Academic Freedom and Federal Courts in the 1990s: The Legitimation of the Conservative Entrepreneurial State

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By

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In this paper we review Supreme and Appellate Court academic freedom cases from the past decade. Academic freedom is central to the academic profession because it protects professors’ abilities to follow research where it leads and to teach controversial ideas within their domains of expertise. Academic freedom depends on free circulation and broad accessibility to ideas: without such freedom professors cannot challenge orthodoxies, pursue unpopular ideas, review each other’s work, or share information with the broader public. Because such freedom is contingent on historical circumstances and is given meaning through law, we examine cases to reveal the problems faced by the profession in the 1990s.

The bases for academic freedom are the civil liberties associated with the rise of democracy, particularly free speech and broad access to information. Following these notions, professors in the early twentieth century created the concept of academic freedom after a number of well-publicized firings of colleagues who had offended their governing boards or public officials (Hofstadter and Metzger 1957, Slaughter 1980, Silva and Slaughter 1984). Faculty at the turn of the century found themselves in difficult positions: they worked for institutions whose governors were primarily business leaders or clergy, and who usually opposed controversial ideas (e.g., unionization, Christian socialism). To protect themselves, professors organized the American Association of University Professors (AAUP) in 1915, claiming that their search for truth would ultimately benefit society (Metzger 1993). More specifically, they claimed that their institutions would benefit most fully by allowing them to pursue “truth” and teach even the most controversial ideas within their domains of expertise. Since then professors have struggled to find broad acceptance for their notion of academic freedom and to protect themselves from unfair dismissals and retaliation (Hofstadter and Metzger 1975, Lewis 1988, Schrecker 1986, Slaughter
1993, 1994).

The authors of this paper are both professors of higher education, one a J.D. and Ph.D. in higher education, the other a Ph.D. in educational policy studies, and we write from professors’ points of view, which are not always the same as those of institutions. We see faculty, not administrators or support professionals, as most fully representing the academic community. We are concerned with both legal and social dimensions of academic freedom law. Understanding this law is important because its rules, reasoning, and precedent build up to binding authority on academic freedom. But law also has a social dimension that extends beyond its letter. The law, as text, tells us about power relations within the academy as well as between the academy and various outside agencies which engage it in litigation.

We begin our paper with a presentation of our conceptual framework, which is premised on the understanding that ideology and norms are central to academic freedom. Next we describe our sample and the methods we used to analyze the cases. The body of our paper presents our analysis of the cases. From our analysis, we conclude that during the 1990s academic freedom cases reflect and favor a conservative entrepreneurial ideology. This ideology plays out with regard to academic freedom in the following ways: (1) institutions of higher education gain power over their faculty employees; (2) colleges and universities become more accommodating of religious expression on campus; (3) faculty-generated products and processes increasingly are treated as alienable property removed from free circulation of ideas; and (4) the intellectual commons created through the interchange of faculty and students is increasingly privatized by peripheral for-profit organizations, thereby undermining the integrity and autonomy of the academic community. In this juridical narrative of a conservative entrepreneurial state, the cases
make clear that gender, race, and sexual orientation should not be a part of the story. This ideology also works to constrain claims that professional bodies (e.g., the AAUP) have asserted historically for their members under the rubric of academic freedom.

CONCEPTUAL FRAMEWORK

Our analysis is based on an understanding of how ideology serves certain political interests and power arrangements. We define ideology broadly to mean the systems of belief that powerfully influence how we see the world. The cases in our sample support West’s (1990) claims of the emergence of “conservative constitutionalism . . . [which has recently come to] dominate . . . the Supreme Court, may [now] dominate the federal judiciary, and has already profoundly shaped the constitutional law of the foreseeable future” (p. 642). West has explained such conservative ideological views privilege “private and social normative authority as the legitimate and best source of guidance for [government] action” (p. 643). This can be contrasted with “progressive” ideology, which takes the “power and normative authority of some social groups over others... [to be] the fruits of illegitimate private hierarchy” (ibid.). Although this conservatism often is contested (even within the same case), its predominance illustrates that those who control state power seek to further: (1) capitalist over other economic interests, (2) sectarian (e.g., fundamentalist Christianity) over secular interests, and (3) corporate over individual interests. The cases suggest we are (re)entering an ideological regime in which the juridical narrative moves away from an idea of the university that privileges the voice of the individual professor, the secular institution, and the disinterested quest for ideas toward one that affirms the institution, the religious as well as the use of knowledge for profit.

Our perspective on ideology derives from the works of Gramsci (1971) and Althusser
(1971). Gramsci expanded Marxist theory past its economic bases to include the cultural domination of individuals. Relying on an understanding of *hegemony*, Gramsci argued that society’s cultural institutions (e.g., schools, courts, churches, etc.) support the economic domination of some individuals by others. These institutions ensure this domination by promoting the norms and values of the dominant class. For Gramsci, domination occurs less through physical force than through the hegemony of such norms and values, and because this domination uses norms, individuals in effect *consent* to be controlled without realizing it. He also argued that through *counter-hegemony* individuals could overcome their subordination. Gramsci envisioned the rise of *organic intellectuals* from the exploited class, who would challenge the cultural hegemony embedded in social institutions. For Gramsci, hegemony could not be overcome without focusing attention on cultural institutions. We draw on Gramsci because we agree that cultural institutions are contested terrains, and that courts and higher education represent different types of cultural institutions. Although these institutions further the cultural hegemony of conservative entrepreneurship, they also foster that resistance. We believe that by exercising their freedom, faculty can be “organic intellectuals” who contest the hegemony of conservative politics and entrepreneurship.

**Althusser (1971)** built on Gramsci, stressing social domination though ideology. Althusser followed the Marxist notion that state apparatuses (e.g., courts, government agencies, police) function through violence; that is, they use violence, ultimately, to enforce their prerogatives and in this regard they are *repressive state apparatuses*. But he also understood that most state apparatuses are *ideological* because they organize and promote the ideology of the dominant class. For Althusser, ideological state apparatuses included churches, courts, and
schools. Ideology ensures domination because it is enforced not only through repressive means, such as law, but also through *interpellation*. According to Althusser, individuals are interpellated, which means constituted or created, by the prevailing ideology, and the force of ideology is so pervasive and invisible that individuals come to understand their identities, actions, and situations as “obvious.” He stated, “Like all obviousness, including those that make a word ‘name a thing’ or ‘have a meaning’ . . . the obviousness that you and I are subjects [of some prevailing ideology]—and that does not cause any problems—is an ideological effect, the elementary ideological effect” (p. 171). Althusser also theorized that ideological state apparatuses was the true “site of class struggle,” arguing that the class alliance in power was less able to control the ideological state apparatuses--higher education, courts--than the repressive ones--police, military--opening the way for contestation in the ideological state apparatuses. In our analysis, we take higher education and the courts to represent sites of struggle in which conservative and progressive discourses compete for dominance.

Courts are state apparatuses that function simultaneously through rule conventions, repressive mechanisms, for they legitimately initiate punishment, and ideology. Higher education is an ideological state apparatus for two reasons: (1) it is legally an “arm of the state” (even though it tries to distance itself from the state) and (2) it creates knowledge and norms, explicitly trafficking in ideology. We draw on Althusser because his notion allows us to theorize how courts and institutions of higher education simultaneously are subject to, and promote, the ideology of conservative entrepreneurship. This ideology currently serves the interests of those who benefit from a conservative political agenda (e.g., the religious right, those who oppose affirmative action) and the restraint of ideas (e.g., corporations investing in patents). We contend,
however, that such ideology is not always effective and is contested within higher education; thus, faculty play crucial roles in resistance practices.

Given our focus on courts in this paper, we rely most heavily on notions of hegemony and ideology as theorized by Gramsci and Althusser, which explain how state apparatuses serve certain political interests and social arrangements. Like Foucault (1977), however, we also believe that ideology and hegemony are "effects" of power as well as manifestations of power. Foucault argued that power is *disciplinary*: it functions through surveillance, regulation, normalization, and control. Faculty and other professionals are among the primary practitioners of disciplinary power because they observe the citizenry, make them subjects of inquiry and also subject to disciplinary knowledge technologies that identify, describe and thereby control "deviants," who vary from the norm. Disciplinary power functions effectively precisely because it creates knowledge and norms, which individuals internalize, and then use to regulate themselves. Faculty also surveille themselves, indeed, have constructed an ideology of self-surveillance, which allows them to discipline and punish each other. A powerful example of faculty disciplinary practices are tenure and promotion processes in which faculty have developed an elaborate process to surveille and judge each other, with denial of tenure (firing in non-mystified language) being the ultimate punishment. The disciplinary power to discipline of the learned disciplines may constrain faculty resistance as powerfully as any external ideological hegemony.

With Foucault in mind, we believe that academic freedom cannot be understood strictly in terms of the ideological and hegemonic power of state apparatuses. Academic institutions, individuals, and professional associations, among them the learned disciplines and the AAUP, create norms governing faculty behavior and relationships, for example, a tenured professor may
not be dismissed unless for cause or financial exigency. The cases in our sample reflect how the academy and the relationships that are formed within it are influenced by norms that govern elsewhere, for example, by norms surrounding race and gender norms, but also by the specific norms that govern academic life—by norms about confidentiality of peer review, tenure practices, the ability to sell intellectual property. We attempt to explain how these norms manifest themselves in the cases and how they serve or hinder the ideological imperatives promoted by courts. Thus, our conceptual framework, which focuses structurally on ideology and locally on norms, leads us to the following research questions. (1) During the past decade, is there evidence of a conservative ideology/hegemony in the academic freedom cases? (2) If so, how does it manifest itself in academia? (3) If the cases are taken as a juridical narrative about academic freedom, what do they tell us?

**METHOD**

We generated our sample through LEXIS-NEXIS Academic Universe, the legal data base most commonly used by lawyers and available in modified form at some colleges and universities. We used several search techniques because academic freedom is not a fully realized legal concept, but rather stands at the intersection of various kinds of law, particularly, First Amendment law, contract law, antidiscrimination law, state sovereignty or Eleventh Amendment law, and, most recently, patent and copyright law.\(^1\) Our search covered the past ten years (January 1, 1989 through December 31, 1998) and was deliberately broad.\(^2\) We had two criteria for case selection. First, we used any Supreme Court cases during the past decade that mentioned academic freedom, even though they did not directly involve universities or professors. This approach allowed us to locate cases that may shape academic freedom in higher education.
because of their potential for application (e.g., K-12 school law is sometimes extended to postsecondary education). Second, we included in our sample any Supreme Court case in which an educational organization [e.g., the AAUP, National Education Association (NEA), American Association of University Women (AAUW)] had an interest strong enough to file an amicus brief (i.e., brief supporting a party in a case). This allowed us to capture cases that organizations concerned with preserving academic freedom see as central to its defense. We eliminated those cases which invoked academic freedom but ultimately had no bearing on it. These decision rule yielded 13 cases.

We analyzed each of the 13 cases in terms of their implications for members of the academic community, determining whether the courts furthered or hindered academic freedom. Generally following West’s (1990) definitions, we categorized decisions as follows: (1) “Progressive” decisions promoted egalitarianism, the free circulation of ideas, individual freedom, and secularism; (2) “Conservative/Entrepreneurial” decisions promoted elitism, the constraint of ideas, capitalism, corporate interests, and sectarianism; and (3) “Progressive/Conservative,” decisions served both progressive and conservative ideology or were unclear in that regard. We argued that progressive decisions furthered academic freedom, if only tangentially, conservative decisions hindered academic freedom, and progressive/conservative decisions could further or hinder academic freedom depending on how the decisions are utilized by courts in future and related cases. Finally, we asked how the cases contributed to the juridical narrative the courts were telling about academic freedom.

We focused our attention on the majority opinions in the cases, referring to dissenting or concurring opinions only when they further clarified the points being made. The reliance on
majority opinions, of course, makes courts seem monolithic. It is important to understand, however, that the legal system consists of multiple, conflicting discourses, such as color blindness versus race-consciousness, each seeking and gaining predominance at different times.

We see intellectual property, which consists of patents, copyright and trademarks, as increasingly posing problems for academic freedom. Intellectual property often constrains freedom of access to information, cutting off the free circulation of ideas and free speech that could follow from such information. Because intellectual property has only recently become an academic freedom concern, litigation surrounding universities and patents, copyright, and trademarks is, for the most part, only beginning to reach the Supreme Court. To access cases dealing with these topics, we had to turn to the appellate courts. Thus, we searched the Courts of Appeals for copyright litigation involving institutions of higher education decided during the past ten years. To be usable a case had to involve postsecondary institutions, professors, and/or students. We used a similar procedure to locate patent cases. We did not identify any trademark cases. The search yielded 9 copyright and 11 patent cases. We used the same analytic approach to the intellectual property cases as we did for the academic freedom cases.

THE SUPREME COURT AND ACADEMIC FREEDOM CASES, 1989-1999

The academic freedom cases of the 1990s appear to reinstate the privilege given to institutional interests over individual freedom that was evident before the 1950s (see Van Alstyne 1993), while at the same time expanding individuals’ rights to require public accommodation of their religious expression and entrepreneurship. The 13 cases discussed in this section illustrate the predominance of conservative ideology on the Supreme Court. We sorted the cases into four categories: employment (3), public funding (5), free speech (3), and student
admission/attendance. (2) We also classified each as "Progressive," "Conservative," or "Progressive/Conservative" (see Table 1). While the cases often dealt with more than one category, sorting them in this manner allowed us to illustrate the common themes cutting across the cases.

[insert Table 1 here]

EMPLOYMENT CASES. We classified these cases as "employment" because they involved dismissals or employee discipline of some kind.

1) Jett v. Dallas Independent School District (1989). Jett, a White male teacher and football coach at a predominantly Black high school, sued his school district under Section 1981 of the 1866 Civil Rights Act, which prohibits racial discrimination by private and public employers, after he was reassigned by the Superintendent to a teaching position. The reassignment followed repeated clashes between Jett and his school's Black principal. Jett sued the District and school officials for race discrimination and violation of his rights to free speech. More specifically, Jett alleged that the reassignment was racially-motivated and based on comments that his predominantly Black students could not meet the National Collegiate Athletic Association's academic requirements.

The procedural issue for the Court was whether the case should be tried under Section 1981 of the 1866 Civil Rights Act or 1983 of the 1871 Civil Rights Act. The substantive issue was whether the School District was responsible for the actions of its employees. Jett had chosen to bring his case under Section 1981 rather than 1983 because winning under Section 1983 is very difficult due to its focus on "policy-making" government officials rather than on institutional actors who do not hold top management positions. The Supreme Court ruled that
Section 1981 was inappropriate because it covers only private conduct, and sent the case back to be tried under Section 1983. As expected, the lower court decided that the principal or superintendent was not a “policy-making” official regarding reassignments and Jett lost his case. This case constrains a plaintiff’s ability to sue a public institution. Unless the governing board of a public institution engages in discriminatory action or explicitly endorses the actions of top management officials, plaintiffs cannot effectively sue public institutions, leaving them with fewer legal remedies for violations of their legal rights.

In *Jett*, the Supreme Court essentially shifted into the private realm a considerable number of potentially discriminatory practices, making them exempt from the Constitution. realm a considerable number of potentially discriminatory practices. In other words, if institutional actors do not hold top management positions, they are unlikely to be considered “policy makers.” Their actions, therefore, become “private” and institutions are not responsible for them. The *Jett* decision restricts the ability of faculty members to seek damages from their institutions for violations of civil rights by persons who are likely to be their immediate supervisors—program heads, department chairs, deans—and who are most likely to engage in discriminatory practices because they are closely involved in day-to-day contact with faculty. *Jett* reflects how public institutions themselves avoid such litigation; they simply ensure that their middle level administrators have no official “policy-making” authority. Thus, the case is conservative because it privileges institutional over individual rights.

Furthermore, *Jett* illustrates the Supreme Court’s conservatism toward racial issues. The decade’s “race” cases indicate that the majority of justices are intolerant of institutional attempts at remedying racial injustice. For example, in *Spallone v. United States* (1990), the Court refused
to uphold a district court’s remedy (a daily fine) for a city’s refusal to eliminate its racially-discriminatory housing practices. In *R.A.V. v. City of St. Paul* (1992), the Court refused to uphold a city ordinance intending to prevent victimization through racially-oppressive symbols (i.e., a burning cross). In *Adarand v. Peña* (1995), the Court refused to uphold the federal government’s affirmative action in awarding federal contracts. The Court’s conservative ideology toward racial matters is most striking when compared to its more progressive stance toward gender issues. For example, the Court has expanded sexual harassment law to allow plaintiffs to collect damages from educational institutions (e.g., *Franklin v. Gwinnett County Public Schools* 1992, *Davis v. Monroe County Board of Education* 1999), perhaps even for same-sex harassment (e.g., *Oncale v. Sundowner Offshore Services, Inc.* 1998). The Court also has prohibited gender discrimination in public college admissions (*United States v. Virginia* 1996). Thus, *Jett* points to alarming American conservatism toward racial matters and might justify academia’s reluctance to deal proactively with such matters.


While investigating a Title VII, which prohibits employment discrimination, race and gender discrimination complaint, the Equal Employment Opportunity Commission, sued the University to enforce its subpoena of confidential peer review materials. Rosalie Tung, who was denied tenure by the business school, claimed that her department chairman sexually harassed her, and that she was denied tenure because her colleagues did not want “a Chinese-American, Oriental woman in their school” (p. 185). To evaluate Tung’s case, the Commission sought her tenure review file as well as the files of five men who received tenure. The University argued that it did not have to turn over the files unless the Commission demonstrated a “need” for them because
(1) it had a legal privilege to prevent disclosure of confidential peer review materials; and (2) it was protected by academic freedom.

The Supreme Court unanimously rejected the legal privilege argument by holding that Title VII gave the Commission broad rights to obtain peer review materials. The Court unanimously rejected the academic freedom argument as inappropriate, because that claim traditionally has been asserted against a government’s restriction of free speech. Since this case did not involve such restriction, the Court saw University’s arguments about disclosure interfering with academic freedom by preventing candid evaluations and “chilling” speech as attenuated and speculative.

We classified this decision as progressive/conservative because the issue before the Court was a procedural one, that is, whether the Commission could demand peer review materials. In some ways the decision may be viewed as a victory for individual rights because it refused to uphold an institutional interest, but it cannot be taken to support anything other than that the University of Pennsylvania had to reveal information it preferred to keep confidential. The case did not, and, given its narrow focus, could not require the University to uphold the substantive requirements of Title VII. Indeed, Justice Blackmun warned the lower courts about the continued importance of judicial respect for the university as institution. He stated:

In keeping with Title VII’s preservation of employers’ remaining freedom of choice . . . courts have stressed the importance of avoiding second-guessing of legitimate academic judgments. This Court itself has cautioned [before] that ‘judges . . . asked to review the substance of a genuinely academic decision . . . should show great respect for the faculty’s professional judgment. . . . Nothing we say today should be understood as a retreat from this principle of respect for legitimate academic decision making (p. 198-9).

In effect, the Commission was able to obtain Tung’s file, but the Court urged judicial respect for faculty evaluation of Tung’s promotion, an evaluation which initially denied her promotion.
Faculty members may be guaranteed access to the peer review materials but still may face automatic deference to institutional action. In this regard, the case cannot be deemed progressive.

This legal text illustrates another aspect of academic freedom, for it reveals how academic norms like confidentiality create conflicts among faculty, pitting peer reviewers against candidates, thus, hindering their ability to protect each other from unethical conduct. Following Foucault (1977), these norms allow faculty to “discipline” themselves. In other words, faculty internalize norms about what constitutes “excellence” with regard to promotion even when these norms promote race and gender discrimination, and vote accordingly. These norms have such a strong hold on faculty that the AAUP, which has traditionally defended individual faculty rights over institutional interests, filed a brief essentially siding with the University in support of confidentiality. In so doing, the AAUP supported one set of faculty interests, the senior peer reviewer’s, over another set of faculty interests, the junior, female candidate’s.

3) Waters v. Churchill (1994). Churchill, a nurse in a public hospital, was dismissed by her employer for making negative comments about her supervisors and department. Churchill, however, claimed she talked only about the hospital’s cover-up of serious under staffing, talk which she contended was a matter of public concern and therefore protected by the First Amendment. However, the hospital did not believe Churchill’s side of the story, even though other employees had corroborated it. The issue for the Court was whether the employer liability must be based on what was actually said. The Court indicated that when there is disagreement over what was said, the proper focus should be on what the employer reasonably thought was said, not on necessarily on what was actually said.

The Waters case indicates that even though employees have rights to comment on
matters of public concern, the employers’ interests in achieving their goals in an effective, efficient, and orderly manner will be given more weight. *Waters* also poses serious problems for academic freedom. While the Court purported to affirm that employees do have rights to free speech in the context of employment, it actually affirmed that what employers believe carries more weight. The case is conservative, then, because it favors institutional interests over individual academic freedom. Furthermore, as with *Jett*, *Waters* appears to make private the illegal acts of administrators and promotion and tenure committees by guaranteeing that the law will not reach their conduct if they believe their actions are in the best interest of their institutions. For example, an administrator’s “reasonable belief” that a faculty member’s expression will be disruptive might justify a restriction of that expression (see the Jeffries discussion below). Not only has the Court made it difficult for professors to sue institutions by narrowing the focus to the actions of policy-making officials (*Jett*), but it has also required (*Waters*) that even in those relatively rare instances when professors are able to legitimately make charges against those officials, the version of events that will carry most weight is that of administrators who are policy-making officials.

The significance of *Waters* for academic freedom is further illustrated by considering the Leonard Jeffries case. Jeffries, a professor and chair of the Black Studies Department at City College of New York, had made controversial comments about race and was removed from his administrative post by the University. He sued and won a jury verdict that the institution violated his First Amendment rights, which was affirmed originally on appeal (*Jeffries v. Harleston* 1994). The University appealed to the Supreme Court, and the Court cleared the judgment and ordered the lower court to decide the matter in light of *Waters* (*Harleston v. Jeffries* 1994). The
Court of Appeals for the Second Circuit, citing Waters as holding that an employer who has a "reasonable belief" that a faculty member's expression will be disruptive is justified in disciplining the employee, and, not incidentally, restricting his/her views, held that the University did not violate Jeffries' rights (Jeffries v. Harleston 1995). Regardless of how one feels about Jeffries, one must be concerned with how easy it is for institutions to punish faculty members for their views, and how Waters (and Jeffries) legitimates such punishment. The Court's almost absolute deference to institutional action in these cases may prove highly detrimental to academic freedom. When Waters is combined with the normalizing practice of confidentiality in faculty evaluation and the force of judicial respect for institutional action, it is clear that administrative concepts of academic freedom have more authority than professional ones.

It is significant that only one of the three employment cases involved a private entity, and the University of Pennsylvania lost the case even thought the Court's appeared to require judicial respect for institutional action. In the two cases against public entities (Jett and Waters), the Court directly favored the institution over the individual plaintiff. These cases suggest that the Supreme Court is making the rules public employers operate under more like private ones. Private employers have a great deal of authority to make decisions that promote their institutional interests and they are not subject to constitutional requirements (Kaplin and Lee 1995). We believe that modeling the public employment context after the private presents considerable obstacles for individual academic freedom. There is already concern with constructing an institutional version of academic freedom (Rabban 1993), and the fact that public institutions can, and do, easily avoid liability reinforces institutional power, insulating public institutions from the constitutional restraints originally intended to constrain that power.
PUBLIC FUNDING. We classified these cases under “funding” because they deal how the government supports or withdraws funding for public facilities or public programs based on expression of employees or participants.

1-3) Webster v. Reproductive Health Services (1989), Rust v. Sullivan (1991), Planned Parenthood of Southeastern Pennsylvania v. Casey (1992). In these three cases, the plaintiffs argued that the laws violated women’s right to obtain abortions, and women’s and health professionals’ free-speech rights to advocate abortion. In all three cases the Supreme Court upheld government restrictions on abortion rights. In Webster, the Court upheld Missouri’s law restricting public entities from performing or counseling abortions. In Rust, the Court upheld the federal government’s requirement that recipients of funds falling within the purview of the Public Health Service Act refrain from performing or counseling abortions. In Casey, the Court upheld Pennsylvania’s law imposing informed consent and reporting requirements on state agencies, except for a spouse-notice requirement. More relevant to academic freedom, the Court upheld the restrictions on public employees’ rights to advocate abortion while permitting or requiring them to promote “pro-life” stances. Despite its rulings, the Court purported to be upholding the essential ruling of Roe v. Wade (1973), which women the legal right to obtain abortions at least within the first trimester of pregnancy.

These cases made four significant points and the latter two are especially salient for academic freedom. First, the Court approved the government’s constraint of the private right of abortion in the “public’s interest” in protecting “potential human life.” Second, the Court overwhelmingly accepted governments’ reasons for restricting abortions and rejected the plaintiffs’ arguments. Third, the Court limited the rights of health professionals’ to advocate
abortion or to refuse to advocate pro-life positions. Fourth, the Court indicated that the government’s funding decisions permit it to take ideological stances, in this case “life begins at conception” and the “state has an interest in ‘potential life’,” that appear to restrict individual constitutional rights of individuals to the rights to privacy and to take abortion-rights stances.

The Webster decision warrants further explanation because it involved a significant threat to Roe v. Wade and came after a number of politically conservative justices were appointed to the Court primarily because of their anti-abortion-rights positions. The concern of the case was a Missouri statute that contained the following phrases in its preamble: (1) the “life of each human being begins at conception,” (2) “unborn children have protectable [sic] interests in life, health, and well-being,” and (3) the State’s law shall be interpreted to “provide unborn children with the same rights enjoyed by other persons” (p. 505). Furthermore, the law restricted the use of public funds, employees, and facilities for performing and assisting in, or encouraging and counseling, abortions, and it required doctors to perform certain viability tests on fetuses believed to be 20 weeks or more.

Except for Justice Stevens, no Justice referred specifically to the religious motivation of the State’s legislators, or even the social context in which this case was decided. Yet the religious, particularly fundamentalist Christian, basis for Webster is evident. First, religious groups, despite their differences, organized themselves around the abortion issue and exerted considerable pressure on legislatures to pass restrictive abortion laws. An analysis of the amicus briefs filed in the case are particularly illustrative. In the 74 amicus briefs that we located, 42 briefs supported the State. Out of the 42, 27 were filed by explicitly Christian (n=12) or “right-to-life” organizations (n=15). Significantly, no explicitly-non-Christian religious organization
filed a brief for the State. Furthermore, of the 32 amicus briefs filed on behalf of Reproductive Health Services, only three appeared to be explicitly associated with a religious organization. Of these three briefs, one was filed by a Jewish organization, another by a number of Christian, particularly Catholic, groups, and one by a combination of “pro-choice” Jewish and Christian groups. Clearly, Christian organizations are more likely to file briefs in abortion cases than others, and, with a few exceptions, they support abortion-restrictions. Similar patterns appeared in the amicus briefs associated with Rust and Casey. These abortion cases cannot be dissociated from religion, particularly from fundamentalist Christianity.

Despite the embodiment of fundamentalist Christian views in the preamble to the Missouri statute, neither the State nor the plaintiffs specifically referred to religion. Only Justice Stevens’s dissenting opinion expressly indicated that Missouri’s statute had a religious basis. He stated:

> I am persuaded that the absence of any kind of secular purpose for the legislative declarations that life begins at conception . . . makes the relevant portion of the preamble invalid under . . . Constitution. This conclusion . . . rests on the fact that the preamble, an unequivocal endorsement of a religious tenet of some but by no all means all Christian faiths, serves no identifiable secular purpose (p. 566-7).

As Stevens implied, the Webster decision, like Rust and Casey, is an example of the Court’s favoring religious accommodation over government neutrality, the “public interest” in regulating morality over the private right to choose, and the state’s institutional interests to further the ideology of life through its facilities over individual freedom. In terms of academic freedom, Webster supports a scenario in which faculty at the University of Missouri could teach abortion but not perform it in its publicly-funded medical school. By making instruction with regard to abortion different from practice-oriented procedures taught in medical schools, this case has the potential to remove control of teaching and curriculum from faculty.
The abortion rulings during the past decade also have negative implications for those institutions with medical or counseling facilities which receive government funding; for faculty, administrators, and students at those institutions; and for the free circulation of ideas. At the very least, the abortion rulings indicate that the government may not just restrict the performance or advocacy of abortions, but may also require pro-childbirth speech. In other words, the government may regulate the types of ideas permitted in public institutions, thus infringing upon a faculty member’s ability to encourage, advocate, or even speak about abortion, especially if he or she is a medical doctor. Under the surface, unstated, yet very much at stake in abortion cases, is the government’s ability to promote religious tenets. In these cases, the Court essentially created a State “right” to take a position favoring particular religious expressions and suppressing the views of individuals who disagree. These rulings set precedents that allow the State to prohibit outright the performance and advocacy of abortions at public institutions, and it may also force private institutions to do the same through its funding power, as happened in Rust when an agency accepted federal funds. Therefore, these cases are conservative because they hinder academic freedom by permitting the State to further sectarian interests at the expense of secular interests and free speech.

4) Rosenberger v. Rector and Visitors of the University of Virginia (1995). Rosenberger involved a more explicit requirement of religious accommodation. In this case, Wide Awake Productions (WAP), a recognized student organization, requested funds from the university’s student activity fee (SAF) for expenses related to its overtly religious publication, “Wide Awake: A Christian Perspective at the University of Virginia.” The University refused the request, arguing that the SAF did not subsidize any political, religious, or philanthropic activities. The
Supreme Court held that the University’s denial of funds to WAP violated its rights to freedom of speech. The Court indicated that once the University permitted the broad use of student activities funds, it could not discriminate against religious viewpoints.

A quick reading of this case might indicate a victory for individual freedom over institutional rights. That is, this decision grants individuals the right to freely exercise their religions and have public institutions subsidize that exercise. However, we consider this decision conservative because it supports sectarian over secular interests. Arguably, the cases that set the stage for a public university’s accommodation of religious groups were decided long before *Rosenberger*. For example, in *Healy v. James* (1972), the Court prohibited public institutions from censoring student groups with whose viewpoints they disagreed; and in *Widmar v. Vincent* (1981), the Court prohibited public universities from restricting students’ use of their facilities for religious activities. The problem with *Rosenberger* for academic freedom is that it essentially privatizes the exercise of religious expression at public expense, thus requiring the use of funds for religious practices and creating the potential for suppression of other views on campuses.

Moreover, when the Rosenberger decision is viewed in conjunction with the abortion decisions and other religion cases during the past decade, there is a pattern of religious groups pressuring public entities to accommodate their demands, and the Court has legitimated that action. During the past decade, except for a few exceptions involving explicit government endorsement of religion, the Supreme Court during the past decade has supported such groups’ demands for public accommodation of religion (e.g., see *Board of Education of Westside Community Schools v. Mergens* 1990; *Capitol Square Review and Advisory Board v. Pinette* 1995; *Church of the Lukumi Babalu Aye v. City of Hialeah* 1993; *Lamb’s Chapel v. Center*...
Moriches Union Free School District 1993). However, the Court did not support the demands of all religious groups. The Court held in favor of the State in a case involving the dismissal of two Native American employees who ingested peyote during a religious ceremony (Employment Division v. Smith 1990). The ruling in the latter case led to the passage of the Religious Freedom Restoration Act of 1993, which required a compelling State interest for infringing upon religious expression. The Court, however, overturned this law in City of Boerne v. Flores (1997), leaving itself the option of deciding when and how religion may be accommodated. In other words, during this decade the Court did not explicitly require accommodation of non-Christian religious expression.

During the 1990s, the Court minimized one of the most fundamental restrictions on government power in the liberal state: the individual freedom to not be subject to any religious ideology. In appearing to favor religious accommodation, the Court is essentially legitimizing sectarian politics because Christianity is by far the most dominant religion in this Country. An estimated 86 percent of Americans identify themselves as Christian (Hunter 1999), and more than half of Americans consider themselves Protestants (Marsden 1992). In addition, these cases also tell a compelling story about the hegemony of certain sectarian views. For example, a close reading of the religion cases reveals how fundamentalist Christians have pressured governments to assume pro-religious stances. Given the Court’s conservative stance and the political effectiveness of the religious right, there is serious potential for domination by fundamentalist Christians. In fact, we already have evidence of this in academia: an increasing number of fundamentalist Christians are seeking student fees for their religious activities (e.g. see Rosenberger itself), at the same time that they challenge the use of those fees for issues they
deem to promote liberal causes (e.g., the Supreme Court agreed to hear such a case in Board of Regents v. Southworth 1999). At the same time, the Supreme Court has not favored religious accommodation when the religion in question is perceived to be at cross-purposes with a conservative, Christian state, as was the case in the peyote cases.

5) National Endowment for the Arts v. Finley (1998). In this case, the Supreme Court upheld a 1990 amendment to the National Endowment for the Arts and Humanities Act, which required the Chair of the Agency to ensure that grants reflect consideration of “general standards of decency and respect for the diverse beliefs and values of the American public” (p. 8). Four artists who were denied Agency funding sued, alleging a violation of the artists’ freedom of expression. The Court held that the Agency did not violate the First Amendment. The Court indicated that the 1990 amendment only required the Agency to take into “consideration” decency standards but did not preclude awards to any specific projects. Furthermore, the Court held that Congress has wide latitude in setting funding priorities and can subsidize the viewpoints it wishes to promote. This ruling has all but eliminated the National Endowment for the Arts.

Finley supports certain “public interests,” such as the right to prohibit indecency, and certain institutional interests, such as the Agency’s interests in judging applications in ways that do not offend the public, and more important, in ways that do not offend Congress, above individual freedom. Finley also supports the majority of “obscenity” or “indecency” cases in the 1990s, reflecting governments’ willingness to suppress such expression and the Court’s tolerance of that action (see, e.g., Barnes v. Glen Theatres, Inc. 1991; Denver Area Educational Telecommunications Consortium v. F.C.C. 1996; Fort Wayne Books, Inc. v. Indiana 1989). The Court’s approval of Congressional regulation of expression through its allocation of funds creates
difficult dilemmas for faculty seeking research funding and for institutions and students who rely on any kind of government funding. It appears that faculty and institutions that seek to further ideological stances contrary to conservative ones may not receive funding. Alternatively, faculty and institutions seeking such funding may begin to avoid stances deemed liberal, policing their own right to academic freedom and "disciplining" themselves.

Taken together, the five public funding cases reveal how powerful interest groups can and do organize around the rubric of the "public interest" in morality in order to pressure state institutions to support particular ideological stances as well as how those institutions in turn legitimize such action. Clearly, governments is furthering pro-sectarian activities and restricting secularization. It appears that governments, whether federal or state, are gaining a right to promote ideological positions they favors, even if this results in the suppression of dissenting ideas. In particular, the abortion cases show the Court supporting the use of State power to promote ideological positions that coincide with fundamentalist Christianity. Abortion is among the central tenets of belief for fundamentalist Christians, but not for most other Christians and most other religions. The abortion cases contrast oddly with Rosenberger, which affirms the importance of all viewpoints, not a particular ideological position. Considered along with the abortion cases, however, Rosenberger suggests that the Court’s is favoring fundamentalist Christianity because conflicting constitutional principles are interpreted to privilege that specific ideological position.

Finley and the "obscenity" or "indecency" cases show the Court’s promotion of conservative ideas generally, not only ideas associated with fundamentalist Christianity. Finley speaks to more than immediate instances of speech because it was tied to resource granting. Any
institution of higher education or faculty member receiving public funding should be concerned that the State’s ability to give money may also give it the ability to compel or prohibit certain ideas.

**FREE SPEECH.** We classified these cases as “free speech” because they involved some kind of restriction on speech or expression.

1) **Board of Trustees of the State University of New York v. Fox (1989).** In this case, the University’s policies prohibited in-person solicitation on campus by businesses. The case arose when students in residence at SUNY’s Courtland campus dormitories were prohibited from hosting salespersons from a housewares company. The University argued that such prohibition was essential for furthering its educational interests. The Court held that the University could prohibit commercial speech, so long as its rules furthered its educational goals and the speech did not have other, presumably free speech, implications. The case was ultimately dismissed because the students graduated, but before the dismissal the Court appeared to hinder private entrepreneurship because it upheld the institution’s “educational” interests in protecting students from commercial information over the students’ interests in receiving that information. *Fox* has little bearing on faculty academic freedom except, perhaps, that it represents another victory for institutions. Universities and colleges may be able to claim a privilege to constrain commercial activity in a way that the Court did not generally afford to other public entities during the decade (e.g., *Liquormart, Inc. v. Rhode Island* 1996; *Rubin v. Coors Brewing Company* 1995). The effect of this decision may be that universities will further their economic interests by restricting the commercial activities of others in their facilities.

2) **Lehnert v. Ferris Faculty Association (1991).** Five non-union faculty members at Ferris State
College sued the local union, the NEA, and its state affiliate over the payroll deductions of certain union fees, which they alleged were not related to the local union’s duties. The Court ruled that exclusive bargaining agents may only charge dissenting employees for those activities germane to the collective-bargaining activity, justified by the government’s interests in labor peace and avoiding “free riders,” and which do not significantly burden the free speech rights of dissenting employees. Unions can charge dissenting employees for certain activities, such as state and national conventions and strike preparation, that are not directly related to the bargaining unit because such activities ultimately benefit the unit’s employees, but they cannot charge those employees for political or ideological activities such as lobbying, litigation unrelated to the unit, public relations efforts.

On the one hand, Lehnert is progressive in the sense that unions are given *some* right to promote the interests of their members. In this sense it seems to further the institutional interests of unions, for example, their right to bargain with powerful employers collectively. On the other hand, the Court indicated that the union’s interests extend only to issues associated with the local bargaining unit. Thus, a national union, such as the NEA, must account for its expenditures to all dissenting employees and refund to them any portion that does not relate to the local union. This significantly constrains the national union’s ability to promote the interests of employees generally through means such as public relations or litigation. In this regard, the decision favors the private rights of dissenting faculty members over the rights of the collective bargaining unit. Lehnert supports individual freedom to refuse to association over the institutional interests of unions.

The Court usually has supported the rights of universities, as corporate bodies, over the
individual rights of faculty. However, this past term, however, in *Central State University v. AAUP* (1999), the Court ruled in favor of the institution rather than the union, upholding a state law requiring public institutions to develop standards for faculty workloads, but then exempted those standards from collective bargaining. In this situation, the Court supports both individual and institutional rights against unions, making employee organizations less powerful and managerial representatives of the institutions more powerful. By taking this position, the Court has again taken a conservative stance against academic freedom.

3) *Reno v. American Civil Liberties Union (1997)*. In *Reno*, the Court invalidated the provisions of the Communications Decency Act of 1996, which sought to protect minors from harmful materials on the Internet. The law criminalized the transmission or display of “obscene” or “indecent” materials to anyone under 18 years of age. The effect of this law was to create a strong defense for those who attempted to restrict access to minors through age-verification mechanisms. The Court held that the law violated the First Amendment because it was vague and too broad, covering materials that adults could view legally.

During the 1990s, the Court consistently supported the government regulation of obscenity, favoring the public’s right to regulate morality. (See the discussion under *Finley*.) In this case, however, the Court did not. The difference might be that because the Internet is a forum for commercial speech, the pursuit of knowledge, and the expression of all kinds of ideas. When commercial or entrepreneurial interests are at play, the government’s interest in regulating morality may be weaker. Thus, faculty members and institutions may assert an academic freedom right against the government when they use Internet, a medium that has commercial potential. This decision also favors academic freedom in another important sense. Because many
institutions and faculty members rely on the Internet as a teaching tool, an unfavorable decision might have significantly interfered with the academic freedom right to decide the following without state interference: what gets taught; who should be taught; and how it should be taught.

Except for Reno, we do not consider the free speech cases progressive. They reveal conservative actions that have the potential to significantly hinder academic freedom: in Lehnert the faculty challenges to union activities, and in Fox, the de facto but not de jure in loco parentis control of students. On the other hand, the cases illustrate how for-profit, corporate interests of both public and private colleges are privileged: in Fox, SUNY may engage in commercial activities within its facilities, but exclude others from doing the same; in Lehnert, the limits on union activities benefit the public colleges because it weakens unions; and in Reno, colleges and individuals may pursue commercial activities on the Internet without fear of prosecution. These decisions reflect institutions’ power in the commercial realm, which, as we discuss later, has significant implications for disputes over intellectual property. But, because such freedom is ostensibly favored only in commercial arenas, these cases might not support broader, more socially-conscious, faculty and institutional endeavors.

ATTENDANCE/ADMISSIONS. The following two cases deal with student enrollment.

1) Salve Regina College v. Russell (1991). The college dismissed Russell, a severely overweight student, from its nursing program at the end of her junior year because she failed to abide the terms of a “contract” requiring her to lose two pounds per week. She sued, asserting a number of federal and state law claims, including breach of contract. The district court held that Russell had “substantially performed” all requirements for graduation, so the College had breached its contract with her when it asked her to withdraw. The appeals court agreed, without reviewing
whether the trial judge correctly applied state law. The Supreme Court sent the case back to the lower court, holding that appeal courts must carefully review federal trial judges' state-law decisions. Although this case has little significance for academic freedom because it was decided on a procedural issue, the case arguably provides precedent for contract law principles in the university setting. Since the student eventually won, the case may support individual freedom to contract over institutional interests.

2) *United States v. Virginia* (1996). In *Virginia*, the Supreme Court invalidated Virginia Military Institute's (VMI) single-sex admissions policies, holding that the institution's exclusion of women unfairly discriminated against them. VMI claimed that its single-sex policies were constitutional because they contributed to diversity in higher education, and its "aversative" method of "producing citizen soldiers" could not be provided to women because it involved "physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values" (p. 522). After a federal appeals court found for the United States, VMI proposed a parallel program, the Virginia Women's Institute for Leadership, (VWIL), for women at Mary Baldwin College, a nearby private liberal arts institution for women. The district and appeals courts approved the VWIL. The Supreme Court held that: (1) Virginia did not show "exceedingly persuasive justification" for restricting women from VMI; (2) the State's argument that the training program was unsuitable for women perpetuated gender stereotypes; and (3) the VWIL program was inferior to VMI's.

We consider this case progressive because it supports individual freedom from gender discrimination over institutional interests in maintaining that discrimination. VMI's resources--endowment, reputation, alumni support, networks, unique curricular offering--appeared
significant to the Court, allowing it to hold that women were excluded from the advantages of such a program. On the one hand, this case, in conjunction with *Russell*, which allowed students to sue for breach of contract, expands students’ rights’ as consumers and also promotes entrepreneurship by stressing the potential economic gains from investing in a particular kind of education. On the other hand, the decision has conservative dimensions because it may hinder important institutional interests, including the provision of programs that promote diversity, for example, fellowships to increase women in the sciences. Furthermore, this case essentially relegated single-sex public education to the private sphere, allowing private institutions to gain economically from the uniqueness of such an endeavor and to charge a great deal of money for doing so. In this latter sense, the case might serve private corporate interests at the expense of the individual freedom to choose an institution that suits one’s needs.

We classified the 13 cases in regard to academic freedom along a continuum of progressive and conservative ideologies. Following West (1990), we defined progressive ideology as rejecting the legitimacy of private normative authority and supporting egalitarianism, the free circulation of ideas, individual freedom, and secularism. In contrast, again following West, we defined conservative ideology as conflating private normative authority with government action, thus supporting elitism, the constraint of ideas, corporate interests, and sectarianism. With these definitions in mind, only *Reno* and *VMI* can be said to reflect progressive stances toward academic freedom, while the *University of Pennsylvania* case reflects both conservative and progressive stances. We found little relevance for academic freedom in the *Fox*, and *Salve Regina College* cases. The eight remaining cases reflect the predominance of a conservative, a tendency that has become stronger since the mid-1970s.
The cases reveal how conservative ideology shapes academic freedom. First, faculty members have few legal options against their institutions, especially for race discrimination. Second, the state regulates “morality” in academia, and in so doing, suppresses dissenting views. Finally, public institutions are increasingly accommodating religious expression and profit-making.

The latter point is important. Public accommodation of religious expression has negative consequences for academic freedom in that—whether intentional or not—this practice leads to the increasing presence of Christian sectarian politics on campus. Christianity is by far the predominant religion in the United States generally, and on our campuses, specifically. Indeed, many U.S. colleges were founded to promote sectarian Christian beliefs (Hunter 1999, Marsden 1992). The political clout of fundamentalist Christian groups such as the Christian Coalition both on and off campus could, through the public accommodation of religion, encourage a suppressive sectarianism. These groups tend to pressure institutions to engage in certain practices, such as the funding religious groups, and refrain from others, such as the funding of “liberal” causes. The Court’s decisions in the religion and abortion cases, and to a degree in the decency cases, allowed states to take stances that favor particular religious views, raising the possibility that a State may express its preference in public higher education, constraining, for example, advocacy of abortion in student health services or medical schools. Although it is possible for groups other than fundamentalist Christians to organize to require such state action, in the cases we examined fundamentalist Christians were the only ones able to secure a State’s endorsement of some of their religious tenets.

In this section, we illustrated how the Court furthered and legitimated a conservative
ideology. In the next, we discuss intellectual property cases, which we believe have significant implications for academic freedom. Overall, the intellectual property cases illustrate a preference for entrepreneurship, and we consider how the ideology of entrepreneurship hinders academic freedom when it is promoted in colleges and universities.

**INTELLECTUAL PROPERTY AND ACADEMIC FREEDOM, APPELLATE COURT CASES, 1989-1999**

Current trends in higher education make consideration of intellectual property an imperative for fully understanding academic freedom. As political and legal systems became more conservative regarding the free flow of knowledge, they established and upheld competitiveness policies that rendered faculty and student knowledge “saleable” (Slaughter and Rhoades 1996). We see patenting and copyrighting of faculty and student generated ideas as significant potential constraints on academic freedom. The AAUP has recently turned its attention to this issue, stressing in formal statements that academic freedom depends on free access to ideas (AAUP 1999a, 1999b, 1999c).

The birth of the competitiveness policy regime was signaled by passage of the Bayh-Dole Act of 1980, which allowed universities to patent and exploit their faculty’s intellectual property. In the same year, the Supreme Court, in *Diamond v. Chakrabarty*, ruled that living organisms were patentable. Again in 1980, the Patent and Trademarks Office issued the Cohen-Boyer patent on rDNA to Stanford and in 1988, that Office issued Harvard a patent on the transgenic mouse, later marketed globally by DuPont as “oncomouse,” a laboratory animal for researchers. In 1990, the California Supreme Court ruled that a patient did not have a property right to his own bodily tissues after they were used by UCLA researchers to develop a commercially important cell line (U.S. Congress 1991). As a number of the cases that follow indicate, increasing numbers of
universities began to develop intellectual property programs to patent, copyright and market professors’ and students’ ideas in the 1990s, although only a handful generated significant revenue streams through such activities.

By its very nature ownership of ideas works to constrain “the free search for truth and its free exposition” (AAUP 1999a). When knowledge is alienable, anyone other than the owner can be excluded from it. We contend that university ownership of intellectual property: (1) renders the relations between faculty, administration, and students more adversarial; (2) reshapes the quest for knowledge, sometimes turning it away from directions identified by learned disciplines as important and toward areas identified by corporations as having profit potential; and (3) makes universities similar to other market institutions rather than spaces free from the profit motive. This intensification of knowledge commercialization is part and parcel of prevailing forms of global capitalism. As Soros (1998) stated:

[The] hallmark of the current form of global capitalism, the feature that sets it apart from earlier versions, is its pervasive success: the intensification of the profit motive and its penetration into areas that were previously governed by other considerations. Non-monetary values used to play a larger role in people’s lives; in particular, culture and the professions were supposed to be governed by cultural and professional values and not construed as business enterprises. To understand how the current global capitalist regime differs from previous regimes, we must recognize the growing role of money as intrinsic value. It is no exaggeration to say the money rules people’s lives to a greater extent than ever before (p. 115-6).

In our treatment of patent and copyright cases, we avoid the thorny question of whether faculty should be able to own the intellectual property they create. This question is now moot regarding patents. Although patents must be held by persons who reduce an invention to practice, ownership of patents has successfully been claimed by universities, except for the rare case in which faculty or students can prove that they used no university time or resources to make their invention (Smith 1997), or when collective bargaining contracts hold otherwise (Rhoades 1998).
Universities generally assert their rights to patents through state legislation or pre-employment contracts. Generally, faculty who have contested university ownership have not prevailed (Chew 1992, Cherensky 1993, Smith 1997). Although faculty do not own the property they create, they and their departments or colleges usually do receive a share of the proceeds, which range from 10-50 percent (Chew 1992).

In terms of copyrights, faculty usually assign their rights to a publisher, who then owns the copyrighted material. In the case of books, the professor/author receives a share from the publisher, usually between 6-12 percent of each copy sold, although in the case of journals, it is often customary for the professor to receive no monetary recompense. However, some universities now require faculty to sign employment agreements giving them the ownership of copyrights. For example, Stanford University requires that its employees sign the Patent and Copyright Agreement for Personnel at Stanford (Stanford University 1999). This agreement states that employees must assign to the University work that “a) [is] work for hire . . . , b) supported by a direct allocation of funds through the University for pursuit of a specific project, c) is commissioned by the University, or d) is otherwise subject to contractual obligations.” This kind of policy might make, for example, the ownership of WEB-based courses contentious. The University might claim that such a courses are (a) work for hire, (b) supported by University funds (including the use of its website), or © commissioned by it. In other words, it appears that a faculty member who develops a WEB course under Stanford’s policy will not be able to solely reap the profit from it, to assign the copyright to another person, or to take it with him or her if he or she leaves Stanford.

Despite Stanford, most universities have not yet tried to claim a share of faculty income
from copyrights. We do not argue for or against faculty or university claims to intellectual property, or for assigning particular shares to the various parties, but we do point out that as ideas become more like marketable commodities, they becomes less easily and equally available to faculty, students, the academic community, and the public at large, a state of affairs that we find problematic, regardless of whether institutions or faculty benefit from the sale of ideas.

**Patent Cases**

Eleven patent cases appeared in various courts of appeal during the past decade. The cases involved infringement (3), students (2), miscellaneous patent litigation (4), and the Eleventh Amendment (2). We will treat these cases in the order mentioned, drawing out their implications for academic freedom.

[insert Table 2 here]

**INFRINGEMENT.** The following cases involve patent infringement litigation; that is, the lawsuits concern whether a non-patent holder tried to benefit illegally from another’s patent rights.

1) *Michael Foods, Inc. v. Papetti’s Hygrade Egg Products (1994).* The intellectual property in this case was a method for the ultra pasteurization of liquid whole egg products developed by professors at North Carolina State University (a plaintiff in the case). The plaintiffs sued for patent infringement, and the court upheld the lower court’s decision in their favor. The professors who invented the product were so removed from the case that they were not even mentioned in the lawsuit. The intellectual property was treated like any other product, and the university protected itself as would any other business trying to maximize profits, successfully insisting upon the monopoly granted by the patent and preventing others from using the knowledge
associated with it.

2) **Bio-Technology General Corporation v. Genentech, Inc. (1996).** Bio-Technology General Corporation and Bio-Technology General [Israel] Limited (together “BTG”) accused Genentech Incorporated (Genentech) of stealing the discovery of human growth hormone from the University of California, further arguing that Genentech’s patents were not valid because it did not disclose this misconduct during the patent process. The court disregarded BTG’s charges as unproven and dismissed the case.

Despite the fact that the case was dismissed, it points to universities’ swing toward entrepreneurship. Genentech was formed by a group of University of California faculty and its patents were based on research initiated when the faculty were at the University. The University requires currently faculty to assign all intellectual property to it when they sign an employment contract. The institution has moved aggressively to claim faculty intellectual property that once might have been turned into start-up companies by faculty, under their control, and from which they, not the University, would profit (Chew 1992). This case suggests that the potential value of intellectual property is such that universities will very likely exercise greater vigilance about what goes on in university labs. When an atmosphere of vigilance constrains free intellectual discourse, faculty and students worried about misappropriation of discoveries are unlikely to discuss their work outside of a small group of individuals, thus constraining academic freedom.

3) **Johns Hopkins University v. Cellpro, Inc. (1998).** The intellectual property here was the Civin patents, which were used to make bone marrow transplants safer. Johns Hopkins University sued Cellpro for patent infringement. Its status as a university was mentioned only when Cellpro charged that after patenting the University was unable to convert the patents to
practice again, rendering the patent invalid. The University responded that the reason for this was that its lab used undergraduates, who could be not considered "skilled in the art" of this research. The court agreed with the University, and upheld its claims against Cellpro, affirming the University's monopoly of knowledge, even though the patents were crucial to saving human lives and were likely financed in part by public tax dollars used for research.

Taken together, these patent infringement cases indicate a State preference for institutional and private rights to profit from knowledge rather than the public rights to obtain and benefit immediately from that knowledge. In this regard these decisions are predominantly conservative, although the BTG case was decided on an procedural point. Further, and more significantly, these cases illustrate how knowledge is constrained as universities move more deeply into entrepreneurship.

STUDENTS. These following cases relate to patent litigation involving students’ work.

1) *In re Cronyn (1989).* A corporation sought to declare invalid a Reed College faculty member’s patent application for a chemical compound used in the treatment of cancer because the information had previously been published in three undergraduate student theses. According to patent law, if the knowledge were previously published, it would be in the public domain and, therefore, unpatentable. The corporation argued that the Reed College student theses should be considered as published because they were indexed in a shoe box in the chemistry department, and listed in the college library by the students’ last name with no reference to their contents. The Board of Patent Appeals and Interferences found for the corporation, holding that the three theses were printed publications that anticipated the patent. The Court reversed the Board’s ruling, following earlier decisions that students’ work was in the public domain and accessible, and, thus
unpatentable, if they were indexed, catalogued, and shelved in a university library. In this case, the court reasoned that the theses were not accessible because the cataloguing was not sufficient for anyone else to make use of the information.

Since the Court has indicated that student theses catalogued and shelved in a university library puts that research in the public domain, it has supported the practice of withholding students’ research results from publication, or even placement in the open shelves of university libraries, so that professors or students’ corporate sponsors can patent. Publication, construed to include placement in libraries, precludes patenting. As universities have moved aggressively to patent, this has led to a standard practice, endorsed by the Government University Research Roundtable, of allowing universities to withhold students’ work for sixty days (Campbell 1997). Cases have been reported, however, in which students’ work was withheld anywhere from ninety days to three years (Holleman, Morgan and Slaughter 1999). In terms of academic freedom, any time research is withheld the intellectual enterprise is compromised, and perhaps even more so in the case of thesis or dissertation research, which may be at the cutting edge of scholarship.

2) **National Research Development Corporation v. Varian Associates (1994).** Hoult, while a graduate student at Oxford University under the supervision of Professor Richards in the early 1970s, invented a method and apparatus for eliminating systemic noise in a Nuclear Magnetic Resonance (NMR) spectrometer. In the United States, Hoult received a patent for his invention and assigned his rights to the National Research and Development Corporation (NRDC).

However, while Hoult was working on his discovery, Richards attended a 1973 experimental NMR Conference in the United States, and as the court stated:

> While traveling to the conference one morning, Dr. Richards had an informal, one-on-one conversation on a bus with Dr. Stejskal, a Monsanto Corporation research scientist.
During that conversation, which took place without Dr. Hoult's knowledge or explicit permission, Dr. Richards disclosed the essence of Dr. Hoult's invention to Dr. Stejskal. It is undisputed... that Dr. Richards at that time did not ask Dr. Stejskal to keep the information confidential and did not inform him that either he or Dr. Hoult intended to file for a patent thereon (p. 3-4).

When he got back to Monsanto Corporation (Monsanto), Stejskal and his colleagues incorporated Hoult's invention, as disclosed by his professor, into one of its spectrometers and has used it ever since. NDRC filed a lawsuit against Varian Associates (Varian) in 1989 for infringing its patent, and Varian claimed that the NDRC patent was invalid because Monsanto had been using the invention for years. NDRC argued that the information was understood to be confidential, but the court disagreed, relying on Richard's testimony and the 1973 Conference's intended purpose of encouraging the "free disclosure of information" (p. 8).

*Varian Associates* supports the free circulation of ideas, but it also underscores the commercialization of relations between students and professors. Because student research has value as intellectual property, in this case the commercial world intruded on the professor-student, teaching-learning relationship, constraining the academic freedom of both professor and student to freely discuss the results of their research. Ironically, a professor's unguarded disclosure of information to an industrial scientist at a conference designed to encourage collaboration between academe and industry later penalized his student and university through the loss of patent rights. The case also illustrated the contradictory demands of the university on faculty and students who create intellectual property. On the one hand, universities encourage university-industry exchanges; on the other hand, they encourage patenting, precluding such exchanges.

Together, the student cases suggest that universities have the power to dictate the terms of students' intellectual property rights and to decide to what extent students will reap the profits
from the products of their labor. More importantly, these cases point to the serious potential that profit-driven intellectual property has for the exploitation of students by preventing the “publication” of their work, or by using confidential information against them.

**MISCELLANEOUS PATENT LITIGATION.** The following cases illustrate the diverse kinds of conflicts associated with patents.

1) *Carnegie Mellon University v. Schwartz (1997).* Carnegie Mellon University sued a patent firm and one of its associates for a filing error that invalidated two patent applications. The lower court ruled against the University, but the appeals court disagreed. It held that the lower court should not have dismissed the lawsuit until the University’s other litigation in California had been completed because only then could it be determined if the University suffered economically from the error. This case has no immediate academic freedom implications, but it does illustrate the broad scope of litigation in which universities engage in order to protect intellectual property.

2) *Synbiotics Corporation v. Regents of the University of California (1994).* In this case, Synbiotics Corporation (Synbiotics) sued the University and its licensee, IDEXX, over a patent for diagnosing feline immunodeficiency virus because the University’s exclusive license to IDEXX gave it a competitive advantage in the cutthroat pet veterinary market. The court responded that the exclusivity of university licensing agreements was not a litigable matter. This decision affirms universities’ rights to grant exclusive licenses of intellectual property to private corporations. When universities first began patenting in biotechnology, they considered making all licenses based on university patents nonexclusive in order to better benefit the public good, but changed position when the profit potential of the biotechnology industry became apparent (U.S. Congress 1991). In essence, the ability to grant exclusive licenses confirmed the
University’s commercial viability, opening the way for further entrepreneurism, marked by more aggressive pursuit of faculty disclosures of patentable material. However, the more knowledge becomes property, alienable and owned, the greater the constraints on academic freedom.

3) In re Regents of the University of California (1995). Singer, who was listed as the inventor on four patents developed during the course of his employment, sued the University of California for breach of contract. He claimed that his employment agreement required the University to aggressively pursue alleged infringers of the patents, but that it failed to do so. The University requested that the case be kept in the federal courts where patent law is tried, but the court determined that Singer’s contract claim belonged in state courts. Because we were unable to determine the final outcome of this case, except that Singer’s appeal to the California Supreme Court was denied, we assume that he lost his lawsuit. Nevertheless, the case illustrates how universities capture faculty’s intellectual property through employment agreements, treating faculty activities as “work for hire” that institutions can treat as they wish.

4) In re Regents of the University of California (1996). This was another decision in the University’s decades-long struggle to protect its rDNA technology, in this case, human insulin. Initially, the University was in litigation with the Lilly Corporation over the human insulin patents. Then, rather than fighting Lilly, the University made Lilly its licensee and, together, they turned against Genentech, Lilly’s competitor. Because the University and Lilly developed a community of interest when the latter became the former’s licensee, they attempted to defeat Genentech’s quest for information in a lawsuit alleging that the University’s patents were invalid. If the patents were invalidated, Genentech could develop products covered by them. Genentech sought to depose three Lilly attorneys in regard to litigation on certain patents here and in other
countries, but the University and Lilly asserted an attorney-client legal privilege. The court found for the University of California and Lilly. Although not bearing directly on academic freedom, the court, at the University’s request, again restricted free access to information.

Although these miscellaneous cases do not all have direct implications for academic freedom, they illustrate the range of issues around which institutions litigate regarding intellectual property. The cases show how lucrative such property has become once determined alienable—so much so that institutions will expend a great many resources to defend their interests, even if this means suing their own affiliates (e.g., employees and associates, such as Genentech). More important, the litigation over intellectual property is very costly, especially when it involves complex multi-state litigation, as in the University of California case. Thus, it moves resources away from Universities’ core missions of teaching, research and service, and moves intellectual property out of the purview of the faculty. Furthermore, such activity strengthens administrative offices at the periphery of the university, possibly undermining the power of faculty as collective decision makers, thus indirectly affecting academic freedom.

**ELEVENTH AMENDMENT.** The Eleventh Amendment protects the state and its agencies from being sued in many, but not all, circumstances. These cases involve public universities’ attempts at avoiding litigation.

1) *Genentech, Inc. v. Regents of the University of California (1998).* In its multifaceted and prolonged litigation around human insulin, the University of California, which held the patent on human insulin, exclusively licensed the patent to Lilly, and then claimed Eleventh Amendment immunity from Genentech’s litigation over the validity of the patent. Genentech challenged the University’s claims to immunity, arguing that if it could not sue, it would lose its property
without receiving due process. The University wielded the patent against Genentech to protect Lilly’s, Genentech’s competitor, economic interests. In other words, the University was threatening Genentech with an infringement suit, but Genentech could not countersue because of the University’s Eleventh Amendment protection. In considering this case, the court noted that Congress enacted a law (PL 102-560) in 1992 that closed the government immunity “loophole” that allowed states to take unfair advantages of others in patents and copyright disputes.

The court referred to the Supreme Court’s decision in *Regents of the University of California v. Doe* (1997), which held that universities do not lose their Eleventh Amendment immunity by pursuing intellectual property. The court in this case, however, chose to construe the *Doe* case narrowly, indicating it did not insulate universities broadly and decisively from lawsuits, at least in regard to patent law. The court deliberately also skipped over the question of whether university intellectual property programs qualified as state action, indicating only that it was “not irrelevant, in connection with the University’s claimed immunity, that the commercially-oriented activity is not central to the University’s charter,” and that “the University’s voluntary actions created a case or controversy . . . that can be resolved only by federal [courts]. By these actions, deliberately undertaken and within the University's control, the University has . . . waived any immunity as an arm of the state” (p. 1454). Furthermore, the court paid attention to the fact that in 1994 the University of California received $50.2 million in royalties, filed for 389 patents, and received 126 patents. In short, the Court skirted the questions of whether the University of California’s patent activity was covered by the Eleventh Amendment but developed arguments suggesting that patenting was not part of the core mission of universities.
In this case, the Court held against giving universities special advantage when they acted as entrepreneurs; however, it confirmed universities' identity as entrepreneurs by treating the university as a profit-making body. What triggered the ruling was the University's aggressiveness in pursuing intellectual property protection. Had Genentech been the instigator, the case may have turned out differently. In a very real sense, the University's aggressive program of patent protection literally compromised its immunity. This decision rendered universities more like businesses, constricting professional space free from market encroachment, thereby constraining academic freedom.

2) United States ex rel. Zissler v. Regents of the University of Minnesota (1998). The federal government sued the University of Minnesota for mishandling a large, multi-year federal grant. A central component of the grant was the development and production of Antithymocyte Globulin (ALG), a drug used to reduce organ transplant rejection reactions. The University held the patent for the drug. The federal government claimed that the University made false claims (in violation of the federal False Claims Act of 1994) to the National Institute of Health to the effect that it earned no grant-related income when in fact it earned over $80 million from the production and sale of ALG. The federal government charged that even though ALG was designated an "investigational drug," which made it unavailable for sale, the University sold 20 different ALG products to approximately 280 different purchasers throughout the world and used this money to support its medical school. The University claimed an Eleventh Amendment protection from the lawsuit, arguing that it was not a "person" under the False Claims Act. The court ruled against the University.

Although the case turned on the Eleventh Amendment issue, its substance dealt with
falsification of records and profiteering. These charges were not about faculty and administrators altering research results, but about their covering up accounts so they could draw on research-generated revenue streams to help pay medical school costs. Such misconduct deeply violates the essence of academic freedom, which calls for openness and honesty in all representation of research. Faculty and administrators in this case engaged in the pursuit of profit that went far beyond even the unclear and blurred boundaries surrounding entrepreneurship and moved into malfeasance.

These Eleventh Amendment cases suggest that courts, by legitimizing entrepreneurship, altered the traditional distinction between public and private arenas. Universities’ aggressive pursuit of profit-making endeavors has encouraged courts to permit the “privatization” of public knowledge, and in doing so, may have removed the traditional defenses available to public entities. Thus, public universities, historically immune from lawsuits, are finding themselves subject to traditional private law claims (e.g., contract law, fraud, etc.). The Supreme Court, however, has not restricted completely public universities’ use of the Eleventh Amendment, thus, permitting these universities (for the time being) to use that Amendment to avoid litigation and its consequences. In effect, universities can reap the benefits of knowledge “privatization,” while escaping responsibility for charges involving issues central to academic freedom. The effect of this privatization is not only important in the intellectual property context, but also, as we discussed, in the public employment context in general, which though supposedly regulated by antidiscrimination and free-speech laws, actually is treated very much like a private sphere. In regard to academic freedom, public institutions, though technically subject to constitutional constraints, actually are given by courts extensive deference in regard to employment and
commercial decisions.

The patent cases reveal increasing constraints on the free circulation of ideas. Most of the decisions (except the University of Minnesota case) directly permitted either the institutions to restrain the circulation of ideas (five conservative cases), or they could lead to such actions (five progressive/conservative cases). Universities have begun to assert their rights to faculty generated patentable discovery by state legislation or pre-employment patent assignment, removing from the faculty decisions about how such intellectual property may be used. Universities willingly exercise the monopolies of knowledge conferred by patents, curtailing free access to, and circulation and use of, such knowledge. In their pursuit of patentable knowledge, universities and faculty may: (1) withhold work from publication; (2) become involved in a broad array of litigation which diverts resources from the institutions’ core mission; and (3) conduct themselves so much like businesses that they compromise their autonomy and put faculty’s fragile academic freedom at risk. Overall, the patent cases show the courts confirming (and legitimizing) that universities are moving toward entrepreneurship and away from “non-monetary values [, which] used to play a larger role in people’s lives” (Soros, p. 115-6).

Copyright Cases

We sorted the nine copyright cases in our sample into four topic areas: validity of copyright (1), joint work (2), “fair use” (5), and Eleventh Amendment (1). We address the cases in that order.

[insert Table 3 here]

VALIDITY. This case deals with the legitimacy of an asserted copyright.

1) Applied Innovations v. Regents of the University of Minnesota (1989). This case involved a
challenge to the University’s copyright of a personality test, the Minnesota Multiphasic Personality Inventory (MMPI), a psychometric test that allowed objective assessments of personality characteristics affecting professional and social adjustment. The test was created by professors, copyrighted by the University of Minnesota in the 1940s (it later licensed it to National Computer Systems), and was widely used. Applied Innovations developed software that enabled the owner to administer, score, and interpret the MMPI test. The University saw the software as an infringement of its copyright and sued. Applied Innovations argued that the copyright was invalid because: (1) the University did not prove satisfactorily that it owned the MMPI; and (2) the professors’ who developed the MMPI were funded by Works Progress Administration (WPA) grants that required all research results to be in the public domain, thus, making the MMPI un-copyrightable. The court held that the University owned the copyright because the professors had assigned away their rights. The court agreed also with the University that the WPA has never required WPA-funded research to be in the public domain; it has indicated only that the research be “available” to the public. The University complied with this requirement by housing the raw data in its library. The court indicated as well that although testing data was un-copyrightable information, test processes such as scale membership, t-scores, and algebraic formulas employed in the MMPI test could be copyrighted on the basis of originality and creativity.

This case suggests that university ownership of intellectual property is far from new. Professors have been assigning their copyrights to universities since at least the 1940s. The finding, however, that test processes can be copyrighted suggests a broadening of the scope of copyright. Because these processes provide the underpinnings for testing generally, copyright
protection may make it more difficult for scholars and researchers to access and improve on testing, constraining the free circulation of ideas.

**JOINT WORK.** These two cases concern disputes over the ownership of joint work. They concern as well faculty/student collaboration, which may present particular difficulties for academic freedom.

1) **Cawley v. Swearer (1991).** Cawley, a graduate student at the University of Michigan, wrote a thesis under the direction of Professor Anton on the spending patterns of government units. Cawley then sued Anton, the University of Michigan, and the National Science Foundation (NSF), which had sponsored Anton and Cawley’s work, for misusing his work in several ways. First, he claimed that he was inappropriately named as author in one of Anton’s articles in which he thought another student’s work was incorrect. Second, he claimed that he was not named in another of Anton’s articles, even though they had joint authorship. Third, he accused the NSF of unlawfully “taking” his work when an NSF used some of the information in a book that Cawley gathered while he worked on the grant. As is usually the case when a student sues a professor, the court held that Cawley’s claims were not legitimate. The court dismissed the charges against Anton because Cawley had not registered his work with the Copyright Office. The claims against the NSF were dismissed because the staffer worked in an individual, rather than institutional, capacity.

This case demonstrates how the academy has become a “culture of credit,” characterized by individual claims to ideas. Claims to credit have very likely escalated because of market demands for signs of productivity on the part of academics, who are pressured by what Massey and Zemsky (1994) call an “academic ratchet,” which tightens and heightens professional and
institutional demands for publications. These claims appear even in the professor-student relationship, turning a teaching-learning relation into a conflict between putative owners of joint work.

2) *Seshadri v. Kasrarian (1997)*. Seshadri, a professor at the University of Wisconsin, had a falling out with Kasrarian, his graduate student, over a paper Seshadri submitted to a journal under both their names. The University of Wisconsin settled the conflict by suspending Seshadri for a year without pay and forbidding him to advise graduate students indefinitely. Seshadri then sued Kasrarian, claiming the article in question was not joint work, but was written entirely by himself. The court, however, found that the initial article submission and earlier testimony indicated that Seshadri regarded the work as jointly-owned. The court affirmed the principle that when a work is jointly-owned, either owner may copyright it and license the copyright to a third party, subject only to a duty to account to the coauthor for any profits. As in the previous case, *Seshadri* points to a culture of credit, characterized by individual claims to ideas that turn the teacher-learner relationship into conflicts over ownership between professors and students.

These two cases suggest that the courts treat collaborative academic work as they do other kinds of joint work, turning ideas into material goods that can be owned. The joint work doctrine allows all claimants equal status, opening up the possibility for students’ to claim credit, a progressive notion, given students’ place in the academic hierarchy. Students, however, can only make such a claim if professors at some point acknowledge their endeavors as joint work. Under pressure from the culture of credit, professors are unlikely to represent work with students as joint, instead claiming themselves as sole authors and owners of the copyright.

**FAIR USE.** The Copyright Act of 1976 contains a “fair use” exception to the monopoly of
copyrighted material so that critics, journalists, and educators could copy sections, thus contributing to the free flow of ideas in a democratic society. The fair use of a copyrighted work includes copying the material for criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research. In determining whether the use made of a work is “fair,” courts consider (a) whether the use is for commercial purposes, (b) the type of work involved, © the amount copied, and (d) the effect on the market value of the work. Supreme Court decisions indicate that the “market value” component is the most important. These five cases relate to the fair use of unpublished materials, course lectures, and materials included in “course packs.”

1-2) Wright v. Warner Books (1991), Sundeman v. The Seajay Society, Inc. (1998). These two decisions related to the use of unpublished materials contained in university libraries. In Wright, the literary estate of Richard Wright, author of Native Son and numerous other works, sued for copyright infringement of unpublished materials. Yale University was drawn into the case because its library purchased the Wright archives, where Walker, a Howard University professor, used the documents (illegally, the estate argued). In Sundeman, the literary estate of Marjorie Rawlings, author of The Yearling and many other works (including the unpublished first novel Blood of My Blood), and a foundation representing the University of Florida sued another foundation for allowing a scholar to read the unpublished work and offer a critical commentary.7 The courts took the positions that scholars and critics were protected by the Copyright Act, allowing them to use unpublished manuscripts and archival materials, even when they were part of literary estates. The courts took this position despite the fact that copyright decisions regarding unpublished materials favor the ability authors and their estates to control first public expression.
of those material.

Although fair use prevailed, thus rendering these decisions progressive, we note that these cases reflect the penetration in the realm of ideas by the profit nexus in that literary trustees apparently hold rights to material even after it has been purchased by libraries, as was the case with the Wright estate and the Yale University Library. Moreover, even letters written by the author to a scholar are still within the purview of the estate and cannot be used at will, only in “fair use.” In other words, Professor Walker could not quote freely from letters Wright had sent to her, constraining the free flow of knowledge and limiting academic freedom.

3) Association of American Medical Colleges v. Cuomo (1991). In 1988, New York State passed the Standardized Testing Act (the Act). The Act required that standardized testing be open to public scrutiny by providing breakdowns of test results by race, ethnicity, gender and linguistic background, and by giving students sample questions for nominal fees. The Association of American Medical Colleges (AAMC), purveyor of the MCAT, sued, arguing that the Act called for more than fair use. The AAMC had not made past versions of its tests publicly available and provided only a single sample test to prospective test takers. AAMC argued that the Act was inapplicable in its case because it owned a copyright of the MCAT and the Act would harm AAMC’s market for the test. Although the court weighed the market issue heavily, it decided that there were still matters to be settled and ordered the case for re-trial. For example, an unresolved and contested issue was the impact of Act on the MCAT’s market value. Before the case was retried, the State entered into an agreement with AAMC in which AAMC agreed to offer additional administrations of its tests to state residents, if it was not subject to the full requirements of the Act’s disclosure provisions. In essence, AAMC agreed to meet informally some of the
requirements of the Act, rather than proceed with a case that risked its full compliance with the law's requirements.

Although this case did not deal directly with students or faculty who hold copyrights, it dealt with the professional society that acts as the collective body of the medical profession, a body which polices entry into medical school through the MCAT. Like other entities that test, the AAMC is an example of professions creating property rights in knowledge, requiring that knowledge to be purchased or licensed, then using it to judge, select, and discipline aspirants to the profession. These cases illustrate how the "norms" of profit-making are internalized and result in, following Foucault (1977), self-discipline. In other words, the profession has certain ways of knowing, judging, and selecting individuals, disciplining itself, and making scholarship narrow and most accessible to those students able to attend schools with the resources necessary to prepare them to meet the testing hurdles. By stipulating to certain practices rather than trying the case, the AAMC ensured that its property and power of gate-keeping for the medical establishment remained in place.

4) University of Florida v. KPB, Inc. (1996). KPB Incorporated (KPB) was the parent company of A-Plus Notes, a company that produced commercial study guides for various courses taught by University of Florida faculty. By hiring students to take lecture notes, which it then marketed to the student body as a whole, KPB left itself open to a copyright infringement (and trademark violation) lawsuit by the University. The court ruled against the University of Florida on both copyright and trademark grounds, citing the fair use doctrine. The ruling implies that the contents of courses at public universities, delivered in public settings, are not protected by copyright nor owned by the university. On the one hand, this decision is progressive because it strengthens
academic freedom by indicating that the content of professors' courses is free and accessible once presented in the classroom. On the other hand, this decision may be conservative because it suggests that external companies can send paid representatives, in this case students, into classrooms, to mine professors' course content, which the company then repackages and sells to students. Although money paid for such course notes cannot be seen as an extra fee, since presumably the students were entitled to everything the professor had to say via their tuition, such a decision suggests that the ancillary company could re-package professors' materials and sell them to a broader audience.

The impact of this decision is best exemplified by the distance education controversy, over which professors, institutions, and ancillary companies are currently struggling (AAUP 1999b, Noble 1999). Very often the institution, while not owning the material, stands to benefit from arrangements with ancillary companies that re-package professors' work, as is the case in the current struggle at UCLA over distance education (Noble 1999). While making course content free and accessible may increase the circulation of ideas, they are not free; indeed, external entities are interested in packaging these ideas for circulation only at a profit. Such a ruling deprives faculty of control over the content of their courses, and may create situations in which the university or an external entity, rather than the faculty member, has final say over what is included or excluded in the package, thereby curtailing academic freedom.

5) Princeton University Press v. Michigan Document Services (1996). Several presses sued the Michigan Document Services (MDS), a company which copied materials to produce course packs tailored to meet University of Michigan professors' requirements for specific classes. MDS took a principled position on fair use, arguing that the course packs were educational and
noncommercial. The Court of Appeals for the Sixth Circuit disagreed, adhering to Supreme Court precedent emphasizing the importance of market value in determinations of fair use. The publishers convinced the court that MDS's refusal to pay permission fees for its use of copyrighted material deprived them of over $500 thousand annually. Given that profitability of scholarly books is often marginal, the court reasoned that the publishers needed the fees.

Chief Judge Martin's dissenting opinion, however, pointed out how problematic this ruling is for higher education. He argued that the unlimited public access to published work in educational settings is one of the essential checks on the otherwise exclusive property rights given to copyright holders. He argued:

The majority's strict reading of the fair use doctrine promises to hinder scholastic progress nationwide. By charging permission fees for this kind of job, publishers will pass on expenses to colleges and universities that will, of course, pass such fees onto students. . . . [The] fair use doctrine contemplates the creation and free flow of information; the unhindered flow of such information, through . . . education in turn spawns the creation and free flow of new information (p. 1393-4).

As in the previous case, a for-profit corporation external to the university, benefitted from the majority decision (although Princeton University Press is legally part of the university, its mission is publishing for profit and not part of the core mission of the university). The case, therefore, hinders academic freedom.

The two latter cases privileged companies that profited from selling materials produced by professors for the general university community. They suggest that the academic community is like an "intellectual commons" that persons and corporations ancillary to the university community can package for profit, then withhold that package from the general public, except for a price. In other words, the university cannot claim the product of professors' classroom endeavor, nor can the professor, but companies external to the academic world can do so. In
essence, profit-making corporations can enclose sections of the intellectual commons. Such enclosures might destroy the intellectual commons, just as the sixteenth-century British enclosures of common land in Scotland destroyed the clan system and identity of that country.

**ELEVENTH AMENDMENT.**

1) *Chavez v. Arte Publico Press (1998).* In this last case, the dispute began over copyrights but was decided on Eleventh Amendment grounds. In the case, Denise Chavez, a playwright and dramatist with a strong reputation as a spokesperson for Spanish-speaking women, contracted with Arte Publico Press for a book. Arte Publico Press is owned by the University of Houston, a public institution. Chavez wanted the Press to stop publishing one of her books because it did not correct errors she brought to its attention. She objected also to the Press' misidentification of her as a judge of plays chosen for an anthology. Before 1992, the University of Houston was protected from such lawsuits by the Eleventh Amendment. But in that year, Congress amended both the Copyright and Trademark Acts to eliminate state immunity from lawsuits in federal courts. Because of this Amendment, the lower courts found for Chavez, and the University of Houston appealed to the Supreme Court. The Supreme Court cleared the decision and ordered the appeals court to decide the case in light of its previous decisions holding that Congress could not abrogate states' rights to immunity under the Eleventh Amendment (*University of Houston v. Chavez* 1996). This case was reheard, and the court found for the University.

At first glance, this case seemed concerned with rather abstruse issues of constitutional law that had no academic freedom dimensions. This decision, however, concerns public universities' immunity from lawsuits related to their profit-making endeavors. State entities can engage in private for-profit activities, even in unfair practices, yet claim the public-right to
immunity in lawsuits. The decision effectively encourages universities to act as state-subsidized entrepreneurs. The Supreme Court has given public universities special protection to engage in for-profit activity. For example, in two cases decided in June 1999, the Court affirmed public institutions’ immunity against patent and trademark laws (Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank 1999, College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd. 1999). Because a public university is not liable in the same way that is a private university or a private publishing company, it is granted a competitive advantage. By affirming the university as a state-subsidized entrepreneur, the federal courts opened the way for universities’ broader engagement in academic capitalism (Slaughter and Leslie 1997).

The copyright cases of the 1990s reveal the existence of: (1) an academic culture of credit and claims to ownership under copyright that renders relations previously free from legal jurisdiction subject to it, in the process making more adversarial the relations between colleagues, between faculty and institutions, and between faculty and students; (2) the penetration of the academy by external, for-profit entities that stake claims to property in the intellectual commons created by the university community; and (3) the affirmation of public universities as state subsidized entrepreneurs, opening the way to universities’ broader engagement in entrepreneurship. Although the copyright cases exhibited more progressive ideology than the patent ones, they have negative consequences for academic freedom.

Cumulatively, these intellectual property decisions are likely to restrict the free circulation of and broad accessibility to ideas, the antithesis of academic freedom. At the very least, these cases make the exercise of academic freedom more difficult. In some ways, the restriction of ideas in order to profit from them may be seen as furthering faculty members’
ability to reap the economic rewards of their work. Ultimately, however, the restraint on ideas works against faculty members. Given that faculty often have to assign away their intellectual property rights, and that courts further institutional over individual interests, faculty have little legal recourse in these matters. More important, the cases reflect how the ideology of entrepreneurship makes the restriction of ideas for profit normal or, per Althusser, “obvious.” Thus, the cases reflect in some sense the legitimation of entrepreneurship from above (i.e., from courts), but at a more basic level they reflect how entrepreneurship also comes from below; that is, from the norms that govern academic life (e.g., culture of credit, academic capitalism, etc.).

CONCLUSION

The cases illustrated how academic institutions involuntarily contribute to a conservative entrepreneurial state through the state-enforced accommodation of politically-conservative decisions or voluntarily contribute to a conservative entrepreneurial state through the exploitation of faculty and students and aggressive pursuit of profit. As the cases indicate, federal courts legitimate this kind of State. The 13 academic freedom cases most directly illustrated the ways in which the Supreme Court supports a conservative agenda. The intellectual property cases illustrated most directly the ways in which federal courts support an entrepreneurial agenda, which is in most cases, but not all, conservative according to our definition. In most of the cases, we can see that the state acting on institutions of higher education or through them, furthered conservative ideological imperatives without having to look toward the constraints imposed by our liberal form of government, thereby putting into question the notion of liberalism and the values and discourses associated with it. Academia itself promotes this ideology by challenging antidiscrimination laws (e.g., University of Pennsylvania) and protecting its profits (e.g., the
University of California litigation).

In this paper, we argued that the Supreme Court and Appellate Court cases illustrate how academic freedom has been redefined in conservative ways. This is troubling generally, but it is particularly troubling in the academic context because the constraint of academic freedom directly affects the individuals who most fully represent the academic community, the faculty. Furthermore, although the academic community traditionally prides itself as epitomizing the “free” marketplace of ideas, the search for “truth,” and the production of knowledge, the cases reflect serious and considerable conflict within that community (e.g., the discrimination against women and people of color in the University of Pennsylvania case; the accommodation of fundamentalist Christianity in Rosenberger, the restriction of student rights in Fox, Salve Regina College, VMI, In re Cronyn, Varian Associates; and all the disputes over who “owns” knowledge in the intellectual property cases). The cases also indicate that public and private colleges and universities have become (either by choice or by state pressure) more accommodating of sectarian interests and the commodification of ideas, either of which “casts a pall of orthodoxy over the classroom” (quoting Justice Brennan in Keyishian v. Board of Regents 1967, p. 603).

We sought in this paper to make faculty aware of serious trouble spots for academic freedom. We conclude with a few suggestions for tempering the ideological imperatives of conservative entrepreneurship. Before we do that we make three points about ideology in general. First, although courts legitimize particular ideologies, we do not believe any ideology is static or intractable. As the cases illustrated, the courts are not always consistent. And there can be no one true ideology; ideology manifests itself in many ways and not always consistently. For example, a move to use the courts to ensure the state regulation of abortion for the “public interest” can lead
also to the state regulation of intellectual property for the same interest, which would hinder the conservative stance on the pursuit of profit. Second, not all ideology need be politically repressive. In this paper, we argued that progressive ideological stances further academic freedom. Finally, it is the inherent contradiction in all ideology that sets the stage for contestation, resistance, and re-appropriation. We can heed, therefore, the writings of Gramsci and others who asserted the possibility of resisting in “counter-hegemonic” ways.

Conservative entrepreneurial ideology, however, ultimately diminishes academic freedom because it constrains the free circulation and broad access to ideas by furthering elitist (e.g., limiting antidiscrimination law), institutional or corporate (e.g., avoiding liability), capitalist (e.g., privileging profit making over other endeavors), and sectarian (e.g., fundamentalist Christianity) interests. To resist the conservative entrepreneurial state requires understanding how it impacts academic freedom because it is this freedom that provides opportunities for resistance. Faculty should be seriously concerned with the state subsidy of private interests such as entrepreneurship (e.g., as reflected in the intellectual property cases); sectarian views (e.g., as reflected in the three abortion cases, Finley, and Rosenberger); unethical conduct (i.e., the exploitation of students’ ideas in Cawley, In re Cronyn, and Varian Associates); and employment discrimination (as illustrated by Jett and University of Pennsylvania). It is easy to lull oneself into perceiving the state only in regard to repression, but the state must be regarded as ideological in the Althusserian sense as well. Not only can the state enact violence to ensure compliance through its apparatuses, but, as Althusser noted, it can make that compliance seem “obvious.” The state’s ideological apparatuses cannot be disconnected from its repressive ones; thus, we cannot ignore the potential ideological domination embedded in the public subsidy of private
rights. The state is vulnerable to the politically-repressive tendencies of those with wealth and other privileges (e.g., corporations, fundamentalist Christians). Therefore, the public subsidy of private rights not only has the potential for favoring certain discourses over others in academia, but these discourses can become exclusive of others, thereby significantly restricting the free circulation of ideas. The unfettered pursuit of government funding has negative consequences for individual and institutional academic freedom if such funding is tied to ideologies restrictive of the free flow of ideas or free access to ideas. Nonetheless, state funding also provides the stage for the growth of diverse ideas (Slaughter, 1988). Generally, we contend that academic freedom is one of the keys to checking and resisting the oppressive tendencies of the state, and argue for awareness that government funding has consequences for academic freedom.

We also noted the courts’ “hands off” approach to institutional action in the academic freedom and intellectual property cases. This had the negative consequence of modeling the public academic arena after the private one. While private institutions of higher education are to a large extent protected from public accountability, our review of the cases indicated that public institutions are also treated very much as “private” in many contexts relevant to academic freedom (e.g., the employment context, intellectual property). The “moral and ethical elevation of the private arena—as that arena where virtue, morality, and conscience are realized—over the public arena” (Seligman, 1997, p. 505) significantly diminishes the traditional, constitutional constraints on state and institutional power, putting faculty and students at the mercy of state and institutional actors. We must contest the elevation of the private arena over the public one because ultimately this elevation will constrain rather than promote academic freedom.

The cases we described in this paper, particularly those dealing with intellectual property,
point toward the disturbing growth of academic capitalism (Slaughter and Leslie 1997). By academic capitalism, we mean the rise of the profit nexus in many aspects of academic life, and the restructuring of institutions, priorities, and relationships that promote the pursuit of profit. Arguably, such ideology has led to the increase of knowledge for the “public good,” even if for profit. More likely, however, the profit orientation toward knowledge has led to an ideology of privileging competition for profit-making over all other endeavors, including and especially those that lead toward social justice. The competition within academia and with other public and private industries for the “mining” of knowledge severely constrains inter- and intra-university relationships and privileges those discourses that promote profit at the expense of those that expose hidden power arrangements and promote social justice. The core reason for academic freedom—the protection of faculty who express dissenting ideas—then gets lost. More disturbing is how the right to academic freedom is being misappropriated for profit. This right is now being claimed by institutions and those affiliated with it (e.g., faculty in profit-making departments, private industries forming partnerships with universities) for the protection from the public disclosure of research findings, trade secrets, and so forth. Secrecy is usually antithetical to academic freedom.

The study of cases such as these allows understanding academic freedom in important ways. In fact, academic freedom, because it necessarily requires the elaboration of “rights” (institutional and individual) is a particularly relevant subject of law (Byrne 1989). Judges as authorities of legal discourses, therefore play a key role in the shaping of academic freedom. We pointed to a disturbing judicial trend toward politically-conservative, entrepreneurial philosophy. Such trends must be exposed so that they can be resisted by those whose interests are not
necessarily served by them. Faculty are also authorities of discourses and sometimes "organic intellectuals" who can use their authority to assert counter-philosophies, hopefully ones that promote social justice and the free circulation of ideas. At any rate, we should pay attention to the federal cases, particularly those of the Supreme Court, because they shed light on how academic freedom manifests itself in academia, and indicate how institutions will be required to act on academic freedom issues. State cases may become increasingly important because Contract law is adjudicated in state courts. If, as we predict, the employment and intellectual property contexts further "privatized," then contract law might become considerably more important than federal law for resolving disputes with far reaching implications for academic freedom.

Our concern with academic freedom can no longer focus only on federal or constitutional law. In fact, as Kaplin and Lee (1995) pointed out, the legal boundaries of academic freedom are initially defined by contract law (e.g., the inclusion of the AAUP principles in faculty contracts), thus, making academic freedom an interest for which two parties may negotiate. The potential importance of contract law for academic freedom will require close attention to letters of appointment, faculty and student handbooks, and other institutional documents. Although not all states acknowledge these materials as contracts, they may provide the basis for individual and institutional interests. And, if the AAUP’s policies are included in these documents, they might be used as evidence of industry practice. Institutional documents, therefore, must be understood by faculty and modified when appropriate. In this regard, forming collectives, and perhaps unions, with other faculty members provides the key for negotiating better “working conditions” for faculty and students.
In conclusion, our review suggested that the future of academic freedom looks precarious. External forces are redefining academic freedom in ways that privilege conservative discourses. Our focus has been on the State and social forces, so we agree with Foucault (1980) that although the focus on the power of state apparatuses is important, we must also look for power in the “local,” or more “minute and everyday lives” (p.60), understanding how faculty, “discipline” themselves to behave in certain ways that ultimately work against academic freedom. We do not ignore that faculty members misuse academic freedom, acting individually and through institutional committees. Academic freedom violations occur within institutions, within departments, and even within classrooms. For example, Rabban (1993) pointed out that faculty members, acting through committees, abuse academic freedom. Tierney (1996) noted how academic practices hinder the development of certain discourses. And Olivas (1993) argued that claims of academic freedom are used to shield faculty member’s creation of harassing environments for students. Faculty must not permit themselves to abuse academic freedom or to exploit each other and their student as they struggle to resist their very real loss of academic freedom. Because the courts are not supportive of faculty members, any loss by a faculty member in the institutional or judicial system is a potential loss for academic freedom. In a very real sense, the struggle for academic freedom may not be in the courts or in the commercial arena, but in departments and classrooms. Therefore, these locations/spaces may be where our attention first must be focused. However, it is important not to place responsibility at the level of faculty only. Rather we must always seek to see how larger social forces work to restrict and constrain academic freedom.
NOTES

1. The degree to which the Supreme Court has paid attention to academic freedom has varied over time. Elaborations of the rise and fall of courts' deference to professors' ideas about academic freedom and tenure have been provided by, among others, Rabban (1993) and Van Alstyne (1993). More general histories of academic freedom have been conducted by, among others, Hofstadter and Metzger (1957), Lewis (1988), Schrecker (1986), Slaughter (1980, 1981, 1993), and Silva and Slaughter (1994). The AAUP documents pertinent to academic freedom are contained in its 1990 Policy Documents and Reports (The Red Book), and we refer readers particularly to the 1940 Statement of Principles on Academic Freedom and Tenure, which represents the profession's understanding of academic freedom and provides evidence of "industry practice."

2. We began writing this paper in January 1999, and so we ended our search for cases in December 1998. The Supreme Court, however, continues to decide cases that may bear on academic freedom. For example, since December 1998, the Court has ruled on employee liability under the American with Disabilities Act, sexual harassment under Title IX of the Educational Amendments of 1972, punitive damages under Title VII of the Civil Rights Act of 1964, and state immunity for intellectual property litigation under the Eleventh Amendment. We cite in the paper some of these cases but do not conduct an extensive analysis of them.

3. Waters v. Churchill (1994) was sent back to the lower court to decide after the Supreme Court ruled that the proper focus should be on what the employer reasonably thought was said, not necessarily on what was actually said.

4. We include in the "right-to-life" group those organizations that use often non-religious names to promote religious causes (e.g., the Family Research Council, which filed a brief in the case, and whose website identifies its mission as "promoting the traditional family unit and the Judeo-Christian value system upon which it is built"). We did not include in this category such organizations as The Rutherford Institute, which also filed a brief in Webster supporting Missouri, and whose mission statement purports to support "religious liberty."


6. In making this ruling, the Court cited another case in which a court noted that if institutions chose to make claims on faculty writing as "work for hire," they could successfully claim ownership to it. It is only because institutions have refrained from making these claims that courts have had to settle disputes between colleagues about joint work and copyright ownership.

7. In a strange twist, the literary estate and the University's foundation sued the Seajay Foundation, which was aligned with the University's press and, probably, a faculty member. Although the rights of the press and scholar were affirmed, the case revealed the aggressiveness of the giving arm of the University, which acted to protect what it saw as university property, even though it acted against another part of the University.

8. It is unlikely that the recent Clinton appointments (Justices Ruth Bader Ginsburg and Stephen Breyer) will have too great an impact on the predominant ideology of the current Supreme Court. When ultra-conservatives (Justices Rehnquist, Scalia, Kennedy, and Thomas) are joined by the "merely" conservatives (Justices O'Connor and perhaps Souter), they will out-vote the so-called moderates (Justices Stevens, Ginsburg, Breyer, and perhaps Souter). We also have to note the large number of current federal lower court judges who were nominated by Presidents Reagan and Bush (for life) during their tenure in office. Our contention about the current ideological imperatives of the federal courts, therefore, will likely be valid for some time.
# TABLES

Table 1: Academic Freedom Cases

<table>
<thead>
<tr>
<th>TYPE</th>
<th>CASE</th>
<th>ISSUE</th>
<th>EDUCATIONAL ASSOCIATION¹</th>
<th>DECISION²</th>
<th>CLASSIFICATION</th>
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<tr>
<td>Employment</td>
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<td>Race discrimination and municipal liability</td>
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<td>Employer</td>
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<td>Release of confidential peer review files</td>
<td>AAUP (neither), ACE and other universities (for Penn)³</td>
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<td>Waters</td>
<td>Employee dismissal for criticizing employer</td>
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<td>State restriction of abortion rights</td>
<td>NEA, AAUW, Professors et al (against State); ACL (for State)⁴</td>
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<td>Conservative</td>
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<td></td>
<td>Rust</td>
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<td>Casey</td>
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<td>Rosenberger</td>
<td>Funding of Religious Activities</td>
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<td>Reno</td>
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<td>VMI</td>
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<td>Case involved university</td>
<td>Student⁸</td>
<td>Progressive</td>
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</table>

¹This refers to the educational association (or individual) which filed an amicus brief on behalf of one of the parties.
²This refers to the winning party in the case.
³ACE is the American Council on Education. The Universities which filed briefs included Harvard University and Stanford University.
⁴ACL is the American Collegians for Life.
⁵AMSA is the American Medical Student Association.
⁶UFL is the University Faculty for Life.
⁷ISI is the Intercollegiate Studies Institute; SPLC is the Student Press Law Center.
⁸The actual plaintiff in the case was the United States, who filed the lawsuit on behalf of a woman denied admission to VMI.
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<td>Federal grant misconduct</td>
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<td>University press and government immunity</td>
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*Jeffries v. Harleston*, 21 F.3d 1238 (2d Cir. 1994).


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