

# Critical Inquiry: A Tool for Protecting the Dissident Professor's Academic Freedom

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## INTRODUCTION

Dissident speech, whenever it occurs, is both a test and a measure of the vitality of a democracy. However, in times of national emergency or war, the government's interest in safety and security pushes strongly against the citizens' interest in individual liberty and free expression, especially their right to speak out against or question the government's policies and actors.<sup>1</sup>

The events of September 11, 2001, and our nation's subsequent involvement in international conflicts have exacerbated the tension between national security and individual expression. However, despite its recent resurgence, this tension is not new.<sup>2</sup> Writing more than sixty years ago during World War II, Justice Robert Jackson observed:

We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State . . . the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ

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1. I use the terms "free expression" and "expressive activity" interchangeably and as a term that connotes both speech and conduct. See Louis Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 79 (1968) (arguing that speech and conduct are constitutionally indistinguishable in a First Amendment context because "[s]peech is conduct and actions speak").

2. See generally GEOFFREY R. STONE, *PERILOUS TIMES* (2004) (discussing tensions over free expression from the 1790s through the 1960s in five eras of war or national emergency).

as to things that touch the heart of the existing order.<sup>3</sup>

Perhaps nowhere is this “intellectual individualism” and the right of free expression more important or more highly valued than within our nation’s institutions of higher learning.<sup>4</sup> Thus one of the most dramatic illustrations of the post-September 11th tension occurred when, in early 2005, Hamilton College (“Hamilton”) rescinded its speaking invitation to Ward Churchill, a then-tenured professor at the University of Colorado, Boulder (“CU”).<sup>5</sup> The withdrawal of the invitation was the culmination of efforts by a disgruntled Hamilton professor who wanted to prevent Churchill’s visit to the campus. The professor objected to a polemical essay written by Churchill about September 11, and Churchill’s disparaging remarks concerning the victims of the World Trade Center attacks. The Hamilton professor’s agitation over the Churchill invitation and polemical essay created a firestorm of controversy locally and nationally. Although Churchill’s political statements were “extramural utterances,” that is, statements made by an academic expressing publicly his views on matters unrelated to his academic specialty, they prompted a two-year investigation by CU that ultimately resulted in Churchill’s termination from employment.<sup>6</sup>

The Churchill controversy and his subsequent termination exemplify the absence of meaningful protection for controversial extramural utterances by academics. In my view, the decision by CU’s Chancellor and Board of Regents to fire Churchill was a patently obvious attempt to punish Churchill’s expression of his personal view of a national political matter. While I neither share Churchill’s sentiments about the victims nor embrace his less-than-rigorous analysis of American foreign policy in the Middle East, I do unequivocally support his right to express his personal political viewpoint as essential to a robust national debate on matters of public importance. Therefore, the fact that Churchill was terminated is troubling.

However, even more disturbing are the broader implications of Churchill’s termination. The actions taken by CU’s highest officials raise the issue of whether any tenured professor at a public university risks incurring an investigation of all her endeavors—academic and otherwise—when she expresses dissident political opinions. After incidents like Churchill’s firing, all faculty members might fear that they are susceptible to the same intense

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3. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641-42 (1943).

4. *See, e.g.*, Robin Wilson & Ana Marie Cox, *Terrorist Attacks Put Academic Freedom to the Test*, CHRON. HIGHER EDUC., Oct. 5, 2001, at A12 (“[P]rofessors across the country have found their freedom to speak out hemmed in by incensed students, alumni, and university officials. . . . Academics have been shouted down by voices on the left and the right.”).

5. *See, e.g.*, Patrick D. Healy, *College Cancels Speech by Professor Who Disparaged 9/11 Attack Victims*, N.Y. TIMES, Feb. 2, 2005, at B1.

6. *See, e.g.*, Dan Frosch, *Colorado Regents Vote to Fire a Controversial Professor*, N.Y. TIMES, Jul. 25, 2007, at A11. Churchill’s termination was based on academic misconduct, including plagiarism. *Id.*

scrutiny and—ultimately—the same harsh economic sanction.<sup>7</sup> As a result, professors will likely err on the side of caution, refraining from speaking or writing publicly about their political perspectives.<sup>8</sup> There will be a chilling effect throughout academia. In turn, the national debate on matters of public importance will be diminished through protective self-censoring by academics.<sup>9</sup>

In this Essay, I argue that the concept of academic freedom should be broad enough to protect professors from intrusion by administrators, other professors, and outside actors. Protection of academic freedom should extend to professors both when they are teaching or researching and when they are speaking out as ordinary citizens. My perspective is not a novel one, since, at least in theory, the three fundamental principles of the American Association of University Professors (“AAUP”) provide for freedom in teaching, researching, and speaking as a citizen.<sup>10</sup> However, although the third AAUP principle purports to insulate extramural utterances, it has not provided adequate protection for professors, as Churchill’s dismissal illustrates.<sup>11</sup>

I suggest that institutions of higher learning should resist pressures that interfere<sup>12</sup> with an academic’s extramural utterances.<sup>13</sup> However, on those

7. Even if Churchill, as a tenured professor at a public university, had turned to the federal courts for vindication of his freedom to speak as a citizen, he would have found minimal help. Sadly, public university professors do not enjoy expansive speech protection under the Supreme Court’s free speech jurisprudence. Despite lofty pronouncements about “the transcendent value” of academic freedom, the Court has not squarely defined or addressed the contours of the term. *See, e.g., Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). To the contrary, if a professor speaks out as a citizen she can be subjected to sanctions under the public employee speech doctrine. This highly restrictive doctrine can apply when the professor seeks to challenge her right to speak in court, whether her extramural utterances occurred on her home campus or in an outside venue. *See, e.g., Jeffries v. Harleston*, 52 F.3d 9 (2d Cir. 1995) (applying the public employee speech doctrine to a public university professor who was demoted based on his controversial off-campus speech).

8. *See* Jennifer Elrod, *Academics, Public Employee Speech, and the Public University*, 22 *BUFF. PUB. INT. L.J.* 1, 60 (2004) [hereinafter Elrod, *Academics*] (describing the potential chilling and self-censoring of professors where they worry about crossing an unspoken boundary).

9. *Id.*

10. *See* AM. ASS’N OF UNIV. PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE WITH 1970 INTERPRETATIVE COMMENTS, available at <http://www.aaup.org/NR/rdonlyres/EBB1B330-33D3-4A51-B534-CEE0C7A90DAB/0/1940StatementofPrinciplesonAcademicFreedomandTenure.pdf> [hereinafter AAUP, 1940 *Statement*]; *see also* UNIV. OF COLO. BD. OF REGENTS, LAWS OF THE REGENTS, Art. 5, Pt. D, 5.D.1-2 (2002), available at <https://www.cu.edu/regents/Laws/Article5D.htm>; UNIV. OF COLO. FACULTY HANDBOOK, ACADEMIC PRINCIPLES, PROFESSIONAL RIGHTS AND RESPONSIBILITIES, AND RELATED POLICIES, II.B, available at [http://www.cu.edu/faculty/fac\\_handbook/06/Six-II.html](http://www.cu.edu/faculty/fac_handbook/06/Six-II.html) (including a full reference to the AAUP Statement on Academic Freedom and Tenure) (last visited Feb. 4, 2008).

11. *See, e.g.,* John Gravois, *Colo. Regents Vote to Fire Ward Churchill*, *CHRON. HIGHER EDUC.*, Aug. 3, 2007, at A1 (describing the history of the Churchill controversy and conservatives’ pleasure in his termination). *But see Ward Churchill Fired from CU Boulder Amid Storm of Controversy, AIM Protests*, *NATIVE VOICE*, Aug. 1, 2007, at C1 (commenting that Churchill’s firing was little more than CU officials submitting to pressure from neoconservatives).

12. Interference may take many forms in the academic setting. For example, one professor may mount a campaign to prevent another academic’s visit to a campus as happened at Hamilton.

inevitable occasions where institution officials believe it is necessary to address a professor's comments, I propose a structured, open debate process that I refer to as "critical inquiry." When implemented properly, the critical inquiry process can serve as a tool to mitigate against the impulse to silence controversial ideas and eliminate rigorous—even rancorous—debate on matters of public importance. Simultaneously, critical inquiry reinforces the educational value of airing a multitude of viewpoints, allowing the college or university campuses to remain laboratories of ideas and intellectual experimentation.<sup>14</sup> Finally, the critical inquiry process provides a forum for institutional officials to clarify that a dissident professor is expressing personal views by including in the debate other academics who hold opposing views.

In Part I of this opinion essay, I briefly review Churchill's provocative essay, *Some People Push Back*, in which he describes his personal political views about the events that unfolded on September 11, 2001, and his critique of America foreign policy. In Part II, I examine the importance of open dissent to a vibrant democracy, particularly during times of national emergency or war when such expression is often suppressed under the guise of patriotism or national unity.<sup>15</sup> Next, in Part III, using the example of the Churchill controversy, I discuss the danger that suppression of an academic's expressive activity will chill expression of opposition viewpoints within the university, dampen scholarly endeavors, and discourage citizen participation in the national debate. In Part IV, I examine the AAUP's three core principles. Finally, In Part V, I describe both the theory and application of the process of critical inquiry. I suggest that institutions of higher education use this process as a structured forum in which participants can analyze, dispute, and debate the issues raised by contested remarks as an alternative to other forms of interference with extramural utterances and academic freedom.

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See Healy, *supra* note 5. Politicians may bring intense pressure to bear on a college president to sanction a professor. See *Jeffries*, 53 F.2d at 9.

13. In advocating for academic freedom, I do not suggest that a college or university should never investigate allegations of academic misconduct against a tenured professor such as those made against Churchill. To the contrary, an institution of higher education (public or private) has an obligation under the AAUP's principles of academic freedom to ensure that its scholarly standards are being met by all members of its faculty. Rather, I merely propose that institutions of higher learning resist those pressures (inside and outside) that interfere with an academic's extramural utterances.

14. See *Keyishian v. Bd. of Regents*, 385 U.S. at 603 ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'") (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

15. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943) ("Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion only achieves the unanimity of the graveyard.").

I  
CONTROVERSY AND TERMINATION

*A. Churchill's Essay*

Churchill's essay, *Some People Push Back: On the Justice of Roosting Chickens*, was the subject of a national controversy in early 2005.<sup>16</sup> This provocative title repeats a metaphor first used by Malcolm X forty years earlier. When asked about the assassination of President Kennedy, he replied: "it was merely a case of 'chickens coming home to roost,'" suggesting that the oppressed, inevitably, will rise up and strike back against their oppressors.<sup>17</sup> Likewise, in his essay, Churchill maintains that the attacks of September 11, 2001, were retribution for the genocide caused by the harsh economic sanctions imposed by the American government against Iraq.<sup>18</sup> He contends that both father and son Bush administrations were responsible for the deaths of thousands of Iraqis, including more than 500,000 children, accounting for approximately one-quarter of the child-age population.<sup>19</sup> Churchill characterizes the physical and psychological devastation as a "holocaust."<sup>20</sup>

Controversially, Churchill insists that the victims who died in the World Trade Center on September 11, 2001, were not innocent. Rather, he contends that they were complicit in the American Government's harsh sanctions against the Iraqis and the resulting deadly violence.<sup>21</sup> Churchill argues that the victims were part of "a technocratic corps at the very heart of America's global financial empire—the 'mighty engine of profit' to which the military dimension of U.S. policy has always been enslaved"<sup>22</sup> He claims that the destruction of the World Trade Center was an effective way to penalize "the little Eichmanns" for their active participation in the global American empire.<sup>23</sup>

Although he subsequently revised his essay,<sup>24</sup> Churchill has held fast to his assertion that "the little Eichmanns" were essential players in an amoral system that killed large numbers of Iraqi citizens,<sup>25</sup> and therefore that the

16. Ward Churchill, *Some People Push Back: On the Justice of Roosting Chickens*, <http://www.kersplebedeb.com/mystuff/s11/churchill.html> (last visited July 28, 2008).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* Although Churchill briefly mentions the Pentagon and its victims as "military targets, pure and simple," his essay focuses on those who died in the World Trade Center. *Id.*

22. *Id.*

23. *Id.*

24. See WARD CHURCHILL, *ON THE JUSTICE OF ROOSTING CHICKENS: REFLECTIONS ON THE CONSEQUENCES OF U.S. IMPERIAL ARROGANCE AND CRIMINALITY* ch. 1 (2003) (revised version of the essay).

25. See Pamela White, *The Man in the Maelstrom*, *BOULDER WEEKLY*, Feb. 10, 2005, at 6 (Churchill stated: "And I am mightily sorry about the janitors and food-service workers and the kids. I mourn the kids in particular.").

attacks of September 11, 2001, were justifiable.<sup>26</sup> For his part, Churchill continues to assert that his aim is to shake Americans out of their complacency and to effect changes in the policies of the American government.<sup>27</sup>

### B. The Hamilton Controversy

The agitation by one Hamilton professor concerning Churchill's essay created such an outrage that the administrators at Hamilton ultimately rescinded their invitation to Churchill to be part of an academic panel.<sup>28</sup> Churchill's essay had been in publication for over three years by the time he was first invited to speak in December of 2004 at Hamilton. Prior to the Hamilton invitation, the essay had largely been ignored or overlooked by politicians, academics, and the general public.<sup>29</sup> However, upon learning that the Kirkland Project of Hamilton<sup>30</sup> had invited Churchill to give a talk on the incarceration of Native Americans,<sup>31</sup> Theodore Eismeier, a professor of American Government at Hamilton, complained to the administration, expressing his personal disapproval of Churchill's essay and political views.<sup>32</sup> In response, Hamilton's President, Joan Hinde Stewart, changed the format of the talk from a lecture on Native American incarceration to a panel discussion among four professors on "The Limits of Dissent."<sup>33</sup> President Stewart said that despite Churchill's repugnant remarks about the World Trade Center's victims, such statements were the test of free speech, and announced her plans to include Churchill as one of the panelists.<sup>34</sup>

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26. Churchill, *supra* note 16; see also White, *supra* note 25, at 7-8.

27. Churchill, *supra* note 16; see also White, *supra* note 25, at 7 ("I did a framing that was comparable in its purported insensitivity to what the Pentagon does as business as usual with no complaint at all from the American public, and the response is a terrorist response. Now that we understand it, maybe we can fix it. But first you have really to understand it and not pretend it's something 'other,' alien, psychotic.")

28. See Howard Pankratz, *Prof Quits Chair Over 9/11, Ward Churchill Resigns As Head of CU's Ethnic-Studies Department In Wake of Criticism Over His Comparing World Trade Center Victims to "Little Eichmanns,"* DENVER POST, Feb. 1, 2005, at A1.

29. See Scott Smallwood, *Inside a Free-Speech Firestorm*, CHRON. HIGHER EDUC., Feb. 18, 2005, at A10 (reporting that "other than a brief mention in *The Burlington Free-Press* during a December 2001 visit to the University of Vermont, the essay never made the news").

30. See, e.g., Michelle York, *Unrest on Campus Over Speaker Who Sees U.S. Role in 9/11*, N.Y. TIMES, Jan. 31, 2005, available at <http://www.nytimes.com/2005/01/31/nyregion/31hamilton.html> (reporting that the Kirkland Project was Hamilton's attempt to bring diversity to the predominantly white, male campus and to create a "safe" space for women, people of color, lesbians, gays, and others).

31. See, e.g., Nancy Rabinowitz, *What You Didn't See on TV: The Kirkland Project Speaks Out*, SPECTATOR, Feb. 4, 2005.

32. See Smallwood, *supra* note 29 (describing Professor Theodore Eismeier's many activities and efforts to prevent Churchill from speaking at Hamilton).

33. See Press Release, Hamilton Coll., *Kirkland Project Panel Cancelled* (Feb. 2, 2005), available at [http://www.hamilton.edu/news/more\\_news/display.cfm?ID=9020](http://www.hamilton.edu/news/more_news/display.cfm?ID=9020) (describing the cancellation of the panel discussion based on "threats of violence").

34. See Press Release, Hamilton Coll., *President Stewart Sends Message to Hamilton College Community: Memo Updates Campus on Kirkland Project* (Jan. 20, 2005), available at

Displeased that the administration had not immediately withdrawn Churchill's invitation to visit the campus, Eismeier began a multi-prong offensive, including a media campaign, to prevent Churchill's appearance at Hamilton.<sup>35</sup> Eismeier wrote two opinion pieces in the student newspaper knowing that the editor would publish both of them on January 21, 2005, in the first issue of the winter semester.<sup>36</sup> Eismeier was also featured in the editor's front-page article, *Controversial Speaker to Visit the Hill*.<sup>37</sup> Eismeier also posted provocative anti-Churchill leaflets around the campus with a photograph of Churchill cradling an assault rifle, and repeatedly urged, via e-mail, personal appeals, and fliers, that students and faculty boycott the panel on "The Limits of Dissent."<sup>38</sup> Eismeier then reached out to reporters from mainstream newspapers in Syracuse, New York, and Denver, Colorado, expressing his personal objection to Churchill's impending visit to Hamilton.<sup>39</sup>

### C. Controversy Goes National

Eismeier's activities generated intense controversy at Hamilton.<sup>40</sup> They also brought greater media attention, leading many to express outrage at both the college and Churchill.<sup>41</sup> A few days after the publication of Eismeier's opinion pieces, a cadre of conservative bloggers seized upon the controversy

[http://www.hamilton.edu/news/more\\_news/display.cfm?ID=9011](http://www.hamilton.edu/news/more_news/display.cfm?ID=9011).

35. See Smallwood, *supra* note 29.

36. The fact that both of Eismeier's opinion pieces appeared in the issue suggests his very strong influence upon his government student, the editor of the student newspaper that published the pieces. See Theodore Eismeier et al., *Postscript: Deja Vu All Over Again*, SPECTATOR, Jan. 21, 2005 [hereinafter Eismeier, *Postscript*]; Theodore Eismeier et al., *Advocacy and Academia*, SPECTATOR, Jan. 21, 2005 [hereinafter, Eismeier, *Advocacy*].

37. See Ian Mandel, *Controversial Speaker to Visit Hill*, SPECTATOR, Jan. 21, 2005. Despite his claim that he was presenting both sides, the student editor quoted Eismeier in his front-page article and provided Eismeier with space for two opinion pieces. The January 21, 2005, issue of the newspaper took on the appearance of Eismeier's bully pulpit.

38. See Eismeier, *Postscript*, *supra* note 36. But see Maurice Isserman, *Would Malcolm X be Welcome to Speak at Hamilton College?*, SPECTATOR, Jan. 28, 2005, (suggesting that the only acceptable controversial speakers are those like Malcolm X whose reputations have been "sanitized and legitimized" by the passage of time following their deaths).

39. See Theodore J. Eismeier, *A Post-Wardem: One Professor's Defense*, SPECTATOR, Feb. 18, 2005, [hereinafter, Eismeier, *A Post-Wardem*] (stating that he had spoken with reporters prior to the cancellation of the panel on dissent and claiming that the college had failed to repudiate Churchill's comments about September 11). But see Press Release, Hamilton Coll., President Stewart Sends Message to Hamilton College Community, *supra* note 34 (Hamilton's president issues press release that Churchill's statements, even though offensive to many, are protected free speech).

40. See, e.g., Britten Chase, *Crisis of Academic Freedom at Hamilton College: Why Ward Churchill Is Not Susan Rosenberg*, SPECTATOR, Jan. 28, 2005 ("We have an intellectual right to embrace [Churchill] or dismiss him. The school owes its students as many sides of an issue as it can provide and we owe ourselves the responsibility to form an opinion based on what we have heard.").

41. See, e.g., Alaina Potrikos, *Controversy Festers on Hamilton Campus Again*, POST-STANDARD (Syracuse, N.Y.), Jan. 26, 2005, at A1 (describing Churchill's impending visit to Hamilton as causing controversy on the campus).

and, within a matter of hours, they made national the story of the campus turmoil over Churchill's visit to Hamilton.<sup>42</sup> The tale of the Churchill controversy then caught the attention of the mainstream media.<sup>43</sup> For example, the Wall Street Journal called Churchill "a cheerleader of the 9/11 attacks."<sup>44</sup> In Colorado, the Rocky Mountain News published daily articles about protests on the Hamilton campus opposing Churchill's visit, demands by various Colorado politicians for CU to fire Churchill, and a series of *ad hominem* attacks on Churchill questioning his ethnicity, behavior, integrity, and political beliefs.<sup>45</sup>

Politicians in Colorado and New York demanded Churchill's immediate removal from CU.<sup>46</sup> New York's then-Governor George Pataki called Churchill a "bigoted terrorist supporter."<sup>47</sup> Yet Pataki disregarded the fact that Churchill had spoken about his essay without incident many times between 2001 and 2005, including at Syracuse University in upstate New York. Nevertheless Pataki was "appalled . . . that this person with such a warped sense of right and wrong and of humanity teaches at a higher education institution anywhere in America."<sup>48</sup>

#### *D. Churchill Is Investigated and Fired by CU's Regents*

On the CU campus, high level officials were quick to respond to the pressure from Colorado politicians and state newspapers regarding the controversy on Hamilton's campus. The CU Board of Regents called a special meeting for February 3, 2005.<sup>49</sup> At the meeting, the Board passed a Resolution ordering a thirty-day inquiry to determine whether Churchill should be fired for cause from his tenured professorship.<sup>50</sup> At that time, the only claim against Churchill was that his comments about the events and victims of September 11, 2001, were outrageous.<sup>51</sup> Thus, his extramural utterances, which should have

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42. See Smallwood, *supra* note 29.

43. See, e.g., *Choice of Speaker Ignites Protests Again at Hamilton College*, ASSOC. PRESS STATE & LOCAL WIRE, Jan. 26, 2005.

44. Editorial, *There They Go Again*, WALL ST. J., Jan. 28, 2005, at W11.

45. See, e.g., John C. Ensslin, *CU Prof's Essay Sparks Dispute: Ward Churchill Says 9/11 Victims Were Not Innocent People*, ROCKY MOUNTAIN NEWS, Jan. 27, 2005, at 4A.

46. See Frosch, *supra* note 6.

47. See Errol A. Cockfield, Jr., *Controversial Speaker Raises Pataki's Wrath*, NEWSDAY, Feb. 1, 2005, at A31.

48. See *Panel Discussion Canceled Amid Furor Over 9/11 Remarks*, FIRST AMENDMENT CENTER, Feb. 1, 2005, <http://www.firstamendmentcenter.org/%5Cnews.aspx?id=14774>.

49. See Press Release, Univ. of Colo. at Boulder, CU Board of Regents to Hold Special Meeting (Jan. 30, 2005), available at <http://www.colorado.edu/news/releases/2005/39.html> ("Mr. Churchill's comments regarding the events of September 11, 2001 have resulted in substantial controversy . . ."); Press Release, Univ. of Colo. at Boulder, CU Board of Regents Special Meeting on Feb. 3 (Feb. 2, 2005), available at <http://www.colorado.edu/news/releases/2005/48.html> ("The special meeting was called to consider the recently publicized comments of Professor Ward Churchill of the department of ethnic studies at CU-Boulder.").

50. See Univ. of Colo., Bd. of Regents, Minutes of the Special Meeting on February 3, 2005, available at <https://www.cu.edu/regents/Minutes/MINUTESFEB020305.htm>.

51. See Press Release, Univ. of Colo. at Boulder, CU Board of Regents Special Meeting on

been protected speech, were the basis for the overly broad investigation ordered by CU.

The Regents' Resolution endorsed "the principles of academic freedom" set forth in their bylaws, and they expressed their expectation that "discourse at the University of Colorado [would] include a high level of intellectual honesty and scholarship" when examining the Churchill matter.<sup>52</sup> Although CU expected a high level of discourse on *its* campus, such discipline did not extend to Hamilton, a small college in upstate New York nearly two thousand miles from CU's campus in Boulder, Colorado.

Rather than limit the inquiry to the Hamilton controversy and its potential impact upon CU, the institution engaged in a wide-ranging investigation simply because Churchill had expressed his political point of view publicly. In fact, Churchill was no longer even speaking in his capacity as a CU professor, an expert on Native Americans, but as a panelist on "The Limits of Dissent."<sup>53</sup> Therefore, Churchill's essay had nothing to do with his scholarship as a tenured member of the Ethnic Studies Department at CU.

In response to the Regents' Resolution, the Interim Chancellor stated that his office would "oversee a thorough examination of Professor Churchill's writings, speeches, tape recordings, and other works."<sup>54</sup> The combination of the Regents' Resolution and the Interim Chancellor's investigation sent a chilling signal that a professor's extramural utterances could trigger a far-reaching investigation into virtually *everything* he or she had written or stated publicly. Moreover, as many academics and commentators pointed out, the airing of controversial views on campus is protected by the concept of academic freedom, including extramural utterances that are repugnant.<sup>55</sup>

Feb. 3, *supra* note 49 (stating that Churchill's remarks about September 11 were the reason for the Regents' Special Meeting).

52. See Univ. of Colo., Bd. of Regents, Minutes of the Special Meeting on February 3, 2005, *supra* note 50; see also Jefferson Dodge, *Faculty Defend Free-Speech Rights of UCB Prof Amid Public Outcry*, SILVER & GOLD, Feb. 3, 2005, available at <https://www.cu.edu/sg/messages/4177.html> (reporting that one Regent stated that Churchill's comments about the events and attacks of September 11, 2001, were not protected by "tenure and freedom of speech," another Regent stated she was "appalled" and that "something needs to be done" about Churchill).

53. See Rabinowitz, *supra* note 31 ("At the instruction of the dean and President, the Kirkland Project changed [Churchill's] talk to a panel that focused on the very dangerous ideas being opposed by [a] small group of faculty.").

54. See Univ. of Colo., Bd. of Regents, Minutes of the Special Meeting on February 3, 2005, *supra* note 50 (Interim Chancellor's statement to Regents regarding the oversight by his office and the investigation into all of Churchill's writings and public statements).

55. See, e.g., Am. Ass'n of Univ. Professors, *AAUP Releases Statement on Professor Ward Churchill Controversy*, Feb. 4, 2005, available at <http://www.aaup.org/AAUP/newsroom/prarchives/2005/Church.htm> ("Freedom of faculty members to express views, however unpopular or distasteful, is an essential condition of an institution of higher learning that is truly free."); Dan Poulson & Harvey Silvergate, *Warding Off Attack*, FOUNDATION FOR INDIVIDUAL RTS. EDUC., Feb. 18, 2005, available at <http://www.thefire.org/index.php/article/5326.html/> ("Sadly as long as spineless educational leaders continue to value a quiet campus over academic freedom, and to

Responding to the actions of the Interim Chancellor and the Regents, the CU Boulder Faculty Assembly (“BFA”)<sup>56</sup> and the CU Boulder Arts and Sciences Council (“ASC”) issued statements in support of Churchill’s right to express his views, even though many of their members found Churchill’s views offensive.<sup>57</sup> The BFA also urged CU’s Administration to resist outside pressures from the media and politicians.<sup>58</sup> The statement further requested that CU halt its investigation because the inquiry threatened the intellectual freedom of the CU faculty.<sup>59</sup>

## II

### DISSENT AND EXTRAMURAL UTTERANCE

The firestorm of controversy over Churchill’s essay demonstrates the uncertainty of the scope of protection that tenured faculty enjoy when they engage in dissident political expression. It also highlights the need for a process at the institutional level to resolve tensions involving extramural utterances. Central to this process must be the recognition of what Justice Brennan described as “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.”<sup>60</sup>

Within any rigorous and wide-ranging exchange on public issues, many different perspectives are offered, including dissident views. One essential component of any robust debate is the airing of oppositional perspectives.<sup>61</sup> However, dissident expression touches the emotional and intellectual core of many citizens. Dissent is often a discomfiting, irritating, or disquieting reminder that not everyone holds the same view on a particular subject.<sup>62</sup> The dissenter’s perspective might also be difficult to listen to or comprehend because the subject matter could be emotionally painful or highly inflammatory to the listener. As Professor Steven Shiffrin has observed, “[t]he democratic value of dissent . . . is a part of the daily dialectic of power relations in the society.”<sup>63</sup> Dissident expression permits all segments of society to participate in

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protect the sensibilities of those who think they have a right not to be offended, it may never be safe – for liberals or conservatives – to be unpopular.”)

56. See Dodge, *supra* note 52 (reporting that the faculty defended Churchill’s right to express what many viewed as offensive remarks because “[t]he lifeblood of any strong university is its diversity of ideas”).

57. See Jefferson Dodge, *A & S Council: Halt Churchill Review*, SILVER & GOLD, Feb. 17, 2005, available at <https://www.cu.edu/sg/messages/4205.html> (reporting that the faculty governance body of the Arts and Sciences faculty opposed CU’s investigation of Churchill and urged the university to defend academic freedom).

58. *Id.*

59. *Id.*

60. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

61. *Id.* (indicating that robust debate “may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”).

62. See, e.g., STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 96-97 (1990).

63. *Id.*

the system and change the governmental actors or policies when the populace deems it necessary.<sup>64</sup>

A period of war or national emergency tests our commitment both to robust and wide-open debate on matters of national concern and to the rights of citizens to question or criticize the government's actions.<sup>65</sup> During these periods, some place greater emphasis on a unified national front, on maintaining a singularity of purpose, thought, and action. However, doing so often prompts well-meaning politicians and citizens to question or even scapegoat those individuals who oppose or question the necessity of certain governmental actions. These dissenters are frequently called "un-American," "disloyal," "unpatriotic," "traitor," or given other similar negative labels.<sup>66</sup> The subtext of these characterizations is that the actor's expression is seditious, subversive, and even possibly treasonous.<sup>67</sup>

In a time of war, the government seeks to mold public opinion in order to garner unquestioning nation-wide loyalty and support for the administration's policies. Meanwhile, dissidents question and challenge the government's actions in both engaging in war and molding citizens' opinions.<sup>68</sup> However, when information and debate are suppressed, the discussion of important political matters is skewed and democratic governance is significantly diminished.<sup>69</sup> Thus, silencing dissenting or oppositional views both reduces the information available to citizens upon which they can make informed decisions and hastens the shaping of uniform public opinion by the government.

To bolster support for the government's policies and laws in time of war or national emergency, some politicians and citizens insist upon uniformity of opinion. These supporters view dissident expression on campuses<sup>70</sup> or in society-at-large<sup>71</sup> as dangerous and urge that it be suppressed because the

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64. *Id.*

65. See STONE, *supra* note 2, at 14 (arguing that the government suppressed civil liberties in five eras—1798, the Civil War, World Wars I and II, and the Vietnam War—and sacrificed civil liberties in an effort to create a unified and unitary mindset).

66. John K. Wilson, *Academic Freedom in America after 9/11*, NEA HIGHER EDUC. J., Fall 2005, at 119, available at <http://www2.nea.org/he/heta05/images/2005pg119.pdf> (describing the various chilling effects upon colleges and universities after September 11, 2001).

67. *Id.*

68. See, e.g., Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255-57 (asserting that active citizen participation is essential to democratic governance).

69. See, e.g., Jennifer Elrod, *Protecting Journalists from Compelled Disclosure: A Proposal for a Federal Statute*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 115, 131-35 (2003) (arguing that there is a strong first amendment value of informed decision-making, autonomy, and active participation by citizens in a democracy).

70. *Id.*; see also Ellen Schrecker, *Worse Than McCarthy*, CHRON. HIGHER EDUC., Feb. 10, 2006, at B20.

71. See AM. COUNCIL OF TR. & ALUMNI (ACTA), DEFENDING CIVILIZATION (2002), available at <http://govdocs.evergreen.edu/defciv.pdf>.

nation's security is at risk.<sup>72</sup> This repression is necessary because defending against internal threats detracts from the nation's ability to focus on thwarting its external enemies.<sup>73</sup> Such a perspective has long been part of our nation's response to actual or perceived enemies.<sup>74</sup> When facing enemies, extraordinary measures, even stripping away civil liberties and rights, may be viewed as vital and necessary to safeguard the nation.<sup>75</sup> This might explain why any inquisitive commentary or the most cursory analysis about September 11, 2001, prompted harsh responses and, in some instances, punitive actions—as happened to Churchill, who was ultimately fired following the controversy.<sup>76</sup>

In sharp contrast, others advocate that the demand for national unity must always be tempered so that the government does not strip away any more civil

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72. See, e.g., ACTA, *supra* note 71. ACTA describes itself as filling a need because, while politicians “from across the spectrum condemned the [September 11] attacks and followed the President in calling evil by its rightful name, many faculty demurred. Many invoked tolerance and diversity as antidotes to evil. Some even pointed accusatory fingers, not at terrorists, but at American itself.” *Id.* at 1. The original report named names and published the statements made by the approximately 40 academics whom ACTA deemed to be insufficiently patriotic. See Eric Scigliano, *Naming—and Un-naming—Names*, NATION, Dec. 13, 2001, available at <http://www.thenation.com/doc/20011231/scigliano/print> (reporting that ACTA had posted the list of the academics' names and then removed it from its website's report). *But see* Kristine McNeil, *The War on Academic Freedom*, NATION, Nov. 11, 2005, <http://www.thenation.com/doc.mhtml?=20021125s=mcneil> (asserting that contrary to its claims of preserving academic freedom and dissent, ACTA was seeking suppression of all viewpoints that did not support, without question, U.S. foreign policy).

73. See ACTA, *supra* note 71, at 1.

74. See, e.g., Alien Enemies Act, ch. 66, §§ 1-3, 1 Stat. 577 (1798) (current version at 50 U.S.C. §§ 21-24 (2000)); Sedition Act, ch. 74, §§ 1-4, 1 Stat. 596 (1798) (expired 1801). President John Adams secured the passage of the Alien and Sedition Acts on the basis that the French posed a threat to America. The Sedition Act enabled the government to punish citizens who were critical of the Adams Administration, including the Jeffersonian Republicans who were gaining political power and challenging the Federalists then in power. See also Smith Act of June 28, 1940, ch. 439, §§ 1-5, 54 Stat. 670, 670-71 (codified as amended at 18 U.S.C. §§ 2385 (2000)) (punishing citizens deemed to be subversives); the Espionage Act of 1917, Act of June 15, 1917, Pub. L. No. 65-24, ch. 30, 40 Stat. 217 (repealed 1948) (punishing speech that impeded the nation's war effort); Act of March 3, 1903, Pub. L. No. 57-162, ch. 1012, 32 Stat. 1213 (repealed 1907) (denying entrance to and permitting deportation of anarchists on the basis of their political belief or affiliation); STONE, *supra* note 2, at 16-78 (discussing the Sedition Act of 1798 and its impact upon dissident political speakers).

75. See, e.g., MARK E. NEELY, JR., *THE FATE OF LIBERTY* (1991) (analyzing Lincoln's suspension of *Habeas Corpus* and its impact on dissidents during the Civil War), STONE, *supra* note 2, at 8-134; see also *Schenck v. United States*, 249 U.S. 47 (1919) (finding that free expression can be suppressed during a time of war without offending the First Amendment); Exec. Order No. 9066, 7 Fed. Reg. 1407 (1942) (mandating the internment of Japanese-American citizens during World War II); see also *Yasui v. United States*, 320 U.S. 115 (1943); *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944); *Ex parte Endo*, 323 U.S. 283 (1944) (upholding the constitutionality of the government's actions towards Japanese Americans during World War II).

76. See Wilson & Cox, *supra* note 4 (reporting that professors were unable to express any views that were not in conformity with the status quo regarding the events of September 11, 2001); see also Frosch, *supra* note 6, (describing the Churchill controversy over his polemical essay and his subsequent firing).

liberties than are absolutely necessary to protect the nation and its citizens.<sup>77</sup> Dissent is an essential counterweight to the status quo, serving as both a check and balance against the push for a uniform mindset. Dissident expression, therefore, helps to temper the government's impulse to become authoritarian by reserving or withholding a portion of public support for an administration's particular policy or action. As it is public opinion that in large measure drives the government's policies,<sup>78</sup> the absence of full public support may therefore slow or otherwise impact the implementation of new policies.<sup>79</sup>

On college or university campuses, these same issues surface on a wide variety of academic matters and political issues, including the events of September 11, 2001.<sup>80</sup> The importance of permitting controversial viewpoints to be aired on campus is hardly a new issue.<sup>81</sup> But in the aftermath of September 11, 2001, a strong current of suppression emerged on campuses across this nation.<sup>82</sup>

### III CHILLING EFFECT

The lack of protection for extramural utterances as expressed by dissident academics such as Churchill is exacerbated by the uncertainty regarding what an institution's leaders deem to be acceptable expressive activity. This lack of protection creates a "chilling effect"<sup>83</sup> that can dampen or stifle the extramural activity of a professor. "[This uncertainty] has an unmistakable [sic] tendency to chill that free play of the spirit which all teachers ought especially to

77. See, e.g., DAVID COLE & JAMES X. DEMPSEY, *TERRORISM & THE CONSTITUTION* (3d ed. 2006) (arguing that civil liberties are being stripped away under the sweeping claim of national security).

78. See Leonard W. Levy, *The Original Constitution As a Bill of Rights*, 9 CONST. COMMENT. 163, 165 (1992) ("The rights of the people, according to Federalist theoreticians, depended not on 'parchment provisions,' but on public opinion, an extended republic, a federal system, a pluralistic society of competing interests, and a national government of limited powers . . .").

79. *Id.*

80. See Jonathan R. Cole, *Academic Freedom under Fire*, DAEDALUS, Spring 2005, at 5 (suggesting a parallel between the McCarthy era and the current attacks on dissident academics by "the influence of external politics on university decision making").

81. See, e.g., Jordan E. Kurland, *Ban Outside Speakers? Not On Our Watch*, ACADEME ONLINE (2007), available at [http://findarticles.com/p/articles/mi\\_qa3860/is\\_/ai\\_n21033324](http://findarticles.com/p/articles/mi_qa3860/is_/ai_n21033324) (providing brief history of various attempts to ban campus speakers from 1950s to the present based upon the speaker's viewpoint).

82. See, e.g., Wilson & Cox, *supra* note 4; Schrecker, *supra* note 70, and Cole, *supra* note 80.

83. See, e.g., Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685, 689 (1978) ("The very essence of a chilling effect is an act of deterrence."); *id.* at 691 ("Free speech is an affirmative value—we are concerned with encouraging speech almost as much as preventing its restriction by the government.") (citations omitted).

cultivate and practice; it makes for caution and timidity. . . .<sup>84</sup> The chilling effect poses an ongoing threat to other faculty members.<sup>85</sup> By punishing one professor's expressive activity through actions taken by her home institution, all professors are reminded that they, too, risk sanctions for speaking publicly as a citizen.<sup>86</sup>

In post-September 11 America, academics who are most at risk of having their extramural utterances suppressed are those who express political viewpoints seen as controversial either inside<sup>87</sup> or outside<sup>88</sup> the educational institution. In this increasingly politically conservative environment, professors likely to be targeted are those whose views are labeled "non-mainstream," "leftist," "radical," or "liberal."<sup>89</sup> These professors might hesitate to express their views even as citizens despite the fact that their perspective might add depth, breadth, understanding, and diversity to a matter that is under public discussion. The loss of such an opinion could significantly reduce the depth or scope of the examination of an important issue.<sup>90</sup>

In addition, the Churchill example shows that a tenured professor's extramural utterance might become fodder for a university's wide-ranging investigation. This potential inquiry can have a negative effect upon the institution as an intellectual marketplace of ideas and debate. As it is unlikely that professors compartmentalize all of their statements and theories into tidy categories of "academic" or "extramural," the negative effect of a university's inquiry could be a general self-censorship by professors.<sup>91</sup> This would extend to both their scholarly endeavors and their extramural utterances. Even more problematic, professors might decide to be cautious when developing new theories or challenging traditional or status quo views in their field lest another

84. *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring).

85. *Adler v. Bd. of Educ.*, 342 U.S. 485, 510 (1952) (Douglas, J., dissenting) ("Teachers are under constant surveillance; their pasts are combed for signs of disloyalty; their utterances are watched for clues to dangerous thoughts. A pall is cast over the classrooms. There can be no real academic freedom in that environment.")

86. *See Schauer*, *supra* note 83, at 691 ("If, despite the first amendment, no one was willing to discuss public issues, express new opinions, or exchange ideas and information, society would no doubt suffer.") (citations omitted).

87. *See, e.g., Eismeier, A Post-Wardem*, *supra* note 39.

88. *See, e.g., Dan Elliott, Politicians vs. Professors: Battle Heats Up Post-Sept. 11*, ASSOC. PRESS STATE & LOCAL WIRE, Feb. 13, 2005.

89. *See, e.g., Robin Wilson, Conservatives Just Aren't Into Academe, Study Finds*, CHRON. HIGHER EDUC., Feb. 22, 2008, at A1.

90. *See Schauer*, *supra* note 83, at 693.

The danger of this . . . invidious chilling effect lies in the fact that something that "ought" to be expressed is not. Deterred by the fear of punishment, some individuals refrain from saying or publishing that which they lawfully could, and indeed, should. This is to be feared not only because of the harm that flows from the non-exercise of a constitutional right, but also because of general societal loss which results when the freedoms guaranteed by the first amendment are not exercised.

*Id.*

91. *See Elrod, Academics*, *supra* note 8, at 60.

professor, administrator, or politician object.<sup>92</sup> In turn, there might be a chilling effect in terms of intellectual diversity or discovery in higher education and a “deadening dogma [will take] the place of free inquiry” in the discourse of higher education.<sup>93</sup>

As I will discuss below, in order to insulate a professor’s extramural utterance, a more speech-protective process should attach to those expressions than is currently available.<sup>94</sup> This process has the potential to diminish the chilling effect upon controversial academic speakers. It can also provide greater protection for extramural utterances by faculty, and can simultaneously serve the university’s educational interest of intellectual rigor and experimentation.

#### IV

##### AAUP AND EXTRAMURAL UTTERANCES

The AAUP’s position on academic freedom provides three separate principles that are designed to protect professors’ autonomy.

Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for

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92. *Id.* at 693-94 (“[The first] amendment is based on the assumption, perhaps unprovable, that the uninhibited exchange of information, the active search for truth[,] and the open criticism of government are positive virtues. The chilling effect doctrine is simply the logical corollary to the view that the suppression of protected speech is a particularly harmful and undesirable situation.”); see *Adler v. Bd. of Educ.*, 342 U.S. 485, 510 (1952) (Douglas, J., dissenting) (“Supineness and dogmatism take the place of inquiry” and “the ‘party line’ of the orthodox view, of conventional thought, of the accepted approach” is the only safe choice for teachers.); see, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (“Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”).

93. *Adler*, 342 U.S. at 510.

94. See *infra* Part V, discussing critical inquiry.

the opinions of others, and should make every effort to indicate that they are not speaking for the institution.<sup>95</sup>

With regard to its third tenet, the AAUP provides: “[t]he controlling principle is that a faculty member’s expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member’s unfitness for his or her position. Extramural utterances rarely bear upon the faculty member’s fitness for the position.”<sup>96</sup> These three core AAUP principles create the professional standards and norms for both the faculty and the institutions of higher education, thereby establishing a baseline for both groups when issues arise in the realm of a professor’s teaching, researching, or speaking as a citizen.

The existence of these three core principles may lead many academics to believe that they are insulated from intrusions by administrators, trustees, other professors, or outside actors in their teaching, researching, or speaking extramurally. However, the legal, political, and social reality is otherwise.<sup>97</sup> The disjunction between reality and a professor’s theoretical academic freedom is problematic, and the quest for a solution has engaged many thinkers both inside<sup>98</sup> and outside<sup>99</sup> the legal academy. Some scholars, most recently Professor Robert Post, have persuasively argued that academic freedom belongs to the institution, “the corporate body of the faculty,”<sup>100</sup> and “[is] designed to facilitate the self-regulation of the professoriate.”<sup>101</sup> Post further contends that academic freedom is not and should never be an individual right of a faculty member.<sup>102</sup> In his view, the purpose of academic freedom is “to ensure that faculty within the university are free to engage in the professionally competent forms of inquiry and teaching that are necessary for the realization of the social purposes of the university.”<sup>103</sup> These goals are accomplished

95. See AAUP, *1940 Statement*, *supra* note 10, at 3-4; see generally Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265 (1988) (setting forth the constitutional principles and outside factors that influence academic freedom).

96. *Id.* at 6 (quoting the 1964 *Committee A Statement on Extramural Utterances*).

97. See Elrod, *Academics*, *supra* note 8, at 32-59 (arguing that academic freedom claims are most often resolved under the Court’s public employee speech doctrine rather than the AAUP’s three core principles).

98. See generally *id.*

99. See, e.g., Cole, *supra* note 80.

100. Robert Post, *The Structure of Academic Freedom*, in ACADEMIC FREEDOM AFTER SEPTEMBER 11, at 61, 64 (Beshara Doumani ed., 2006).

101. *Id.*

102. *Id.* at 78 (commenting that institutions of higher education “hire, promote, tenure and support faculty based on criteria of academic merit that purport to apply professional standards”). But see Elrod, *Academics*, *supra* note 8, at 61-69 (arguing that academic speech, a professor’s expressive activity directly tied to her academic expertise, should be afforded greater constitutional protection under the First Amendment’s speech clause and, therefore, is an individual right rather than an institutional one. Otherwise, there is no meaningful protection for the expressive activity of public university professors).

103. Post, *supra* note 100 at 64.

through the AAUP's three core principles of teaching, researching, and speaking extramurally in accordance with the professional norms of the faculty.<sup>104</sup>

By parsing its core tenets of academic freedom into three distinct components, the AAUP emphasizes the distinctive characteristics, import, and practical effect that each principle represents to the faculty.<sup>105</sup> In theory, the first and second principles provide a professor with protection from administrators who want to interfere with the academic's classroom teaching or her scholarly endeavors.<sup>106</sup> These two principles (teaching and researching) are tied directly to the actual campus employment settings relevant to professors' academic role.<sup>107</sup> In these situations, the interests of the institution and the interests of the faculty are more likely to be aligned by the direct ties among a professor's scholarly endeavors, her departmental colleagues, and the university's funding.<sup>108</sup> In this instance, as Post suggests, the members of the faculty have a strong interest in self-regulation because it implicates their professional endeavors and autonomy.<sup>109</sup>

The third AAUP tenet, extramural utterances as a principle of academic freedom, creates a greater challenge because the academic is speaking as citizen rather than a professor.<sup>110</sup> Since this third foundational principle ostensibly protects extramural utterances, it is possible that Churchill might have thought that his political expression was protected under this tenet,<sup>111</sup> which was incorporated into CU's bylaws.<sup>112</sup> Churchill's essay on September 11, 2001, was an extramural utterance, an "expression of opinion as a citizen," as defined by the AAUP.<sup>113</sup> The essay, therefore, was protected as long as Churchill was "accurate," appropriately restrained, demonstrated his respect for the opinions of others, and indicated that he was not speaking in his capacity as a university spokesperson.<sup>114</sup> Under this third tenet, an academic's expressive

104. *Id.* at 74-88. *But see* Judith Butler, *Academic Norms, Contemporary Challenges: A Reply to Robert Post on Academic Freedom*, in *ACADEMIC FREEDOM AFTER SEPTEMBER 11*, at 107, 120 (Beshara Doumani ed., 2006) (arguing that Post's analysis relies too heavily upon a fixed notion of scientific inquiry from the early twentieth century that has been discarded because "standards and norms are historically changeable and socially negotiated").

105. These separate principles were part of the AAUP's response to the need for professionalization in college or university teaching so that universities would stop bowing to pressure to fire a professor each time a professors' views irritated a trustee or donor. *See* Elrod, *Academics*, *supra* note 8, at 13-23.

106. *See id.* at 15.

107. *See* AAUP, *1940 Statement*, *supra* note 10.

108. *See* Elrod, *Academics*, *supra* note 8, at 61-69.

109. *See* Post, *supra* note 100 at 72-73.

110. *Id.* at 82-88.

111. *See* AAUP, *1940 Statement*, *supra* note 10, at 2.

112. *See* UNIV. OF COLO. FACULTY HANDBOOK, *supra* note 10. All three AAUP foundational principles appear in CU's By-Laws of the Regents and in its Faculty Handbook.

113. AAUP, *1940 Statement*, *supra* note 10.

114. *Id.* It is unclear, however, who determines the accuracy, restraint, respect for others' opinions, and professional identity from which the assertions were made.

activity “should be free from institutional censorship or discipline” and the professor should have the freedom to speak about matters of public concern or political issues.<sup>115</sup>

The physical setting in which an extramural utterance occurs is distinct from those regulated by the AAUP’s first and second principles of academic freedom. Although the freedom of teaching and researching are exercised in the professor’s classroom or laboratory, the freedom to speak as a citizen outside the classroom takes place in other locales, including in public venues (e.g., a lecture, a letter to a newspaper, a demonstration in a public park), on the academic’s home campus outside an assigned classroom or laboratory, or on the campus of another university.<sup>116</sup> There is a significant disconnect between the role of the professor as an employee of a public institution and the role of the professor who engages in expressive activity comparable to that of other citizens. The former requires a certain level of education, peer scrutiny and evaluation, and publication. The latter involves a personal opinion that might or might not be based on facts that might or might not have been subjected to rigorous review.<sup>117</sup>

While the AAUP purports to address the challenges posed by a professor’s extramural utterances, they are unresolved issues that have plagued academia for nearly a century. In fact, extramural expressions have prompted the majority of the AAUP’s inquiries since the organization’s founding in 1915.<sup>118</sup> Because an academic’s expressive activity is concerned with personal political views about a particular issue, there is a significantly reduced likelihood that the university’s primary interests or positions are implicated.<sup>119</sup> For example, the subject of Churchill’s controversial essay (the causes of the attacks on September 11) was not connected to either his role as a teacher of Ethnic Studies at CU on the subject of Native Americans or the institution’s educational operations. Thus, there was no nexus between Churchill’s employment duties and the expression of his political views on American foreign policy. Yet in the absence of meaningful protection for extramural utterances under the AAUP’s third principle of academic freedom, CU used Churchill’s polemical essay unrelated to his professorial duties to launch its overly broad investigation.

As discussed above, extramural utterances are the most frequent grounds

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115. *Id.*

116. This is not meant as an exhaustive list of possible settings in which professors might engage in expressive activity. Rather, it is meant merely as a brief set of illustrations.

117. *See, e.g.,* *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572-74 (1968) (allowing erroneous statements by public school teacher regarding a matter of public concern in order encourage such discussions).

118. *Post, supra* note 100, at 82.

119. *See* Elrod, *Academics, supra* note 8, at 50-60 (discussing the public employee speech doctrine and its application to higher education).

for disputes between faculty members and their home institutions.<sup>120</sup> The idea of the institution's administrators or other faculty members asserting "control" or "censorship" over a professor's extramural utterances is antithetical to the notion of free speech.<sup>121</sup> It also is a poor fit with the notion of academic freedom as equivalent to and requiring *self*-regulation, because there is no cognizable relationship between a professor's academic work and her political speech when it is delivered outside her employment.<sup>122</sup>

The Churchill controversy at Hamilton illustrates these tensions between a professor's extramural expression and the institution's educational interests. The Director of the Kirkland Project invited Churchill to speak about Native Americans and another professor, Eismeier, objected.<sup>123</sup> The college's president attempted to resolve the then-internal controversy by creating a panel discussion on dissent among four scholars, including Churchill.<sup>124</sup> But Eismeier was determined to prevent Churchill's appearance on campus and turned the matter into a full-blown controversy at the college.<sup>125</sup> The result of this ensuing controversy—CU's investigation and eventual termination of Churchill—demonstrates the inadequacy of the AAUP principles to provide meaningful protection where an educational institution bows to political pressures. Consequently, as illustrated by the Churchill controversies at Hamilton and at CU, the existence of AAUP principles alone is insufficient; an institutional process is needed to mediate controversies between universities and academics involving extramural utterances.

## V

### CRITICAL INQUIRY AS A SOLUTION

I propose the process of critical inquiry as the solution to the challenge posed by an academic's controversial extramural utterances on a university campus. It provides the college or university with a rigorous, intellectual, and

120. Post, *supra* note 100, at 82 ("Since its founding, AAUP's docket of alleged violations of academic freedom has been 'overwhelmingly . . . dominated by extramural freedom cases.'") (citations omitted).

121. See, e.g., *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("For speech concerning public affairs is more than self-expression; it is the essence of self-government."); see also *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.") (citations omitted).

122. See Post, *supra* note 100, at 82 ("This dimension of academic freedom does not concern the freedom to communicate in ways that are connected to faculty expertise . . .").

123. See Smallwood, *supra* note 29.

124. See Press Release, Hamilton Coll., Letter to the Hamilton Community; President Discusses Kirkland Project/Ward Churchill Event (Feb. 9, 2005), available at [http://www.hamilton.edu/news/more\\_news/display.cfm?ID=9073](http://www.hamilton.edu/news/more_news/display.cfm?ID=9073).

125. See *supra* Part I.B, discussing the controversy at Hamilton.

educational process, allowing for a wide-ranging debate within a set of defined rules by panelists who hold various ideological positions and attendees. The critical inquiry forum permits the airing of controversial or dissident expressions and demonstrates the university's commitment to the importance of the exposition of ideas even though they are unsettling or challenging.

My solution is desirable because it affords the university a central role in creating and implementing an academic and a practical exercise that informs and enlightens the participants, attendees, and the community. The critical inquiry process reduces the likelihood that a controversial speaker's utterances will be censored by the university merely on the grounds that someone inside (like Hamilton's Eismeier)<sup>126</sup> or outside the university (like New York's then-governor George Pataki)<sup>127</sup> raises a personal objection. The university can rely on the critical inquiry process to reinforce its central mission of intellectual discovery and experimentation. Moreover, the process both theoretically and practically buttresses the AAUP's third principle of academic freedom by creating a specific forum, guidelines, and rules to be used where the university determines there may have been controversial extramural utterances by a professor.

Critical inquiry<sup>128</sup> is meant to be both a methodology and a skill. As a methodology, the individual follows a set of specific steps.<sup>129</sup> First, the individual examines carefully an issue or topic. This requires asking appropriate questions to gather information. Second, she assesses the relevant facts and information, by recognizing and eliminating false assumptions. Third, she incorporates favorable and adverse facts, synthesizes the information, and draws the appropriate conclusion about a particular issue or topic.<sup>130</sup> The skill of critical inquiry is acquired and then sharpened as the individual engages in the process repeatedly and over time. This is analogous to the skills that law students acquire and refine when they brief cases.

The university should create an on-campus debate forum in which the participants apply these steps of the critical inquiry methodology. The

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126. See Smallwood, *supra* note 29 (describing Eismeier's actions to prevent Churchill's appearance at Hamilton).

127. See Cockfield, *supra* note 47 (reporting Pataki's anger over Hamilton's invitation to Churchill).

128. See, e.g., Norma J. Shepelak et al., *Critical Thinking in Introductory Sociology Classes: A Program of Implementation and Evaluation*, 20 *TEACHING SOCIOLOGY* 18, 19 (1992).

129. *Id.* at 19 ("Critical thinking . . . is viewed as a cognitive approach to an active, rational assessment of information and is based on an awareness and understanding of a set of logical analyses that permit a rational evaluation of arguments.") (citations omitted).

130. See, e.g., C. Harvey Williams, *Doing Critical Thinking Together: Applications to Government, Politics, and Public Policy*, 24 *PS: POLIT. SCI. & POLITICS* 510, 511 (1991) ("What are the fundamental issues raised? What is the relevant evidence required for resolving these issues? Is the source of authority credible? Are the reasons given adequate? Are there contradictions in the logic and evidence presented? Are the conclusions based on appropriate assumptions and premises? Are there other points of view than can be considered?").

institutional backing for this forum will serve to validate the value and importance of the process. Institutional involvement will also allow practical application of the theory to serve as a model, a demonstration of the way in which the critical inquiry process should be carried out in the university's forum.

The critical inquiry process subjects concepts and facts to rigorous scrutiny from multiple perspectives in a formal setting under specific guidelines and rules. Thus, when the critical inquiry methodology is followed in the campus setting, the process permits an in-depth examination of a particular topic.<sup>131</sup> Simultaneously, following the critical inquiry process reduces the tendency of participants to engage in sloppy critiques or personal attacks because they must support and defend their theories and facts in a public forum with a neutral facilitator guiding the process.

To implement a critical inquiry process, the university should select a date, an allotted time frame, and a campus venue for the critical inquiry panel. The university should also produce a set of written guidelines that detail the methodology as outlined above and specific rules for the debate process. These rules should be provided to all participants and attendees. For example, the panelists should be accorded equal time in which to express their views. The audience should also be permitted to ask questions during a particular segment of the event. The university should also determine the number of panelists and select the participants to ensure a balance of ideological positions. The university should hire a neutral facilitator. Much like a judge presiding over a trial, the facilitator will not participate in the process directly but will ensure that the participants adhere to the university's guidelines and rules for debate.

Critical inquiry, as a mechanism, would benefit not only professors whose speeches or writings prompt a controversy, but also the entire university community by providing a forum for airing oppositional views. Adopting a critical inquiry process to deal with the circumstances surrounding the Churchill controversy would have allowed Hamilton to go forward with its panel discussion on "The Limits of Dissent."<sup>132</sup> Churchill's theory that American economic sanctions resulted in the injury or death of over 500,000 children could have been publically discussed and confronted using statistics gleaned from U.S. government and other official sources.<sup>133</sup> Hamilton's scholarly panelists could have studied Churchill's controversial essay, *Some People Push Back*, and selected a number of points on which to challenge Churchill. And, at the same time, these same panelists could have acknowledged Churchill's right to express his perspective on an important and timely topic. Similarly, Churchill would have had to prepare for the panel and any factual or theoretical challenges to the assertions he made in his essay.

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131. See generally Shepelak, *supra* note 128; Williams, *supra* note 130.

132. See *supra* Part I.B, describing the controversy over Churchill at Hamilton.

133. See Churchill, *supra* note 16.

Thus, not only could he have gathered additional facts to support his position, but he also could have publicly made corrections or comments to further add to the audience's understanding of his perspectives.

One of the challenges posed by the process of critical inquiry is the necessity for the individual to examine carefully and critically his or her long-held personal assumptions and, in some instances, to discard them.<sup>134</sup> In Churchill's situation, he could have analyzed more carefully his sweeping assertion that all "Good Americans" were as morally guilty "Good Germans" of the Nazi era because Americans permitted their government to impose harsh economic sanctions against the Iraqis and in their name.<sup>135</sup> Likewise, Eismeier could have examined and then discarded his assumption that he alone was the judge of what expression by an outside speaker was acceptable to him and was, therefore, allowed to be uttered on the Hamilton campus.<sup>136</sup>

The appearance of a controversial professor on campus can be potentially troubling to some faculty and administrators. Yet those who oppose the invitee's viewpoint can play a valuable role in the critical inquiry process. Rather than act like Eismeier, objectors can step forward and volunteer for the critical inquiry forum to vet rigorously the speaker's perspectives. In lieu of taking affirmative steps to interfere with or otherwise prevent the speaker from expressing his or her ideas, objectors can be among the first to take on the challenge of exposing a variety of ideas and theories to the rigorous exchange and analysis that critical inquiry provides.<sup>137</sup>

Events such as a panel on "The Limits of Dissent" at Hamilton are a significant part of the education that colleges and universities deliver to their students. Professors enlighten their students not only in the classroom but also in a variety of campus settings, including debates or discussions that raise and examine controversial ideas or diverse viewpoints. In large measure, these exercises in critical inquiry could not only serve students' educational needs but also society's need for deliberative decision makers who are respectful and understanding of even controversial or offensive viewpoints in deference to a right to freedom of expression and a marketplace of ideas.<sup>138</sup> General education equips students for their roles as contributing members of the workforce and as

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134. See Williams, *supra* note 130, at 511 (positing that the successful critical thinker must possess, among other things, "a willingness to scrutinize personal ideas and values and to articulate and empathize with opposing views without defensive reactions; a curiosity about the relationship between ideas, theories, and systems, as well as a passion for insight and understanding; and, finally, a constructive attitude toward argumentation without being consumed by ego protection.").

135. See Churchill, *supra* note 16.

136. See Eismeier, *Postscript*, *supra* note 36; Eismeier, *Advocacy*, *supra* note 36; Eismeier, *A Post-Wardem*, *supra* note 39.

137. See Rabinowitz, *supra* note 31 (discussing the reaction of some Hamilton's faculty members to Elizabeth Fox Genovese anti-abortion views and her use of the term "holocaust"); see also Smallwood, *supra* note 29.

138. See *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).

active citizens in society. Higher education reinforces these important goals, values, and ideals by preparing college graduates to enter into the workplace and to take up their roles as citizens in a democracy as thoughtful and respectful members of a diverse society.<sup>139</sup>

Of course, not all controversies over invitations to dissident academics will result in an informal resolution under the critical inquiry process. There is always the possibility that the rescission of an invitation might produce a chilling effect upon the profession, as may have happened in the Churchill controversy at CU.<sup>140</sup>

#### CONCLUSION

Without greater respect and protection for extramural utterances, the marketplace of ideas will be diminished and, ultimately, chilled both on the campus and in the larger society. The Churchill controversy presents a telling example of what can happen when a university's commitment to academic freedom is not buttressed by a process for protecting academic freedom. Critical inquiry is an apt solution because it preserves the value of open, wide-ranging debate that characterizes higher learning.<sup>141</sup> It also protects and enhances our vibrant democratic system of governance—a form of government predicated on vigorous argumentation and discussion concerning a broad range of issues of public importance or national concern.<sup>142</sup> At the same time, critical inquiry offers more robust protection to the individual scholar when anyone seeks to silence or censor an academic's extramural utterances.

Dissident speech like Ward Churchill's polemical essay about September 11, 2001, and his speaking engagements in academic settings test our commitment to the free expression about which Justice Jackson wrote more than sixty years ago, recognizing the toleration of dissent as central to robust democratic governance.<sup>143</sup> If our nation's commitment to free expression is to have vitality and meaning, then we must protect that free expression even though the words spoken by another person offend, displease, or enrage us by touching our most raw emotions. As Justice Jackson warns, if we do not protect speech when it offends us, then the First Amendment means little or nothing, ensuring only "a mere shadow of freedom."<sup>144</sup>

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139. See *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

140. See *supra* Part III, discussing the chilling effect.

141. See *Keyishian*, 385 U.S. at 603.

142. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

143. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641-42 (1943).

144. *Id.* at 642.

