

Fall 2006

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Recommended Citation

Robert M. O'Neil, *Bias, "Balance," and Beyond: New Threats to Academic Freedom*, 77 U. COLO. L. REV. 985 (2006).

Available at: <https://scholar.law.colorado.edu/lawreview/vol77/iss4/9>

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BIAS, “BALANCE,” AND BEYOND: NEW THREATS TO ACADEMIC FREEDOM

ROBERT M. O’NEIL*

Rating professors’ views and values has long been a favorite pursuit of college undergraduates. In the early weeks of 2006, however, such assessment assumed a bizarre new twist for students at UCLA.¹ A conservative alumni group widely advertised its readiness to pay undergraduates to tape or transcribe lectures of professors perceived as overly liberal, and to gather other evidence of “imbalance” in the classroom.² This plan was the inspiration of Andrew Jones, a recent UCLA graduate who had chaired the campus Republican organization.³ Before any students had actually signed up for the project, Mr. Jones modified his offer after university officials warned that taping lectures might well violate copyright law and subject the students to legal liability.⁴

The sponsoring organization, the Bruin Alumni Association, already maintained a website on which it claimed that the UCLA campus was overrun by “radical” professors, students, and administrators who “have made UCLA a major organizing center for opposition” to the Iraq War, the Bush administration, and other conservative interests.⁵ The website also accused the university for offering the study of fields that are “irreparably anti-American and anti-capitalist” and for condoning an environment hostile to any student who does not “embrace political extremism.”⁶ The site also included a list of the “Dirty Thirty”—those faculty members whose views most deeply offended the conservative alumni group.⁷

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1. See Piper Fogg, *Independent Alumni Group Offers \$100 Bounties to UCLA Students Who Ferret Out Classroom Bias*, CHRON. HIGHER EDUC. (Wash., D.C.), Jan. 19, 2006, available at <http://chronicle.com/daily/2006/01/2006011904n.htm>.

2. *Id.*

3. *Id.*

4. Cindy Chang, *Conservative Alumnus Pulls Offer to Buy Lecture Tapes*, N.Y. TIMES, Jan. 24, 2006, at A14.

5. Fogg, *supra* note 1.

6. *Id.*

7. Chang, *supra* note 4.

Although few, if any, students actually pursued the proffered bounty, the proposal posed deeply troubling and unsettled questions in the quest for curricular “balance.”⁸ As the UCLA administration recognized, professors who were publicized as “radicals” on an Internet website would almost certainly have no legal recourse, save for the remote possibility they might sue for libel if a blatantly false and damaging statement were posted, or that they could seek redress for misappropriation of their intellectual property.⁹ Otherwise, a private group’s posting of even scurrilous comments about a university professor’s politics must be tolerated.

Mr. Jones was hardly the first disaffected alumnus, parent, or critic to launch such an initiative. By the time he posted his offer to pay students to be classroom monitors, several websites were already up and running with highly critical comments about “imbalanced” professors. NoIndoctrination.org had been online for several years, posting detailed information about professors seen as overly liberal.¹⁰ Campus Watch had for an even longer time posted reports of professors whose views on Middle East tensions were viewed as hostile to Israel or overly sympathetic to the Palestinian cause.¹¹ Local campus groups had also established websites and blogs that encouraged and featured candid discussion and critiques of “biased” teachers and their classroom comments, as well as distortions in their published writings.

The emerging context is substantially broader than even these highly visible activities. Claims of political or ideological bias have caused substantial investigations to an unprecedented degree most notably, though far from exclusively, in the now famous case of Columbia University’s Department of Middle East and Asian Languages and Cultures.¹² On several occasions students have actually gone to court to seek a restoration of the “balance” they claimed was lacking in their college experience—most visibly, the legal challenge to a summer reading assignment for entering students at the University of North Carolina at Chapel Hill.¹³ Also at Chapel Hill, a formal complaint was filed with a

8. See Sonya Geis, *Students Are Offered Cash to Monitor Liberals*, WASH. POST, Jan. 22, 2006, at A2.

9. Mellinda Dudley, *Site Targets Professors*, DAILY BRUIN, Jan. 19, 2006, <http://www.dailybruin.ucla.edu/news/articles.asp?ID=35507>.

10. See NoIndoctrination.org, <http://noindoctrination.org> (last visited July 18, 2006) [hereinafter NoIndoctrination.org]. See generally, Justin Pope, *Ideals Colliding in College Classes*, RICHMOND TIMES DISPATCH, Dec. 26, 2004, at A6.

11. See Campus Watch, <http://www.campus-watch.org> (last visited July 18, 2006).

12. Jennifer Jacobson, *Columbia U. Report Criticizes Professor’s Classroom Conduct but Finds No Pattern of Anti-Semitism*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 1, 2005, available at <http://chronicle.com/prm/daily/2005/04/2005040104n.htm>.

13. Pope, *supra* note 10.

federal civil rights agency against an English professor on the basis of an after-class e-mail that one of his students read as disparaging to homophobic views.¹⁴

The gravest threat of all has come from legislation proposed in the United States Congress and no fewer than sixteen states, which would essentially mandate "balance" in university curricula, and would offer avenues of recourse to aggrieved students.¹⁵ Though none of these measures (subsumed under the title "Academic Bill of Rights" (ABOR)) has yet made its way into law, the mere pendency of such proposals and their serious consideration by lawmakers invariably creates anxiety and concern across the academic community.¹⁶ Such anxiety is heightened by the same realization that swept the UCLA campus while Mr. Jones' offer was pending—that university professors are helpless against such hostile forces unless an adverse personnel action occurs. These new and ominous activities, and some possible responses to them, are the focus of this article.

This article will first examine the reality of the extent of political imbalance in academia, the impact of that political imbalance on students, and the internal avenues of recourse already available to those students negatively affected. Second, the focus will shift to the impact of private groups who seek to expose and document imbalance in the classroom and the options available to professors who seek to prevent or refute charges of bias levied by these groups. The third major focus will address ABOR and the actions taken by both our federal government and the legislatures of a growing number of states as they assess the feasibility of regulating imbalance by legally mandating a balanced academia. Finally, the article will consider what steps a university may and may not take to seek balance in the wake of current controversies.

The central premise of virtually all of these hostile initiatives is that American college and university faculties are heavily skewed to the liberal end of the political and ideological spectrum. As a result, conservative faculty are said to feel isolated, unfairly treated in seeking promotion and tenure, and occasionally persecuted. Similarly, students who lean to the right are portrayed as feeling unwelcome on most campuses, and may even be disadvantaged in grading, as well as in other less formal ways.

14. George Archibald, *Discrimination Against White Male Found*, WASH. TIMES, Sept. 24, 2004, at A1.

15. G. Jeffrey MacDonald, *Whither Academic Freedom?*, USA TODAY, May 18, 2005, at D9.

16. See *infra* pp. 19–23 (describing ABOR and the concerns of the academic community).

The data that support such charges are superficially impressive. A report published in the spring of 2005 by several reputable social scientists offered three conclusions that were seen as the first solid vindication of the "liberal bias" charges. First, the number of registered Democrats outnumbered registered Republicans (at least in the humanities and social sciences) by a ratio of seven to one.¹⁷ Second, this imbalance has substantially worsened in the past decade or two.¹⁸ Third, there was growing and disturbing evidence of the effects of bias in professional opportunity and advancement: while publications and research support ranked first among desiderata for recognition and success, ideology ranked second and disadvantaged conservative scholars.¹⁹ A later study reported that Democrats outnumbered Republicans in party registration by a ratio of nine to one on the Berkeley and Stanford faculties.²⁰ The news media eagerly greeted these reports. "Republicans outnumbered in academia," proclaimed a *New York Times* headline,²¹ while the *Chronicle of Higher Education* headed the story "Conservative Professors Are Less Likely to Advance in Academe, Study Finds."²²

There have been other indicia of such concern. For example, New York Times columnist David Brooks devoted an entire piece to his lament about "lonely conservatives" across the Ivy League, identifying for each institution a single holdout against the liberal tide—Harvey Mansfield at Harvard, Alan Kors at Penn, Donald Kagan at Yale, and others whose ideological isolation drew Brooks' sympathy, and his rebuke for institutions that should be more ideologically diverse.²³ The summer of 2005 brought publication of a new report on Intellectual Diversity by the American Council of Trustees and Alumni, founded by Lynne Cheney over a decade ago, and committed to an articulation of conservative views within the academic world. The report's key points included the following: "Faculty imbalance, combined with the idea that the 'politically correct' point of view has a right to dominate classroom and campus discussions, has had fearful consequences for university life."²⁴

17. Stanley Rothman, S. Robert Lichter & Neil Nevitte, *Politics and Professional Advancement Among College Faculty*, 3 FORUM No. 1, art. 2, at 2, available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1067&context=forum>.

18. *Id.* at 13.

19. *Id.*

20. John Teirney, *Republicans Outnumbered in Academia, Studies Find*, N.Y. TIMES, Nov. 18, 2004, at A23.

21. *Id.*

22. Piper Fogg, *Conservative Professors are Less Likely to Advance in Academe, Study Finds*, CHRON. HIGHER EDUC. (Wash., D.C.), Mar. 31, 2005, available at <http://chronicle.com/daily/2005/03/2005033102n.htm>.

23. David Brooks, *Lonely Campus Voices*, N.Y. TIMES, Sept. 27, 2003, at A15.

24. See Am. Council of Trustees and Alumni, *Higher Ed Failing on Intellectual Diver-*

Thus, "[m]any of our campuses have become . . . islands of oppression in a sea of freedom. . . . The lack of intellectual diversity is depriving an entire generation of the kind of education they deserve."²⁵

Finally, there have been numerous anecdotal accounts of classroom encounters that left conservative students feeling isolated, embattled, demeaned, or besieged on all but the most politically homogeneous and congenial of campuses. Indeed, much of the pressure behind movements like those leading to ABOR reflects this concern. Sponsors of such legislation claim to have received a host of complaints from isolated conservative students, charging that their conservative views were unwelcome on the campus and especially in the classroom, where liberal ideologies prevailed. Such reports have been augmented by accounts of the travails of right-leaning professors—those "lonely conservatives" who were the focus of David Brook's harsh critique of faculty imbalance in the Ivy League.

Such charges have been rightly faulted in several important respects. For one, the data that sustain allegations of faculty imbalance usually reflect the most "liberal" segments of "liberal" institutions: social science and humanities professors at Ivy League universities and highly selective liberal arts colleges. If the faculties in business, medicine and engineering were added, the resulting ratios might look very different. The charges also reflect rather small samples, whether or not representative. During one of the legislative hearings on ABOR, a Pennsylvania lawmaker who supports such measures asked the University of Pittsburgh's Provost whether he was troubled by the fact that in recent campaigns, 119 members of his faculty contributed to Democrats, while only thirty-three had supported Republicans.²⁶ The Provost calmly replied that since Pittsburgh's full-time faculty exceeded 4,000, one would need a far larger sample to sustain any judgment about political tilting.²⁷

More serious than the statistical superficiality of such charges are the inferences on which they rest—chiefly that a professor who consistently supports Democrats will somehow seek to indoctrinate students with a "liberal" or left-leaning viewpoint, or that one who mainly supports Republicans will advance an opposing view. Such an assumption is sharply at variance both with experience in the academic community and with the most basic professional obligation of university scholars and

sity, INSIDE ACADEME, Fall-Winter 2005, at 3, available at http://www.goacta.org/publications/newsletters/acta_2005_fall-winter.pdf.

25. *Id.*

26. Bill Toland, *Pitt Provost: Political Bias Not a Problem*, PITTSBURGH POST-GAZETTE, Nov. 11, 2005, at B5.

27. *Id.*

teachers. Critics who claim that any imbalance in political affiliation creates a risk of classroom indoctrination have not only failed to document such a correlation with reliable data, but profoundly misunderstand the very nature of professional responsibility in the academy.

The inability to document the correlation is more than anecdotal. Several striking revelations have seriously undermined the case advanced by such critics of academic "bias." The movement for such measures as ABOR is largely the creation of David Horowitz, a one-time left-wing radical student who in the 1990s became convinced that universities and their faculties poorly served conservative students and colleagues, and that some major reform was in order.²⁸ During testimony before several legislative committees and in a flurry of campus speeches promoting his agenda, Mr. Horowitz cited two egregious examples of the intimidation and oppression of which he complained. One involved an unnamed Pennsylvania State University professor who inappropriately showed his students the Michael Moore film *Fahrenheit 9/11* during a required class period. The other horror story involved an unnamed California professor who opposed abortion and gave a pro-choice student a low grade for holding a contrary view. When Mr. Horowitz was challenged during one of the Pennsylvania House Committee hearings to document these claims, he conceded that he lacked evidence to sustain or verify these charges. No individuals have yet been named in connection with either episode. Pennsylvania lawmakers expressed concern, and warned Horowitz to use greater care in the future.²⁹

Broader claims of student abuse or mistreatment on ideological grounds have been similarly elusive. When a conservative trustee of the State University of New York (SUNY) urged adoption of a measure that would enhance diversity, an extensive survey of SUNY's sixty-four campuses revealed that no student had filed a complaint alleging political bias anywhere in the vast system.³⁰ The principal witness before the Pennsylvania House Committee's Philadelphia hearing was the president of Temple University, one of the state's largest and most diverse institutions. During his five years as president, his administration had received no student complaints of mistreatment or ideological bias, despite a well publicized procedure through which such concerns could be registered.³¹

28. Jennifer Jacobson, *What Makes David Run*, CHRON. HIGHER EDUC. (Wash., D.C.), May 6, 2005, at A9.

29. See *id.*; Jennifer Jacobson, *Conservative Activist Admits Lack of Evidence for Some Allegations of Faculty Bias*, CHRON. HIGHER EDUC. (Wash., D.C.), Jan. 20, 2006, at A33.

30. Jennifer Jacobson, *Pa. House Committee Hears More Testimony on Liberal Views of State's Professors*, CHRON. HIGHER EDUC. (Wash., D.C.), Jan. 11, 2006, <http://chronicle.com/daily/2006/01/2006011105n.htm>.

31. Patrick Kerkstra, *Hearing into Bias Falls Short of Billing*, PHILA. INQUIRER, Jan. 10,

Later in that hearing, a Temple professor who had been scheduled to testify about allegedly flagrant political bias on his campus mysteriously failed to appear.³² The one and only student who did testify that day and who lamented what he saw as a less than congenial campus climate, conceded that he had never filed a grievance through the readily accessible channel created for that purpose.

A widely celebrated claim of mistreatment of conservative faculty also turned out to contain more fiction than fact. Professor William Bradford joined the faculty of the Indiana University School of Law in Indianapolis in 2001.³³ Bradford was heralded as a decorated war veteran, an ardent patriot and an Apache Indian.³⁴ He claimed that two tenured senior colleagues had made life around the law school acutely uncomfortable for him, and during a third-year review had specifically faulted him as "uncollegial" on the basis of his manifest political views.³⁵ He also claimed his two detractors had managed to block his path to tenure despite otherwise exemplary credentials.³⁶ The case received widespread and generally sympathetic coverage, including a major article in the *Chronicle of Higher Education* and an appearance on *The O'Reilly Factor* during the summer of 2005.³⁷ Then doubts began to emerge. Journalists probed Bradford's claims, and soon discovered that he had never served on active duty, had received no medals, and had essentially fabricated the charges.³⁸ Bradford then quietly resigned from the law faculty, and the matter became moot.³⁹

About the same time, a case of genuine faculty bias produced a very different outcome. Professor Robert Natelson had been teaching at the University of Montana Law School for many years, but his request to teach constitutional law had been consistently denied.⁴⁰ Such rejection, he claimed, reflected bias against his conservative views, known widely since his Republican gubernatorial campaign.⁴¹ The law school's dean

2006, at B1.

32. *Id.*

33. Ruth Holladay, *Professor Enmeshed in Flap Over Collegiality*, INDIANAPOLIS STAR, June 26, 2005, at B1.

34. *Id.*

35. *Id.*

36. *Id.*

37. Ruth Holladay, *Truth Comes Out About Professor's Background*, INDIANAPOLIS STAR, Dec. 4, 2005, at B1.

38. *Id.*

39. *Id.*

40. Jennifer Jacobson, *U. of Montana Accepts Panel's Ruling and Appoints Conservative Professor to Teach Constitutional Law*, CHRON. HIGHER. EDUC. (Wash., D.C.), July 19, 2005, available at www.chronicle.com/daily/2005/07/2005071904n.htm.

41. *Id.*

appointed an external panel to review the charge of political discrimination.⁴² Two outside experts—law professors at Colorado and Arizona State—concluded that Natelson was indeed fully qualified to teach constitutional law, and should not be denied the opportunity for ideological or other reasons.⁴³ Montana's dean and president promptly accepted the majority recommendation.⁴⁴ Starting early in 2006, Natelson was at last able to teach constitutional law as he had fervently wished for many years.⁴⁵ The happy outcome of the Natelson case and the dismal conclusion of the Bradford saga suggest that the system is more than capable of addressing genuine claims of bias brought by conservative faculty. The differing outcomes also imply that such bias does exist in rare instances, but that such claims need to be critically assessed and not simply accepted at face value.

From such recent experience one might draw several inferences. On one hand, there is more than anecdotal evidence that liberals outnumber conservatives on many faculties, often by substantial margins. Professors on the political right may indeed feel less welcome in some departments than their left-leaning colleagues. Students, meanwhile, may also find most campuses a bit more congenial to liberals than to conservatives in and outside the classroom. Yet on the other hand, such existing data suggest that claims of "bias," "imbalance," "ideological discrimination" and the like have been sharply exaggerated and presuppose an undocumented correlation between party affiliation or personal belief and pedagogy. Meanwhile, much mischief has already been wrought on the basis of such inferences and suppositions, however tenuous their foundation may be. It is now time to examine this response and its pernicious effects more closely.

A prime example of private pressure to redress perceived "imbalance" is a group known by its website as "NoIndoctrination.org."⁴⁶ Luann Wright founded the group after her son enrolled in English courses at the University of California-San Diego, the content of which she found disturbing.⁴⁷ A former high school teacher, Wright especially objected to a syllabus that contained only race-related essays.⁴⁸ One of

42. *Id.*

43. *Id.* The group's third member, a more conservative practicing lawyer, differed from that consensus finding other flaws in the case. *Id.*

44. *Id.*

45. *Id.*

46. See NoIndoctrination.org, *supra* note 10.

47. Thomas Bartlett, *Web Site Lists Professors Who 'Indoctrinate' Students*, CHRON. HIGHER EDUC. (Wash., D.C.), Dec. 13, 2002, at A11.

48. *Id.*

those essays referred to men as "phalocrats," only one of several terms that troubled the Wrights.⁴⁹

The website contains an invitation to students to post anonymous comments about classes taught by professors whom they find biased or imbalanced. The teachers are identified by name and by course taught.⁵⁰ Students posting such critical comments are invited not only to describe the course and its content, but also to rate the instructor's degree of perceived bias as "noticeable," "objectionable," or "excessive."⁵¹ The anonymity that is guaranteed to the person posting such a critique derives from potential concern about reprisal or retaliation to which a student commentator might be subjected if he or she could be identified before final grades had been submitted. Meanwhile, accused or targeted professors are invited to respond. Several professors have done so, with their comments accompanying the initial student critique.⁵²

This website proclaims itself "a nonprofit organization promoting open inquiry in academia."⁵³ Although the sponsors claim to be neutral, virtually all the critical postings target courses and teachers deemed to be overly liberal or left-leaning.⁵⁴ The website recites as part of its credo many pertinent policies on academic freedom, notably those issues advanced by the American Association of University Professors (AAUP).⁵⁵

There have been other intrusive and worrisome forms of surveillance. Campus Watch has for several years specifically targeted professors whose views on Middle East politics are seen as hostile to the Israeli cause or overly sympathetic to Palestinian interests.⁵⁶ There are other sites that reflect no special ideological agenda, but simply invite disaffected students to vent their views about instructors whom they like or dislike. RateMyProfessors.com, for example, posts evaluations that usually reflect a small (and not necessarily representative) cross-section of

49. *Id.*

50. *See* Campus Watch, *supra* note 11.

51. NoIndoctrination.org, *supra* note 10, at http://www.noindoctrination.org/cgi-bin/add_comment.cgi (allowing students and users of the Website to report "blatant socio-political bias") (last visited Sept. 29, 2006).

52. *Id.* at <http://www.noindoctrination.org/rebuttals.shtml> (allowing course instructors to submit rebuttal postings to accusations of sociopolitical bias) (last visited Sept. 29, 2006).

53. *Id.* at <http://www.noindoctrination.org/aboutus.shtml> (outlining the purpose of NoIndoctrination.org, and stating that "[b]latant and oppressive bias . . . dishonors the teaching profession . . . [and causes] student anger, frustration and intimidation") (last visited Sept. 29, 2006).

54. *Id.* at http://www.noindoctrination.org/cgi-bin/view_listings.cgi (listing various student complaints about political bias in the classroom) (last visited Sept. 29, 2006).

55. *Id.* at <http://www.noindoctrination.org/acadf.shtml> (outlining the definition and concept of academic freedom) (last visited Sept. 29, 2006).

56. *See* Campus Watch, *supra* note 11.

mostly disparaging student comments about professors in general.⁵⁷ While promotion and tenure committees are unlikely to take such comments into account, students who seek guidance in choosing courses are somewhat less critical. Thus, when a particular professor is rated “hot” even by a handful of former students, or is lauded for being an unusually easy grader, enrollments may soar in response to a minimal and eclectic sampling of student views.

Most recently, attention shifted sharply to a maverick alumni group at UCLA, the Bruin Alumni Association, which had launched a website (UCLAprofs.com) inviting critical comments about liberal faculty and their courses.⁵⁸ Early in 2006, the group went a significant step further, offering for a brief time to pay students for gathering and reporting information about “unbalanced” classes and their teachers.⁵⁹ The group’s head, Andrew Jones, explained this mercenary approach as reflecting a “need . . . to professionalize the process,” adding that “[i]f we are going to be making accusations of professional malfeasance, then I want . . . to have real solid independent proof” of the kind that compensating student monitors might make more credible.⁶⁰

Indignation and outrage followed Jones’ announcement of a pay scale for interested student information-gatherers. The chair of the UCLA faculty senate reported that she had heard from several colleagues who were appalled by “the idea students were being enticed into being paid informants.”⁶¹ Within a few days, the pay offer was withdrawn, although the basic website continues to invite student comments about examples of bias within the UCLA faculty. The administration warned that students who reproduced detailed lecture notes and course materials, the task that would have earned the highest fee on the proposed scale, could incur civil and even criminal liability for copyright infringement. Beyond that remote risk, there seemed little the administration could do to protect professors who became the target of intemperate and possibly unfair criticism.⁶²

In the abstract, such outlets differ little from more traditional channels through which students have widely shared their views of courses

57. James D. Miller, *How to Fight RateMyProfessors.com*, INSIDE HIGHER ED, Jan. 31, 2006, <http://www.insidehighered.com/views/2006/01/31/miller>.

58. Scott Jaschik, *The New Class Monitors*, INSIDE HIGHER ED, Jan. 18, 2006, <http://www.insidehighered.com/news/2006/01/18/ucla>.

59. *Id.*

60. *Id.*

61. *Id.*

62. See Brian Thill, *An Idea Too Dangerous To Ignore*, INSIDE HIGHER ED, Jan. 23, 2006, <http://www.insidehighered.com/views/2006/01/23/thill> (discussing the negative impacts of paying students to report on professors).

and teachers—much as generations of Harvard undergraduates have done through the Crimson Confidential Guide and as decades of Berkeley students have done through the Slate Supplement. The premise of such media seems to be that the more such information is available, the sounder undergraduates' choices will be among a dizzying array of course offerings. Thus, the new and focused websites could be seen as simply a logical extension into the digital age of time-honored and widely accepted rating systems.

Such oversight of the college classroom nonetheless creates an unavoidable risk of chilling the speech not only of professors viewed as "radical" and targeted on that basis, but also of students whose views may arouse the interest of the monitoring groups. Even though promotion and tenure committees, or hiring committees at other universities, are unlikely to give such assessments any credence in making personnel judgments, the same cannot be said of students who are eager for any guidance in choosing courses. Thus, enrollments may be adversely affected, and, to the extent that a college teacher's stature reflects degree of popularity (quite apart from more immediate matters of self-esteem), the consequences may not be trivial, however unrepresentative and unscientific the samples that drive such posting might be. Thus, as Justin Pope's review of these new surveillance systems concluded, "[t]o many professors, there's a new and deeply troubling aspect to this latest chapter in the debate over academic freedom: students trying to dictate what they don't want to be taught."⁶³

Quite simply, the difficulty is finding any avenue of protection or redress for professors who suddenly find themselves the target of such criticism. Several possibilities merit at least brief consideration. One obvious protection for professors would be for them to respond to errors or exaggerations in the website profile of their courses or views. The value of simply correcting the record is exemplified by the recent experience of a University of Washington sociology professor, who had been accused by an anonymous online critic of "thoroughly indoctrinating" his students in a course on social deviance.⁶⁴ The suspect instructor was not only deeply embarrassed by such exposure, but was especially troubled that "the student so completely misunderstood what I was teaching on these topics."⁶⁵ Even a minimal opportunity for rebuttal of the sort that NoIndoctrination.org, for example, provides to its targeted faculty members, would be of some help in setting the record straight.

63. See Pope, *supra* note 10.

64. *Colleges and Universities: San Diego, California*, NEWSL. ON INTELL. FREEDOM (American Library Association, Chicago, Ill.), Jan. 2003, at 29.

65. *Id.*

There is also the remote possibility that a posting is so widely off the mark and so potentially damaging to a professor's reputation that it might invite a libel suit. Given the current state of the law of defamation, however, charges must be more than simply false and injurious to support a damage claim. Many university professors, especially those who are visible enough to invite such scrutiny, would likely be deemed "public figures" and would thus need to show "actual malice" (knowledge of falsehood or reckless disregard of the truth) before maintaining a successful libel suit. When it comes to material posted on the Internet, there is an additional and serious barrier to such redress. Unlike print publishers, who are liable for everything they disseminate, those who provide Internet access or maintain a passive website may not, under a 1996 federal statute, be held liable for even outrageous and damaging statements posted by someone else. Only the author of the offending statement can be held accountable.⁶⁶ Since most of the student critics on websites like those we have examined are anonymous, the only way a libeled professor could pursue legal redress would be by discovering the author's identity. The website proprietor will typically refuse to disclose that information, believing that anonymity is vital not only to protect a student against reprisal from an aggrieved professor, but also to sustain a steady flow of information and accusations for the website itself. Thus, the theoretical possibility of a professorial libel suit turns out to be even more remote than the defamatory postings might suppose.

The removal of such familiar options as rebuttal or legal redress for libel brings us back to the one area that concerned UCLA officials enough to warn students about the hazards of accepting Mr. Jones' generous offer to monitor classes. The top of the Bruin Alumni Association pay scale was reserved for students who were willing and able to produce "full, detailed lecture notes, all professor-distributed materials and full tape recordings of every class session."⁶⁷ Under existing copyright law, a professor's lectures are clearly protected against publication or distribution by anyone else without permission.⁶⁸ Additionally, it is equally clear that students enrolled in the course are free to take verbatim notes for their own needs, and are presumably just as free to share those notes with fellow students who missed the class for any of myriad reasons. The rub comes here because the Bruin Alumni Association's system falls somewhere between these two comfortable extremes. Mr. Jones has insisted that because any information would be gathered by students who

66. 47 U.S.C. § 230 (2000).

67. Jaschik, *supra* note 58.

68. See 17 U.S.C. § 101 (2000) (defining various protected copyrights from which protection for a professor's lecture notes have been extrapolated).

are clearly entitled to take classroom notes and any posting of those notes would serve a pedagogical purpose, UCLA lawyers incorrectly chided potential student monitors since the "materials and lecture recordings would not be sold or published in their entirety."⁶⁹

Rather, the Bruin Alumni Association's intent was to draw excerpts from the materials and to post only fragments or summaries. Such partial or limited use of someone's intellectual property arguably falls within the scope of the "fair use" doctrine which permits book reviewers or drama critics to excerpt small portions of protected material even for highly unflattering appraisals in the mass media.⁷⁰ Thus it is far from clear that any UCLA professor may either bar an enrolled student from turning detailed lecture notes over to an outside organization, or prevent that organization from posting on its website a stinging critique of the course that includes brief excerpts from the lectures—however unrepresentative those excerpts may be, and however unfair the implications of their use to appraise the instructor's views. In short, such intrusive tactics may well constitute a potentially severe threat to academic freedom without any legal remedy or recourse.

That is the conclusion embraced by the AAUP Special Committee on Academic Freedom and National Security in Times of Crisis ("the Committee").⁷¹ In its major report, filed two years after the September 11 attacks, the Committee lamented the recent proliferation of such monitoring and the ominous portent for free expression in the nation's classrooms. However, the Committee saw no solution or safeguard to such reprehensible practices. "As private entities," the Committee cautioned, such organizations as NoIndoctrination.org and campuswatch.org "are protected by the First Amendment from state censorship so long as they stay within lawful bounds. They are sheltered by the same freedom of expression that we seek for ourselves, and they are equally subject to public rebuke."⁷² The report also addressed the plight of the individual professor who is unfairly targeted by such a website. Barring the remote possibility of a libel or copyright infringement suit, "the law demands . . . a certain toughening of the mental hide; such is the price of free speech."⁷³

From this welter of options emerges little more than the Committee's suggestion of "public rebuke" as an avenue of recourse. Yet there

69. Jaschik, *supra* note 58.

70. See 17 U.S.C. § 107.

71. See Robert M. O'Neil, *Academic Freedom and National Security in Times of Crisis*, ACADEME, Nov.-Dec. 2003, at 34, 37.

72. *Id.* at 37.

73. *Id.*

has been no prospect of a “watchingcampuswatch.org” or “counterindoc-trination.org” yet visible on the web. Nor does it seem likely that, should such sites be launched, they would attract much attention within or beyond the academic community. Posting counter or refutative statements about professors who have been unfairly tagged as “radicals” or as “Palestinian sympathizers” might make a record for the truth, but would probably accomplish little else.

Recently, pressure on university faculties for a balanced college curriculum came from an ominous new source: state and federal legislation. For the first time in American history, the United States Congress and the legislatures of one third of the states gave serious consideration to bills that would essentially mandate political and ideological neutrality on the college campus.⁷⁴ Such proposals reflected the tireless efforts of David Horowitz, an advocate for correcting imbalance who had become disenchanted with his former colleagues on the left and was convinced that higher education had not only become seriously imbalanced, but that many students were subject to unacceptable indoctrination in and outside of the classroom. The evidence supporting Horowitz’s central premise was based upon the very studies we reviewed earlier that indicated political skewing among college faculties, augmented by anecdotes that aggrieved students and parents had brought to his attention.⁷⁵ However, his critique went further, focusing on individual professors who, in his view, had crossed the line to the detriment of higher education.⁷⁶

Early in 2006, Horowitz published an expose of 101 university professors who exemplified the attributes he deplored.⁷⁷ To prospective readers who might view college faculty as “harmless, antiquated hippies,” Horowitz’s publisher warned that, to the contrary, the targets of this book “spew violent anti-Americanism, preach anti-Semitism, and cheer on the killing of American soldiers and civilians—all the while collecting tax dollars and tuition fees to indoctrinate our children.”⁷⁸

The remedy for such a deplorable condition took the form of the ABOR.⁷⁹ Horowitz and his allies had already drafted legislation bearing that caption, specifically designed to restore balance and combat bias in

74. See Jacobson, *supra* note 28.

75. *Id.*

76. *Id.*

77. DAVID HOROWITZ, *THE PROFESSORS: THE 101 MOST DANGEROUS ACADEMICS IN AMERICA* (2006).

78. Regnery Publishing, Inc., *Book Details—Coming to a Campus Near You: Terrorists, Racists, and Communists—You Know Them as The Professors*, <http://www.regnery.com/books/professors.html> (last visited Sept. 21, 2006).

79. SAF: The Academic Bill of Rights (ABOR), <http://www.studentsforacademicfreedom.org/abor.html>.

the college classroom. In slightly varying forms, ABOR found its way into fifteen state legislatures between 2003 and 2006.⁸⁰ These proposals contained several distinct elements. They often began by reciting universally embraced principles of academic freedom, drawn directly from policies of the AAUP—declaring, for example, that students are entitled to not be exploited or harassed in class, and that faculty are not to be selected on the basis of party or ideology.⁸¹ Students are to be graded solely on the basis of their “reasoned answers and appropriate knowledge of the subjects” and not “on the basis of their political or religious beliefs.”⁸² Faculty members “will not use their courses for the purpose of political, ideological, religious or anti-religious indoctrination.”⁸³ The selection of outside speakers and the allocation of funds to support their campus visits, as well as other student activities, “will observe the principles of academic freedom and promote intellectual pluralism.”⁸⁴ In order to reinforce the commitment to an open campus, disruption of speakers or destruction of literature or any “other effort[s] to obstruct this exchange will not be tolerated.”⁸⁵ So far so good, it would seem, even to the most ardent champion of academic freedom.

The rub came, however, in the form of several less benign mandates. First, ABOR placed upon faculties a duty to make their students aware of viewpoints other than their own, recognizing that “academic disciplines should welcome a diversity of approaches to unsettled questions.”⁸⁶ Second, “[c]urricula and reading lists in the humanities and social sciences should reflect the uncertainty and unsettled character of all human knowledge in these areas by providing students with dissenting sources and viewpoints where appropriate.”⁸⁷ Finally, institutions of higher learning (as well as academic professional societies) “should maintain a posture of organizational neutrality with respect to the substantive disagreements that divide researchers on questions within, or outside, their fields of inquiry.”⁸⁸

When such measures first surfaced on legislative dockets, the academic community reacted with predictable anger and distress. The Horowitz proposals seemed flawed in so many respects that a critic

80. G. Jeffrey MacDonald, *Whither Academic Freedom? State Legislatures are Battleground as Divisive Issue Gains Momentum*, USA TODAY, May 18, 2005, at 9D.

81. See ABOR, *supra* note 79.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

hardly knew where to begin. Even the seemingly innocuous provisions drew sharp rebuke from champions of academic freedom. Notably, Professor Joan Wallach Scott, a historian at the Institute for Advanced Study and former chair of the AAUP's Committee on Academic Freedom and Tenure, testified before Pennsylvania's House Select Committee on Student Academic Freedom in the late fall of 2005.⁸⁹ After questioning the need for any remedial legislative action, Scott reported that she and her AAUP colleagues viewed ABOR as both a "misnomer [and] a mistake" because it "ironically infringes academic freedom in the very act of purporting to protect it."⁹⁰ Specifically, she charged that the proposed legislation "threatens to impose legislative oversight on the professional judgment of the faculty," an oversight which seemed not only unnecessary in light of self-regulatory commitment, but also "dangerous [because] it recalls the kind of government intervention in the academy practiced by totalitarian governments . . . who seek to control thought rather than permit a free marketplace of ideas."⁹¹ Scott continued her critique, stressing that when ABOR insists that "students have the same rights to academic freedom as their professors, [it] deprives teachers of the authority necessary for teaching."⁹² Scott similarly concluded her challenge to the Horowitz proposal with the assertion that when ABOR insists "that all courses and departments have 'balance' and 'diverse points of view' represented, [ABOR] would actually prevent colleges and universities from making the kinds of judgments that guarantee high quality teaching."⁹³

The AAUP's detailed critique of ABOR has also focused rather sharply on some of the more contentious of its specific language. For example, it claimed that a right of "access to a broad range of serious scholarly opinion" could be read as inviting "diversity to be measured by political standards that diverge from the academic criteria of the scholarly profession. Measured in this way, diversity can easily become contradictory to academic ends."⁹⁴ ABOR's seemingly benign guarantee of fair grading of students could, for example, so constrain professorial assessment or appraisal of student performance that "faculty could not

89. *Hearing on HR 177 Before the Pa. General Assembly's H. Select Comm. on Student Academic Freedom*, 2005 Session (Nov. 9, 2005) (Testimony of Professor Joan Wallach Scott), <http://www.aaup.org/AAUP/government/state/Academic+Bill+of+Rights-State+Level/Scotttestimony.htm> (last visited Sept. 29, 2006).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. AAUP, Summary of the Academic Bill of Rights Legislation, <http://www.aaup.org/AAUP/government/ABOR/legislationsummary.htm>.

teach at all if they were utterly denied the ability to exercise this authority."⁹⁵ Or, to take another superficially innocuous mandate—to keep controversial and unrelated matter out of the classroom—ABOR “seeks to distinguish indoctrination from appropriate pedagogy by applying principles other than relevant scholarly standards, as interpreted and applied by the academic profession.”⁹⁶

The critique of the Horowitz/ABOR proposals thus reflected two deep and profound concerns. Most basically, such legislation risked or invited a shifting of the locus of critical judgment about teaching and learning from faculties and campus academic administrators to government agencies, and possibly even courts, to a greater degree than had ever happened in the history of American higher education. The other concern was more practical; much of ABOR language, even phrases so seemingly concordant with AAUP policies, harbored grave risks of interpretation and application (especially in unsympathetic non-academic hands). Thus what might seem to many lawmakers a well-intentioned measure designed to enhance academic freedom turned out, on closer scrutiny, to pose many dangers that warranted its rejection. The debate is likely to continue for years.⁹⁷

ABOR has fared quite differently across the country. Comparable language that had been inserted in the House and Senate versions of the Congressional Higher Education Reauthorization Bill remained on the table in both bodies.⁹⁸ The Georgia legislature passed a general resolution endorsing the spirit of the bill, although in a somewhat diluted form.⁹⁹ Other states considered, but eventually killed, such measures before an actual vote could be taken. Most notably, in Ohio and Florida, public university presidents banded together to urge the defeat or suspension of such proposals.¹⁰⁰

The Florida experience contained an additional revealing twist. Florida's version of ABOR went further than that of most others, providing a statutory remedy for students aggrieved by political or ideological

95. *Id.*

96. *Id.*

97. For a broad critique, see ASS'N OF AM. COLLEGES AND UNIVERSITIES, ACADEMIC FREEDOM AND EDUCATIONAL RESPONSIBILITY (2006), available at <http://www.aacu.org/about/statements/documents/academicFreedom.pdf> (last visited Sept. 29, 2006).

98. Sara Hebel, *Patrolling Professors' Politics: Conservative Activists and Students Press Campaigns Against Perceived Bias on Campuses*, CHRON. HIGHER EDUC. (Wash., D.C.), Feb. 13, 2004, at A18.

99. Peter Schmidt, *How to Look Good In Red: As the U. of Georgia Shows, Public Colleges and Political Conservatives Can Get Along Pretty Well, Actually*, CHRON. HIGHER EDUC., June 17, 2005, at A14.

100. Kimberly Miller, *Lawmaker's Plan to Muzzle Professors Hits Snag in Senate*, PALM BEACH POST, Apr. 22, 2005, at A5.

discrimination in the classroom.¹⁰¹ The proposal's sponsor, Rep. Dennis Baxley, having obtained the endorsement of a house committee, seemed prepared to play his trump card—statements provided by a former police officer who, as a student at Florida State University, complained of a professor who allegedly told his students, "I don't give Republicans A's."¹⁰² Baxley prefaced his presentation by assuring his colleagues that any among them who doubted the campus conditions he lamented were "either very naïve or [had not] talked to the students or faculty who live through subtle and sometimes not-so-subtle persecution every day."¹⁰³ But Baxley had not anticipated the response from Florida State University's President, T. K. Wetherell, who had served earlier as the speaker of Florida's lower house. On the merits, Wetherell said he strongly doubted that such an incident ever occurred on his campus, noting that he had not "seen too many police officers around FSU who aren't willing to speak up."¹⁰⁴ He then asked for names, dates and other details.¹⁰⁵ Baxley first apologized to his former legislative colleague and then quietly conceded he could not document the incident.¹⁰⁶ Not long after that incident, a private meeting between Rep. Baxley and several leading Florida university presidents brought about the demise of the proposal.¹⁰⁷

David Horowitz, as it happened, also unwittingly contributed to the shelving of Florida's ominous version of ABOR. Testifying at an earlier committee hearing on the Baxley proposal, Horowitz cited "scores of examples" across the country in which liberal professors had allegedly belittled, demeaned or insulted conservative students.¹⁰⁸ A Miami Beach Democrat on the committee asked Horowitz for such examples from Florida institutions.¹⁰⁹ The best Horowitz could do was to note that the University of Florida had used student fees to bring Michael Moore to campus during the 2004 election.¹¹⁰ A university spokesman was ready with an answer that seemed to refute the claim of bias or imbalance. The choice of speakers had been made by the campus speaker bureau and during the same period had included New York Republican Governor George Pataki and former Bush White House Press Secretary Ari Flei-

101. *Id.*

102. David Karp, *Lawmaker Takes His Complaints to the Top*, ST. PETERSBURG TIMES (St. Petersburg, Russia), Apr. 22, 2005, at B1.

103. David Karp, *Lawmaker Aims to Halt Bias in Class*, ST. PETERSBURG TIMES (St. Petersburg, Russia), Apr. 6, 2005, at B1.

104. *Id.*

105. *See id.*

106. *Id.*

107. *Id.*

108. Karp, *supra* note 103.

109. *Id.*

110. *Id.*

sher.¹¹¹ That process seemed closely concordant with ABOR's mandate for a range of invited speakers who would "promote intellectual pluralism."¹¹²

Colorado's legislative experience with ABOR produced a slightly less happy outcome. The climate was more volatile than that of most other states where similar proposals were pending, given recent revelations of Professor Ward Churchill's post-September 11 rantings about "little Eichmanns" and the like.¹¹³ At a time when passage of ABOR seemed a genuine possibility, the presidents of Colorado's public universities concurred in a Memorandum of Understanding that committed the presidents to "review [each institution's] student rights and campus grievance procedures to ensure that political diversity is explicitly recognized and protected."¹¹⁴ Implicit in such an accord was a commitment to develop and publicize more widely official channels through which students might protest classroom harassment, intimidation or indoctrination.¹¹⁵ Since adoption of the Memorandum of Understanding, there appears to have been but one relevant incident. A Native American political science professor at Denver's Metropolitan State College was the target of grievances filed by two students—Republican activists who claimed they had been victims of a liberal classroom bias and ideological intimidation.¹¹⁶ Although Professor Oneida Meranto, a Navajo, vehemently denied the charges and noted that one of the grievants attended but a single class session, Meranto was subjected to a barrage of threatening e-mails and other messages, and felt she could not safely cross the campus without an escort.¹¹⁷ Meanwhile, the student complaints were reviewed and eventually rejected. The College's president assured Meranto that the institution "cannot and will not presume that your treatment of students reflects ideological bias or prejudice merely because you express your point of view."¹¹⁸ With an eye to ABOR controversy—David Horowitz has commented quite publicly on the case—the president

111. *Id.*

112. *Id.*

113. Kevin Mattson, *A Student Bill of Rights: The Right Takes Aim at the Ivory Tower—Brandishing a New Legislative Agenda; Rightwing Persecution of Liberals in Education*, THE NATION Apr. 4, 2005.

114. See generally, Robert M. O'Neil, *Limits of Freedom: The Ward Churchill Case*, CHANGE, Sept.-Oct. 2006, at 34–41.

115. Dave Curtin, *Three New Claims of Prof. Bias Are Heard by Panel*, DENVER POST, Sept. 10, 2004, at B1; Jennifer Jacobson, *A Liberal Professor Fights a Label*, CHRON. HIGHER EDUC. (Wash., D.C.), Nov. 26, 2004, at A8.

116. Jennifer Jacobson, *A Liberal Professor Fights a Label*, CHRON. HIGHER EDUC., Nov. 26, 2004 available at <http://www.chronicle.com/weekly/v51/i14/14a00801.htm>.

117. *Id.*

118. *Id.*

added his concern that “‘watchdogs’ for ‘political bias’ who seek to remove professors holding a point of view will inhibit the rich dialogue that must take place in the classroom and destroy expressive freedom that is essential to the search for truth.”¹¹⁹ It remains unclear how much the Meranto case may fairly be attributed to the pendency of ABOR. The Memorandum of Understanding also remains unclear, since student grievance procedures were already in place at Denver’s Metropolitan State College as at most other Colorado institutions.¹²⁰ What is beyond doubt, however, as the President of Metropolitan State College suggested, is that widespread discussion of, and publicity about, such measures has created a climate in which students who feel aggrieved by uncongenial ideologies and unwelcome classroom experiences sense an empowerment that would not have been as apparent in earlier, pre-ABOR times.

Only one legislative body has enacted any version of the ABOR. South Dakota’s lower house adopted such a proposal in the second week of February 2006.¹²¹ Although somewhat milder than versions that had been introduced in other states, the South Dakota act would require the state’s public colleges and universities to file an annual report “detailing the steps [it] is taking to ensure intellectual diversity and the free exchange of ideas.”¹²² The bill defines “intellectual diversity” as “the foundation of a learning environment that exposes students to a variety of political, ideological and other perspectives.”¹²³ The bill concluded with an enumeration of steps that institutions “may,” but need not, take in the course of their analysis—notably “includ[ing] intellectual diversity concerns in the institution’s guidelines on teaching” and “includ[ing] intellectual diversity issues in student course evaluations.”¹²⁴ South Dakota colleges and universities might also choose to “create an institutional ombudsman on intellectual diversity.”¹²⁵ Although passage of this bill was not preceded by lengthy hearings of the kind that have occurred in other states, the sponsors’ citation of national studies of faculty political affiliations and alleged classroom bias left little doubt of a close kinship between South Dakota’s reporting requirement and the more traditional or familiar ABOR mandates. Eventually, South Dakota’s Senate killed this proposal, thus ending the brief life of what may well have

119. *Id.*

120. *Id.*

121. Scott Jaschik, *Intellectual Diversity or Political Repackaging?* INSIDE HIGHER EDUC., Feb. 9, 2006, <http://www.insidehighered.com/news/2006/02/09/dakota>.

122. *Id.*

123. H.R. Res. 1222 Leg. 81st Sess. (S.D. 2006)

124. *Id.*

125. *Id.*

been the most ominous of the recent legislative threats to academic freedom.¹²⁶

The recent events in South Dakota raise the most difficult academic freedom issue: would some version of ABOR passed by South Dakota or another state be vulnerable to a credible academic-freedom-based court challenge once it was on the books? The superficial response would be that a law which simply declares a legislative preference or priority—especially when much of that declaration is consonant with established precepts of academic freedom—would be immune from such a challenge. Surely, if state lawmakers simply enacted the AAUP's 1940 statement or other policies protecting academic freedom and free expression, no legal recourse could be contemplated. By the same token, those portions of ABOR that merely invoke or recite AAUP principles should be beyond challenge in the courts. Indeed, even those ABOR provisions that have been harshly criticized by academic freedom champions—the mandates for "plurality" and "diversity" and "reflecting the uncertainty and unsettled character" of the humanities and social sciences—may be disagreeable and unwelcome to most academics, but seem to be little more than an expression of legislators' hopes that a broader range of views may find their way onto the nation's campuses. To that extent, the case for invulnerability has much to commend it.

The major proponent of a less benign view is Georgetown University Law Professor J. Peter Byrne, a longtime and close observer of the debate on academic freedom. His own writings reflect an objectivity on such matters that has caused advocates on both sides of academic freedom debates to embrace his views. However, he vigorously rejects the "merely declarative" view of ABOR. "Enactment of ABOR," he insists, "would immediately violate [constitutional academic freedom] on its face."¹²⁷ Professor Byrne reaches that conclusion for several reasons. He cites as a fundamental flaw of such legislation its blatant premise that "faculties have no obligation to be viewpoint neutral . . . regarding substantive disputes within their disciplines."¹²⁸ While neutrality may be constitutionally obligatory when it comes to institutional allocation of student activity fees, the same is hardly true for professors; "university faculties need not and, perhaps, should not be [neutral]."¹²⁹

126. Sara Hebel, *South Dakota Senate Kills Bill Requiring Annual Reports on Intellectual Diversity at Colleges*, CHRON. HIGHER EDUC., Feb. 27, 2006, available at <http://chronicle.com/daily/2006/02/2006022702n.htm>.

127. J. Peter Byrne, *Constitutional Academic Freedom After Grutter: Getting Real About the "Four Freedoms" of a University*, 77 U. COLO. L. REV. 929, 945 (2006).

128. *Id.* at 947.

129. *Id.*

Professor Byrne cites several ways in which such bias-targeting measures seem to him clearly violative of free expression. First, he notes, ABOR directly regulates two core university freedoms, "determining on academic grounds who may teach and what may be taught."¹³⁰ Second, Byrne adds, "[ABOR] represents a political effort to change the content of teaching and scholarship within existing fields," citing the Supreme Court's *Sweezy* decision¹³¹ for the view that such legislation "constitutes a 'governmental intervention in the intellectual life of the university.'"¹³² Third, Professor Byrne accurately observes that "courts have shown little patience with political measures that exert indirect influence over teaching and scholarship," citing especially the eagerness with which federal judges have dispatched (on First Amendment grounds) every campus speech code that has been challenged in court.¹³³ Finally, Professor Byrne argues that ABOR legislation seeks to displace faculty governance peer review by encouraging new regulatory bodies to oversee faculty functions.¹³⁴

These claims are surely compelling, advanced by one who has successfully fashioned and applied such sensitive interests in academic freedom scholarship and litigation.¹³⁵ Yet the conclusion to which this analysis leads, appealing though it is to professorial interests, may not be inexorable. In fact, with all deference, the contrary view that pending ABOR measures would be legally invulnerable seems sounder, if obviously less congenial.

Any analysis of this perplexing issue must recognize that lawmakers often declare or express their views—even through formal legislation—in ways that are beyond constitutional challenge. If a law contains no sanctions, and thus cannot be directly enforced against a citizen, however abhorrent the underlying sentiment may be, it will usually withstand legal challenge. Two exceptions should be noted at this point. On one hand, legislative endorsement or validation of religious views that might well violate the Establishment Clause's required separation of church and state, and on the other hand, legislative encouragement or validation of racial, gender or other forms of discrimination, where lawmakers may be viewed as part of a governmental threat to constitutionally guaranteed equality. Apart from these two special situations, legislators are broadly

130. *Id.* at 946.

131. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

132. Byrne, *supra* note 127, at 946.

133. *Id.* at 947.

134. *Id.* at 948-49.

135. *Id.*

free to declare their views in a non-coercive form, subject to recourse at the ballot box but not in the courtroom.

In the broader range of situations, mere legislative statement of a preference does not directly implicate constitutional rights to the degree necessary to sustain a legal challenge. For example, a public college or university in an ABOR state that fires, refuses to hire or declines to promote an individual faculty member and invokes the relevant ABOR provision in so doing, may surely be challenged in court. Few principles are more central to academic freedom than the unacceptability of political or ideological reasons for personnel judgments. As one court of appeals made unmistakably clear in the 1980s, "an official of a state university may not restrict speech or association, even by subtle or indirect coercion or refusal to hire, simply because the official finds the views expressed by any group to be abhorrent."¹³⁶ Thus, the victim of such bias surely would prevail in court.

The basis for the legal challenge, however, would be the institution's adverse action. Relevant provisions of ABOR would bear, at most, a remote relationship to that action. Surely the university's president or chancellor could hardly avoid liability for such an unconstitutional judgment by claiming that "ABOR made me do it." Even where the basis for an adverse action probably would not have triggered official reprisal or constraint until ABOR language suggested it—for example, charging a professor with "intruding unrelated controversial material into the classroom"—it is that action itself which would be legally vulnerable, not the abstract ABOR language that may have suggested such action. Hence the dilemma which seems to place ABOR beyond legal challenge is that an adverse personnel action, curricular revision, restriction of library or other materials, or other sanction that abridges academic freedom is legally vulnerable (or not) on its own merits, almost without regard to the catalytic or inspirational role the legislative language may have played.

It might now be useful to revisit Professor Byrne's reasons for reaching a strikingly different conclusion. He argues, quite cogently, that ABOR directly regulates two core university freedoms, specifically deciding on academic grounds "who shall teach and what shall be taught."¹³⁷ If a university chooses to conform its hiring or curricular judgments to please lawmakers by conforming more closely to ABOR precepts, it is far from clear that any "regulating" has occurred, at least at the state level. Much the same can be said of Professor Byrne's second

136. *Ollman v. Toll*, 518 F.Supp. 1196, 1203 (1981), *aff'd*, 704 F.2d 139 (4th Cir. 1983).

137. Byrne, *supra* note 127, at 946.

critique, that ABOR "represents a political effort to change the content of teaching and scholarship."¹³⁸ So the reality of implementing ABOR based legislation would seem to be, but far short of the "governmental intervention in the intellectual life of the university" which is Professor Byrne's talisman. And while he rightly notes the disdain that federal judges have shown for "regulatory mechanisms, such as peer review, designed to keep universities directed toward education and scholarship," the cases in which restrictive speech codes (most notably) have been struck down on First Amendment grounds all contained evidence of specific sanctions or penalties that were not only on the books, but the enforcement of which had actually been threatened.¹³⁹ Take away the sanctions, and federal judges might still have "little patience" with such measures, but they would be hard pressed to find sufficient evidence of demonstrated "injury" on which a constitutional decree must be grounded.

The last of Professor Byrne's cited concerns is subtler, that ABOR seeks to displace faculty governance peer review by encouraging new regulatory bodies to oversee faculty functions.¹⁴⁰ Mounting a constitutional challenge on that basis would be correspondingly harder, if not impossible. Courts have been far less sensitive to governmentally mandated shifts in governance than to restriction of individual or even collective expression in cruder forms.¹⁴¹ Thus, it is far from clear whether ABOR would be unconstitutional even if it did directly, of its own force, displace existing governance systems. When the most that can be said is that such legislation "seeks to displace" or encourages "institutional displacement of traditional governance," we are some distance from having a conclusive First Amendment or academic freedom claim that would prevail in court.

There is a subtler theory that Professor Byrne did not press, though it is quite consistent with his views. Could it be said that ABOR—even the serious consideration of such measures, let alone their adoption—so chills the climate for free speech and academic freedom that it could be challenged on that basis even without any sanctions or potential for direct application? It is true that courts have occasionally responded favorably to such claims—notably, in barring undercover police officers from spying on UCLA classes,¹⁴² professors and students, and in mandating destruction of the rogue Ohio grand jury report whose publication

138. *Id.*

139. *Id.* at 949.

140. *Id.* at 948–49.

141. *Id.* at 949.

142. *White v. Davis*, 533 P.2d 222 (Cal. 1975).

so frightened Kent State University faculty members that they eschewed controversy in their classes.¹⁴³ It is barely possible that a useful analogy could be drawn between such experiences and the enactment of an ABOR, especially if the predictable institutional conformity actually did take place. The theory on which such a claim might rest would be slightly different from those Professor Byrne describes. Indeed, the premise of such a challenge to ABOR would be that sanctions (concededly not present in the legislation) are simply not essential to a free speech claim. Not only is actual enforcement not vital for such a claim; even the possibility of direct enforcement by state government need not be shown. The actionable threat would simply inhere in the changed climate created by governmental endorsement of views and values so alien to free inquiry and expression that their mere legislative declaration threatens academic freedom. Should it be shown, in addition, that substantial numbers of recruited faculty have declined offers to join institutions in that state, so much the better. Suffice it to say that such a challenge would be far from easy or obvious. At this stage, however, it seems to offer the only likely basis for a successful constitutional indictment of ABOR and its progeny.

Finally, suppose an institution perceives a state of imbalance in a particular academic unit, and wishes—entirely on its own—to redress that condition. It would be naïve to deny that such conditions ever exist on the typical university campus, or to suggest that a quest for greater balance is *per se* unacceptable. Indeed, a widely shared commitment to provide students a broad array of views, and to pursue scholarly inquiry from diverse perspectives, would counsel occasional attention to imbalance within schools and departments. The critical issue is not whether steps may be taken to redress apparent imbalance, but rather who should initiate those steps and what steps are consistent with academic freedom.

At the outset, it is perfectly clear what an institution concerned about imbalance may not do. To base a faculty hiring or promotion decision on ideology or political affiliation is of course impermissible, both in terms of policy and (for public universities) constitutional law as well. In the late 1970s, the University of Maryland was charged with refusing to appoint Marxist Bertel Ollman to a department chair because of his widely expressed views.¹⁴⁴ The administration insisted that its refusal to appoint Ollman had nothing to do with his ideology, but reflected a negative assessment of his qualifications and experience.¹⁴⁵ The federal

143. *Hammond v. Brown*, 323 F. Supp. 326 (N.D. Ohio 1971).

144. *Ollman v. Toll*, 518 F. Supp. 1196 (D. Md. 1981), *aff'd*, 704 F.2d 139 (4th Cir. 1983).

145. *Id.*

courts, to which Ollman took his constitutional claim, eventually sided with the university and dismissed the suit.¹⁴⁶ While accepting the administration's non-ideological basis for Ollman's rejection, the federal judge reaffirmed the standard that must govern such a case: "No more direct assault on academic freedom can be imagined than for school authorities to refuse to hire a teacher because of his or her political, philosophical or ideological beliefs."¹⁴⁷

The appeals court affirmed, but added its equally strong conviction that ideology may play no role in academic personnel judgments.¹⁴⁸ That court also took favorable note of a recent case decided by an Arkansas federal judge, who had overturned a nonrenewal of a "professor with leftist political opinions" after finding that "the university was swayed by public controversy over the professor's employment."¹⁴⁹ Thus, any such consideration of ideology in the faculty personnel process offers the clearest example of what universities may not do to redress perceived imbalance.

The same may not be said, however, of official statements of condemnation. If a president, chancellor, provost or dean becomes concerned about the seeming bias of an academic unit, no principle of academic freedom precludes public expression of such concern. Much as university officials have felt free to express their disapproval of faculty outbursts in the post-September 11 era, their ability to speak out with regard to the condition of an entire school or department should not be seen as an attack on the academic freedom of members of that unit—unless, of course, the official statement contains an implied threat resembling CCNY President Harleston's ill-fated declaration that those views simply "have no place here at City College."¹⁵⁰ Merely expressing official disapproval, perhaps accompanied by a declared hope for greater balance in the future, does not by itself cross the line. Such a public indictment of an academic unit's collective ideology is likely to evoke much faculty anxiety and even indignation, but such concerns are political, not constitutional.

There must be other and better ways in which a university that seeks to redress imbalance may proceed. Perhaps most obvious is formal investigation. Despite occasional claims that such an official probe may threaten academic freedom, the process of inquiry is central to scholar-

146. *Id.*

147. *Id.*

148. *Id.*

149. *Cooper v. Ross*, 472 F. Supp. 802 (E.D. Ark. 1979).

150. Joseph Berger, *Professor's Theories on Race Stir Turmoil at City College* N.Y. TIMES, Apr. 20, 1990, at B1.

ship. It is what the academic community does best, and the academic community should most especially not resist bringing such a process to bear upon its own most troubling tensions. Thus, when Columbia University was beset by student complaints of bias and mistreatment in the Department of Middle East Languages and Culture, the chief academic officer appointed a prestigious faculty panel to conduct an intensive investigation.¹⁵¹ After exhaustive inquiry including interviews with all relevant students and professors, the panel issued a report in late March, 2005.¹⁵² Central to the committee's analysis was a rejection of charges of anti-Semitism within the troubled department.¹⁵³ Although the panel did note one instance in which a faculty member had "exceeded commonly accepted bounds" in his dealings with an Israeli student, the broader charges of bias that had triggered the inquiry were not substantiated.¹⁵⁴ The consensus predictably drew criticism from both sides: from pro-Israeli groups charging that the inquiry had failed to fault certain statements they found troubling in and outside class, and from pro-Palestinians critical of the negative assessment of one faculty member's conduct.¹⁵⁵ Columbia's President, Lee Bollinger, promptly endorsed the report and accepted its conclusions, which included closer attention to student grievance procedures, the advisory system, and the establishment of "a common, central university site to which students, faculty and administrators could turn to express concerns, though not necessarily grievances, about the quality of their experience at Columbia."¹⁵⁶

Another quite different incident reinforces the immense value of careful investigation. About a week after the September 11 attacks, Orange Coast Community College instructor Kenneth Hearlson was charged by several of his students of having pointed to Muslims in his classroom, and shouting at them "you drove two planes into the World Trade Center; you killed five thousand people."¹⁵⁷ He was also reported to have called his Muslim students "terrorists," "murderers" and "Nazis."¹⁵⁸ Resisting demands for immediate dismissal, the college administration asked a local attorney to undertake an exhaustive inquiry into the

151. Jennifer Jacobson, *Columbia U. Report Criticizes Professor's Classroom Conduct but Finds No Pattern of Anti-Semitism*, CHRON. HIGHER EDUC., April 1, 2005 available at <http://www.chronicle.com/daily/2005/04/2005040104n.htm>.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. Robin Wilson and Scott Smallwood, *One Professor Cleared, Another Disciplined Over September 11 Remarks*, CHRON. HIGHER EDUC., Jan. 11, 2002, available at <http://www.chronicle.com/weekly/v48/i18/18a01202.htm>.

158. *Id.*

incident, while Hearlson was placed on leave for the balance of the semester.¹⁵⁹ By December, the investigation was complete.¹⁶⁰ The attorney concluded that on the basis of all the evidence she reviewed, Hearlson had never made the inflammatory statements that were attributed to him.¹⁶¹ Rather, on the day in question, the instructor led a heated discussion of the hijacking and the attacks, during which provocative and troubling questions were raised. Hearlson, in short, may have been less than fully sensitive to his Muslim students—and on that basis the college did issue a formal letter of reprimand, while reinstating him in his teaching position.¹⁶² The Hearlson inquiry offers a classic example of the potential value to academic freedom of intensive inquiry, even under conditions where those who are the subject or target of such inquiry might well prefer a lower profile.

Beyond investigation, several other options may avail the university that wishes to achieve greater balance. There should be no doubt that a university administration may approve faculty hiring in areas of critical need without abridging anyone's academic freedom. If an economics department has just lost (or never had) a critical mass of quantitative economists, or a psychology department is seriously understaffed in clinical specialties, few would doubt that the administration may target such needs or deficiencies in future faculty hiring. Ideology and politics play no role in such a judgment about core academic and scholarly qualifications. Thus, a dean or provost may simply refuse to authorize faculty recruitment until and unless it addresses the critical needs.

When "balance" enters the equation, the analysis is more difficult, though similar principles should apply. Taking the case of Middle Eastern Studies, a department that has no expert on Israel, or on the Palestinian state, may be limited to recruiting a scholar who would remedy that deficiency. But suppose among the existing cadre of experts on Israel, there is no Zionist. And suppose there is intense student, alumni, and community pressure to add an avowed Zionist. In that situation, the answer should depend on the way in which a Zionist perspective enters the equation. The critical difference should be between seeking a scholar whose expertise includes Zionism (whatever may be his or her personal views on that volatile issue), and seeking someone who has publicly expressed a Zionist viewpoint (which may or may not be consistent with that person's academic expertise). Both quests might be seen as directed toward "balance," but they are fundamentally different in terms central to

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

academic freedom. A focus on expertise is entirely appropriate, even though it may indirectly serve the viewpoint goal—that is, one whose academic competence includes Zionism may well turn out to be an advocate for that viewpoint. But there is no guarantee of such concordance, as there would be when advocacy or viewpoint is the desiderata. This distinction is critical, if subtle. We may seek to achieve “balance” in the former sense, emphasizing expertise, while we may not focus on viewpoint or advocacy as the goal.

Academic leadership offers another promising avenue of potential redress. Surely an appropriate step in addressing an “imbalanced” unit would be to seek as dean or department chair a person with demonstrated skill in building consensus and, most especially, in bringing about balance in discussion of contentious issues. The institution might even view favorably a candidate’s past success in achieving, through academically acceptable means, the very type of balance that is seen as seriously lacking. Conversely, it would abridge no one’s academic freedom to pass over an otherwise qualified candidate whose record evidenced an absence of such skills, or even worse, a propensity for condoning division and discord. To seek to achieve or maintain balance by entrusting leadership to a person with a proven ability to build harmony and trust seems wholly appropriate. There remains the far more difficult question—whether an incumbent dean or department chair could be removed for having consistently failed to redress a manifestly imbalanced condition within the unit for which he or she was responsible. Obviously the dean’s or chair’s own views or ideology could not be made the occasion for such intervention, though a thorough assessment of unsuccessful efforts to improve balance through faculty recruitment and retention may be. Removing one who had tried and failed at achieving better balance seems a drastic solution, but not necessarily beyond consideration.

In future evaluations of administrative performance, it might also be permissible to take into account (and reward) efforts to achieve balance and success in meeting those goals, so long as the means used to do so are acceptable. Since institutions regularly assess and recognize success in achieving racial, gender and ethnic diversity in faculty recruitment and retention, adding “balance” of this type to the equation seems not to distort the process. Care need be taken both in stating such a criterion, and in the way in which its achievement is measured through annual and longer-term assessments. However, these are details of a type that should not deter the process.

But let us suppose that such means as we have reviewed here simply do not achieve the desired balance. Indeed, conditions may well deteriorate, as the “balancing” members of a department may become discour-

aged and depart, leaving only those whose dominant role created the initial problem. The administration might be tempted simply to abolish the department and start over. That would involve the termination of tenured faculty positions, a process that might initially seem inconceivable. Surprisingly, however, the AAUP policy does permit so drastic a step under carefully constrained conditions. Tenured faculty positions may be terminated as part of the "bona fide formal discontinuance of a program or department of instruction;"¹⁶³ understandably, several stringent conditions apply. The judgment must be based "essentially upon educational considerations," as determined by a faculty body.¹⁶⁴ The driving force may not include "cyclical or temporary variations in enrollment," but must reflect "long-range judgments that the educational mission of the institution as a whole will be enhanced by the discontinuance."¹⁶⁵ The AAUP policy also contains elaborate provisions to protect individual members of a discontinued department, including efforts to provide alternative employment at the institution or elsewhere.

The question whether acute "imbalance" might warrant discontinuance of a distressed department seems never to have been tested. Such drastic actions are extremely rare. The exception may be the de facto dismantling of a department, as with the Department of Demography at the University of California-Berkeley which was officially eliminated—little more than deleting a non-functional budget heading—after the last faculty member assigned to that department had resigned and one other readily accepted reassignment to a cognate field in which he held a joint appointment. Discontinuance may also result from a merger of two institutions that results in severe and unproductive redundancy, as when the merger of Case Institute and Western Reserve University left two very similar departments of architecture; the undergraduate unit was discontinued with AAUP approval, and as many as possible of its faculty (though not all) were transferred to the surviving graduate program. At the least, where "imbalance" is the catalyst for proposed discontinuance, an especially rigorous faculty review of such an administrative initiative is necessary. The possibility seems at least worth discussing, in extremis, though with appropriate cautions and safeguards.

If the imbalanced department may not be discontinued, could an institution with vast resources essentially bypass that department by creat-

163. AAUP, *Recommended Institutional Regulations on Academic Freedom and Tenure* at 4(d), available at http://oaa.depaul.edu/_content/what/documents/RcommendedInstitutionalRegulationsAcademicdoTenure.pdf#search=%22Recommended%20Institutional%20Regulations%20on%20Academic%20Freedom%20and%20Tenure%22.

164. *Id.*

165. *Id.*

ing a wholly new unit to cover the same subject matter—though with a far better balance among its founding faculty? Specifically, could the faculty of the superseded unit claim that such competition abridged their academic freedom? The cost of such a drastic solution readily explains the absence of any case studies by which to assess its impact. Yet a university's judgment to create an arguably parallel unit would be difficult to condemn when a university enjoys sufficient authority over the general contours of the curriculum, even if the effect of such action might be to drain away many of the students who would normally have enrolled in course taught by the "imbalanced" unit's faculty. Creating inter-departmental competition, especially in order to enhance students' options and choices, is not inherently unacceptable, though it does invite close scrutiny, and (even apart from the forbidding cost of such action) may be suspect as a remedy for perceived imbalance.

Several other measures with curricular implications seem more congenial to academic values. A concerned administration could, for example, create and support a few new faculty positions that crossed departmental lines, specifically targeting the better "balanced" side of an unbalanced academic unit. At an even lower level of commitment, the administration might create a few campus-wide visiting faculty positions, with an eye to recruiting scholars whose expertise would offset the leaning of the imbalanced unit. Although some existing academic unit would be needed to provide a home for such visitors, as well as for the interdisciplinary appointees, there should be willing sponsors ready to take advantage of such an opportunity. Thus, to return to Middle East Studies, if the core department simply refuses to hire anyone with expertise on Zionism, presumably a home for such a person could be found in such units as history, political science, or religious studies. Surely no academic unit "owns" a discipline so completely that it may not only refuse to meet a need within its own ranks, but may also block remedial action by a sister department. The institution's commitment to offer a range and variety of subjects and courses surely transcends the "turf" claims of a recalcitrant department, regardless of balance or bias.

There may well be other ways by which a university could seek to redress curricular imbalance that it perceives and wishes to change. The approaches suggested here are more illustrative than definitive. The central concern is that whatever is done in this sensitive area must reflect the academic judgment of the institution and its faculty, not the dictates of a state legislature or other governmental body, or pressure from a private organization of alumni or others; any other approach ill serves the interests of academic freedom.

