

Surmounting Legal and Legislative Attacks on the Academy
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We are under attack as academic professionals—whether we teach, research or work in libraries; whether we are tenured or not; whether we are full-time or not; whether we are graduate assistants or not; whether we teach in 4-year institutions or community colleges. These external attacks are being launched in the courts, administrative tribunals, Congress and state legislatures.

In the key 1957 U.S. Supreme Court case, *Sweezy v. New Hampshire*, the Court strongly disapproved of government interference in the academy when the Attorney General of New Hampshire sought to compel the testimony of Professor Sweezy about a series of lectures he presented at the University of New Hampshire. The Court cautioned that “[s]cholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study, and to evaluate.” We are in such a period of suspicion and distrust.

In the influential concurring opinion of Sweezy, Justice Frankfurter wrote of the “four essential freedoms” of a university, including its faculty, “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.” Some 50 years later, these four freedoms are being undermined with judges and legislators too often second-guessing faculty academic decisions, thereby undermining faculty autonomy. In my remarks today, I will review the judicial and legislative threats to the academy, specifically (1) curricular choices and scholarship, (2) affirmative action/student selection, and (3) anti-union efforts.

Before doing so, some context. First, there are many threats to the academy—the evisceration of tenure, the rise and exploitation of contingent labor, corporatization of the academy, national security post-9/11--to name just a few. Many of these challenges to the academy are being touched on in other venues at this conference. I will focus on particular legislative and judicial threats. That does not mean that there aren't many other, significant threats to our colleges and universities with which we should be concerned.

Second, the opinions and analysis I express today are my own. They are, of course, shaped by my many years of practice as a higher education and unionside labor lawyer—for various firms and organizations. But I am not here today as an official spokesperson.

Lastly, and most importantly: There's much expertise in this room. I look forward to the opportunity to learn from you today.

Let us begin . . .

I. What May Be Taught and How It Shall be Taught

A. The Courts

While courts continue to pay lip service to the “deference” owed academic decisions within colleges and universities, the application of the law to the facts suggests otherwise, treading upon what may be taught and how it shall be taught.

In 1985 the U.S. Supreme Court properly found that when faculty make “genuinely academic decision[s,] . . . [judges] should show great respect for the faculty’s professional judgment. Plainly, they may not override [those decisions] unless [they are] 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 the Univ. of Michigan v. Ewing*. Yet courts are engaging in this second-guessing of faculty professional judgment too frequently.

One recent curriculum case in the Tenth Circuit exemplifies this trend of second-guessing core academic decisions. While the federal appellate court in *Axson-Flynn v. Johnson (University of Utah)*, opined that it would “not second-guess the pedagogical wisdom or efficacy of an educator’s goal,” it did exactly that. See Donna R. Euben, “Political and Religious Belief Discrimination on Campus: Faculty and Student Academic Freedom and the First Amendment” (National Association of College and University Attorneys (NACUA), March 2005); Donna R. Euben, “Legal Watch: Curriculum Matters,” *Academe: Bulletin of the American Association of University Professors* (Nov./Dec. 2002).

Christina Axson-Flynn was a former student at the University of Utah, and a member of the Church of Jesus Christ of Latter-Day Saints. She sued the faculty in the university theater department for having violated her First Amendment rights by the curriculum requiring that students perform in-class plays that offended her.

The professors asserted, “[I]t is an essential part of an actor’s training to take on difficult roles, roles which sometime[s] make actors uncomfortable and challenge their perspective.” The student alleged that she told the theater department before being accepted that she refused to “take

the name of God or Christ in vain” or use certain “offensive” words. After she was accepted into the program, she changed some words in assigned scripts for in-class performances so as to avoid using words she found offensive. Her professors warned her that she would not be able to change scripts in future assignments. Axson-Flynn dropped out of the special theater program and sued her professors, arguing that the university violated her free speech (by compelling her to say offensive words) and her religion (by forcing her to say words she considered sinful).

In 2001 the lower court ruled against Axson-Flynn. The court reasoned that if the curriculum requirements were to constitute a First Amendment violation, “then a believer in ‘creationism’ could not be required to discuss and master the theory of evolution in a science class; a neo-Nazi could refuse to discuss, write or consider the Holocaust in a critical manner in a history class.”

However, a unanimous three-judge panel of the Tenth Circuit reversed the district court and remanded the case for trial. The court reasoned that the student’s speech could be restricted so long as it was “reasonably related to pedagogical concerns”: “That schools must be empowered at times to restrict the speech of their students for pedagogical purposes is not a controversial proposition. . . Student speech in the classroom context is . . . restricted every day in a variety of ways, few of which would be deemed controversial.” The court found, however, that it would be “abdicating” its “judicial duty” if it “failed to investigate whether the educational goal or pedagogical concern [of the faculty] was pretextual.” The court emphasized that it “may override an educator’s judgment where the proffered goal or methodology was a sham pretext for an impermissible ulterior motive,” such as religious bias.

In the end, then, the court did exactly what it said it was not doing: second-guessing the professional expertise of faculty in making core academic decision about what shall be taught and how it shall be taught.

B. Legislation

Lewis Menand described academic freedom as a “deal” between professors and society. Academics would commit themselves to the “disinterested pursuit of truth” in return for political non-interference in university affairs. Lewis Menand, *The Metaphysical Club* 417 (2001). If that was the deal, we’ve been had.

There are (and have been) a number of legislative initiatives—federal and state—that threaten the autonomy of faculty and professional staff, including appropriations fights, curriculum dictates, and ideological diversity initiatives. *See generally* Anne H. Franke, “Sustaining Expressional Rights: Legislative Threats to Academic Freedom” (Stetson University College of Law, 27th Annual Conference on Law and Higher Education, Feb. 2006); Donna R. Euben, “Academic Freedom and Professorial Speech” (Stetson University College of Law, 25th Annual Conference on Law and Higher Education, Feb. 2004). These legislative battles not only implicate the Sweezy freedoms of what may be taught and how it shall be taught, but also who may teach.

1. Appropriations Fights

State legislators may seek through the appropriations process to penalize the exercise of academic freedom by faculty members at public colleges and universities.

In 2002 the House appropriations committee of the North Carolina state legislature voted to cut the university system's budget to block the assignment of a book, *Approaching the Qur'an: The Early Revelations*, to all incoming freshmen and transfer students at the University of North Carolina at Chapel Hill. See generally Donna R. Euben, "Legal Watch: Curriculum Matters," *Academe: Bulletin of the American Association of University Professors (Academe)* (Nov./Dec. 2002). The appropriations law denied public funds unless "all other known religions were offered in an equal or incremental way," but stipulated that the prohibition "is not intended to interfere with academic freedom, but to ensure that all religions are taught in a nondiscriminatory fashion." According to the media, one of the Representatives declared that students should not be "required to study this evil." Eric Hoover, "Unfazed (and Unconverted) by Book on the Koran: Freshmen at Chapel Hill, puzzled by uproar, find value in their first assignment," *CHE* (Sept. 6, 2002). The university successfully defeated both the appropriations problem as well as litigation challenging the book assignment as establishing religion. *Id.*; see generally Mary Burgan, "Academic Freedom on a World of Moral Crises," *CHE* (op-ed) (Sept. 6, 2002).

In 2003 the Kansas state legislature had introduced a bill that sought to cut \$3.1 million from the University of Kansas budget after learning about a student's objections to the content of a popular course in human sexuality. The elective course, taught for many years by an award-winning professor, uses videotapes and pictures that depict genitalia and sexual activity. Luckily Governor Kathleen Sebelius vetoed that part of the appropriations bill, finding the proposed cut to be "an inappropriate use of legislative powers designed to impinge upon academic freedom in the State of Kansas." However, the legislature subsequently passed a bill requiring state institutions to develop a policy on the use "of sexually explicit materials, including videos, as part of the

curriculum . . . for undergraduate students.” “Kansas Governor Affirms Academic Freedom,” *Academe* (July-Aug. 2003).

In 2002 a Minnesota state legislator proposed to delete from the University of Minnesota Press’s budget the cost of the book *Harmful to Minors: The Perils of Protecting Children from Sex*. The university press published the book that explores issues of childhood sexuality. According to the *Chronicle of Higher Education*, the controversy increased book sales and, apparently, led to a large second printing. “Book on Childhood Sexuality Arouses Controversy,” *CHE* (Apr. 19, 2002).

In 2002 the Missouri state legislature cut the University of Missouri at Kansas City’s \$412 million budget by \$100,000 in response, in part, to objections by state legislators to the work on pedophilia by a professor. He had published an article in the *Journal of Homosexuality* criticizing the “moral panic” over pedophilia and arguing for the need to distinguish between sexual assault of children and consensual intergenerational sex. The media quoted a state legislator as declaring that public universities “can say and do whatever they want, but we don’t have to pay for it.” “Book on Childhood Sexuality Arouses Controversy,” *CHE* (Apr. 19, 2002).

In 2005 Texas Congressman Joe Barton, who was the former chair of the U.S. House of Representatives Committee on Energy and Commerce, requested all research reports and computer data from three professors at different institutions working on global warming. Representative Barton is a strong critic of international efforts to control greenhouse gases. *See* Richard Monastersky, “GOP Congressman Rebukes Colleague for Investigation of Climate Scientists,” *CHE* (July 29, 2005). Barton sought detailed information on all studies on which the professors were authors or co-authors and demanded production of computer programs. One of

the professors (Professor Mann, an assistant professor at the University of Virginia) replied that his papers and computer programs were publicly available.

Another source of appropriations threats sometimes involve the selection of cases handled by litigation clinical programs at law schools. The state legislature of Pennsylvania was displeased with the University of Pittsburgh Environmental Law Clinic's representation of opponents of an expressway and logging project, and provided in the school's appropriations bill that no tax money could be used to support the clinic. In response, the university chancellor reportedly announced that the institution intended to sever its relationship with the clinic because the clinic had "cost the university political goodwill." The administration also assessed the law clinic over \$62,00 for overhead and administrative expenses. In January 2002 the faculty Tenure and Academic Freedom Committee of the university reviewed the chancellor's actions and found them to "clearly involve infringement upon the principles of academic freedom." In March 2002 the administration decided to operate the clinic with private funds. Don Hopey, "Law Clinic a Liability for Pitt, Chief Says," *Post-Gazette* (Nov. 8, 2001); Katherine S. Mangun, "U. of Pittsburgh Law Clinic Will Turn to Private Funds to Remain Open," *CHE* (Mar. 18, 2002).

And so we see state legislators using appropriations to threaten the autonomy of faculty and professional staff.

2. Constitution Day

In the 2004 appropriations bill, the powerful Democratic Senator Robert Byrd (D-WV) inserted Section 111(b) of the Consolidated Appropriations Act of 2005. It requires colleges that receive public funds to offer “an educational program on the United States Constitution on September 17 of [each] year for the students served by the educational institution.” Byrd said in a statement released by his office that this rider was needed because colleges and universities were “in need of great improvements in teaching what is actually in the Constitution and just why it is so important to our daily lives.” In response, Richard Levin, president of Yale University, declared that “the Constitution is a brilliant document, but for the Congress to prescribe the curriculum of the nation’s colleges is a bad precedent.” Raymond Pacia, “Univ. Opposes Mandated Constitution Day,” *Yale Daily News* (Jan. 12, 2005).

William Van Alstyne, a top constitutional scholar, noted the irony of participating in the first Constitution Day program on his campus: “I thought this was a very ironic way to be honoring the Constitution. What right and power does Congress have to order institutions of higher learning to depart from whatever curriculum they feel is most appropriate? It’s about academic freedom.” Dean’s Office, William & Mary website. He further observed, “Increasingly, Congress uses its spending powers with strings attached to coerce any number of things.”

Regarding his legal opinion on the Constitution Day law, Van Alstyne said, “It is not necessarily unconstitutional for Congress to act in this way; rather, it may simply be in exceedingly bad taste”

You’ll be relieved to know that two professors have put together an entertaining pop quiz for higher education institutions to fulfill their Constitution Day mandate. Lawrence Douglas and Alexander George, “A Pop Quiz for Constitution Day,” *CHE* (Sept. 15, 2006). One of the questions: “What are the first words of the Constitution? A. Oh say can you see; B. Yo, peeps;

C. We, the People; and D. In the beginning . . . “ Another question: “Where is the Constitution?
A. In the National Archives; B. in the oval office wastebasket; C. In an undisclosed secure
location; and D. In Senator Byrd’s pocket.”

3. Ideological Diversity Legislative Initiatives: Federal and State

You know you are in trouble when the allegedly liberal media—as embodied by the *Washington Post*—wrote in a recent editorial opining on the selection of the new president of Harvard University that one of her first challenges is to “bring[] diversity to the political outlook of the faculty” at the institution. “First at Harvard,” *The Washington Post* A20 (Feb. 13, 2007).

As you heard yesterday at this conference, state legislators are introducing bills that seek to strip faculty and professional staff of our right to determine what may be taught and who may teach it.

For the past two years self-identified “conservatives” have called for “political diversity” in the classroom and for monitoring by students of teachers on college and university campuses for perceived “liberal bias” in their classroom presentations. “Students for Academic Freedom” (hereafter “SAF”), sponsored by conservative activist David Horowitz, arose on dozens of campuses, where students campaign on campus and in state legislatures for the adoption of a so-called “Academic Bill of Rights” (hereafter “ABOR”). *See generally* Donna R. Euben, “Political and Religious Belief Discrimination on Campus: Faculty and Student Academic Freedom and the First Amendment” (NACUA, March 2005). The bottom line, according to Horowitz, is that that “faculty and administration” are “ideologically conformist in their liberalism.” The ABoR has reached the level of active legislation in at least 21 states. Horowitz conceded in January 2006

that he could not substantiate several examples of faculty heavy-handed mistreatment of conservative students that he regularly cited. Scott Jaschik, “Retractions from David Horowitz,” *Inside Higher Education* (Jan. 11, 2006). Nevertheless, in 2007 ABOR bills are still being introduced in state legislatures. *See, e.g.*, Kentucky HB 158 (2007); West Virginia HB 2884 (2007).

Legislative action on the ABOR has not been limited to the states. In October 2003 U.S. Congressman Kingston (R-Ga.) introduced a resolution providing that “American colleges and universities should adopt an Academic Bill of Rights to secure the intellectual independence of faculty members and students.” While the House education committee at the time did not act on the Kingston resolution, different versions of the resolution were included in the bill intended to serve as the main legislative vehicle for the reauthorization of the Higher Education Act in both 2004 and 2005. The language proposed provides that it is the right of students to be “presented diverse approaches and dissenting sources and viewpoints within the institutional setting.”

Supporters of so-called “intellectual diversity,” including the American Council of Trustees and Alumni, have now launched a new legislative initiative, known as the Intellectual Diversity in Higher Education Act (IDHEA). ACTA and other conservative organizations are aggressively circulating model legislation that requires annual reports to state legislatures from public colleges and universities on how they promote intellectual diversity on their campuses and that bans political indoctrination of students.

While renamed the Intellectual Diversity in Higher Education Act, much of its language tracks the language of the ABOR. Conservatives have had versions of the intellectual diversity bills introduced in a number of states, including Missouri, Montana, Oregon, and Virginia. The good

work of the Free Exchange on Campus coalition helped defeat at least two of these efforts in Montana and Virginia. My understanding is that one of the reasons these attempts to control the faculty failed was because legislators, like me, don't know what "intellectual diversity" means.

Anne Neal from ACTA bizarrely claims that passing these bills would allow legislatures to claim that they have "properly placed the burden on the institutions themselves, rather than inserting [them]selves in an inappropriate way." ACTA Press Release, "Legislation Requires Colleges to File Annual Reports on Intellectual Diversity" (Jan. 26, 2006). However, her legislative initiative tramples on core academic decisions—and is improper and inappropriate.

The IDHEA defines "ideological diversity" as "the foundation of a learning environment that exposes students to a variety of political, ideological and other perspectives." It also posits that "political and ideological bias in hiring, promotion, and tenure is unacceptable." The problem is, of course, in who defines the range of ideological and other perspectives. Ideology is, of course, different than a disciplinary approach. And both are different from political affiliation:

Is a biology class that doesn't cover evolution [but not creationism] not intellectually diverse? What about a science class covering global warming [because] the professor concludes that the science is, as the United Nations has concluded, incontrovertible? Must equal time be given to the current administration's counter argument? What about a professor of biology who won't support evolution? Is a failure to hire [that instructor] a valid academic judgment or [] "ideological" discrimination?

Ann D. Springer, "Political Viewpoint and Religious Belief Discrimination" (NACUA, March 2007).

These bills treat ideology as immutable, assuming that conservative ideology is a special class that has or deserves protection under the law. But race and gender are immutable

characteristics—not ideology. Moreover, faculty at public institutions, like most other public employees, cannot be appointed or dismissed based on their political affiliations. See Donna R. Euben, “Political and Religious Belief Discrimination on Campus: Faculty and Student Academic Freedom and the First Amendment” (NACUA, March 2005).

The passage of such an intellectual diversity law would appear vulnerable to legal challenge. Enactment of a law that mandates political involvement in faculty appointments and curriculum choices would seemingly violate the First Amendment of academic freedom as “governmental intrusion into the intellectual life of a university.” See *Sweezy*. The law would also seem to suffer from being too vague and overbroad. Under First Amendment jurisprudence, courts will strike down vague and overbroad statutes because they inhibit the exercise of free speech. What is “intellectual diversity”? How are we to understand, let alone enforce, the bill’s requirement that universities provide “a balanced variety of campus speakers”?

Ellen Schrecker, the historian of McCarthyism in higher education, recently critiqued the ABoR in the *Chronicle of Higher Education*, and her criticism is similarly applicable to the “intellectual perversity” initiatives. These bills “seriously undermine[] . . . academic freedom. By injecting extraneous political considerations into personnel and curricular decisions, the measure[s] not only interfere[] with those areas of educational policy that are the traditional responsibility of the faculty, it also disregards the professional standards that guarantee the quality of American higher education. . . . Professors must make the main decision about hiring, tenure, promotion, and curriculum. . . .” Ellen Schrecker, “Worse Than McCarthy,” *CHE* (Feb. 10, 2006) (op-ed).

These legislative intrusions undermine the notion of deference to academic decision-making.

III. Who To Admit for Study: Affirmative Action

The fourth essential freedom delineated by the *Sweezy* Court is who is to admit for study. Attacks on diversity-related efforts in student admissions continue in both courts and state legislatures despite the recent University of Michigan decisions.

A. Litigation

In the University of Michigan cases, *Grutter v. Bollinger* and *Gratz v. Bollinger*, the U.S. Supreme Court ruled that promoting racial diversity on campus serves a compelling state interest, and that the law school properly treated applicants on an individualized basis in which race is one of several factors. In so holding, the Court deferred to the academic judgment of the University of Michigan that fostering racial diversity in the student body was essential to the law school's educational mission. Who to admit to study, according to Justice O'Connor, "lies primarily within the expertise of the university. Our holding in *Grutter* is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits." The Michigan law school admission policy, which the Court upheld, was the unanimously approved policy of the law school faculty.

(You may remember that the AFL-CIO filed an amicus brief in both Michigan cases—on which we were joined by the UAW and the AFT. In those briefs we argued that the university had presented compelling evidence of the educational benefits of the diverse student body created by the admissions policies, and pointed to the benefits of such policies not only to the university but also to America's workplaces.)

On December 4, 2006 the Supreme Court heard argument in two significant voluntary integration cases—one from Seattle, the other from Louisville--that involve the constitutional validity of school-district plans that consider race in assigning students to public schools. In *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Bd. of Education*, the court will address a number of issues, including whether racial diversity is a compelling interest in selecting students for admission in K-12. The lower courts upheld the affirmative action plans, citing *Grutter* for the importance of diversity and that judges should defer to educators' judgments.

One of the concerns is whether the Court will craft its decision in a way that resurrects the affirmative-action debate in post-secondary admissions programs. What is disturbing is that the Court rarely grants certiorari in cases where the lower courts both ruled that race was a proper consideration in assigning students to public schools. No conflict in the circuits exists and generally the Court is not known to take cases to affirm them.

In the end, based on oral argument, we can be cautiously optimistic that *Grutter* will remain good law at least in the college and university context, although I'm less sanguine about the actual outcome of these two K-12 cases.

B. The Politics of Affirmative Action

Affirmative action is also a hot political issue. In November 2006 voters in Michigan approved Proposition 2, a state constitutional amendment banning race-based and sex-based preferences in

public education, public employment and state contracting. This successful initiative in Michigan, like those in California and Washington, was spearheaded by the so-called “maven of anti-affirmative action efforts,” Ward Connerly, who runs the American Civil Rights Institute. Connerly has indicated that he and his allies are organizing in nine or more states for November 2007. According to a recent article in the *San Francisco Chronicle* in December 2006, “Twenty-three states have systems for putting laws directly before voters in the form of ballot initiatives.” Connerly was quoted as saying, “Three down and 20 to go. We don’t need to do them all, but if we do a significant number, we will have demonstrated that race preferences are antithetical to the popular will of the American people.” Bill Berkowitz, “Ward Connerly’s Anti-Affirmative Action Jihad” (Media Transparency, Jan. 30, 2007).

The recent attack on the University of Colorado’s spending on diversity programs is, perhaps, a harbinger of challenges to come. A libertarian group, the Independence Institute, recommended that state lawmakers undertake an independent investigation of spending on diversity initiatives at the Boulder institution. Upon the report’s release, two Republican legislators called for the state auditor to examine the university’s spending. *See* Peter Schmidt, “U. of Colorado Assailed for Its Spending on Diversity,” *CHE* (Jan. 26, 2007). One academic administrator commented that the scrutiny of the university’s spending on diversity by state legislators is “the next wave” of attacks on affirmative action. Peter Schmidt, “Diversity-Program Administrators Fear Challenges to Their Spending,” *CHE* (Feb. 2, 2007).

Affirmative action will continue to be fought out in the courts and in elections. And again, I view these affirmative challenges as attacks on the ability of faculty and professional staff to make core academic decisions to select students.

IV. The Challenges for Unionized Faculty

Not only do we face challenges as faculty and professional staff in higher education generally, but so do we as union members. While these attacks on unions do not implicate core academic decisions as delineated by the U.S. Supreme Court in *Sweezy*, I view them more broadly as threats to the autonomy of faculty and professional staff to determine for ourselves how we do our intellectual work.

A. The National Labor Relations Board

The National Labor Relations Board (NLRB) is broken. The Board rarely protects workers—intellectual or industrial. (While rulings of the Board regulate employees in the private sector only, Board decisions are often relied upon in interpreting state public sector laws. So the NLRB has an impact beyond the private sector.)

Some recent, troubling illustrations:

In 2004 the NLRB ruled in *Brown University*, 342 N.L.R.B. No. 42 (2004), that graduate assistants are not employees under the National Labor Relations Act. The three-member Republican majority reasoned that the “fundamental premise” of the NLRA is “designed to cover economic relationships.” Therefore, the Board declined to exercise its jurisdiction over “relationships that are ‘primarily educational.’” How the Board could determine that all graduate assistants, who are paid in various ways to teach courses, are not employees continues to astonish me. But there you have it.

Another troubling decision is the Board's 2006 ruling that redefined the meaning of supervisor to exclude millions of workers from NLRA coverage. In the lead supervisor case, *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006), the Board held that most of the permanent charge nurses in an acute care hospital were supervisors excluded from the protections of the Act. The Board ignored board precedent and the purpose of the NLRA to find that an employee may be a supervisor when the employee possesses supervisory responsibilities, including the exercise of independent judgment, a "regular and substantial" amount of the time, with the Board finding "substantial" to mean at least 10-15% of the employee's work time.

The full impact of the decision has yet to be felt. At least one outcome will be more litigation in representation cases, causing long delays that are deadly to organizing campaigns. We should also anticipate employers raising supervisory status to delay elections for years.

The potential impact of *Oakwood* on faculty and professional staff is troubling. You may remember that in the 1980 U.S. Supreme Court decision *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), the Court declined to rule on whether the faculty at Yeshiva University were supervisory. Rather, it observed in a footnote that professors at the university "also play a predominant role in faculty hiring, tenure, sabbaticals, termination and promotion. . . . [But s]ince we do not reach the question of supervisory status, we need not rely primarily on these features of faculty authority." The majority of this Supreme Court would almost certainly view the professors at Yeshiva University as supervisors as well as managers. We hire adjuncts; we appoint and promote junior colleagues; and we select graduate assistants. But wait--we're safe on that last front: Faculty cannot be supervisors because graduate assistants are not employees, right? As the Board dissenters in *Oakwood* wrote, the majority decision could "create a new class

of workers ... who have neither the genuine prerogatives of management, nor the statutory rights of ordinary employees.”

Not only is the NLRB’s adjudication process dysfunctional; the NLRB’s election process is broken too. For example, I understand that in December 2003, a majority of faculty signed majority authorization cards saying they wanted to be represented by New York State United Teachers (NYSUT/AFT). Pace University’s administration then went to enormous lengths to block them from winning recognition and a contract. Says Chris Williams, an adjunct professor at Pace: “I would starve to death if I had to rely on my wages from Pace. I’d be homeless. The average pay for an adjunct for a three-credit course is just \$2,500 for a 15-week course.”

http://www.aflcio.org/joinaunion/voiceatwork/efca/efca_profile_cw.cfm. The story continues:

The adjunct faculty then tried the election process route of the Board. First, the university tried to delay the election. Then, after the election was held in spring 2004 and they voted overwhelmingly for the union, the university came up with a bizarre legal argument that hundreds of adjunct faculty members should be excluded from the bargaining unit and refused to include them in negotiations. The director of NLRB’s Region 2 found the disputed adjunct faculty members part of the bargaining unit, and the five-member NLRB in Washington, D.C. rejected a request by the university to have the region’s decision overturned. But even now, Pace is appealing the decision to the federal appeals court. That postpones the adjunct faculty’s rights even longer. A staggering two-and-a-half years of negotiations have passed and the adjunct faculty still has no contract.

Tula Connell, “Hey Boss: Lose the Second Yacht” (Mar. 9, 2007), blog.aflcio.org.

B. The Legislative Front

On the legislative front, we are seeing attacks on public employee benefits—especially pensions and retiree health benefits—across the country. The media headlines say it all: In Wisconsin the state government faces a shortfall of about \$17.4 billion in what they need to set aside for

pensions and other retiree benefits. Avrum Lank, "State Pensions are Short," *Milwaukee Journal Sentinel* (Jan. 30, 2007). In Alaska the state has an \$8 billion in unfunded liability in the pension system. Sabra Ayres, *Anchorage Daily News* (Jan. 30, 2007). (Much of this has come to a head due to a new accounting rule applicable to government agencies that require them to disclose their unfunded liability for retirement benefits (GASB 45).)

There is a general movement to substantially increase out-of-pocket expenses for retirees for health coverage, to reduce benefits, to move retirees older than 65 to Medicare, to not provide retiree medical coverage to employees currently under 40 years old, and to shift to defined-contribution plans, like 401(k)s, and away from defined benefit pension plans. And, of course, defined contribution plans are far less likely to offer annuity options than are defined benefit plans. *See generally* "Employee Benefit Research Institute, Pension Income of the Elderly and Characteristics of Their Former Employers" (Mar. 6, 2007), www.ebri.org.

I see no abatement of threats to the unionized academy that jeopardizes the autonomy of higher education faculty and professional staff.

V. Surmounting the Hurdles

How to surmount these challenges? Well, I guess I'm what President Bush called Vice-President Cheney--"a person reflecting a half-glass-full mentality." Here are some modest suggestions of how we might surmount these challenges to the academy.

A. Collective Bargaining

1. Negotiate strong academic freedom provisions in your collective bargaining agreements (CBAs). Don't just include laudatory language in your preambles, but, for example, incorporate

the *1940 Statement of Principles on Academic Freedom and Tenure*, a provision upon which courts have relied to enforce contracts. By establishing academic freedom as a contractual right, you can better protect yourself from the wavering commitment of some courts to an individual First Amendment right to academic freedom.

2. Seek to classify in your CBAs various ranks of faculty and professional staff as employees (not supervisors). On September 1, 2006 Kaiser Permanente and the California Nurses Association, in anticipation of the Board's decision in *Oakwood*, agreed to a five-year contract, which includes the following Recognition provision: "the Employer agrees that it will not challenge the bargaining status of any nurse or job classification covered by this Agreement, [or] claim that any nurse or job classification covered by this Agreement exercises supervisory authority within the meaning of the NLRA." "Kaiser RNs Win Huge Gains in New Pact 25% Pay Hikes, Improved Retirement Security-Plus Landmark Language on RN Union, Advocacy Rights" (Press Release, Sept. 1, 2006), www.calnurses.org/media-center/press-releases/2006. The language further provides that Kaiser will not "challenge" the right of the union "to represent any nurse in any job classification covered by this agreement based on a claim that such a nurse is a supervisor." The language will be enforced through expedited arbitration.

3. Craft CBAs carefully with respect to retiree benefits. Courts will apply basic contractual principles to interpret whether certain retiree benefits can be altered or eliminated after an employee has retired. Recent litigation suggests that clauses in CBAs "that specifically or implicitly suggest that benefits are without time limit are likely to be construed in such manner. On the other hand, the absence of such guarantees shifts the burden to the retirees and the unions to show intent to provide lifetime benefits." Nicholas DiGiovanni, Jr., "Annual Legal Update" 19 (National Center for the Study of Collective Bargaining in Higher Education and the Professions, 2006). This is a very fact-sensitive area of the law and it is important to consult with those who

are knowledgeable to make every effort to craft language that protects the benefits of current and future retirees.

4. Continue to exercise your political power and negotiate neutrality agreements that include card check recognition, like the recent Rutgers University agreement. Such efforts often successfully allow unions to “sidestep[] the consequences of both employer anti-union tactics and lengthy delays under the NLRB election regime.” James J. Brudney, “Neutrality Agreements and Card Check Recognition: Prospects for Changing Labor Relations Paradigms” 5 (American Constitution Society, Feb. 2007).

B. Campus Initiatives

1. Invoke academic freedom violations sparingly. Failure to get the parking space is not necessarily an academic freedom violation. It might implicate seniority rights or discrimination laws protecting the disabled. But we undermine the importance of academic freedom if we argue it all the time.

2. Defend academic freedom on your campus by supporting your colleagues when controversies arise in their classroom. We need to figure out a way to help our colleagues—especially those of us who are more vulnerable, such as graduate assistants, adjuncts, and other non-tenured folks—on how to deal with such threats. The University of North Carolina, for example, has prepared background materials for faculty members who teach about controversial issues to help them think about how to engage students and create a classroom climate that is safe for vigorous discussion and disagreement. See <http://ctl.unc.edu/fyc21.html>. Similarly, the American Anthropological Association created a Task Force on Middle East Anthropology that in 2006 issued a “Handbook for Scholars and Teachers” entitled “Academic Freedom and Professional Responsibility after 9/11.” The handbook seeks to provide professors with “tools . . . to manage teaching and research confrontations that limit the range of academic discourse.”

We in higher education unions need to figure out ways through peer-to-peer professional development to have our more experienced colleagues share with us effective ways to raise controversial issues in the classroom. Such professional development should aim to provide concrete suggestions and pedagogical tools for those of us who face, or could face, attacks on our teaching methods or course content. It would also serve as a responsive way to defend the core rights of faculty, rather than slipping into self-censorship.

3. In terms of affirmative action, serve on your admissions committees, and be active in whatever faculty governance mechanism exists on student admissions. The determination of who “may be admitted to study” is a core academic decision that requires that faculty play a primary role. Although it is not an obligation many relish, if we are not there and playing an active, determinative role, we are ceding that core academic decision to administrators.

C. Legislation

1. We must advocate for our needs—and also those of our students. In so doing, however, we need not be solely motivated by self-interest. Walter Reuther, the long-time president of the United Autoworkers, in his famous GM strike program post-World War II, promoted the concept—and catchphrase—“wage increases without price increases” for car buyers. Nelson Lichtenstein, *Walter Reuther: The Most Dangerous Man in Detroit* 223 (University of Illinois Press, 1995). Perhaps we, in the academy, should consider embracing that slogan with a slight tweak: “salary increases without tuition increases.”

So we should be working hard for passage of the College Student Relief Act of 2007, and other such federal efforts to control tuition costs. (H.R. 5 would phase in interested rate cuts over five years for undergraduate borrowers of new subsidized student loans from a fixed rate of 6.8

percent to a fixed rate of 3.4 percent.) We should not allow administration to pit us against our students and their families. Rather, we should be framing the options.

2. And we should continue our good and effective fight against the ABoR and the IDHEA initiatives. ACTA's president, Ann Neal, informed *Inside Higher Education* that ACTA's 2006 report, "How Many Ward Churchills," was "not science, but propaganda." The AFT has provided a substantial service by exposing these so-called studies alleging liberal bias in the classroom in its report, "The 'Faculty Bias' Studies: Science or Propaganda?". The report rightly concludes that these studies are severely flawed in their methodology, and make sweeping assumptions that invalidate the "findings." Nevertheless, this notion of politically biased classrooms clearly has traction.

We need to continue to think through how we speak about our work in the classroom. We should NOT contend that academic freedom means no review of course content. Rather, we should emphasize that established procedures of peer review within our institutions ensure that our curriculum is appropriate under disciplinary and professional standards. To that end, we should expand the successful coalition we have built to fight these legislative intrusions. Specifically, we should more aggressively reach out to academic disciplinary associations that can reinforce that we are accountable for our course content—both through peer review, the standards of our disciplines, and other standards of the profession.

3. Lastly, on the legislative front, we should fight to protect the rights of unionized workers, including faculty and professional staff, by supporting the Employee Free Choice Act. The bill would allow workers to form a union if a majority of employees in a workplace sign up for one, short-circuiting an employer-dominated campaign and another vote. It also provides meaningful penalties for violating workers' rights, and ensures that collective bargaining results if workers choose a union.

In the end, all of the potential steps to surmount these challenges to the academy boil down to exercising our political power.

Don't like court decisions? Decisions of the NLRB? Get better judges and Board members nominated and confirmed by voting for a president and senate that better understands the needs of working people—in and outside of the academy. Don't like threats to your state funding? Pick a new governor and state legislature. Or better yet, run for the state legislature.

VI. Conclusion

Michel Foucault said in an interview with the Italian magazine *L'Espresso* in 1984 that

the role of the intellectual does not consist in telling others what they must do. What right would they have to do that? ... The job of an intellectual does not consist in molding the political will of others. It is a matter of performing analyses in his or her own fields, of interrogating anew the evidence and the postulates, of shaking up habits, ways of acting and thinking, of dispelling commonplace beliefs, of taking a new measure of rules and institutions...it is a matter of participating in the formation of a political will, where [the intellectual] is called to perform a role as a citizen.

Performing the role of a citizen means organizing on your campuses, in your communities, and nationally. Organize politically; get active and elect legislators, governors, and presidents who understand the critical importance of academic freedom, professional autonomy, and the value of an unconstrained education in a truly free society.