

FOREWORD

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The papers that follow were first presented orally at the Thirteenth Ira C. Rothgerber, Jr., Conference held February 3-4, 2006, at the University of Colorado School of Law. The conference, titled *Horowitz, Churchill, Columbia—What Next for Academic Freedom?* was sponsored by the Byron R. White Center for the Study of American Constitutional Law, the Keller First Amendment Center, and the *University Of Colorado Law Review*.

Although academic freedom is a perennial source of controversy, prominent debates on campuses around the country sparked the idea for this conference. For example, Conservatives and Christians have accused the academy of excluding their voices. On our own University of Colorado campus, a controversial publication by Professor Ward Churchill received national attention; so did an academic battle over the Israeli-Palestinian conflict at Columbia University. Our speakers brought fresh perspectives to these and other debates about the theory and practice of academic freedom.

Emily Calhoun leads with a discussion of the disjuncture between the importance of the particular discipline in academic life and neglect of the discipline in academic freedom controversies. She argues that academic freedom debates might proceed along a different path—and might draw on First Amendment associational rights concepts rather than on the conventional free speech framework—were the discipline to become more central to the debate.

Larry Alexander contends that the most profound problems with academic freedom are the identity politics and post-modernist perspectives that plague the academy. He suggests that these intellectual currents have undermined traditional academic criteria of evidence and argument, resulting in the “de-academification” of the academy, leaving no basis for protections of academic freedom.

Paul Campos agrees with Professor Alexander’s claim that much of what passes for knowledge in the contemporary university is nonsense, but argues that the claim does not go far enough. He insists that the non-sensical nature of many contemporary knowledge claims is attributable

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not only to the general place post-modernism has in academia but also to blind acceptance of metaphysical axioms that make concepts such as human freedom incoherent.

Frederick Schauer analyzes Supreme Court and lower court case law on academic freedom. He concludes that doctrinal support for the right is both weaker and narrower than is commonly assumed. He connects his analysis with discussions of the distinction between individual and institutional understandings of academic freedom. His conclusion is that individual claims of academic freedom may be largely untenable as a distinct right apart from otherwise available free speech rights. As a result, the institutional concept of academic freedom is not only normatively desirable but also consistent with the First Amendment generally.

Peter Byrne examines the scope and strength of the right to academic freedom as affirmed in *Grutter v. Bollinger*, 539 U.S. 306 (2003). His thesis is that the Supreme Court defined academic freedom too broadly. Unless the definition is narrowed, he claims, academic freedom will weaken the autonomy of academic institutions to maintain scholarly standards without intrusion of political tests and controls.

Alan Chen discusses "positional" and "First Amendment" paradoxes of academic freedom. He observes that the positional paradox arises because of the relative positions of the academic freedom claimant and the alleged intruder, while the First Amendment paradox results from short-comings of the doctrinal tools traditionally used in free-speech claims. In light of these paradoxes, he contends, legal analysis of academic speech claims should depend on whether the conduct serves an appropriate pedagogical purpose.

Robert O'Neil closes with an exploration of the controversial topic of political imbalance in the academy and the impact of private and public pressures on institutes of higher education. He argues that private pressures such as websites that solicit reports of alleged imbalances and public pressures such as the proposed Academic Bill of Rights are ineffective ways to address questions about political imbalance. He proposes that universities can better redress the issue through formal investigation and academic leadership. He warns, though, that these pursuits should reflect the academic judgment of the institution and its faculties, not the dictates of a governmental body or pressure from private organizations.