

The PHI BETA KAPPA Society

VISITING



SCHOLAR
PROGRAM

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PUBLIC LECTURE
OFFERINGS

**ACADEMIC FREEDOM: FROM PROFESSIONAL NORM TO FIRST
AMENDMENT RIGHT**

This topic, the broadest of the talks I offer, is the title of my recent book, published by Harvard University Press in 2024. The talk compares the professional norm of academic freedom, derived from the 1915 Declaration of the newly formed American Association of University Professors (AAUP), with the development of academic freedom as a First Amendment right, beginning with Supreme Court decisions in the 1950s. It points out that the courts have extended the First Amendment right of academic freedom, initially recognized in cases protecting individual professors, to universities as institutions. A few cases have indicated that this right might also extend to students. Yet as judges themselves have often observed, the First Amendment right of academic freedom, though broadly recognized, has not been well defined, and legal decisions have often reached inconsistent results. After summarizing the existing case law, this talk urges the development of a distinctive First Amendment law of academic freedom, differentiated from the general First Amendment law of free speech. It maintains that this distinctive law should be informed by the professional norm of academic freedom, which stresses that protecting the expert speech of professors promotes the societal interest in the production and dissemination of knowledge. The details of this talk touch on many current controversies, such as restrictions on teaching designated subjects and theories, regulation of hate speech or other offensive speech deemed to harm the learning environment, limitations on public access to university campuses, and mandatory “diversity statements” from candidates for faculty positions.

DAVID M. RABBAN

DIFFERENTIATING ACADEMIC FREEDOM FROM FREE SPEECH

The widespread failure to differentiate academic freedom from free speech has been a major impediment to developing a convincing analysis of academic freedom both as a professional norm and as a First Amendment right. Many have claimed that academic freedom extends to the general political expression of professors. Yet the extension is inconsistent with the primary justification of academic freedom as necessary to protect the societal interest in expert knowledge. This societal interest does not justify giving professors more freedom than others in expressing nonexpert political views. As many legal decisions demonstrate, unconvincing claims of academic freedom often prompt the rejection of much more plausible ones. This talk addresses and rejects arguments for extending academic freedom to general political expression, which are often made on pragmatic grounds. It points out that general rights of free speech can often protect the general political expression of professors even if the right of academic freedom does not apply.

THE MEANING OF ACADEMIC FREEDOM AS A FIRST AMENDMENT RIGHT OF PROFESSORS

This talk examines academic freedom as a First Amendment right of professors. After tracing the original recognition of this right by the Supreme Court in cases about subversive advocacy during the Cold War of the 1950s and 1960s, the talk explores the often conflicting judicial decisions. While overwhelmingly concluding that the First Amendment protects the academic freedom of professors, judges have disagreed about its meaning. Some decisions have limited it to the content of expert expression in teaching and scholarship. Others have applied it more broadly to protect decisions by professors about pedagogy and course coverage, to invalidate laws that could inhibit academic discussion in the classroom, and to exempt unpublished scholarship and confidential research sources from disclosure in litigation. Beyond teaching and scholarship, some cases have extended academic freedom to cover expression about university affairs and about general political and ideological issues. Further complicating analysis, in other cases judges used general free speech principles to punish expert academic expression that unquestionably would have been protected had they applied the First Amendment law of academic freedom. The talk concludes with proposals for a theory that would better justify academic freedom as a First Amendment right of professors and resolve much of the inconsistency and confusion in current law.

DAVID M. RABBAN

THE MEANING OF ACADEMIC FREEDOM AS A FIRST AMENDMENT RIGHT OF UNIVERSITIES

This talk examines academic freedom as a First Amendment right of universities. It highlights the Supreme Court's identification of four essential elements of a university's academic freedom, derived from a South African statement written in opposition to the imposition of Apartheid: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who should be admitted to study." The talk identifies contexts in which courts have accepted and rejected university claims to academic freedom. It also identifies and suggests the resolution of key issues that have arisen in litigation over institutional academic freedom, including its scope, who exercises academic freedom on behalf of the university, the extent to which private universities may have more academic freedom from the state than public universities, whether institutional academic freedom can justify university regulation of offensive speech and exclusion of the public from campus, and the treatment of conflicting academic freedom claims between professors and universities.

FIRST AMENDMENT RIGHT OF STUDENTS TO FREE SPEECH AND ACADEMIC FREEDOM

This talk examines the First Amendment rights of students to free speech and academic freedom. Courts since the 1960s, it points out, have clearly recognized that the First Amendment extends to speech by students. In the words of a famous 1969 decision by the Supreme Court, students "do not shed their constitutional rights at the school-house gate." Yet the Court also asserted that the First Amendment rights of students must be "applied in light of the special characteristics of the school environment." Courts have frequently enforced the First Amendment rights of students to speak and associate on campus. But in contrast to the many judicial decisions that address academic freedom as a First Amendment right of professors and universities, only a few have alluded to student academic freedom, and fewer still have identified it as a First Amendment right. Yet these few decisions indicate that student academic freedom can be incorporated within the First Amendment, particularly to protect their freedom to learn. While promoting the development of student academic freedom as a distinctive First Amendment right, the talk differentiates it from general student First Amendment rights of free speech.

CLASSROOM DISCUSSION TOPICS

1. ANY OF THE ABOVE LECTURES CAN ALSO BE USED AS DISCUSSION TOPICS