

The Academic Bill of Rights: Imposing a Political Litmus Test on Academic Freedom

Introduction

The publicity of Colorado Professor Ward Churchill's remarks on the victims of the 9/11 attacks has raised concerns about the nature of higher education in colleges across America. Professor Churchill's comments along with the release of data purporting to show that liberals greatly outnumber conservatives in faculty positions in universities have fueled legislation collectively known as the "Academic Bill of Rights."¹ The goal of the Academic Bill of Rights is to require universities to maintain political pluralism and diversity and to prevent college professors from indoctrinating students.² At the heart of the Academic Bill of Rights is a concern for protecting academic freedom, specifically the academic freedom of college students.³ Yet, despite its good intentions, the bill will restrict the exercise of the very fundamental right it is purporting to protect. The Academic Bill of Rights will impose a political litmus test on academic freedom by measuring it using political standards, rather than competent pedagogical criteria. If there is a problem, the First Amendment itself should provide a guide, not further legislation that will substantially entangle both the government and the courts in an effort to control academic freedom.

Why the Academic Bill of Rights infringes academic freedom

Academic freedom is a special concern of the First Amendment.⁴ As with all free speech rights, the best way to protect academic freedom is to keep governmental intrusion at a minimum. The Academic Bill of Rights restricts academic freedom by imposing significant

¹ *American Association of University Professors Statement on the Academic Bill of Rights*, at 34-35, col. 1.

² *E.g. Florida Senate Bill 2126, An Act Relating to Student and Faculty Academic Freedom in Postsecondary Education*, at 34, col. 1; *See also* David Horowitz, *Why an Academic Bill of Rights is Necessary*, at 47, col. 1 (quoting Ohio Senate Bill 24).

³ *Florida Senate Bill 2126*, at 34, col. 1.

⁴ *Keyishian v. Board of Regents of the University of the State of New York*, at 3, col. 1.

constraints on both universities and professors. One goal of the Academic Bill of Rights is to promote a diversity of views and perspectives among university faculty. The American Association of University Professors (AAUP) has labeled this the “principle of neutrality.”⁵ However, looking at the drafting and purpose of the proposed legislation, the Academic Bill of Rights primarily contemplates one kind of diversity—political diversity. For example, Florida’s version of the Academic Bill of Rights states: “intellectual independence means the protection of students as well as faculty from the imposition of any orthodoxy of a political or ideological nature.”⁶ Although the Florida bill does not direct colleges to enact guidelines implementing the principle of neutrality, other versions of the Academic Bill of Rights have contemplated such a policy.⁷ The Academic Bill of Rights will impose pressure on university officials to question faculty on issues not directly related to their academic credentials or pedagogical methods.⁸ Subsequently, a university will be required, or at the very least pressured, into hiring professors that represent not just a healthy plurality of credible academic views, but also different views on political and other ideological issues.

In *Keyishian v. Board of Regents of the University of the State of New York*, the Supreme Court struck the down a program that required faculty members to declare they were not associated with the communist party.⁹ Although the *Keyishian* case presented a reverse concern, namely the use of a program to restrict political views, the spirit of the decision is nonetheless applicable to an assessment of the Academic Bill of Rights. The Court noted, “The Nation’s future depends upon leaders trained through a wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of

⁵ *American Association of University Professors*, at 35, col. 1.

⁶ *Florida Senate Bill 2126*, at 34, col. 1.

⁷ *American Association of University Professors*, at 35, col. 1.

⁸ *See Id.*

⁹ *Keyishian*, at 2, col. 2.

authoritative selection.”¹⁰ The Academic Bill of Rights, like the New York program, is a system that would monitor and control the hiring process of faculty by some form of authoritative selection.

The legislative or judicial oversight contemplated by Academic Bill of Rights reveals the insurmountable paradox inherent in the bill. Supporters of the Bill of Rights insist that the only way to protect a “multitude of tongues” is through some sort of monitoring. Consequently, the Academic Bill of Rights dictates to universities that they must be cognizant of the political and ideological views of their faculty. Yet, any sort of monitoring or oversight is antithetical to the very principle of academic freedom. The Academic Bill of Rights cannot prevent “orthodoxy” while imposing a diversity requirement on universities. In the end, the principle of neutrality contemplated by the Academic Bill of Rights is merely a disguised form of orthodoxy; it establishes a political litmus test that will restrict the freedom of universities to hire teachers. In fact, the language of the Florida bill, for example, is completely contradictory. That legislation states that academic freedom is best protected by preventing “interference by legislators.”¹¹ Yet, the Academic Bill of Rights is clearly an effort by *legislators* to *interfere* with academic freedom.

Although the legislation is silent on the issue, it must be assumed that the courts will ultimately be the arbitrators of the neutrality requirement. In other words, the bill will give professors and even students an avenue to seek redress in the courts if they believe faculty members do not represent the proper balance of ideological and political viewpoints. Thus, the courts will be forced to determine which academic views are credible and, by definition, which views would necessarily foster greater “diversity.” If passed, the Academic Bill of Rights would

¹⁰ *Id.* at 3, col. 1.

¹¹ *Florida Senate Bill 2126*, at 34, col. 1.

hinder the ability of a university to choose and promote faculty based upon professional standards of the academic community. Ultimately, academic freedom would no longer be *free*; it would be tethered down by legislative oversight and judicial rulings.

The Academic Bill of Rights also seeks to protect students from indoctrination. The AAUP has labeled this the ‘indoctrination principle.’¹² The indoctrination principle means that professors should not use the classroom as a means to preach any political or ideological philosophy that does not serve a pedagogical purpose. David Horowitz, the architect of the Academic Bill of Rights, notes that indoctrination occurs on both sides of the political spectrum.¹³ While no one argues that professors are infallible, there is no indication that improper indoctrination of students by professors pervades America’s universities. Even if the problem is widespread, the Academic Bill of Rights is not a narrowly-tailored remedy. Therefore, with respect to academic freedom and the First Amendment, the bill is a dangerous means for attempting to protect students from indoctrination.

The Academic Bill of Rights, as a solution for protecting students from indoctrination, will stifle academic freedom. The legislation raises two crucial concerns. First, by being overly vague, the Academic Bill of Rights threatens First Amendment protections. The Academic Bill of Rights fails to provide any standards for what constitutes indoctrination. The Florida version, for instance, states that students have a right not to be taught by a professor who “persistently introduce[s] controversial matter into the classroom.”¹⁴ The Florida proposal and others also speak vaguely about “indoctrination” without providing any substance to the term.¹⁵ In *Keyishian*, the Court proclaimed: “standards of permissible statutory vagueness are strict in the

¹² *American Association of University Professors*, at 35, col. 2.

¹³ Horowitz, at 46, col. 2.

¹⁴ *Florida Senate Bill 2126*, at 34, col. 1.

¹⁵ *Id.*

area of free expression . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”¹⁶ By merely regulating “controversial material” and preventing “indoctrination,” the Academic Bill of Rights does not even come close to the constitutional standard of a narrowly-tailored regulation; it does not inform teachers or the university what is being proscribed.¹⁷

Ultimately, even if the drafters of the Academic Bill of Rights could formulate a narrowly-defined statute, the legislation would still conflict with the principles of the First Amendment and academic freedom. Any attempt to define what constitutes “controversial” material, for instance, would necessarily involve the silencing of some speech in the classroom. And, as John Stuart Mill declared more than a hundred years ago, “All silencing of discussion is an assumption of infallibility.”¹⁸ It would be a precarious enterprise to allow the government, instead of the professoriate, to define academic standards. The Supreme Court has also avowed: “To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation.”¹⁹ The evaluation of academic standards and academic freedoms belongs, as much as possible, to universities and their professors.

The second problem is that the Academic Bill of Rights “seeks to distinguish indoctrination from appropriate pedagogy by applying principles other than relevant scholarly standards.”²⁰ In other words, the legislation attempts to give students a right to almost any viewpoint in the classroom, and by the same token, it protects them from any viewpoint in

¹⁶ *Keyishian*, at 3, col. 1-2.

¹⁷ *See Id.* at 3, col. 2.

¹⁸ John Stuart Mill, “Liberty of Thought and Discussion,” *On Liberty*, at 47, col. 2. *See also* Michael A. Olivas, *Reflections on Professional Academic Freedom: Second Thoughts on the Third “Essential Freedom”*, at 71, col. 1, stating “The search for truth requires that scholars receive the protection of academic freedom in posing new, controversial, or unpopular ideas in their teaching and research.”

¹⁹ *Keyishian*, at 3, col. 1 (quoting *Sweezy v. New Hampshire*).

²⁰ *American Association of University Professors*, at 35, col. 2.

classroom.²¹ “If students possessed such rights,” according to the AAUP, “all knowledge would be reduced to opinion, and education would be rendered superfluous.”²² The Academic Bill of Rights will strip faculty from making judgments on the academic work of students. It will take such evaluative judgments from the hands of university professors and give it to university administrators, or worse yet, the courts. It runs against the grain of the entire academic enterprise to give the courts the power to determine what is and what is not academic knowledge. Such skepticism of the academic profession presents a credible risk to the integrity of our educational system. The threat of such oversight would deprive professors of the authority necessary for teaching.²³

Why the First Amendment is the proper guardian of academic freedom

The Academic Bill of Rights is redundant and unnecessary because the First Amendment itself provides the best protection for academic freedom. The First Amendment does not tolerate viewpoint discrimination or any system that effectively suppresses valid free speech. Therefore, enforcement of the First Amendment should protect all facets of academic freedom contemplated by the Academic Bill of Rights.

The principle of neutrality is already protected by the First Amendment. The First Amendment obviously does not require ideological or political diversity among a university’s faculty. However, the First Amendment does prevent a public university from discriminating against teachers based solely upon the views they express. For example, the Court declared in *Keyishian* that discriminating against faculty members who refused to sign a certificate stating they were not communist was unconstitutional.²⁴ Supporters of the Academic Bill of Rights

²¹ *Id.* at 35-36, col. 1.

²² *Id.* at 36, col. 1.

²³ *Id.* at 36, col. 2.

²⁴ *Keyishian*, at 2, col. 1.

seem to suggest that some viewpoints are intentionally excluded from college campuses. The Florida proposal states: “no political or ideological orthodoxy should be imposed on professors and researchers through the hiring, tenure, or termination process or through any other administrative means.”²⁵ Yet, such protections against discrimination should already be guaranteed by the First Amendment. In other words, it is already unconstitutional for a university to discriminate against faculty because of their political views. As such, the First Amendment also protects Professor Ward Churchill from declaring that the victims of the 9/11 terrorist attacks were “little Eichmanns.” Aside from some variations in the language of the bills, the main purpose of the Academic Bill of Rights is not to guard against discrimination, but to guarantee a broad range of viewpoints in colleges. In the end, the idea of “diversity” is merely an euphemism; the Academic Bill of Rights has the dangerous goal of trying to inject certain political views into classroom.

The First Amendment also shields students from unjust indoctrination by preventing them from being discriminated against because of their viewpoints. While academic freedom requires giving a great latitude to professors to determine what are proper viewpoint-based assertions, the principle of academic freedom also protects students. The AAUP has agreed that professors can violate the indoctrination principle. According to the AAUP, faculty would violate the indoctrination principle if they were “to evaluate their students in ways not justified by the scholarly and ethical standards of the profession.”²⁶ Yet, it must be the responsibility of universities and colleges themselves to protect students who have been unfairly evaluated, or discriminated against, by their teachers. Proponents of the Academic Bill of Rights contend that

²⁵ *Florida Senate Bill 2126*, at 34, col. 1.

²⁶ *American Association of University Professors*, at 35, col. 1.

universities will rarely dismiss faculty for their teaching methods.²⁷ Yet, the courts have upheld decisions by colleges to terminate teachers due to concerns for their teaching methods. For instance, in *Hetrick v. Martin*, the court held that a university may discharge a teacher because of “displeasure with her ‘pedagogical attitudes.’”²⁸ Faculty who violate professional standards should be punished by university administrators. Even admitting that some professors have deviated from proper educational and professional standards, the Academic Bill of Rights is not the answer to providing students redress for such violations of *their* academic freedom.

Conclusion

The Academic Bill of Rights, by applying a political litmus test to the principles of neutrality and indoctrination, will distort and hinder academic freedom. The Supreme Court cautioned in *Sweezy v. New Hampshire*: “Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”²⁹ The Academic Bill of Rights robs teachers, and therefore students, of this freedom. For the sake of the future of higher education, we can only hope that the Academic Bill of Rights will not gain the support needed to actually become law.

²⁷ Horowitz, at 46, col. 1.

²⁸ *Hetrick v. Matrtin*, at 2, col. 1.

²⁹ *Keyishian*, at 3, col. 1 (quoting *Sweezy v. New Hampshire*).