J. COLLEGE & UNIVERSITY LAW 141, 147 (1981).

courts, without considering the different situations between England and the USA. Such an origin for academic abstention accounts for the lack of explanation in court opinions: it was a rule without a good reason.

Yet English civil courts did *not always* defer to colleges. In the year 1723, the Chancellor of Cambridge University revoked a doctor of divinity degree from a former student without providing the former student a hearing, and King's Bench ordered the University to restore the degree.⁵¹

2. in loco parentis

The doctrine of *in loco parentis*⁵² is traceable to Blackstone, writing in the year 1770.⁵³ The original formulation of this doctrine in England allowed teachers to administer physical punishment to pupils, without the teacher being guilty of battery. Later, the doctrine was extended to include academic decisions by teachers and professors.

The traditional law is that courts *never* intervene in domestic disputes, such as a parent rearing a child, or disputes between spouses (except divorces). The doctrine of *in loco parentis* extends this tort immunity to teachers and professors. The assumption underlying *in loco parentis* is that parents, teachers, and professors are always benevolent and always act in the best interests of the child. A legal treatise from the year 1920 tersely summarized the doctrine of *in loco parentis*:

[University and college authorities] stand in loco parentis concerning the physical and moral welfare and mental training of the pupils, and to that end they may make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise or their aims worthy is a matter left solely to the discretion of the authorities, and in the exercise of that discretion the courts are not disposed to interfere unless the rules and aims are unlawful or against public policy.
... a college may forbid its students to marry, or to walk the streets at midnight, or to board at a public hotel. So it may make attendance upon religious services a condition of remaining within its walls.

27 RULING CASE LAW 141, § 10 (1920).

⁵¹ *The King v. University of Cambridge (Bentley's Case)*, 8 Modern Rep. (Select Cases) 148, 92 E.R. 818, 2 Lord Raymond 1334 (K.B. 1723).

⁵² The phrase *in loco parentis* is Latin for "in place of parents".

⁵³ William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, Book I, *453 (1770). ("... the father, or other guardian, may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent ... that of restraint and correction, as may be necessary to answer the purposes for which he is employed.").

There are many classic cases involving *in loco parentis* and colleges in the USA. An 1866 case from Illinois held that a private college had broad powers to make rules affecting its students.⁵⁴ A frequently cited case from Kentucky in 1913 upholds the right of a private college to make a restaurant across the street from the campus off limits for students of the college.⁵⁵ In 1924, the Florida Supreme Court held that a private college had broad powers to make rules affecting its students.⁵⁶ In 1928, an appellate court in New York State held that a private university could expel a student without a hearing for not being “a typical Syracuse girl.”⁵⁷ There are a number of law review articles that discuss the doctrine of *in loco parentis*.⁵⁸

⁵⁴ *People ex rel. Pratt v. Wheaton College*, 40 Ill. 186, 1866 WL 4454 (Ill. 1866) (Doe not mention *in loco parentis*, but does say: “A discretionary power has been given [college authorities] to regulate the discipline of their college in such manner as they deem proper, and so long as their rules violate neither divine nor human law, we have no more authority to interfere than we have to control the domestic discipline of a father in his family.” And: “A person in his capacity as a citizen may have the right to do many things which a student of Wheaton college cannot do without incurring the penalty of college laws. A person as a citizen has a legal right to marry, or to walk the streets at midnight, or to board at a public hotel, and yet it would be absurd to say that a college cannot forbid its students to do any of these things. So a citizen, as such, can attend church on Sunday or not, as he may think proper, but it could hardly be contended that a college would not have the right to make attendance upon religious services a condition of remaining within its walls.”).

⁵⁵ *Gott v. Berea College*, 161 S.W. 204, 206 (Ky. 1913) (“College authorities stand in *in loco parentis* concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise or their aims worthy is a matter left solely to the discretion of the authorities or parents, as the case may be, and, in the exercise of that discretion, the courts are not disposed to interfere, unless the rules and aims are unlawful or against public policy.”).

⁵⁶ *John B. Stetson University v. Hunt*, 102 So. 637, 640 (Fla. 1924) (“As to mental training, moral and physical discipline, and welfare of the pupils, college authorities stand in *in loco parentis* and in their discretion may make any regulation for their government which a parent could make for the same purpose, and so long as such regulations do not violate divine or human law, courts have no more authority to interfere than they have to control the domestic discipline of a father in his family. *Gott v. Berea College*, supra.”).

⁵⁷ *Anthony v. Syracuse University*, 223 N.Y.S. 796 (N.Y.Sup. 17 Aug 1927) (Mentions “*in loco parentis*”), *rev'd*, 231 N.Y.S. 435 (N.Y.A.D. 14 Nov 1928) (Appellate opinion does not mention “*in loco parentis*”. Instead, the appellate court enforced the following unconscionable and overbroad regulation in the university catalog: “Attendance at the University is a privilege and not a right. In order to safeguard its scholarship and its moral atmosphere, the University reserves the right to request the withdrawal of any student whose presence is deemed detrimental. Specific charges may or may not accompany a request for withdrawal.”).

⁵⁸ John C. Hogan and Mortimer D. Schwartz, “*In Loco Parentis* in the United States 1765-1985, 8 JOURNAL OF LEGAL HISTORY 260 (1987); Brian Jackson, Note, “The Lingering Legacy of *In Loco Parentis*: An Historical Survey and Proposal for Reform,” 44 VANDERBILT LAW REVIEW 1135 (Oct 1991). Also see, anonymous, “Private Government on the Campus — Judicial Review of University Expulsions,” 72 YALE LAW REVIEW 1362, 1368, 1380 (1963); Perry A. Zirkel and Henry F.

Note that in the original form, *in loco parentis* only applied to pupils or students who were children, which was — prior to the late 1960s — defined as less than 21 years of age. In the 1800s, most undergraduate college students in the USA were less than 21 y of age. When medical students, law students, and graduate students sued their college, judges applied the doctrine of *in loco parentis* to students who were more than 21 years of age, and who were legally adults. Also note that colleges, unlike parents, could permanently expel a student. In each of these two situations, it would seem that the college had more authority than the parents. These inconsistencies suggest that the use of *in loco parentis* by judges should have been called academic abstention.

The doctrine of *in loco parentis* became obsolete for college students in the late 1960s.⁵⁹ This now antique doctrine is mentioned here for historical interest, as it was one of a handful of doctrines formerly used by judges to justify giving deference to colleges. Note that judges may have been influenced by the doctrine of *in loco parentis* in deciding cases prior to 1970, without explicitly mentioning this doctrine, and these cases remain as precedent, although their reasoning is flawed.

3. blindly following precedent

As mentioned above, the historic justification that students and professors were subject to ecclesiastical courts was never acceptable in the USA and *in loco parentis* became invalid in the late 1960s. However, as shown by the cases quoted above, judges in the USA after 1970 continued to blindly follow precedent and continued to refuse to consider the merits of plaintiff's case against a college or school. These judges tersely observe that it is well-established law that judges do *not* inquire into student v. college disputes, then grant a summary judgment motion for the defendant-college. These judges did *not* notice that the reasons supporting the precedent cases were no longer valid.

Reichner, "Is the *In Loco Parentis* Doctrine Dead?" 15 JOURNAL LAW & EDUCATION 271 (Summer 1986); Spring J. Walton, "*In Loco Parentis* for the 1990's: New Liabilities," 19 OHIO NORTHERN UNIVERSITY LAW REVIEW 247, 248-256 (1992).

⁵⁹ *Goldberg v. Regents of University of Cal.*, 57 Cal.Rptr. 463, 470 (Cal.App. 1967) ("For constitutional purposes, the better approach, as indicated in *Dixon*, [294 F.2d 150] recognizes that state universities should no longer stand in loco parentis in relation to their students. [footnote omitted]"); *Buttny v. Smiley*, 281 F.Supp. 280, 286 (D.Colo. 1968) ("We agree with the students that the doctrine of 'In Loco Parentis' is no longer tenable in a university community; and we believe that there is a trend to reject the authority of university officials to regulate 'off-campus' activity of students."); *Gay Students Organization of University of New Hampshire v. Bonner*, 367 F.Supp. 1088, 1093 (D.N.H. 1974) ("With the lowering of the age of majority to eighteen, the *in loco parentis* rationale for vesting unbridled discretion in university officials is no longer tenable."), *aff'd as modified*, 509 F.2d 652, 657-658 (1stCir. 1974).

In practice, this respect for precedent means that well established rules of contract law and tort law do *not* apply to treatment of pupils or students by teachers, professors, schools, or colleges.⁶⁰ In other words, academic abstention replaces the usual common law of contract and torts.

A law professor chastised judges for disregarding the usual rules of contract law in student v. college disputes:

Part of the explanation for this rather unusual view of contract law may be that courts traditionally have ruled that the actions of colleges and universities are to be deferred to, particularly when the actions concern academic affairs or private schools. [footnote omitted] The peculiar use of contract law in the educational area allows courts to review the issues, thus satisfying student litigants, yet continue to defer to educational judgments made by the schools, satisfying them at the same time. Thus contract law is manipulated to put a heavy burden on the student. One senses in the cases, therefore, an unsettling lack of judicial honesty. That is not to say that schools do not deserve deference; that very well may be the appropriate posture of a court when reviewing the actions of a school. What is repugnant is to abuse notions of traditional contract law instead of developing doctrines that honestly provide for the strong policy concerns felt by courts deciding cases in this area.

On the contrary, rather than a more principled approach, modern courts seem to make overt choices about how strictly contract theories will be applied, depending on the result they wish to reach. As a result, a student seldom can win a case using an argument based on strict views of contract law, although the student might prevail if the case truly were analyzed by a court under such contract theories. [footnote omitted]

Victoria J. Dodd, "The Non-Contractual Nature of the Student-University Contractual Relationship," 33 UNIV. KANSAS LAW REVIEW 701, 710-711 (Summer 1985).

4. autonomy of colleges

Academic degrees represent the certification of a college that an individual person is educated or competent.⁶¹ Because the college's reputation is attached to the academic degrees, it follows that the college should have control over the curriculum (e.g., required classes), grades in classes, minimum acceptable grade-point average, approval of theses or dissertations, and other requirements for an academic degree. Judicial respect for autonomy of colleges is also called

⁶⁰ See, e.g., *Olsson*, 402 N.E.2d at 1152 (N.Y. 1980) ("... such hornbook rules cannot be applied mechanically where the "principal" is an educational institution and the result would be to override a determination concerning a student's academic qualifications."), quoted above at page 22. This remark in *Olsson* is quoted with approval in *Hines v. Rinker*, 667 F.2d 699, 703-704 (8th Cir. 1981); *Neel v. Indiana Univ. Bd. of Trustees*, 435 N.E.2d 607, 611 (Ind.App. 1982); and *Gordon v. Purdue University*, 862 N.E.2d 1244, 1251 (Ind.App. 2007). See *Paynter*, above at page 17. See also *Slaughter v. Brigham Young University*, 514 F.2d 622, 626 (10th Cir. 1975) ("The trial court's rigid application of commercial contract doctrine advanced by plaintiff was in error, This does not mean that 'contract law' must be rigidly applied in all its aspects,") and *Mahavongsanan v. Hall*, 529 F.2d 448, 450 (5th Cir. 1976) ("The appellee's claim of a binding, absolute unchangeable contract is particularly anomalous in the context of training professional teachers in post graduate level work.").

⁶¹ See, e.g., *Olsson*, at page 22 above, and *Susan M.*, at page 24 above.

institutional academic freedom. In my opinion, this is the only good reason for academic abstention amongst the reasons given by judges.

Judges in educational malpractice cases have frequently mentioned autonomy of schools and colleges as one of several reasons *not* to allow the tort of educational malpractice.⁶²

The conclusion of a 1923 trial court opinion in New York State mentions the deference and respect that the King of England had for a school teacher:

A teacher must be in authority and have control in a school. If not, there would be no school. Many years ago a learned and judicious schoolmaster said to Charles II in the plenitude of his power:

“Sire, pull off thy hat in my school; for if my scholars discover that the king is above me in authority, they will soon cease to respect me.”

And the king pulled off his hat, to demonstrate, by example, that the schoolmaster's authority should be respected even by a king.

People v. Petrie, 198 N.Y.S. 81 (N.Y.Co.Ct. 1923) (Reversing assault conviction of a teacher who “chastised” a 15 y old pupil with a rubber hose.)

⁶² See e.g., *Donohue v. Copiague Union Free School Dist.*, 391 N.E.2d 1352, 1354 (N.Y. 1979) (“To entertain a cause of action for ‘educational malpractice’ would require the courts not merely to make judgments as to the validity of broad educational policies a course we have unalteringly eschewed in the past but, more importantly, to sit in review of the day-to-day implementation of these policies. Recognition in the courts of this cause of action would constitute blatant interference with the responsibility for the administration of the public school system lodged by Constitution and statute in school administrative agencies.”); *Moore v. Vanderloo*, 386 N.W.2d 108, 115 (Iowa 1986) (“A fourth reason related by the courts in denying educational malpractice claims that is applicable here is that recognizing such a cause of action would force the courts blatantly to interfere with the internal operations and daily workings of an educational institution. This concern is particularly appropriate in the area of higher education. It has been recognized that academic freedom thrives on the autonomous decision-making by the academy itself. In essence, plaintiffs are asking this court to pass judgment on the curriculum of Palmer [College]. We decline to do so. [citations omitted]”); *Ross v. Creighton University*, 957 F.2d 410, 414-415 (7th Cir. 1992) (“A final reason courts have cited for denying this cause of action is that it threatens to embroil the courts into overseeing the day-to-day operations of schools. [citations omitted] This oversight might be particularly troubling in the university setting where it necessarily implicates considerations of academic freedom and autonomy. *Moore*, 386 N.W.2d at 115.”); *Finstad v. Washburn University of Topeka*, 845 P.2d 685, 694 (Kan. 1993) (“The strong public policy reasons for not recognizing a tort action for educational malpractice are identified in *Ross* and *Donohue* as ... (4) the courts' overseeing the day-to-day operation of the schools. We find these reasons to be compelling and the rationales of *Ross* and *Donohue* to be persuasive.”).

5. judges intellectually incompetent?

A number of judges have remarked that judges are *not* able to decide the competence of students in colleges or universities. This excuse is true for students in medicine, science, engineering, and mathematics — topics that are uncommon in the educational background of judges. However, judges also abstain from deciding competence of law students,⁶³ a subject area that should be familiar to judges, which shows that the alleged judicial incompetence is a pretext.

The U.S. Supreme Court has specifically admonished judges *not* to interfere with academic decisions:

Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.

Board of Curators of University of Missouri v. Horowitz, 435 U.S. 78, 90 (1978).

Courts are particularly ill-equipped to evaluate academic performance.
Horowitz, at 92.

Connelly says that “Courts are not supposed to be learned in medicine and are not qualified to pass opinion as to the attainments of a student in medicine.”⁶⁴ But courts routinely hear medical malpractice cases, despite the fact that neither the judge nor jury understands medicine. Medical malpractice cases are presented through opinions of expert witnesses and the factfinder decides whose experts are more credible. In this way, it is not necessary that a judge or jury understand medicine. Similar criticism can be made of other cases in which a court declined to decide the merits of a student who alleged his/her thesis or dissertation was not accepted for improper reasons. If the court wanted to decide the merits of these academic cases, the judge could find a way: either by listening to expert witnesses hired by the parties, by the judge appointing a Master to decide the technical issues, or by the judge appointing an independent expert witness.

Clearly, the judges’ lament that they are not intellectually qualified to review academic matters is pretextual, because these same judges routinely adjudicate disputes about medical malpractice, design of allegedly defective products, patent infringement, toxic torts, and other highly technical issues.

⁶³ See, e.g., *Keys*, at page 17 above, and *Susan M.*, at page 24 above.

⁶⁴ *Connelly*, 244 F.Supp. at 161 (D.Vt. 1965).

6. floodgates of litigation

I suspect the main reason behind many judges' assertion of academic abstention — aside from respect for precedent — is to prevent opening the floodgates of litigation. That's what the highest court of New York State admitted: "... to so involve the courts in assessing the propriety of particular grades would promote litigation by countless unsuccessful students."⁶⁵ A trial court in Ohio made the same point in a case involving a failing grade in a nursing class.⁶⁶ Courts have generally refused to hear cases alleging educational malpractice, because of fear of opening the floodgates of litigation.⁶⁷

Opening the floodgates of litigation is especially distasteful reason for abstention, as the *only* function of courts is to resolve disputes between two parties. The refusal of courts to decide the merits of a case because of a fear of future excessive work load for judges is simply an *unprofessional* abdication of their responsibility. If there really is a flood of future litigation, the obvious solution is to hire more judges. This is not a difficult problem to solve.

And there are good reasons to believe that there will *not* be a flood of litigation against professors, colleges, and schools. Litigation is expensive. Most students — except children of wealthy parents — can not afford to hire an attorney to litigate a dispute. Similarly, with the low

⁶⁵ *Susan M.*, 556 N.E.2d at 1107 (N.Y. 1990).

⁶⁶ *Johnson v. Cuyahoga County Community College*, 489 N.E.2d 1088, 1089-90 (Ohio Com.Pl. 27 Dec 1985) ("This fact pattern presents a unique claim in this court and one without Ohio precedent. Nevertheless, there is an explanation for the paucity of cases arising out of academic grading procedures. It is a manifestation of the reluctance of courts to involve themselves in the educational sphere. From the judiciary's point of view, there is an interest in the economy of litigation. In today's litigious society, there is a universal desire to prevent overburdening an already severely taxed system with additional causes of action.").

⁶⁷ See, e.g., *Moore v. Vanderloo*, 386 N.W.2d 108, 114 (Iowa 1986) ("A third justification offered for failure to recognize an educational malpractice cause of action is the resulting burden that would be placed on schools in what reasonably may be predicted to be an ensuing flood of litigation."); *Ross v. Creighton University*, 740 F.Supp. 1319, 1329 (N.D.Ill. 1990) ("It also must be remembered that education is a service rendered on an immensely greater scale than other professional services. If every failed student could seek tort damages against any teacher, administrator and school he feels may have shortchanged him at some point in his education, the courts could be deluged and schools shut down."); *aff'd in part*, 957 F.2d 410, 414 (7th Cir. 1992) ("A third reason for denying this cause of action is the potential it presents for a flood of litigation against schools. *Moore v. Vanderloo*, 386 N.W.2d 108, 114-15 (Iowa 1986). As the district court noted, 'education is a service rendered on an immensely greater scale than other professional services.' *Ross v. Creighton Univ.*, 740 F.Supp. 1319, 1329 (N.D.Ill. 1990)."); *Finstad v. Washburn University of Topeka*, 845 P.2d 685, 694 (Kan. 1993) ("The strong public policy reasons for not recognizing a tort action for educational malpractice are identified in *Ross* and *Donohue* as ... (3) the potential for a flood of litigation;.... We find these reasons to be compelling and the rationales of *Ross* and *Donohue* to be persuasive.").

salary for professors in the USA, few professors can afford to hire an attorney to litigate a dispute against their employer.

It is possible that, lurking in the back of the judges' minds, is the specter of school desegregation. Beginning in the mid-1950s, and continuing for more than forty years, many judges in U.S. District Courts had to decide school desegregation policy, including how to bus students from their residences to a distant school, in order to achieve quick racial integration in the face of a defiant or recalcitrant school administration and hostile public. Planning school desegregation really was burdensome for judges.⁶⁸ I suggest the legal debacle of desegregation taught judges *not* to interfere with schools. Incidentally, some of the landmark cases in which courts first intervened in expulsion of pupils or students for disciplinary reasons were cases involving black pupils or black students in civil rights demonstrations.⁶⁹

7. at-will employment

The law of at-will employment, which permits a school or college to dismiss any *untenured* teacher or *untenured* professor for any reason, or no reason at all, also functions to bar dismissed employees from seeking redress of grievances in the courts.⁷⁰ To be sure, at-will employment is a rule of law, not a principle of abstention, but the end result is the same — the former employee can be *unfairly* dismissed and courts will not do justice.

conclusion

That academic abstention, when it is justified by judges, has *two* historical justifications (i.e., ecclesiastical and *in loco parentis*), *four* current justifications, *plus* the law of at-will employment for *untenured* faculty, makes academic abstention mysterious. In my opinion, only the autonomy of colleges (i.e., institutional academic freedom) is a reasonable justification, and that reason will not support academic abstention in schools below the college level.

⁶⁸ See, e.g., *Berry v. School Dist. of City of Benton Harbor*, 141 F.Supp.2d 802 (W.D.Mich. 2001) (“This 34-year-old school desegregation case has been the subject of numerous prior opinions of this court.”). The landmark case of *Brown v. Board of Education of Topeka, Shawnee County, Kansas*, began in 1951 (98 F.Supp. 797) and was still active in 1992 (978 F.2d 585), for a 41 year lifetime.

⁶⁹ See, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975); *Dixon v. Alabama State Board. of Education*, 294 F.2d 150 (5th Cir. 1961), *cert. den.*, 368 U.S. 930 (1961).

⁷⁰ Ronald B. Standler, *History of At-Will Employment Law in the USA*, <http://www.rbs2.com/atwill.htm> (2000).

Unfortunately for grieved students who were genuinely abused by faculty, there is no forum outside a university for either (1) correcting such abuses and (2) holding faculty accountable for their misconduct or malice toward a student.

Modern Justification for Academic Abstention

Judges have not provided a clear justification for their consistent doctrine of abstaining from reviewing purely academic decisions. My historical research shows that this doctrine goes back hundreds of years. I suggest that a modern justification for academic abstention can have two forms:

1. **for schools and universities operated by a state or local government**, judges give great deference to the decisions of administrative bodies, which has its origins in the separation of powers (i.e., judicial, executive, legislative).
2. **for schools and universities operated by a private corporation**, the business judgment rule prevents a judge from reviewing the decision.

The usual sense of abstention in American jurisprudence is that federal courts should avoid interference with functions of state governments, including the administration of state universities. See, e.g., *Megill v. Board of Regents of Florida*, 541 F.2d 1073, 1077 (5th Cir. 1976) (“This Court does not sit as a reviewing body of the correctness or incorrectness of the Board of Regents’ decision in granting or withholding tenure. This is founded on the policy that federal courts should be loathe to intrude into internal school affairs. [two citations omitted]”).

The business judgment rule is well known in corporate law, and it seems straightforward to apply it to corporations that are colleges. The application of the business judgment rule to an academic dispute is found in a Kentucky case from the year 1913:

College authorities ... [may] make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise or their aims worthy is a matter left solely to the discretion of the authorities or parents, as the case may be, and, in the exercise of that discretion, the courts are not disposed to interfere, unless the rules and aims are unlawful or against public policy. Section 881 of the Kentucky Statutes, applicable to corporations of this character, provides that they may "adopt such rules for their government and operation, not inconsistent with law, as the directors, trustees, or managers may deem proper." The corporate charter of Berea College empowers the board of trustees to “make such by-laws as it may deem necessary to promote the interest of the institution, not in violation of any laws of the state or the United States.” This reference to the college powers shows that its authorities have a large discretion, and they are similar to the charter and corporate rights under which colleges and such institutions are generally conducted.

Gott v. Berea College, 161 S.W. 204, 206 (Ky. 1913).

The use of the business judgment rule in disputes with a private college can also be traced to a landmark law review article by Prof. Chafee.⁷¹

Implications of Academic Abstention

As long as academic abstention remains valid law, attorneys should be reluctant to encourage pupils, students, or professors to litigate disputes with a school or college over purely academic matters, because the doctrine of academic abstention means that the school or college will win, regardless of the facts of the case and regardless of the unfairness or injustice to the plaintiff. Not only is such litigation futile for the plaintiff, but also it is a waste of plaintiff's money, and can make the plaintiff *persona non grata* amongst faculty.

Academic abstention does *not* mean that attorneys are useless in disputes involving purely academic issues in schools or colleges. An attorney who is knowledgeable about education law — and who understands how professors and deans make decisions — can help a grieved person prepare letters to college officials, as well as advise a grieved person about testimony at hearings in educational institutions. Because a grieved person generally has few opportunities to resolve their problem in a college, it is essential that grieved people consult an attorney as soon as possible, and *not* first consult an attorney late in the appeals stage. All of the relevant facts and all of the relevant issues should be disclosed in the initial proceeding at the school or college, because courts are reluctant to consider facts or issues that were not raised in administrative proceeding prior to the case arriving in court. An attorney can advise his/her client on how to present the facts, how to avoid self-serving whining and irrelevant issues⁷², and which legal issues to include.

Attorneys for schools or colleges can advise the administration of the distinction between constitutionally protected freedoms, other legal rights, and purely academic matters. In some cases, there are elements of constitutionally protected freedoms and other legal rights in a case involving a poor grade, expulsion of a student, or denial of tenure to a professor. And, more importantly, an attorney can also review the college's written rules and policy manuals, and suggest editorial revisions to remove ambiguity, to remove statements that are either overbroad or unconscionable, and to make the rules easy for a judge to enforce.

Writing in 1968, during the turbulent era of student protests on campus, a professor noted that the college's lack of clear, written rules — or lack of uniform enforcement — invited judicial scrutiny:

⁷¹ Zachariah Chafee, "The Internal Affairs of Associations Not for Profit," 43 HARVARD LAW REVIEW 993 (1930).

⁷² People who are ordinarily articulate and intelligent often respond angrily, and ineffectively, when they have been mistreated. One of the roles of an attorney is to counsel a client about how to effectively present his/her case.

Lack of clearly defined consequences for lateness of submitting work and failure to clarify rules concerning the attribution of sources on student papers might cause difficulties. Lack of consistency in rulings of expulsion for failure to make normal academic progress might also provide opportunities for judicial review. It is the excessive vagueness or ambiguity of the rules concerning academic requirements, or the obvious inconsistency in their application, that may give rise to lawsuits. Greater attention to these problems by faculty and administrators should largely eliminate any danger of judicial interference.

William M. Beaney, "Students, Higher Education, and the Law," 45 DENVER LAW JOURNAL 511, 519-520 (1968).

Later, another law professor criticized colleges for not writing their bulletins, catalogues, and other written rules for students with the care that would be given to a legal contract.

... the manner in which school materials are written and distributed reinforces the idea that schools do not perceive that they may be drafting promises or contracts. Documents frequently contradict each other or contain ambiguities. [footnote omitted] Given that the contractual relationship between student and school has been recognized in this country for over one hundred years, one wonders why educational institutions continue to produce documents with seemingly little or no awareness of their potential legal effect.

Victoria J. Dodd, "The Non-Contractual Nature of the Student-University Contractual Relationship," 33 UNIV. KANSAS LAW REVIEW 701, 721 (Summer 1985).

Let me answer Prof. Dodd's perhaps rhetorical question about why colleges continue to produce amateurishly drafted contracts. First, most of the faculty and administration (except for the law school) hold lawyers in contempt. Second, with the courts using the doctrine of academic abstention, there is no need for colleges to consider a legal view of contracts, because the college always wins in court, even if the college's rules are inconsistent, ambiguous, or even unconscionable.

Need External Forum

One result of academic abstention is that final decisions about students' academic qualifications are made by the college, and litigation is futile. It is certainly appropriate for a professor, or committee of professors, to make an initial decision about a students' academic qualifications. Review or appeals inside a college/university nearly always affirms the judgment of the initial evaluation for two reasons: (1) the spirit of collegiality means that professors are loath to criticize the evaluations of students by other professors, and (2) administrators do not want to encourage appeals by disgruntled students. Final review of a grieved student's case should be by someone who is *both* initially impartial *and* truly independent. As one law professor said:

Impartiality is more likely when the judging function is placed in a person or persons outside the agency this is proposing adverse action, [footnote omitted]

William G. Buss, "Easy Cases Make Bad Law: Academic Expulsion and the Uncertain Law of Procedural Due Process," 65 IOWA LAW REVIEW 1, 16 (Oct 1979).

The obvious place for a final review is a courtroom, using the same rules and same common law as for other disputes in our society. A law student criticized academic abstention:

... the delegation of absolute autonomy may lead college officials to give too much weight to administrative convenience. Certainly, the present system encourages these officials to exercise a minimum amount of good faith in their dealings with the disgruntled student.

If for no other reason, the arbitrary and capricious standard should be reexamined because it abrogates the basic principle of due process that no man may be a judge in his own case. What is needed, however, is a legal context that does not ensure the defendant the *final* say as to its own guilt, for such broadly conferred power may lead to abuse.

[all footnotes omitted]

Robert Faulkner, Note, "Judicial Deference to University Decisions Not to Grant Degrees, Certificates, and Credit — The Fiduciary Alternative," 40 SYRACUSE LAW REVIEW 837, 849-850 (1989)

Hearings and appeals on campus are designed by the college to be convenient for the college. The absence of an attorney for the accused student or professor, the absence of cross-examination of witnesses, and the lack of a written transcript of the testimony at a hearing all limit the ability of college administrators to properly review any appeals. The private nature of hearings and appeals (i.e., no journalists, no attorney for the accused) makes it easy for the college to conceal any misconduct by its faculty or staff. And the doctrine of academic abstention effectively prevents judges in open court from reviewing purely academic decisions by colleges.

My View

Numerous attorneys for student-plaintiffs, as well as some authors of notes or articles in law reviews, have advocated using consumer protection law in student v. university disputes. I agree with such claims in the context of fraud in the inducement by the university, such as specific, objective, written misrepresentations by the university about either its accreditation, credentials of its faculty, student/faculty ratio, employment opportunities of its graduates, or other topics on which a prospective student could reasonably rely to his/her detriment in choosing to enroll.

I strongly disagree with applying consumer protection law to academic disputes in universities, because a college-level education is not a commodity provided by faculty. Just because a student pays tuition and works diligently, a student is neither entitled to a passing grade in a class nor entitled to an academic degree. Each student must prove to the faculty that the student is competent and worthy of a degree, by a showing of meritorious performance by the student.

By paying tuition and working diligently, a student is entitled to be evaluated fairly (e.g., without maliciousness) and treated in accordance with the regulations of the college, including having an opportunity to learn. The student will graduate *only if* the student meets *all* of the requirements listed in the college's regulations.

The measure of prestigious colleges is either that (1) they accept less than half of those who apply for admission or (2) less than half of those people who initially enroll will graduate. Thus it

is *expected* that students will be expelled for inadequate academic performance at any college with high standards. Other students will realize that they don't belong at a particular college because of their poor grades, and then they either voluntarily withdraw or not return for the following year of classes. Colleges who impose such high (i.e., elitist) academic standards have a reputation that enhances the value of academic degrees from those colleges.

I agree that judges should respect the autonomy of colleges in making educational policies and rules, provided that the college's rules are *neither* unconscionable *nor* overbroad. However, judges should *not* respect: malicious decisions by faculty or administrators, failure of faculty or administrators to follow the written policy of the school or college, arbitrary or capricious decisions, etc.

In my essay on educational malpractice law,⁷³ I suggested that if courts hear disputes about grades in a college class, plaintiff should have a very high initial burden, such as submitting affidavits from at least three professors, each of whom is personally qualified to teach the subject matter of the class, and each of whom expresses an opinion that the grade is at least one letter grade too low. It may be desirable for the three affidavits to come from professors at three different colleges or universities, to avoid a personal vendetta against the accused instructor. This high initial burden will discourage litigants who have a weak case or nonexistent case, therefore helping to prevent weak claims from reaching a court. I suggested a similar rule in disputes about the acceptability of a thesis or dissertation.

Conclusion

In contrast to academic freedom, which applies *only* to professors and universities, academic abstention applies to *all* educational programs from elementary school through medical school and Ph.D. programs.

It is no exaggeration to say that the doctrine of academic abstention is the most important doctrine in education law in the USA. The impact of academic abstention is simple: the school or college always wins any dispute about purely academic matters, no matter how grave the injustice to the student or professor. The doctrine of academic abstention is a simple and valid explanation for a complex array of cases (e.g., cases involving pupils v. schools, students v. universities, teachers v. schools, and professors v. universities) involving different issues.

Academic abstention is likely to continue, because American law respects precedent and courts in the USA have a long history of refusing to hear disputes by students or professors involving purely academic matters. Moreover, university administrators have no motivation to

⁷³ Ronald B. Standler, *Educational Malpractice in the USA, Part 2*
<http://www.rbs2.com/edumal2.pdf> (5 April 2003).

change the law, because disputes by grieved students or grieved professors are an annoyance to the university and because litigation is worse than an annoyance.

In posting this essay at my website, I do *not* intend to discourage potential plaintiffs from seeking legal counsel. See my disclaimer, at page 5, above.

As explained above, at page 61, I suggest that academic abstention can now be justified in two ways: (1) for state colleges and public schools, abstention comes from judicial deference to administrative agencies; (2) for private colleges and private schools, abstention comes from judicial unwillingness to intrude into the internal affairs of a private corporation, which is the business judgment rule from corporate law.

My experience as a full-time student in universities for 13 years, as a professor for 10 years, and as an attorney who works in higher-education law, is that professors — and especially committees of professors — are generally fair to students. In fact, the bias of most professors seems to be to give students a second chance after a student commits serious misconduct or after a student shows appalling ignorance. However, students are *occasionally* maliciously harmed by professors, and university administrators tend to support their professors and committees of professors. As explained above, at page 63, society needs to find a way for grieved students to be heard in a fair forum outside a university, and the most logical forum is a courtroom. I think academic abstention is an anachronism that needs to be discarded.

About the Author

The author earned a B.Sc. in physics in 1971 from the University of Denver and a Ph.D. in physics in 1977 from the New Mexico Institute of Mining and Technology. Dr. Standler was a professor of electrical engineering for ten years. Following the annihilation of financial support for scholarly research in all of his areas of science and engineering, he changed careers to law. He earned a J.D. in 1998 from Franklin Pierce Law Center. Since 1998, Dr. Standler has been an attorney in Massachusetts, where he specializes in higher-education law, copyright law, and computer law, and consults nationwide with litigators on scientific evidence in torts.

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