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To: Regents of the University of Colorado

From: Patrick O'Rourke

Re: Intersection of Articles 1, 5, and 7 of the *Laws of the Regents* and associated policies – Free Speech and Academic Freedom

Date: May 18, 2018

Contents

I. Introduction

In the upcoming weeks, the Governance Committee and then the Board of Regents will consider revisions to Articles 1, 5, and 7 of the *Laws of the Regents* and the associated policies. Because these articles and policies address the related concepts of freedom of expression and academic freedom, I have prepared this memorandum discussing the interplay between them and the principles underlying them. I also discuss how these revisions relate to other *Laws of the Regents* and associated policies.

II. Context

Before discussing the articles and policies, I will detail the tensions in higher education around freedom of expression. These tensions frame the discussion, as students, faculty, and administrators identify differing priorities.

Traditionally, institutions of higher education identify academic freedom and freedom of expression as the fundamental principles undergirding the academic enterprise. Without academic freedom and freedom of expression, the faculty could not challenge existing social and scientific tenets, thus impeding the university's mission of advancing knowledge. Within this framework, freedom of expression and academic freedom allow members of the university community to express viewpoints that many would consider unorthodox, insulting, or offensive.

At the same time, this generation of university students places a premium on creating an inclusive and non-threatening learning environment. When campus speech is threatening to them or the groups with whom they identify, many students support restrictions upon speech. Across the country, students have attempted to preclude from campus invited guests whose viewpoints they oppose. In recent years, colleges and universities outside of the University of Colorado system cancelled events because they feared protests or experienced events that protestors disrupted.

Recent studies support that students view freedom of expression differently than university administrators and faculty.[1] In particular, today's students have a strong inclination to protect others from hateful or intolerant speech. In a nationwide study of more than 3000 students, many responded they believe that a diverse and inclusive society is more important than a society that protects free speech, with female, African American, and Democrat students favoring diversity and inclusion by a significant margin.

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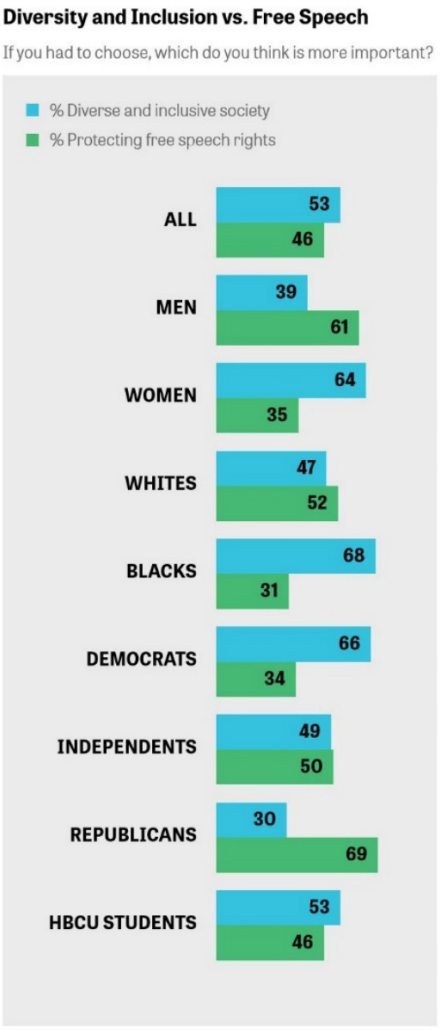
[1] In the following pages, I draw primarily from three studies:

The American Council on Education's survey *Free Speech and Campus Inclusion: A Survey of College Presidents* (2018). This was a survey of 471 college and university presidents. 78 percent of those college and university presidents lead four-year institutions. Of those, 40 percent were public institutions.

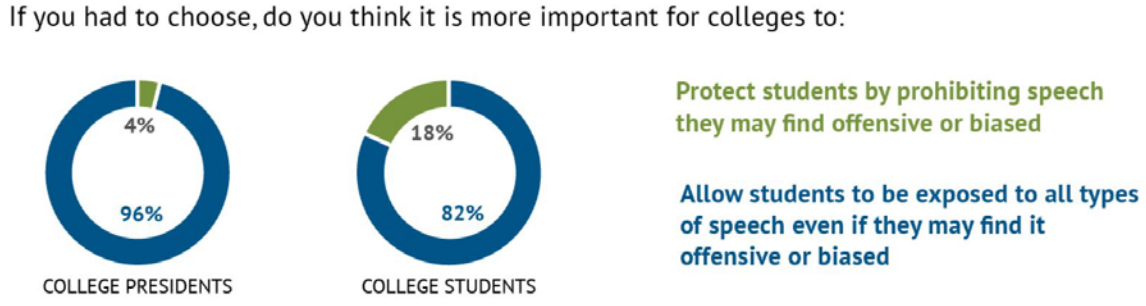
The Gallup/Knight Foundation's survey *Free Expression on Campus: What College Students Think About First Amendment Issues* (2018). The respondents were 3,014 full-time students at 39 different four-year colleges and universities across the United States. Twenty-five of the institutions were public institutions. Ten of the institutions had enrollments of more than 10,000 students. Six institutions were in the East, twelve in the Midwest, fifteen in the South, and six in the West. The students drew from many ethnic, religion, socioeconomic, and political backgrounds.

The Foundation for Individual Rights in Education's survey *Speaking Freely: What Students Think About Expression at American Colleges* (2017). The respondents were 1,250 students at two and four-year educational institutions across the United States.

While I have drawn most extensively from the American Council on Education survey to demonstrate the differences between university presidents and students, faculty responses closely parallel those of university presidents. A recent survey of almost 900 faculty from public and private four-year institutions showed that 93 percent agreed with the statement: "[U]niversity life requires that people with diverse viewpoints and perspectives encounter each other in an environment where they feel free to speak up and challenge each other." In the same survey, the majority of faculty favored an "open" environment supportive of freedom of expression over a "positive" environment. Samuel J. Abrams, *Professors Support Free Speech,* The American Interest (2018).

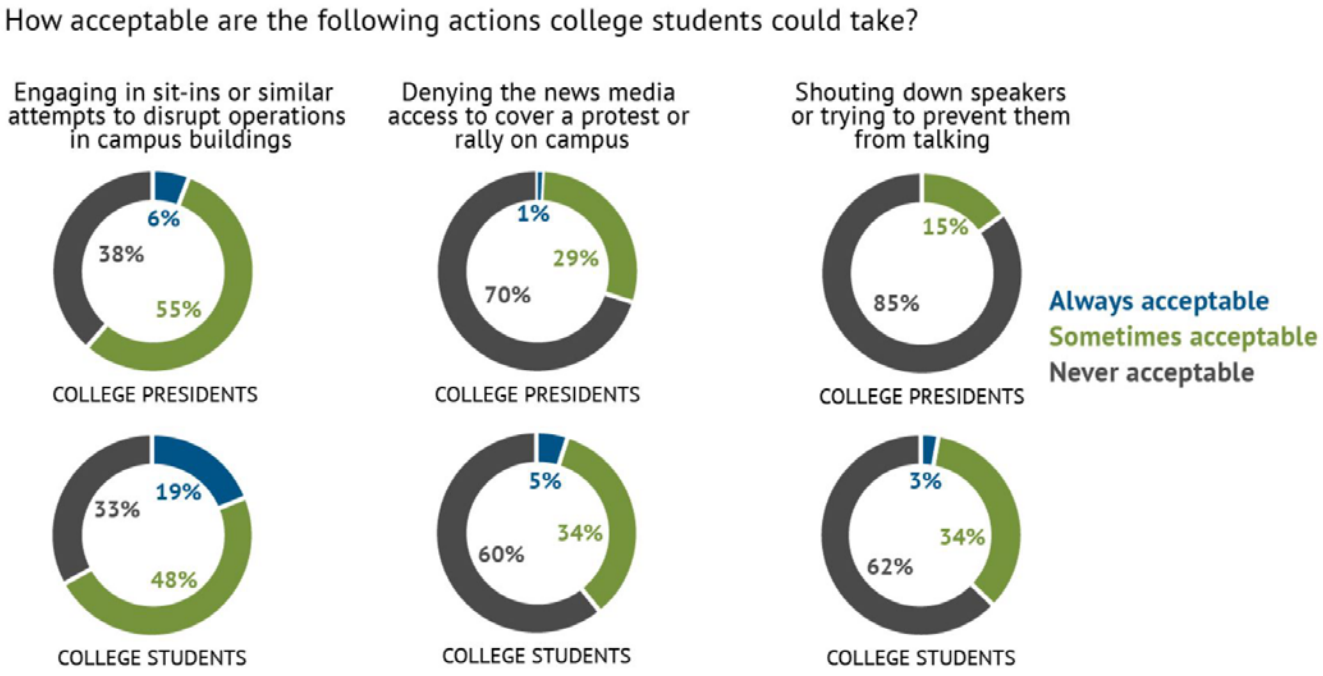


Because of this preference, it's not surprising that a significant number of students believe that colleges should limit speech they find offensive or biased, but not many university presidents share this preference.



Sources: *Pulse Point Presidential Survey on Campus Inclusion and Free Speech*, American Council on Education, 2018; *Knight Foundation-Gallup Survey on Free Expression on Campus: What College Students Think About First Amendment Issues*, 2018.

These different views lead to significant disparities in how students and college presidents view tactics that students use to protest speech, with students being far more willing to shout down speakers or otherwise trying to prevent them from speaking.



Sources: *Pulse Point Presidential Survey on Campus Inclusion and Free Speech*, American Council on Education, 2018; *Knight Foundation-Gallup Survey on Free Expression on Campus: What College Students Think About First Amendment Issues*, 2018.

Although external speakers and protests against them generate much of the controversy, they are not the sole point of tension, and issues arise about whether institutions should restrict the speech of those within the university community. Many students are willing to support restrictions on individual speech, even when the speech goes beyond slurs and is identified as political speech.

Student Support for Campus Restrictions on Forms of Expression

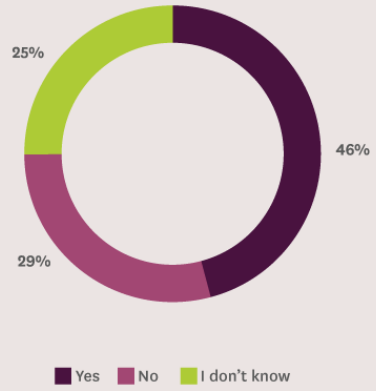
Figures are the percentages who say colleges should be able to restrict that form of expression

	SLURS	STEREOTYPICAL COSTUMES	POLITICAL SPEECH
All	73	60	30
Men	68	52	24
Women	78	66	34
Whites	74	61	28
Blacks	82	72	46
Democrats	80	67	34
Independents	71	58	28
Republicans	61	47	23
HBCU students	73	64	37

This willingness to restrict speech is particularly prevalent when the speech is characterized as “hate speech,” with many students responding that they either do not believe or do not know whether the First Amendment protects hate speech.

Figure 4. Student knowledge of hate-speech protection

Does the First Amendment to the Constitution protect hate speech?



Beyond the question of knowing whether the First Amendment actually protects hate speech, many students do not believe the First Amendment should protect hate speech.

Most Students Do Not Think Hate Speech Should Be Protected by First Amendment

Do you think hate speech is a form of expression that should or should not be protected by the First Amendment?

	% YES, SHOULD PROTECT	% NO, SHOULD NOT PROTECT
All	35	64
Men	43	56
Women	29	71
Whites	36	64
Blacks	29	71
Democrats	25	75
Independents	40	59
Republicans	47	52
HBCU students	42	58

Ultimately, these controversies reflect a broader polarization of speech in society that the prevalence of social media exacerbates. Interestingly, most students indicate they discuss political and social ideas more often through social media than in the classroom or other campus face-to-face interactions.

College Student Views of Where Discussion of Political or Social Ideas Takes Place

Where do you think most expression and discussion of political or social ideas among students at your college takes places these days — [(responses rotated:) face-to-face on campus in classrooms and public areas (or) online through social media]?

	% FACE-TO-FACE ON CAMPUS	% ONLINE THROUGH SOCIAL MEDIA
All	43	57
Men	44	55
Women	42	58
Whites	44	56
Blacks	39	59
Democrats	41	58
Independents	44	55
Republicans	43	57
HBCU students	44	56

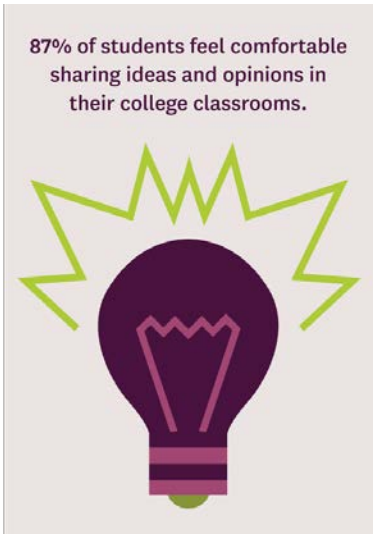
Perhaps because social media is not face-to-face and fails to provide the opportunity for a meaningful dialogue, students identify those interactions as lacking civility.

College Students' Opinions of Effects of Social Media on Expression

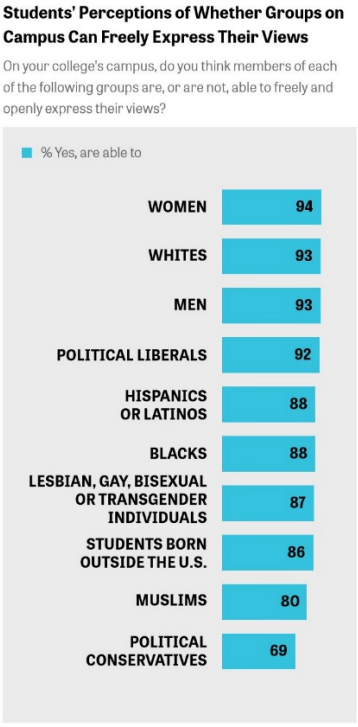
Thinking generally about how people interact on social media, do you strongly agree, somewhat agree, somewhat disagree or strongly disagree with each of the following statements.

	% STRONGLY AGREE/AGREE	% STRONGLY DISAGREE/ DISAGREE
THE DIALOGUE THAT OCCURS ON SOCIAL MEDIA IS USUALLY CIVIL		
All	37	63
Men	36	64
Women	38	62
Whites	36	64
Blacks	39	61
Democrats	35	65
Independents	37	63
Republicans	43	57
HBCU students	45	55

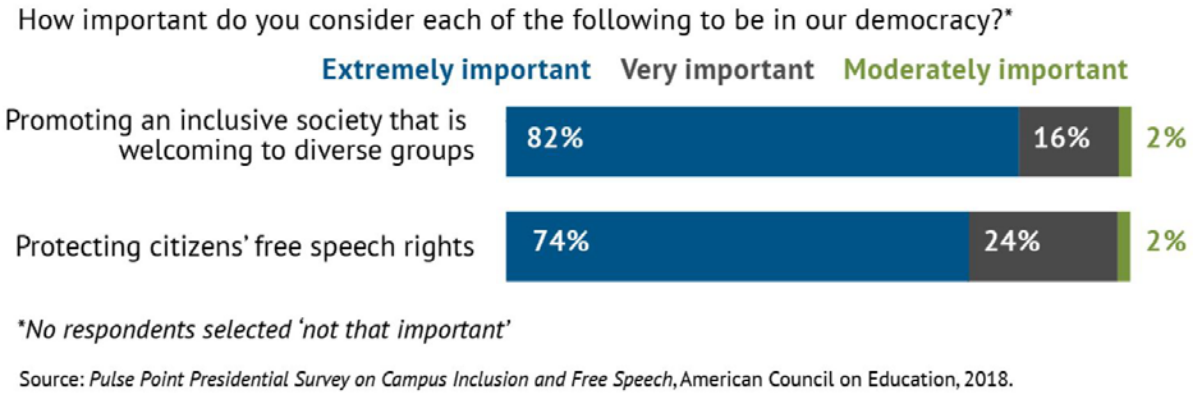
In contrast to the social media environment, where students identify a marked lack of civility, a substantial majority of students in the FIRE study reported that they felt comfortable sharing ideas and opinions in the classroom.



While the overall student response about the classroom environment is encouraging, the Gallup/Knight Foundation survey lends itself to the conclusion that not all students are equally able to express their viewpoints freely across campus. Notably, this question did not ask whether those who self-identify in each category are able to express their views, but instead asked all the respondents whether members of the following groups are able to freely and openly express their views.



Only with this background, which identifies the tensions and challenges in the current environment, can I turn to the question of how the law operates and explain the principles that underlie the revisions to Articles 1, 5, and 7 of the *Laws of the Regents* and the associated policies. In doing so, keep in mind that supporting freedom of expression and supporting an inclusive environment are not mutually exclusive. To the contrary, the overwhelming majority of university presidents believe that both are important in a democratic society.



III. The Law

I now turn to the legal principles that provide a framework for how universities, particularly public universities, address freedom of expression and academic freedom. The law constrains some of the responses that universities might otherwise undertake to promote inclusive learning environments but permits others.

In this discussion, I will address the following areas in sequence:

- Who is subject to the First Amendment?
- What speech does the First Amendment protect?
- How does free speech occur on a university campus?
- What free speech rights do employees possess?
- What academic freedom rights do faculty possess?
- What academic freedom rights do students possess?

In discussing these topics, I am summarizing the legal principles described in cases. Most of these cases come from the United States Supreme Court. I have relied upon federal courts or the Colorado Supreme Court for guidance in areas where the United States Supreme Court has not yet resolved an issue.[2]

In some areas, I supplement legal discussion with policy documents that the American Association of University Professors publishes. These demonstrate prevailing academic norms and are published in American Association of University Professors, Policy Documents and Reports (11th Ed. 2015)

A. Who is Subject to the First Amendment?

The First Amendment to the United States Constitution creates legal protection of free speech. It states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[3]

By its plain language, the First Amendment applies only to Congress, but the states' ratification of the Fourteenth Amendment after the Civil War made free speech rights effective against the states and other governmental entities. Consequently, public universities must comply with the First Amendment. Unless they have created free speech protections through their own policies or the legislature of their state requires them to, private universities do not have to respect free speech rights.

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[2] The legal citation tells you the court that made a legal decision. For example, the "U.S." in the citation *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) tells you that the United States Supreme Court decided the case in 1954. The "10th Cir." in the case *Schrier v. Univ. of Colo.*, 427 F.3d 1253 (10th Cir. 2005) tells you that the Tenth Circuit Court of Appeals decided the case in 2005. The "Colo." In *Churchill v. The University of Colorado at Boulder*, 285 P.2d 986 (Colo. 2012) tells you that the Colorado Supreme Court decided the case in 2012.

[3] Colorado's State Constitution contains a provision that provides for freedom of speech. Article II, Section 10 states, "No law shall be passed to impair the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty . . ." The Colorado Supreme Court held that Article II, Section 10 protects more speech than the First Amendment, but nonetheless adopts the United States Supreme Court's framework for determining whether the constitution permits restrictions upon speech occurring on public property. *Denver Pub. Co. v. City of Aurora*, 896 P.2d 306, 309 (Colo. 1995). For purposes of this memorandum, I will use the term "First Amendment" to refer to the constitutional protections for speech under both state and federal law.

B. What Speech Does the First Amendment Protect?

i. What is a Matter of Public Concern?

The First Amendment itself does not specify what constitutes "speech." It may seem contradictory, but "speech" also includes non-spoken activities. "The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech." *Virginia v. Black*, 538 U.S. 343, 358 (2003).

When considering whether the First Amendment protects speech, courts will first examine the character of the communication. Matters of "public concern" receive the greatest constitutional protection. Speech involves matters of public concern "when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Lane v. Franks*, 134 S. Ct. 2369, 2380 (2014) (internal quotations and citations omitted). The First Amendment protects some speech that sells a product or service, but commercial speech doesn't receive as much protection as speech on matters of public concern. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770-71 (1976).

In contrast to matters of public concern, the First Amendment does not protect certain modes of speech or expression, including true threats, fighting words, incitements to imminent lawless action, true harassment, and lewd and obscene speech. *Cohen v California*, 403 U.S. 15, 21 (1971); *Watts v United States*, 394 U.S. 705, 708 (1969); *Chaplinsky v New Hampshire*, 315 U.S. 568, 570-71 (1942), *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651 (1999);*Planned Parenthood v Am. Coalition of Life Activists*, 290 F 3d 1058, 1070 (9th Cir. 2002).

ii. What About Hate Speech?

No agreed-upon definition of "hate speech" exists, but one legal commentator has defined it as: "The use of words which are deliberately abusive and/or insulting and/or threatening and/or demeaning directed at members of vulnerable minorities, calculated to stir up hatred against them." Jeremy Waldron, The Harm in Hate Speech 8-9 (2012).

Most often, when people wish to restrict hate speech, they justify the restriction on the grounds that hate speech constitutes unlawful "fighting words." This concept stems from *Chaplinski v. New Hampshire,* which held that the First Amendment does not protect those words that, by their very utterance inflict injury or tend to incite an immediate breach of the peace. *Chaplinsky,* 315 U.S. at 570 .

Chaplinski was the high-water mark of the opinions that restrict offensive speech. While the court has not expressly overruled it, later decisions narrow its scope. In the seventy years since *Chaplinski*, the court has not upheld a single fighting words conviction and appears to have since recognized that "allowing speech to be censored or punished because it causes an immediate emotional reaction gives the government an unlimited power to restrict expression." Erwin Chemerinsky and Howard Gillman, Free Speech on Campus (pp. 91-92), Yale University Press (2017).

Instead, *Brandenburg v. Ohio*, 395 U.S. 444 (1969) considered a Ku Klux Klan leader's racially hostile statements, "including bury all n***gers," and rejected the argument that his statement fell outside of the First Amendment. The justices explained that the First Amendment does not "permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting imminent lawless action and is likely to incite or produce such action." *Brandenburg*, 395 U.S. at 447-48. This high standard precludes the government from prohibiting speech unless it will incite imminent physical violence.

Cohen v. California, 403 U.S. 15 (1971) further limited the fighting words doctrine when it overturned a man's conviction for wearing a jacket with lettering stating "F**k the Draft" in the courthouse. While acknowledging these words are offensive and may provoke strong reactions, *Cohen* reasoned that the message was targeted at a general audience, not a particular individual. Recognizing that offensive speech targeted towards the community may result in "verbal tumult, discord, and even offensive utterance," the justices nonetheless determined that these are the "necessary side effects of the broader enduring values which the process of open debate permits us to achieve." *Cohen*, 403 U.S. at 21.

RAV v. City of St. Paul, 505 U.S. 377 (1992) further extended the First Amendment's protections to a case where a gang burned a cross in the front yard of an African-American family. The Supreme Court found that government cannot prohibit "hate speech" because of its content. It can only prohibit speech when it is accompanied by other efforts to produce imminent violence or otherwise violate the law. So the government could prosecute the gang members for arson, but it could not prosecute them because a burning cross is a hateful message. RAV, 505 U.S. at 386.

And most recently *Snyder v. Phelps*, 562 U.S. 443 (2011) upheld the First Amendment rights of the Westboro Baptist Church, whose members engage in vitriolic speech against homosexuals at military funerals. The First Amendment protects deplorable speech whenever it can "be fairly considered as relating to any matter of political, social, or other concern to the community" or when it addresses "a subject of general interest and of value and concern to public." *Snyder*, 562 U.S. at 453. An idea "cannot be restricted simply because it is upsetting or arouses contempt. . . If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Snyder*, 562 U.S. at 458. Indeed, "the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Snyder*, 562 U.S. at 458.

iii. Can Universities Pass Speech Codes?

Notwithstanding the broad constitutional protections for offensive and hateful speech, several hundred universities adopted speech codes in the 1990s and 2000s that prohibited hate speech. "[A] number of these were challenged in court, and all to be challenged were declared unconstitutional." *Chemerinsky, Free Speech on Campus* (Page 96).

For example, after the University of Wisconsin passed a code prohibiting "racist or discriminatory comments, epithets or other expressive behavior [that] . . . demean the race, sex, religion, color, creed, disability, national origin, ancestry or age of the individual or individuals," the courts declared the code unconstitutional. Not only does the First Amendment protects demeaning speech, attempting to ban offensive speech has the pernicious effect of limiting the diversity of ideas among students and thereby "prevent[s] the robust exchange of ideas which intellectually diverse campuses provide." *The UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1176 (E.D. Wis. 1991) (internal quotations and citations omitted).

Because offensive speech is often protected, a legitimate question exists about whether universities may prohibit speech that amounts to harassment. The constitution does not protect truly harassing speech, but proving harassment is much harder than many in higher education would anticipate. The statements must be "so severe, pervasive, and objectively offensive" and "so undermine[] and detract[] from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651 (1999). The University of Colorado's policies prohibit harassment that meets this stringent standard.

Offensive speech directed towards a broad audience, much like the offensive jacket in *Cohen,* rather speech directed towards a particular individual or limited group of individuals, will rarely have the ability to "effectively den[y] equal access to an institution's resources or opportunities." Consequently, a campus cannot prohibit a speaker whose views are offensive to large members of the student body on the grounds that speech is harassing.

None of this detracts from the fact that hateful speech inflicts real harm on those exposed to it. One law professor explained, "Victims of vicious hate propaganda experience psychological symptoms and emotional distress. . . ." Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story,* Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment (Page 24) Westview Press (1993). As such, the question exists as to what universities can do in response to speech that harms members of its community.

iv. How Can Universities Respond to Hate Speech?

University officials must not censor disagreeable speech, but nothing requires them to remain silent in the face of speech inconsistent with the university's mission or values. When a university speaks, "it is entitled to say what it wishes" and "it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995). A university can communicate its values, its expectation that members of the university community will engage in reasoned discourse, and its commitment that people of all protected characteristics are welcome to learn, study, teach, and work on its campuses. The First Amendment anticipates that the "the dynamics of free speech, of counterspeech, of refutation" can nullify or mitigate the effects of harmful or false speech. *United States v. Alvarez*, 567 U.S. 709, 726 (2012).

Similarly, the university should not characterize the entire campus, particularly the outside or common areas, as "safe spaces." In these public areas, members of the university may be exposed to speech that offends them. Not all portions of the campus, however, are public spaces, and universities can create offices that support populations of students and counseling centers to mitigate the effects of emotionally damaging events. The classroom is also not a traditional public forum, and faculty can promote respectful academic discourse.

As a result, in approaching the revisions to the *Laws of the Regents* and the associated policies, hate speech jurisprudence sets the boundaries of what the university can do to limit freedom of expression, but it does not prevent members of the university community either from encouraging civil discourse and condemning those who engage in harmful speech.

C. How Does Free Speech Occur on a University Campus?

Turning from the question of which speech the constitution protects, I will now discuss how the law applies to events on a university campus. For this discussion, I am not discussing speech within the course of a faculty member's employment. Nor am I discussing student speech in the classroom. Instead, I am discussing the legal parameters governing events on campus.

i. Is All Public Property Treated Identically Under the First Amendment?

The first step in First Amendment analysis is defining when speech receives constitutional protection, but the next step is equally important. The government can regulate speech in some instances, and the courts first examine the nature of the forum where the speech occurs to determine whether regulations are permissible.

The degree of scrutiny courts place on a government's restraint of speech is largely governed by the kind of forum the government is attempting to regulate. The differences in scrutiny exist because "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981).

Thus, "[t]he Government, like any private landowner, may preserve the property under its control for the use to which it is lawfully dedicated." *Sentinel Commc'ns Co. v. Watts*, 936 F.2d 1189, 1201 (11th Cir. 1991). It is equally clear, however, that state-funded universities are government property, "not enclaves immune from the sweep of the First Amendment." *Healy v. James*, 408 U.S. 169, 180 (1972).

The United States Supreme Court has broadly discerned three distinct categories of government property for First Amendment purposes: (1) traditional public fora; (2) designated public fora; (3) and limited public fora. *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009)

ii. Are Universities Public Fora Open to Everyone?

Traditional public fora are areas like streets and parks that, since "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Courts generally do not consider universities, even in their outdoor spaces, as traditional public fora because they are not dedicated spaces for the general public.

Instead, because universities exist for the specific purpose of providing education, “a university differs in specific respects from public forums such as streets or parks or even municipal streets.” *Widmar v. Vincent*, 454 U.S. 263, 267, n.5 (1981). Because a university’s mission is educational, courts “have never denied a university’s authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities.” *Widmar*, 454 U.S. at 267, n.5.

The law does not require universities to open their campuses for speech by members of the general public, as “the First Amendment does not guarantee access to property just because it is owned by the government.” *Bloedorn v. Grube*, 631 F.3d 1218, 1230 (11th Cir. 2011). Except in a traditional public forum, the government may “make distinction in access on the basis of speaker identity.” *Bloedorn*, 631 F.3d at 1231. Thus, a public entity may exclude anyone who is “not a member of the class of speakers for whose especial benefit the forum was created.” *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.,* 473 U.S. 788, 806 (1985).

iii. Can Universities Restrict the Use of Their Property?

If the touchpoint for university rules that restrict the use of its property is reasonableness, the first challenge a university will face is explaining why it needs to restrict the time, place, or manner of someone’s expression. Most often, universities rely upon an interest in preventing disruption of educational activities or its mission. The courts usually find that the university’s interest in preventing disruption is legitimate.

Since *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 514 (1969), educators may prevent activities that create a "substantial disruption of or material interference with school activities." And universities may create their rules based upon reasonable expectations of what will be disruptive, even if disruptive events have not yet occurred. *Lowery v. Euverard*, 497 F.3d 584, 592 (6th Cir. 2007).

Permitting and scheduling requirements are among the measures that courts permit because they allow universities to "coordinate multiple uses of limited space, assure preservation of the campus, prevent uses that are dangerous to students and other people, and to assure financial accountability for damage." *Bowman v. White*, 444 F.3d 967, 980 (8th Cir. 2006).

University officials must administer scheduling and permitting requirements, including security fees, using objective criteria. One city's permitting and fee schedule failed constitutional scrutiny because "it simply cannot be said that [the schedule provides] any narrowly drawn, reasonable and definite standards. . . The decision how much to charge for police protection or administrative time -- or even whether to charge at all -- is left to the whim of the administrator." Ultimately, a permitting and fee schedule cannot survive if "nothing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees." *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 133(1992).

iv. What is Viewpoint Neutrality?

While government officials and government agencies can express their own views, the courts normally disapprove when government officials restrict another person's speech because it disapproves the speaker's message. "[I]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). Stated another way, a university must abstain from regulating speech when the speaker's ideology or perspective caused the restriction. *Rosenberger v. Rector & Visitors of the Univ. of Va*., 515 U.S. 819, 829-29 (1995).

Consequently, public officials must apply any requirements equally and without considering the substance of the speech. "Once the government has chosen to permit discussion of certain subject matters, it may not then silence speakers who address those subject matters from a particular perspective. *Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 972 (9th Cir. 2008). If a university official denies a person permission to speak, he must be able to demonstrate the denial is grounded in some reason that would be applied to other speakers and that did not consider the words being expressed.

v. What About Senate Bill 62?

The legal principles described above provide the constitutional framework for freedom of expression on campus, but Colorado's General Assembly can create greater protections than what the constitution requires. In 2017, Colorado's General Assembly passed Senate Bill 62, which was codified as *Colo. Rev. Stat. 23-5-144*.

This statute recognizes a "statewide interest [in] protect[ing] the rights of students to exercise their freedom of speech on the campuses of public institutions of higher education," while at the same time "recognizing the right of those institutions of higher education to enact reasonable time, place, and manner restrictions that preserve their ability to fulfill their educational missions." *Colo. Rev. Stat. 23-5-144(1)(a)*.

The statute makes clear that speech on campuses is not limited to "free speech zones" and allows students to engage in expressive activities in any "generally accessible, open, outdoor area" or any "nonacademic and publicly open portion of a facility that the the institution of higher education has traditionally made available to students for expressive purposes." *Colo. Rev. Stat. 23-5-144(4).* When a student is engaged in speech in these fora, an institution "may not subject[] a student to disciplinary action resulting from his or her expression, because of the content or viewpoint of the expression, or because of the reaction or opposition by listeners or observers to such expression." *Colo. Rev. Stat. 23-5-144(3)(a).* Notably, however, the statute does not grant anyone the ability to disrupt previously reserved activities. *Colo. Rev. Stat. 23-5-144(3)(b).*

Nor does the statute prohibit universities from requiring organizers to schedule events, pay facility or security fees, or comply with other requirements, so long as those requirements are reasonable, justified without reference to the content of the speech, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of the information or message. *Colo. Rev. Stat. 23-5-144(5)(a-d)*.

vi. What's a Heckler's Veto?

Sometimes we are asked whether a security fee is reasonable when the need for security is not to protect the speaker or the campus from those who wish to hear the speaker's message, but instead arises because others are protesting. Canceling an event because of the protestors' disruption is commonly known as a "heckler's veto."

The courts err on the side of permitting speech when municipalities argue that protests pose a safety risk. "[A] municipality's legitimate concern for public safety does not automatically justify a refusal to permit a controversial group to present its ideas in public. . . A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Nationalist Movement v. City of Bos.*, 12 F. Supp. 2d 182, 191-92 (D. Mass. 1998). Most of the "heckler's veto" cases arise outside of the educational context.

Some emerging case law indicates that the heckler's veto line of cases do not apply in the educational setting and that a school may cancel an event where a speaker presence disrupts the educational environment, even when the disruption is cause by protestors.

Dariano v. Morgan Hill Unified Sch. Dist., 767 F.3d 764, 778-79 (9th Cir. 2014) distinguished "heckler's veto" cases against municipalities from cases where schools precluded speakers to avoid disruption of the educational environment. "[W]here speech for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others, school officials may limit the speech." 767 F.3d at 778. *Dariano* found no difference between the "substantial disruption caused by the speaker and substantial disruption caused by the reactions of onlookers or a combination of circumstances." *Dariano*, 767 F.3d at 778. In other words, the courts look to the effect of the speech, which is disruption, not who is to blame for the disruption.

Dariano's reasoning aligns with a case in which students were denied permission to engage in expressive activity because of the actions of other students. The students who wished to engage in expressive conduct observed that the disruption occurred "only because of the wrongful behavior of third parties" and argued that their speech should not be burdened by others' conduct. *Taylor v. Roswell Indep. Sch. Dist*., 713 F.3d 25, 38 (10th Cir. 2013). But the courts disagreed, "This argument might be effective outside the school context, but it ignores the special characteristics of the school environment." Taylor, 713 F.3d at 38. No cases hold that "school officials' ability to limit disruptive expression depends on the blameworthiness of the speaker." *Taylor*, 713 F.3d at 38 n. 11.

These cases suggest that universities can lawfully deny speaker's access to campus when the speech poses a disruption to the campus, even if the disruption is caused by protestors. Any such cancellations should be rare, but campuses may act, in light of true threats or disruption, to preserve the educational environment.

Dariano and *Taylor* cases provide the most fleshed out application of the heckler's veto doctrine in the educational setting, but there are some other cases that have held that cancelling an event might violate the First Amendment, especially where "providing a security presence would have been a less restrictive means of ensuring student safety." *Rock for Life-UMBC v. Hrabowski*, 411 F. App'x 541, 552-53 (4th Cir. 2010). What *Rock for Life* and other cases do not address, however, is whether the organizer of the event should have to pay for the security presence. While many cases indicate that security fees are permissible, "relying on instances of past protests, either for or against a student organization or speaker, will inevitably impose elevated fees for events featuring speech that is controversial or provocative and likely to draw opposition. Assessing security costs in this manner impermissibly risks suppression of speech on only one side of a contentious debate." *Coll. Republicans of the Univ. of Wash. v. Cauce*, No. C18-189-MJP, 2018 U.S. Dist. LEXIS 22234, at *9 (W.D. Wash. Feb. 9, 2018).

D. What Free Speech Rights Do Public Employees Possess?

Turning from campus events to the question of how the First Amendment applies to employee speech, it's important to:

- Distinguish between speech occurring within the course of an employee's duties and speech occurring outside of an employee's duties. Recent cases illustrate that public employees have fewer constitutional protections in the course of their employment than they have in their private lives.

- Identify the unresolved questions about whether university faculty are constitutionally different from other public employees when they engage in speech in the course and scope of their employment.

- Discuss how universities protect academic freedom, even if academic freedom is not a freestanding constitutional right.

i. Does the First Amendment Protect a Public Employee's Political Speech that Occurs Outside Employment?

Public employees regularly engage in political activity and speech outside of their employment. Since the 1940's the AAUP has contended that these extramural activities deserve protection, but also recognize that this speech "carries with it duties correlative with rights." For this reason:

> College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

American Association of University Professors, *1940 Statement on Principles of Academic Freedom and Tenure*, Policy Documents and Reports (Page 14) (11th Ed. 2015).

The First Amendment generally protects a public employee's exercise of free speech outside of employment, but that protection is not absolute, and the courts will balance the employee's interests against the employer's interests. When the government acts as an employer, its interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one. . . ." *Waters v. Churchill*, 511 U.S. 661, 675 (1994).

As such, a public employer "has significantly greater leeway in its dealings with citizen employees than when it brings its sovereign power to bear on citizens at large." *Engquist v. Oregon Dep't of Agr.*, 553 U.S. 591, 598 (2008). "[A]lthough government employees do not lose their constitutional rights when they accept their positions, those rights must be balanced against the realities of the employment contexts." *Engquist*, 553 U.S. at 598. One of those realities is that a public employee's political speech can disrupt the workplace, and, when disruption occurs, the employer may terminate the employee. *Anderson v. McCotter*, 205 F.3d 1214, 1217-18 (10th Cir. 2000). The employer need only have a reasonable belief that the public employee's speech "impedes the performance of the speaker's duties or interferes with the regular operations of the enterprise." *Anderson*, 205 F.3d at 1218.

To balance the competing interests of the employer and the public employee, the courts employ a four-part test to determine whether an employee has been discharged or disciplined for extramural political speech in violation of the First Amendment.

First, the public employee must demonstrate that his speech involved a matter of public concern. Second, the employee must demonstrate that his interest in commenting on matters of public concern outweighs the interest of the government in promoting the efficiency of the public service. Third, the employee must demonstrate that his exercise of constitutionally protected speech was a substantial motivating factor in the employer's decision. Fourth, if the employee carries his three prior burdens, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected speech. *Trant v. Oklahoma*, 754 F.3d 1158, 1165 (10th Cir. 2014).

ii. Does the First Amendment Protect a Faculty Member's Expressive Activities in Research and Teaching?

For more than 150 years after the states ratified the First Amendment, the law was essentially uniform that a public employee had no right to object to conditions placed upon the terms of employment - - including those that restricted the exercise of First Amendment rights. Justice Holmes's formulation of this position was, "A policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford,* 155 Mass. 216, 220 (1892). In other words, a governmental employer could fire an employee who took political positions contrary to the employer's interests.

The law began to change in the 1950s after governmental employers attempted to force public employees, particularly teachers, to swear oaths of loyalty to the United States and reveal the groups with whom they associated. *Wiemann v. Updegraff,* 344 U.S. 183, 189 (1952). By the 1960s, it was clear that "the liberties of religion and expression may be infringed by the denial" of public employment because of the employee's political views. *Sherbert v. Verner,* 374 U.S. 398, 404 (1963). Not only did the First Amendment prevent governmental employers from denying employment because of the employee's political views, it also limited a governmental employer's ability to discharge an employee who exercised his First Amendment rights. *Pickering v. Board of Education,* 391 U.S. 563, 575 (1968).

After *Pickering*, the courts interpreted the First Amendment as protecting public employees who spoke on matters of public concern both inside and outside the course and scope of their employment. *Garcetti v. Ceballos*, 547 U.S. 410 (2006) dramatically changed the playing field.

Garcetti determined that public employees have no First Amendment protections when making statements pursuant to their official duties. “When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. Government employers, like private employers, need a significant degree of control over their employees’ words and actions; without it, there would be little chance for the efficient provision of public services.” *Garcetti*, 547 U.S. at 418. For this reason, “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” *Garcetti,* 547 U.S. at 418.

The AAUP and other organizations argued in amicus briefs in *Garcett*i that the First Amendment should protect academic speech in ways that it does not protect other public employees’ speech. Research and teaching are two of the primary functions that faculty members pursue as public employees, which opens the possibility under *Garcetti* that the courts would determine that faculty members “are not speaking as citizens for First Amendment purposes” when they engage in research or teaching.

The court declined the AAUP’s invitation to create special First Amendment protections for teaching and research and left the issue to be resolved sometime in the future. Justice Kennedy noted that “there is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence,” and therefore *Garcetti* does not “decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.” *Garcetti*, 547 U.S. at 425. If *Garcetti* applies to faculty speech, a public university could terminate a tenured faculty member whose research reached unpopular conclusions without violating the First Amendment.

Since *Garcetti,* lower courts reach differing conclusions about whether faculty retain First Amendment rights when engaged in teaching and scholarship. Most courts conclude that *Garcetti* does not apply to speech related to scholarship or teaching, so faculty continue to enjoy First Amendment rights for these pursuits. Some courts take a different approach and apply *Garcetti* to deny academic activities constitutional protection. We won’t have a clear answer to this question until the United States Supreme Court resolves the conflict.

Even if the United States Supreme Court extends *Garcetti* and determines conclusively that the First Amendment does not apply to a faculty member’s teaching and research, such a decision would not prohibit universities from creating protections for teaching and research as a matter of their own laws and policies.

iii. Can the University Make Employment Decisions Based Upon a Faculty Member's Political Affiliation or Political Philosophy?

The Civil Rights Act of 1871, codified at 42 U.S.C. § 1983, provides a remedy when public employers violate public employees' constitutional rights. Public employees have successfully argued that a public employer's decisions, such as selection, promotion, and termination, cannot rely upon the employee's or potential employee's political affiliation or belief. Conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so. *Rutan v. Republican Party*, 497 U.S. 62, 78 (1990).

The primary exceptions to this rule allows a very narrow group of public officials to hire "confidential" and "policymaking" positions on a political basis. The courts reason, for example, that the "Governor of a State may appropriately believe that the official duties of various assistants who help him write speeches, explain his views to the press, or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments." *Branti v. Finkel*, 445 U.S. 507, 518, 1980). In these cases, the "hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel*, 445 U.S. at 518.

Absent these limited circumstances, the First Amendment prohibits public employers from denying or terminating employment because it disapproves of an employee's political beliefs and associations. "[P]olitical belief and association constitute the core of those activities protected by the First Amendment." *Rutan v. Republican Party of Ill.,* 497 U.S. 62, 69, (1990). Because the First Amendment protects political beliefs and associations, laws that premise the appointment and retention of teachers upon their willingness to ascribe to a particular political belief constitute an unconstitutional restriction of political belief and association. *Keyishian v. Board of Regents of Univ. of New York,* 385 U.S. 589, 609-610 (1967).

Wagner v. Jones, 664 F.3d 259 (8th Cir. 2011) demonstrates these principles in the university setting. In *Wagner*, the dean of a publicly-funded law school allegedly denied employment to an applicant because other faculty members opposed to the applicant's conservative political views. "[N]o more direct assault on academic freedom can be imagined than for the school authorities to [refuse to hire] a teacher because of his or her philosophical, political, or ideological beliefs." *Wagner*, 664 F.3d at 269.

Given that universities cannot refuse to hire a person who holds a particular political belief, the corollary is also true. Universities may not hire employees because they personally hold a political affiliation or belief, as "the First Amendment protects public employees not only from politically motivated discharge, but also from promotion, transfer, recalls, and other hiring decisions conditioned on political affiliation." *Galli v. N.J. Meadowlands Comm'n*, 490 F.3d 265, 270 (3d Cir. 2007). Extending employment opportunities because of a candidate's political beliefs disadvantages other candidate who do not share those beliefs.

In this discussion, it's important to distinguish between a faculty member's personal affiliations or beliefs and his competence to teach an assigned subject. Many political science departments have a class on liberal political thought, and the department may lawfully hire a faculty member with professional competence in that field of study. Similarly, a law school might lawfully hire a faculty member whose publications endorse a textualist approach to constitutional interpretation, even though that is generally considered a conservative school of thought, because of his competency in an established field of legal theory. These determinations are based upon academic criteria, not the faculty member's political or personal beliefs.

E. What Academic Freedom Rights Do Faculty Possess?

i. How Does Freedom of Expression Relate to Academic Freedom?

Many people, both within and outside the university community use the terms "freedom of expression" and "academic freedom" interchangeably. This is a mistake, as "freedom of expression" is a freedom that attaches to all citizens engaged in constitutionally protected speech. "Academic freedom," in contrast, applies to speech of an academic nature within an institution of higher education.

The AAUP provides a broad definition of academic freedom, "Teachers are entitled to full freedom in research and in the publication of the results. . . [T]eachers are entitled to freedom in the classroom in discussing their subject." American Association of University Professors, *1940 Statement on Principles of Academic Freedom and Tenure*, Policy Documents and Reports (Page 14) (11th Ed. 2015) The basic principle is one of non-interference - - the faculty member is entitled to inquire about any subject and to express their conclusions without fear of sanction.

The courts recognize the importance of academic freedom. "[Teachers] must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma." *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J. concurring). The strongest statement of academic freedom is, "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967).

Despite these statements, however, courts have not held that academic freedom exists independently of the First Amendment or that it provides university faculty with any greater speech protections than those other public employees possess. To the contrary, an "independent right to academic freedom does not arise under the First Amendment without reference to the attendant right of free expression. . . . [the plaintiff's] argument implies that professors possess a special constitutional right of academic freedom not enjoyed by other governmental employees. We decline to construe the First Amendment in a manner that would promote such inequality among similarly situated citizens." *Schrier v. Univ. of Colo*., 427 F.3d 1253, 1266 (10th Cir. 2005).

Because academic freedom does not enjoy freestanding constitutional status, many universities enact laws and policies to protect academic freedom. The proposed revisions to the *Laws of the Regents* and the associated policies continue to protect academic freedom at the University of Colorado. When the Board of Regents acts in its legislative capacity, these laws bind the university and its employees. *Subryan v. Regents of University of Colorado*, 698 P.2d 1383, 1384 (Colo. App. 1984). If the university violates the *Laws of the Regents*, a court could review its action under Rule 106 of the Colorado Rules of Civil Procedure and nullify it. *Churchill v. The University of Colorado at Boulder*, 285 P.3d.2d 986, 1006 (Colo. 2012).

ii. Can Faculty Teach Whatever They Want?

Given the broad definition of academic freedom, one could ask whether a faculty member could depart from the subject matter of a course to teach something else. For example, if the English Department prescribed a curriculum for English 101, could a faculty member decide to depart from that curriculum and teach subjects of his own choosing? Or if a professor was teaching a course in mathematics, could he devote several of the classes to the politics of an upcoming election?

To answer this question, remember that academic freedom is not solely a right that accrues to individual faculty members, because academic freedom also embodies the "four essential freedoms" of a university. These freedoms are the right of a university to determine for itself on academic grounds "who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J. concurring).

The concept that a university has the ability to determine "what may be taught," as well as "how it shall be taught" allows the institution itself to exercise responsibility for curriculum, subject matter, and methods of instruction. Consistent with this principle, the AAUP's notes that "in many institutions the contents of courses are subject to collegial and institutional oversight and control," as "curriculum committees typically supervise course offerings to ensure their fit with programmatic goals and their compatibility with larger enducational ends (like course sequencing)." American Association of University Professors, *2007 Statement on Freedom in the Classroom*, Policy Documents and Reports (Page 22) (11th Ed. 2015).

A university's "ability to set a curriculum is as much an element of academic freedom as any scholar's right to express a point of view." *Webb v. Bd. of Trustees of Ball State Univ.*, 167 F.3d 1146, 1149 (7th Cir. 1999). Because a university assigns faculty members to teach particular courses and as a legitimate expectation they will teach the assigned subject, "no college or university is required to allow a chemistry professor to devote extensive classroom time to the teaching of James Joyce's demanding novel *Ulysses,* nor must it permit a professor of mathematics to fill her class hours with instruction on the law of torts." *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 671-72 (7th Cir. 2006).

The difficulty sometimes lies in determining when a faculty member's instruction impermissibly strays from the subject matter of the course. The AAUP admonished that faculty "should be careful not to introduce into their teaching controversial matter which has no relation to their subject." American Association of University Professors, *1940 Statement on Principles of Academic Freedom and Tenure*, Policy Documents and Reports (Page 14) (11th Ed. 2015). It later added an interpretative comment in 1970 to explain that this reference was not designed to prevent the teaching of controversial material, but instead "underscore[s] the need for teachers to avoid persistently intruding material which has no relation to their subject."

In determining what material has no relation to the subject of a course, however, an observer should remain mindful of the range of teaching techniques. Comparing prior events to current events and drawing analogies between them could provoke academic debate even though someone could claim that the faculty member is injecting politics into an unrelated discussion. For example, "Might not an instructor of classical philosophy teaching Aristotle's views of moral virtue present President Bill Clinton's conduct as a case study for student discussion?" American Association of University Professors, *2007 Statement on Freedom in the Classroom*, Policy Documents and Reports (Page 24) (11th Ed. 2015)

iii. Does Academic Freedom Prevent a University from Evaluating Faculty Performance?

Some critics of higher education claim that academic freedom and the tenure system prevent universities from holding faculty accountable for their performance as teachers and scholars. Just as academic freedom does not prevent a university from establishing curricular expectations, a university's right to determine "who may teach" encompasses its ability to establish standards of performance and evaluate faculty against those standards.

While faculty have argued that academic freedom prevents a university from conducting evaluations, "teacher evaluation is part of the University's own right to academic freedom . . . [T]he University may require [a faculty member] to use its evaluation forms and it may withhold merit pay increases for her refusal to do so." *Wirsing v. Bd. of Regents of Univ. of Colo.*, 739 F. Supp. 551, 554 (D. Colo. 1990).

In fact, university decisions involving promotion and tenure stand for the proposition that a university may evaluate the academic merit of a faculty member's work. And, when a university performs this evaluation, academic freedom serves as a bulwark to prevent courts from second-guessing the university's decision. "When judges are asked to review the substance of a genuinely academic decision. . . they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985). Stated more directly, "it is not the function of the courts to sit as super-tenure committees." *Villanueva v. Wellesley College*, 930 F.2d 124, 129 (1st Cir. 1991).

This judicial deference only extends so far. While the courts will not reweigh a university's evaluation of a faculty member on academic grounds, it will examine whether a university has relied upon impermissible grounds when making academic decisions. For example, a court should set aside a tenure decision based upon discriminatory motives. "The costs associated with racial and sexual discrimination in institutions of higher learning are very substantial. Few would deny that ferreting out this kind of invidious discrimination is a great, if not compelling, governmental interest." *Univ. of Pa. v. EEOC*, 493 U.S. 182, 193 (1990).

F. What Academic Freedom Rights Do Students Possess?

i. Do Students Have Free Speech Rights in the Classroom

We sometimes face questions about whether faculty members can regulate student speech in the classroom. For example, could a faculty member prohibit a classroom discussion, even if was related to the subject matter of a course, because the discussion deviates from what the faculty member planned to teach?

In contrast to outside speakers and non-curricular events, "activities that may fairly be characterized as part of the school curriculum" are considered school sponsored speech. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271, (1988) "[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273. It is only when the decision to limit expression "has no valid educational purpose that the First Amendment is so directly and sharply implicated as to require judicial intervention to protect students' constitutional rights." *Hazelwood*, 484 U.S. at 273.

The faculty member's right to determine the control how content is presented in the classroom should not be perceived, however, as a right to harass or demean a student who holds views that the faculty member dislikes. The AAUP acknowledges that the arguments in favor of the need to "foster an atmosphere respectful of and welcoming to all persons strike a deeply responsive chord in the academy." American Association of University Professors, *1994 Statement on Freedom of Expression and Speech Codes*, Policy Documents and Reports (Page 361) (11th Ed. 2015). Consequently, "an instructor may not harass a student nor act on an invidiously discriminatory ground toward a student, in class or elsewhere. It is a breach of professional ethics for an instructor to hold a student up to obloquy or ridicule in class for advancing an idea grounded in religion . . . politics, or anything else." *2007 Statement on Freedom in the Classroom*, (Page 23). But this principle of non-harassment does not mean that students have a "right not to have their most cherished beliefs challenged," as ideas that are "germane to a subject under discussion in the classroom cannot be censored because a student with particular religious or political beliefs might be offended." *2007 Statement on Freedom in the Classroom* (Page 23).

Nor does a faculty member have an obligation of neutrality when teaching controversial topics, because “if an instructor has formed an opinion on a controversial question in adherence to scholarly standards of professional care, it is as much an exercise in academic freedom to test those opinions before students as it is to present them to the public at large.” *2007 Statement on Freedom in the Classroom*, (Page 22) In doing so, however, a faculty member should not “insist upon the truth of such propositions in ways that prevent students from expressing disagreement. . . . Such engagement is essential if students are to acquire skills of critical independence.” *2007 Statement on Freedom in the Classroom* (Page 21).

ii. Can a Faculty Member Who Disapproves of a Student’s Views Penalize a Student’s Grade?

As a general proposition, students are entitled to be evaluated on the merits of their academic performance. A faculty member may not assign a low grade as “a pretext for punishing the student for her race, gender, economic class, religion or political persuasion. *Settle v. Dickson Cty. Sch. Bd.*, 53 F.3d 152, 155 (6th Cir. 1995). A student who shows that an impermissible factor controlled a grading decision should be able to seek relief.

That being said, an instructor “has broad authority to base her grades for students on her view of the students’ work.” *Settle*, 53 F.3d at 155. As a result, students do not have a right at all times to voice a particular viewpoint and may be graded upon the instructor’s assessment of their work. “The First Amendment does not require an educator to change the assignment to suit the student's opinion or to approve the work of a student that, in his or her judgment, fails to meet a legitimate academic standard. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1288 (10th Cir. 2004).

"[S]chools also routinely require students to express a viewpoint that is not their own in order to teach the students to think critically." *Pompeo v. Bd. of Regents*, 852 F.3d 973, 983 (10th Cir. 2017) “[T]eachers, like judges, must daily decide which arguments are relevant, which computations are correct, which analogies are good or bad, and when it is time to stop writing or talking. Grades must be given by teachers in the classroom, just as cases are decided in the courtroom; and to this end teachers, like judges, must direct the content of speech.” *Pompeo,* 852 F.3d at 983-84. Thus, for example, while the First Amendment would not allow a faculty member to fail a student whose denies in her personal life that the Holocaust existed, the faculty member could fail a student in a course on the History of the Holocaust who denied that it occurred.

Because the considerations that lead to a grading decision are complex, a court may not override a faculty member’s grading decision "unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment" and instead used "the proffered goal or methodology [as] a sham pretext for an impermissible ulterior motive." *Pompeo*, 852 F.3d at 977. The prevent grades from being assigned on impermissible bases, the AAUP recommends that all universities employ “a suitable mechanism for appeal . . . for reviewing allegations that inappropriate criteria were used

in determining the grade or that the instructor did not adhere to stated procedures or grading standards". American Association of University Professors, *1998 Statement on The Assignment of Course Grades and Student Appeals*, Policy Documents and Reports (Page 29) (11th Ed. 2015)

IV. The Laws of the Regents and Regent Policy – Proposed Revisions

With this understanding of the social context and the legal framework that surrounds any discussion of freedom of speech and academic freedom, I will turn to the proposed revisions to the *Laws of the Regents* and the associate policies and explain how they attempt to balance the competing interests. The text of the proposed law or policy is provided in *italics*, followed by a discussion of the rationale for the law or policy.

A. Laws of the Regents – Article 1 – Freedom of Expression

> *Governing Principles*
> *The University of Colorado is committed to the principle of freedom of expression embodied in the First Amendment to the United States Constitution and Article II Section 10 of Colorado's State Constitution. The University of Colorado has an obligation to uphold the principle of freedom of expression. All members of the university community, defined as the Regents of the University of Colorado, the officers of the university and the administration, and the university's faculty, staff, and students, have a responsibility to protect the university as a forum for the free expression of ideas.*

Rationale: As a state institution of higher education, the University of Colorado is subject to the First Amendment to the United States Constitution and the corresponding provisions of Colorado's Constitution. This provision recognizes not only that the university must abide by the principles of freedom of expression, but also places a responsibility upon all members of the university community to protect the university as a forum for the free expression of ideas.

> *The University of Colorado is an institution of higher education and its campuses are devoted to the pursuit of learning and the advancement of knowledge through the free exchange of ideas. The free exchange of ideas includes not only the right to speak, but the right to listen.*

Rationale: Universities are dedicated to the notion that the free exchange of ideas advances knowledge. The free exchange of ideas includes the right to speak, but also includes the right to listen. Actions that prevent others from hearing ideas are contrary to the university's mission.

> *The university community must strictly adhere to the principle of viewpoint neutrality, meaning that the university shall not prohibit or restrict speech based upon either the substantive content of the speech or the message it conveys or because of the reaction or opposition of others to such expression.*

Rationale: As described above, except on the rare occasions when speech is not protected by the First Amendment (true threats, fraud, harassment, fighting words, obscenity), the university must not prohibit or restrict speech based upon the content that it conveys. Nor may it prohibit or restrict speech because it believes that others will have a negative reaction to that speech. As described below, however, the university may apply appropriate content-neutral criteria to schedule and manage campus events, as well as to protect campus safety.

> *Speech related to political, academic, artistic, and social concern serve vital purposes, both in society and within the university itself. Speech related to these topics is within the boundaries of free expression, even when others construe that speech as wrong or insensitive. The proper response to ideas that members of the university community find offensive or unwarranted is to challenge those ideas through the exercise of reason and debate, rather than attempt to interfere with or suppress them.*

Rationale: The university must permit speech that many would consider offensive or insensitive. Permitting that speech and respecting the right of a speaker to hold an offensive idea, however, does not mean that any member of the university community must respect the idea itself. All members of the university community may challenge another's ideas through the exercise of reason and debate.

> *1.E.2 Scope of Regent Law*
> *This article of the Laws of the Regents addresses speech that occurs on University of Colorado campuses, but not speech occurring in the course of research or in the classroom instructional environment. Speech in research and teaching is governed by Article 5, Part B and Article 7, Part C of the Laws of the Regents.*

Rationale: Freedom of expression for citizens is different than academic freedom, which attaches to teaching and research. Academic freedom is described in other laws and policies.

> *1.E.3 Definition of Free Expression*
> *Free expression encompasses verbal and written means by which individuals may communicate ideas to others, including all forms of peaceful assembly, protests, speaking verbally, holding signs, circulating petitions, and distributing written materials. Free expression includes voter registration activities but does not include speech that is primarily for a commercial purpose, including the promotion, sale, or distribution of any product or service.*

Rationale: The definition of free expression is broad and includes verbal and written communicative activities. This definition is consistent with the Senate Bill 62. Commercial speech is not protected in the same manner as political, social, and academic speech, and therefore the campuses may regulate commercial speech differently from how it regulates other forms of speech.

Free expression does not include speech or conduct that is not within the First Amendment's protections, including speech or conduct that is a true threat, fraudulent, harassing, obscene, defamatory, or otherwise unlawful.

Rationale: The United States Supreme Court excludes some limited categories of speech from constitutional protection. The university does not provide any protection to these types of speech.

1.E.4 Authority to Enact Lawful Regulations
As described in Regent Policy 1.D, the Board of Regents authorizes the president and the chancellors to enact regulations in accordance with university policy and applicable law to promote free expression on the University of Colorado campuses and property, while simultaneously protecting the university environment, establishing lawful standards of conduct, and preventing disruption of university activities.

Rationale: As permitted by constitutional law and Senate Bill 62, the university may enact content-neutral time, place and manner regulations to protect the university environment and prevent disruption of university activities. This provision delegates the authority to enact lawful and appropriate regulations to the president and chancellors.

B. Regent Policy 1.D – Freedom of Expression – Proposed Revisions

1.D.1 As required by Regent Law, the University of Colorado shall protect the freedom of expression of its students, faculty, and staff on campus and in its programs and activities.

Rationale: This provision provides the authority, as stated within the *Laws of the Regents*, for Regent Policy 1.D.

1.D.2 This policy addresses speech that occurs on University of Colorado campuses, but not speech occurring in the course of research or in the classroom instructional environment. Speech in research and teaching is governed Regent Policies 5.B and 7C.

Rationale: This provision carries through the distinction between freedom of expression and academic freedom.

1.D.3 Use of University Grounds, Buildings and Facilities:
No campus shall designate any area as a free speech zone or otherwise limit free expression to a predetermined and designated area of campus. Generally accessible outdoor areas on the campuses shall be available to members of the university community for free expression in accordance with campus policies authorized by this section.

> *The president of the university shall adopt, in accordance with university policy and applicable external law, regulations and procedures governing the use of university grounds, buildings, and facilities not located upon any university campus.*
>
> *The chancellor of each campus shall adopt, in accordance with university policy and applicable external law, regulations and procedures governing the use of university grounds, buildings and facilities on that campus.*

Rationale: Consistent with Senate Bill 62, this provision prohibits any campus from designating any area as a free speech zone or otherwise limiting free expression to a single area on campus. It authorizes the president and chancellors to adopt regulations and procedures for the use of university grounds, buildings, and facilities.

> *The use of university grounds, buildings, and facilities shall be limited to members of the university community, except as the use by others is specifically authorized under regulations adopted in accordance with university policy and applicable law.*

Rationale: As described above, the university and its campuses are not traditional public fora that are open to all members of the public for expressive activities. Because the campuses exist for educational purposes, the use of their grounds, buildings and facilities are normally limited to members of the university community. Each campus may enact guidelines that allow third parties to engage in expressive activities on campus. Normally, a campus organization will invite third parties to campus. If a campus allows uninvited third parties to engage in expressive activities, it must do so without considering the content of their speech.

> *The use of university grounds, buildings, and facilities may be subject to requirements that govern the time, place, and manner of expression, including scheduling requirements, but all such requirements must be:*
> *Reasonable;*
> *Justified without reference to the content of the expression;*
> *Narrowly tailored to protect the university environment, prevent disruption of university activities, or serve another significant university interest;*
> *Leave open ample alternate channels for communication of the information or message.*

Rationale: This provision allows the university to create time, place, and manner regulations, including scheduling requirements, in accordance with Senate Bill 62.

> *The use of university, grounds, buildings, and facilities by members of the university community may be conditioned upon the payment of reasonable expenses incurred by the campus in hosting an event. Any such fees shall be determined based upon the campus's good faith estimate, based upon the application of objective criteria, of the actual expenses it shall incur in hosting an event. In no instance shall a campus assess any such expenses in a manner that is based upon disapproval of the substantive message that the speaker expresses.*

Rationale: This provision recognizes the ability of the campuses to require organizations to provide payment for expenses that the university occurs in hosting an event. Any fees must not be content based and must instead be based solely on objective criteria, such as the number of persons expected to attend.

> *Nothing in this section grants members of the university community the right to materially disrupt previously scheduled or reserved activities occurring on university grounds, buildings, and facilities.*

Rationale: This provision, when read in harmony with the definition of freedom of expression, recognizes that expression can include protest, but does not protect conduct that disrupts previously scheduled events

> *Freedom of Expression by University of Colorado Faculty*
> *When engaged in teaching and research, faculty enjoy the associated rights and observe the associated responsibilities of academic freedom as expressed in Article 5, Part B of the Laws of the Regents and Regent Policy 5.B.*
>
> *University faculty are citizens and members of a learned profession. When university faculty speak or write as citizens, not in furtherance of their university duties or in the course and scope of their university employment, on matters of political, academic, artistic, or social concern, the university shall not censor their expression, initiate disciplinary action against them, or otherwise subject the faculty members to adverse employment actions because it disapproves of the substance of their expression.*
>
> *When university faculty speak or write as citizens, not in furtherance of their university duties or in the course and scope of their university employment, they must make every effort to indicate that their expression is their own and does not represent the opinion or position of the university.*

Rationale: University faculty are citizens who possess right to freedom of expression. The university may not censor speech that occurs in their role as citizens because it disagrees with their opinions. When speaking as citizens, however, faculty should make clear that they are not speaking for the university.

The freedom of expression recognized in this section does not grant university faculty the right to refuse to perform official duties, to materially disrupt the university environment or university activities, or to disregard the standards of ethical conduct as expressed in Article 1, Part D of the Laws of the Regents or Regent Policy 1.C.

Rationale: While recognizing the ability of faculty to speak as citizens, freedom of expression does not allow faculty to refuse to perform official duties, materially disrupt the university environment or university activities, or to engage in unethical conduct in violation of other university policies.

Freedom of Expression by University of Colorado Staff
University staff are citizens. When university staff speak or write as citizens, not in furtherance of their university duties or in the course and scope of their university employment, on matters of political, academic, artistic, or social concern, the university shall not censor their expression, initiate disciplinary action against them, or otherwise subject the staff members to adverse employment actions because it disapproves of the substance of their expression.

When university staff speak or write as citizens, they must make every effort to indicate that their expression is their own and does not represent the opinion or position of the university.

The freedom of expression recognized in this section does not grant university staff the right to refuse to perform official duties, to materially disrupt the university environment or university activities, or to disregard the standards of ethical conduct as expressed in Article 1, Part D of the Laws of the Regents or Regent Policy 1.C.

Rationale: This provision mirrors the freedom of expression provided to faculty and extends the same freedom to staff.

Freedom of Expression by University Students
When engaged in educational activities, university students enjoy the associated rights and observe the associated responsibilities of academic freedom as expressed in Article 7, Part B of the Laws of the Regents.

University students are citizens. When university students speak or write as citizens on matters of political, academic, artistic, or social concern, not in furtherance of their studies or in the course of their academic duties, the university shall not censor their expression, initiate disciplinary action against them, or otherwise subject the students to adverse academic actions because it disapproves of the substance of their expression.

The freedom of expression recognized in this section does not grant university students the right to materially disrupt the university environment or university activities or to disregard the standards of conduct as promulgated under Article 7, Part B of the Laws of the Regents.

Rationale: This provision mirrors the freedom of expression provided to faculty and extends the same freedom to students.

C. Laws of the Regents – Academic Freedom – Faculty – Proposed Revisions

Part B: Academic Freedom

5.B.1 Freedom of Inquiry and Discourse as a Core Principle of the University
The University of Colorado was created and is maintained to afford individuals an education in the several branches of literature, arts, sciences, and the professions and to create knowledge through the pursuit of research. These aims can be achieved only in an atmosphere of free inquiry and discourse.

The core principle of free inquiry and discourse is recognized by the Board of Regents as academic freedom. For faculty, academic freedom pertains to their teaching, scholarly, and creative work.

All members of the university community have the right to free expression as stated in Article 1.E. of Regent Law and further elaborated in Regent Policy 1.D; however, this right is distinct from academic freedom.

Rationale: This provision recognizes the purpose of academic freedom, which is to create knowledge. Free inquiry and discourse is the hallmark of academic freedom, which is distinct from the freedom of expression that all citizens possess.

5.B.2 Principles of Academic Freedom
Academic freedom is the freedom to inquire, discover, access, publish, disseminate, and teach truth as the faculty member understands it, subject to no control or authority save the control and authority of the rational methods by which knowledge is established in the field.

Rationale: The provision provides the definition of academic freedom, which is the freedom to inquiry, discover, access, publish, disseminate, and teach truth as the faculty member understands it. This is a broad and individualized definition of academic freedom, which is not constrained by any requirements that a faculty member hold or express particular ideas or beliefs. The limiting principles is that academic freedom attaches only to opinions formed through rational methods, which would not include practices like fabrication, falsification, or plagiarism.

All members of the university community, when engaged in independent teaching, scholarly or creative work within the scope of their responsibilities, are afforded the right of academic freedom and have the right to grieve perceived violations of academic freedom through the Faculty Senate grievance process. The rights and responsibilities associated with the principles of academic freedom are elaborated in Regent Policy 5.B.

Rationale: Academic freedom is not limited to tenured or tenure track faculty. It attaches to those who are engaged in independent teaching, scholarly, or creative work. Any employee engaged in these activities who believes that the university has violated his academic freedom may file a grievance with the Faculty Senate Committee on Privilege & Tenure. This provision also contains an important concept, which is that academic freedom not only creates rights, but imposes correlative responsibilities.

D. Regent Policy 5.B. -Academic Freedom – Faculty – Proposed Revisions

Policy 5.B Academic Freedom
For the purposes of discussing academic freedom, "the faculty" as referred to in Policy 5.B.1 and 5.B.2, shall mean all those members of the university community afforded academic freedom under Regent Law 5.B.

5.B.1 Associated Rights
All faculty members, within the scope of their faculty responsibilities, must have freedom to study, learn, and conduct scholarship and creative work within their discipline, and to communicate the results of these pursuits to others, bound only by the control and authority of the rational methods by which knowledge is established in the field. The fullest exposure to conflicting opinions is the best insurance against error.

Rationale: This provision recognizes that academic freedom depends upon the ability of the university to expose the university community to conflicting opinions. Only through the exercise of debate, where no ideas are forbidden or exempt from scrutiny, can the marketplace of ideas flourish.

Faculty members shall not be subjected to direct or indirect pressures in an attempt to influence their work in a manner that would conflict with professional standards of the field. The Board of Regents and administration shall not impose such pressures or influence and shall resist such pressures or interference when exerted from outside the university.

Rationale: Academic freedom is more than a right that individual faculty members possess. It also expresses a principle that the university may not interfere with a faculty member's work or attempt to influence it. When governmental officials or others exert those pressures from outside the university, its leaders must resist them.

> *The appointment, reappointment, promotion of all faculty, and award of tenure to tenure track faculty, shall not be awarded or denied based on extrinsic considerations such as a faculty member's expression of political, social, or religious views.*

Rationale: Academic freedom requires that the university must make faculty personnel decisions solely upon academic merit, rather than extrinsic considerations.

> *Subject to the responsibilities identified in section 5.B.2(C), faculty are afforded freedom in achieving the goals of their assigned courses.*

Rationale: As described above and below, unless there are curricular constraints, faculty may teach courses in ways most conducive to achieving the academic goals.

> *5.B.2 Associated Responsibilities*
> *Faculty members have the responsibility to maintain competence; to devote themselves to developing and improving their teaching, scholarship, research, creative work, clinical activities, writing, and speaking, and to act with integrity, in accordance with the highest standards of their profession.*

Rationale: The university has legitimate expectations of faculty, including that they maintain their competence, devote themselves to developing and improving their scholarly activities, and to act with integrity and in accordance with the highest standards of their profession.

> *While academic freedom affords faculty members wide latitude in defining their scholarly activities, their teaching, scholarship, and creative work shall be assessed by reference to the criteria of the faculty member's primary unit(s).*

Rationale: Academic freedom does not mean that the university cannot assess the merit of a faculty member's service. To the contrary, the university has the right to establish standards of performance and evaluate performance through the faculty member's primary unit.

> *Faculty members are responsible for requirements (e.g. course content, topic order, course schedule, assessment mechanisms) specified by responsible faculty bodies, such as curriculum committees.*

Rationale: Faculty members are expected to fulfill established course requirements and may not use academic freedom to justify deviation from them.

> *Faculty members should be able to justify, in terms of curriculum and student learning, all materials introduced into the classroom.*

Rationale: When students enroll in a course, they legitimately expect they will receive instruction that fulfills the course requirements. Faculty members should not introduce materials into the classroom that do not promote those ends.

> *All members of the university community shall comply with the standards of ethical conduct stated Article 1, Part D or Regent Policy 1.C.*

Rationale: Faculty members may not use academic freedom to engage in unethical conduct in violation of other university policies.

E. Article 7 – Laws of the Regents – Student Academic Freedom – Proposed Revisions

> *Part C: Academic Freedom*
> *7.C.1 The core principle of free inquiry and discourse is recognized by the Board of Regents as academic freedom. For students, academic freedom pertains to their course discussions, course assignments, and scholarly work.*
>
> *7.C.2 All members of the university community have the right to free expression as stated in Article 1.E of Regent Law and further elaborated in Regent Policy 1.D; however, this right is distinct from academic freedom.*

Rationale: These provisions establish that students possess academic freedom in their course discussions, course assignments, and scholarly work.

> *7.C.3 In any course, students shall be free to discuss topics or ask questions related to the topic of that course provided that students follow applicable campus policies and reasonable procedures established by the instructor to ensure orderly discussion and progress toward class and course goals.*

Rationale: This provision establishes that students have the right to participate in class discussions, subject to reasonable procedures that an instructor establishes to ensure that discussions remain orderly and focused upon the course goals. For example, an instructor may limit discussion during a lecture to ensure that the class completes its requirements. Those procedures should not favor the expression of some students' views over others' views.

> *7.C.4 Students should be evaluated solely on academic performance, which shall be assessed according to the published requirements established by the instructor or academic unit.*

Rationale: Faculty should evaluate students solely on their academic performance, not extrinsic considerations. To allow for fair evaluation, the syllabus or other departmental documents should define the performance criteria of the course.

F. Regent Policy 7C – Student Academic Freedom – Proposed Revisions

Policy 7.C: Academic Freedom
7.C.1 Associated Rights
(A) During a class discussion, students shall be free to raise questions and express reasoned opinions on the current subject, provided that students follow applicable campus policies and reasonable procedures established by the instructor to ensure orderly discussion and progress toward class and course goals.

(B) During faculty office hours, students shall be free to question, discuss, and express reasoned opinions on all subjects related to the course.

(C) Students shall be free to take reasoned exception to the data or views or the methods of data collection, analysis, and/or interpretation of data offered in any course of study.

Rationale: These provisions define the sphere where students possess academic freedom and how they exercise that freedom.

(D) Students should have protection, through orderly procedures, against prejudiced or capricious academic evaluation.

Rationale: This provision anticipates that the university will have processes by which students can challenge academic evaluations that they believe are prejudiced against them for reasons extrinsic to the merit of their performance. It also anticipates that students can challenge arbitrary or unsubstantiated evaluations.

7.C.2 Associated Responsibilities
(A) As members of the campus scholarly community, students shall strive to attain the standards of academic performance established for any course of study in which they are enrolled.

(B) Academic freedom notwithstanding, all students shall comply with standards of conduct, and with any reasonable procedures for classroom discussion established by the instructor.

Rationale: These provisions anticipate that students are responsible for their own academic performance and must comply with reasonable standards of classroom decorum. Academic freedom does not provide a student with the license to disrupt the classroom environment or determine the standards against which his performance will be measured.

V. Relationship to Other *Laws of the Regents* and Associated Policies

The proposed laws and policies addressing freedom of expression and academic freedom are part of the overall policy framework at the University of Colorado. Because some of these provisions interact with and can only be understood in context with other laws and policies, I will describe some of the most important interactions.

A. Regent Policy 1.B – Guiding Principles

Regent Policy 1.B contains the University of Colorado's guiding principles. These principles include that the university will:

- Ensure policies, programs, procedures and practices encourage, honor, and respect teaching, learning, and academic culture.
- Ensure policies, programs, procedures and practices promote a continuing commitment to building a community of faculty, students, and staff in which diversity is a fundamental value. Such policies, programs and procedures will also serve to ensure the rich interchange of ideas in the pursuit of truth and learning, including diversity of political, geographic, cultural, intellectual, and philosophical perspectives.
- Ensure that the university is an economic, social, and cultural catalyst.
- Provide an outstanding, respectful, and responsive living, learning, teaching, and working environment.

As described above, the principles of freedom of expression and academic freedom are vital to a university's mission. Protecting these freedoms is consistent with the goal of "ensuring the rich interchange of ideas in the pursuit of truth and learning." Promoting inquiry is consistent with the goal of ensuring that the university is a social and cultural catalyst.

B. Article 5 of *Laws of the Regents* – Dismissal for Cause - Proposed

Article 5 of the *Laws of the Regents* defines the grounds upon which the Board of Regents may dismiss a tenured or tenure track faculty member. The proposed grounds for dismissal are "demonstrable professional incompetence; conviction, whether by a plea or a verdict of guilty or following a plea of nolo contendere, for any felony or any offense involving moral turpitude; violation of university policies pertaining to discrimination, sexual misconduct, or fiscal misconduct; violation of the weapons control policy; material or repeated neglect of duty; or other conduct that falls below minimum standards of professional integrity." The proposed policies on freedom of expression and academic freedom create rights that would preclude the university for seeking dismissal because of a faculty member's protected speech.

C. Article 10 of *Laws of the Regents* – Nondiscrimination

Article 10 of the *Laws of the Regents* prohibits discrimination. It states:

> *The University of Colorado does not discriminate on the basis of race, color, national origin, sex, pregnancy, age, disability, creed, religion, sexual orientation, gender identity, gender expression, veteran status, political affiliation, or political philosophy in admission and access to, and treatment and employment in, its educational programs and activities. The university takes action to increase ethnic, cultural, and gender diversity, to employ qualified disabled individuals, and to provide equal opportunity to all students and employees.*
>
> *Qualification for the position and institutional need shall be the sole bases for hiring employees, and the criteria for retaining employees shall be related to performance evaluation, assessment of institutional need, fiscal constraints, and/or, in the case of university staff, the rational exercise of administrative prerogative.*
>
> *All students shall have the same fundamental rights to equal respect, due process, and judgment of them based solely on factors demonstrably related to performance and expectations as students. All students share equally the obligations to perform their duties and exercise judgments of others in accordance with the basic standards of fairness, equity, and inquiry that should always guide education.*

The provisions of Article 10 are consistent with the proposed provisions addressing freedom of speech and academic freedom. Article 10 prohibits the university from engaging in acts of discrimination on the basis of protected characteristics, including political affiliation and political philosophy.

It is important to note that Article 10 prohibits discrimination. Discrimination occurs when the university denies a person an educational or employment opportunity or subjects a person to an adverse educational or employment experience because of a protected characteristic. While the university can act to promote cultural diversity amongst its faculty and employees, any action to promote diversity must be read in conjunction with the requirement that qualification for the position and institutional need shall be the sole bases for hiring employees. I do not believe that the university can offer employment where a person's protected characteristics serve as the motivating factor without running afoul of its own nondiscrimination policies.

D. Regent Policy 10.P - Diversity

Regent Policy 10.P contains a statement of the Board of Regents' commitment to diversity. It includes a statement that "a supportive campus environment demands that all participants in the university be treated with absolute respect for their persons and their work." The policy also states that "a climate of respect must include an openness, on the part of the university, to new definitions of what constitutes valid and valuable research, pedagogy, and service." This policy further states that "a climate of healthy diversity is one in which people value a rich panoply of diverse ideas, perspectives and backgrounds, individual and group differences, and communicate openly."

Each of these statements is support of academic freedom and the ability of members of the university community to engage in open discussions. The university is free to create expectations how members of the university community will engage with each other, but these expectations must be read in conjunction with the First Amendment's limitations upon offensive or controversial speech. To the extent that speech is protected by the First Amendment and occurs consistently with the university's lawful polices, the university cannot take action that punishes a person for expressing offensive views.

E. Regent Policy 10.I – Political Participation

In Regent Policy 10.I, the Board of Regents supports the ability of employees and students to engage in political activities and to hold political events on campus. This policy includes:

- The University looks with favor on political participation by all citizens and accordingly encourages all members of the University community, as citizens, to engage in any and all forms of campaign activity traditional in American election campaigns.

- The University has consistently upheld the rights of the open forum and accordingly will welcome speakers on campus of all shades and hues of opinion, including advocates of the election of any candidate for public office and of any public policy in issue in public discussion, provided, of course, that the applicable rules and regulations for use of University facilities are respected.

- In encouraging much participation in the political affairs of the state and nation, the University does not take any position, in favor of or in opposition to, any candidate or public position. The University wishes to emphasize this fact and to make it perfectly clear to the citizens of Colorado that the political actions of members of the University community are taken by them individually as citizens and cannot commit the University in whatever they may advocate.

Each of these provisions is consistent with the proposed principles of freedom of expression. The principles of freedom of expression prohibit the university from taking adverse employment actions because a person has engaged in protected political speech, including campaign activity. The principles of freedom of expression also adhere to the concept of viewpoint neutrality contained in Regent Policy 10.I.