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Academic Freedom: A 'Special Concern of the First Amendment'

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Article

Academic Freedom: A "Special Concern of the First Amendment"

J. Peter Byrne†

No [one] ought to meddle with the universities, who does not know them well and love them well

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† Associate Professor, Georgetown University Law Center. I am grateful to the following colleagues for helpful comments on earlier drafts: Walter Metzger, Vicki Jackson, L. Michael Seidman, Thomas Krattenmaker, Steven Goldberg, Daniel Ernst, and Warren Schwartz. Valerie Hastings, Tracy Rickett, Anne McBride and Timothy Maguire provided valuable research assistance. Charles Horsky deserves special thanks for many stimulating and pleasant weekends discussing academic freedom. Finally, I dedicate the article to my mother, Dorothy Byrne, whose proud and loving celebration upon the acceptance of this article for publication was one of her last gifts to me.

* Letter to George Pryme (Mar. 8, 1837), reprinted in 2 A. STANLEY, *THE LIFE AND CORRESPONDENCE OF THOMAS ARNOLD, D.D.* 67, 69 (12th ed. 1881). Arnold goes on to affirm his love of his university and concludes: "And therefore I wish it improved and reformed—though this is a *therefore* which men are exceedingly slow to understand." *Id.*

CONTENTS

I.	INTRODUCTION	252
II.	THE FIRST AMENDMENT ON CAMPUS	256
	A. <i>Academic Speech</i>	258
	B. <i>Student Speech and Extracurricular Political Activity</i>	261
	C. <i>Tenure</i>	265
III.	THE AMERICAN TRADITION OF ACADEMIC FREEDOM	267
	A. <i>Early History and Structure</i>	267
	B. <i>The Rise of the Scientific Research Value</i>	269
	C. <i>Development of the Concept of Academic Freedom</i>	273
	D. <i>The Challenge of Other Academic Values</i>	279
	E. <i>Professional Competence as a Regulatory Standard</i>	283
IV.	CONSTITUTIONAL ACADEMIC FREEDOM AND THE INDIVIDUAL SCHOLAR	288
	A. <i>Sweezy and the Origins of Constitutional Academic Freedom</i>	289
	B. <i>Ambiguous Development in Barenblatt and Keyishian</i>	293
	C. <i>Constitutional Academic Freedom and the State Action Doctrine: An Aside</i>	299
	D. <i>The Proper Scope of Judicial Intervention</i>	301
V.	CONSTITUTIONAL ACADEMIC FREEDOM AND THE PROTECTION OF INSTITUTIONAL AUTONOMY	311
	A. <i>The Supreme Court and Institutional Academic Freedom</i>	312
	B. <i>The Legal Roots of Institutional Academic Freedom</i>	320
	1. <i>Academic Abstention</i>	323
	2. <i>State Constitutional Law</i>	327
	C. <i>Institutional Academic Freedom and the First Amendment</i>	331
VI.	CONCLUSION	339

I. INTRODUCTION

The First Amendment protects academic freedom. This simple proposition stands explicit or implicit in numerous judicial opinions, often proclaimed in fervid rhetoric. Attempts to understand the scope and foundation of a constitutional guarantee of academic freedom, however, generally result in paradox or confusion. The cases, shorn of panegyrics, are incon-

clusive, the promise of their rhetoric reproached by the ambiguous realities of academic life.

The problems are fundamental: There has been no adequate analysis of what academic freedom the Constitution protects or of why it protects it. Lacking definition or guiding principle, the doctrine floats in the law, picking up decisions as a hull does barnacles. For example, the Sixth Circuit recently addressed the question of whether the dismissal of a non-tenured professor by his dean for refusing to change a student's grade violates the professor's First Amendment right of academic freedom.¹ The District Court had rejected the claim, agreeing that the First Amendment protects the professor's choice of "teaching method" (itself a view rejected by a majority of courts),² but insisting that grading does not fall within "teaching method."³ The Sixth Circuit held that the professor's grading was a "communicative act"⁴ protected by the First Amendment but that the administrator himself could change the grade on his own authority.⁵ This bizarre decision gives the professor a symbolic legal right against his institution but severely restricts his professional authority.⁶ Twisted into incoherence by the effort to abide by contradictory statements in prior decisions, the opinion lacks sensitivity to the relationship between teaching and constitutional values.

In a second, more serious example, the Supreme Court currently is wrestling with the question of whether a university's academic freedom requires some privilege against or other restraint on discovery of confidential tenure review records by the Equal Employment Opportunity Commission (or by a private claimant) in cases of alleged racial or gender discrimination in the denial of tenure.⁷ Lower courts have provided an impressive variety of answers to this delicate question—some denying any

1. *Parate v. Isibor*, 868 F.2d 821 (6th Cir. 1989).

2. See *Carley v. Arizona Bd. of Regents*, 153 Ariz. 461, 463-65, 737 P.2d 1099, 1101-03 (Ct. App. 1987) (collecting cases). *Carley* is itself an outstanding example of confusion over the legal significance of academic freedom. The Arizona Civil Liberties Union filed an amicus brief on behalf of Carley, whose preposterous claim was that the university violated his constitutional rights by taking into account highly negative student evaluations of his teaching in deciding not to renew his contract. See *Proper Use of Student Evaluations at Issue in Professor's Legal Appeal to Regain Job*, CHRONICLE HIGHER EDUC., Dec. 17, 1986, at 14. The court rejected Carley's claim and ordered him to pay the university's legal fees.

3. *Parate v. Isibor*, No. 3-86-0311 (M.D. Tenn. Aug. 27, 1987).

4. 868 F.2d at 827.

5. *Id.* at 830.

6. The specific issue of control over grading was addressed quite adequately in *Lovelace v. Southeastern Mass. Univ.*, 793 F.2d 419 (1st Cir. 1986), which held that a professor has no constitutional right to depart from a university's grading policy. The court stressed the right of a university to set fundamental educational policy free from judicial interference. *Id.* at 425-26. *Lovelace* involved a professor who graded part-time students severely in a curriculum intended to draw older students and workers into college. The Supreme Court has suggested that a university's grading decisions should not be subject to challenge in court unless they can be shown to be failures to exercise professional academic judgment. *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985).

7. *EEOC v. University of Pa.*, 850 F.2d 969 (3d Cir. 1988), *cert. granted*, 109 S. Ct. 554 (1988), *amended*, 109 S. Ct. 1660 (1989).

protection for peer review, others crafting various qualified privileges, and still others rejecting a privilege but mandating extensive protective orders.⁸ The justices will search in vain among prior decisions for any real guidance on this question, finding fulsome praise of free teaching and scholarship and frequent admonitions against official interference with core academic decision-making. But nowhere will the Court find instruction on why the private evaluations of one scholar by another implicate the values protected by the First Amendment.

The problem goes beyond a few hard cases or weird decisions. American law operates on an impoverished understanding of the unique and complex functions performed by our universities. All too often, courts fail to recognize that universities are fundamentally different from business corporations, government agencies, or churches. Concepts and categories developed in the law to regulate these institutions are applied to university problems with varying degrees of awareness that square pegs are being pressed into round holes. Our universities require legal provisions tailored to their own goals and problems.

This article attempts comprehensively to describe and criticize the roles of the Constitution and the courts in supporting a meaningful system of academic freedom. The analysis begins by suggesting that the meaning of academic freedom must vary among different communities of speech. Accordingly, I examine carefully the transmission of the term, academic freedom, from internal academic arguments about the role of the faculty within our universities to the realm of constitutional law, where its interpretation by judges determines the status of universities within our political system. I conclude that the term appropriately has different, if related, meanings in the mouths of academics and in the mouths of judges and that both the academy and the courts have suffered from the confusion. Finally, I offer a theory of constitutional academic freedom based on the traditional legal status of academic institutions and on the appropriate role of the judiciary in academic affairs.

An article that aims to resolve confusion about a term that has several meanings needs to take special care with its own usage. I claim that "academic freedom" means something different from "constitutional academic freedom"; accordingly, I am confronted by a problem of terminology, since the sources I discuss often fail to recognize the difference.⁹ Although the

8. See, e.g., *EEOC v. Franklin & Marshall College*, 775 F.2d 110 (3d Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986) (qualified academic privilege not recognized); *EEOC v. University of Notre Dame du Lac*, 715 F.2d 331 (7th Cir. 1983) (qualified academic privilege recognized); *Gray v. Board of Higher Educ.*, 692 F.2d 901 (2d Cir. 1982) (plaintiff's interest outweighs qualified academic privilege); *In re Dinnan*, 661 F.2d 426 (5th Cir. 1981) (academic privilege rejected), *cert. denied*, 457 U.S. 1106 (1982); *Dixon v. Rutgers*, 110 N.J. 432, 541 A.2d 1046 (1988) (privilege rejected but protective orders required). For a lucid argument against such a privilege, see DeLano, *Discovery in University Employment Discrimination Suits: Should Peer Review Materials Be Privileged?*, 14 J. COLL. & UNIV. L. 121 (1987).

9. Many commentators have recognized that the courts have given constitutional protection only to

confusion wrought by others is part of my thesis, I shall be as precise as possible. Therefore, I use "academic freedom" as a non-legal term referring to the liberties claimed by professors through professional channels against administrative or political interference with research, teaching, and governance. When writing of legal doctrine, I will use the term "constitutional academic freedom." As will be seen, the essence of constitutional academic freedom is the insulation of scholarship and liberal education from extramural political interference.

There is a further confusion that should be pointed out at the beginning of this article. Academic freedom, when understood as a legal principle, sometimes is meant to encompass only the rights of individual faculty members, either against their universities or against the state. At other times, it refers to the corporate right of the university against the state. I try to be clear in distinguishing between these meanings, but the reader should be aware of the difficulty. As will be evident, the force of the non-legal tradition of academic freedom has been directed at protecting the professional autonomy of the individual professor when engaging in academic work within the university, but I believe that constitutional academic freedom should primarily insulate the university in core academic affairs from interference by the state.

The article proceeds as follows: First, I attempt to present the cultural and intellectual values that support a constitutional right of academic freedom, explaining the differences between academic freedom and other important applications of the First Amendment to speech by members of the university community. Second, I describe the development within the academy of the norm of freedom for a professor to research, publish and teach, and I analyze its relation both to the power structure of the university and to prevailing models of successful scholarly endeavor. I then examine and critique the Supreme Court's usage of the phrase "academic freedom" and argue for a very limited judicial role in protecting faculty against their schools. Finally, I describe the constitutional protection afforded sensitive university decisions from lay interference, presenting a view of the pre-constitutional legal roots of this protection. These common law and state constitutional roots suggest the appropriate normative basis for and scope of constitutional academic freedom.

some aspects of academic freedom, but they have seen this partial protection as a measure of prudence in the face of conflicting interests rather than as the development of a different model of legal protection for university work. See T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 610-16 (1970); *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1050-51 (1968).

Scholars recently have begun to insist on a sharper distinction between traditional academic freedom and its constitutional counterpart. See Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265 (1988); Yudof, *Three Faces of Academic Freedom*, 32 LOYOLA L. REV. 831 (1987). They have not, I think, adequately described the distinction.

II. THE FIRST AMENDMENT ON CAMPUS

My concern is only with substantive protection of academic freedom by the First Amendment. Isolating this legal right has proven difficult, in part because courts have employed several legal doctrines that are not themselves based on academic freedom to protect the liberties of professors and students. At the same time, courts have declined to recognize a constitutional shield for many forms of classroom speech that seem at first blush to implicate general principles of free expression. This confusion has led some commentators to put a large array of legal principles under the umbrella of academic freedom, but it has led others to doubt that the law recognizes an independent right of academic freedom at all. A detailed examination of the legal claims of academic freedom must therefore begin with some general differentiation of academic speech from other forms of speech protected by the First Amendment.

This blending of academic with constitutional values is not surprising. There were no American legal precedents for academic freedom prior to its acceptance by the Supreme Court into the pantheon of First Amendment rights in 1957.¹⁰ Neither the common law nor any federal or state statute granted the university professor any more security than that granted in her contract of employment.¹¹ Prior to 1957, academic freedom was a matter of professional ideology and custom. Many institutions had committed themselves to the American Association of University Professors' (AAUP) *1940 Statement of Principles on Academic Freedom and Tenure*,¹² and they adopted internal procedures consistent with its principles. Abuses were investigated and reported by Committee A of the AAUP, but the only sanction was censure.¹³ The Supreme Court's challenge has been to give legal substance—with all that entails both of general applicability and technical, pragmatic detail—to an idea originally conceived as a solution to long term problems of a distinct community and best articulated in the speeches and writings of philosophers and social

10. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). For a trenchant description of the legal rights of professors early in this century, see Note, *Academic Freedom and the Law*, 46 *YALE L.J.* 670 (1937); see also E. ELLIOTT & M. CHAMBERS, *THE COLLEGES AND THE COURTS* 68-91 (1936).

11. The legal position of the faculty member often was worse than that. Courts generally permitted institutions to dismiss faculty before the expiration of their employment contracts when an authorizing statute or a school by-law conferred on governing boards the discretion to dismiss faculty whenever they felt the action appropriate. See *Ward v. Board of Regents*, 138 F. 372 (8th Cir. 1905); R. HOFSTADTER & W. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 465 (1955); Note, *supra* note 10, at 672 & n.16 (collecting cases). Faculty at state universities were sometimes considered to be state officers rather than contract employees; sometimes this status gave the professor more rights, sometimes less. See E. ELLIOTT & M. CHAMBERS, *supra* note 10, at 71-73.

12. AAUP, *1940 Statement of Principles on Academic Freedom and Tenure*, 64 *A.A.U.P. BULL.* 108 (1978) [hereinafter *1940 Statement*], reprinted in *AAUP POLICY DOCUMENTS & REPORTS* 3 (1984) [hereinafter *POLICY DOCUMENTS*].

13. See R. HOFSTADTER & W. METZGER, *supra* note 11, at 490-95 (describing Committee A and its procedures).

scientists.¹⁴ It is no wonder that lawyers have had trouble getting the hang of it.

The Court has been far more generous in its praise of academic freedom than in providing a precise analysis of its meaning. The Court has proclaimed that “[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation,”¹⁵ that “[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us,”¹⁶ and even that “[t]he classroom is peculiarly the ‘marketplace of ideas.’”¹⁷ What consequence any of this has in determining which officials can do what to which professors has remained largely unexplained. A gross imbalance between encomium and rule suggests an extreme reluctance by or difficulty for a court to find any particular practice to be a violation of academic freedom.

Moreover, the Court has been unclear about whether constitutional academic freedom is an individual or community right. Academics traditionally have conceived of academic freedom in the United States as a right of individual teachers. Beginning no later than 1978, however, the Court has developed a concept of constitutional academic freedom as a qualified right of the institution to be free from government interference in its core administrative activities, such as deciding who may teach and who may learn.¹⁸ Why the First Amendment protects administrative activities at some remove from teaching and scholarship has yet to be adequately justified. While this doctrine involves several anomalies, courts and commentators were immediately startled by a central paradox: The institutional right seems to give a university the authority to hire and fire without government interference those very individuals apparently granted a personal right to write and teach without institutional hindrance.¹⁹ How can the same right protect both traditional antagonists—the professor and the university? Even the Court has suggested that these rights may be somewhat inconsistent.²⁰ Nonetheless, this paradox should be seen as neither collateral nor embarrassing; academic discourse benefits from the tension between the independence of a scholar’s judgment and the university’s

14. See, e.g., Dewey, *Academic Freedom*, 23 EDUC. REV. 1 (1902); Lovejoy, *Academic Freedom*, in 1 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 384 (E. Seligman ed. 1930).

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

16. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

17. *Id.*

18. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978).

19. See Finkin, *On “Institutional” Academic Freedom*, 61 TEX. L. REV. 817, 839–40 (1983).

20. “Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself.” *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (citations omitted). Cf. *Piarowski v. Illinois Community College Dist.* 515, 759 F.2d 625, 629 (7th Cir.) (Posner, J.) (discussing how “these two freedoms are in conflict . . .”), *cert. denied*, 106 S. Ct. 528 (1985).

evaluation of her professional competence. This issue lies at the heart of this article and will be discussed in detail.

I shall argue that the First Amendment protects the central intellectual efforts of the modern university. These efforts include teaching, scholarship, and experimentation, all of which contribute unique cultural and intellectual values to a free society. My primary concern is with the appropriate *manner* of constitutional protection for this system, given its historical origins, its intellectual assumptions, the structural compromises and political equilibria that sustain it, and the attitude of the judiciary toward it.

It might be helpful if at the outset we consider the First Amendment values that justify a distinct protection for academic work. This analysis will allow us to distinguish other manifestations of the First Amendment on campus—such as protection for the extra-scholastic utterances of faculty and students—and to explain why they should not be thought of as rights of academic freedom.

A. *Academic Speech*

Academic speech—a term I use to encompass both scholarship and teaching—has unique value because of the disciplinary and ethical constraints under which it is produced. Scholars work within a discipline, primarily addressing other scholars and students. Their audience understands and evaluates their speech within a tradition of knowledge, shared assumptions and arguments about methodology and criteria, and common objectives of exploration or discovery. This learned and critical audience provides comfort and challenge to the academic speaker; he knows that his auditors will listen with care, consider with knowledge, and challenge with intelligence. The speaker cannot persuade her colleagues by her social standing, physical strength or the raw vehemence of her argument; she must persuade on the basis of reason and evidence (concepts vouchsafed, if only contingently, by her discipline). The ordinary criterion of success is whether, through mastery of the discipline's discourse, the scholar improves the account of some worthy subject that the discipline has previously accepted.

Academic speech is rigidly formalistic. Every lecture or article must presuppose the history and current canon of the discipline; every departure from common understandings must be explained and justified. Many lovely and personally satisfying styles of expression are outlawed: The physicist may not sing, the historian may not whine, the economist may not offer the primordial scream. More seriously, the persons who may engage in this speech are rigorously controlled. To enter the discourse, the scholar must proceed through the university course of study—at great expense and personal sacrifice—in order to be certified by her peers as com-

petent to engage in scholarly exchange. Students, even though adults in civil society, are admitted as neophytes and treated as intellectual dependents, so long as they lack mastery or certification. Students and junior professors suffer real punishment for speech deemed inadequate by the masters. In general civil society, the First Amendment opposes both prior and subsequent restraint on the speaker by a class of officials determining which speech is valuable and which is not.²¹

Yet within these constraints, the academic speaker in control of his methodology is free to reach conclusions that contradict previous dogma, whether within the academy or throughout the larger society. Indeed, such contradiction is prized as new knowledge, the mark of contribution, the *sine qua non* of the doctoral dissertation. Moreover, the community of scholars will close ranks behind even the most mediocre scholar whenever civil authority threatens to punish unorthodox scholarship. Those instances where it has failed to defend its fellows are incidents of permanent shame and regret.²²

This essential freedom has been at the core of professorial insistence on faculty autonomy within the university power structure. It obviously resonates with traditional First Amendment liberty. But the simple fact that such speech strives to be free in its application of methodology to reach controversial conclusions does not set it apart within First Amendment values. The unique point is that academic speech can be more free than the speaker; that the speaker may be driven to conclusions by her respect for methodology and evidence that contradict her own preconceptions and cherished assumptions. The scholar cannot argue merely for her political party, religion, class, race, or gender; she must acknowledge the hard resistance of the subject matter, the inadequacies of friends' arguments, and the force of those of her enemies. That is what scholars mean by disinterested argument—not indifference to the outcome, but insistence that commitment not weaken the rigor and honesty by which the argument is pursued.

The First Amendment value of academic speech rests on its commit-

21. See T. EMERSON, *supra* note 9, at 503–12.

22. For example, much has been written recently about the administration of the preeminent philosopher, Martin Heidegger, as Rektor of Freiburg University in 1933–34. Disturbing disclosures have been published in H. OTT, MARTIN HEIDEGGER: UNTERWEGS ZU SEINER BIOGRAPHIE (1989), and V. FARIAS, HEIDEGGER ET LE NAZISME (1988); commentary in English includes Stern, *Heil Heidegger*, LONDON REV. BOOKS, Apr. 20, 1989, at 7–10; Zimmerman, *Philosophy Among the Ruins*, TIMES LITERARY SUPPLEMENT, May 5–11, 1989, at 481; *Over a Philosophic Temple, Shadow of a Swastika*, N.Y. Times, Feb. 4, 1988, at A4, col. 3. Apparently, Heidegger sought the position with the help of Nazi officials, proclaimed himself Führer of the University, made Hitler's pronouncements the official ideology, blackballed "un-German" professors, attacked Catholics, and urged Hitler to exercise total control over all German universities. Despite the creditable claim that Heidegger is the foremost philosopher of the twentieth century, influencing thinkers ranging from Paul Tillich to Jacques Derrida, the publication of evidence of his enthusiastic suppression of academic freedom and complicity in the Nazi regime will inevitably cast doubt, not on the genius, but on the moral consequences of his writings.

ment to truth (however partially understood by the discipline), its honesty and carefulness, its richness of meaning, its doctrinal freedom, and its invitation to criticism. These are not often identified as the justifications for the First Amendment protection of speech.²³ In society at large, freedom of speech insulates from penalty expression that is vulgar, pernicious, incomprehensible, and mad.²⁴ Even advertising, which is wholly self-interested and manipulative, is protected.²⁵ Only genitalia and false statements of fact may usually be regulated,²⁶ and verbal provocations to crime, violence and riot may be prohibited.²⁷ The justifications for this regime are various but persuasive. First Amendment doctrine recognizes the danger to a democratic political process if officials proscribe some subjects or modes of expression.²⁸ This sensitivity is heightened by the enormous cultural diversity of the American polity. Advocates of free expression also properly cast doubt both on the wisdom of officials, even when acting in good faith, to decide which ideas are out of bounds and on the efficacy of combatting apparently dangerous ideas by suppressing them.²⁹ Finally, many recognize the value to the individual citizen of being the sole legal arbiter of what she shall say, read or think; such freedom and responsibility dignify the citizen in a democracy.³⁰

Yet can it be said that these familiar themes exhaust the value to democratic society of free expression? The First Amendment ought also to be aspirational. Society ought to strive toward speech that is truthful, gracious, well-considered, and generous to opponents. It ought not settle for, though it must often permit, speech that is ignorant, self-interested, manipulative, hateful or vapid. Without some such ideal, actively pursued, speech loses its value as communication, and thought loses its power to persuade through appeal to reason. When discourse becomes debased,

23. However, Professor Meiklejohn, long a defender of academic freedom, has made similar statements on occasion:

I believe, as a teacher, that the people do need novels and dramas and paintings and poems, "because they will be called upon to vote." The primary social fact which blocks and hinders the success of our experiment in self-government is that our citizens are not educated for self-government. We are terrified by ideas, rather than challenged and stimulated by them.

Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 263.

24. See, e.g., *Texas v. Johnson*, 109 S. Ct. 2533 (1989) (flag burning); *Cohen v. California*, 403 U.S. 15 (1971) (wearing jacket bearing words "Fuck the Draft" in courthouse); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (Ku Klux Klan rally). *But cf.* *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (on nuisance theory, FCC has right to regulate broadcast of George Carlin's "Filthy Words" monologue).

25. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979).

26. See, e.g., *Young v. American Mini Theatres*, 427 U.S. 50 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

27. See, e.g., *Yates v. United States*, 354 U.S. 298, 318, 326 (1957) (advocacy of forcible overthrow of government as abstract principle may not be punished, but advocacy promoting forcible overthrow may be).

28. See A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 94 (1948); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

29. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

30. T. EMERSON, *supra* note 9, at 6.

conflict of interests within democratic society cannot be resolved or lessened through debate or deliberation (because no one will take them seriously) but only through the parlay of money, numbers and force. Speech should be protected because it is beneficial.

Preeminent among the systems of discourse within our diverse society, academic speech holds expression to high standards. For all the notorious faults of jargon and circumlocution associated with scholarship, academic speech provides our most important model of expression that is meaningful as well as free, coherent yet diverse, critical and inspirational. The nature of this importance will be explored more fully below, but I wish to emphasize here that much of its value is social—it contributes profoundly to society at large. We employ the expositors of academic speech to train nearly everyone who exercises leadership within our society. Beyond whatever specialized learning our graduates assimilate, they ought to be persuaded that careful, honest expression demands an answer in kind. The experience of academic freedom helps secure broader, positive liberties of expression.

The judges who pioneered the modern doctrine of free speech followed Mill in arguing that even hateful speech must be tolerated, because such speech may be true. Suppression is unnecessary, moreover, because truth will emerge in any open competition with falsehood. The problems with this argument are familiar and many.³¹ For example, proponents of falsehoods may employ powerful means of persuasion, such as television commercials that endow their views with glamour or associate them with attractive symbols. The mass audience may lack the interest, information or intelligence necessary to sift through specious propositions. But, as Professor Schauer has pointed out, this “argument from truth” holds sound for smaller social groups committed to rational thinking and to pursuit of truth as a primary value.³² The structures of academic discourse can be justified because they facilitate the rational pursuit of truth. Academic freedom resembles other free expression values insofar as it protects the individual scholar’s point of view; it is distinct insofar as it protects those structures that permit the individual scholar to engage with others in collective scholarship. I shall argue below that constitutional academic freedom should protect these structures from extramural political distortion.

B. *Student Speech and Extracurricular Political Activity*

Academic freedom was constitutionalized during a period in which the Court announced other First Amendment rights of teachers and students.

31. See F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 15–39 (1982). Holmes’ views of the First Amendment are discussed *infra* note 176 and accompanying text.

32. F. SCHAUER, *supra* note 31, at 25–26. Professor Schauer argues: “In systems of scientific and academic discourse, the argument from truth has substantial validity.” *Id.* at 26. Because these social groups are committed to rational thinking, “maximum freedom of discussion is a desirable goal.” *Id.*

Understandably, but erroneously, academic freedom has been thought to encompass all First Amendment rights exercisable on a campus or by members of the academic community.³³ The term "academic freedom" should be reserved for those rights necessary for the preservation of the unique functions of the university, particularly the goals of disinterested scholarship and teaching.³⁴ The First Amendment rights I here wish to put aside are those general civil rights of free speech incidentally exercised by members of the academic community and enforced against public universities only because they are viewed as instrumentalities of the state. These "civil" rights fall essentially into two categories.

First, no recognized student rights of free speech are properly part of constitutional academic freedom, because none of them has anything to do with scholarship or systematic learning. Cases allowing public school students to wear armbands,³⁵ demonstrate in good order,³⁶ distribute newspapers,³⁷ and form political organizations³⁸ grant students rights against public education officials plainly analogous to those enjoyed generally by citizens against government.³⁹ Moreover, such activities have little to do

33. This hodgepodge is typified by N. DORSEN, P. BENDER, & B. NEUBORNE, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 805-90 (4th ed. 1976), where diverse substantive and procedural rights of teachers and students in primary and higher education are grouped under the heading of "academic freedom."

34. "Not ideas of any sort, but ideas promulgated according to disciplined and publicly accepted procedures, have rights in the university." Birnbaum, *Students, Professors, and Philosopher Kings*, in *CONTENT AND CONTEXT* 401, 403 (C. Kaysen ed. 1973).

35. See *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969).

36. See *Shamloo v. Mississippi State Bd. of Trustees*, 620 F.2d 516 (5th Cir. 1980).

37. See *Papish v. Board of Curators*, 410 U.S. 667 (1973) (per curiam).

38. See *Healy v. James*, 408 U.S. 169 (1972).

39. A self-conscious tradition of academic freedom for students has never developed in the United States. In nineteenth century Germany, students were "free to roam from place to place, sampling academic wares; . . . they were free to determine the choice and sequence of courses, and were responsible to no one for regular attendance; . . . they were exempted from all tests save the final examination; . . . they lived in private quarters and controlled their private lives." R. HOFSTADTER & W. METZGER, *supra* note 11, at 386. Some of these principles were acknowledged in the development of the modern American university in, for example, the elective system. See Eliot, *Academic Freedom*, *SCIENCE*, July 5, 1907, at 5, 7-10. Moreover, American college students long have had an indigenous tradition of extracurricular activities and organizations. See F. RUDOLPH, *THE AMERICAN COLLEGE AND UNIVERSITY* 136-55 (1962). This relative freedom has been in tension with the British collegiate view of undergraduate education, where the school assumes some quasi-parental role to guide the intellectual and moral development of the student. Moreover, until World War II, higher education in America was an elite attainment of a small minority. The *in loco parentis* tradition was strengthened by the notorious immaturity and weak intellectual preparation of American undergraduates. Recent cases securing student civil rights compel universities to treat students largely as adult citizens in their exercise of civil rights, but say nothing about the colleges' responsibility for their students' educational or moral welfare.

Professor Van Alstyne once urged an enforceable legal regime of student academic freedom. Van Alstyne, *Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations*, 2 *LAW IN TRANSITION* Q. 1 (1965). Upon examination, he argues for giving the student civil rights against the public university, so as to protect adequately the student's interest in pursuing higher education. (In this argument he proved prophetic.) Nothing in his discussion really touches on the conditions or methods of education. See *id.* at 34. It is confusing to label as "academic freedom" these general civil rights.

In the 1960's, the AAUP, in concert with several other higher education organizations, developed statements of student academic freedom. *Statement on the Academic Freedom of Students*, 51

with the formal academic training of the students; even if the activities so protected have learning value, the learning seems more the product of experience than that of intellectual training. Indeed, sometimes these political activities threaten academic work and values, and courts have drawn the limit on the exercise of student civil rights at the point where they interfere with the primary educational work of the school.⁴⁰ Courts also have refused to review academic evaluations of students by universities.⁴¹ In short, while student civil rights enforce social norms against schools, constitutional academic freedom enforces academic norms against society. Thus, while the Constitution affords students at public institutions extensive civil rights, it affords them no rights of academic freedom at all.

Second, and more complicated, the right of a professor to participate in political activity off campus and on her own time without institutional reprisal should not be viewed as a matter of constitutional academic freedom. This assertion may seem perverse. The notorious investigations of professors by state and federal officials for "disloyalty" during the 1950's have often been portrayed as the quintessential violation of academic freedom, even though the conduct investigated nearly always involved non-academic political organizing rather than scholarship or teaching.⁴² Also,

A.A.U.P. BULL. 447 (1965); *Joint Statement on Rights and Freedoms of Students*, 54 A.A.U.P. BULL. 258 (1968). The statements went somewhat beyond civil rights, urging a manner of teaching that promoted student discussion, inquiry, and expression, and that prohibited professors from downgrading a student because her opinions differed from the professor's. While these statements are helpful admonitions that probably mirror the convictions of most faculty, they have not given rise to enforceable rules.

A more recent case that might begin to elaborate a student right of academic freedom, although it never uses that phrase, is *Board of Educ. v. Pico*, 457 U.S. 853 (1982), which limited the discretion of a school board to remove controversial books from a junior high school library in order to protect the students' right to receive information. Development of *Pico's* confused rationale seems unlikely. See *Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562 (1988) (school officials may impose restrictions on school-sponsored student newspaper).

40. *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) (students may wear armbands, because that does not disrupt classroom). The possible tension between student civil rights and traditional notions of academic freedom were touched on in *Healy v. James*, 408 U.S. 169 (1972). The president of a state college had denied recognition to a chapter of Students for a Democratic Society, because he believed that the student group advocated the employment of force and violence on campus, views that "openly repudiate[d] the College's dedication to academic freedom." *Id.* at 176 (apparently quoting college president). The Supreme Court ruled that the college could not exclude the student group because of their advocacy of unpalatable positions, but it could require their compliance with rules of conduct designed to safeguard "the traditional academic atmosphere." *Id.* at 194 n.24. Thus, the Court sought to accommodate the students' civil rights to the educational imperatives of the school. See also *Furumoto v. Lyman*, 362 F. Supp. 1267 (N.D. Cal. 1973) (students at private university have no constitutional right to demonstrate during class to protest professor's well-known views on eugenics).

41. Courts read the Due Process Clause as requiring that a student receive a formal hearing before she is dismissed for disciplinary reasons, but not before she is dismissed for academic reasons. *Board of Curators v. Horowitz*, 435 U.S. 78, 85-86 (1978); *Henson v. Honor Comm.*, 719 F.2d 69, 72-75 (4th Cir. 1983). The same distinction can be found between civil and educational rights: Courts enforce the former but not the latter. See *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 222-28 (1985).

42. See E. SCHRECKER, *NO IVORY TOWER* 44 (1986).

the AAUP has always included some protection of outside political speech within its principles of academic freedom.⁴³

Yet, Professor Van Alstyne surely was right when he argued that professors at state universities have no greater (or lesser) right to participate in political affairs than do other government employees.⁴⁴ Since the 1960's, the First Amendment has protected state employees from employment penalties for exercising general civil rights of free speech, but it does not distinguish among professors, prosecutors, or janitors.⁴⁵ Like student free speech, the professor's right to speak publicly on matters of public concern reflects the permeation of the campus by general civil rights rather than an elaboration of a right unique to the university. Advocates extended academic freedom to extramural speech because, prior to 1950, civil liberty had not yet developed to the point where those who exercised rights were protected against losing public employment.⁴⁶ Moreover, at a time when the state civil service was small, professors, by training and inclination, were the most conspicuous state employees participating in public affairs; given their visibility in politics, it is understandable that their right to participate should have been seen as part of their academic freedom rather than as a general right of all state employees.

In arguing that neither student nor faculty political speech falls within the ambit of academic freedom, I have relied on the general proposition that academic freedom should be understood to include only rights unique or necessary to the functions of higher education. This is properly the domain of academic freedom. This proposition, although admittedly somewhat axiomatic, requires elaboration and justification. Academic freedom is the only First Amendment right enjoyed solely by members of a particular profession.⁴⁷ As such, it resembles a medieval corporate liberty or

43. AAUP, *General Declaration of Principles*, reprinted in 2 AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY 860, 874-75 (R. Hofstadter & W. Smith eds. 1961) [hereinafter DOCUMENTARY HISTORY]; 1940 Statement, *supra* note 12, at 109, reprinted in POLICY DOCUMENTS, *supra* note 12, at 3-4.

44. Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, in THE CONCEPT OF ACADEMIC FREEDOM 59 (E. Pincoffs ed. 1972). See also Lovejoy, *supra* note 14, at 386 (noting that penalizing teachers for speech outside university, while "contrary in spirit to academic freedom," is primarily abuse of "ordinary civil liberties").

45. *Pickering v. Board of Educ.*, 391 U.S. 563, 572-73 (1968). Although *Pickering* involved a schoolteacher, neither in this nor in any subsequent case has the Court based First Amendment protection on values pertaining to education; rather, it has stressed general concerns about speech by public employees on matters of public concern. See *Connick v. Meyers*, 461 U.S. 138, 143-49 (1983) (First Amendment rights of assistant district attorneys).

46. See, e.g., *Adler v. Board of Educ.*, 342 U.S. 485, 492-93 (1952) (not unconstitutional to dismiss public employees for exercising First Amendment rights); *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517-18 (1892) (Holmes, J.) ("The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.").

47. Journalists obviously perform professional functions protected by the First Amendment, yet the freedom of the press protects any citizen who wishes to publish information or opinion. Indeed, the argument that the press should have a special right of access to government-controlled information has been resisted, in part, on the ground that First Amendment rights should not be reserved for members of a particular profession. See *Pell v. Procunier*, 417 U.S. 817, 829-35 (1974) (First Amendment guarantees press no right of special access not also available to general public); Van

jurisdiction, such as those enjoyed by faculties of medieval universities and other occupational guilds,⁴⁸ rather than the universal civil liberties born in the Enlightenment and enshrined in the Bill of Rights. Understanding why some citizens, who benefit from elite training and employment, should enjoy constitutional rights beyond those available to other citizens in their employment requires careful attention to the requirements of academic work and its value to society at large. Academic freedom cannot endure as a privilege of status or badge of esteem but only as a necessary incident of the university's commitment to the pursuit of truth and the controvertibility of dogma.⁴⁹ Restricting academic freedom to those liberties necessary for valuable scholarship and teaching preserves its coherence and vigor, protects other citizens against professional arrogance, and invites a useful inquiry into the role of constitutional law in preserving the truth-seeking value of higher education.

C. Tenure

A professor's tenure is often confused with his academic freedom. Security of academic tenure means that, after successful completion of a probationary period, a professor can be dismissed only for good cause—such as incompetence or neglect of duty—adequately proved at a fair hearing.⁵⁰ Tenure, of course, is created by contract and implemented by institutional regulations. The procedures requisite for dismissal are elaborate (and constitutionally-mandated when the tenured professor works at a state institution).⁵¹ These procedures usually involve written notice, an adversarial hearing before neutral decision-makers, and several levels of appeal.⁵² Al-

Alstyn, *The First Amendment and the Free Press: A Comment on Some New Trends and Some Old Theories*, 9 HOFSTRA L. REV. 1, 18-24 (1980).

48. See R. NISBET, *THE DEGRADATION OF ACADEMIC DOGMA* 61 (1971); R. MACIVER, *ACADEMIC FREEDOM IN OUR TIME* 9 (1955). For a description of the rights enjoyed by medieval faculty, see Metzger, *Academic Tenure in America: A Historical Essay*, in *FACULTY TENURE: A REPORT AND RECOMMENDATIONS BY THE COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION* 93, 94-111 (1973) [hereinafter *FACULTY TENURE*]; see also *infra* note 274.

49. See R. NISBET, *supra* note 48, at 61-64; R. KIRK, *ACADEMIC FREEDOM* 26-27 (1955).

50. AAUP, *Statement on Procedural Standards in Faculty Dismissal Proceedings*, 44 A.A.U.P. BULL. 270 (1958) [hereinafter *Procedural Standards*], reprinted in *POLICY DOCUMENTS, supra* note 12, at 10. For general discussions of the tenure system, see *FACULTY TENURE, supra* note 48; Machlup, *In Defense of Academic Tenure*, 50 A.A.U.P. BULL. 112 (1964); C. BYSE & L. JOUGHIN, *TENURE IN AMERICAN HIGHER EDUCATION: PLANS, PRACTICES, AND THE LAW* (1959).

51. *Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1972).

52. The AAUP guidelines call for a statement of the grounds for dismissal, detailed notice of procedural rights, a hearing before a faculty committee, and an appeal. *Procedural Standards, supra* note 50, at 272-74, reprinted in *POLICY DOCUMENTS, supra* note 12, at 11-13. Courts have been reluctant to specify the procedures constitutionally required before termination of a tenured faculty member, although notice and a hearing before an impartial body prior to termination are generally considered essential requirements. See W. KAPLIN, *THE LAW OF HIGHER EDUCATION* 180 174 (1980). Courts also have resisted the drive to impose the niceties of adversarial hearings, such as cross-examination of witnesses by lawyers, in order to preserve the informal and collegial manner more familiar to non-lawyerly academics. See, e.g., *Frumppkin v. Board of Trustees*, 626 F.2d 19, 21-22 (6th Cir. 1980); see also *Crook v. Baker*, 813 F.2d 88, 99-100 (1987) (approving informal procedures for revocation of graduate degree). This judicial refusal to impose civil norms on academic ways is

though it entails some negative consequences for higher education, procedural protection of tenure does promote academic freedom by requiring some public airing of explicit and ideologically neutral reasons for dismissal. This exposure makes firing a professor for advocating unpopular or embarrassing views much more difficult.⁵³ It also induces an atmosphere of institutional inertia on personnel issues by making any move against a tenured faculty member very costly; this permits thought and inquiry to be truly disinterested among those tenured faculty who think or inquire at all.⁵⁴

Just as clearly, protection of tenure does not protect the academic freedom of the untenured. Indeed, the effort to obtain tenure usually will direct their scholarship into those established channels more readily understood and likely applauded by the tenured. Similarly, protection of tenure does not guarantee that initial hiring decisions are free from ideological bias. Substantive protections of academic freedom may play an important role at this initial stage because, although an untenured professor may be fired or a candidate passed over for no reason at all, they may not be fired or passed over for a reason that violates the First Amendment.⁵⁵

No more in the law of academic freedom than in other branches of law can substance and procedure be fully separated. The procedural protections surrounding tenure have led to the acceptance of a crucial tenet that invigorates the notion of academic freedom whether the professor is tenured or not: Judgments of scholarly and teaching competence must ordinarily be made by peers. Judgments of hiring and firing are made in the first instance by other faculty deemed capable of evaluating on appropriate academic grounds the potential and accomplishment of the candidate. Administrators and trustees can act only in the face of departmental rec-

closely analogous to the judicial preservation of academic values from political interference that I view as the primary meaning of constitutional academic freedom. Nonetheless, judicial insistence on notice and some kind of fair hearing prior to termination of tenured faculty has done much to regularize the security of tenure necessary for free inquiry and teaching at the public universities that had not voluntarily adopted adequate procedures.

53. The United Kingdom recently abolished tenure in its universities while codifying substantive protection for the right of the scholar "to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions." Education Reform Act, 1988, ch. 40, § 202(2)(a); see Walker, *British Parliament Votes to End Tenure for New Faculty Members at Universities*, CHRONICLE HIGHER EDUC., Aug. 3, 1988, at 1.

54. As Robert MacIver wrote, tenure protects not only "the thinker, the intellectual pioneer, the social critic but also the inert, the barely competent, the perfunctory reciter of ancient lessons, and the one-time scholar who now devotes his best energies to more lucrative pursuits." R. MACIVER, *supra* note 48, at 240.

55. *Perry v. Sinderman*, 408 U.S. 593, 597-98 (1972). This basic principle has been narrowed somewhat through procedural refinement. A teacher who contends that she has been dismissed for exercising a constitutional right to free speech must show that retaliation for protected activity played a *decisive* role in her termination. More precisely, after a teacher shows that her behavior is constitutionally protected, the burden shifts to the school to prove that it would have reached the same decision "even in the absence of the protected conduct." *Mount Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

ommendations, and governors, legislators, donors, and police officers may have no say at all.

The structural mechanisms within the university that give precedence to peer judgment and the function that this judgment performs in preserving the coherence and promoting the accomplishments of a given discipline determine the content of academic freedom. This thesis will be better explained and defended in a later section. For the present, it must suffice to assert that insistence on procedural patterns that exclude non-academics from primary review of a candidate's or professor's performance are intended to (and do) suppress reliance on exogenous factors in evaluation. This article will examine the substantive significance of this procedural pattern while not assessing the legal propriety of specific procedures.

So far, I have argued more about what academic freedom is not than about what it is. We have proceeded no further than the proposition that a First Amendment right of academic freedom should support primarily formal teaching and scholarship. The historical origins of the tradition of academic freedom, which emerged in our universities to address specific academic problems, bear out this proposition. Consideration of the development of academic freedom in the universities is necessary both to give substance to the invocation of academic values and to suggest the necessary distinction between scholarly aspiration and constitutional protection.

III. THE AMERICAN TRADITION OF ACADEMIC FREEDOM

A. *Early History and Structure*

The American tradition of academic freedom has emphasized the protection of individual faculty members. It can best be understood in historical context.⁵⁶ America developed a unique sense of academic freedom because its colleges began with a unique corporate structure. The English university familiar to the first academic pioneers was a medieval corporation of its faculty, who had full authority over the assets and affairs of the institution. The Crown and Church largely respected the autonomy of the universities, in part because both needed the universities and in part because the universities were able to enlist each source of power to check incursions by the other.⁵⁷ The Reformation brought with it some damaging control by the Crown, although it effectively ended any risk of domination by the Church.⁵⁸ The autonomy of the ancient academic institu-

56. Anyone who writes about the history of academic freedom is deeply indebted to R. HOFSTADTER & W. METZGER, *supra* note 11; L. VEYSEY, *THE EMERGENCE OF THE AMERICAN UNIVERSITY* (1965); and F. RUDOLPH, *supra* note 39.

57. See R. HOFSTADTER & W. METZGER, *supra* note 11, at 6-8; *infra* note 274.

58. In the sixteenth and seventeenth centuries, monarchs did impose some controls to ensure support from the universities. Perhaps the best known account is Macaulay's retelling of James II's attempt to capture Oxford for Roman Catholicism. 2 T. MACAULAY, *HISTORY OF ENGLAND* 86-109 (Everyman's ed. 1906). Until the nineteenth century, at the ancient English universities, all faculty

tions remained substantial, however; no outside agencies meddled with teaching, although faculty were subject to internal discipline.⁵⁹

Although early American colleges consciously modeled themselves on English institutions in many ways, they were governed from the beginning by outside boards of non-academics.⁶⁰ Such boards were needed to mobilize the support necessary for establishing new colleges on the frontier without wealthy patrons. These non-academic trustees—predominantly clergymen and public officials occupied by other employments—could not administer the colleges continuously, the affairs of which were entrusted to a president chosen by the board. The college president, although often the most eminent member of the faculty, held his position on the confidence of the trustees and exercised important administrative powers as their agent.⁶¹

The faculty were employees of the corporation rather than its constituents; they could be dismissed at any time for any ground not precluded by their contracts and had no more than an advisory role in setting the goals or policies of the college.⁶² These teachers received extremely low pay and social status; they divided long hours of work between classroom drill in Latin and Greek grammar and disciplinary supervision of often wildly immature and poorly prepared students.⁶³ Not surprisingly, few pursued academic careers; most faculty were young divines preparing for orders or waiting for a call to a church.

The structural elements that would give shape to academic freedom were established early: legal control by non-academic trustees; effective

had to be ordained clergy, and students had to take religious oaths to receive degrees.

59. See Shils, *Great Britain and the United States: Legislators, Bureaucrats and the Universities*, in *UNIVERSITIES, POLITICIANS AND BUREAUCRATS: EUROPE AND THE UNITED STATES* 437, 443 (H. Daalder & E. Shils eds. 1982). The autonomy of British universities persisted into contemporary times and long after universal reliance on government funding. The recent British statute that eliminated tenure also subjected the universities to much greater control by a University Funding Council, itself subject to the authority of the Secretary of State for Education and Science. Education Reform Act, 1988, ch. 40, § 131.

60. Harvard, the first American college (1636), began with a corporation of resident faculty and a board of overseers who represented lay founders and exercised effective control. Yale, the third college (1701), was the first with a single absentee board of non-academics, a structure which provided the model for later colleges. R. HOFSTADTER & W. METZGER, *supra* note 11, at 134-39; F. RUDOLPH, *supra* note 39, at 166-67; Herbst, *The First Three American Colleges: Schools of the Reformation*, in 8 *PERSPECTIVES IN AMERICAN HISTORY* 8-11 (D. Fleming & B. Bailyn eds. 1974). The Yale charter of 1745, which spelled out the nature of the board's ultimate control, is reprinted conveniently in 1 *DOCUMENTARY HISTORY*, *supra* note 43, at 49.

61. R. HOFSTADTER & W. METZGER, *supra* note 11, at 125; F. RUDOLPH, *supra* note 39, at 164-65. The legal position of the college president has been described as "the chief executive agent of the governing board, with the responsibility of recommending the employment and dismissal of all, or nearly all, subordinate administrative officers and faculty members." E. ELLIOTT & M. CHAMBERS, *supra* note 10, at 68.

62. "[A] professor, learned and distinguished as he may be, is an employe [sic], and subordinate of the Board of Regents, in law." *Hartigan v. Board of Regents*, 49 W. Va. 14, 22, 38 S.E. 698, 702 (1901). *Bracken v. Visitors of William & Mary College*, 7 Va. (3 Call.) 495 (1790), appears to be the first case affirming the right of a board to fire a professor; John Marshall argued for the college.

63. F. RUDOLPH, *supra* note 39, at 158-64, 193-200; R. HOFSTADTER & W. METZGER, *supra* note 11, at 229-30.

governance by administrators set apart from the faculty by political allegiance and professional orientation; dependent and insecure faculty. The American college promised an internal division of interest and ideal unknown in England.

In the old-time college, prior to the Civil War, the concept of academic freedom was literally inconceivable.⁶⁴ The goal of higher education was to train young men in religious piety and mental discipline as a preparation for the clergy and other gentlemanly professions, such as law and medicine.⁶⁵ The essentially religious objectives of the early colleges demanded and received the assent of faculty to the theological essentials of the Christian sect that founded and supported the college.⁶⁶ Just as important, no one conceived the function of college faculty to be that of producing scholarship, let alone that of criticizing prevailing dogma or advancing the search for truth.⁶⁷ Rather, their efforts remained largely devoted to drilling youths in the rudiments of ancient languages and mathematics, educational endeavors unlikely to erupt into intellectual controversy.⁶⁸ Faculty performed essentially fixed if learned operations within a traditional curriculum under the sanction of established truth. Questions of religious conscience may have arisen in such a context, but academic freedom as we know it simply had no meaning.⁶⁹

B. *The Rise of the Scientific Research Value*

By the end of the Civil War, the old-time college had become subject to criticism from numerous reformers for the narrowness of the curriculum, particularly insofar as it excluded science, modern languages, and subjects of practical utility, such as agriculture and engineering.⁷⁰ Reformers

64. See R. HOFSTADTER & W. METZGER, *supra* note 11, at 263 ("For the most part, the concept of academic freedom as it is usually expressed today had not received a clear formulation in the antebellum period.").

65. The classic statement of this viewpoint is the 1828 Report of the Yale Faculty, a spirited defense of the traditional classical curriculum and the moral ground of education. It is available in 1 DOCUMENTARY HISTORY, *supra* note 43, at 275.

66. In the seventeenth century, the first president of Harvard College, Henry Dunster, resigned because of his deviant views on infant baptism. R. HOFSTADTER & W. METZGER, *supra* note 11, at 86-91. During the first half of the nineteenth century, Benjamin Hale was dismissed from Dartmouth because he converted from Congregationalism to Episcopalianism. W. SMITH, PROFESSORS AND PUBLIC ETHICS: STUDIES OF NORTHERN MORAL PHILOSOPHERS BEFORE THE CIVIL WAR 7 (1956). As late as the 1880's, distinguished colleges such as Princeton, Amherst, and Brown imposed minimal religious qualifications on faculty candidates. L. VEYSEY, *supra* note 56, at 45-49.

67. Some antebellum professors played important extramural roles as public religious moralists, but this aspect of intellectual life entered the curriculum only through the "moral philosophy" class that typically provided the capstone to collegiate education and spoke within the religious tradition of the school. See D. HOWE, THE UNITARIAN CONSCIENCE (1970).

68. Scientific inquiry flourished in eighteenth-century America, but it permeated only the margins of the colleges before 1865. On the significance of science in revolutionary America, see Goldberg, *The Constitutional Status of American Science*, 1979 U. ILL. L.F. 1, 2-7; on the slow acceptance of science into the American college curriculum, see F. RUDOLPH, *supra* note 39, at 222-35, 244-48.

69. See R. HOFSTADTER & W. METZGER, *supra* note 11, at 262-63.

70. Recent historians have challenged the rigid division between the early college and the modern

looked toward different goals. Some, inspired by a somewhat naive view of the German universities, wished the colleges to become true universities devoted to disinterested research and specialization. Others demanded more practical courses of study to better prepare men and women to lead and serve the growing industrial society.⁷¹

Both viewpoints gained rapid, if not universal, acceptance during the 1870's and '80's. The adoption of the elective system permitted a much wider array of subjects to be studied in greater depth, while the creation of graduate schools provided the trained specialists necessary to teach increasingly technical subjects.⁷² Higher education began to be seen as scientific training for practical jobs rather than moral training of gentlemen for elite professions.⁷³ As such, it appealed far more to government and business leaders, practical men of affairs, who responded with unprecedented financial generosity and provided the resources for the creation of the enormous institutions of higher learning familiar to us today. Presidents took the lead in transforming colleges into universities or giving character to newly founded institutions. In performing these tasks, presidents lost whatever place they had among the faculty, becoming institutional executives and educational entrepreneurs. Just as antebellum presidents resembled the clergy who dominated their boards, so the new resembled the successful businessmen and lawyers who now most frequently served as trustees.⁷⁴ The creation of the modern university, al-

scientific and professional university, arguing either that a traditional period of serious scholarship in the service of religion flourished there, L. STEVENSON, *SCHOLARLY MEANS TO EVANGELICAL ENDS* 9-10 (1986), or that there stirred an earlier interest in reform, B. BLEDSTEIN, *THE CULTURE OF PROFESSIONALISM* 224 (1976). Whatever welcome perspectives these works provide on the nature of the transformation, they only emphasize the magnitude and significance of the change from religious college to secular university, "the rise of a totally new conception of the university—diversified, research-oriented, and secular, where the old one had been unified, teaching-oriented, and Christian," D. HOWE, *supra* note 67, at 299.

71. See A. NEVINS, *THE STATE UNIVERSITIES AND DEMOCRACY* 2-22 (1962). The demand for practical and democratic education resulted in the enactment of the Morrill Act, ch. 130, 12 Stat. 503 (1862) (codified at 7 U.S.C. §§ 301-308 (1982)), which provided land grants to states to erect and support colleges

where the leading object shall be, without excluding other scientific and classical studies and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts . . . in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life.

Morrill Act, 12 Stat. at 504 (codified at 7 U.S.C. § 304 (1982)).

72. Johns Hopkins University was founded in 1876; it was the first university to emphasize graduate over undergraduate education and to substitute institutionally a scientific for a religious model of truth. Its influence was vast. See F. RUDOLPH, *supra* note 39, at 269-75.

73. Professor Bledstein ascribes to the new university a central role in the creation and sustenance of the American culture of professionalism. See B. BLEDSTEIN, *supra* note 70, at 288-90. Universities certainly conferred prestige on and standards for both established and new professions by assuming the function of professional education.

74. In one sample of college governing boards, the percentage of clergymen declined from 39.1 in 1860 to 7.2 in 1930. McGrath, *The Control of Higher Education in America*, 17 *EDUC. REC.* 259, 262-64 (1936). The effects of this change are criticized memorably in T. VELEN, *THE HIGHER LEARNING IN AMERICA: A MEMORANDUM ON THE CONDUCT OF UNIVERSITIES BY BUSINESS MEN* 43-61 (1918).

though full of ambiguity, was the vessel into which the best energies of educated men and women of that age were poured; it constituted a decisive revolution of global significance in higher education and an equally significant innovation in the social structure of intellectual thought.⁷⁵

These structural changes reflected a fundamental change in the intellectual orientation of American universities. The change is usefully, if simple-mindedly, expressed as a movement from a paradigm of fixed values vouchsafed by religious faith to one of relative truths continuously revised by scientific endeavor.⁷⁶ This shift did not merely elevate the relative status of the natural sciences; scholars in nearly all disciplines adopted scientific methods and goals whether they were addressing social, moral, or aesthetic issues.⁷⁷ Religion lost prestige as the primary basis for interpreting human goals. Universities became secular; religion was usually retained only as a polite ornament.⁷⁸

Social sciences rapidly developed. To be sure, a science of government had been conceived in the eighteenth century, and the rational foundations of political economy had been accepted for many years. But now the faith that reason could grasp the essentials of human activity was enhanced by the prestige of the scientific method as well as the financial support and bureaucratic organization provided by the growing universities. Soon, departments of political science, sociology, anthropology, psychology, and economics sprang up within American higher education.⁷⁹ Scientific profes-

75. See generally L. VEYSEY, *supra* note 56, at 439-44 (discussing rise of university in United States and its assimilation into American culture).

76. See generally R. HOFSTADTER & W. METZGER, *supra* note 11, at 78-113, 112 (surveying "decline of religious scruples of the pristine Puritan age" with respect to education). This simplistic formulation seems adequate for present purposes. Yet, it should be acknowledged that scientists of the day who insisted on the capacity of objective reason to portray accurately an autonomous reality tended to be dogmatic and intolerant, see L. VEYSEY, *supra* note 56, at 145-49, while those who followed William James and John Dewey tended to celebrate the functional dimensions of scientific truth. See generally M. WHITE, *SOCIAL THOUGHT IN AMERICA* (1947) (examining contributions of Dewey, Veblen, Holmes, Beard, and Harvey to revolt against formalism). Still, scientists were united by the beliefs that no conclusion was immune from criticism and that scientific investigation would render propositions more nearly true than those previously available.

77. The attempt to conform even literary scholarship to the scientific model is described historically in G. GRAFF, *PROFESSING LITERATURE* (1986).

78. Democratic political discourse also had lost prestige at this time, creating a vacuum that the social sciences filled. Americans at the time of the founding of the republic may have believed that truth could emerge from deliberation among free citizens or their representatives. See, e.g., Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1559-60 (1988). In the period after the Civil War, democratic political life came to be seen less as a vehicle for the emergence of moral truth than as a corrupt trading of influence. See generally G. FREDERICKSON, *THE INNER CIVIL WAR 189-98* (1965) (discussing response of intellectuals to *laissez faire* politics of Reconstruction era). Social science promised a more certain foundation for understanding a rapidly changing society, and the scholar could dictate laws to society for the public good without popular interference. See B. BLEDSSTEIN, *supra* note 70, at 321-22, 326-27. Such extravagant faith in scientific analysis reflected both confidence from astonishing achievement and anxiety about failure.

79. The rapid development of the social sciences is marked by the dates when national scholarly associations were founded: the American Economic Association in 1885, the American Political Science Association in 1903, and the American Sociological Association in 1905. B. CLARK, *THE ACADEMIC LIFE: SMALL WORLDS, DIFFERENT WORLDS* 289-97 (1987).

sional education in law, social work, education, and business joined that in medicine.⁸⁰ These endeavors were united in the expectation that by diligence and care in the employ of the scientific method, free from the interested rhetoric of religion and politics, they could discover the rational laws that governed relations among people. Many diverse adherents looked forward to reforms tending toward the final perfection of society.

These changes in the structure and purpose of higher education also enlarged the status and expectations of faculty. No longer hard-pressed drudges, faculty became highly-trained professionals. Far more able and ambitious people became professors. The passing of the old-time college freed faculty from the tedium of recitation drills and, in time, of *in loco parentis* responsibilities. The elective system offered far more interesting subject matter for teaching. The specialization needed to teach such courses required more rigorous and continuous training; this, joined with the nineteenth-century allure of the German example, gave stature to research and writing as a necessary requisite and sign of the professor's knowledge and achievement. Moreover, the life of science was heroic: The professor was expected to extend the frontier of knowledge and remove the age-old afflictions of physical and social life through mastery of the scientific method.

Yet low faculty salaries and uncertain tenure remained the norm.⁸¹ Professors remained employees; although no longer dependent on the will of clergymen, they were now answerable to businessmen and to a president who often shared business values. The president and board still personally hired, fired, and renewed contracts until the twentieth century.

Academic freedom became a rallying cry at this time for professors seeking more control over their professional lives.⁸² Much of the term's appeal came from its German association. German professors were free to teach and lecture on the subjects they wished. Although their universities were agencies of the state and the professors themselves civil servants, German law and custom left matters of appointment and curriculum

80. The reforms instituted by Dean Langdell at Harvard Law School, for example, rested on an understanding of law as a science capable of discovering general principles that organized and explained apparently disparate judicial decisions. See Gray, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983). Langdell himself said that "[i]f law be not a science, a university will consult its own dignity in declining to teach it." Langdell, Speech (Nov. 5, 1836), reprinted in 3 LAW Q. REV. 123, 124 (1887), quoted in Gray, *supra*, at 38.

81. In some ways, professors' legal rights were diminished in the latter part of the nineteenth century. Courts generally permitted colleges to dismiss professors at will, even during the term of a contract, at least when state statutes or private college by-laws gave schools the power to dismiss faculty at their discretion. See R. HOFSTADTER & W. METZGER, *supra* note 11, at 459-67; Note, *supra* note 10, at 671-73. Concerning faculty salaries, see L. VEYSEY, *supra* note 56, at 390-91.

82. Hofstadter attributes the professors' aggressiveness to rising expectations. R. HOFSTADTER, *THE AGE OF REFORM* 153-55 (1955). The demand for academic freedom became coherent only in the 1890's, when the structure of the modern university had become clear. L. VEYSEY, *supra* note 56, at 384-85. Dramatic confrontations during this decade between trustees and faculty at the University of Wisconsin, the University of Chicago, and at Stanford stimulated attempts to clarify principles. See R. HOFSTADTER & W. METZGER, *supra* note 11, at 420-51.

solely in the hands of the academics. This professional freedom and control were seen as partly responsible for the preeminence of Teutonic scholarship during the period.⁸³

C. *Development of the Concept of Academic Freedom*

In America, the problem was not the state as such, but interference by lay trustees or regents. Both federal and state governments largely refrained from any involvement in internal university affairs.⁸⁴ Disputes tended to be internal to the university, and academic freedom became conceived as an adjustment of rights among participants. Professors simultaneously demanded that no ideological test be applied to their work and that evaluation be performed by professional peers. These demands were justified largely by appeal to the exigencies of science: The error in any theory could be perceived only by trained specialists, and error must be tolerated if truth is to advance.⁸⁵ The opinions of laypersons were not scientific; lay interference with scientists would only retard the discovery of truth.

There are two important aspects of this struggle. First, academics wanted to wrest control over the evaluation of scholarly thought from "lay thinking" as represented by boards of trustees. Professors were virtually the only spokespersons for academic freedom, and their efforts were largely responsible for its eventual acceptance. In one sense, it was a self-interested struggle for professional autonomy and dignity directed at improved salary and employment security.⁸⁶ In a second sense, however, this demand represented a desire for conditions necessary to perform uniquely valuable work. A primary condition was respect for the special character of academic speech: Scholarship bore a special relationship to the search for truth and should not be confused with mere political or religious opinion. Scholarship was a form of elite speech that demanded protection from popular prejudices.⁸⁷

Science provided not only the necessary rationale for excluding lay people from evaluation but also a strong rationale for freedom: Scientific endeavor presupposes a progressive conception of knowledge. Understanding at any one moment is imperfect, and defects can be exposed by testing hypotheses against reality, through either adducing new data or experi-

83. See R. HOFSTADTER & W. METZGER, *supra* note 11, at 385-89.

84. State politicians did sometimes interfere with their state universities. See R. HOFSTADTER & W. METZGER, *supra* note 11, at 429-32.

85. See, e.g., Dewey, *supra* note 14, at 3-4.

86. L. VEYSEY, *supra* note 56, at 386-92.

87. The insulation of scientific endeavor from popular judgment can be understood as part of the general effort to establish the authority of the professions over the potentially anarchistic forces of social change in nineteenth century America. See T. HASKELL, *THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCES* 80-85, 220-26 (1977) (stressing importance of organization, discipline, and communication for definition of professionalism).

mentation. The process of hypothesis-experimentation-new hypotheses improves knowledge and brings us closer to a complete, more nearly objective truth about the world. Error is not dangerous so long as the process is continued, because acknowledged means will expose it; in fact, it is actually beneficial (and inevitable) as part of progressive discovery.⁸⁸

This apparent comfort with error stands in contrast to the acute anxiety about "error" within religious organizations, which included the antebellum colleges. Although religious truth enjoys the ultimate sanction, it is notoriously difficult to discern, because in most religious traditions, God remains beyond human reason. Religious organizations exist in a tension between the inscrutability of God and the need to speak about the divine in ways intelligible and meaningful to members of the community.⁸⁹ Religious toleration results from humility about our capacity to understand God and from frustration with the means available to convince the heretic of his error. Religious organizations may feel driven to adopt secondary rules, such as the infallibility of the Pope or the literal truth of the Bible, to provide internal certainty against disputes about fundamental premises. Even in the liberal Protestant religions that dominated the early colleges, differences about essentials sometimes required departure or ostracism.⁹⁰ Within even the most rationalistic religions, error (or deviate opinion) must eventually result in exclusion.⁹¹

88. See R. MACIVER, *supra* note 48, at 4-5.

89. A similar observation is made by Robert Cover in describing the fractious lives of communities of primary meaning: "The radical instability of the paideic *nomos* forces intentional communities—communities whose members believe themselves to have common meanings for the normative dimensions of their common lives—to maintain their coherence as paideic entities by expulsion and exile of the potent flowers of normative meaning." Cover, *Foreword—Nomos and Narrative*, 97 HARV. L. REV. 4, 15-16 (1983). For a sensitive study of the linguistic complexity of religious statements, see P. VAN BUREN, *THE SECULAR MEANING OF THE GOSPEL* (1963).

90. See *supra* note 66.

91. The crucial role in the development of academic freedom played by the replacement of a predominantly religious paradigm by a scientific one may be contrasted to the divergent development of Roman Catholic universities until the 1960's. Catholic educators of the latter part of the nineteenth century rejected many of the values of the new university as excessively secular and relativistic. Philip Gleason characterizes this opposition:

To an age whose education was secular, scientific, and technical in spirit, particularized in vision, flexible in approach, vocational in aim, and democratic in social orientation, the Jesuits [the religious order that dominated Catholic higher education at the time] thus opposed a system that was religious, literary, and humanistic in spirit, synthetic in vision, rigid in approach, liberal in aim, and elitist in social orientation.

Gleason, *American Catholic Higher Education: A Historical Perspective*, in *THE SHAPE OF CATHOLIC HIGHER EDUCATION* 15, 46 (R. Hassenger ed. 1967). The Catholic opposition to the research ethic, reflected in the paucity of graduate studies in Catholic universities of the time, was expressed most notably in 1938 by George Bull, S.J., then Dean of the Graduate School at Fordham University, who argued that "research cannot be the primary object of a Catholic graduate school, because it is at war with the whole Catholic life of the mind." Instead, the goal must be "deeper penetration into the velvety manifold of reality, as Catholics possess it." Bull, *The Function of the Catholic Graduate School*, 13 *THOUGHT* 364, 378, 379 (1938) (emphasis in original); see also J. ANNORELLI, *ACADEMIC FREEDOM AND CATHOLIC HIGHER EDUCATION* 34 (1987) (describing early Catholic opposition to research in higher education).

In an educational institution where truth is vouchsafed by faith or authority, academic freedom cannot flourish. Catholic universities did not accept academic freedom either in principle or in practice

Science permits the refutation of error without exclusion from the community because it enjoys an accepted method of falsification.⁹² Experimentation tests theory against fact. All scientists accept the authority of nature; if a hypothesis cannot account for all the natural phenomena it purports to cover, the hypothesis must be rejected or modified. Disputants may disagree over the design of an experiment or its interpretation, but in both theory and practice the differences can be resolved, typically by structuring a new experiment. The faith that nature, unlike God, is comprehensible within the rational categories of thought leads to this accepted means for resolving disputes within the scientific community. Moreover, it supports the optimistic view that scientific knowledge is progressive. The process of theory, dispute, and experiment, rather than producing anxiety about the continuity of the community, is celebrated as intrinsic to the pursuit of truth.⁹³

The essential requirement for successful scientific endeavor is free exchange among competent scientists. This simple insight has two practical corollaries. First, non-scientists must be excluded from the process, be-

until the 1960's. *Id.* at 204-05. The current general acceptance of academic freedom at Catholic universities has been the result of a historic process of secularization at those schools, similar to the secularization of Protestant universities in the nineteenth century. (The differences are important and provocative but outside the scope of this article.) By way of contrast, new Protestant Fundamentalist colleges that insist on biblical literalism and inerrancy frequently reject the notion of academic freedom. See J. CARPENTER & K. SHIPPS, *MAKING HIGHER EDUCATION CHRISTIAN: THE HISTORY AND MISSION OF EVANGELICAL COLLEGES IN AMERICA* (1987); *Southern Baptist Leaders Vow to Fight "Takeover" as Fundamentalists Seek Control of Governing Boards*, *CHRONICLE HIGHER EDUC.*, Oct. 21, 1987, at A15.

The AAUP's 1940 *Statement of Principles on Academic Freedom and Tenure* contained a limited provision of special treatment for religious colleges: "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." 1940 *Statement*, *supra* note 12, at 109, *reprinted in* POLICY DOCUMENTS, *supra* note 12, at 3. By 1970, the turn in Catholic higher education toward research and academic freedom led the AAUP to state that "[m]ost church-related institutions no longer need or desire the departure from the principle of academic freedom implied in the 1940 *Statement*, and we do not now endorse such a departure." AAUP, 1970 *Interpretative Comments*, 64 A.A.U.P. BULL. 110, 111 (1978) *reprinted in* POLICY DOCUMENTS, *supra* note 12, at 5, 5. The increase in fundamentalist education and the dismissal of Charles Curran from the Theology Department at Catholic University have raised concerns that the AAUP may have been mistaken about the desires of sectarian educators. Professor Curran, himself, advocates that Catholic universities should adhere to principles of academic freedom but that those principles should not prohibit a theology faculty at a Catholic university from dismissing for incompetence a tenured professor "who does not believe in Jesus or does not accept a role for the pope in the Church." Curran, *Academic Freedom and Catholic Universities*, 66 TEX. L. REV. 1441, 1454 (1988). This equation of beliefs with professional incompetence is untenable. It seems best for all to admit the incompatibility between dogmatic truth and academic freedom and to recognize that religious groups may have internally valid reasons for requiring conformity by faculty to religious tenets that non-members or advocates of academic freedom need not accommodate. See Laycock & Waelbroeck, *Academic Freedom and the Free Exercise of Religion*, 66 TEX. L. REV. 1455, 1456-58 (1988).

92. The classic exposition of this view of the basis of knowledge is that of Karl Popper. See K. POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* (1959). Popper would accept as scientific only statements that are testable, that is, statements which can be falsified by experiments. *Id.* at 47-48.

93. Social scientists have also accepted the scientific notion of falsification: Scientists must reject or modify hypotheses that do not account for the social phenomena that they purport to cover. Although experimentation and the choice of methodology are far more problematic for social than for natural theories, social scientists have long accepted that theory must be tested against fact.

cause they will impose artificial constraints on the offering of new hypotheses or the criticism of accepted ones. These constraints might be attractive because of their political, moral, and religious bases, but they will retard and distort scientific effort. Second, the basis for excluding participants in scientific inquiry rests on evaluating professional qualifications instead of substantive views. Error is tolerable; incompetence is not. Qualifications are ideologically neutral, and only peers can evaluate them.

Social scientists expected that under conditions of professional freedom they could achieve beneficial results comparable to those achieved by natural scientists during the previous century.⁹⁴ They argued for the exclusion of laypersons from evaluation of scientific social theories and for peer review of the professional competence of aspiring social scientists.⁹⁵ These demands were far more controversial in the mouths of economists and political scientists than in the mouths of biologists or chemists. Businessmen understandably felt that they could evaluate theories of labor relations better than theories of gravitational attraction. Moreover, they suspected that what they viewed as error might have pernicious political consequences.⁹⁶ Social scientists deeply resented these doubts both because they represented unphilosophical aspersions cast on the status of their enterprise, and because these academics in fact hoped that in a properly progressive democracy, experts would soon displace businessmen as the most powerful class.⁹⁷

The American concept of academic freedom emerged from this ideological and practical conflict between academic social scientists and their lay employers. The importance of science to the formulation of academic freedom is manifest in the AAUP's *1915 General Declaration of Principles*,⁹⁸ the single most important document relating to American academic freedom. Drafted by a talented committee dominated by liberal economists and sociologists and adopted by the AAUP while John Dewey was chair-

94. R. HOFSTADTER & W. METZGER, *supra* note 11, at 418.

95. *General Report of the Committee on Academic Freedom and Academic Tenure*, 1 A.A.U.P. BULL. pt. 1, at 15, 17 (1915) [hereinafter *1915 Statement*], reprinted in 2 DOCUMENTARY HISTORY, *supra* note 43, at 860.

96. Arthur Twining Hadley sympathetically expressed the viewpoint of the trustees:

The authority which seeks to suppress freedom of teaching may be right or it may be wrong in what it says, but at any rate it has perfectly intelligible reasons to give. If it believes that the eternal salvation of the pupils will be jeopardized by certain views as to the creation of the world, or if it believes that the commercial prosperity of the country is dependent upon certain theories of political economy, its duty seems to lie plain before it; and the community tends to support it for its steadfastness in thus doing what it believes to be its duty.

Hadley, *Academic Freedom in Theory and in Practice*, 91 ATLANTIC 152, 152 (1903).

97. John Dewey lamented that although social studies were progressing toward true sciences, "to the public at large the facts and relations with which these topics deal are still almost wholly in the region of opinion, prejudice, and accepted tradition." Dewey, *supra* note 14, at 5. This dualism between science and opinion recurs in many arguments of the period in favor of a special protection for academic freedom.

98. *1915 Statement*, *supra* note 95, at 17, reprinted in 2 DOCUMENTARY HISTORY, *supra* note 43, at 860.

man, the *1915 Declaration* is both the most influential statement of the case for academic freedom and a revealing testament to the contemporary faith in the ability of neutral, expert social scientists to improve the human condition.

The Committee justified academic freedom by arguing for the essentially scientific character of modern academic disciplines:

The modern university is becoming more and more the home of scientific research. There are three fields of human inquiry in which the race is only at the beginning: natural science, social science, and philosophy and religion, dealing with the relations of man to outer nature, to his fellow men, and to the ultimate realities and values. In natural science all that we have learned but serves to make us realize more deeply how much more remains to be discovered. In social science in its largest sense, which is concerned with the relations of men in society and with the conditions of social order and well-being, we have learned only an adumbration of the laws which govern these vastly complex phenomena. Finally, in the spiritual life, and in the interpretation of the general meaning and ends of human existence and its relation to the universe, we are still far from a comprehension of the final truths, and from a universal agreement among all sincere and earnest men. In all of these domains of knowledge, the first condition of progress is complete and unlimited freedom to pursue inquiry and publish its results. Such freedom is the breath in the nostrils of all scientific activity.⁹⁹

The Committee believed that all reality was knowable, that free employment of the scientific method would lead to the discovery of truths that exist autonomously in the world.

Accordingly, the Committee rejected any view that academic freedom implied an absolute right of free utterance for the individual faculty member:

The claim to freedom of teaching is made in the interest of the integrity and of the progress of scientific inquiry; it is, therefore, only those who carry on their work in the temper of the scientific inquirer who may justly assert this claim. The liberty of the scholar within the university to set forth his conclusions, be they what they may, is conditioned by their being conclusions gained by a scholar's method and held in a scholar's spirit; that is to say, they must be the fruits of competent and patient and sincere inquiry, and they should be set forth with dignity, courtesy, and temperateness of language.¹⁰⁰

Academic speakers can be held within the strictures of discourse estab-

99. *Id.* at 27-28, reprinted in 2 DOCUMENTARY HISTORY, *supra* note 43, at 867.

100. *Id.* at 33, reprinted in 2 DOCUMENTARY HISTORY, *supra* note 43, at 871.

lished by their discipline; departure from the scientific model can be punished. Indeed, the Committee never argued that speech should be immune from adverse consequences. It contended only that the consequences be determined by competent professionals within the same discipline.

It is, it will be seen, in no sense the contention of this committee that academic freedom implies that individual teachers should be exempt from all restraints as to the matter or manner of their utterances, either within or without the university. . . . What this report chiefly maintains is that [disciplinary] action can not with safety be taken by bodies not composed of members of the academic profession.¹⁰¹

The trustees, whose views would be based on self-interest and informal experience, must be prevented from forcing their opinions on academics.¹⁰² Indeed, from the Committee's perspective, unrestrained freedom of speech would destroy the university; abandonment of the rigors of the scientific method would forfeit the opportunity to master the truth.

The Committee did not consider this adherence to professional standards to be ideologically coercive in principle. It saw scientific speech as essentially non-ideological; it was disinterested and patient, seeking autonomous laws of nature or of society through methods best calculated to avoid error and prejudice. The Committee insisted on a clear distinction between speech that was academic and that which was merely political or sectarian. It believed that scientific speech was much more valuable, because it was verifiable; roughly, the Committee saw scientific speech as knowledge (at least potentially) while it considered political speech to be only opinion (which is true only by accident).¹⁰³

Academic freedom conceived as the insulation of the individual professor from lay interference triumphed with the rise of the bureaucratically-

101. *Id.* at 38, reprinted in 2 DOCUMENTARY HISTORY, *supra* note 43, at 875.

102. John Dewey also attributed the conflict between the public and professors to the former's inability to acknowledge the special claims of science. While prejudices against the theory of evolution still persisted, Dewey noted:

[T]he more influential sections of the community upon which the universities properly depend have adjusted themselves to the fact that biology is a science which must be the judge of its own methods of work; that its facts and tests of fact are to be sought within its own scientific operations, and not in any extraneous sources. There are still, however, large portions of society which have not come to recognize that biology is an established science, and which, therefore, cannot concede to it the right to determine belief in regions that conflict with received opinions, and with the emotions that cluster about them.

Dewey, *supra* note 14, at 4.

103. The classic definitions of academic freedom share the structure of professionalism set out in the 1915 *Statement*. For instance, Robert MacIver wrote that "[a]cademic freedom is . . . a right claimed by the accredited educator, as teacher and investigator, to interpret his findings and to communicate his conclusions without being subjected to any interference, molestation, or penalization because the conclusions are unacceptable to some constituted authority within or beyond the institution." R. MACIVER, *supra* note 48, at 6. Here, again, a sharp distinction is implied between competence and viewpoint, and the emphasis is on restraining the "constituted authority" from enforcing judgments not made on scientific grounds. See also Lovejoy, *supra* note 14, at 384-85 (implying same distinction).

organized research university. The AAUP's 1940 *Statement of Principles* codifies in summary terms the academic freedom rights of faculty in research and teaching.¹⁰⁴ It has been endorsed by every major higher education organization in the nation.¹⁰⁵ The AAUP's vision of academic freedom, as explained in the 1915 *Statement* and the 1940 *Statement of Principles*, has proven intensely attractive for a variety of reasons. First, it embodies a noble vision of the academic calling—the advancement of truth—that justifies the efforts and sacrifices of professors. Second, it eliminates the gravest evils of lay control over universities—ignorant interference with painstaking investigation and discussion of controversial problems—by insisting that professors be evaluated only for professional competence and only (in the first instance) by peers. This arrangement also compensates, in some respect, for the American faculty's lack of control over the educational policy of the university.¹⁰⁶ Third, the concept of peer review according to professional standards ideally fits the fragmented state of modern learning in which plausible unifying principles are unavailable, and disciplines are usually bureaucratically organized into autonomous departments.¹⁰⁷

D. *The Challenge of Other Academic Values*

While the American tradition of academic freedom emerged from the professional organization of scholars dedicated to the scientific search for truth, the research value has never been the only value for higher education in America. It has always had to compete with what may be called, for lack of better labels, humanistic and democratic values.¹⁰⁸ The humanistic value in higher education embraces both the view that valuable knowledge includes ideas of order and relationship—often moral or aesthetic ideas—that are not scientifically demonstrable (or falsifiable) and the related view that students must receive a coherent education in the traditions of civilized thought, writing, and art. Although my label yokes

104. 1940 *Statement*, *supra* note 12, at 110, *reprinted in* POLICY DOCUMENTS, *supra* note 12, at 3-4.

105. *Id.* at 108-09, *reprinted in* POLICY DOCUMENTS, *supra* note 12, at 7-9.

106. Metzger, *supra* note 9, at 1276-77.

107. Laurence Veysey cogently argues that the large and complex bureaucracies of modern universities were necessary institutional responses to growth in an environment lacking specific shared values. L. VEYSEY, *supra* note 56, at 311. No consensus could support a hierarchy of values or intellectual endeavors, but bureaucracy could support initiatives by individuals or subgroups in one area without requiring that scholars in other areas either approve or understand them. Academic freedom is consistent with this diffuse organization, because it "specializes" the evaluation of scholars and provides a positive rationale for administrative officials not to insist on some partial vision of basic institutional values. The relationship between triumphs of the scientific method and bureaucracy at the turn of the century are analyzed insightfully in R. WIEBE, *THE SEARCH FOR ORDER: 1877-1920* 145-55 (1967).

108. In identifying three primary values in modern American higher education, I am adopting the tripartite division employed by Professor Veysey of service (utility), research, and culture. *See* L. VEYSEY, *supra* note 56, at 12-13.

together diverse voices that quarrel loudly with one another, the humanistic value does identify a persistent tradition—one that maintains continuity with that of the old-time college and that has trenchantly criticized modern academia for excessive specialization, intellectual fragmentation, ethical agnosticism, and poor training of students.¹⁰⁹ Proponents of humanistic values successfully reasserted their views against the research dogmatists after 1900;¹¹⁰ since then, the research and humanistic values have coexisted without synthesis.

Humanists tend to regard the college rather than the graduate school as the central institution of the university (although the devotion of some faculty in professional schools to professional training, at the expense of critical theory, may reflect a similar concern with the development of the student for effective or moral action). Humanistic values may limit research values by insisting that faculty nurture students at the cost of time and effort that could be directed toward research or that they teach foundational courses rather than courses in which the professor explains current research problems.¹¹¹ In practice, such conflicts are bureaucratically managed, although the same tensions may surface over collateral issues such as the relative significance of teaching and publishing in tenure and promotion decisions.

Although humanists may cast doubt on some claims of science, they often will close ranks with researchers to resist the demands of lay persons for control by insisting on the pursuit of knowledge and culture, each for its own sake.¹¹² Because humanists emphasize the significance of aesthetic or moral judgments and seek to train students to make careful distinctions, they tend to protect academic ideals against intrusions by the public at large. Irving Babbitt, for example, wrote that the purpose of the college is “to check the drift toward a pure democracy” and “to insist on the idea of quality; it should hold all the faster to its humane standards now that the world is threatened with a universal impressionism.”¹¹³ This inevitability

109. See *id.* at 180–251; G. GRAFF, *supra* note 77, at 121–243. Important educators within this tradition include Woodrow Wilson, Alexander Meiklejohn, and Robert Hutchins. Polemical writings range from I. BABBIT, *LITERATURE AND THE AMERICAN COLLEGE* (1908) to A. BLOOM, *THE CLOSING OF THE AMERICAN MIND* (1987); see also *THE VOICE OF LIBERAL LEARNING: MICHAEL OAKESHOTT ON EDUCATION* (T. Fuller ed. 1989) [hereinafter *OAKESHOTT ON EDUCATION*].

110. See L. VEYSEY, *supra* note 56, at 180–259.

111. Humanists often advocate a general education. For a recent and sophisticated plea for liberal education, see E. BOYER, *COLLEGE: THE UNDERGRADUATE EXPERIENCE IN AMERICA* 43–69, 68 (1987) (arguing that colleges should avoid narrow skill training and that they have “an obligation to give students a sense of passage toward a more coherent view of knowledge and a more integrated life”).

112. See, e.g., R. KIRK, *supra* note 49, at 27 (academic freedom is necessary for pursuit of truth); A. MEIKLEJOHN, *THE LIBERAL COLLEGE* 84–96 (1967) (academic freedom provides opportunity for “the highest development of private reason and imagination”).

113. I. BABBIT, *supra* note 109, at 80, 81. Michael Oakeshott has expressed similar sentiments with greater subtlety:

A university, like everything else, has a place in the society to which it belongs, but that place is not the function of contributing to some other kind of activity in the society but of being

contains an element of elitism, a view that there is a higher sphere of thought and action than that normally occupied by business or working people. Nonetheless, humanists often also wish to improve the lives of people broadly or at least to train their elite students to meet their responsibilities to others.

The democratic value in higher education reflects the demands placed on our colleges and universities by the society at large that they help fulfill broad goals of social mobility and general prosperity.¹¹⁴ This value dates at least from the passage of the Morrill Act in 1862,¹¹⁵ which instituted the land-grant college, but has become more prominent and influential since the massive increase in demand for higher education since 1945. Advocates for democratic values have always insisted on the provision of an education suited to the abilities and concerns of a larger percentage of American youth, as well as to available employment opportunities.¹¹⁶ Similarly, there has been a desire for scholarship that is useful, either for industrial development or for social justice. In general, advocates of democratic values view education as instrumental, conferring benefits on the general public, rather than as a good in itself or in its diffuse, long-term consequences. Such familiar aspects of university life as student loans, college athletics, agricultural research, and affirmative action reflect democratic values.¹¹⁷ Indeed, the judicial enforcement against state universities of the constitutional rights of students to free speech and fair disciplinary procedures—rights sometimes mistaken for academic freedom it-

itself and not another thing. Its first business is with the pursuit of learning—there is no substitute which, in a university, will make up for the absence of this—and, secondly, its concern is with the sort of education that has been found to spring up in the course of this activity. A university will have ceased to exist when its learning has degenerated into what is now called research, when its teaching has become mere instruction and occupies the whole of an undergraduate's time, and when those who came to be taught come, not in search of their intellectual fortune but with a vitality so unroused or so exhausted that they wish only to be provided with a serviceable moral and intellectual outfit; when they come with no understanding of the manners of conversation but desire only a qualification for earning a living or a certificate to let them in on the exploitation of the world.

OAKESHOTT ON EDUCATION, *supra* note 109, at 103–04.

114. See generally A. GUTMANN, *DEMOCRATIC EDUCATION* (1987) (educational goods should both satisfy democratically-informed distributional goals and maintain imperatives of democratic political systems); C. KERR, *THE USES OF THE UNIVERSITY* (1963) (universities are central to economic and social growth); A. NEVINS, *supra* note 71 (access to higher education promotes social mobility and intellectually-capable citizenry necessary to democracy).

115. 12 Stat. 503 (1862) (codified at 7 U.S.C. §§ 301-308 (1982)).

116. See 1 *HIGHER EDUCATION FOR DEMOCRACY: A REPORT OF THE PRESIDENT'S COMMISSION ON HIGHER EDUCATION* (1947), reprinted in part in 2 *DOCUMENTARY HISTORY*, *supra* note 43, at 970, 979 (“We shall be denying educational opportunity to many young people as long as we maintain the present orientation of higher education toward verbal skills and intellectual interests.”).

117. Student loans and affirmative action are democratic in an obvious sense: They extend the availability of higher education to segments of the population that have been deterred by economic or social barriers. Agricultural research can enhance the profitability of farms and benefit consumers. College athletics are democratic in several senses: They imply a criterion of collegiate admission and success that is wholly unintellectual; they provide popular entertainment; and they enhance the image of an institution to those indifferent to scholarship but important to the college's financial success, such as alumni and state legislators.

self—represents a high-water mark in the imposition of democratic values on universities.¹¹⁸ Largely accepted by many members of the academic community, democratic values have been naturalized as academic values.

Democratic values exist in tension with academic freedom because they insist that the university, and the scholarship of individuals, be measured by standards other than professional competence in the pursuit of truth.¹¹⁹ Such tension can erupt into conflict, if rarely, such as when administrators demand that scholarship remain “loyal” or be useful to industry. Far more subtle and widespread are the effects wrought by shifts in values and emphasis, such as in the maintenance of large intercollegiate athletic programs, contract-research for industry or government, and lucrative opportunities for consulting. Both institutions and individual scholars may come to feel excessive dependence on those who pay for these useful or popular programs.¹²⁰

That academic freedom may need to give way to humanistic or democratic values in an intra-university decision is not necessarily a defeat for higher education. Universities perform vital functions in preserving the intellectual heritage, providing training for useful employment, and promoting economic development; performance of these functions justifies for the public the expenditure of enormous resources to benefit universities. For example, the extent to which notions of traditional professional competence ought to be altered in order to promote racial or ethnic heterogeneity on faculties is a question of primary importance on which persons of equal thoughtfulness and good faith can differ. An advocate of academic freedom might criticize some affirmative action plans as derogations from accepted notions of professional competence for political reasons. But one side ought not win a final victory merely because it can plausibly wave the banner of academic freedom. Faculty and administrators might honorably reject this argument to advance other values in appropriate circumstances.

118. See *supra* text accompanying notes 33–41.

119. The most bitter opponents of incorporating democratic values into higher education tend to be those humanists who see such values as imperiling the survival of their view of culture and excellence. See, e.g., A. BLOOM, *supra* note 109, at 351 (describing how “sea of democratic relativism . . . has lowered university standards and obscured the university’s purpose”); Hook, *Conflict and Change in the Academic Community*, in *IN DEFENSE OF ACADEMIC FREEDOM* 106, 117 (S. Hook ed. 1971) (decrying “politicalization” of the university as threat to “the values of the liberal arts tradition”).

120. See D. BOK, *BEYOND THE IVORY TOWER* 24–26 (1982) (arguing that financial and professional opportunities outside of academe have significantly decreased academic independence). Professor Rebecca Eisenberg recently has offered a perceptive critique of the weakness of traditional academic freedom for protecting academic values against the dangers posed by sponsored research. Eisenberg, *Academic Freedom and Academic Values in Sponsored Research*, 66 *TEX. L. REV.* 1363 (1988). She points out that

research sponsors threaten academic values when they seek to control the dissemination of research results, the conduct of research, or the choice of research topics by faculty members, even when faculty members themselves acquiesce in the sponsor’s restrictions. . . . A conception of academic freedom that precludes universities from setting limits on sponsor-imposed restrictions can only weaken the position of universities and faculty members in defending academic values against competing outside interests.

Id. at 1384.

Indeed, the tension is legitimate and ought to be permanent. These different academic values have existed together successfully for many years in our universities, during which time acceptance of academic freedom has become nearly universal.

Although the tradition of academic freedom reflects primarily research values, constitutional academic freedom, as I will argue below, reflects and protects both scientific research and humanistic values. Both these values are manifest in traditions of scholarship and pedagogy called liberal education, a concept indigenous to the university. Constitutional academic freedom primarily protects these special values from interference by non-academics who wish to use the university for political ends. Democratic values reflect the imposition on and the adoption by universities of the goals of society at large. Democratic values may nourish liberal education indirectly by inducing support or correcting baseless prejudices, but they also threaten it by encouraging the abandonment of the ideal of the true for that of the useful. Accommodating these values requires careful and delicate balancing by faculties and administrators committed to the preservation of liberal learning. Politicians steeped in popular preferences are likely to sacrifice humanistic and research values for immediate social benefits. Constitutional academic freedom requires courts to scrutinize external requirements that threaten indigenous values.

E. *Professional Competence as a Regulatory Standard*

Graver than the threat to academic freedom from other academic values is the danger from its own internal contradictions. Chief among these is its reliance on the ideological neutrality of the notion of professional competence. As noted above, academic freedom does not insulate speakers from being penalized for the content of their speech. Academic freedom only requires that speakers be evaluated by their peers for relative professional competence and within the procedural restraints of the tenure system. Few thinkers today are as confident as the drafters of the AAUP's *1915 Statement*¹²¹ that questions of professional competence are divorced from questions of values. Science accepts the view that paradigms of analysis shape the results investigators obtain; the scientific method is not a transparent perspective on autonomous facts.¹²² Much less often are the inquiries of social scientists seen as ideologically neutral or free from cultural presupposition.¹²³ This, of course, does not make physics or anthropology

121. *1915 Statement*, *supra* note 95.

122. The key contribution here has been, of course, T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

123. See, e.g., Birnbaum, *supra* note 34, at 441 ("[t]he delineation between objective knowledge and social and political judgments in the social sciences is impossible to maintain."). Social scientists today argue from many perspectives over the meaning and value of any social inquiry that aspires to be scientific. See, e.g., C. LINDBLOM & D. COHEN, *USABLE KNOWLEDGE* (1979); *METATHEORY IN SOCIAL SCIENCE* (D. Fiske & R. Shweder eds. 1986). A renewed defense of the philosophical basis for

merely subjective; the vigor of criticism and the acceptance of demonstrating falsity by experiment or evidence curbs the prejudices of the investigator. The integrity of academic freedom depends on the good faith of the professorate and on its collective ability to distinguish between scholars who disagree with accepted findings and those who do not understand them. One probably can safely assume that most scholars attempt to put aside mere disagreement or repugnance most of the time.

Trouble develops, however, when scholars depart from or challenge basic suppositions of a discipline that help to define competence. Norman Birnbaum has advised us to pay "explicit attention to the mechanisms of academic succession, with their customary confusion of criteria of competence and of adherence to conventional categories of thought."¹²⁴ Unusual scholarship often generates visceral negative reactions whereby professional disagreement and political opposition may become expressed by claims that the challenger is incompetent. The sociologist who maintains that the entrails of an owl can render more useful information than can a statistical survey is likely to be met with derision as well as disagreement.¹²⁵ The competence of a modern historian who insisted on a Whig interpretation of events while focusing largely on the affairs of "great men" would likewise be suspect.

Those who challenge disciplinary axioms are likely to be held to higher standards of competence than those who ably travel established pathways, yet those who are able to establish successfully new perspectives in a discipline are likely to become its leaders. Such disputes may be bitter because the professional status of all participants may hang on whether views they have advocated are ascendant or on the wane. Although some individuals may suffer in this process because they are denied positions obtained by more conventional scholars of equal competence, holding radically unconventional scholars to higher standards helps to maintain the coherence of a discipline. In this context, claims that the insurgent's academic freedom has been violated cannot be disentangled from the substance of the dispute, because both issues turn on the intellectual value of the challenger's position.

Academic freedom concerns are likely to become even more pervasive when a discipline is divided over the acceptability of fundamental paradigms. Without agreement about basic paradigms, competence loses much of the neutrality that might ordinarily be assumed, as there may be no shared criterion for evaluation.¹²⁶ Participants may view themselves as

academic freedom within the university must await a new synthesis of theories of knowledge.

124. Birnbaum, *supra* note 34, at 456.

125. This is not to say that one could not construct, for example, an academically-respectable argument that reading entrails performed a more useful or meaningful role within Roman culture than surveys do in ours.

126. Thomas Kuhn writes that the incommensurability of scientific paradigms makes it very difficult for proponents of competing paradigms to communicate with each other. T. KUHN, *supra* note

competing for the future of the discipline. Arguably, this roughly describes the situation in legal scholarship highlighted by the recent controversial employment decisions at Harvard Law School.¹²⁷ In such settings there may be no neutral principle by which to resolve the dispute, because questions of competence and substantive acceptance cannot be separated. Thus, concluding that one side has violated academic freedom will be viewed as implying necessarily that the opposing view has substantial merit as a paradigm for the discipline. Academic freedom was never intended to provide a rule for settling this kind of problem. Toleration, understanding and analytical syntheses are the only means by which the dignity of individuals can be protected during such fertile but disturbing times. Interestingly, the AAUP argues that faculty appointments should be made without regard to the "fit" of the candidate's views with any "contemporary orthodoxy," but it also holds that a faculty's good faith attempt to separate evaluation of competence from ideological disagreement both exhausts the candidate's rights and is itself protected by academic freedom from further questioning.¹²⁸

Even were one dissatisfied with reliance upon peer review, no alternative seems as promising.¹²⁹ The AAUP's efforts understandably are dedicated to increasing the centrality of peer review, through grievance procedures that act as a faculty check upon administrators' responses to departmental recommendations. (The principle of academic freedom reflects the structure of the university; the drive for professorial autonomy can be furthered by increasing the power of the faculty within the univer-

122, at 149-50.

127. See "Of Law and the River," and of Nihilism and Academic Freedom, 35 J. LEGAL EDUC. 1 (1985) (exchanges of letters among legal academics concerning Paul Carrington's criticism of Critical Legal Studies movement); Frug, *McCarthyism and Critical Legal Studies*, 22 HARV. C.R.-C.L. L. REV. 665 (1987); Trillin, *A Reporter at Large: Harvard Law*, NEW YORKER, Mar. 26, 1984, at 53-83. Professor Frug argues that the repeated criticism that Critical Legal Studies is "incompetent" derives from a desire to maintain perceived academic standards against challenges to traditional institutional practices. Frug, *supra*, at 696. He also observes that confusion about the nature of "competence" may only be exacerbated by appeals to academic freedom. *Id.* at 688-89. Contemporary social science as a whole is characterized by competing, seemingly irreconcilable methodologies. See G. LINDBLOM & D. COHEN, *supra* note 123, at 47-49.

128. AAUP, *Some Observations on Ideology, Competence, and Faculty Selection*, ACADEME, Jan.-Feb. 1986, at 1a [hereinafter AAUP, *Observations on Ideology*]. While defending the relevance of academic freedom to these problems, Professor Rabban nonetheless concedes that the AAUP has somewhat begged the question: "To a significant extent, the very definition of a discipline and its standards for determining professional competence are themselves based on conventional wisdom." Rabban, *Does Academic Freedom Limit Faculty Autonomy?*, 66 TEX. L. REV. 1405, 1426 (1988).

129. Professor Frug, in his thoughtful essay comparing McCarthyism with recent hiring controversies regarding scholars associated with the Critical Legal Studies movement, offers an ethical basis for academic freedom that goes somewhat beyond faculty self-governance and adherence to professional standards for evaluation: "To be successful, my own notion of academic freedom—of continuous dialogue between opposed positions—must overcome the blindness of different sides to other points of view; indeed, the very definition of the various sides must become an object of discussion." Frug, *supra* note 127, at 701. Whether or not it is useful to stretch the term "academic freedom" to encompass this humane engagement about academic norms, it is important to insist that angry controversy over criteria for good scholarship raises intellectual and social, rather than legal, problems.

sity, but at some cost to other values). It is incoherent to suggest that academic freedom could be furthered by reducing peer review and substituting the enforcement of rules by lay persons such as judges. This ignores both the historical basis of, and the actual structures that protect, faculty rights.

Some may argue that peer review provides only specious protection for the professor's liberty, particularly when the candidate seeks to challenge orthodoxy. Professor Bertell Ollman, himself the protagonist in a well-known dispute about academic freedom analyzed below, has argued that peer review is a mechanism of repression, that the faculty itself is entrusted by higher-ups with the task of limiting the numbers of radical faculty on campus, and that the higher-ups—administrators and governors—intervene only when the faculty fail.¹³⁰ Ollman is one of the few commentators to stress the central role of policing of the academic standards by faculty in the exercise of academic freedom. His analysis appears mistaken, however, in its assumption that the ideal of academic freedom is the "professor's right to pursue truth in his own way."¹³¹ American academics have always insisted that speakers conform broadly to the evolving standards of the discipline. What Ollman viewed as prejudice or conspiracy against radical thinking and Marxist critique probably reflected good faith substantive judgments about what kinds of political science are the most valuable. Such judgments may be wrong or may be widely viewed as such in the future, but the effort to make judgments is essential for progress, or at least for coherence, within disciplines.¹³²

Some may find the concern for progress and coherence naive. Few to-

130. Ollman, *Academic Freedom in America Today: A Marxist View*, MONTHLY REVIEW, Mar. 1984, at 24, reprinted in REGULATING THE INTELLECTUALS 45 (C. Kaplan & E. Schrecker eds. 1983).

131. *Id.* at 25, reprinted in REGULATING THE INTELLECTUALS, *supra* note 130, at 46.

132. Thomas Kuhn offers the following perspective on the resistance of proponents of an older paradigm to those of a new one:

Lifelong resistance, particularly from those whose productive careers have committed them to an older tradition of normal science, is not a violation of scientific standards but an index to the nature of scientific research itself. The source of resistance is the assurance that the older paradigm will ultimately solve all its problems, that nature can be shoved into the box the paradigm provides. Inevitably, at times of revolution, that assurance seems stubborn and pig-headed as indeed it sometimes becomes. But it is also something more. That same assurance is what makes normal or puzzle-solving science possible.

T. KUHN, *supra* note 122, at 151-52.

Frank Kermode, the eminent literary critic, makes a similar point about the persistent attachment of literary scholars to canons of revered and studied literary work:

[W]hether one thinks of canons as objectionable because formed at random or to serve some interests at the expense of others, or whether one supposes that the contents of canons are providentially chosen, there can be no doubt that we have not found ways of ordering our thoughts about the history of literature and art without recourse to them. That is why the minorities who want to be rid of what they regard as a reactionary canon can think of no way of doing so without putting a radical one in its place.

. . . The canon, in predetermining value, shapes the past and makes it humanly available, accessibly modern.

F. KERMODE, HISTORY AND VALUE 116-17 (1988).

day share the faith of the early prophets of academic freedom that the scientific method imminently will reveal objective truths about social and ethical dilemmas that can transform the basis of social life.¹³³ Some within the academy also dispute the existence of any truth independent of the seeker and may insist that all paradigms of systematic thought are only expressions of the social placement of the speakers.¹³⁴ To the extent such critics find the protection of academic freedom comfortable, they will seek to uncouple the justification for academic freedom from the view that one account of phenomena may be, in some objective sense, more true than another. Such thinkers, quite unafraid of rendering discourse incoherent (because they believe it to be so already), would likely favor a general free speech approach, where virtually all voices are protected: Academic speech should be treated like political speech because there is no material difference between the two. Yet if formulations and critiques of any subject are merely restatements of subjective political preferences, it is difficult to see why society at large should not demand that only certain political preferences be reflected. If speech is believed to have no autonomy from political power, political power will not long brook contradictory speech. Academic freedom in such a setting would be only the result of inertia and traditionalism.¹³⁵

Academic freedom has taken firm root in American society because of the widespread view that academic speech matters.¹³⁶ Disciplined attempts

133. For all the new-found awareness of the influences of research paradigms, the natural sciences remain largely immune from incursions on academic freedom. "One of the strongest, if still unwritten, rules of scientific life is the prohibition of appeals to heads of state or to the populace at large in matters scientific." T. KUHN, *supra* note 122, at 168. No doubt the broad consensus on the underlying principles of methodology and the relatively objective results of scientific research permit functional distinctions between competence and viewpoint to an extent impossible in the social sciences and humanities. Thus, the natural sciences remain what Allen Bloom called them in a slightly different context: "the Switzerland of learning." A. BLOOM, *supra* note 109, at 349.

134. See, e.g., Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 57-59 (1984) (legal theory).

135. An honest attempt to escape this dilemma is found in S. LEVINSON, *CONSTITUTIONAL FAITH* 170-78 (1988). Professor Levinson shares the radical skepticism about truth referred to in the text, identifying himself with the view that "what is professed to be known [is] itself constituted by the subject that claims to know." *Id.* at 175. He finds, however, a basis for academic freedom in the behavior of faculty within a discipline, who "decide whose conversations it finds interesting, helpful, or illuminating" and agrees that "none of us could possibly believe that everyone is a genuine contributor." *Id.* at 178. This view is confusing. A normative principle, such as academic freedom, cannot be justified by descriptions of behavior. Although Professor Levinson wishes to expand the range of voices valued by academics, he also asserts that a faculty must be able to exclude speakers whose work it finds uninteresting. To what criteria of interest should the faculty agree? Moreover, he does not address the problem of why society at large should permit professors the liberty to make these distinctions themselves.

136. See R. NISBET, *supra* note 48, at 24-27. One could also take the opposite view that academic speech does not matter at all—that academic freedom permits or encourages intellectual malcontents to direct potentially revolutionary energy toward arcane and harmless exercises that have little effect on the real world of power and wealth. Leaving aside the poverty of the view that education and scholarship are so far inferior in value to dominance and acquisition, see generally E.M. FORSTER, *THE LONGEST JOURNEY* 67-68 (Vintage ed. 1962) (contrasting the "goodness" and morality of academic imperatives with directives issued by powers of "great" force), this view misconceives the origin and function of legal rules. If academic speech were always harmless, no legal protection

to transcend received or popular opinions provide both weight and depth to academic discourse and to education. Indeed, beyond their capacity to train students for white-collar jobs, our colleges and universities are valued because their work and the time we spend in them affirm the worth of free inquiry and the capacity of the trained mind to see things, however partially, as they are. The modern university epitomizes a liberal faith that a free people can, like the college itself, cast off authoritarianism without lapsing into total relativism or incoherence. Perhaps, intimations of this vision explain the glowing rhetoric with which the Supreme Court has justified its constitutional protection of academic freedom.

IV. CONSTITUTIONAL ACADEMIC FREEDOM AND THE INDIVIDUAL SCHOLAR

When the Supreme Court came to constitutionalize academic freedom, it encountered a tradition of values and personnel procedures protecting the individual scholar from non-academic judgments by college administrators. In considering the Supreme Court's innovations, we will want to enquire about the extent to which the Court has also sought to protect the individual scholar against administrators or trustees who are state actors. Yet the Supreme Court's cases are few and vague, and lower court decisions seem confused and contradictory. In this section, I review Supreme Court precedent concerning constitutional academic freedom and the individual professor. I argue that courts are poorly equipped to enforce traditional academic freedom as a legal norm, and I suggest more limited, but useful, protection for individual faculty members.¹³⁷

would be required because the speech would never be worth challenging. Both academic tradition and the constitutional protection of academic freedom have been fashioned in crisis and conflict.

137. Throughout this article, I treat cases involving elementary and secondary school teachers as marginal, citing or discussing them only when they bear directly on the law as it pertains to universities. This distinction is appropriate for several reasons. First, academic freedom was conceived and implemented in the university, and any role it plays in the lower grades is derivative. Second, as argued in the previous section, academic freedom makes sense only for teachers who are also researchers or scholars—work not generally expected of elementary and secondary school teachers. *See supra* text accompanying notes 84–107. Third, when lower courts sometimes use the term academic freedom in defending the classroom speech of schoolteachers from sanctions by principals or school boards, they appear to mediate between the often-affirmed power of school boards to inculcate “American values” in young pupils, *see* Diamond, *The First Amendment and the Public Schools: The Case Against Judicial Intervention*, 59 *TEX. L. REV.* 477, 497 (1981) (one First Amendment concern in public schools is indoctrination), and the values of individual expression and diversity, *see* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). Universities do not “inculcate” ideology; their transmission of cultural values is an explicitly intellectual process that permits the student to reach her own conclusions. The rights of schoolteachers are important, but they are articulated in such a different educational context that they should be kept distinct.

A. *Sweezy and the Origins of Constitutional Academic Freedom*

In *Sweezy v. New Hampshire*,¹³⁸ the Supreme Court reversed the conviction of Marxist economist¹³⁹ Paul Sweezy for refusing to answer several questions put to him by the State attorney general, who was investigating "subversive persons." A few of the questions inquired into the content of a guest lecture Sweezy had given in a humanities class at the University of New Hampshire. A plurality of the Justices joined an opinion by Chief Justice Warren, holding that the Attorney General's questioning violated due process because the state legislature had made a "broad and ill-defined" delegation to him of its investigative power.¹⁴⁰ This odd holding, which imposes federal separation of powers limitations on the states, has had no subsequent legal career. The opinion nevertheless contains passages that generally approve constitutional limitations on government power to interfere with academic freedom. The plurality states provisionally: "We do not now conceive of any circumstance wherein a state interest would justify infringement of rights in these fields."¹⁴¹ The decision to base the holding on an improbable procedural limitation on state legislatures rather than on a clear, positive right of academic freedom may have reflected either the Court's primary anxiety about abuses arising from broad legislative investigations—the essential tool of McCarthyism¹⁴²—or the Court's aversion at that time to the articulation of precise, conclusive First Amendment rights.¹⁴³

A concurring opinion by Justice Frankfurter, joined by Justice Harlan,

138. 354 U.S. 234 (1957).

139. Paul Sweezy, described in the Court's opinion only as a journalist, was (and remains) a significant Marxist economist and the founder of the leftist periodical *Monthly Review*. Sweezy earned his doctorate from Harvard and was an assistant professor there until 1945. He resigned in the belief that his department would not grant tenure to a Marxist. He had already written a pathbreaking book in American Marxism, *The Theory of Capitalist Development*. After leaving Harvard, Sweezy was free not to seek another academic position because he enjoyed (ironically) a small independent fortune inherited from his father, a successful Wall Street banker. See *Interview with Paul M. Sweezy*, MONTHLY REVIEW, Apr. 1987, at 1; see also Brief for Appellant at 5, *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (No. 175). Because Sweezy did not occupy a regular academic position at a university, he did not come within the protection offered by AAUP and the traditions of academic freedom.

140. 354 U.S. at 245, 254–55.

141. *Id.* at 251.

142. In a companion case, the Court reversed the conviction for criminal contempt of a witness who had refused to answer questions from the House Un-American Activities Committee on the ground that the House's delegation of investigational power was so vague that the witness was unable to decide which questions the Committee had authority to compel him to answer. *Watkins v. United States*, 354 U.S. 178 (1957). The decision appears intended to prompt congressional reexamination of the scope and propriety of the Committee's investigation. See *id.* at 198–99.

143. In another decision announced the same day, the Court reversed the convictions of members of the Communist party for conspiracy to violate the Smith Act, on the ground that the Act, as upheld in *Dennis v. United States*, 341 U.S. 494 (1951), only outlawed any advocacy of violent revolution, not "teaching of forcible overthrow as an abstract principle." *Yates v. United States*, 354 U.S. 298, 318 (1957). Professor Gunther has emphasized the importance of *Yates* as a step toward stricter requirements that speech incite unlawful action before it can be prevented. Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 753 (1975).

went further, arguing that in the academic realm, "thought and action are presumptively immune from inquisition by political authority."¹⁴⁴ Frankfurter thus would have held that university freedom for teaching and scholarship without interference from government is a positive right and that the state here had failed to provide a compelling justification for questioning an academic about the content of a lecture. Frankfurter argued at length for "the exclusion of governmental intervention in the intellectual life of a university."¹⁴⁵ He gave some content to the legal right of academic freedom by quoting a statement by South African academics concerning " "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." "¹⁴⁶

There are at least three significant oddities about the plurality and concurring opinions in *Sweezy*. First, never before had the Court suggested that academic freedom was protected by the First Amendment.¹⁴⁷ Al-

144. 354 U.S. at 266 (Frankfurter, J., concurring).

145. *Id.* at 262.

146. *Id.* at 263 (quoting statement of conference of senior scholars from Universities of Cape Town and Witwatersrand).

147. The only prior use of the term "academic freedom" in a Supreme Court opinion was by Justice Douglas, dissenting in *Adler v. Board of Educ.*, 342 U.S. 485, 508 (1952). In *Adler*, the Court upheld the Feinberg Law against a First Amendment challenge by schoolteachers. This state statute was designed to preclude the employment of anyone who belonged to an organization advocating the violent overthrow of the government. The *Adler* Court upheld the law on the now-discredited doctrine that government can condition public employment on compliance with any pertinent conditions. Justice Douglas argued in broad, non-technical language, that this rule was pernicious; he graphically described "this system of spying and surveillance" that might result from the Feinberg Law. *Id.* at 510-11. This situation, he maintained, was inconsistent with academic freedom. Justice Douglas never argued that academic freedom itself was constitutionally protected; rather, he argued that the Court should have found that the statute violated the teacher's right of free expression because, in part, the law would inhibit academic freedom, understood as the actual process of free inquiry in the classroom. In other words, academic freedom denoted an attractive mode of teaching and scholarship rather than a legal right.

Similarly, in *Wieman v. Updegraff*, 344 U.S. 183 (1952), the Supreme Court struck down an Oklahoma law barring from public employment persons who had been members of "subversive organizations" within the past five years, regardless of their knowledge of the organization. Although the appellants were faculty at a state college, the Court properly made clear that the requirement was unconstitutional as applied to any public employees. Nonetheless, Justice Frankfurter emphasized in his concurring opinion the deleterious effects on education from attempting to enforce ideological orthodoxy on faculty. *Id.* at 196-98. Although he never used the words "academic freedom," he wrote vigorously about the social value of free-thinking teachers in a way that anticipated future judicial justifications for academic freedom. He also quoted extensively from congressional testimony by Robert Hutchins, former President of the University of Chicago and an outstanding theorist of higher education, about the role of free speech in universities.

Finally, *Slochower v. Board of Educ.*, 350 U.S. 551 (1956), struck down a state law requiring public colleges to dismiss any employee who exercised her Fifth Amendment privilege against self-incrimination. Again, although this ruling applied to all public employees—not just to teachers and scholars—it vindicated the right of an associate professor at Brooklyn College. It addressed a practice condemned by the AAUP but too often followed by fearful institutions of higher education.

Though none of these cases established or called for the establishment of a constitutional right of academic freedom, they do reflect the Court's accumulating concern about the effects of the loyalty craze on vigorous teaching and scholarship and about the developing articulation of the social utility of free schools.

Although some commentators find ancestors of constitutional academic freedom in the line of cases beginning with *Meyer v. Nebraska*, 262 U.S. 390 (1923), which did affirm a "right to teach" while

though the decision must be viewed as the major break with the historical status of academic activity under the Constitution, neither opinion contains any acknowledgment that the Court was making new law. The only hint that the Justices were aware that they were conferring a novel constitutional status on academic freedom is the vehemence of the rhetoric with which they praised the right. The formal pose that academic freedom always had been a functioning part of the system of freedom of expression may best be explained by the vulnerability of a Court then actively reaching out to curb abusive legislative investigations. *Sweezy* was handed down on the same day as six other opinions making it more difficult for Congress, administrative agencies, and state legislatures to expose and to penalize allegedly subversive persons.¹⁴⁸ When imposing novel and controversial limitations on government power, the Court often strives to appear to be proceeding upon long-established consensual norms. In any event, press reports of the controversial decisions handed down on "Red Monday," whether approving or condemning the Court's intervention in "loyalty" issues, failed to observe that a new constitutional right of academic freedom had been born.¹⁴⁹

Because of the Justices' reticence about the effects of their decisions, neither opinion frankly assessed the advantages or disadvantages of constitutionalizing academic freedom. The failure to place academic freedom within a context of competing concerns and the Court's exuberant praise of its value made the legal reach of the right of academic freedom appear soaring and expansive; observers might understandably have predicted a major role for the Court in identifying and rectifying violations of this vital principle. Today we can see how misleading such a reading would have been. At the time of the *Sweezy* decision, the AAUP was deeply ambivalent about the constitutionalization of academic freedom, because some members feared the long-term consequences of having judges rather than professors elaborate and apply the protective rules of academic life. As a result of this reluctance, the AAUP did not file a brief in *Sweezy*, depriving the Court of knowledgeable counsel on the virtues and risks of its course.¹⁵⁰

invalidating a state ban on teaching the German language, see *Finkin*, *supra* note 19, at 836-37, these are old-fashioned substantive due process cases that suggest no special value to learning or scholarship but uphold liberty to teach on the same theory as liberty to employ workers at substandard wages. See Metzger, *supra* note 9, at 1285 n.45.

148. In addition to *Sweezy* and the cases cited *supra* notes 142-43, on June 17, 1957, the Court handed down *Service v. Dulles*, 354 U.S. 363 (1957), which invalidated the dismissal of an allegedly disloyal State Department employee as inconsistent with the department's procedural regulations.

149. See *The Court, Congress, Chaos*, NEWSWEEK, July 1, 1957, at 19-20; N.Y. Times, June 23, 1957, at E9, col. 3 (cartoon depicting Supreme Court as guard dog protecting Bill of Rights from congressional investigations); *Lawmakers Assail High Court for 'Invasion'*, Wash. Post and Times Herald, June 19, 1957, at B4, col. 1; *'Liberal' Court Emerges as Champion of Individual*, Christian Sci. Monitor, June 18, 1957, at 1, col. 5; *Judiciary Seen as Setting Limit on Other Branches*, N.Y. Times, June 18, 1957, at 1, col. 5.

150. Soon thereafter, Professor Carr explained the AAUP's dilemma:

A second curious feature of the decision is that Frankfurter's opinion, subsequently the more influential, looks solely to non-legal sources to describe the content of the right of academic freedom. In an important sense, this reliance was inevitable because the Court's decision had no legal precursors and the words "academic freedom" had no meaning apart from their usage in academic contexts. Frankfurter never pauses, however, to comment on the different meanings words can have in different professional and social contexts. Thus he quotes with approval an aspirational political statement by academics about the four freedoms of a university, leaving ambiguous whether these four freedoms henceforth constitute positive limitations on state power.¹⁵¹ Frankfurter does not signal whether he is writing a judicial opinion or a professorial tract.

Frankfurter's loose and essayistic writing creates a further source of fertile ambiguity. The structures of both Warren's and Frankfurter's opinions follow the established First Amendment convention that the rights claimed by *Sweezy* were personal to him: As a speaker, he asserted his constitutional right as a limitation on state power. Yet, in finding a violation of academic freedom, Frankfurter repeatedly addresses the right of the university itself—rather than those of its faculty members as individuals—to be free from wrongful governmental interference. On the facts of the case, the distinction is unimportant because the "villain" was the state itself—the attorney general acting as an agent of the legislature to enforce political norms—and both the professor and the university were its "victims." The confusion is crucial, nonetheless, because academic freedom had traditionally been understood as a personal right of the faculty member against university administrators and trustees.¹⁵² Would the case have been decided differently had a dean, who would have been a state official, asked the questions of *Sweezy*?¹⁵³ The roots of this distinction and

The *Sweezy* decision posed quite a problem for the American Association of University Professors. At the time the case was being argued, it was suggested by interested persons that the Association consider the submission of an amicus brief to the Supreme Court. The Association declined to do so, thinking it likely that the case would be decided on grounds not directly related to the principles and activities of the Association, and also because it was not completely persuaded of the wisdom of seeking legal recognition of and protection for academic freedom as against the legislative power of investigation. The Court's decision in the *Sweezy* case made it necessary for the Association to reconsider its position. . . . The Association would perhaps have preferred to let the meaning and practice of academic freedom take shape, as it has in the past, on a private, voluntary basis through the collective efforts of teachers, institutions of higher learning, and educational associations. . . .

. . . [O]ne reason for the Association's reluctance to see academic freedom defined as a legal concept has been its fear that what the courts give, they may take away, and that having thus given and taken away, academic freedom may be left in a weaker position than it was before it became a concern of the law.

Carr, *Academic Freedom, the American Association of University Professors, and the United States Supreme Court*, 45 A.A.U.P. BULL. 5, 19-20 (1959).

151. 354 U.S. at 262-63.

152. See *supra* text accompanying notes 104-07.

153. During the 1950's, academic administrators often questioned targets of legislative inquiries about their radical political involvements. See E. SCHRECKER, *supra* note 42, at 219-40. The AAUP

its perpetuation by Frankfurter's apparently careless employment of non-legal discussions will be discussed in detail below.¹⁵⁴

A third significant aspect of *Sweezy* is that although Frankfurter draws the content of academic freedom from available non-legal sources, both he and Warren praise academic freedom by stressing the social utility of free universities. Both Justices argue that continued progress in the social sciences requires freedom of inquiry and discussion, that impairment of this progress would imperil democratic government and civilization, and, therefore, that government must not interfere with academic freedom.¹⁵⁵ The persuasiveness of this reasoning may be thought to lie at the core of the justification for the constitutional status of academic freedom. Obviously, it is intensely problematic: Our democratic government was established and flourished for one hundred years before departments of social sciences were established at any American universities.¹⁵⁶ As will be explored below,¹⁵⁷ affirmation of the social utility of academic freedom reflects the faith of an intellectual elite in the centrality of neutral reason to the success of the liberal state. At present, it is enough to note that someone who supports freedom of inquiry and discussion within academic life without regard to its constitutional status need argue only that it is likely to produce "better" writing and teaching.

B. *Ambiguous Development in Barenblatt and Keyishian*

Sweezy endowed the new constitutional right of academic freedom with a legacy of triumphant rhetoric but also with an ambiguous description of the relationship between academic custom and positive legal right. The Court's decision not to ground its ruling on a positive right of academic freedom, moreover, presaged the Court's refusal to give this right the practical force that its rhetorical enthusiasms promised. Indeed, the Court's decision two years later in *Barenblatt v. United States*,¹⁵⁸ affirming the conviction of an academic for criminal contempt in refusing to answer Congressional questions concerning Communist activities among graduate students at the University of Michigan, immediately suggested limits on the reach of academic freedom. Justice Harlan's opinion, while promising that the Court would "always be on the alert against intrusion

took the position that professors have a duty of candor when answering questions put by college administrators seeking to determine their fitness to teach. 42 A.A.U.P. BULL. 60 (1956).

154. See *infra* text accompanying notes 238-46.

155. 354 U.S. at 250 (plurality opinion); *id.* at 261-62 (Frankfurter, J., concurring).

156. It is not merely tendentious to note that Jefferson, Jackson, and Lincoln presided over robustly democratic societies wholly deprived of guidance by social scientists. Even granting the greater complexity of current government and society, social science seems more necessary to technocratic structures of social management than to democratic choice. See R. WIEBE, *supra* note 107, at 145-49.

157. See *infra* text accompanying notes 328-35.

158. 360 U.S. 109 (1959).

by Congress into this constitutionally protected domain,"¹⁵⁹ stresses that a university is not a "constitutional sanctuary from inquiry into matters that may otherwise be within the constitutional legislative domain. . . ."¹⁶⁰ *Barenblatt* could be seen as a defeat for academic freedom, because it substantially upheld the investigation of the House Un-American Activities Committee into campus Communism.

Whatever its effect on academic morale in 1959, *Barenblatt's* impact on the development of the constitutional right of academic freedom has been negligible.¹⁶¹ Harlan labored to distinguish between attempts by Congress to control teaching in the universities through investigations, which would violate academic freedom, and efforts by Congress to discover traces of the international conspiracy on campuses, which fell outside of academic freedom. The Court justified Congress' investigation by the special nature of the Communist party (taken as dedicated to violent overthrow of constitutional government) and by its particular focus on political organization.¹⁶² Even if the cruel and fruitless loyalty investigations did in fact inhibit the vigor of academic writing on social issues in the 1940's and 1950's,¹⁶³ an allegation that seems frequently overstated,¹⁶⁴ Harlan was correct that investigations about a subversive organization that included graduate students did not violate academic freedom; significantly, none of the *Barenblatt* dissenters argue otherwise.¹⁶⁵ Political organization deserves First Amendment protection, but it has little or nothing to do with scholarly

159. *Id.* at 112.

160. *Id.*

161. The AAUP filed an *amicus* brief in *Barenblatt*. Significantly, it did not argue that *Barenblatt's* right of academic freedom had been violated, but rather that "[t]he threatened punishment of petitioner is a link within a chain of acts which ends in a trespass by the Government on certain immunities [i.e. institutional autonomy] essential to academic institutions." Brief of American Association of University Professors as Amicus Curiae at 13-14, *Barenblatt v. United States*, 360 U.S. 109 (1959) (No. 35).

162. 360 U.S. at 127-30.

163. One survey of social scientists during the McCarthy period found that 20% of the respondents stated that they had become less willing to express unpopular views in class and 17% stated that they were more inclined to avoid controversial subjects in their speeches and writings. P. LAZARSFELD & W. THIELENS, *THE ACADEMIC MIND: SOCIAL SCIENTISTS IN A TIME OF CRISIS* 194 (1958).

164. Professor Schrecker cautiously suggests that the purging of past and present Communists from academia may have been responsible for the dearth of radical academic work during the 1950's. E. SCHRECKER, *supra* note 42, at 339. Justice Douglas apoplectically expressed this same view: "[O]ne of the main problems of faculty members is their own re-education or re-orientation. . . . More often than not they represent those who withered under the pressures of McCarthyism or other forces of conformity and represent but a timid replica of those who once brought distinction to the ideal of academic freedom." *Healy v. James*, 408 U.S. 169, 196-97 (1972) (Douglas, J., concurring).

An atmosphere of fear and suspicion certainly dampens intellectual boldness. Yet, it seems too simple to ascribe the centrist tone of much academic social writing in the 1950's to McCarthy-like investigations. A host of powerful factors, such as the widespread first-hand experience of war, television, prosperity, and the baby boom contributed to a strong political desire for consensus that influenced academic scholars. Indeed, European scholarship settled into a more centrist mode as well, even without the demagoguery and paranoia of loyalty investigations.

165. Justice Black's eloquent dissent never mentions academic freedom or *Sweezy*. 360 U.S. at 134-62 (Black, J., dissenting).

writing and teaching.¹⁶⁶ *Barenblatt* highlights the nature of the offense to academic freedom that distinguished *Sweezy*: political review of an academic lecture.¹⁶⁷

The Court's preference for deciding academic freedom cases on other grounds was continued in *Keyishian v. Board of Regents*¹⁶⁸ in 1967. The case struck down on vagueness and overbreadth grounds the application of New York's Feinberg Law—a series of statutes and regulations intended to bar “subversive” persons from employment—to professors at the State University of New York.¹⁶⁹ The Court read certain sections of the law outlawing advocacy of forceful overthrow of the government to embrace potentially sympathetic classroom treatment of Marxist or other revolutionary works or ideas. The provision was held to be unconstitutionally vague because a professor's fear of the law would distort his selection and treatment of subjects.¹⁷⁰ The Court emphasized that regulations affecting academic freedom must be sufficiently clear so as not to discourage the exercise of constitutional rights.

Ironically, this opinion, which voided a statute as unduly vague, is itself extraordinarily vague about the dimensions of the right of academic freedom.¹⁷¹ Plainly, the Court was convinced that the imposing apparatus of loyalty laws had chilled and would continue to chill controversial teaching, research, and writing over a broad range of politically-sensitive subjects. At the same time, the Court implied that truly subversive teaching, intentionally indoctrinating students with treasonous sentiments or inciting them to violence, properly could be penalized.¹⁷² The Court failed to develop a principled distinction between protected and punishable academic speech, although it insisted quite justifiably that loyalty laws attempt to do precisely that. The only guidance the Court did provide was by way of example: It presented obviously protected conduct that the vague Feinberg Law, *reductio ad absurdum*, might prohibit, such as a teacher's informing her class about the Declaration of Independence or her carrying a copy of the Communist Manifesto.¹⁷³ The Court provided such examples more to impugn the statute than to illuminate the constitutional right.

In the absence of a precise delineation of the protected right, the fervid

166. See *supra* notes 33–34 and accompanying text.

167. 360 U.S. at 129–30.

168. 385 U.S. 589 (1967).

169. This was essentially the same package of laws upheld against a challenge by schoolteachers in *Adler v. Board of Educ.*, 342 U.S. 485 (1952). See *supra* note 147.

170. 385 U.S. at 604.

171. Justice Clark aptly began his dissent: “The blunderbuss fashion in which the majority couches ‘its artillery of words,’ together with the morass of cases it cites as authority and the obscurity of their application to the question at hand, makes it difficult to grasp the true thrust of its decision.” *Id.* at 620–21 (Clark, J., dissenting).

172. *Id.* at 599–600, 602.

173. *Id.* at 600–01.

and stirring rhetoric with which the Court praised academic freedom must be considered for the meaning of the ideas it clothes. The language used, other than that borrowed from *Sweezy*, deserves to be quoted in full:

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. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The classroom is peculiarly the "marketplace of ideas." 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."¹⁷⁴

Several features of this passage are noteworthy. First, the Court here makes an even more passionate claim for the social utility of academic freedom than it did in *Sweezy*. The quasi-religious claim, that academic freedom is of "transcendent" value to every member of society, even if a product of imprecise word choice, seems significant. The Court does not posit any direct benefit to the average citizen from academic freedom, such as higher wages or longer life. Rather, the value is found in the acculturation of the future leaders of the political order in a critical attitude toward authoritarian dogma and in tolerance of dissent. The view seems to be that a free education of this sort will graduate political leaders tolerant toward dissent within society as a whole. That the Court is emphasizing free education's capacity to promote allegiance to open inquiry rather than its ability actually to "discover truth" through academic inquiry is emphasized by its quotation from Learned Hand's opinion in *Associated Press*, the next line of which reads: "To many this is, and always will be, folly; but we have staked upon it our all."¹⁷⁵ The rhetoric of the *Keyishian* Court implies that the elements of free inquiry, discussion, dissent, and consensus are not important primarily because they lead to truth—although the attainability of such truth may be a formal premise of the doctrine—but because they express an invaluable sense of what kind of society we, as a people, desire; their value is symbolic rather than practical.

Second, the Court remains reticent in defining the content of constitutional academic freedom. Describing the classroom as "peculiarly the 'marketplace of ideas'" obscures more than it clarifies. The Court is surely right insofar as it suggests that academic freedom requires that

174. *Id.* at 603 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) and *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)) (citations omitted).

175. 52 F. Supp. at 372.

ideas achieve eminence only to the extent that competent scholars accept them upon due and unconstrained examination. However, the application of Holmes' familiar metaphor to the operation of a classroom falsely suggests that teaching normally involves a free exchange of ideas among equals.¹⁷⁶ The academic status of the writings of a Dryden or Pascal or the prevalence of a particular scientific hypothesis about the origin of the Milky Way or about reproduction among swordfish does not depend upon the applause or assent of undergraduates. Necessary functions of modern universities include the preservation of ideas, the advancement of knowledge to which the public is indifferent, and the education of students in elite standards of criticism and sophisticated means of investigation.¹⁷⁷ Moreover, the careless application of the "marketplace" metaphor overlooks delicate issues concerning the professor's limited autonomy in the selection of content for a particular course.

Third, the Court's use of rhetoric to define the content of academic freedom increases the ambiguity already created by basing the case's holding upon vagueness. The Court insists that the First Amendment will not "tolerate laws that cast a pall of orthodoxy over the classroom."¹⁷⁸ The central point appears to be that laws are bad when they discourage free and unconstrained teaching, not just when they directly prohibit it. This point is appropriate in a case based upon vagueness, and it implicitly limits the holding of *Barenblatt*. But this language obviously goes too far. Many laws and regulations pertaining to universities discourage heterodoxy by supporting a self-perpetuating academic establishment with identifiable standards for teaching and scholarship.¹⁷⁹ For example, the estab-

176. Holmes employed the metaphor of a marketplace of ideas in his famous dissent in *Abrams v. United States*, 250 U.S. 616 (1919), where he wrote that the "best test of truth is the power of the thought to get itself accepted in the competition of the market." *Id.* at 630. In the context of that dissent, it is plain that Holmes was referring to basic postulates about social life, such as the attractiveness or justice of communism, that are not susceptible to being settled according to established criteria. Moreover, for Holmes, society's acceptance of an idea exhausts what it means for that idea to be true. His view of discourse reflects a Darwinian yet pessimistic view of the struggle of interest groups to achieve social dominance. He favors "free trade in ideas" because it facilitates this underlying process of social competition. As he stated in his dissent in *Gitlow v. New York*, 268 U.S. 652, 673 (1925), "[i]f in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." This meaning of truth seems antithetical to the aspirations of scholarship, which seeks to measure the viability or importance of an idea by intellectual or experiential criteria independent of popular prejudices. See also A. MEIKLEJOHN, *supra* note 112, at 89 (arguing that colleges must "stand apart, viewing all interests of men alike with equal eye, and measuring each in terms of every other and the whole.")

177. Robert Hutchins is one of the most articulate to insist that "[i]f there are permanent studies which every person who wishes to call himself educated should master; if those studies constitute our intellectual inheritance, then those studies should be the center of a general education." R. HUTCHINS, *THE HIGHER LEARNING IN AMERICA* 70 (1936).

178. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

179. See, e.g., *Marjorie Webster Junior College v. Middle States Ass'n of Colleges & Secondary Schools*, 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970) (association's refusal to accredit proprietary school not subject to antitrust laws). An attempt to bring disproportionate impact suits against universities under Titles VI and VII of the Civil Rights Act of 1964 probably would founder

lished procedures for graduate training, enforced by accreditation agencies, promote orthodoxy by preserving a professorate of similar training, which emphasizes a limited choice of investigatory methods, at least as compared with a faculty chosen at random or by diverse political interest groups.¹⁸⁰

The anomalies in the Court's rhetorical exposition of the meaning of constitutional academic freedom seem to stem from its incomplete understanding of what academic freedom requires. The Court's rhetoric praises academic freedom as an institutional right to be free from orthodoxy prescribed by the government at large. The focus is on the classroom, viewed metaphorically as the process of institutionalized scholarship and teaching, rather than on the rights of any individual teacher or student; the benefits to democracy flow through a system of education not seriously imperiled by isolated injustices. The "orthodoxies" feared are not those of academics themselves, but those imposed by non-academic officials seeking to advance their views on various policies. These are the only kind of interferences in the "free market" of teaching with which the Court is concerned. This focus on the protection of the system from government interference can easily be missed because the term academic freedom had always signified an individual right against any interference by laypersons. The Court's rhetoric, however, is quite unsuitable to this traditional notion.

These two cases exhaust the Supreme Court's development of a university faculty member's right of academic freedom. Despite their analytical shortcomings, *Sweezy* and *Keyishian* contributed substantially to the virtual extinction of *overt* efforts by non-academic government officials to prescribe political orthodoxy in university teaching and research.¹⁸¹ Today, few politicians seek political capital by attacking academics for their political opinions, and those who do only provide their victims with lawsuits that usually fortify their academic positions against more subtle or justifiable assault. This does not mean that ideological passion and prejudice now play no part in academic appointments (how could they not?); rather the rules of the game are now those of the academy.

because of judicial reluctance to tamper with educational standards, even though such suits may be brought against other professional groups. See *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777 (1989) (subjective or discretionary employment practices in bank subject to disproportionate impact challenge).

180. Requiring generally that college professors of literature earn doctoral degrees limits both the number who become teachers and the kind of questions they pursue. See, e.g., *I. BABBIT*, *supra* note 109, at 118-49; *G. GRAFF*, *supra* note 77, at 57-59, 65-72.

181. Other important cases protecting faculty members from interference from non-academic governmental officials are *White v. Davis*, 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975) (First Amendment provides basis for injunction against police attending classes in disguise to report on seditious utterances); *Hammond v. Brown*, 323 F. Supp. 326 (N.D. Ohio), *aff'd*, 450 F.2d 480 (6th Cir. 1971) (per curiam) (grand jury report violated academic freedom when it criticized faculty for being partly responsible for violent demonstrations at Kent State University because of critical tone of teaching). Both cases treat academic freedom as a corporate right but permit faculty to sue to protect common rights.

C. *Constitutional Academic Freedom and the State Action Doctrine: An Aside*

Theoretical problems with establishing an individual constitutional right of academic freedom arise from the anomalies of the state action doctrine. Only if administrators can be characterized as exercising state power can the First Amendment limit the internal authority of the university. Despite the general uncertainty about the state action doctrine,¹⁸² a rigid rule of application to universities has developed. Faculty and students at state universities enjoy extensive substantive and procedural constitutional rights against their institutions while faculty and students at private institutions enjoy none.¹⁸³ This is so despite the substantially similar functions usually served by state and private institutions; the dean of the University of Virginia Law School does not need to be restrained from instituting an assault against liberty any more than does the dean of the Harvard Law School.¹⁸⁴ More significantly, academic tradition accords

182. See, e.g., Brest, *State Action and Liberal Theory: A Casenote on Flag Brothers v. Brooks*, 130 U. PA. L. REV. 1296, 1302 (1982) ("The state action problem vividly illustrates the ambivalent, if not contradictory, relationship of citizen and state that plagues modern liberal theory."); Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 221 ("The problem of defining 'state action' continues to haunt constitutional adjudication and legal literature.").

183. See, e.g., *Krohn v. Harvard Law School*, 552 F.2d 21 (1st Cir. 1977) (private institution held not to be engaged in "state action" despite historic connections with Commonwealth, public aid, tax exemption, and public certification of graduates); *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968) (Friendly, J.) (when university suspended students, those enrolled in private liberal arts college could not bring constitutional action against school but those enrolled in state-contracted ceramics college could). See also O'Neil, *Private Universities and Public Law*, 19 BUFFALO L. REV. 155, 155 (1970) (noting that while federal judges "are no longer reluctant to test the disciplinary procedures of state colleges and universities," they balk "when the institution imposing the challenged penalty is not state-supported.").

184. At the same time, the law professor at the Harvard Law School has no less need for freedom to write and teach than does the law professor at the University of Virginia. "Although private universities are probably not subject to the Bill of Rights, no one could defend having one set of rules for faculty members in state universities and another and more limited set for scholars employed by private institutions." D. BOK, *supra* note 120, at 29.

The absence of a real distinction between public and private universities goes beyond the inability to decide whether higher education is a public or private function. The federal government's commitment to higher education through subsidy of student loans and grants, which exceeds \$15 billion annually, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S., No. 248, at 147 (1988), is distributed without regard to the public or private character of the institution. Similarly, both types of universities directly receive current fund revenue from the federal government that exceeds \$12 billion annually in the aggregate. NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS table 226, at 261 (1988). Federal funds provide about one-sixth of the current fund revenue of all private institutions of higher education. *Id.*, table 225, at 260. Several leading private universities receive a much larger percentage, even a majority, of their current revenue from federal research grants. Needless to say, extensive regulations follow these federal funds. Universities under private control, however, apparently will not be deemed state actors regardless of the degree of government support given or regulation imposed. See *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) ("private" school for troubled children that receives more than 90% of its budget from public funds and is extensively regulated by state held not to be "state actor").

While private universities have at least a quasi-public character, many state universities enjoy substantial autonomy from the center of state political power. See *infra* notes 314-18 and accompanying text. A college president or department head simply does not reflect the coercive power of the state in the sense that a police officer or a welfare investigator does. One way to resolve this confusion is to

largely identical rights of academic freedom to professors regardless of their institutions' governmental affiliations.¹⁸⁵ Thus, the state action doctrine mandates judicial enforcement of constitutional liberties against institutional infringements for half the nation's academics and denies it to the other half¹⁸⁶ for reasons which, if desirable at all, are very far removed from the realities of academic life.¹⁸⁷

The state action doctrine also may blur the important distinctions for academic freedom between university administrators and nonacademic officials. Department heads, deans, and presidents may penalize a faculty member for the content of her scholarship if they follow the correct procedures, apply academic criteria, and do not usurp the judgment of peers; the state attorney general, the state legislature, and the governor may *never* do so. The state action doctrine does not distinguish between those who are part of the system of academic freedom and those who are not. This may tempt a court to intervene in decisions it ought to respect. Indeed, even fellow faculty exercising peer review could be characterized as state officials. To this extent, Chief Justice Rehnquist is correct in insisting that government as educator is different from government as sovereign.¹⁸⁸

A final anomaly in the application of the state action doctrine is that constitutional academic freedom is the only constitutional right exercised by state actors.¹⁸⁹ Those universities whose institutional liberties have been recognized by the Supreme Court include the state universities of Michigan, Missouri, and California.¹⁹⁰ A state university is a unique state entity in that it enjoys federal constitutional rights against the state itself.

treat most large private universities as state actors. See O'Neil, *supra* note 183, at 157. Consistent with the discussion below, I would be more inclined to treat reasonably autonomous state universities as private parties, freeing universities more broadly from strictures designed for governmental entities. Important social interests can be better protected against academic imperialism through statutes such as Title IX of the Civil Rights Act of 1964, 20 U.S.C. § 1681 (1982) (prohibiting sex discrimination by institutions receiving federal funds).

185. Early advocates of academic freedom feared interference more from businessmen, who dominated university boards of trustees at the end of the nineteenth century, than from government officials. See R. HOFSTADTER & W. METZGER, *supra* note 11, at 413-60. Lay interference with scholarship violates academic freedom regardless of its source or nature.

186. More specifically, approximately 75 percent of faculty teach in public institutions while 25 percent teach in private institutions. However, one-third of all faculty teach in two-year colleges (which are nearly all public); these rarely emphasize faculty research. B. CLARK, *supra* note 79, at 17, 78-79.

187. The courts' increasing reluctance to impose constitutional limitations on traditionally private universities no doubt reflects a desire not to enmesh them in legal restrictions. As such, it may be part of the judicial effort to enhance the autonomy of universities from political control. See *infra* notes 295-302 and accompanying text.

188. Healy v. James, 408 U.S. 169, 201 (1972) (Rehnquist, J., concurring).

189. State universities are shielded from liability for constitutional violations to some extent by the Eleventh Amendment, which prohibits damage suits against the states in federal court. Most federal courts which have addressed the issue have found that state universities are integral parts of the state for Eleventh Amendment purposes. See Note, *The Status of Public Universities Under the Eleventh Amendment*, 78 GEO. L.J. (1990) (forthcoming).

190. Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1985); Widmar v. Vincent,

D. *The Proper Scope of Judicial Intervention*

The Supreme Court's establishment of a constitutional status for academic freedom led some commentators to predict that the Court would eventually provide extensive protection for the academic judgments of individual faculty against interference by university administrators,¹⁹¹ thus giving constitutional status to traditional notions of academic freedom. Although in a few early cases, lower federal courts protected teachers against sanctions for teaching unpopular books,¹⁹² courts soon abandoned the effort to shield teachers from administrative displeasure (with the important exception of requiring the procedural protection of the tenure system). Thus, courts have denied relief to teachers sanctioned for unusual teaching methods,¹⁹³ for receiving poor student evaluations,¹⁹⁴ and for straying from prescribed coverage.¹⁹⁵ Even when courts agree in principle that a teacher's behavior is constitutionally protected, they often find that antagonism to the protected behavior was not the effective motivation for a teacher's dismissal.¹⁹⁶ In short, as far as the courts are concerned, admin-

454 U.S. 263, 277-81 (1981) (Stevens, J., concurring); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.).

191. See, e.g., Finkin, *Toward a Law of Academic Status*, 22 *BUFFALO L. REV.* 575, 587 (1973); Murphy, *Academic Freedom—An Emerging Constitutional Right*, 28 *LAW & CONTEMP. PROBS.* 447, 486 (1963); *Developments in the Law—Academic Freedom*, 81 *HARV. L. REV.* 1045, 1051 (1968) (“Although the legal protection currently afforded to academic freedom is thus quite limited, the doctrines inhibiting a more expansive judicial role are being gradually eroded as the courts are involved more frequently by aggrieved students and teachers.”). Thomas Emerson argued at the time that the Supreme Court had not yet elevated academic freedom to an independent constitutional right, but had only used familiar First Amendment doctrine to protect academic freedom interests; he predicted that such an elevation was several decades away. T. EMERSON, *supra* note 9, at 610, 616.

192. See, e.g., *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969) (protecting article by Robert J. Lifton in *Atlantic Monthly*); *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970) (protecting *Welcome to the Monkey House* by Kurt Vonnegut). Both cases involved high school teachers; as noted *supra* note 137, questions of classroom freedom involving primary and secondary schools are quite different from those arising in universities.

A more recent case is *Kingsville Indep. School Dist. v. Cooper*, 611 F.2d 1109 (5th Cir. 1980). In that case a high school teacher was denied contract renewal by a school board in a small Texas town after he addressed sensitive racial issues through student role-playing. The Court found a violation of protected classroom discussion. The Fifth Circuit's solicitude for the teacher's liberty may be explained by that court's well-developed sensitivity to the perpetuation of racial prejudice.

193. See, e.g., *Hetrick v. Martin*, 480 F.2d 705 (6th Cir. 1973).

194. See *Carley v. Arizona Bd. of Regents*, 153 *ARIZ.* 461, 737 P.2d 1099 (Ct. App. 1987); *supra* note 2.

195. See *Clark v. Holmes*, 474 F.2d 928, 931 (7th Cir. 1972) (“[W]e do not conceive academic freedom to be a license for uncontrolled expression at variance with established curricular contents and internally destructive of the proper functioning of the institution.”), *cert. denied*, 411 U.S. 972 (1973); *Goldwasser v. Brown*, 417 F.2d 1169, 1177 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970).

196. Such decisions follow *Mount Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). See W. KAPLIN, *supra* note 52, at 192-95. In *Mount Healthy*, a unanimous Court held that a school board could fire a teacher, even if her exercise of First Amendment rights was a “substantial factor” in the decision, so long as the Board could prove that it would have reached the same decision “even in the absence of the protected conduct.” 429 U.S. at 287. There can be little doubt that *Mount Healthy* makes it difficult for individual faculty to bring constitutional academic freedom cases against their institutions, as it requires them to defeat the university's showing that they could have been dismissed for a “legitimate” reason.

istrators may exercise extensive control over curricular judgments so long as they do not penalize a professor solely for his political viewpoint. One commentator concluded that the constitutional right to academic freedom in the classroom, presumably proclaimed by *Sweezy*, is only a "myth."¹⁹⁷ However, no one adequately has explained why this should be so or accounted for the different response from courts when those interfering are political officials or bureaucrats rather than academic administrators.

An unusual example of apparent political interference in faculty hiring may serve to illustrate what *Sweezy* and *Keyishian* have accomplished and what they have not. In 1978, a search committee at the University of Maryland recommended to the administration that Bertell Ollman—a Marxist professor then at New York University—be appointed as the new chairman of the Department of Government and Politics.¹⁹⁸ A major political controversy ensued that raised many sensitive issues, including the prudence of appointing a radical Marxist chairman of an ideologically divided department, the respective powers of appointment of the search committee, the department, and the president, and the influence of outside political pressure. The Governor and several legislators warned against appointment of a Marxist; newspapers and professional organizations warned against refusing to appoint someone because he was a Marxist.¹⁹⁹ The university depended on public support in its efforts to improve its academic programs. After much deliberation, the president refused to appoint Professor Ollman, arguing that he was not the right person to develop the potential of the department, disclaiming any reliance on Ollman's political beliefs, and promising to stand firm against "outside pressures."²⁰⁰

Not surprisingly, Professor Ollman sued the president for violating his constitutional right of academic freedom. Professor Ollman had substantial support in the lawsuit from various organs of liberal opinion and was represented *pro bono publico* by one of the premier law firms in the nation.²⁰¹ Nevertheless, the suit failed; the district court credited the presi-

197. Katz, *The First Amendment's Protection of Expressive Activity in the University Classroom: A Constitutional Myth*, 16 U.C. DAVIS L. REV. 857, 932 (1983).

198. Ollman v. Toll, 518 F. Supp. 1196, 1199-1201 (D. Md. 1981), *aff'd*, 704 F.2d 139 (4th Cir. 1983). The search committee actually recommended that two people, Ollman and another, be appointed.

199. See, e.g., *U-Md. Head Rejects Marxist Professor*, Wash. Post, July 21, 1978, at B1, col. 2; *The Governor and the Marxist*, Wash. Post, Apr. 30, 1978, at B6, col. 1; *Litmus Test at College Park*, Baltimore Sun, Apr. 27, 1978, at A18, col. 1.

200. 518 F. Supp. at 1199-1201, 1213-14. It appears from context that by "outside pressures," the president was referring only to those who urged him to appoint Ollman rather than to those who insisted that he not.

201. Arnold & Porter represented Professor Ollman. It is a happy fact that apparent academic victims of intolerance frequently enjoy the very best legal representation at little or no cost. Professor Charles Curran, for example, was represented by Cravath, Swaine & Moore in his recent dispute with Catholic University. This generous representation reflects both the cultural significance of academic freedom and the social respectability of its beneficiaries. Less noteworthy academics often are advised by the AAUP or the ACLU.

dent's testimony that Ollman's political beliefs were not a "substantial or motivating"²⁰² factor in denying him the appointment. Under this established evidentiary standard, the court concluded that the plaintiff's constitutional rights had not been violated. Despite the outcome of the lawsuit, the AAUP had previously censured the university for a violation of academic freedom in its handling of the appointment, and Maryland remained the most prominent university on the AAUP censure list until it was taken off in 1988.²⁰³

The *Ollman* case illuminates some of the most profound issues in the relationship between political ideology and academic freedom. Indeed, Professor Ollman himself later contributed an extremely stimulating critique, arguing that the concept of academic freedom is a bulwark of bourgeois liberalism against truly radical thought.²⁰⁴ Before considering the implications of this critique, it is important to note the degree to which the First Amendment actually protected Professor Ollman.

First, if he had proved that antipathy by public officials to his political beliefs was "a substantial or motivating factor" in President Toll's decision not to appoint him,²⁰⁵ he would have made out a violation of the First Amendment and, perhaps, this would have entitled him to judicial relief.²⁰⁶ The intolerant statements of non-academic public officials helped his case immeasurably; had he been able to show that they played a sig-

202. 518 F. Supp. at 1214-18. This is a straightforward application of the *Mount Healthy* rule. See *supra* note 196 and accompanying text.

203. See *Academic Freedom and Tenure: The University of Maryland*, ACADEME, May 1979, at 213-27. The investigating committee did not conclude that the president rejected Professor Ollman because of his political beliefs; it viewed the rationale for the decision as ambiguous. It faulted the university for confused procedures for making appointments, for prejudicial delay, for failing clearly to rebuff outside political pressures not to make the appointment, and for failing adequately to explain the actual grounds for the decision. Although Committee A on Academic Freedom and Tenure, see *supra* note 13, recommended that the AAUP not censure the university, the members attending the annual meeting voted to censure, on the stated grounds that under the circumstances, the president should have fully explained the grounds for non-appointment.

In conducting its investigations and reaching its judgments, the AAUP looks carefully at decision-making procedures and the distribution of authority within the institution. This is appropriate because of the AAUP's expertise in such matters and its view that faculty governance is inseparable from academic freedom. The AAUP's emphasis on structure and system is illustrated by the statement of the investigating committee: "The investigating committee's primary concern is not whether Professor Ollman's constitutional rights have been abridged—that issue is the subject of independent litigation—but the condition of academic freedom at the University of Maryland as revealed by the events and actions surrounding the decision not to appoint him." *Id.* at 223.

204. See Ollman, *supra* note 130 and accompanying text.

205. 518 F. Supp. at 1214.

206. The availability of § 1983 remedies to a professor who wishes to obtain damages from a state university because it has violated his constitutional academic freedom has been put further into doubt by the Supreme Court's recent decision that neither state agencies nor state officials are "persons" within the meaning of the statute. *Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304 (1989). Moreover, many courts have construed the Eleventh Amendment to bar damage actions under § 1983 against state universities. See *supra* note 189. The consequence of these developments may be that professors able to prove a violation of constitutional rights may often be limited to injunctive relief. Courts, however, have been reluctant to grant injunctive relief that displaces academic decision-making.

nificant role in the chairmanship decision, he would have prevailed.²⁰⁷ This deters politicians from interfering in academic disputes.

Second, in addition to excluding non-academics from academic decisions, constitutional academic freedom requires academic decision-makers to justify their decisions on properly academic grounds.²⁰⁸ University administrators, like other public officials, cannot penalize employees solely because of their political beliefs or affiliation. In *Ollman*, the president carefully explained his decision solely on the academic merits of appointing Ollman to the chairmanship and disclaimed any reliance on his political beliefs. Some academics, of course, may justify on neutral grounds decisions actually taken in antipathy to political views. Justifications are subject to testing, however, and the very processes of discovery and litigation deter illegitimate decisions.²⁰⁹

These constitutional protections, although plainly limited, are important. Exclusion of public officials from academic decisions preserves the liberty of both the individual faculty members and their universities. Policing this exclusion is an appropriate role for the federal judiciary, because it has the power to check incursions by officials whom universities may be too weak to resist. Universities, after all, exist only through the continuing generosity of public appropriations and private gifts. The McCarthy period demonstrated how difficult it is for all but the wealthiest universities to resist political interference.²¹⁰ The Court began to constitutionalize academic freedom in response to these very problems. Such a role is appropriate for the courts because exercising judicial power to check non-academic officials needs to be done only rarely; the clarity of the principle and the degree of public support for it make the academic adventures of politicians today instantly controversial.²¹¹ Courts need not continuously supervise relations between the political and academic worlds.

207. See also *Cooper v. Ross*, 472 F. Supp. 802, 811 (E.D. Ark. 1979) ("political furor" surrounding Marxist professor persuaded court that professor was dismissed because of his political views).

208. See *infra* notes 226-29.

209. This, of course, is the basic assumption behind the tenure system, which requires that tenured faculty be dismissed only for good cause and that the existence of that good cause be shown at an impartial hearing. See *supra* notes 50-55 and accompanying text. The justifications for dismissal are few, and the hearing tests whether decisions were made on forbidden grounds. When non-tenured faculty claim that they have been penalized for the exercise of constitutional rights, they must first show that they engaged in some protected activity potentially related to the action taken against them. *Mount Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). This is in the nature of a *prima facie* case and shifts the burden of persuasion to the school authorities to show that they would have reached the same decision regardless of the protected activity. The valid academic grounds that may discharge their burden are, of course, much broader than those that suffice for the dismissal of tenured faculty.

210. Professor Schrecker's study reveals that large, private institutions with strong academic traditions, such as Harvard and Chicago, were better able to resist political demands for loyalty tests than were state universities dependent on legislative appropriations, which often jumped to cooperate with red-hunting officials. E. SCHRECKER, *supra* note 42, at 112-13, 197-205, 267.

211. An unusual academic freedom case has percolated for some years in New York, where the irresponsible involvement of Governor Cuomo has exacerbated the problem. A state university profes-

It would be perilous for courts to proceed further to determine if academic personnel decisions were based on reasonable assessment of the merits or wholly without taint of ideological bias. Courts are ill-equipped to find their way among the labyrinths of academic decision-making. Courts and commentators too often refer to "academic grounds" for decisions as if the term referred to something fixed and pure.

In reality, as the *Ollman* case itself illustrates, the terrain is shrouded and disputed. The selection of Ollman by the search committee appeared to be an effort by one faction of the Department of Politics to gain control at the expense of the "old guard."²¹² These insurgents may have been influenced by both their own commitment to the left and their impatience with the department's traditional leadership. Both the department and central administration believed that the location of the University of Maryland, adjacent to Washington, D.C., provided the possibility that a great department might be created from a mediocre one, but the parties were quite divided in their views as to what constituted a great department. The discipline itself was, and still is, divided into numerous methodological, philosophical, and political groups.²¹³ These various passions insured that this academic personnel decision could not be based on pure determinations of the "quality" of the candidate's publications, teaching, and administrative ability. Moreover, as I argued above,²¹⁴ even evaluations of the writing, teaching, and administrative ability of a candidate for a faculty position, without these admixtures of departmental and entrepreneurial passions, are not antiseptic questions of scientific evaluation but contain ineradicable elements of ideological partisanship.

The extent to which any of these forces properly may influence particular appointment decisions is subject to dispute. Any one academic's view will be influenced by her own view of the ends of her own work and of higher education generally. The same faculty candidate can be seen as a careful scholar, a tiresome grunt, an effective teacher, a shameless showman, a thoughtful conservative and a homophobic reactionary. In univer-

sor of African studies taught in a class that Zionism was a form of racism. Some Jewish leaders attacked the professor as anti-Semitic, charging that equating Zionism with racism is one of the "things you just can't say in a classroom." Governor Cuomo issued a press release criticizing the professor and also the Stony Brook faculty for not speaking out against such "pernicious" ideas. See *Academic Freedom Tenet is Tested*, N.Y. Times, Oct. 11, 1983, at C1, col. 1. Stony Brook investigated the professor's teaching and concluded that his opinion was protected by academic freedom. In 1985, however, the professor was denied tenure after various faculty committees recommended that tenure be granted. See *CHRONICLE HIGHER EDUC.*, June 3, 1987, at 11. The professor sued and his case is pending. Ironically, the professor's suit has benefited greatly from the Governor's intervention.

212. 518 F. Supp. at 1208-10.

213. It is generally understood that some academic departments will hire no Marxists, while a few will hire Marxists only. Similarly, some universities may not hire any disciples of Leo Strauss; no doubt at other schools Strausserians have a leg up. A self-identified Marxist or Strausserian is simultaneously part of both a scholarly and a political tradition. Those who prefer not to hire either scholar may be unable to distinguish among the various grounds for approval or opposition.

214. See *supra* text accompanying notes 121-36.

sities, the system of academic freedom tends more to keep competing notions in ongoing tension rather than to declare final victors; the new comes quickly, the old remains indefinitely.²¹⁵

Courts seem entirely ill-equipped to resolve these disputes. Asked to protect the academic freedom of a candidate denied tenure by faculty vote, a court would need to determine what, in fact, are the requirements for tenure, whether the candidate met the requirements, and whether the faculty rejected the candidate for some non-academic reason. Such an inquiry, backed by the coercive power of the state, would put the department or school into intellectual receivership, with the court determining the appropriate paradigms of thought.²¹⁶ In practice, courts would either protect points of view with which they were sympathetic or, more likely, protect all arguably respectable points of view, the judicial attitude most consistent with general First Amendment values.

This last response may seem appealing since it would require academics to be open to innovative critical ideas. In actuality, it would represent the final dispatch of the scientific research and humanistic values by the democratic value—the replacement of a manner of discourse native to the university by one more appropriate to society at large. It is crucial to academic discourse that new speech be critically met and that those who fail to satisfy a reasonable standard be excluded. This intellectual displacement would seem to be the likely consequence of a civil authority's requiring the acceptance of controversial paradigms.

This is not to say that courts cannot competently decide easy cases, as when regents at a state university penalize a scholar against his department's recommendation on grounds clearly linked to the political direction of his scholarship. Such cases are extremely rare, however, in the modern university and would severely damage the reputation of any school. The best justification for allowing a professor to sue her university on the ground that it has unjustifiably deprived her of a job for non-academic reasons is to proclaim the social importance of academic freedom so that the threat of suit will cause aggressive administrators or regents to reflect on the impropriety of acting on their biases.

The view to which we have come is that constitutional academic freedom cannot be violated by any personnel decision based upon professional competence and taken by peers in good faith.²¹⁷ And, indeed, courts have

215. The current hiring and tenure system preserves older viewpoints because tenured scholars cannot be ousted. The prevalence of the requirement of a doctoral degree for hiring and the necessity of publication for advancement compel young scholars to be thoroughly "up-to-date," even modish, in their work because of the difficulty of saying anything new. Moreover, the criteria for hiring and advancement are so notoriously vague that different decision-makers may take the same positions on a candidate for reasons that have no relation to one another.

216. Cf. *Jones v. Wolf*, 443 U.S. 595, 602 (1979) ("[T]he First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice.").

217. *Cooper v. Ross*, 472 F. Supp. 802 (E.D. Ark. 1979), is a case where, given the factual findings of the court, one could conclude that Cooper's non-retention was not a good faith academic

never sanctioned a university for such a decision. Although courts have not articulated or justified a rule of constitutional academic freedom such as this, this rule resembles that followed in the somewhat similar area of procedural and substantive judicial review of academic evaluations of students.²¹⁸

Given the scope of these disputes, it would be most difficult for a court to separate legitimate from illegitimate academic decision-making. The court would have no guiding principles enabling it to determine which academic grounds are consistent with the First Amendment and which are not. This is so because, as noted below, the only intelligible purpose for constitutional academic freedom is to protect academic values and practices from conformity to general social demands.²¹⁹ Imposing on academic actors principles deduced from the First Amendment generally, such as those of "compelling state interest" or "public forum," will impose on academics popular standards of evaluation and acceptable discourse—a compulsion wholly at odds with every respectable tradition of academic freedom.²²⁰ It is appropriate to remember that judges themselves are public officials whom academic freedom strives to exclude from interfering in academic affairs.²²¹ Judicial views of civil liberty may infringe academic principles just as much as executive or legislative views of national security.²²²

decision, but rather an incompetent attempt by the administration to diffuse the public outcry in Little Rock concerning Cooper's classroom proclamation of his devotion to revolutionary Communism.

218. See *infra* text accompanying notes 295–302.

219. See *infra* text accompanying notes 324–34.

220. See *supra* text accompanying notes 84–107.

221. It is a healthy caution that the first great academic freedom court case of modern times presented the spectacle of a judge ordering, without any prior notice or hearing, the Board of Higher Education of New York not to employ Bertrand Russell, the foremost logician of the century, to teach mathematics at the City College because of the "immoral and salacious" doctrines advocated in his prior books. *Kay v. Board of Higher Educ.*, 173 Misc. 943, 947, 18 N.Y.S.2d 821, 826 (Sup. Ct. 1940). Justice McGeehan therein wrote the immortal lines: "Academic freedom does not mean academic license. It is the freedom to do good and not to teach evil." *Id.* at 829. The case was a *cause célèbre*; John Harlan represented Russell in an appeal that was unsuccessful on jurisdictional grounds. See *THE BERTRAND RUSSELL CASE* (J. Dewey & H. Kallen eds. 1941); Comment, *The Bertrand Russell Case: The History of a Litigation*, 53 HARV. L. REV. 1192 (1940). Empowering judges to pass on the qualifications of academics may be hazardous. By contrast, a California court rejected a similar challenge to the employment of Russell at UCLA, finding itself without authority to pass on his qualifications because of the university's autonomy guaranteed by the state constitution. *Wall v. Board of Regents*, 38 Cal. App. 2d 698, 102 P.2d 533 (1940). I argue below that such state constitutional provisions are an important precursor to federal constitutional academic freedom. See *infra* text accompanying notes 303–18.

222. Perhaps the most celebrated example of a court's confusing civil with educational norms is *State v. Schmid*, 84 N.J. 535, 423 A.2d 615 (1980), *appeal dismissed sub nom.* *Princeton v. Schmid*, 455 U.S. 100 (1982). The court found that a non-student, a Lyndon Larouche activist, had a state constitutional right to hand out leaflets on the campus of Princeton University. The court reasoned that because Princeton was committed to free scholarship and learning, the public should have a right to speak freely on the campus, subject to reasonable time, place, and manner restrictions. This conclusion betrays indifference to the gulf existing between political harangue and the disciplined academic speech of teaching and scholarship. This indifference is made explicit in the indignant account of the case written by Professor Sanford Levinson, who represented Schmid, wherein the author confesses that he had "become progressively disillusioned with rationalist models of behavior and thus more

When presented with claims by faculty members that other academics, usually administrators and department chairs, have violated their rights to academic freedom, courts should only ascertain if the administrators can establish that they in good faith rejected the candidate on academic grounds.²²³ They should not go further to assess whether the stated academic grounds are adequate, because no standards of adequacy have been or could be established by academic custom that are sufficiently accessible to provide a legal standard or test. Should a court hold, for example, that a university administrator violates academic freedom when he fires a creative and original untenured philosopher because he believes that the philosophy department needs instead to hire experts on Plato and Aristotle? The court would have no basis in law for holding that the administrator had exceeded his powers, even though the scholar is penalized for her meritorious speech.

At the same time, a more aggressive evaluation of the propriety of the grounds for decision by academic organizations, such as the AAUP, is entirely justified. The AAUP does not review the merits of academic decisions; it relentlessly insists on procedures that place effective power over tenure and dismissal in the hands of faculty. The AAUP rationally could criticize the administrator discussed above for rejecting a departmental recommendation of tenure for a candidate because it is that association's business to enhance the sphere of freedom and control over academic administration of its members. The advocacy of this position, outside the coercive domain of law, furthers the academic debate through which workable norms have in the past and may in the future be established.²²⁴

Moreover, if the tradition of academic freedom is to endure and grow, its animating values and operational assumptions must be reevaluated and applied by thoughtful academics in addressing major, contemporary

accepting of the importance of displays of emotion, including the use of angry epithets that put their hearers on notice about the intensity of the speaker's feelings." Levinson, *Princeton Versus Free Speech: A Post Mortem*, in REGULATING THE INTELLECTUALS, *supra* note 130, at 189, 204. Even though the result the court reached is harmless, its reasoning fails to allow universities the discretion to maintain control over the appropriate atmosphere for study and reasoned discourse. In another case, the Second Circuit's farcical decision that a student's First Amendment rights to receive commercial information (here, to hold "Tupperware" parties) might be sufficient to void a university rule against commercial solicitation in dormitories was recently reversed by the Supreme Court. *Fox v. Board of Trustees*, 841 F.2d 1207 (2d Cir. 1988), *rev'd*, 109 S. Ct. 3028 (1989).

223. The AAUP has asserted that the judgment of faculty departments that attempt in good faith to put aside ideological "fit" in evaluating candidates should be protected by academic freedom. AAUP, *Observations on Ideology*, *supra* note 128, at 1a-2a. Courts should not distinguish between faculty groups or administrators in deferring to good faith judgments, because the Constitution cannot impose any ideal structure of authority among the constituents of the university. Moreover, courts need to take a more lenient view of what are legitimate criteria than should the AAUP, both because courts lack the expertise to draw the line and because they wield coercive power.

224. See *supra* note 203. Similarly, professors may agitate for a broader freedom to debate the intramural issues of their university than the Supreme Court affords public employees under the First Amendment. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323, 1332-45 (1988). Such a claim would be based on that aspect of the tradition of academic freedom which has sought to transfer control from administrators or trustees to faculty.

problems. For example, Professors Eisenberg and Rabban recently debated the usefulness of the traditional academic freedom emphasis on faculty autonomy in preserving fundamental academic values in an era of pervasive corporate and government sponsorship of research.²²⁵ Despite their principled disagreement, both authors presumably would be unhappy to delegate resolution of this complex problem to the judiciary, which would apply constitutional rules very difficult to change and fashioned for other settings.

There are many signs that in intra-academic cases, courts are limiting their inquiries to assuring themselves that decisions are truly academic in character and that they do not offend some independent legal norm such as that against racial discrimination. That rule has been expressly established in cases where courts have been asked to review a university's academic evaluation of a student. Thus, the Supreme Court has held that due process does not require a hearing before a student is dismissed from a state university for "academic" reasons,²²⁶ even though it does require hearings before a student is dismissed for disciplinary reasons.²²⁷ The Court argued that academic judgments are more "subjective and evaluative"²²⁸ than disciplinary judgments. Similarly, the Court has held that academic dismissal of a student from a state university does not violate substantive due process if made on bona fide academic grounds.²²⁹ Even though these cases neither explore very incisively the checkered nature of academic decisions nor admit the difficulty when constitutional values clash with one another, they do provide the doctrinal basis for a judicial refusal to review most internal academic freedom disputes.²³⁰ Further, as I will argue below, they rest on a firm common law tradition.²³¹ There seems little reason for the Constitution to concern itself more with good faith academic evaluations of faculty than with similar evaluations of students.

Nor should courts subject academic justifications to familiar First Amendment tests, such as demanding that such rationales be sufficiently "compelling" to overcome the faculty member's presumptive right of free

225. See Eisenberg, *supra* note 120, at 1374-84; Rabban, *supra* note 128, at 1416-21.

226. Board of Curators v. Horowitz, 435 U.S. 78 (1978).

227. Goss v. Lopez, 419 U.S. 565, 576 (1973) ("Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.").

228. 435 U.S. at 90.

229. Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214 (1985).

230. The Court's deference to expert decisions made in good faith is epitomized by Youngberg v. Romeo, 457 U.S. 307, 323 (1982) (treatment decisions for institutionalized mentally retarded patients violate due process only when there occurs "such a substantial departure from accepted professional judgement, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgement.").

231. See *infra* text accompanying notes 294-97.

expression.²³² Such an approach mechanically imports norms from political society into the academic context. This model of analysis, which captures the presumption that government should never (or rarely) penalize citizens for the content of their speech,²³³ misses a crucial attribute of academic life: Scholars routinely are criticized for the content of their speech by other scholars, and some are eventually penalized by their institutions. Assistant professors are denied tenure; more prestigious schools decline to hire tenured faculty at other schools; some tenured faculty receive smaller raises than others. These administrative actions by academic officers are often based on negative evaluations of a professor's speech. Employing a legal test that presumes the faculty member's speech is immune from these judgments and penalties wholly misconceives the scholarly enterprise. It is of the essence that worthy ideas be distinguished from dull, and an unobjectionable corollary is that some speakers will be valued more highly and given more prominent positions.

Generally in First Amendment matters, the law prohibits government agents from distinguishing among speakers because we deny the capacity of government to establish a hierarchy of thought. The First Amendment formally insists upon a complete relativity of value among ideas and expressions in order to preserve liberty. Imposing such a model on the university would be false and perverse. The government agents here—faculty and deans—presumptively are competent to judge by academic criteria the value of the speaker's ideas;²³⁴ if we deny their collective authority we deny the structural principle of collective scholarship upon which the university is built. To “liberate” the fomenter of innovative scholarship from adverse consequences would introduce a thoroughgoing relativity into scholarly discourse that would destroy categories and disciplines, based as they are on accepted and identifiable—as well as disputed and changing—premises.

Academics have evolved a system of academic freedom that preserves substantial professional liberty for individual scholars without producing intellectual anarchy. Potentially destructive personal consequences from adverse substantive criticism are ameliorated by a series of bureaucratic procedures that comprise the tenure system. In brief, these procedures insure that personnel decisions are based largely on scholarship and teach-

232. This is essentially the approach taken in cases concerning the exercise of general First Amendment rights within the school environment. Thus, students can wear armbands in class so long as it does not substantially interfere with the educational mission of the school. *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969). By contrast, speech, criticism, and sanction within accustomed patterns are all part of a functioning system of academic freedom.

233. *See, e.g.*, *Texas v. Johnson*, 109 S. Ct. 2533, 2544 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

234. This refers back to the point that faculty and administrators at public universities may arguably be considered state actors for purposes of the 14th Amendment. *See supra* text accompanying note 188.

ing ability by placing primary responsibility for hiring and promotion on peers. Also, they limit the occasions when major personnel decisions will be made, particularly freeing the mature scholar after a probationary period from the primary concern about losing her job. Academic freedom encompasses the tensions inherent in individuality and conformity, imagination and coherence, change and hierarchy. These principles are widely accepted by universities; constructive enhancement of scholars' freedom will require careful development of new structured relationships within the academic community.²³⁵

In this section, I have sketched the development of the constitutional law of academic freedom. The Court has come to limit the judiciary's role to excluding non-academics from imposing ideological criteria on academic decision-making, while refusing to impose substantive limits on academic administrators who in good faith penalize faculty for academic speech. Even though the Court's approach appears anomalous given that the main thrust of the non-legal tradition of academic freedom has been to secure the autonomy of the individual teacher against improper interference by administrators, I have argued that the Court has struck the appropriate balance between its desire to protect free scholarship and its concern about involving itself in academic disputes. To make this judgment more persuasive, it is necessary to explain the legal roots of the Court's protection of institutional freedom and to suggest an appropriate relationship between the academic tradition of individual freedom and the constitutional protection of institutional freedom.

V. CONSTITUTIONAL ACADEMIC FREEDOM AND THE PROTECTION OF INSTITUTIONAL AUTONOMY

In the last decade, the Supreme Court's decisions concerning academic freedom have protected principally and expressly a First Amendment right of the university itself—understood in its corporate capacity—largely to be free from government interference in the performance of core educational functions.²³⁶ These functions usually are taken to include the "four freedoms" of a university identified by Justice Frankfurter in *Sweezy*.²³⁷ Commentators steeped in the traditional notion of academic freedom—understood as the protection of the scholarly integrity of faculty from institutional interference—have expressed both surprise at this change in doc-

235. See D. BOK, *supra* note 120, at 23–26, 26 ("The conditions of modern life have placed new pressures and inhibitions on intellectual inquiry, but . . . the most that a university can do is to try to free the scholar from artificial constraints that are subject to its control.").

236. The cultural and social predicate for the assertion of institutional autonomy is explained in Metzger, *Academic Freedom in Delocalized Academic Institutions*, in DIMENSIONS OF ACADEMIC FREEDOM 1 (W. Metzger ed. 1969).

237. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (freedom to determine who may teach, what may be taught, how it shall be taught, and who may study).

trine and concern that a university may have a constitutional right to violate an individual professor's academic freedom.

The Court's new elaboration of institutional academic freedom does contain anomalies. The First Amendment rarely protects institutional decision-making so indirectly related to expression as student admissions or faculty hiring. It may be hard to identify what speech (or even point of view) the university expresses as an institution, distinct from those of individual faculty, students, or administrators. Moreover, while the right to institutional academic freedom has arisen at the time in our history when universities have been most subject to federal regulation, no federal regulation has been invalidated under the right. As in *Sweezy* and *Keyishian*, the new turn in academic freedom has flowered in dicta and rhetoric more than in holdings and rules.

In this section of the article, I argue that judicial protection of institutional autonomy is the appropriate concern of constitutional academic freedom. This builds on the prior argument that routine protection of the rights of individual professors against academic officers is excessively problematic. I will first describe and analyze what the Supreme Court has written about institutional academic freedom. Then, I will argue that this right has deep *legal* roots that help explain its emergence, despite its abrupt departure from the academic *tradition* of academic freedom. Significant changes in the social function of the university and in its legal status, furthermore, have necessitated some constitutional protection of the university's essential institutional decision-making. Finally, I argue that this constitutional protection is justified by the same compelling need to protect inquiry and exchange among trained scholars that underlay the traditional struggle within the university for academic freedom.

A. *The Supreme Court and Institutional Academic Freedom*

Again, we must begin with *Sweezy*.²³⁸ The inquiry of the New Hampshire attorney general in that case was arguably a threat both to Paul Sweezy and to the University of New Hampshire as an institution. The Justices' opinions acknowledge the double threat. Both Warren and Frankfurter emphasize the systemic values of academic freedom. Indeed, Frankfurter writes as if the university were the real party to the suit, not Sweezy, to whom he refers at one point as "the witness," rather than as the petitioner.²³⁹ Academic freedom is described by Frankfurter not as a limitation on the grounds or procedures by which academics may be sanctioned but as "the exclusion of governmental intervention in the intellectual life of a university."²⁴⁰

238. 354 U.S. 234 (1957). *See supra* notes 138-56 and accompanying text.

239. 354 U.S. at 261 (Frankfurter, J., concurring).

240. *Id.* at 262.

His long quotation from the pleas for free universities in South Africa refers primarily to institutional freedoms, as in the now famous invocation of the “ ‘ ‘four essential freedoms” of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.’ ”²⁴¹ Frankfurter’s concern lies with the threat of McCarthyism to the autonomy of universities, rather than with a violation of any individual professor’s rights.²⁴² By contrast, when addressing other legal issues raised by *Sweezy* unrelated to university functions, Frankfurter wrote passionately about the political autonomy of the individual citizen.²⁴³

McCarthyism represented a democratic assault on elite institutions as much as a demagogic persecution of radicals. The investigations by federal and state legislative committees constituted an unprecedented attempt by democratic governments to hold universities to the public’s notion of academic fitness.²⁴⁴ Ellen Schrecker’s study of McCarthyism and the universities details several occasions in which university administrators penalized accused radicals in the hopes of preserving institutional autonomy.²⁴⁵ While the loyalty craze of the post-war period was a complex phenomenon, the political investigation of universities reflected in part the anxiety of the public over the values of elite institutions at a time when those institutions were growing rapidly and taking on a new importance in educating a wider spectrum of American youth. It was the first instance in which the autonomy of universities from the federal government had been drawn into doubt. Frankfurter’s concern with threats to institutional values was not inappropriate.²⁴⁶

The potential for reading *Sweezy* as establishing a right of institutional autonomy went unrealized for many years. Justice Powell first tapped it in his separate yet controlling opinion in *Regents of the University of California v. Bakke*.²⁴⁷ Powell held that, even though the Fourteenth Amend-

241. *Id.* at 263.

242. “These pages need not be burdened with proof, based on the testimony of a cloud of impressive witnesses, of the dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a university.” *Id.* at 262.

243. For example, Frankfurter wrote that “[f]or a citizen to be made to forego even a part of so basic a liberty as his political autonomy, the subordinating interest of the State must be compelling,” and “the inviolability of privacy belonging to a citizen’s political loyalties has . . . overwhelming . . . importance . . .” *Id.* at 265.

244. See E. SCHRECKER, *supra* note 42. For excerpts of Robert Hutchings’ testimony on behalf of the University of Chicago before the Illinois Seditious Activities Investigation Committee, see R. MACIVER, *supra* note 48, at 186.

245. See E. SCHRECKER, *supra* note 42, at 105 (discussing how president of University of Washington defended his decision to fire three tenured professors on grounds that “it was necessary to anticipate outside pressures and get rid of Communist professors before reactionary politicians, who were unable to tell a crypto-Communist from an anti-Communist, took over the task”).

246. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), similarly can be understood as a defense of institutional autonomy. The statutes invalidated there were imposed on the university by the legislature, and the Court praised the systemic benefits of free teaching and scholarship.

247. 438 U.S. 265 (1978) (opinion by Powell, J.).

ment and Title VI²⁴⁸ prohibited any state instrumentality from penalizing any applicant because of his race, the First Amendment right of academic freedom empowered a state university to take race or national origin into account in admitting students when doing so in pursuit of the academic goal of a diverse student body.²⁴⁹ Powell relied on the fourth of Frankfurter's "four essential freedoms"—the right of the university to determine for itself on academic grounds who may be admitted to study.²⁵⁰ Powell explicitly connected racial diversity with the grounds on which the Court in *Sweezy* praised academic freedom: "The atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body."²⁵¹ Justice Powell's practical accommodation between constitutional interests in non-discrimination generally and the university's right to create a racially diverse student body in particular led to a rejection of racial quotas in admissions but an acceptance of admissions criteria that make race one factor among many to be taken into account.

In attempting to gauge the significance of *Bakke* in the development of the constitutional law of academic freedom, one should begin by noting that racial diversity has nothing to do with the values upholding the tradition of individual academic freedom: To the drafters of the AAUP's 1915 *Statement*, benefitting a scholar because of his race would have been as repulsive in principle as penalizing him.²⁵² They believed that scholars could identify the best scholars by employing criteria as neutral and as divorced from social prejudices or aspirations as science itself. Of course, they had nothing to say about the rights of students, who were always considered insignificant in the search for truth. More fundamentally, they would have been puzzled by the suggestion that the search for truth at the university would be enhanced by ethnic diversity. Truth would be discovered by the disinterested pursuit of the scientific method by trained professionals of high intelligence; race or ethnic origin was completely irrelevant when these professional criteria were satisfied.

A racially diverse student body more directly serves the academic values of humanism and democracy. Seen as a humanistic value, diversity con-

248. 42 U.S.C. § 2000d (1982) (prohibits discrimination on the basis of race, color, or national origin in any federally assisted program).

249. 438 U.S. at 311-19.

250. *Id.* at 312.

251. *Id.*

252. This is not to deny the pervasive barriers to higher education for blacks in 1915 and long thereafter. See generally Kujovick, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*, 72 MINN. L. REV. 29 (1987) (tracing history of black public colleges). The AAUP, too, has acknowledged the persistence of prejudicial barriers to equal opportunity in higher education, and it has supported affirmative action on a basis that seeks to preserve its long commitment to impersonal concepts of merit. See AAUP, *Affirmative Action in Higher Education: A Report by the Council Committee on Discrimination*, 59 A.A.U.P. BULL. 178 (1973), reprinted in POLICY DOCUMENTS, *supra* note 12, at 82.

tributes to developing a mature cosmopolitan outlook on the part of the student by challenging easy ethnocentricity. This serves the traditional college value of nurturing the student to a responsible adulthood; as the pre-Civil War college aimed to produce Christian gentlemen, the modern college strives to develop a citizen capable of living harmoniously with people of different backgrounds by understanding that the perspective of each is limited but valid. At the same time, for racial minorities, affirmative action serves the powerful democratic value of social mobility. Since a chief social goal for higher education has been the acceleration of social and economic advances for relatively disadvantaged ethnic groups and social classes, affirmative action would fit easily among the democratic values of higher education. Interestingly, in justifying a university's right to give weight to the fact that an applicant is not white, Justice Powell flatly rejects the appropriateness of a university promoting social mobility for racial minorities but warmly endorses the university's desire for a diverse student body; he rejects the democratic value but accepts the humanistic value.²⁵³ Thus, *Bakke* finds a constitutional right of academic freedom to develop a policy that is essentially irrelevant to the tradition of academic freedom and the research values from which it springs.

An early reader of *Bakke* could be pardoned if she doubted that the Court was serious about a First Amendment right of institutional academic freedom. Was it not merely a chimera of a doctrine, affirmed only for that day, to provide an acceptable ground on which Justice Powell could preserve affirmative action while condemning racial preferences? Indeed, one might have argued that the virtue which most recommended institutional academic freedom in *Bakke* was its distance from the tangled, acrimonious constitutional debate about racial justice; perhaps it drew a tranquilizing cloud over an insoluble conflict in values.²⁵⁴ Yet the tradition of university autonomy in the pursuit of educational goals supports both Justice Powell's approval of the avoidance by the university of the social norm of non-discrimination in order to pursue humanistic values and his rejection of the university's freedom to adopt democratic values different from those specified in Title VI.

The Court's subsequent development of institutional academic freedom

253. Powell does not really disparage the goal of providing relief to a racial group so long isolated and denied the benefits of quality higher education; rather, he insists that such a policy must be formulated by the legislature. "[The university's] broad mission is education, not the formulation of any legislative policy. . . . [I]solated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria." 438 U.S. at 309. Powell seems to argue that allocations among social groups of opportunities for social mobility are more the business of the legislature than the university. While the university may make rules that promote democratic values, it may do so only subject to the superior authority of the state. When the university makes rules promoting research or humanistic values, it enjoys some measure of constitutional protection. In other words, the state ought not to legislate research or humanistic values for universities.

254. See J. WILKINSON, FROM BROWN TO BAKKE 303-04 (1979).

suggests that the institutional right has more vitality than our early reader might have suspected, but the Court has yet to provide it with either a definite sphere of influence or an adequate constitutional justification. Justice Stevens' concurring opinion in *Widmar v. Vincent*²⁵⁵ represents both a refreshing acknowledgment that universities must and should distinguish among speakers on the basis of the content of their speech and a pioneering inquiry into which university administrative decisions the First Amendment should protect. In *Widmar*, the Court held unconstitutional a University of Missouri regulation prohibiting student religious groups from holding prayer meetings on school property otherwise generally available to student organizations; the university erroneously believed that the Establishment Clause required such a prohibition.²⁵⁶

Justice Stevens' concurring opinion took issue with the Court's statement that the university required a compelling interest to justify content-based discrimination against the students' religious speech. He argued that requiring a university to justify the regulation with a compelling interest might interfere with the university's academic freedom to distinguish between academically valuable and relatively worthless speech. Stevens went on to explain that substantive decisions of university administrators deserve to be protected as academic freedom because they are necessary and appropriate in creating the atmosphere of a university.²⁵⁷

Stevens' view recognizes that academic speech requires social support—that scholars' efforts to advance knowledge and train youth require social structures supporting these goals. Through its administration, a school makes choices about admissions, hiring, and expenditures which shape its educational character and mission. Thus, core academic administrative decisions—determining who may teach, what may be taught, how it shall be taught, and who may be admitted to study—cannot be interfered with by civil authorities without impairing the unique virtues of academic speech. Stevens finds this administrative liberty to be limited by the principle that the university cannot penalize a speaker because it disagrees with her viewpoint.²⁵⁸ Thus, Justice Stevens translates to the administrative sphere the distinction inherent in the AAUP's *1915 Statement* between permissibly evaluating a scholar's professional competence, which corresponds to evaluating some campus speech as academically valuable, and impermissibly making political judgments—corresponding to a university's decision to eliminate a department or a student organization because it disagrees with its viewpoint.²⁵⁹ A school cannot ban the Stu-

255. 454 U.S. 263 (1981) (Stevens, J., concurring).

256. *Id.* at 270-73.

257. *Id.* at 278.

258. *Id.* at 280.

259. *1915 Statement*, *supra* note 95, at 31-35, reprinted in 2 DOCUMENTARY HISTORY, *supra* note 43, at 869-72.

dents for a Democratic Society from campus because it disagrees with or fears its social goals, but it can ban fraternities if it views them as trivial and anti-intellectual.²⁶⁰ This distinction is valuable, because it permits a college to make choices that promote educational values while deterring sectarian exclusivity. Unfortunately, it is also unstable.

Justice Stevens' application of the right of institutional academic freedom in his *Widmar* concurrence resembles Justice Powell's invocation of the same concept in *Bakke*. While neither Justice found a statute or regulation unconstitutional because it conflicted with the right, both found in the right a persuasive ground for *not* interpreting a distinct constitutional rule to require certain behavior in a sensitive area for a state university. In 1985, a unanimous Supreme Court accepted this use of institutional academic freedom in *Regents of the University of Michigan v. Ewing*.²⁶¹ There, the Court rejected a claim by a medical student that his dismissal from medical school for academic failures violated substantive due process because it represented an arbitrary departure from a past policy of leniency. Justice Stevens' opinion for the Court formulated a due process rule that incorporated the traditional common law doctrine of academic abstention and implied a strikingly broad autonomy for academic decision-making:

When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.²⁶²

Stevens based this refusal to meddle with academic decisions both on lack of judicial standards and on academic freedom: "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself."²⁶³ Once again, the Court found that academic freedom provided the necessary justification for interpreting a constitutional provision as not inhibiting the discretion of academic decision-makers.

The strength and reach of institutional academic freedom remain in doubt.²⁶⁴ The Supreme Court now has an opportunity to clarify its signif-

260. Compare *Healy v. James*, 408 U.S. 169 (1972) (forbidding ban on SDS) with *Waugh v. Board of Trustees*, 237 U.S. 589 (1914) (upholding ban on fraternities at University of Mississippi).

261. 474 U.S. 214 (1985).

262. *Id.* at 225 (citation omitted) (footnote omitted).

263. *Id.* at 226 n.12 (citations omitted).

264. An often-cited student Note justifies institutional academic freedom, at least for faculty hiring decisions, on the grounds that faculty and students enjoy a freedom of association protected by the First Amendment and that the university as a corporate entity exercises a right of free speech when it

icance in *EEOC v. University of Pennsylvania*, a case which requests it to settle the most contentious issue of academic freedom among the courts of appeal.²⁶⁵ whether academic freedom requires that there be a privilege against discovery of peer review evaluations of faculty candidates in race and sex discrimination cases. As noted at the beginning of this article, the lower courts have offered several answers to this difficult question.²⁶⁶ Plaintiffs required to establish that animus toward blacks or women played a role in denying them employment or tenure may need access to peer review documents to show the intent of decision-makers. In such cases, the interests of the plaintiffs are clear and impressive: Congress expressly extended Title VII to universities in 1972.²⁶⁷ Plaintiffs can obtain similar documents from non-academic employers on a simple showing of relevance.

The *University of Pennsylvania* case presents two related questions: First, does protection of the peer review process from damaging outside interference rise to the level of a constitutional concern? Only if this question is answered in the affirmative need the Court address the second question: Will discovery of peer review evaluations seriously damage the process by chilling candid evaluations of candidates for hiring, promotion or tenure? The analysis developed in this article could help resolve the first question; the second question requires a balancing based on an empirical judgment about the effects of disclosure.

Beyond invoking Frankfurter's "four freedoms," the Supreme Court has not provided any guidance as to which administrative activities are

hires faculty. Note, *Academic Freedom and Federal Regulation of University Hiring*, 92 HARV. L. REV. 879, 885-88 (1979). As formalist legal arguments go, this appears plausible (although the expressive value of hiring is highly qualified). Moreover, grounding constitutional academic freedom on general First Amendment principles avoids the elitist implications of special constitutional status for universities: The same freedoms of inquiry and exchange would protect Georgetown University and the Georgetown Odd Fellows Book Club.

Employing such a First Amendment doctrine, however, obscures the very complexities of university values and organization that give rise to legal disputes. Universities are not simple voluntary associations but complex and permanent social institutions that perform indispensable functions. They do not fit within legal structures created for other institutions. The student Note, for example, draws an analogy between faculty hiring and admittance to membership in a voluntary association, *id.* at 885-86, and between faculty hiring and corporate speech, *id.* at 890-91. But this only pushes offstage the central question of how judges ought to scrutinize the selection of faculty given the democratic demand for racial diversity. As a consequence, the student authors' conclusion—that the public values of racial diversity outweigh a university's right to use traditional selection criteria—emerges from a "black box" of social preferences. This is unsatisfying, because it neither explains why the university can be so regulated while many membership organizations constitutionally cannot be, nor why business corporations can be thoroughly regulated without raising any substantial constitutional question. The student authors fail to make explicit their concept of the university. The Note does not appreciate how legal regulation of universities would improve generally if tailored to their unique characteristics.

265. *EEOC v. University of Pa.*, 850 F.2d 969 (3d Cir. 1988), *cert. granted*, 109 S. Ct. 554 (1988), *amended*, 109 S. Ct. 1660 (1989). See *supra* note 7 and accompanying text.

266. See cases cited *supra* note 8.

267. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. Title VII of the Civil Rights Act of 1964 outlawed discrimination on the basis of race, color, religion, sex, or national origin, 42 U.S.C. § 2000e-2 (1982), and created the Equal Employment Opportunity Commission to enforce the prohibition.

protected by constitutional academic freedom from political regulation. Peer review certainly comes within the protection of institutional academic freedom if any university activity other than teaching and scholarship does. Peer review is the canonical procedure for determining "who will teach." It also is the linchpin in the structural compromise over governance that insulates faculty from regular supervision or review by administrators. Peer review consigns evaluation of a faculty candidate in the ordinary course to fellow faculty whom we must presume to be both competent to evaluate scholarly accomplishment and promise and dedicated to the tradition of academic freedom which seeks to separate the question of competence from exogenous factors. As I argued above,²⁶⁸ imposing preventive regulations on the peer review process threatens the mechanism by which the professor's scholarly freedom is assured in order to address the inevitable but exceptional cases where peers have failed sufficiently to separate competence from ideological acceptability. Academic freedom has no meaning without peer review.

Happily, peer review does not conflict in substance with the dictates of non-discrimination in Title VII. No one contends that academic freedom provides universities any right to exclude minorities or women from faculties; no such decision could be justified on academic grounds. Indeed, this distinction between evaluation on academic grounds, which courts constitutionally must honor, and evaluation poisoned by discrimination, which Congress has instructed the courts to detect and condemn, has been offered to deny the need for protection of peer review documents.²⁶⁹ But this argument misses the central point: The peer review system offers evaluators confidentiality to encourage them to speak honestly and concretely as to the candidate's relative competence and weaknesses; the litigation process exposes the reports in the search for discriminatory animus. Many confidences must be broken in the search for incriminating evidence. The evaluator may feel secure that no one examining his report will conclude that he is sexist but he may nonetheless be anxious that it not be broadcast that he stated, for example, that the candidate was poorly trained by Professor X or is more qualified than Professor Y. Even favorable assessments of the candidate may contain embarrassing criticisms of others within the field. Confidentiality predictably harbors valuable frank evaluations much more often than it shields evidence of discrimination.

At the same time, it is hard to gauge how much the chance that an evaluation may be made public in subsequent litigation may discourage frankness. Some chill surely will be felt. But discrimination suits against universities are not abundant, and protective orders can limit the exposure of documents not introduced into evidence. A qualified privilege, perhaps

268. See *supra* text accompanying notes 104-07.

269. See DeLano, *supra* note 8, at 149.

one requiring some particularized showing of need by the plaintiff, may not provide sufficient assurance of confidentiality to induce an evaluator to be frank. Some empirical study would be helpful in answering these questions.

In striking a balance, the Court must achieve a practical accommodation between important and recognized interests. A cavalier disregard for the interests of the university in the process of peer review would be disastrous; this would relegate institutional academic freedom, at least as to activities other than teaching and scholarship, to a trivial status, a make-weight in decisions reached on undisclosed grounds.

B. *The Legal Roots of Institutional Academic Freedom*

One reason that institutional academic freedom remains little more than a potential constitutional right is that it has not been explained satisfactorily by legal scholars. It is hard to take seriously a constitutional guarantee that has no obvious bases in constitutional or educational tradition and that would protect a state institution when it penalizes individuals also claiming a right of academic freedom. It is no wonder that courts have described academic freedom as contradictory and anomalous. Dean Yudof has even written that academic freedom has "three faces," which are supported by independent policies and which should be kept entirely distinct.²⁷⁰

In my view, the constitutional right of academic freedom provides a constitutional status for higher education. It sets the ground rules for the relationship between civil and political authority on the one hand and universities on the other. The failure to elaborate these ground rules, and the traditions and policies on which they stand, threatens to flood the universities with socially-popular, utilitarian functions and responsibilities that may crowd out the search for truth and the pursuit of knowledge for its own sake. Moreover, the constitutional law of academic freedom when conceived primarily as a protection of institutional autonomy can stand on a lengthy legal tradition, growing out of common law and state constitutional provisions, which are insufficiently understood.

In Part IV, I argued that in protecting academic freedom, courts have wisely confined their efforts to excluding political control over the university and checking political interference with academic functions. The case I have presented has been negative in character, trying to demonstrate that

270. Yudof, *supra* note 9. Dean Yudof views the three faces of academic freedom to be professional autonomy, limits on government indoctrination through schools, and institutional autonomy. I agree that there is a thorough theoretical distinction between traditional academic freedom and the rights of schoolteachers, although I believe that the latter should not be termed academic freedom, *see supra* note 137. We appear to disagree most fundamentally over the significance of institutional freedom to protect the intellectual discourse of academics. Dean Yudof's failure to take seriously institutional freedom may reflect his failure to perceive its ancestry in state constitutional autonomy; indeed, he even expresses surprise that the right should encompass state universities. *Id.* at 855.

constitutional academic freedom was something different from the tradition of faculty academic freedom formulated and successfully advocated by the AAUP. In this section, I attempt to present the affirmative case for constitutional academic freedom, conceived as the prevention of political interference with academic decision-making.

The most helpful and provocative study of institutional academic freedom to date is Professor Finkin's 1983 article.²⁷¹ Finkin's study appears motivated by his concern that "'institutional' academic freedom would constitutionalize the concept of administrative prerogative that the American professorate struggled against at the turn of the century, and it would do so, perversely, in the name of academic freedom."²⁷² He attempts to show that institutional autonomy is only an "excrescence of property rights,"²⁷³ not protecting faculty freedom to teach and write. His effort seems unconvincing, at least in part, because he neglects the legal tradition on which institutional academic freedom rests and fails to appreciate the difficulty of incorporating the AAUP tradition of academic freedom into a legal regime.

As previously discussed, European universities of the middle ages enjoyed extensive autonomy from both church and state, and the authority to base their corporate lives on academic values resulted in free teaching and scholarship.²⁷⁴ Practical autonomy from government control has characterized American colleges and universities, too, at least since disestablishment of the state churches at the beginning of the nineteenth century. As described above, the more difficult process of development in America was

271. Finkin, *supra* note 19, at 817.

272. *Id.* at 854. Professor Finkin's concerns were provoked by the Princeton case. *See supra* note 222.

273. Finkin, *supra* note 19, at 839.

274. *See supra* notes 57-59 and accompanying text. The autonomy of the medieval university developed out of local custom and from the grants of kings and popes seeking at times to protect scholarship, at other times to silence dissent. For example, papal decretals of the twelfth century that forbade the Chancellor of Notre Dame cathedral from selling teaching licenses and requiring him to issue them to every qualified candidate contributed significantly to securing a degree of independence from ecclesiastical authority for the professors at the nascent University of Paris. 1 H. RASHDALL, *THE UNIVERSITIES OF EUROPE IN THE MIDDLE AGES* 281-82 (1936).

An important aspect of this autonomy for purposes of legal analysis is that universities enjoyed extensive jurisdiction over their own members that excluded other civil and ecclesiastical authorities. Indeed, one of the very earliest legal charters of higher education—issued in 1158 by Emperor Frederick Barbarosa and known as the Authentic *Habita*—provided that, in any legal proceeding, a student in Lombardy could have the matter heard by his teacher. *Id.* at 143-45. The medieval University of Oxford, through courts maintained by its Chancellor and its steward, exercised criminal jurisdiction where a member of the university was a party; civil jurisdiction, except those relating to freeholds, where a member was a party; and ecclesiastical jurisdiction over the morals of both clerical and lay members and over testamentary causes. 1 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 169-70 (1927). The protection of university autonomy through the grant of such a franchise jurisdiction, however characteristic of medieval legal thought, is echoed by the American common law doctrine of academic abstention, whereby courts refuse to resolve internal university disputes which otherwise could have been adjudicated according to generally-applicable common law rules. *See infra* notes 277-93 and accompanying text. Examining this historical background makes somewhat less surprising the modern constitutional law of academic freedom that protects university decision-making as well as teaching and scholarship.

the divorce of the college from religious sects and the forging of a distinct educational ethic. Throughout the balance of the nineteenth century, and until the Second World War, private universities received virtually no state or federal support²⁷⁵ and were subjected to few governmentally-imposed legal duties. As discussed below, even some state universities were placed beyond the control of the political branches of state government by constitutional enactment and judicial interpretation. As Professor Metzger has incisively noted, the physical isolation of the college or university, set in a rural college town and behind the traditional college gate, reflected the more general removal of scholarly and student life from the interest or control of society at large.²⁷⁶

What is less often noticed is that this autonomy was legally protected. Of course, the college enjoyed the general freedom from government regulation that all voluntary, non-profit organizations enjoyed in America during the nineteenth century. Professor Finkin is right to regard this freedom as a "property" right that has no bearing on academic freedom because it expresses no values distinctly academic.²⁷⁷ Moreover, grounding the universities' autonomy in property concepts entails deference to "owners" who remain free to pervert academic values by, for instance, suppressing dissident voices. It is appropriate to reflect, however, that the legal sway of property rights was once such that parties seeking autonomy had no need to press for any more specific rights based on more finely-articulated public values. Such it was with universities, which had little reason to argue for their institutional autonomy when government so consistently recognized it in practice, and all were content to speak in terms of property.²⁷⁸ Beginning in the nineteenth century, however, American law came to recognize two legal bases for university autonomy: the common law notion of academic abstention and state constitutional status for state universities.

275. Some states did assign their federal land grants under the Morrill Act, *see supra* note 71, to private institutions; for example, Connecticut, for nearly thirty years, gave land-grant revenues to Yale. 1 R. CHITTENDEN, *THE HISTORY OF THE SHEFFIELD SCIENTIFIC SCHOOL OF YALE UNIVERSITY 1846-1922* 90-92, 269-73 (1928). This was an exception to the rather complete divorce between states and private schools during the nineteenth century. The history of Harvard's founding provides a good example. Harvard in the seventeenth century was both a private and public institution (it would be more accurate to say that such a distinction had not yet been forged); it received regular appropriations from Massachusetts throughout the seventeenth and eighteenth centuries. The subsidies finally ended early in the nineteenth century. The severing of the financial ties reflected the growing religious pluralism of Massachusetts and the powerful ideology of privatization that characterized most American institutions at that time. *See* F. RUDOLPH, *supra* note 39, at 184-90.

276. *See* Metzger, *supra* note 236, at 6.

277. Finkin, *supra* note 19, at 839.

278. This is well-illustrated by *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), which established the autonomy of private colleges from legislative control. The decision, of course, turned on the Court's insistence that a state legislature's "reforms" had impaired the obligation of a contract—a liberty or property right extending far beyond higher education. Indeed, despite the historical importance of the case in fostering a mixed economy of public and private universities, the Court never addressed educational policies or needs.

1. *Academic Abstention*

Academic abstention has long specifically preserved university freedom from state regulation. It describes the traditional refusal of courts to extend common law rules of liability to colleges where doing so would interfere with the college administration's good faith performance of its core functions.²⁷⁹ It would be inappropriate to describe academic abstention as a doctrine, because courts have never developed a consistent or thorough body of rationales or followed a uniform group of leading cases. Yet the consistency of result and invocation of the need for judicial restraint whenever internal university decisions are challenged by an unhappy student or professor has been sufficiently impressive that a competent practitioner today would advise such a student or professor that her chances of success are low or nil.²⁸⁰ The few common law limitations on the authority given the college over its internal affairs still consist of prohibitions against bad faith dealings and violations of overriding public policy.²⁸¹

The practical effect and supporting rationales of such judicial abnegation are demonstrated in the early and influential case of *People ex rel. Pratt v. Wheaton College*,²⁸² where a student, suspended for belonging to a "secret society," sought reinstatement through the courts. After noting the reasonableness of a rule prohibiting secret societies, the court explained the proper relationship between courts and colleges:

But whether the rule be judicious or not, it violates neither good morals nor the law of the land and is therefore clearly within the power of the college authorities to make and enforce. A discretionary power has been given them to regulate the discipline of their college in such a manner as they deem proper, and so long as their rules violate neither divine nor human law, we have no more authority to interfere than we have to control the domestic discipline of a father in his family.²⁸³

The recognition of authority over internal affairs and the exclusion of judicial governance go hand in hand; they amount to a substantial degree of

279. Academic abstention has largely been criticized by legal scholars in the twentieth century, because it presents an apparently unreflective barrier to establishing legal rights of both faculty and students. See, e.g., Nordin, *The Contract to Educate: Toward a More Workable Theory of the Student-University Relationship*, 8 J. COLL. & U.L. 141 (1981-82). In pointing out the persistent strength of academic abstention and offering it as a basis for constitutional protection, I do not mean to suggest that I approve of all the decisions rendered in its name. Critical attention to reshaping the common law of university relations lies outside the scope of this article.

280. Professor Nordin describes academic abstention as "the most consistent value or judgment which the courts bring to any given factual situation concerning higher education." *Id.* at 146.

281. See, e.g., *Carr v. St. John's Univ.*, 17 A.D.2d 632, 231 N.Y.S.2d 410, *aff'd*, 12 N.Y.2d 802, 187 N.E.2d 18, 235 N.Y.S.2d 834 (1962) (court will not review exercise of school's discretion unless it was arbitrary); *Foley v. Benedict*, 55 S.W.2d 805 (Tex. Ct. App. 1932) (court will not interfere absent clear showing of arbitrariness or abuse of discretion).

282. 40 Ill. 186 (1866).

283. *Id.* at 187-88.

common law autonomy. Such common law autonomy could not, of course, prevail against statutes,²⁸⁴ but the paucity of statutes affecting universities made this an insignificant limitation.

Most cases that involve some notion of academic abstention involve complaints by students against college discipline or application of academic standards. Prior to the development of professional research faculties, these matters lay at the heart of the college's goals and preoccupations. Faculty members complaining about dismissal, too, even when claiming a violation of their academic freedom, were rebuffed by the same insistence that courts must not interfere with the broad discretion of the college.²⁸⁵ We have learned to read these cases with distrust because they evoke a dark age of faculty dependence, yet they also represent a positive freedom against state control that should be valued more highly in an age when most universities voluntarily defend the academic freedom of their faculties. The benefits of this institutional freedom are more fully appreciated if one acknowledges the risk of judicial tyranny demonstrated, if farcically, for example, in the Bertrand Russell case.²⁸⁶

Litigants seeking to avoid judicial abstention from internal college disputes have most often sought to demonstrate that they have a contract with the college, for the breach of which a court can grant damages or injunctive relief. And indeed courts often declare that the relation between college and student, or college and teacher, is contractual in nature.²⁸⁷ Yet examination of these cases reveals that such contracts are nearly always construed in favor of the authority of college officials, either by affirming their discretion to interpret vague standards or by giving effect to explicit reservations of discretion so broad that they would void a commercial contract for lack of mutuality.²⁸⁸ Indeed, one court has recently insisted that

284. See, e.g., *Berea College v. Commonwealth*, 123 Ky. 209, 94 S.W. 623 (1906) *aff'd*, 211 U.S. 45 (1908) (state statute forbidding instruction of blacks and whites in same institution upheld as constitutional exercise of state police power).

285. See, e.g., *Ward v. Board of Regents*, 138 F. 372 (8th Cir. 1905). The court stated:

Questions concerning the efficiency of a teacher in an institution of learning, his usefulness, his relations to the student body and to other members of the faculty, are so complicated and delicate that they are peculiarly for the consideration of the governing authorities of the institution. It may be perfectly apparent to them that the presence of a teacher is prejudicial to the welfare and discipline of the college, although it would be difficult, if not impossible, to make it so appear to a jury by the production of evidence in court.

Id. at 377. It follows from this analysis that civil authorities should not be able to penalize professors whom the college wishes to retain.

286. See *supra* note 221 (discussing Russell case).

287. See, e.g., *Carr v. St. John's Univ.*, 17 A.D.2d 632, 231 N.Y.S.2d 410, *aff'd*, 12 N.Y.2d 802, 187 N.E.2d 18, 235 N.Y.S.2d 834 (1962); *Anthony v. Syracuse Univ.*, 224 A.D. 487, 231 N.Y.S. 435 (1928); *Nordin*, *supra* note 279, at 144-45.

288. Thus, in the cases cited *supra* note 287, courts sustained dismissals of students either for narrow sectarian reasons or for no stated reason at all. In *Anthony*, the court stated:

The university may only dismiss a student for reasons falling within two classes, one in connection with safeguarding the university's ideals of scholarship, and the other in connection with safeguarding the university's moral atmosphere. . . . Of course, the university authorities have wide discretion in determining what situation does and what does not fall within the classes mentioned, and the courts would be slow indeed in disturbing any decision of the uni-

contract law provides only an analogy for examining the college's authority to dismiss a student;²⁸⁹ the dilution of contract principles as a binding ground for decision has invariably led to deference toward academic officials.

It would be misleading to suggest that cases affirming academic abstention develop a coherent rationale for their results; very little is said beyond insisting on the need for discretion for college officials to carry out their duties effectively. One rationale that does emerge is that the breadth of the responsibility that the college bears in disciplining students *in loco parentis* requires broad powers.²⁹⁰ This rationale does not speak directly to contemporary concerns, given that colleges today assume little legal or moral responsibility for the moral welfare of their students.²⁹¹ The cases do suggest two other rationales that seem more relevant to contemporary higher education. First, the courts see the college as a separate realm, pursuing values different from those of society as a whole, and striving for collegial, pedagogical, or disciplinary models of personal relations that eschew competition.²⁹² This view of college life, partially mythical, has had profound influence both on judges and academics. The courts fear that offering a legal remedy for a complaint will break down the consensus of value or procedure within the institution. Second, judges feel themselves incompetent to evaluate the merits of academic decisions.²⁹³ This rationale seems strongly connected to the first, because the lack of legal standards presupposes that colleges act upon values different than from those of society at large.

Although this common law notion of academic abstention may seem anachronistic in an age of statute and regulation, the judicial attitudes

versity authorities in this respect.

224 A.D. at 491, 231 N.Y.S. at 440.

Courts are more likely to enforce explicit promises by universities to follow stated disciplinary procedures, *see, e.g.*, *Tedeschi v. Wagner College*, 49 N.Y.2d 652, 404 N.E.2d 1302, 427 N.Y.S.2d 760 (1980).

289. *Slaughter v. Brigham Young Univ.*, 514 F.2d 622 (10th Cir. 1975). The court elaborated: It is apparent that *some* elements of the law of contracts are used and should be used in the analysis of the relationship between plaintiff and the University to provide some framework into which to put the problem of expulsion for disciplinary reasons. This does not mean that "contract law" must be rigidly applied in all its aspects, nor is it so applied even when the contract analogy is extensively adopted.

Id. at 626 (emphasis in original).

290. *See, e.g.*, *Gott v. Berea College*, 156 Ky. 376, 379, 161 S.W. 204, 206 (1913) (upholding rule forbidding students from eating at off-campus restaurants).

291. *See* cases cited *infra* note 292. This attitude seems to be changing; many educators are looking for meaningful ways to guide students toward a healthy maturity without presuming to adopt parental control over the students. *See* Kidder, *Developing "Character" Again at American Universities*, *Christian Science Monitor*, July 27, 1987, at 21, col. 1 (describing President Bok of Harvard as on a crusade "to reawaken a commitment to ethical standards on American campuses.").

292. *See, e.g.*, *People ex rel. Pratt v. Wheaton College*, 40 Ill. 186, 187-88 (1866); *Woods v. Simpson*, 146 Md. 547, 551-52, 126 A. 882, 883 (1924), *citing* *O'Sullivan v. New York Law School*, 75 N.Y. Sup. Ct. 118, 22 N.Y.S. 663 (1893).

293. *See, e.g.*, *Stetson Univ. v. Hunt*, 88 Fla. 510, 516, 102 So. 637, 640 (1924); *State v. Hyman*, 180 Tenn. 99, 108, 171 S.W.2d 822, 826 (1942).

embodied therein persist in surprisingly similar forms. Several recent decisions shielding colleges from tort liability have insisted that tort law should not impose duties on colleges in dealing with their students that the colleges have not voluntarily and unambiguously assumed.²⁹⁴ These decisions evince a judicial regard for preserving the discretion of academics hardly in evidence when the defendants are doctors or railroad companies.

The Supreme Court has repeatedly cautioned federal judges not to meddle with the discretion of academics, either on substantive or procedural grounds, when they make bona fide academic decisions. The leading case here is *Board of Curators v. Horowitz*,²⁹⁵ where the Supreme Court held that the Due Process Clause requires neither notice nor a hearing before a university student may be dismissed for poor academic performance. The Court explained that the determination whether to dismiss a student for academic reasons "requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision-making."²⁹⁶ Moreover, the "educational process is not by nature adversary; instead it centers around a continuing relationship between faculty and students . . ."²⁹⁷ *Horowitz* thus counsels courts that universities proceed on assumptions different from society as a whole and that an insistence by courts on conforming to legal standards or procedures will likely destroy something uniquely valuable in higher education.

This point of view recurs; courts trim constitutional rights to preserve academic values in other contexts. A striking example is the consistent refusal by courts to require that lawyers be able to participate actively in those university hearings actually required by the Due Process Clause on the ground that professional advocacy and cross-examination will transform the proceedings from the informal and collegial to the adversarial and technical.²⁹⁸ Although invocation of academic abstention does not defeat all constitutional claims, it is consistently used to avoid enforcing some general societal norms within the university.

The constitutional right of institutional academic freedom appears to be a collateral descendent of the common law notion of academic abstention. This heritage is made explicit in *Regents of the University of Michigan v.*

294. See, e.g., *Bradshaw v. Rawlings*, 612 F.2d 135, 138-39 (3d Cir. 1979) (college had no duty to protect students from hazards of driving while intoxicated); *University of Denver v. Whitlock*, 744 P.2d 54, 60-61 (Colo. 1987) (university not liable for injuries incurred at fraternity house); *Eiseman v. State*, 70 N.Y.2d 175, 189-92, 511 N.E.2d 1128, 1135-37, 518 N.Y.S.2d 608, 615-17 (1987) (holding university not liable for murder committed by prisoner on conditional release while attending classes).

295. 435 U.S. 78 (1978). See *supra* text accompanying note 226 (discussing *Horowitz*).

296. *Id.* at 90.

297. *Id.*

298. See, e.g., *Crook v. Baker*, 813 F.2d 88, 99 (6th Cir. 1987); *Frumkin v. Board of Trustees*, 626 F.2d 19, 21-22 (6th Cir. 1980); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 158-59 (5th Cir. 1961).

Ewing,²⁹⁹ where the Court, after invoking *Horowitz* and the rhetoric of abstention, suggests that these views recommend themselves as protection for academic freedom.³⁰⁰ And the "four freedoms" of *Sweezy*³⁰¹ reflect the kinds of university decisions courts have refused to review under common law principles.³⁰² Institutional academic freedom can be viewed as academic abstention raised to constitutional status, so that judges can consider whether statutes or regulations fail to give sufficient consideration to the special needs or prerogatives of the academic community.

2. State Constitutional Law

The second legal source for constitutional academic freedom lies in state constitutional provisions endowing state universities with the status of being separate branches of government. These provisions are contained in several state constitutions.³⁰³ The provisions either expressly or, as construed by state courts, implicitly limit the power of the state legislature to interfere with the internal decision-making of the university, even though the university is supported by state appropriations. State courts in several states, in fact, have held state statutes unconstitutional because they reflect attempts by state legislatures to interfere with academic decision-making.

The State of Michigan enacted the first constitutional provision for the separate government of its state university in 1850,³⁰⁴ and its courts have given the provision more far-reaching and detailed development than have courts in other states with similar provisions.³⁰⁵ The current provision gives the elected Board of Regents of the University of Michigan "general supervision of its institution and the control and direction of all expenditures from the institution's funds."³⁰⁶ The Michigan courts have consistently construed the provision as a prohibition against all attempts by the legislature to interfere with the academic management of the university.

299. 474 U.S. 214 (1985).

300. *Id.* at 226 & n.12.

301. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

302. A principal difference between the *Sweezy* formulation and that implicit in the older abstention cases is that the former encompasses only decisions made on "academic grounds," while the latter often concerned themselves with the moral grounds central to the educational mission of those times.

303. It is difficult to identify all the state universities that have constitutional status, because courts have been willing to interpret often ambiguous constitutional language as imposing limitations on the legislature. States with universities enjoying explicit constitutional status include California, CAL. CONST. art. IX, § 9; Georgia, GA. CONST. art. VIII, § 4; Hawaii, HAW. CONST. art. X, § 6; Idaho, IDAHO CONST. art. IX, § 10; Michigan, MICH. CONST. art. VIII, § 5; Minnesota, MINN. CONST. art. XIII, § 3; Montana, MONT. CONST. art. X, § 9; Nebraska, NEB. CONST. art. VII, § 10; and Oklahoma, OKLA. CONST. art. XIII, § 8. See H. EDWARDS & V. NORDIN, HIGHER EDUCATION AND THE LAW 57-79 (1979); E. ELLIOTT & M. CHAMBERS, *supra* note 10, at 134-164; L. GLENNY & T. DALGLISH, PUBLIC UNIVERSITIES, STATE AGENCIES, AND THE LAW 5-49 (1973); *Recent Decisions*, 55 MICH. L. REV. 711, 728 (1957) (summarizing state constitutions).

304. MICH. CONST. of 1850, art. XIII, §§ 6-8.

305. See cases cited *infra* notes 307-14 and accompanying text.

306. MICH. CONST. art. VIII, § 5. The 1850 provision granted constitutional status to the University of Michigan; the current provision (adopted in 1963) grants it to Michigan State and Wayne State as well.

Thus, the courts have held unconstitutional legislative efforts to compel appointments to faculty positions,³⁰⁷ to control the location of departments,³⁰⁸ to determine the percentage of out-of-state students,³⁰⁹ to penalize student radicals,³¹⁰ and to require divestiture of securities related to South Africa.³¹¹ Even attempts by the legislature to tie substantive conditions to specific appropriations have been set aside when found to interfere with general operations of the university.³¹² At the same time, the courts have upheld statutes regulating the financial practices of the university and its relations with employees, neither regulation significantly affecting academic values.³¹³ Thus, the courts have construed the grant of authority to the regents as a flexible prohibition against legislative meddling, permitting the courts to determine whether a statute interferes with the university's autonomy over core academic issues.³¹⁴

The purpose behind provisions such as Michigan's is to improve the quality of the state university by protecting it from political manipulation. When Michigan constitutionalized institutional autonomy in 1850, it did so against a history of frustrating failures to establish respectable state universities in America. As a Michigan legislative report of 1840 concluded, "[t]hus has State after State, in this American Union, endowed universities, and then, by repeated contradictory and over legislation, torn them to pieces with the same facility as they do the statute book, and for

307. See *People v. Regents of the Univ. of Mich.*, 18 Mich. 468 (1869); *People ex. rel. Drake v. Regents of the Univ. of Mich.*, 4 Mich. 98 (1856).

308. See *Sterling v. Regents of the Univ. of Mich.*, 110 Mich. 369, 68 N.W. 253 (1896).

309. See *Regents of the Univ. of Mich. v. State*, 47 Mich. App. 23, 208 N.W.2d 871 (1973), *dismissed as moot*, 395 Mich. 52, 235 N.W.2d 1 (1975).

310. See *id.*

311. See *Regents of the Univ. of Mich. v. State*, 166 Mich. App. 314, 419 N.W.2d 773 (1988).

312. See *State Bd. of Agric. v. Auditor Gen.*, 226 Mich. 417, 197 N.W. 160 (1924); see also *Regents of the Univ. of Mich. v. State*, 395 Mich. 52, 235 N.W.2d 1 (1975) (construing statute as not imposing conditions on universities in order to avoid constitutional issues).

313. See *Regents of the Univ. of Mich. v. Employment Relations Comm'n*, 389 Mich. 96, 204 N.W.2d 218 (1973); *Recent Decisions*, *supra* note 303, at 729.

314. California also has a well-developed state constitutional law of institutional autonomy. See Horowitz, *The Autonomy of the University of California Under the State Constitution*, 25 UCLA L. REV. 23 (1977). California has provided the only case where rejection of a claim of state constitutional autonomy clearly advanced intellectual freedom. *Tolman v. Underhill*, 39 Cal. 2d 708, 249 P.2d 280 (1952) (rejecting regents' power to prescribe loyalty oath for faculty in addition to that required of all public employees by state constitution). Other states with constitutional status for state universities have less certain protection for institutional autonomy, see, e.g., *Board of Regents v. Exon*, 199 Neb. 146, 148, 256 N.W.2d 330, 332 (1977) (construing 1871 constitutional provision to "remove the University from the plenary control of the Legislature and establish the Board of Regents as an independent body charged with the power and responsibility to manage and operate the University as free from political influence and control as possible"). Some state universities, among which Wisconsin is the preeminent example, have achieved excellence through a close and ideologically-charged relationship between legislature and university. See L. VEYSEY, *supra* note 56, at 108. Even in states where the university clearly is a creature of statute, courts sometimes have construed these statutes as guaranteeing to the universities a certain distance from the political branches of government. See, e.g., *People ex rel. Board of Trustees v. Barrett*, 382 Ill. 321, 46 N.E.2d 951 (1943) (state university is entitled to select its own legal counsel and attorney general has no right to represent either university corporation or trustees).

the same reason, because they have the right."³¹⁵ How the people could control a learned and intellectually elite institution without destroying values that they as a group may not comprehend or share proved a difficult issue of political architecture. The legislature was perceived to manage the university for practical, political ends, rather than for long-term scholarly and educational objectives. The solution adopted—the election for eight year terms of officials responsible only for university governance—was an ingenious innovation, accommodating conflicting values and fostering a university known and admired throughout the world.³¹⁶

This solution employs the traditional American constitutional device of separation of powers.³¹⁷ The Michigan Constitution gives power for different purposes to both the regents and the legislature. Although their powers overlap to some extent, the regents have certain core powers over the internal academic administration of the school that the legislature cannot arrogate to itself. The courts enforce this division in order to protect the values for which the division was made, even in the absence of an express judicial role in restraining legislative intrusions.³¹⁸ In this case, the courts protect those academic values that the legislature can be expected to slight.

The tradition of constitutional autonomy for state universities seems to have contributed to the development of the federal right of institutional academic freedom. At a minimum, it confirms the persistence of the view, inherent in academic abstention, that civil authorities ought to respect the special needs and values of universities, even when erected and supported by the state. More distinctly, institutional autonomy helps to explain why federal courts seek to protect administrative decisions not related directly to speech or the exchange of ideas; these state constitutional provisions recognize that political control over academic administration may prevent the achievement of educational and scholarly excellence. Perceiving a basis in separation of powers protection also makes federal protection of these administrative actions seem less anomalous. Also, this tradition of state

315. *Sterling v. Regents of the Univ. of Mich.*, 110 Mich. 369, 377, 68 N.W. 253, 255 (1896) (quoting legislative report).

316. The failure to accommodate conflicting values is illustrated by the hiring and firing of radical faculty at the Kansas State Agricultural College in the 1890's by shifting Populist and Republican legislative majorities. See R. HOFSTADTER & W. METZGER, *supra* note 11, at 424–25. The insufficiently-studied process of accommodation between higher education and democratic control has led to the diverse missions of our public universities.

317. Obviously, the separation of powers is a central mechanism in the United States Constitution. See G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *CONSTITUTIONAL LAW* 359–435 (1986 & Supp. 1989) 29–59.

318. In recent years, the Supreme Court has voided several federal statutes on similar grounds—that the legislature had invoked powers reserved to the executive. See *Bowsher v. Synar*, 478 U.S. 714 (1986) (invalidating Balanced Budget and Emergency Deficit Control Act of 1985); *INS v. Chadha*, 462 U.S. 919 (1983) (holding legislative veto unconstitutional). Considering the university to be an equal branch of government may seem odd, but an analogous conception was common in the Middle Ages. See *supra* note 274.

constitutional law suggests why federal courts have not doubted that the federal right of academic freedom protects state as well as private universities: Both have traditionally enjoyed autonomy from political interference.

Thus, both academic abstention and constitutional autonomy seem to be precursors of the modern federal constitutional protection of institutional autonomy. This modern development can be seen as an adaptation of traditional legal rules and judicial attitudes to the contemporary legal environment. In this legal environment, universities are subject both to numerous civil norms from which they formerly were exempt and to extensive statutory and administrative regulation. Since 1945, universities have educated a far higher percentage of the American population for participation in an increasingly complex society and economy.³¹⁹ This new, more central position in national life has been funded in significant part by federal and state governments, which in turn have sought to ensure university assistance in fulfilling social and economic goals. Statutes and regulations concerning hiring, advancement, admissions, financial aid, student records, and a myriad of other operations have been enacted. Courts have insisted that some civil rights of individual members be respected by public universities.³²⁰ All this has greatly complicated relations between political officials and universities, drawing the latter out of their prior social isolation.

It would be fatuous to denigrate this entire development as a derogation from the ideal; much of permanent value for both the university and society at large has been gained. At the same time, many educators express understandable concern about distraction from the traditional values of higher education: the search for truth, the nurturing of intellectual maturity, the insistence on high standards, and the regard for merit.³²¹

Constitutional academic freedom can perhaps best be seen as a principle that regulation should not proceed so far as to deprive the university of control over its academic destiny. This principle has been fashioned by courts, explaining why they restrain themselves from imposing far-reaching constitutional or common law duties on the university. As such,

319. The percentage of college-age Americans attending college has increased from 4% in 1900 and 15% in 1940 to 50% in 1980. B. CLARK, *supra* note 79, at 50. The change in the role and internal structure of the contemporary university is discussed provocatively throughout C. KERR, *supra* note 114.

320. Judicial recognition of student civil rights is discussed at *supra* notes 33-41 and accompanying text.

321. Educators who also are lawyers have taken the lead in discussing whether federal regulation of universities threatens core values. Compare Oaks, *A Private University Looks at Government Regulation*, 4 J. COLL. & U.L. 1 (1976) (President Oaks of Brigham Young was formerly a University of Chicago law professor) with H. EDWARDS, *HIGHER EDUCATION AND THE UNHOLY CRUSADE AGAINST GOVERNMENT REGULATION* (1980) (Judge Edwards was formerly a professor of law at University of Michigan). President Derek Bok, himself a former law professor at Harvard, has taken a thoughtful and balanced position. See D. BOK, *supra* note 120, at 37-60.

it represents academic abstention raised to a constitutional level; there, it generates force comparable to other constitutional norms, such as due process. The principle also can be directed to legislatures and administrative agencies, prohibiting them from reducing the university to a passive instrument of political or utilitarian calculation. For example, if the United States Department of Education attempted to compel universities to offer students a particular liberal arts curriculum, its efforts surely would be unconstitutional.³²² Thus, courts have embedded institutional autonomy into the federal constitution through judicial construction, providing to qualifying universities rights against the federal government long enjoyed against state government by universities with state constitutional status.

Recognizing this legal parentage helps to clarify the constitutional right of academic freedom (even if it does not finally justify it). The Supreme Court's move to protect the institution as a whole should not be viewed as a perversion of faculty rights, based upon an erroneous development of Frankfurter's language in his *Sweezy* concurrence. Nor does it represent confusion between property and free speech rights. Constitutionalizing academic freedom did not involve absorption of a non-legal norm developed by faculty activists, so much as adaptation of the traditional legal supports of the college to preserve intellectual independence for the modern university. Academic abstention and institutional autonomy persist because they are the legal structures our institutions have developed that most fully recognize the distinctiveness of higher education. When confronted by laws that threatened this distinctiveness by insisting that the university enter completely into the mainstream of democratic culture, courts have turned to familiar legal structures originally developed in order to prevent political demands from engulfing academic values. That such a development is justified remains to be defended.

C. *Institutional Academic Freedom and the First Amendment*

One who has generally accepted my account of the nature and origin of constitutional academic freedom might nonetheless conclude that the whole development has been mistaken and illegitimate. This position is not untenable. To be sure, there is not even a colorable claim that the founders specifically intended to provide any constitutional status for higher education.³²³ Even if universities should be afforded constitutional

322. Former Secretary Bennett spoke frequently against the trends in liberal arts education, but the Department has never suggested that it has the power to regulate this curriculum. In 1974, the Department of Health, Education and Welfare did propose regulations requiring universities to censor course materials "to ensure that they do not reflect discrimination on the basis of sex." D. BOK, *supra* note 120, at 52. Imposing such a political constraint on teaching the liberal arts would be a violation of constitutional academic freedom.

323. Professor Steven Goldberg has argued persuasively that the founders did intend to protect scientific analysis from religious intolerance and from government interference while authorizing the federal government to finance scientific research. Goldberg, *The Constitutional Status of American*

status, one must explain why this may be accomplished legitimately through judicial interpretation. Furthermore, one might deny that universities merit protection from democratic decision-making or that they harbor any values not adequately represented in the political process. Finally, one might express concern that an autonomous university can systematically suppress the distinctive voices of faculty and students and impose on them the ideology of trustees or administrators.

I will now defend the constitutional right of academic freedom while offering some suggestions for restricting its development. First, I will delineate why a university should be held beyond political control to some degree. Then, I will elaborate the limits of this policy and of constitutional protection.

Universities perform many functions—some competently and some poorly. In attempting to justify a distinct constitutional status for universities, we should not rely upon those functions performed by the market or government which universities may duplicate. Thus, college sports provide outstanding entertainment for millions but in a manner (too often) indistinguishable from the professional; college scientists usefully perform the tasks of applied research called for by government or business, but only economies of training and equipment distinguish this work from that routinely performed “in-house”; and colleges train young people to perform useful tasks required by business or government (and then evaluate their performance), facilitating a rational labor market. There seems to be no reason in principle why government cannot regulate colleges in performing these functions as it does any private enterprise.³²⁴ Thus, courts look just as closely at the antitrust issues raised by college football television contracts as they do at those within professional football.³²⁵ Similarly, if

Science, 1979 U. ILL. L.F. 1. One could argue that constitutional protection of science extends to all inquiry conducted in a scientific method or spirit, but this formulation does not readily resolve the paradoxes of community scholarship that lie at the heart of academic freedom.

324. In prudence, however, a court would do well to assure itself that the government regulation will not injure other university work that requires protection. For example, the Reagan Administration's placement of extensive amounts of scientific data under confidentiality restrictions, see J. SHATTUCK & M. SPENCE, *GOVERNMENT INFORMATION CONTROLS: IMPLICATIONS FOR SCHOLARSHIP, SCIENCE AND TECHNOLOGY* (1988) (criticizing new policies decreasing access to scientific data), ought to be scrutinized carefully by the courts; although the government constitutionally may (but ought not) routinely restrict dissemination of information produced specifically for its use—such as the development of defense technology—it cannot constitutionally restrict the dissemination of a scientific study merely because it provides funding for the study.

325. See *NCAA v. Board of Regents*, 468 U.S. 85 (1984) (holding that NCAA's plan to restrict total number of live televised college football games violates Sherman Act). Yet courts should not extend antitrust principles to strike down competitive restrictions actually protecting amateurism because to do so would invade university efforts to hold intercollegiate sports within the educational mission of the institution. Similarly, but more importantly, courts should not subject agreements relating to educational policy, such as standards for accreditation or principles of financial aid, to antitrust liability. See generally Gulland, Byrne & Steinbach, *Intercollegiate Athletics and Television Contracts: Beyond Economic Justifications in Antitrust Analysis of Agreements Among Colleges*, 52 *FORDHAM L. REV.* 717 (1984) (arguing that NCAA television plan should be subjected to “rule of reason” analysis because *per se* rule lacks flexibility to account for noncommercial educational objectives of NCAA position).

education were merely vocational training, there would be no reason in principle for government to refrain from establishing detailed guidelines for equal opportunity or from dictating warranty liability for universities.³²⁶ Put in terms of the analysis in Part III of this article, government legitimately can regulate those aspects of a university's work that promote democratic values. Indeed, how could this valuable work be carried out without the creation of mutual obligations between government and university? Any argument for constitutional immunity from political control must rest on those research and humanistic values of a university that are unique to it. Immunity ought not be extended any further than necessary to protect those unique attributes of the university.

And what are the indigenous values served by universities? First, the university is the preeminent institution in our society where knowledge and understanding are pursued with detachment or disinterestedness.³²⁷

The Justice Department's current investigation into whether certain private colleges and universities have agreed on tuition or financial aid policies in violation of the antitrust laws, see *Antitrust Division Probing Top Colleges' Tuition and Aid*, Wash. Post, Aug. 9, 1989, at A1, col. 7, seems on this ground grossly misconceived and potentially in violation of constitutional academic freedom. It may result in a governmental attempt to accomplish political ends by forcing the norms of the commercial marketplace on educational institutions.

326. Even vocational training at American universities usually is conducted on a critical and humanistic plane such that requirements of academic freedom and institutional autonomy apply to it. Law schools provide an important example. Teaching and scholarship are conducted in an atmosphere of academic freedom, and law schools enjoy substantial autonomy. Yet, the requirement of the bar examination, imposed by civil authorities, places constraints on the curriculum and the manner of teaching in order to ensure professional competence. Whatever the educational merits of this accommodation, it represents at least a workable resolution of institutional and civic interests.

327. Detachment or objectivity in scholarship is well described by Northrop Frye:

One starts out with a tentative goal in mind, but on the way to it one must consider evidence impartially and draw only the strictly rational conclusions from that evidence. Cooking or manipulating the evidence to make it fit a preconceived idea works against detachment. . . .

The persistence in keeping the mind in a state of disciplined sanity, the courage in facing results that may deny or contradict everything that one had hoped to achieve—these are obviously moral qualities, if the phrase means anything at all.

Frye, *The Knowledge of Good and Evil*, in *THE MORALITY OF SCHOLARSHIP* 1, 3-4 (M. Black ed. 1967). Such a criterion of analysis and exposition neither condones indifference to the social consequences of one's work nor denies that the choice of a subject or problem for examination raises moral questions not directly addressed by the requirement of detachment. See *id.* at 10-16. Indeed, the attempt to impose an imaginative structure on a certain problem may arise from a desire to resolve an emotional tangle within the scholar's personal or social history, see Hampshire, *Commitment and Imagination*, in *THE MORALITY OF SCHOLARSHIP*, *supra*, at 29, 41-55. Such imaginative hypotheses, when subsequently subjected to the rigors of critical analysis and experiment, are necessarily part of the scientific endeavor. See K. POPPER, *supra* note 92, at 31, 44-48. So understood, detachment may be an aspect of the scientific method that is followed in the natural and social sciences as well as in the humanities.

The distinction between detachment and interestedness in argument must be apparent to one who has practiced and taught law. The brief writer must pursue the interests of her client; those interests determine the position she will take on every issue of law and fact; indeed, her exposition of applicable fact and law must strain the professional conventions of veracity without exceeding them. In contrast, the writer of a law review article takes personal responsibility for every position she advocates as well as the quality of her analysis; whatever the reaction of political allies or friends, her professional advancement depends on evaluations of her work by peers who both share and oppose her views; thus, presentation, comprehension, creativity and grace must be the criteria she seeks to satisfy. Scholarship must always be less "committed" than advocacy; the scholar must be open to permitting her materials to persuade her. See Kronman, *Foreword: Legal Scholarships and Moral Education*, 90 *YALE L.J.*

Outside the university, people generally shape or criticize ideas to make money or influence public policy; this is preeminently the case with the mass media, the most powerful forum in which the exchange of ideas takes place.

Disinterested scholarship and research are both goods in themselves and benefits to society as a whole.³²⁸ For example, an analysis of Victorian poetry may lead us to wonder at the continuities and changes in aesthetic forms and social values, while we also admire or critique the literary critic's honest struggle to substantiate a general theory from diverse and recalcitrant texts. Or basic scientific research aimed at enhancing our understanding of the formation of mountain ranges both may lead to a greater appreciation of the character of natural forces and may exemplify the potential of careful, systematic human inquiry. These intellectual pursuits are good, both for the researcher and for those who study his work. The knowledge gained by basic research may improve overall welfare; for instance, geological research may also help those who search for valuable minerals or plan for earthquakes. Yet because society as a whole enjoys its value over a long period of time, no individual can profit comparatively by investing in its creation.

The second value of a university is related to the first: The disinterested search for knowledge fosters a manner of discourse that, at its best, is careful, critical, and ambitious. Again, the method of discourse is both a good in itself and a benefit to society. It is pleasant to participate in discussion that is intelligent, humane, and to the point. More importantly, scholarly discourse creates the most favorable environment in which thinkers may formulate ideas that stand apart from popular opinion or fashionable error.³²⁹

Disinterested and expert thought is also crucial for society as a whole because it provides a standard by which to gauge how trivial, debased, and false is much public discussion of affairs. It is imperative to gain perspective on the mass of "information" that pours from the print and electronic media, drivel that so often merely flatters the ignorance and

955 (1981).

A further requirement of disinterested study is that the subject be freely chosen. "Universities are places where professionals of many disciplines can follow lines of inquiry determined by themselves, individually and collegially, and not dictated by anyone else, on either ideological or practical grounds." Bickel, *The Aims of Education and the Proper Standards of the University*, in *UNIVERSITIES IN THE WESTERN WORLD* 3, 3 (P. Seabury ed. 1975).

328. For an account of knowledge as a good in itself, see J. NEWMAN, *THE IDEA OF A UNIVERSITY* 114 (M. Svaglic ed. 1982) ("there is a Knowledge, which is desirable, though nothing come of it, as being of itself a treasure, and a sufficient remuneration of years of labour"). On the usefulness of higher education, see the speech by the first President of Johns Hopkins, D. GILMAN, *THE BENEFITS WHICH SOCIETY DERIVES FROM UNIVERSITIES* (1885) (universities advance, conserve, refine, and distribute knowledge).

329. Arthur Leff wrote of the pleasure that comes to legal scholars in "those occasional moments when they say, in some concise and illuminating way, something that appears to be true." Leff, *Afterword*, 90 *YALE L.J.* 1296, 1296 (1981).

cupidity of its audience. The role of university discourse in providing an intelligent perspective has grown dramatically since the independent critics and writers who graced the serious, non-academic periodicals of the recent past became an endangered species.³³⁰ It is important to keep vital the possibility of free intellectual excellence lest we become lost to technically-proficient barbarism.³³¹

The third value also follows from the others: The university aspires to instill in those entering adulthood a capacity for mature and independent judgment. The elements of this liberal education, which are constantly revised and challenged, inform the student of the knowledge valued from the past, convey the methodological rudiments of critical thought, and foster the capacity for independent and measured thinking.³³² The term “liberal” does not, of course, refer to any political teaching but to the capacity of such an education to liberate the student from provincial self-interest. Again, liberal education is good in itself, both pleasant and virtuous, and a necessity for providing competent leadership in a complex, technocratic, and democratic society.³³³

One might reasonably complain that this description of values unique to higher education dwells unrealistically on traditional norms—honored more in the breach than in the observance—and fails to account for the main work universities perform today: training young people of widely divergent intellectual capacities and social backgrounds to be competent workers and adequate citizens, and simultaneously conducting research that supports an economically-beneficial rate of technological growth. One might complain further that the perspective I have offered on the work of a university stresses the preoccupation of an elite and unfairly deprecates the concerns of most students for competent instruction in marketable skills. These objections are powerful and reflect disagreements about priorities in higher education that have raged incessantly at least since the

330. The restriction of intellectual life to universities is described with alarm in R. JACOBY, *THE LAST INTELLECTUALS* (1987).

331. Alexander Bickel suggests a slightly different and more direct contribution that disinterested academic speech can make to the political system:

There is all too little in the way of information and opinion entering the universe of political discourse with the credit that attaches to disinterestedness. Much of what there is comes from academic and professional persons, whose credentials are certified by universities or other professional and scholarly organizations, known to be certified in accordance with neutral standards, rather than under the influence of political objectives. Persons so certified then speak with a certain moral authority, and inject into the political process something that it has difficulty generating itself—dispassionate, informed, disinterested judgment, which looks beyond the interests and objectives immediately engaged in the debate on any given issue.

Bickel, *supra* note 327, at 9.

332. This is not the place to enter the debate on what such a liberal education should contain. Recent arguments about core curricula, about the replacement of standard authors by women and non-European writers, and about the role of critical methodologies demonstrate both the necessity and difficulty of offering a vital liberal education to contemporary students.

333. See, e.g., A. GUTMANN, *supra* note 114, at 173.

passage of the Morrill Act.³³⁴ The modern university, of course, attempts to serve the few and the many, the rare and the average, the good and the useful. Its bureaucratic structure and apparent capacity for infinite expansion keep all aboard and avoid the necessity for final agreement on basic goals or purposes.

Yet who can doubt that it is the engagement of learning in the arts and sciences, requiring unfettered debate over detail and structure, that gives life to higher education both in scholarship and in teaching? The memory or promise of these things keeps talented men and women—underpaid if faculty, overcharged if students—at work through hours of drudgery. These studies animate the intellectual life of the university as purely practical skills cannot; outside of the university's precincts, liberal studies would suffer in a way that practical training and research would not. Liberal studies serve the ideals of the academy—knowledge and wisdom; practical studies serve primarily the ideals of democratic society at large—prosperity and equality.

Moreover, the nature and value of liberal studies justifies constitutional limits on legislative control while those of practical studies do not. The latter reflect the concerns normally addressed by government officials considering issues of public policy. Except for practical concerns about localism and comparative professional competence, there is no reason in principle why government cannot regulate these activities as thoroughly as it regulates elementary education or the workplace. Legislative policy may be wise or foolish, it may or may not lead to better-trained scientists or managers, but it is difficult to see how a constitutional principle limiting legislative control of the public purposes of the university would lead to more successful outcomes. Moreover, the political branches have consistently and enthusiastically supported useful research and education (although sometimes ineptly) since agricultural research proved its worth in the 1880's.

Recognizing the centrality of liberal studies to higher education both justifies constitutional protection and provides a principle for that protection. Liberal studies are central to the American notion of the free individual. They are necessary for the exchange of ideas contemplated by the First Amendment, and they exist in constant danger from majorities. Our democratic society necessarily presumes that individuals can freely govern themselves and contribute to society by rising above the flood of prejudice and self-interest.³³⁵ This vision of a democratic people, freely and prudently choosing their institutions, appears indispensable to both liberal and classical republican explanations of the virtues of our Constitution.³³⁶

334. See *supra* notes 70-72 and accompanying text.

335. See, e.g., THE FEDERALIST No. 10 (J. Madison).

336. This view is rejected, however, by the contemporary "public choice" school of political economists. See, e.g., Buchanan, *Politics, Policy, and the Pigovian Margins*, in THEORY OF PUBLIC

Liberal education teaches its students how to take comfort in the clash of opposing views by developing an individual perspective founded on a just appreciation of facts. Some aspect of this analysis can be found in Justice Brennan's opinion for the Court in *Keyishian*,³³⁷ where he pleaded that "[t]he 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.'"³³⁸ Civic and educational aims merge in their common concern to increase the capacity of citizens to exercise reason and judgment freely. The critical and informed discourse of a free university might be said to be strictly a "transcendent value."³³⁹ It offers a symbol of reasoned exchange that stands slightly above the contentions of our political life.

Similarly, the free exchange of ideas, the support of which is the central tenet of the First Amendment, is a more attractive ideal when it results in insight and elucidation rather than in manipulative persuasion or vituperative ranting. The development of a field of knowledge through reasoned debate and the progress of a student to a critical perspective are among the most appealing and fruitful forms of expressive activities. These goals are often missing in political or commercial speech. This may be the sense behind Justice Brennan's highly figurative declaration that the "classroom is peculiarly the 'marketplace of ideas.'"³⁴⁰

Finally, liberal studies may not be adequately protected by legislative majorities.³⁴¹ For the foreseeable future, scholarship and liberal education will likely remain the pursuit of a minority, appealing to those with the requisite intellectual capacity, imagination, and willingness to sacrifice immediate material rewards for the pursuit of knowledge. Those who do not recognize this allure of scholarship tend to value more concrete gains over the remote and intangible benefits of higher education. Universities can do much in the short term to cure contagious disease, alleviate pollution, and integrate minorities into the professional classes—projects close to the heart of dedicated public servants. Constitutional academic freedom requires that such wholly appropriate projects be structured so as not unduly to hamper core educational activities. Judges are sufficiently well

CHOICE 169 (J. Buchanan & R. Tollison eds. 1972).

337. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

338. *Id.* at 603 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

339. 385 U.S. at 603.

340. *Id.*

341. The protection of minority interests from the power of the majority has been a theme of constitutional analysis at least since *The Federalist*. Beginning with the *Carolene Products* footnote, the potentially tyrannical power of the majority has encouraged judges to create constitutional protection for minority interests. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). See generally J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (developing theory of judicial review based on premise that judicial role is to protect "discrete and insular minorities" from institutionalized unfairness of political process).

qualified by background (most have advanced degrees), insulated from political buffeting and economic pressures, and familiar with constitutional norms to perceive the special values of a university and to protect them from legislation. Indeed, the judicial elaboration of academic abstention has demonstrated their traditional regard for higher education. Similarly, judges have shown themselves able to accommodate civic constitutional norms, such as due process, with the legitimate needs of academic institutions. After all, it was the judiciary that fashioned constitutional academic freedom, not the legislature or the academy.

Preserving the fundamental academic values of disinterested inquiry, reasoned and critical discourse, and liberal education justifies a constitutional right of academic freedom.³⁴² These goals give intellectual and educational expression to the vision of human reason implicit in the Constitution. The concern with liberal studies also provides limits on the scope of constitutional protection. I have already argued that legislatures should be permitted to regulate those undertakings of a university unrelated to liberal studies, so that universities can continue to serve public needs and democratic values. Just as importantly, constitutional academic freedom ought not to protect institutions resembling universities but which do not pursue genuine liberal studies—that prohibit or consistently discourage professors from following controversial arguments, that recognize no role for faculty in governance, or that seek to indoctrinate rather than educate students. In other words, universities that do not respect the academic freedom of professors (understood as the core of the doctrine developed by the AAUP) or the essential intellectual freedom of students (a concept barely developed) ought not to be afforded institutional autonomy.³⁴³ This limitation, dictated by the justification for the right, may lessen fears that institutional freedom will cloak extensive violations of professors' academic freedom by institutions bent on intellectual orthodoxy. Institutions so perverse in their ends will suffer the loss of constitutional status, a risk that may deter abuses.

342. Professor Gutmann's non-legal formulation is helpful:

When governmental regulations threaten to destroy the environment for scholarship and teaching, either by substantially lowering the intellectual quality of faculty and students or by draining essential resources from academic to nonacademic areas, universities dedicated to free scholarly inquiry can legitimately assert an institutional right to academic freedom, consistent with (indeed, derived from) the right of their faculty to academic freedom.

A. GUTMANN, *supra* note 114, at 177. I, of course, believe that the constitutional right derives from the structure of disinterested thought and that it is consistent with the tradition of academic freedom.

343. Courts now apply a similar test to determine whether the receipt of government funds by a religiously-affiliated university violates the Establishment Clause of the First Amendment: whether the institution is "pervasively sectarian," thus designed to foster set precepts and proscribe behavior, or whether teaching and scholarship occur in an "atmosphere of intellectual freedom." See *Roemer v. Board of Public Works*, 426 U.S. 736, 755-56 (1976) (quoting *Roemer* district court opinion, 387 F. Supp. 1282, 1295 (D. Md. 1974)); see also *Tilton v. Richardson*, 403 U.S. 672, 680-82 (1971) (applying similar standard). In *Roemer*, the Court specifically noted that the colleges in question subscribe to, and abide by, the AAUP's 1940 *Statement of Principles on Academic Freedom*. 426 U.S. at 756.

Such a mechanism can lessen—but not eliminate—the tension between institutional autonomy and faculty autonomy. Two further points about faculty autonomy should be made: First, the interests of students, alumni, parents, employees, and other constituencies in the work of the university are legitimate; professorial concerns inevitably must co-exist with other university interests. Second, those incidents of faculty autonomy won by creative and persistent agitation through non-legal channels have tended both to be the most significant and the most prized of faculty prerogatives; internal faculty governance powers worth exercising will rarely be won by judicial decree. Government abstinence from interference in university affairs will more likely result in workable allocations of authority suitable to the diverse missions of the university than will judicial restructuring.

Stating these general principles and justifications does not eliminate problems of application. Which actual university functions are so closely tied to liberal studies that they cannot be regulated? Some may charge in frustration that I have traversed much ground to return where many scholars have started—that constitutional academic freedom protects the right of the professor to teach and write without ideological interference.³⁴⁴ While this is obviously a cardinal virtue of liberal studies, it states both too broad and too narrow a view of the place of liberal studies in the university. It is too broad in the sense, explained in Part IV, that penalization of faculty—particularly through peer evaluation—on the basis of their work is an essential part of the process of academic discourse. Thus, faculty should not be able legally to challenge good faith, internal personnel decisions as violations of academic freedom. On the other hand, non-academic officials should never be able to trouble professors about the ideological tendencies of their work. It is too narrow in the sense, elaborated in Part V, that the First Amendment should protect also the social structures and collective judgments that permit cooperative enterprises of scholarship and liberal learning to flourish.

VI. CONCLUSION

Through repetition, the scope of institutional autonomy has come to be understood as the four freedoms offered by Justice Frankfurter: “to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”³⁴⁵ The four freedoms adequately express the degree of autonomy necessary for a university to harbor liberal studies. The great virtue of these freedoms is that they recognize that liberal studies involve more than the simple act of speaking—that they require “that atmosphere which is most

344. See sources cited *supra* note 9.

345. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

conducive to speculation, experiment and creation.'³⁴⁶ This requires security, stimulation, tolerance, generosity of mind, the hiring of competent people, and the reward of excellence. Constitutional protection can preserve the possibility that academics might attain the goals of learning and scholarship. It cannot do more; it should not do less.

346. *Id.*