

Article

*35 INSTITUTIONAL ACADEMIC FREEDOM VS. FACULTY ACADEMIC FREEDOM IN PUBLIC
COLLEGES AND UNIVERSITIES: A DUBIOUS DICHOTOMY

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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." [FN1]

By 1967, academic freedom appeared to be a well-established, important First Amendment value, on which faculty in public colleges and universities could rely with considerable confidence. [FN2] In relevant terms, the First Amendment provides: "Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." [FN3] The First *36 Amendment itself, of course, makes no mention of academic freedom. But in *Keyishian*, the Supreme Court not only characterized academic freedom as "a special concern of the First Amendment;" it also implied that it is one of the "constitutional freedoms." [FN4] The Supreme Court has never over-ruled *Keyishian*. That decision, therefore, remains good law.

Nevertheless, in recent years, a number of federal appellate court decisions have held that academic freedom is, at best, ambiguous, [FN5] because colleges and universities themselves, as institutions are entitled to academic freedom, and because such institutional academic freedom can counter-balance or outweigh whatever academic freedom rights might be attributed to the faculty of these institutions. By institutional academic freedom, courts generally mean institutional autonomy. Courts sometimes equate institutions with their administrators, and conclude that institutional administrators are therefore free to retaliate against faculty for speaking or other forms of expression without regard to faculty members' academic freedom.

One federal appellate court has gone so far as to declare that academic freedom belongs exclusively to institutions, and that faculty are not, and never have been, entitled to academic freedom. This court suggests that college and university faculty are entitled only to the same limited First Amendment speech protections enjoyed by public employees in other contexts, or even to no First Amendment speech protection at all.

[T]o the extent that the Constitution recognizes any right of "academic freedom" above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors [FN6] The Supreme Court, to the extent it has constitutionalized a right of academic

freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs. [FN7]

Such recent appellate court decisions clearly diverge from the Supreme Court's identification of teachers' or faculty's academic freedom as "a special concern of the First Amendment." [FN8] This article undertakes to trace the *37 origins of this divergence. It will focus on the curious evolution of Justice Felix Frankfurter's 1957 quotation from *The Open Universities in South Africa*, [FN9] a book concerning South African universities, into what some courts seem to consider at least quasi-constitutional doctrine. [FN10] Because of the peculiar importance attached to this quotation, both the book and Justice Frankfurter's intention in quoting it will be examined closely in this article. Several stages of this evolution involve significant mis-readings or mis-characterizations of prior authority. The process has resulted in serious adverse consequences for the functioning of public colleges and universities as "the marketplace of ideas." [FN11] The article concludes by suggesting some ways in which academic freedom, a "transcendent value to all of us" [FN12] as well as to public college and university faculty, might better be accorded its rightful importance within the framework of current Supreme Court First Amendment public employee free speech jurisprudence.

I. ACADEMIC FREEDOM AS A SPECIAL CONCERN OF THE FIRST AMENDMENT

The Supreme Court's academic freedom jurisprudence traces back to the early 1950s, initially emerging in the form of dissenting and concurring opinions. The Court affirmed the importance of academic freedom in a plurality opinion in 1957. Ten years later, the Court decided *Keyishian*, the source of the language quoted at the beginning of this article.

*38 A. Early Intimations in the Supreme Court: *Adler* and *Wieman* --A Dissent and a Concurrence

1. *Adler v. Board of Education*

The first intimation that academic freedom might have some status under the Supreme Court's First Amendment jurisprudence appears in Justice Douglas' dissent in *Adler v. Board of Education*, [FN13] one of several cases that came before the Court in the wake of Senator Joseph McCarthy's quest for "subversives" in government employment. Mr. Adler was a public school teacher in New York State. He and others had sought a declaratory judgment asking the courts to find the state's so-called *Feinberg Law* unconstitutional. [FN14] The Act required the New York Board of Regents to make a listing of subversive organizations and provide by rules and regulations that teachers who belonged to such organizations be disqualified for appointment or retention in the state's schools, unless they could somehow persuade authorities otherwise. [FN15] Wrote Justice Douglas:

I cannot ... find in our constitutional scheme the power of a state to place its employees in the category of second-class citizens by denying them freedom of thought and expression. The Constitution guarantees freedom of thought and expression to everyone in our society. All are entitled to it; and none needs it more than the teacher. [FN16]

Justice Douglas continued:

What happens under this law is typical of what happens in a police state. Teachers are under constant surveillance; ... their utterances are watched for clues to dangerous thoughts. A pall is cast over the classrooms. There can be no real academic freedom in that environment. Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect. [FN17]

Justices Douglas and Black urged here that the speech rights of public employees generally, and those of teachers in particular, should not be restricted.

2. Wieman v. Updegraff

In *Wieman v. Updegraff*, [FN18] decided the same year, the Court invalidated an Oklahoma loyalty oath imposed on state college teachers. [FN19] The majority did not mention academic freedom, but in his concurring opinion, Justice Frankfurter *39 insisted on teachers' First Amendment rights of free speech, free inquiry, and freedom of association. [FN20] He praised teachers and their societal role in high terms: "To regard teachers -- in our entire educational system, from the primary grades to the university -- as the priests of our democracy is ... not to indulge in hyperbole." [FN21] He went on:

They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ... dogma. [FN22]

In Justice Frankfurter's view, teachers at all levels of academe are entitled to unrestrained freedoms of expression and association, not only under the First Amendment, but also for policy reasons: so that they could carry out their important and noble work on behalf of the larger society. He did not refer, specifically, to academic freedom in his *Wieman* concurrence, but in a later opinion, he stated that this concurrence was concerned with academic freedom. [FN23] Justice Frankfurter's concurrence in *Wieman* will be considered further in connection with his understanding of the locus of academic freedom. [FN24]

B. The Supreme Court Speaks: *Sweezy* and *Keyishian* --Plurality and Majority Opinions.

The two decisions in which the Supreme Court most clearly and forcibly discussed academic freedom are *Sweezy*, decided in 1957, and *Keyishian*, decided in 1967. Lower courts ever since have cited these cases as basic points of departure for their analysis of academic freedom claims by public college and university faculties. There is less agreement, however, as to what these cases actually stand for. Significant language in these cases is considered here.

1. *Sweezy v. New Hampshire*

Five years after *Adler* and *Wieman*, a plurality of the Court identified academic freedom as a core societal value in *Sweezy v. New Hampshire*: [FN25]

We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression -- areas in which government should be extremely reticent to tread.

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To *40 impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die. [FN26]

Mr. Paul *Sweezy* gave some invited lectures before a class at the University of New Hampshire. Pursuant to a recently enacted state law, the state attorney general interrogated *Sweezy* about these lectures and other matters. *Sweezy* declined to answer certain questions, and the state Attorney General sought to compel his testimony. [FN27] Here for the first time the Court underscored the importance of academic freedom, particularly for teachers in institutions of higher learning. Like Justice Frankfurter, concurring in *Wieman*, the *Sweezy* plurality grounded concern for academic freedom upon the importance of such freedom for the Nation's future and only by implication upon the First Amendment. [FN28] Although the plurality opinion in *Sweezy* necessarily did not represent a majority of the Court, most of its salient

language would be quoted subsequently by Supreme Court majorities in other decisions involving public university faculties' academic freedom. [\[FN29\]](#)

***41** 2. *Keyishian v. Board of Regents of the University of the State of New York*

Ten years later, the Court decided *Keyishian*, [\[FN30\]](#) yet another anti-subversive state law case. [\[FN31\]](#) As in *Sweezy*, the plaintiff-appellants were university faculty, [\[FN32\]](#) and their academic freedom was the core issue. It was here that the Court declared academic freedom both a "transcendent value" which the Nation was "deeply committed to safeguarding," and "a special concern of the First Amendment." [\[FN33\]](#)

A complex set of state laws and regulations applied to personnel of state colleges and universities. Those who belonged to listed "subversive" organizations were to be informed that they would be disqualified for continuing employment. Other provisions required "removal for 'treasonable or seditious' utterances or acts." [\[FN34\]](#) Still others barred employment on the basis of content of speech or expression. [\[FN35\]](#) Each year every teacher was to be reviewed in order "to determine whether any utterance or act of his, inside the classroom or out, came within the sanctions of the laws." [\[FN36\]](#)

The Court found some of the laws unconstitutionally overbroad, and some in violation of the First Amendment right of association. [\[FN37\]](#) The Court concluded that all or part of the state's statutory and regulatory scheme was vague and therefore in violation of the First Amendment:

We emphasize once again that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms" ... [f]or standards of permissible statutory vagueness are strict in the area of free expression. * * * Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity New York's complicated and intricate scheme plainly violates that standard. [\[FN38\]](#)

The Court set out its statement about academic freedom as a "transcendent value" and "a special concern of the First Amendment" in this context. It is clear that the Court meant that academic freedom was a special value within, that is, protected by, the First Amendment.

***42** Because of its importance, and for purposes of the brief analysis that follows, the Court's statement about academic freedom is repeated here:

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." [\[FN39\]](#)

The quoted language from *Keyishian* refers specifically to teachers as among those for whom academic freedom is "of transcendent value." It also refers twice to "the classroom," the second time as "peculiarly the marketplace of ideas." [\[FN40\]](#) The classroom, of course, is the main place where teachers, including university professors, teach. Construed narrowly, these references could be read to mean that a faculty member's academic freedom was confined to classroom speech. More broadly, "the classroom" could be understood to symbolize academic speech inclusively, whether on or off campus. *Sweezy*'s more sweeping terms tend to support the latter sense: "To impose any strait jacket upon the intellectual leaders in our colleges and universities" would impair the Nation's future. [\[FN41\]](#) Lower federal courts would later ponder the questions when and where academic free speech might be protected under the First Amendment. [\[FN42\]](#) In any case, *Keyishian* clearly stated that academic freedom is a particularly important First Amendment "freedom," which was to be enjoyed in the first instance by teachers." [\[FN43\]](#) The Court rather

clearly intended to say that teachers' academic freedom is of transcendent value to all of us. It explained why that is so in its extended quotation from the Supreme Court's plurality opinion in *Sweezy*, which immediately followed and is reproduced here.

***43** The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders of our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." [FN44]

The freedom in the community of American universities is evidently that freedom which is essential for the vital role "played by those who guide and train our youth," "the intellectual leaders of our colleges and universities," those who pursue "scholarship," in short, "teachers and students," who "must always remain free to inquire, to study, and to evaluate ..." Thus academic freedom is "of transcendent value for all of us" and not only for "the teachers concerned," because, its absence would "imperil the future of our nation;" moreover, our civilization "would stagnate and die." [FN45]

By virtue of its quotation with obvious approval by the Keyishian majority, this language from the *Sweezy* plurality became the language of the Supreme Court.

II. BACKGROUND CONCURRENCES, DOCUMENTS, OPINIONS AND DICTA

In recent years, some lower courts and commentators have contended that academic freedom has been held to inhere in colleges and universities themselves as well as, or even instead of, in their faculties. Language in a number of concurrences and lower court dicta, and a few lower court opinions often are cited in support of this understanding. The principle cases commonly cited in this connection are examined in Part II of this article in order to identify precisely what they said and what they did not say.

A. Justice Frankfurter's Concurrence in *Sweezy*.

The most commonly -- almost the only -- cited source for the idea of institutional academic freedom is Justice Frankfurter's concurring opinion in *Sweezy*. Courts and commentators occasionally refer to it, mistakenly, as the holding of the Court. This section of the present article undertakes to determine what exactly Justice Frankfurter said and meant in this concurrence. After a brief survey of the facts and the plurality's opinion, attention turns to Justice Frankfurter's quotation from *The Open Universities in South Africa*. Language from this source is often attributed to Justice Frankfurter, himself. Because of its importance in this context, *The Open Universities in South Africa* itself is then examined, both in its own historical setting, and its content. The meaning of the excerpted language quoted by Justice Frankfurter can better be understood in the context of the book as a whole, which in turn is all the more intelligible given its authors' concerns in the historical setting in which it was written. It may be assumed that Justice Frankfurter was familiar with the book and that setting. Justice Frankfurter's own concurring comments are then considered. Finally, his concurring comments in *Wieman* are examined as further indications of the understanding Justice Frankfurter intended to express in his *Sweezy* concurrence.

1. The *Sweezy* facts and the plurality.

The *Sweezy* case had to do with the First Amendment speech rights of university

professors. [FN46] Pursuant to a state law aimed at denying employment by the state to any subversive person, including those employed as teachers "by any public institution," employment by the state, [FN47] the New Hampshire Attorney General subpoenaed Mr. Sweezy to appear and answer a wide range of questions. [FN48] These questions focused upon such matters as an article Sweezy had co-authored, lectures he had given, and his beliefs. [FN49] The Supreme Court plurality concluded "that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression -- areas in which government should be extremely reticent to tread." [FN50]

There is no suggestion here or elsewhere in its opinion that the Sweezy plurality intended to sponsor any theory as to institutional academic freedom. Instead, the Court went on to high-light "[t]he essentiality of freedom in the community of American universities," "the vital role in a democracy that is played by those who guide and train our youth," and "the intellectual leaders in our colleges and universities." [FN51] The Court concluded the academic freedom portion of its opinion as follows: "Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." [FN52] It *45 seems clear that the Sweezy plurality was concerned about teachers' academic freedom. [FN53]

2. Justice Frankfurter's quotations from The Open Universities in South Africa.

In his concurring opinion in Sweezy v. New Hampshire, [FN54] Justice Frankfurter mentioned a number of statements by various scholars concerned about "governmental intervention in the intellectual life of a university." [FN55] In this context, he turned to a recently published "statement of a conference of senior [South African] scholars" [FN56] entitled The Open Universities in South Africa which he characterized as both "the latest expression on this subject," and "also perhaps the most poignant because its plea on behalf of the free spirit of the open universities of South Africa has gone unheeded." [FN57] Because the language in question has often been mis-attributed, misread, or read out of context in subsequent judicial opinions, the portion of The Open Universities in South Africa quoted by Justice Frankfurter is reproduced here in toto:

In a university knowledge is its own end, not merely a means to an end. A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest. A university is characterized by the spirit of free inquiry, its ideal being the ideal of Socrates -- "to follow the argument where it leads." This implies the right to examine, question, modify or reject traditional ideas and beliefs. Dogma and hypothesis are incompatible, and the concept of an immutable doctrine is repugnant to the spirit of a university. The concern of its scholars is not merely to add and revise facts in relation to an accepted framework, but to be ever examining and modifying the framework itself.

Freedom to reason and freedom for disputation on the basis of observation and experiment are the necessary conditions for the advancement of scientific knowledge. A sense of freedom is also necessary for creative work in the arts which, equally with scientific research, is the concern of the university.

... It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university -- to determine for itself on academic grounds who may teach, what *46 may be taught, how it shall be taught, and who may be admitted to study. [FN58]

It is noteworthy that this statement does not refer to academic freedom or to the academic freedoms of a university. Neither Justice Frankfurter nor the quoted statement identifies the role of faculty in connection with the "four essential freedoms" or in determining "who may teach, what may be taught, how it shall be taught, and who may be admitted to study." Significantly, the quoted language does not set "the university" (or its administration) over against its faculty. Very likely Justice Frankfurter was aware that the activities here characterized as "the four essential freedoms" of a university were typically exercised primarily, if not entirely, by university faculty. The quoted language refers specifically to "[t]he

concern of [a university's] scholars ... to be ever examining and modifying" [FN59] purported facts and frameworks of understanding. Evidently the statement's authors intended to say that it is "the right" of scholars "to examine, modify or reject traditional ideas and beliefs;" to enjoy "[f]reedom to reason and freedom of disputation;" and to do so in "an atmosphere which is most conducive to speculation, experiment and creation." [FN60] "It is the business of a university," the authors declared, "to provide that atmosphere." [FN61]

In addition to this quoted language, there are other indications of Justice Frankfurter's understanding of its meaning. These include Justice Frankfurter's own comments in his concurrence, and his concurrence in an earlier case, where he articulated a similar understanding as to the fundamental importance of faculty free speech in the academy. Before examining these, it is appropriate to consider the South African statement and its context, as indicative of Justice Frankfurter's intention in quoting from it.

3. The Open Universities in South Africa: the Book and its South African setting.

The historical, cultural, and political setting in which The Open Universities in South Africa was published has been described and analyzed in numerous studies. [FN62] Yet federal courts that quote Justice Frankfurter's excerpts *47 from this source only occasionally recognize what he was quoting or even that he was quoting, and rarely, if ever, attend to the document itself or to its historical setting. The Open Universities in South Africa clearly relates to a particular situation developing in South Africa in the 1950s. As can be seen, [FN63] the book itself explicitly refers to and derives from that situation. A brief summary of the situation may further illuminate its authors' concerns and intentions.

a.) The historical, cultural, and political context.

In 1948, eighteen African students were enrolled at the University of Cape Town, and sixty-five at the University of Witwatersrand. [FN64] Another fifty-six were enrolled at the University of Natal, and three hundred and seventeen at the University of South Africa. [FN65] The Universities of Cape Town and Witwatersrand were known as "open" universities because they had never barred students on the basis of race, and students of all racial categories took classes together there in the same classrooms. [FN66]

Also in 1948, the Nationalist Party swept into power following its victory at the polls. The Nationalist Party was strongly supported by Afrikaans or Afrikaners, white descendants of earlier Dutch settlers. Almost immediately, the Nationalist government declared that South Africa was leaving the British Commonwealth and would become the Republic of South Africa. [FN67] The Nationalists had campaigned on a platform of racial separation or segregation, newly designated "apartheid." [FN68] Dr. H. F. Verwoerd explained the rationale for apartheid in a speech to the South African Parliament that year:

With the disorder and chaos that were arising in the country under the administration of the previous government we (the whites and non-Europeans) were becoming a mutual danger to one another. That is really the object of the whole apartheid policy -- the whole object of the *48 policy adopted by this side of the House is to try to ensure that neither of the two will become a danger to the other.

As the nations of the world each in its own territory accomplishes its own national development, so also the opportunity will be given here to the various Native groups each to accomplish its own development each in its own territory. To each of them, from the tribal chief to the ordinary native, the chance is being given to accomplish a fair and reasonable development within his own national group. [FN69]

Pursuant to this doctrine, the Nationalist government proceeded to pass a series of laws severely limiting non-whites' freedoms and status. [FN70] In this setting, Prime Minister Malan appointed a commission headed by Dr. W. W. M. Eiselen, to

develop plans for "education of Natives as an independent race," a plan that would accord with the new government's commitment to apartheid. [FN71] The Eiselen Commission's report appeared in 1951, and recommended major changes in "Bantu" [FN72] educational programs which amounted to total educational and cultural segregation within the various Bantu reserves. [FN73] Responding to the Commission's report, the South African Parliament enacted the Bantu Education Act in 1953 (No. 47 of 1953). Among other features, this Act placed virtually all control of native ("Bantu") education under the Government Minister of Native Affairs. [FN74] Speaking in that capacity, Dr. Verwoerd explained the goals of Bantu education, observing, inter alia:

It is the policy of my department that education would have its roots entirely in the Native areas and in the Native environment and Native community. There Bantu education must be able to give itself complete expression and there it will perform its real service. The Bantu must be guided to serve his own community in all respects. There is no place for him in the European community above the level of certain forms of labour. [FN75]

Also in 1953, the Nationalist Party government appointed a commission chaired by Dr. J. E. Holloway, to "investigate and report on the practicability and financial implications of providing separate training facilities for non- *49 Europeans at universities." [FN76] In substance, the Holloway Commission reported that establishment of new non-white universities would not be feasible. [FN77] Apparently disappointed with this report, the government then appointed a new committee and announced its intent to go ahead and establish new non-white universities for Coloureds, [FN78] Asians, and Bantu, respectively. [FN79] The government introduced a "Separate University Education Bill" in Parliament early in 1957, and later the same year an amended version "was referred to a Parliamentary Commission of Inquiry." [FN80] Opposition to the proposed measure surfaced "throughout the country." [FN81] It was in this setting that resolutions were adopted, pamphlets printed, and conferences held for the purpose of defending the open universities and their autonomy. [FN82]

The Councils and faculties of the open universities had good reason to be concerned. Two years later, the South African Parliament passed The Extension of University Education Act (No. 45 of 1959). [FN83] This Act provided not only for the establishment of new state-administered universities for Africans, Coloureds and Indians; it also prohibited all other universities, including the previously "open universities," from enrolling non-white students. [FN84]

*50 b.) The Open Universities in South Africa: [FN85] Its Authors' Concerns and Proposals.

This fifty-two page book includes edited papers presented and discussed at a conference held at the University of Cape Town on January 9-11, 1957. [FN86] The conference was organized by the Council [FN87] and senior faculty members of the two open universities, the University of Cape Town and the University of Witwatersrand. [FN88] The Conference papers were written by faculty members of the two open universities, Witwatersrand and Cape Town. [FN89] The book's Preface sets out the rationale both for the conference and for publishing the papers presented there.

The University of Cape Town and the University of the Witwatersrand are called the "Open Universities" because they admit non-white students as well as white students and aim, in all academic matters, at treating non-white students on a footing of equality with white students, and without segregation. These universities are now greatly perturbed by the Government's announcement that it intends to obtain power by legislation to prohibit them from admitting non-white students as the proposed separate universities for non-whites become available.

The Councils of the two universities decided to organize jointly a conference consisting mainly of senior members of their academic staffs, and to authorize the conference to prepare for publication a reasoned statement on the value of The Open Universities in South Africa The book clearly reveals the far-reaching character of the issues raised by the Government's proposals, and no one who recognizes the gravity of these issues, in their bearing on the future welfare of South Africa, can afford to ignore the strength of the case made in support of the

open universities that they should not be deprived of freedom to continue to exercise their existing rights. [FN90]

Twenty-six members of the "Conference of Representatives" of the two universities are named at the beginning of the book, after which follows a quotation from John Milton, Areopagita:

And though all the windes of doctrin were let loose to play upon the earth, so Truth be in the field, we do injuriously by licencing and *51 prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the wors, in a free and open encounter. [FN91]

The edited conference papers are then reproduced in the form of six chapters.

Chapter One, captioned "The Essence of the Case," begins by describing the "The South African University System:"

In establishing its system of university education, South Africa has followed the practice of those older countries which have minimized the exercise of State power at the university level. Each university is a corporate body established by an Act of Parliament which endows the Council [FN92] with general control of all the affairs of the university, and endows the Senate [FN93] with specified powers in academic matters.

This is a system of university autonomy under which each university is free to choose its own staff, to decide the nature of its curricula and to select its own students from among those who are academically qualified. [FN94]

The chapter describes policies and practices of the various South African universities with regard to the admission and treatment of non-white students. It then comments on "the Government's intentions:"

Now, however, the Government seeks power to impose upon the universities a uniformity of practice, in accordance with its theory of apartheid. It proposes to establish a number of new university institutions for non-whites, some for Africans only, another -- or others -- for the Asian and Coloured groups; and the Government has announced that its intended legislation for this purpose is to provide "that as separate universities for the various non-European races become available, the white universities will be prohibited from admitting non-Europeans." When this prohibition takes full effect every university and university college in South Africa will be a segregated institution, closed to races other than the one prescribed for it by the Government [FN95]

*52 The authors' and editors' purpose in publishing the book is stated candidly: "The object of this book is to state the case for the open universities and the grounds upon which they oppose the intended legislation." [FN96] A series of "conclusions" follow, some emphasizing the positive values of the open universities' policies, and several refuting claims by proponents of academic apartheid. [FN97] The values of university autonomy and academic freedom are affirmed in this context:

The open universities declare that legislative enforcement of academic segregation on racial grounds is an unwarranted interference with university autonomy and academic freedom. These are values which should not be interfered with, save with the utmost circumspection; and the onus lies upon any government which contemplates such interference to justify its proposed action clearly and irrefutably. [FN98]

The authors then quote with approval from comments by the Holloway Commission report [FN99] regarding academic freedom. Part of this quotation is reproduced here:

The progress of science is dependent to the most profound degree on the freedom to search for the truth. Where new knowledge, new truths, may not be sought, the expansion of the range of human knowledge suffers incalculable harm. On this fact is based the fundamental claim to one of the academic freedoms of a university, namely, its freedom to seek the truth.

The concept of academic freedom has another aspect as well, namely, the freedom to communicate acquired knowledge to others and not only such knowledge but also hypotheses. The communication of their knowledge and hypotheses to one another by research workers and thinkers is of cardinal importance for their co-operation in the advancement of knowledge. To this must be added the fact that to the extent to

which a research worker or thinker is prevented from imparting his findings to others, the dissemination of knowledge and its useful application by mankind are repressed. A university's freedom to communicate knowledge to others connotes by implication the freedom of others, such as students, to receive the information imparted. On the strength of this argument the concept of academic freedom can be expanded to include the freedom of the student to study, and hence the establishment of the academic facilities to enable him to do so.

The members of a university should therefore have the right, so long as it occurs on strictly scientific lines, to think freely, to seek the truth without restraint, and to give free expression to their thoughts and findings, even if these should be erroneous. The only way to show that a *53 view is wrong, is to answer it by refutation and not to stifle it by authority imposed from above. [FN100]

This language rather clearly is referring to academic freedom as exercised by the academic members of the university, those engaged in research and communication to others, whether through teaching or publication, namely, its faculty.

The second chapter, captioned "The Idea of A University," contains the language quoted by Justice Frankfurter in his Sweezy concurrence. Its opening paragraphs again make clear the authors' appreciation of the nature of a university and the role of its faculty:

In our contemporary world universities have a variety of functions, but primarily a university exists for the pursuit of truth. Its essential form is a community of scholars searching for truth and instructing others. These two functions, research and teaching, are linked together. Without the continual seeking to extend the boundaries of knowledge and understanding, teaching atrophies; and the duty of initiating his apprentices into mastery of the knowledge which he has won for himself can be the research worker's strongest stimulus. [FN101]

Here, and in the following paragraph (which is the first paragraph quoted by Justice Frankfurter in his Sweezy concurrence), [FN102] The Open Universities in South Africa authors refer explicitly to universities' "scholars," that is, their faculty members. The language most frequently quoted by those who quote from Justice Frankfurter's concurrence is found on pages 11- 12:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "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. [FN103]

A footnote attributes the second sentence just quoted to an address by the late Dr. T. B. Davie. [FN104] Dr. Davie's statement about "the four essential freedoms," quoted in The Open Universities in South Africa and then quoted by Justice Frankfurter does not mention academic freedom. However, Dr. Davie himself was remembered as a "fearless defender of academic freedom" as *54 against government-mandated racial apartheid, [FN105] and the second chapter of The Open Universities in South Africa where the quoted language is found, later reflects on the "four pillars of university freedom," suggesting that all four are bound together and jointly constitute "the several aspects of academic freedom." [FN106] Here, as earlier in the same chapter, the authors stress the importance of academic freedom as the "atmosphere" or "climate" essential for members of a university to carry out their scholarly activities:

Thirdly, if a university is coerced into accepting a practice which is contrary to its ideal, an injury is done to the spirit of academic freedom. Such an injury has incalculable consequences in its effect upon the intellectual climate in which the members of a university live and work. It creates fear. If a university, committed to the pursuit of truth in the light of reason, is compelled to adopt a practice based, in one of its activities, on non-academic criteria, there must arise the fear that advances in knowledge may also be judged by equally irrelevant considerations. A country where such fear is created will neither retain its own best scholars nor succeed in attracting distinguished scholars from abroad. [FN107]

In the third chapter, "The Challenge," the authors argue that "[t]he attack on the open universities ... emanates from a political party which, at present, happens to

control the Government," [FN108] reviews appreciatively the report of the Holloway Commission, sets out the benefits of "the association of different races at the university level," [FN109] and critiques various features of the proposed academic apartheid legislation. The fourth chapter, "The Conflict of Ideas," focuses on broader issues: the Government's "racial ideology" which insists on the subordination of non-whites to whites versus the "liberal tradition of the Cape Colony," which "stems directly from the main tradition of Western civilization and is in general accord with the ideas, values and attitudes of the Western world." [FN110]

The fifth chapter, "The University in Society," reflects further on these two conflicting ideologies, suggesting correlations with differing concepts of education, and urging that "members" of universities must be "left free to pursue new knowledge" if the larger society is to "cope with the tasks of a new era" and thereby be enabled to survive. [FN111] Here, again, the book's authors urge that university faculties must enjoy "an atmosphere of freedom" in order to carry out their central task:

*55 For obvious reasons, those who are engaged in advancing, testing and disseminating knowledge must always be a small minority. It is no more than common sense to ask that the few who share in this important task shall be free to organize their work in the way which seems to them to be the most conducive to efficiency and success. They do their best work in an atmosphere of freedom, and to apply to them rules and regulations which might be appropriate to any other institution would be folly. Indeed this would promote confusion and inconsistency, muddle and waste. [FN112]

A final chapter, "Separate but Equal?," challenges the contention by proponents of educational apartheid that providing separate but substantially equal university facilities would obviate any "clash with academic freedom." [FN113] The authors note that South Africa, unlike the United States, has no "constitutional safeguards ... similar to the Fourteenth Amendment." [FN114] Instead, they proceed to point out numerous practical problems that would arise if the government were to undertake to achieve genuinely equal educational experiences for students attending segregated universities. These would include not only significant intangibles, [FN115] but also the inordinately and unrealistically high economic costs of attempting to do so. [FN116]

It is apparent that the authors of *The Open Universities in South Africa* intended to oppose the South African government's plans for closing the open universities to non-white students and extending apartheid to all South African universities. The government's plans, if effectuated, would, they thought, violate the universities' academic freedom. Nothing in *The Open Universities in South Africa* suggests that its authors visualized academic freedom as a shield on the arms or in the hands of universities or their administrators against faculty claims of academic freedom. Nor did the book's authors suggest that they would oppose judicial review of any claimed violations of academic freedom. Justice Frankfurter's concurring comments in *Sweezy* did not suggest that he understood the authors to so suggest either.

*56 4. Justice Frankfurter's own concurring comments.

Like the *Sweezy* plurality, Justice Frankfurter, in concurrence, focused on the state's interference with *Sweezy*'s First Amendment rights. [FN117] When Justice Frankfurter wrote about the importance of "free universities," it seems clear that he intended to characterize universities as places where scholars -- that is, the faculty -- pursue their "inquiries" and "speculations" without "governmental intervention in the intellectual life of a university." Freedom to do so, Justice Frankfurter wrote, is "[f]or society's good," and promotes both "wise government and the people's well-being." [FN118]

The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good -- if understanding be an essential need of society -- inquiries into these problems,

speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling.

These pages need not be burdened with proof, based on the testimony of a cloud of [expert] 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. It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor. [FN119]

It was in this context that Justice Frankfurter went on to quote from The Open Universities in South Africa, [FN120] representing, as it did, similar reflections on the importance of protecting scholarly freedom from external political intervention. [FN121] Neither the Sweezy plurality nor Justice Frankfurter's concurrence suggested in any way that university administrators, acting as state agents or the government, should be free to overrule speech by college or university faculty. That kind of situation simply was not before the Court.

*57 Neither Justice Frankfurter nor the language he quoted from The Open Universities in South Africa mentioned academic freedom. [FN122] However, there can be little doubt but that both in quoting The Open Universities in South Africa and in his own comments, Justice Frankfurter was referring to the First Amendment speech rights of faculty, whether as teachers or scholars. The same is abundantly clear in Justice Frankfurter's concurring opinion in *Wieman v. Updegraff*, [FN123] an Oklahoma loyalty oath case. That opinion is examined briefly, since it provides further insight into Justice Frankfurter's concerns as expressed also in his Sweezy concurrence.

5. Justice Frankfurter's concurrence in *Wieman*.

An Oklahoma statute required all state officers and employees to subscribe to a loyalty oath. *Wieman* and the other appellants, who had declined to do so, were members of the faculty and staff of the Oklahoma Agricultural and Mechanical College. [FN124] Justice Frankfurter's concerns in *Wieman* substantially parallel those he expressed in his Sweezy concurrence five years later. Both because this language makes clear Justice Frankfurter's focus upon individual teachers' speech right, [FN125] and because he forcibly emphasizes the importance of free academic thought and expression [FN126] for the nation's democratic society, [FN127] his concurrence in *Wieman* is quoted here at some length:

That our democracy ultimately rests on public opinion is a platitude of speech but not a commonplace in action. Public opinion is the ultimate *58 reliance of our society only if it be disciplined and responsible. It can be disciplined and responsible only if habits of open-mindedness and of critical inquiry are acquired in the formative years of our citizens. The process of education has naturally enough been the basis of hope for the perdurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards.

To regard teachers -- in our entire educational system, from the primary grades to the university -- as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedom of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or state government. [FN128]

The functions of educational institutions in our national life and the conditions under which alone they can adequately perform them are at the basis of these limitations upon state and national power. [FN129]

*59 Neither this concurrence, nor Justice Frankfurter's concurrence in *Sweezy* -- much less the language quoted, respectively, from Chancellor Hutchins or *The Open Universities in South Africa* -- constitute binding authority. But from what Justice Frankfurter says in these concurrences it appears unlikely that he quoted from *The Open Universities in South Africa* in *Sweezy* in order to endorse the idea of institutional academic freedom as over against academic free speech rights of teachers or faculty members. Nor is there any basis in Justice Frankfurter's concurrences for supposing that he would have considered judicial review of a faculty member's academic freedom claim as governmental interference with a university's academic freedom.

The *Open Universities in South Africa* and Justice Frankfurter's concurrence in *Sweezy* were both published in 1957. [FN130] Before that date, no federal court or law journal commentator had even mentioned the concept of institutional academic freedom, much less suggested that a college's or university's putative academic freedom could override or trump faculty members' academic freedom. Faculty academic freedom had been an established professional standard in American higher education as early as 1915. [FN131] Nor did any federal court identify institutional academic freedom during the two decades following 1957. Institutional academic freedom as a matter of law did not exist. Soon afterwards, however, a few Justices and judges began to generate language that others would build upon, with strange consequences.

B. *Regents v. Bakke*: Justice Powell's Concurring Opinion.

The Supreme Court decided *Regents v. Bakke* [FN132] in 1978. Allan Bakke had been denied admission to the University of California Medical School although, he contended, less qualified minority students had been admitted instead under the School's special admission policy. Bakke claimed that the school thereby had violated his Fourteenth Amendment equal protection rights. [FN133]

The California courts held that the School's admissions policy violated Title VI of the Civil Rights Act of 1968 [FN134] and the equal protection clause of the Fourteenth Amendment. [FN135] Justice Powell "announced the judgment of the Court" [FN136] which was otherwise evenly divided as to whether race could ever be a factor in a professional school or university's admissions policy. Although the other Justices wrote separately, concurring in the result, some *60 joining various portions, none joined all of Justice Powell's single or "plurality" opinion. [FN137]

In part of his opinion, Justice Powell reviewed the Medical School's goal of attaining ethnic diversity in its student body. [FN138] He began this review by stating: "Academic freedom, though not a specifically enumerated Constitutional right, long has been viewed as a special concern of the First Amendment." [FN139] He then added: "The freedom of a university to make its own judgments as to education includes the selection of its student body. Mr. Justice Frankfurter summarized the 'four essential freedoms' that constitute academic freedom." [FN140]

Justice Powell went on to quote from Justice Frankfurter's concurrence in *Sweezy*:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "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. [FN141]

Possibly Justice Powell was unaware that neither Justice Frankfurter's concurrence in *Sweezy* nor the quoted excerpt from *The Open Universities in South Africa* contained any reference to academic freedom. Immediately after quoting this excerpt, Justice Powell, somewhat imprecisely declared, "Our national commitment to the safeguarding of these freedoms within the university communities was emphasized in *Keyishian v. Board of Regents*." [FN142] *Keyishian*, of course, contained no mention

of the "four essential freedoms" referred to in Justice Frankfurter's quotation from The Open Universities in South Africa. It seems probable that Justice Powell understood these "freedoms" *61 as those to be enjoyed, as in Keyishian, by university faculty. This likelihood is evidenced not only by his reference to "the safeguarding of these freedoms within university communities [,]" [FN143] but also by his then proceeding to quote language from Keyishian that referred specifically to teachers' academic freedom:

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 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." [FN144]

This language expresses the understanding that academic freedom is a First Amendment value of "transcendent" importance that belongs to teachers; but it is so valued not only by teachers, but by "all of us," because of its importance in the education of the Nation's rising generations of leaders, upon whom, in turn, "[t]he Nation's future depends." In the Bakke context, Justice Powell's point, evidently, was that the Nation would be better served, in training its future leaders, by the Medical School's program which provided for enrolling a diverse student body. "As the Court noted in Keyishian, it is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." [FN145] Justice Powell then concluded his constitutional analysis of this question by stating: "Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to 'the robust exchange of ideas,' petitioner invokes a countervailing interest, that of the First Amendment." [FN146]

*62 Justice Powell did not undertake to explain how the First Amendment might apply to the Regents' or Medical School's situation. [FN147] Selecting students is not aptly characterized as speech. If selecting students were a right guaranteed as an aspect of academic freedom, such freedom would seem to go beyond the reach of the First Amendment, and thus present a conceptual problem for constitutional analysis. Justice Powell did not, however, have to attempt to address or resolve this problem. Instead, he concluded that the Medical School's program violated the Fourteenth Amendment equal protection clause. [FN148] The case was not decided on First Amendment speech or academic freedom grounds. [FN149]

To the extent that Justice Powell's opinion endorsed "[t]he freedom of a university to make its own judgments as to education includ[ing] the selection of its student body," [FN150] it still remained an open question who constituted "the university" for purposes of enjoying or exercising this freedom. It is significant that in this case the faculty of the Medical School were the primary actors. It was "the faculty" who "devised [the] special admissions program to increase the representation of 'disadvantaged' students in each Medical School class." [FN151] Faculty also interviewed applicants and served on the Admissions Committee. [FN152]

Consequently it appears that when Justice Powell characterized "[t]he freedom of a university to make its own judgments as to education" including "the selection of its student body" as a matter of "academic freedom," [FN153] he *63 was referring to the academic institution as a whole, in a case where this freedom was primarily and largely exercised by its faculty members. From Bakke's perspective, the Medical School's faculty, together with those administrators involved in the admission process, were "the state" for purposes of his Fourteenth Amendment equal protection claim. This was not a case in which the Medical School or its administrators claimed a "freedom" other than that which was exercised by the Medical School's faculty. Whatever its other limitations or merits, Justice Powell's Bakke opinion does not in any way touch on, much less justify any claim by a university's administration to "academic freedom" in opposition to its faculty's interest in academic freedom under the First Amendment. [FN154] Moreover, Justice Powell's opinion cannot be said to stand for the proposition that the federal courts should abstain from adjudicating First Amendment claims involving a university or college's policies and practices, or the idea that actions by university administrators that infringe faculty members'

Constitutional rights should somehow be exempted from judicial review. In *Bakke*, the Court did review the California courts' holding that the Medical School's special admissions program violated Title VI of the 1964 Civil Rights Act and the Fourteenth Amendment's equal protection clause. [FN155] And, despite the Medical School's negative determination as to Bakke's admission, [FN156] Justice Powell, joined by all other members of the Supreme Court, ordered Bakke admitted to the Medical School. [FN157]

Since no other Supreme Court Justices joined in Justice Powell's discussion of academic freedom [FN158] that portion of his opinion [FN159] could not constitute binding authority -- much less any kind of "constitutionalization" of institutional (or any other version of) academic freedom. [FN160]

***64** C. Cooper v. Ross: "A Fundamental Tension"?

It was not until 1979 that a federal court first hinted that there might be such a thing as institutional academic freedom and that such freedom might be opposed to the academic freedom of faculty. As will be noted, it did so only in dicta. The case was *Cooper v. Ross*, [FN161] a district court decision written by Eighth Circuit Court of Appeals Judge Gerald W. Heany. [FN162]

Grant Cooper had been an untenured assistant professor of history at an Arkansas public university. In 1973, following his third year of teaching, he joined the Progressive Labor Party (PLP), and informed his classes that he was a communist and a member of the PLP, and that he taught "from a Marxist point of view." [FN163] That fall, University officials informed Cooper that he would not be re-appointed. The district court's salient language reads as follows:

The present case is particularly difficult because it involves a fundamental tension between the academic freedom of the individual teacher to be free of restraints from the university administration, and the academic freedom of the university to be free of government, including judicial, interference. [FN164]

Judge Heany did not cite to any case law or other authority in support of the proposition that the University or its administration was endowed with academic freedom. [FN165] Moreover, Judge Heany cited no authority for his statement that a university's purported academic freedom could conflict with the academic freedom of individual faculty. No court previously had so held. Nor did he cite authority for the extraordinary statement that a university's academic freedom includes the right or privilege "to be free of government, including judicial, interference." In constitutional jurisprudence, judicial review of a claimed constitutional violation has never been characterized as "governmental" action. [FN166] Possibly Judge Heany (or his clerk) mistakenly assumed that case law supported these last two statements.

***65** Judge Heany commented further as to academic freedom, focusing on the question whether a teacher (here a university faculty member) has a "First Amendment and academic freedom" right to determine his own teaching methods: "Case law considering the extent to which the First Amendment and academic freedom protect a teacher's choice of teaching methodology is surprisingly sparse and the results are not entirely consistent." [FN167] The court concluded, however, "this sensitive and difficult issue need not be reached in this case." [FN168] Instead, it found that the University's reasons for Cooper's non-renewal were pretextual, and that his non-renewal violated his First Amendment rights apart from any need to "invoke" academic freedom doctrine with respect to his teaching methods. [FN169]

Thus, the Cooper court decided the case on the basis of the Supreme Court's analytical paradigm from *Mt. Healthy City School District Board of Education v. Doyle*, [FN170] a public school teacher First Amendment speech case where there was no discussion of academic freedom. [FN171] Consequently, the Cooper court's comments as to academic freedom may properly be regarded as dicta. Moreover, as has been noted, this court's dichotomy between university and faculty academic freedom is dicta without any foundation in prior case law. The same is true as to the court's dicta to the effect that a university's ***66** academic freedom exempts its administration from judicial review of constitutionally grounded complaints by

faculty.

D. Justice Stevens' Concurring Comments on "the Academic Freedom of Public Universities" in *Widmar v. Vincent*. [FN172]

A university's policy excluded religious groups from using facilities that were available to other registered student organizations. [FN173] Justice Powell's majority opinion did not mention academic freedom. Instead, the Court found the university's policy failed to meet the "exacting scrutiny" standard appropriate when states undertake to regulate speech on the basis of content. [FN174]

Justice Stevens' concurring opinion [FN175] objected to the majority's analysis:

In my opinion the use of the terms "compelling state interest" and "public forum" to analyze the question presented in this case may needlessly undermine the academic freedom of public universities. [FN176]

Nor do I see why a university should have to establish a "compelling state interest" to defend its decision to permit one group to use the facility and not the other Judgments of this kind should be made by academicians, not by federal judges, [FN177] and their standards for decision should not be encumbered with ambiguous phrases like "compelling state interest." [FN178]

Presumably Justice Stevens derived his understanding that public universities enjoy academic freedom from Justice Powell's gloss in *Bakke* on Justice Frankfurter's quotation from *The Open Universities in South Africa* [FN179] which *67 quotation, oddly, Justice Stevens mis-attributed to T. H. Huxley. [FN180] Nothing here suggests that Justice Stevens anticipated any conflict between public universities' putative academic freedom and faculty academic freedom. His comments here focus on universities or "academicians" in relation to students. Moreover, the notion that public institutions of higher learning themselves are entitled to academic freedom had yet to obtain the support of a majority of the Supreme Court. Nor has it done so to date.

E. Early Seventh Circuit Decisions.

Eventually, it was the Seventh Circuit that first developed the idea that a university's academic freedom might be divided or divorced from that of its faculty. It did not do so immediately, but there were early indications that this idea would emerge. These are the main early such indications.

1. *Dow Chemical Company v. Allen*: [FN181] Institutional academic freedom opposed to, or distinct from, faculty academic freedom?

James Allen and another faculty member at the University of Wisconsin were studying the effects of a chemical herbicide on rhesus monkeys. Based in part on one of their studies, the U.S. Environmental Protection Agency (EPA) ordered emergency suspension of certain uses of two of these herbicides, both of which were manufactured by Dow Chemical Co. Pursuant to a hearing before the EPA, the administrative law judge (ALJ) issued subpoenas requiring the two faculty researchers to produce all documents relating to their studies. They declined to do so, and the district court denied Dow's petition to enforce the subpoenas. [FN182] Dow appealed. The Seventh Circuit affirmed the district court's refusal to enforce the subpoenas, citing a number of relevant considerations.

Among these, the court included a discussion of academic freedom. [FN183] The academic freedom issue was raised for the first time on appeal in an amicus brief filed by the State of Wisconsin. [FN184] In this discussion, the court quoted *Bakke*, *Keyishian*, and *Sweezy* on the importance of academic freedom for our nation, democracy, and civilization, and on the need to protect *68 such freedom from governmental intrusion. In this context, the court stated: "We think it clear that whatever constitutional protection is afforded by the First Amendment extends as

readily to the scholar in the laboratory as to the teacher in the classroom." [FN185]

The Seventh Circuit panel affirmed the district court's judgment on several grounds, including the faculty members' interest in academic freedom. [FN186] In discussing academic freedom, the court somewhat ambiguously touched upon the matter of institutional academic freedom:

Case law considering the standard to be applied where the issue is academic freedom of the university to be free of governmental interference, as opposed to academic freedom of the individual teacher to be free of restraints from the university administration, is surprisingly sparse. [FN187]

The reason the court found such case law sparse is that there was none. [FN188] As stated, it is unclear whether the panel intended to suggest that the "academic freedom of the university" might conflict with the "academic freedom of the individual," or whether the court here meant only to distinguish between the two characterizations of academic freedom in order to identify applicable case law. In any event, the distinction was gratuitous, for the issue the court was considering was whether enforcement of the ALJ's subpoena would impinge upon the faculty researchers' academic freedom. [FN189] To the extent that enforcement of the subpoenas would have infringed upon individual faculty's academic freedom, such infringement also would have affected academic freedom within the university, for it is the faculty of a university who exercise *69 that freedom, here through their research. The Dow court apparently so understood matters:

In the present case, the ... subpoenas by their terms would compel the researchers to turn over to Dow virtually every scrap of paper ... made during the extended period that those studies have been in progress at the university These requirements threaten substantial intrusion into the enterprise of university research, and there are several reasons to think they are capable of chilling the exercise of academic freedom Indeed it is probably fair to say that the character and extent of intervention would be such that, regardless of its purpose, it would "inevitably tend[] to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor. [FN190]

And, the court added, concluding its discussion of the academic freedom question:

For present purposes, our point is simply that respondents' interest in academic freedom may properly figure into the legal calculation of whether forced disclosure would be reasonable Based on the facts before us ... we conclude there is little to justify an intrusion into university life which would risk substantially chilling the exercise of academic freedom. [FN191]

It does not appear that the Seventh Circuit in Dow understood that the faculty's academic freedom and that of the university were in any way in conflict or mutual opposition. In this case, they were actually identical, or simply two ways of stating the same thing. Such was true also, as previously suggested, in the case of Justice Powell's opinion in Bakke, and Justice Frankfurter's concurrence in Sweezy. In Dow, there was no question of any conflict between the researchers' interests and those of the University. If the critical language derived from Cooper [FN192] were read to say that such conflict existed, that reading probably would be in error. At any rate, Dow does not stand for the proposition that a university's academic freedom conflicts with individual faculty academic freedom. No such conflict was before the Dow court, and the court certainly did not decide the case on the basis of any such purported conflict.

*70 2. Judge Coffey's Concurring Opinion in Martin v. Helstad: [FN193] Academic Freedom of Administrators to Direct and Determine Faculty Make-up.

Henry Martin had applied for admission to the University of Wisconsin School of Law and was subsequently notified of his acceptance. The School's application form asked applicants whether they had ever been convicted of criminal conduct. On his form, Martin reported that he was "a former legal offender," but had received a full pardon from the Governor. He neglected to report that he also had been convicted of

a federal offense and was then serving a 10-year sentence in federal prison. On learning of the unreported offense and after giving Martin opportunity to explain the federal conviction and incarceration and account for failing to disclose these facts, the School revoked Martin's admission. Martin then sought injunctive relief to prevent the School from barring his registration. He contended that the School's revocation violated his procedural due process rights. The district court held that Martin had a property interest in his admission, but had received adequate due process. [\[FN194\]](#)

On appeal, the Seventh Circuit panel assumed the existence of such a property interest for analytical purposes. [\[FN195\]](#) Turning to the due process question, the panel applied the test set out in *Mathews v. Eldridge*, [\[FN196\]](#) but noted that "academic dismissals, as opposed to disciplinary dismissals, require no hearing at all." [\[FN197\]](#) It then cited Justice Powell's concurring opinion in *Bakke* as authority for stating: "The deference accorded academic dismissals is based on the policy of fostering academic freedom at the university level This policy is of greater importance in the case of admissions." [\[FN198\]](#) Evidently the Seventh Circuit panel agreed with Justice Powell that a university's admission procedures were entitled to special deference as an exercise of its academic freedom or that of its faculty. Like Justice Powell in *Bakke*, the Martin panel majority did not attempt, and perhaps did not intend, to distinguish between the institution's academic freedom and that of its faculty. [\[FN199\]](#) The panel concluded by upholding the district court's finding that the School had provided sufficient due process, and that a preliminary injunction was not warranted. [\[FN200\]](#)

*71 Judge Coffey concurred in the result, but disagreed with the majority's "assumption" that Martin had a constitutionally protected property interest in attending the School. [\[FN201\]](#) Judge Coffey would have held that Martin had no such interest, both because his acceptance was obtained through "incomplete, false, and misleading information," and because "in the interest of academic freedom, a mere potential student enrollee cannot be said to have a property interest in attending a particular university." [\[FN202\]](#) It is unclear why Judge Coffey thought it necessary to invoke "the interest of academic freedom." His fraudulent inducement analysis should have been dispositive. [\[FN203\]](#) Nevertheless, Judge Coffey proceeded to consider the hypothetical question whether "a potential student enrollee, who has received a letter of acceptance from a particular university" that was not obtained by fraud, "but has not yet enrolled therein [has] for purposes of due process analysis, a constitutionally protected interest in attending that university." [\[FN204\]](#) In the context of analyzing this hypothetical, Judge Coffey stated his own views regarding the nature and scope of academic freedom:

I would hold that the interest of academic freedom includes the right of a university administration to determine who may be admitted to study as well as a right to determine and direct its faculty and student body. [\[FN205\]](#) It is my belief that the University of Wisconsin Law School and other academic institutions, not federal judges, are more qualified to make sensitive academic judgments as to their faculty's make up as well as who should be admitted to study and upon what conditions they shall be admitted.

Basic academic decisions, such as the determination as to the make-up of the faculty and who may be a student on the first day of classes, have long been regarded among the essential prerogatives and freedoms of the university administration. [\[FN206\]](#)

Judge Coffey did not cite any authority for his belief that academic freedom endows university administrators with "the right" to "direct" their faculty or with "prerogatives and freedoms" to determine their faculty's "make-up." The expression "... have long been regarded ..." may have been borrowed from Justice Powell's observation in *Bakke* that, "[a]cademic freedom ... long has been viewed as a special concern of the First Amendment." [\[FN207\]](#) Judge Coffey then cited Justice Powell's plurality opinion in *Bakke*, quoting Justice Frankfurter's quotation in *Sweezy* from *The Open Universities in South Africa* about "the four essential freedoms." [\[FN208\]](#)

*72 Here, apparently for the first time, a federal judge construed this language to refer to the academic freedom of university administrators. Moreover, for the first time, we find this language reinterpreted to refer to administrative

prerogatives and freedoms vis à vis faculty, viz., to "direct" faculty, and "determine the make up of the faculty." [FN209] These references to faculty are, of course, dicta, since the case before the Martin court had nothing to do with directing faculty or determining faculty "make up." Moreover, these references are dicta within dicta, since the issue as to which Judge Coffey was expressing his beliefs was only a hypothetical. [FN210] And, of course, Judge Coffey's concurring opinion, as such, was not binding authority as to matters subsequently before any federal court.

3. E.E.O.C. v. University of Notre Dame du Lac: [FN211] An Institutional "Qualified" or "Limited" Academic Freedom Privilege.

A separate Seventh Circuit panel decision the same year as Martin concluded that colleges and universities may invoke "a limited academic freedom privilege" in the face of challenges to their tenure decisions. [FN212] Judge Coffey wrote for a unanimous panel. Oscar Brookins, a former assistant professor of economics at the University, filed charges with the Equal Employment Opportunity Commission (E.E.O.C.) alleging that he had been denied tenure on the basis of his race. [FN213] Pursuant to its investigation, the E.E.O.C. issued an administrative subpoena broadly calling for the University to produce complete, unredacted personnel records for all faculty in the Economics Department during a given timeframe. When the University declined to comply, the E.E.O.C. filed for enforcement in federal district court. [FN214] The University objected, claiming, among other reasons, a qualified academic privilege:

[T]he University argued that the personnel files in question contained peer review evaluations which were made with the assurance and expectation that the evaluations would remain confidential, and therefore the peer review evaluations were protected from disclosure by a qualified academic privilege. [FN215] The University contended that pursuant to *73 the qualified academic privilege, it should be permitted to delete the names and any and all identifying information of the academicians participating in the peer review process before giving the files to the E.E.O.C. [FN216]

It is noteworthy that the University did not claim an academic freedom privilege. [FN217] Nevertheless, in its analysis, the court proceeded to quote from Justice Powell's concurrence in Bakke, including what Justice Powell had there identified as Justice Frankfurter's summary of "the 'four essential freedoms' that constitute academic freedom," notably, the freedom "of a university -- to determine for itself on academic grounds who may teach" [FN218] Judge Coffey stated that earlier Seventh Circuit decisions "also recognize the constitutional dimensions of academic freedom." [FN219] In conclusion the court stated:

After weighing the respective interests, we recognize in this case a qualified academic freedom privilege protecting academic institutions against the disclosure of the names and identities of persons participating in the peer review process thereby reaffirming long-standing policies of academic institutions. [FN220]

It is unclear why the court characterized this privilege as an academic freedom privilege. [FN221] Perhaps it considered this qualified privilege a matter of academic freedom because the same court had reflected on academic freedom recently in the Dow and Martin cases. The panel commented that it here joined "other courts in recognizing a limited academic freedom privilege *74 in the context of challenges to college or university tenure decisions." [FN222] But none of the cases cited as authority in fact recognized a limited or qualified academic freedom privilege. [FN223] Clearly the court was concerned about protecting academic freedom, although it did not specify whose academic freedom was at stake:

The restrictions and limitations we have placed on the access to the records in question here are necessary ... to preserve the integrity of the academic freedom at stake Secret voting without discussion and reason would be encouraged and lawsuits could conceivably be filed by every unsuccessful tenure applicant in an effort to pierce the qualified academic privilege. Our decision assists in "safeguarding academic freedom which is of transcendent value to all of us and not merely to the [educators] concerned." [FN224]

Here again as in *Sweezy* and *Bakke*, the academic freedom in question was that of the faculty, and implicitly, it was their academic freedom, exercised through the peer review process, that the court intended to protect:

The process of peer evaluation has evolved as the best and most reliable method of providing academic excellence and freedom by assuring that faculty tenure decisions will be made objectively on the basis of frank and unrestrained critiques and discussions of a candidate's academic *75 qualifications Moreover, it is evident that confidentiality is absolutely essential to the proper functioning of the faculty tenure review process. The tenure review process requires that written and oral evaluations be completely candid, critical, objective and thorough in order that the University might grant tenure only to the most qualified candidates based on merit and ability to work effectively with colleagues, students, and the administration. For these reasons, academicians who are selected to evaluate their peers have, since the inception of the academic tenure concept, been assured that their critiques and discussions will remain confidential. Without this assurance of confidentiality, academicians will be reluctant to offer candid and frank evaluations in the future. [\[FN225\]](#)

It is unclear whether the court understood faculty evaluation of tenure candidates as itself an exercise of academic freedom, or whether the court meant that the integrity of the tenure review process was essential to assure that those who receive tenure in colleges and universities will be qualified to contribute to academic excellence and free debate and thereby promote academic freedom in their respective institutions. [\[FN226\]](#) Possibly the court had both of these considerations in mind. In any event, *Notre Dame* does not stand for the proposition that a university's academic freedom in any way conflicts with the academic freedom of its faculty. If two aspects of academic freedom are to be distinguished, here it can only be said that the academic freedom exercised by the faculty through participation in the peer review process contributes to the atmosphere of academic freedom in the university, which in turn is essential for the exercise of academic freedom by its faculty.

F. *University of Pennsylvania v. E.E.O.C.*: The Supreme Court Says No Privilege to Withhold.

The concept of an institutional qualified academic freedom privilege surfaced again in 1990 in *University of Pennsylvania v. E.E.O.C.* [\[FN227\]](#) Rosalie Tung was an untenured associate professor in the University's Wharton School of Business. A majority of her department's faculty had voted favorably, but the University's Personnel Committee denied her tenure. On the basis of her allegations of discrimination, the E.E.O.C. investigated her complaint and subpoenaed various relevant documents from the University. When the University persisted in refusing to produce certain peer review documents, [\[FN228\]](#) the *76 E.E.O.C. obtained an enforcement order from the district court. The Third Circuit affirmed. [\[FN229\]](#) In view of the conflict between the Third Circuit's holding in this case and the Seventh Circuit's decision in *E.E.O.C. v. University of Notre Dame du Lac*, [\[FN230\]](#) the Court granted certiorari. [\[FN231\]](#)

Before the Supreme Court, the University claimed a First Amendment right to academic freedom which would entitle it to withhold the subpoenaed materials. [\[FN232\]](#) The University placed "special reliance" on Justice Frankfurter's *Sweezy* concurrence, where he referred to a university's freedom to "determine for itself on academic grounds who may teach." [\[FN233\]](#)

Writing for a unanimous Supreme Court, Justice Blackmun addressed the University's academic freedom claim: [\[FN234\]](#)

In our view, petitioner's reliance on the so-called academic-freedom cases is somewhat misplaced. In those cases government was attempting to control or direct the content of the speech engaged in by the university or those affiliated with it. In *Sweezy* ..., the Court invalidated the conviction of a person found in contempt for refusing to answer questions about the content of a lecture he had delivered at a state university. Similarly, in *Keyishian*, the Court invalidated a network of state laws that required public employees, including teachers at state universities,

to make certifications with respect to their membership in the Communist Party. When in those cases, the Court spoke of "academic freedom" and the right to determine "on academic grounds who may teach" the Court was speaking in reaction to content-based regulation. [FN235]

This statement indicates confusion at two significant points. Contrary to what is said here, neither Sweezy nor Keyishian involved any attempt "to control or direct the content of the speech engaged in by the university." [FN236] "The University" had not spoken. And in neither of these cases did the Court speak "of ... the right to determine on 'academic grounds who may *77 teach'" This language derives from Justice Frankfurter's quotation from *The Open Universities in South Africa* in his concurring opinion. [FN237] A concurring opinion -- however brilliant its reasoning or renowned its writer -- cannot be said to speak for the Court. [FN238]

The Court did recognize that the University's academic freedom claim was actually made on behalf of its faculty who had served on the various tenure review committees:

[C]ourts have stressed the importance of avoiding second-guessing of legitimate academic judgments. This Court itself has cautioned that "judges ... asked to review the substance of a genuinely academic decision ... should show great respect for the faculty's professional judgment." ... Nothing we say today should be understood as a retreat from this principle of respect for legitimate academic decisionmaking. [FN239]

The Court characterized the University's position as asking it "to recognize an expanded right of academic freedom to protect confidential peer review materials from disclosure." [FN240] The Court declined to do this: "[W]e think the First Amendment cannot be extended to embrace petitioner's claim." [FN241] The Court did not specifically overturn the Seventh Circuit's holding in *Notre Dame* or related cases which had identified a "qualified" or "limited" academic privilege to withhold personnel records from E.E.O.C. investigation of *78 discrimination claims. [FN242] It is unlikely, however, that after *University of Pennsylvania* such privilege remained good law. [FN243]

III. ACADEMIC FREEDOM --A HOUSE DIVIDED AGAINST ITSELF, AND THEREFORE "EQUIVOCAL" OR "INCONSISTENT"

A Seventh Circuit decision in 1985 included language to the effect that academic freedom is an "equivocal" term because it refers both to institutional academic freedom and individual academic freedom, and that these two freedoms conflict with each other. This understanding may be reflected in a later footnote by Justice Stevens, who was associated with the Seventh Circuit. This understanding, here designated the "Piarowski doctrine," is echoed in several subsequent Seventh Circuit opinions.

A. *Piarowski v. Illinois Community College District 515*: [FN244] The term is "equivocal" -- Disjunction and Conflict.

Albert Piarowski was chairman of the art department at Prairie State College, an Illinois junior college. He was also one of the college's art gallery co-coordinators. The main gallery was an open alcove next to the college's "mall" on the main floor of its principal building, and was in full view of passers-by en route to numerous campus facilities there. Piarowski contributed several of his own works to a faculty exhibition. Three of his pieces -- all stained glass "windows" -- depicted naked brown women, one evidently masturbating, another with some kind of anal protrusion, and the third embracing a white male's "grotesquely oversized phallus." [FN245] Following various complaints, College officials ordered Piarowski to remove the three windows, suggesting they be placed in an accessible alternative location. One of the College officials removed the windows after Piarowski refused to do so. [FN246] Piarowski sued unsuccessfully in federal district court, claiming that by ordering him to remove the three pieces, the officials had "violated his

rights under the First Amendment." [FN247] On appeal, the Seventh Circuit panel concluded that the main floor gallery was not a public forum, and that even if it had been, faculty as employees "are not members of the public." [FN248] Without designating its standard of review, the panel evidently applied some version of heightened scrutiny analysis, [FN249] concluding as follows:

*79 When we consider that the expression in this case was not political, that it was regulated rather than suppressed, that the plaintiff is not only a faculty member but an administrator, that good alternative sites may have been available to him, and that in short he is claiming a First Amendment right to exhibit sexually explicit and racially offensive art work in what amounts to the busiest corridor in a college that employs him in a responsible administrative as well as academic positions, we are driven to conclude that the defendants did not infringe the plaintiff's First Amendment rights merely by ordering him to move the art to another room in the same building. [FN250]

Nevertheless, the court devoted a full paragraph to its reflections on academic freedom. [FN251] These reflections apparently are in the nature of dicta, since they do not otherwise figure in the court's analysis. However, since they are the basis for subsequent Seventh Circuit doctrine, these reflections are quoted here at length.

We may assume ... that public colleges do not have carte blanche to regulate the expression of ideas by faculty members in the parts of the college that are not public forums. We state this as an assumption rather than as a conclusion because, though many decisions describe "academic freedom" as an aspect of the freedom of speech that is protected against government abridgement by the First Amendment ... [FN252] the term is equivocal. It is used to denote both the freedom of the academy to pursue its ends without interference from the government (the sense in which it is used, for example, in Justice Powell's opinion in Regents of the University of California v. Bakke, or in our recent decision in EEOC v. University of Notre Dame Du Lac, and the freedom of the individual teacher (or in some versions -- indeed in most cases -- the student) to pursue his ends without interference from the academy; and these two freedoms are in conflict, as in this case. [FN253]

The only previous case suggesting that there might be possible conflict between the academic freedom of the individual teacher and the "academic freedom" of the institution to be free of governmental, viz., judicial "interference," was Cooper v. Ross, and that suggestion was only in dicta. [FN254] The *80 Piarowski court did not cite Cooper or any other authority for stating that "these two freedoms are in conflict." [FN255]

The court's citation to Justice Powell's opinion in Bakke appears to be inapposite. In his discussion of academic freedom, [FN256] Justice Powell did not state or even suggest that the term "academic freedom" is "equivocal." He did not distinguish between two types of academic freedom, much less intimate that such freedoms were in conflict. [FN257] Nor did he state that a university's academic freedom meant that it would be free "to pursue its ends without interference from the government," much less that its administration or officials should enjoy immunity from judicial review of constitutional claims. In fact, Justice Powell and all the other members of the Court ordered Bakke admitted despite the Medical School's adverse admission decision. [FN258]

The Seventh Circuit's decision in Notre Dame likewise fails to provide authority for the notion that "academic freedom" is an "equivocal" term, or for the idea that a university's "academic freedom" conflicts with that of teachers. The "qualified academic freedom privilege" created in Notre Dame protected the faculty members who had participated in the University's peer review process and only thereby protected the institution's "academic excellence and freedom." [FN259] The Seventh Circuit's decision in Notre Dame neither intimated that the term "academic freedom" was equivocal nor suggested that a university's "academic freedom" was in conflict with its faculty's academic freedom.

Nor did the Notre Dame court say that "the academy" was or should be free "to pursue its ends without interference from the government." The privilege the Notre Dame court accorded the University's peer review confidentiality was a "limited" or

"qualified" privilege. [FN260] Moreover, this "qualified academic freedom privilege" was not a shield against "the government" in some generalized sense. It referred specifically to the E.E.O.C.'s administrative subpoena requiring production of a broad range of faculty personnel *81 records. [FN261] The Notre Dame court never suggested that it or any other federal court should abstain from reviewing constitutional claims.

In concluding its one-paragraph reflections on academic freedom, the Piarowski court observed, "[i]f we hold that the college was forbidden to take the action that it took to protect its image, we limit the freedom of the academy to manage its affairs as it chooses." [FN262] No case law had held that "the academy" is free "to manage its affairs as it chooses." The Piarowski court did not attempt to resolve the purported conflict between the "two freedoms." [FN263] Instead, in its subsequent discussion, it undertook to balance Piarowski's more generalized First Amendment interest against the university's interests. [FN264] It does not appear that the Piarowski court reached its decision on the basis of this one-paragraph discussion of academic freedom. [FN265] Perhaps that portion of its opinion should be regarded as dicta. In any event, the idea that academic freedom is an "equivocal" concept and the proposition that the academic freedom of the academy and that of individual faculty "are in conflict" are unsupported by prior case law. Whatever else institutional academic freedom may have meant in earlier cases, it had never been understood to confer upon "the academy" or its administrative officials any blanket privilege, right, or freedom "to pursue its ends" or "to manage its affairs as it chooses" with immunity from judicial review.

B. Justice Stevens' Footnote in Ewing: "Somewhat inconsistently"

Ten days after denying certiorari in Piarowski, the Supreme Court announced its decision in Regents of the University of Michigan v. Ewing. [FN266] Scott Ewing, a former student, claimed that his dismissal from the University's special six-year Medical School program violated due process. [FN267] Justice Stevens, writing for a unanimous Court, upheld the dismissal, finding no due process violation:

The record unmistakably demonstrates ... that the faculty's decision was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing's academic career. When judges are asked to review the substance of a genuinely academic decision, such as *82 this one, they should show great respect for the faculty's professional judgment. [FN268]

Notwithstanding his explicit references to the role of the faculty in deciding to dismiss Mr. Ewing, Justice Stevens added in footnote dicta: "[a]cademic 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." [FN269] As authority, Justice Stevens cited Justice Powell's concurring opinion in Bakke and Justice Frankfurter's concurrence in Sweezy. [FN270] Justice Stevens did not, however, refer here to the University's academic freedom or to "institutional academic freedom." He referred to the University's "autonomous decision-making." The "inconsistency" -- which Justice Stevens did not attempt to identify or explain -- seems to arise out of his possible failure to appreciate fully the fact that "the academy" and its faculty in this case were one and the same. As he, himself, observed in the statement just quoted, [FN271] it was the faculty who had exercised academic freedom in this case. There was no inconsistency. The faculty were acting on behalf of the University. [FN272] Justice Stevens also may have been thinking of Judge Posner's comments in Piarowski. Perhaps "somewhat inconsistently" was Justice Stevens' version of Judge Posner's term, "equivocal." [FN273]

C. Piarowski Doctrine in Subsequent Seventh Circuit Academic Freedom Jurisprudence

Although lacking authority in previous case law, the Piarowski court's pronouncements as to the purportedly "equivocal" meaning of academic freedom and the presumed conflict between institutional and individual *83 faculty entitlements

rather quickly became accepted doctrine in the Seventh Circuit. A few illustrative cases are here considered. [\[FN274\]](#)

1. Weinstein v. University of Illinois. [\[FN275\]](#)

Marvin Weinstein had been an untenured assistant professor at the University of Illinois. Because his research and publications were deemed inadequate, the University gave him a terminal contract which in due course expired. Before the Seventh Circuit, Weinstein contended that the University failed to give him sufficient credit for an article he and two colleagues had written, and in particular, argued that his own name should have been listed first on the article's by-line. [\[FN276\]](#) Although the case was decided on due process grounds, the panel briefly addressed Weinstein's academic freedom claim in a footnote: [\[FN277\]](#)

Weinstein invokes "academic freedom", but that equivocal term ... does not help him. Judicial interference with a university's selection and retention of its faculty would be an interference with academic freedom. We need not cogitate hard cases -- such as denials of tenure because of objections to the politics underlying scholarly work -- to know that a denial of tenure on account of having no scholarly work does not offend any provision of the Constitution. [\[FN278\]](#)

Since the case was decided on other grounds, this footnote commentary should probably be regarded as dicta. What is significant is the court's suggestion that by virtue of a university's putative entitlement to academic freedom, a faculty member who invokes academic freedom will do so in vain, except, perhaps, in a "hard" case where "politics" is involved. The implication*84 is that institutional academic freedom will ordinarily trump or overrule academic freedom claims by individual faculty. Weinstein appears to be the first case in which a federal court explicitly characterized positive adjudication of a university professor's academic freedom complaint as judicial "interference." Piarowski had referred vaguely, if ominously, only to "interference from the government." [\[FN279\]](#) Rather than perpetuate and enlarge earlier dicta, the court could have answered Weinstein's academic freedom claim simply by noting that academic freedom has never been construed to secure continuing employment for faculty whose scholarly activity is found inadequate. The court could have upheld the tenure denial without invoking the dubious dichotomy between individual and institutional academic freedom. There was no need for the court to characterize judicial review of a First Amendment academic freedom claim as "interference" with academic freedom. Here, at least in dicta, the court did review that claim, but found it insubstantial if not also frivolous.

It is unlikely that the Weinstein court seriously intended to propose that it or any other court should ignore an actual violation of a faculty member's Constitutional rights or exonerate the offending college or university or its agents from liability because of the latter's supposed "academic freedom." The critical question when a constitutional claim comes before a court is whether factually and as a matter of law a constitutional violation has occurred. A court cannot make such determination justly or fairly if it begins with the presumption that the college or university is entitled to do as it pleases, or as the Piarowski court put it rather loosely, "to manage its affairs as it chooses." [\[FN280\]](#)

2. Keen v. Penson [\[FN281\]](#)

Kathleen Johnson was a student in an English class at the University of Wisconsin-Oshkosh taught by Professor Carl Keen. Keen overheard Johnson complaining to another student about some aspects of the class. Keen insisted that she apologize to himself and to all the class for her comments, telling her that he would not submit a grade for her until she did so. She wrote several letters of apology, but Keen would write back telling her that he considered her apologies unacceptable. Eventually he assigned her a failing grade. Faculty committees reviewed the situation and recommended to Chancellor Penson that he sanction Keen for unprofessional conduct. Pursuant to the faculty committees' recommendations, Penson demoted Keen to the rank of associate professor and reduced his salary by seven hundred dollars. [\[FN282\]](#)

Keen sued in federal district court, claiming violation of his First Amendment rights, and the court granted summary judgment for the University. [FN283] *85 On appeal, Keen contended that both writing the letters demanding Johnson's apology assigning her a failing grade were protected under the First Amendment as expressions of academic freedom. The Seventh Circuit affirmed the grant of summary judgment, [FN284] citing both Piarowski and, significantly, a line of Supreme Court decisions relating to First Amendment protection for employee free speech generally. The former citation appears somewhat perfunctory: "[a]s this case reveals, the assertion of academic freedom of a professor can conflict with the academic freedom of the university to make decisions affecting that professor." [FN285] As authority the court cited both Piarowski and the Ewing footnote by Justice Stevens, [FN286] but did not proceed to evaluate or "balance" these supposedly conflicting freedoms. Possibly the court simply assumed that the institution's "academic freedom" [FN287] would necessarily prevail. Instead, the court went on to analyze Keen's complaint on the basis of the line of general public employee speech cases inaugurated with the Supreme Court's decision in Pickering v. Board of Education. [FN288] By 1992, it was established that in order to be deemed worthy of First Amendment protection, a public employee's "speech" must relate to a "matter of public concern." [FN289] And whether particular speech would meet this threshold test was considered a question of law for the courts to decide de novo. [FN290] The Keen court found rather easily that both of Keen's modes of expression failed to pass this threshold test: "[i]t is difficult to see what matters *86 of public concern are implicated by Keen's letters to Johnson (the purpose of which was to extract an apology from Johnson) and by the "F" grade he eventually gave her for not appropriately apologizing." [FN291] The court suggested another reason for affirming summary judgment, citing evidence to the effect that Keen had not been disciplined for his speech but rather for his unprofessional conduct. [FN292] This fact alone would have been dispositive, and the court could have ruled on this basis, without needing to consider or apply either academic freedom or public employee speech jurisprudence. [FN293]

The Keen case presents a number of important issues; among these is the scope of academic freedom. There is no authority for asserting that academic freedom protects faculty expression in the form of demands for personal apologies from students or of retaliatory grading or withholding of grades. That being the case, the panel's characterization of purported conflict between a professor's academic freedom and that of the university seems inappropriate. But does or should institutional academic freedom -- supposing such freedom exists apart from faculty academic freedom -- necessarily outweigh or nullify all faculty complaints of academic freedom violations, as seems implicit in the Keen court's recitation of Piarowski doctrine? [FN294] Another question: is it appropriate to analyze faculty academic freedom on the basis of the Pickering line of cases which relate to First Amendment protections for public employee speech generally? Or should academic free speech be accorded some additional protection as a "special concern of the First Amendment"? These important issues will surface again in later cases considered in parts IV and V of this article.

3. Webb v. Board of Trustees and Feldman v. Ho: Institutional Academic Freedom plus Pickering

Two more recent Seventh Circuit decisions follow the Piarowski court's view that academic institutions themselves are entitled to academic freedom that can be exercised in opposition to faculty interests, though neither cites that decision: Webb v. Board of Trustees of Ball State University, [FN295] and Feldman v. Ho. [FN296] Both opinions were written by Judge Easterbrook. Neither involved claims of academic freedom by faculty. Both cite Justice Frankfurter's concurring opinion in Sweezy, though neither notes that Justice Frankfurter was quoting from The Open Universities in South Africa.

*87 In Webb, the court cited Justice Frankfurter's Sweezy concurrence as authority for the proposition: "[T]he University['s] ... ability to set a curriculum is as much an element of academic freedom as any scholar's right to express a point of view." [FN297] Professor Webb had complained that his department chairman had

assigned him to teach certain classes in retaliation for speaking, and asked the district court "to require the University to let him teach classes ... appropriate to his fields of specialization." [FN298] As in Piarowski doctrine, the Webb court apparently visualized the institution's academic freedom primarily as a right exercised by its administration.

In Ho, the court again cited Justice Frankfurter's Sweezy concurrence as to "the four freedoms of a university." In both Ho and Webb, the court attributed this language to Justices Frankfurter and Harlan, and italicized "of a university," evidently in order to imply that these freedoms did not pertain to faculty. [FN299] Ho concerned an assistant professor whose contract was not renewed after he had accused certain colleagues of professional misconduct. The Seventh Circuit overturned a jury award on the theory that "the faculty," not a jury, should be the ones to decide such matters. [FN300] Writing in Ho, the court stated: "A university's academic independence is protected by the Constitution, just like a faculty member's own speech." [FN301] The court did not refer specifically to a university's academic freedom, but rather to its "academic independence." It did not explain how language deriving from a concurring Supreme Court opinion could endow a university with constitutionally protected independence, autonomy, or academic freedom.

The Webb and Ho decisions are significant in that they both applied the Pickering-Connick-Rankin-Waters model developed by the Supreme Court for analyzing public employee speech under the First Amendment wholly apart from academic freedom concerns. [FN302] To be protected under the First Amendment, these cases require that the speech in question must have addressed or related to "a matter of public concern," an issue to be decided by the court as a matter of law. [FN303] If the "speech" survives this threshold test, the court will then "balance" the employee's interest in speaking against the government agency's interest in the efficient or effective delivery of services *88 to the public. [FN304] In both Webb and Ho, the court quoted Waters v. Churchill as to the Court's rationale for limiting public employee speech:

The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate. [FN305]

The Seventh Circuit had already applied Pickering analysis to a faculty academic freedom claim in Keen. [FN306] When, in due course, the Fourth Circuit recently turned to considering academic freedom issues, it would go beyond the Seventh Circuit's doctrine of two academic freedoms in conflict. Based on its own distinctive reading of the Pickering line of cases, it would come to the conclusion that while institutions of higher learning are constitutionally entitled to academic freedom, college and university faculty members are not. There would be only one academic freedom: the institution's.

D. Developing Doctrines in the Fourth Circuit: Institutions Have Academic Freedom But Their Faculties Do Not.

A 1998 Fourth Circuit en banc decision in a public school "speech" case was in large part the basis for more recent decisions by that court as to academic freedom in public institutions of higher learning. Like the series of Seventh Circuit cases considered above, this Fourth Circuit opinion relied on Justice Frankfurter's concurrence in Sweezy, construed to mean that academic administrators are entitled to academic freedom, while teachers are not. This case also set out a distinctive understanding of how the Pickering line of cases [FN307] are to be applied in analyzing teacher First Amendment speech violation claims. Later the Fourth Circuit would apply this distinctive approach to the analysis of academic speech by university faculty.

***89** 1. Boring v. Buncombe County Board of Education

This pivotal case was Boring v. Buncombe County Board of Education. [\[FN308\]](#) Margaret Boring was a drama teacher at Buncombe County High School. One year she selected the play "Independence" for her advanced acting class students to perform in regional competition. In accordance with her usual practice, she told the school principal which play she had chosen but did not describe it further, and the principal did not question her about it. The students' performance won several regional awards. Before going to the state finals, the student actresses put the play on before an English class at the school. Boring had advised the class' teacher that "the play contained mature subject matter," [\[FN309\]](#) and recommended that the teacher obtain parental permission slips for students who would see the play.

After the English class performance, a parent complained about it to the principal, Mr. Fred Ivey. Subsequently, Mr. Ivey refused to enter the play in the state competition, but after further discussion with Boring and the student-actresses' parents, Ivey agreed that it could be performed with certain deletions. Performance at state competition won second prize. Later that academic year, Boring had a temporary plywood floor installed in the school's new auditorium in preparation for another production. When the plywood was removed, screw holes had to be filled and the hardwood state floor refinished. Soon afterwards, Ivey arranged for Boring's transfer to another school because of "personal conflicts resulting from actions ... initiated during the course of this school year." [\[FN310\]](#)

Ms. Boring sued in federal court contending that the transfer "was in retaliation for expression of unpopular views through the production of the play," and therefore in violation of her First Amendment right of free speech. [\[FN311\]](#) The district court held for the defendant on all claims. Ms. Boring appealed the dismissal of her First Amendment claim and a divided Fourth Circuit panel reversed. [\[FN312\]](#) The en banc court vacated the panel decision, and affirmed the district court's judgment. [\[FN313\]](#)

The en banc court relied on two theories. One was that school authorities, not teachers, have authority over curricular decisions; that selecting the play *90 was a curricular decision; and that consequently Boring had "no First Amendment right to insist on the makeup of the curriculum." [\[FN314\]](#) In support of this conclusion, the court cited Plato, [\[FN315\]](#) Burke, [\[FN316\]](#) and Justice Frankfurter's quotation from The Open Universities in South Africa in his Sweezy concurrence: "We agree with Plato and Burke and Justice Frankfurter that the school, not the teacher, has the right to fix the curriculum." [\[FN317\]](#) (The court did not mention that neither Plato, Burke, nor The Open Universities in South Africa authors had the burden or benefit of adjusting their views to the First Amendment.)

The en banc court evidently thought that in quoting The Open Universities in South Africa affirmation of a university's essential freedom "to determine for itself on academic grounds ... what may be taught," Justice Frankfurter had proposed "that the school, not the teacher, has the right to fix the curriculum." [\[FN318\]](#) As has been pointed out previously in this article, neither Justice Frankfurter in Sweezy nor The Open Universities in South Africa he was quoting distinguished between a university's and its faculty's academic freedom. And neither gave any suggestion whatsoever that the administration of a university (or of a public school) has authority to determine curricula, while its faculty (or teachers) do not. The court -- as others had done before it -- was putting its own words into Justice Frankfurter's mouth -- or more precisely, into his concurring opinion in Sweezy. [\[FN319\]](#) The en banc court did not *91 cite to Piarowski [\[FN320\]](#) or Weinstein, [\[FN321\]](#) but evidently shared the Seventh Circuit's emerging doctrine to the effect that Justice Frankfurter's Sweezy concurrence somehow justified actions taken by administrations of academic institutions against their faculties.

The en banc court also applied the Pickering line of public employee speech cases to its analysis of Boring's First Amendment claim. In Connick v. Myers, [\[FN322\]](#) the Supreme Court -- in unusually obscure language -- intimated that in order to be protected under the First Amendment, a public employee's speech must relate to "a

matter of public concern":

We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. [\[FN323\]](#)

The Connick Court did not attempt to define the scope of "matters of public concern," nor did it say whether speech by an employee on matters of public concern would be protected. Lower courts could take a broader or narrower position on these and related issues left open in Connick. [\[FN324\]](#)

Based on its narrower construction, the Fourth Circuit majority concluded that Boring's speech had to do only with selection of a play, which it considered a curricular matter. Implicitly, the court seemed to be saying that this selection was not a matter of public concern because Boring was "speaking" *92 as an employee. [\[FN325\]](#) "Since plaintiff's dispute with the principal, superintendent of schools and the school board is nothing more than an ordinary employment dispute, it does not constitute protected speech and has no First Amendment protection." [\[FN326\]](#) The en banc majority did not discuss whether the play's content [\[FN327\]](#) related to matters of public concern, but focused only on Boring's selection of the play. Both dissents challenged this approach. [\[FN328\]](#)

Judge Motz's dissent -- joined by five other members of the court -- raised the critical question whether it is appropriate for courts to apply the "matters of public concern" test to the analysis of teacher's in-class speech:

In my view, the Connick framework does not provide a workable formula for analyzing whether the First Amendment protects a teacher's in-class speech The public concern element articulated in Connick fails to account adequately for the unique character of a teacher's in-class speech.

When a teacher steps into the classroom she assumes a position of extraordinary public trust and confidence: she is charged with educating our youth. Her speech is neither ordinary employee workplace speech nor common public debate. Any attempt to force it into either of these categories ignores the essence of teaching -- to educate, to enlighten, to inspire -- and the importance of free speech to this most critical endeavor. As the Supreme Court proclaimed more than forty years ago: "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." Sweezy v. New Hampshire, 354 U.S. 234, 250, 77 S.Ct. 1203, 1212 ... (1957). [\[FN329\]](#)

Judge Motz's point appears well-taken. If teachers and students are to "remain free to inquire, to study and evaluate, to gain new maturity and understanding ...," *93 [\[FN330\]](#) they must be protected from governmental interference, whether by external political authorities, or by administrative personnel. It may be noted that the language here quoted from Sweezy was later cited with approval and thus incorporated into the Supreme Court's opinion in Keyishian. [\[FN331\]](#)

Judge Motz's dissent also expressed concern about what she characterized as the Boring majority's "misreading Connick to make the role in which a public employee speaks determinative of whether her speech merits First Amendment protection." [\[FN332\]](#)

Connick never holds that a public employee automatically loses all First Amendment protection whenever she speaks in her role as employee on a matter of public concern. Indeed, the Connick Court implicitly repudiates such a conclusion, by directing that factors other than the role of the speaker are critical to determining when an employee speaks on a matter of public concern -- "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement." [\[FN333\]](#)

The Boring majority opinion had not specifically referred to Boring's "role," but Judge Motz evidently interpreted its meaning correctly. The speaker's "role" would turn out to be dispositive when the Fourth Circuit turned to a case involving "speech" by university professors.

2. Urofsky v. Gilmore: [\[FN334\]](#) The Panel Decision

A year after Boring was decided, a Fourth Circuit panel ruled on another free speech claim, this time by six professors employed at various Virginia public colleges and universities. [\[FN335\]](#) The professors challenged a Virginia law restricting access to sexually explicit material on state-owned computers. The Act in question provided:

Except to the extent required in conjunction with a bona fide, agency- approved undertaking, no agency employee shall utilize agency-owned or agency-leased computer equipment to access, download, print or store any information infrastructure files or services having sexually explicit content. Such agency approvals shall be given in writing by agency heads, and any such approvals shall be available to the public under the provisions of the Virginia Freedom of Information Act. [\[FN336\]](#)

***94** The six claimed that the Act infringed on their First Amendment right to free speech by interfering with their research and teaching. [\[FN337\]](#) The professors apparently did not claim explicitly that the Act interfered with their academic freedom. They contended that access to the kinds of on-line publications in question was necessary for their teaching and research.

For example, plaintiff Urofsky has been reluctant to assign students on- line research assignments on "indecency" law because of the Act; Smith's website containing materials on gender roles and sexuality has been censored as a result of the Act; Meyers is concerned about his ability to access the Commonwealth's own database of sexually explicit poetry to continue his studies on the "fleshy school" of Victorian poets; Heller has stopped using the Internet to continue her research on lesbian and gay studies; and Levin and Delaney are reluctant to continue their psychological research on human experience. [\[FN338\]](#)

The district court granted the plaintiffs' motion for summary judgment. [\[FN339\]](#) The Commonwealth appealed, and the Fourth Circuit panel reversed. [\[FN340\]](#)

The panel majority found this an easy case. Revisiting Boring, the panel explained that there the court had held:

[T]he discharge of a high school drama teacher as a result of her selection of a high school play was not violative of the First Amendment because the choice of the play did not involve a matter of public concern since the choice was made by the teacher in her capacity as a teacher in a matter dealing with curriculum. [\[FN341\]](#)

This reconstruction of the court's rationale in Boring says, in effect, if a teacher speaks as a teacher about matters she is teaching, her speech is unprotected. [\[FN342\]](#) The Urofsky panel's opinion makes no mention of the Supreme Court's holdings in Sweezy, Keyishian, Shelton, or Whitehall. [\[FN343\]](#) Thus the panel majority [\[FN344\]](#) felt justified in concluding:

***95** The essence of Plaintiffs' claim is that they are entitled to access sexually explicit materials in their capacity as state employees. Because Plaintiffs assert only an infringement on the manner in which they perform their work as state employees, they cannot demonstrate that the speech to which they claim entitlement would be made in their capacity as citizens speaking on matters of public concern. [\[FN345\]](#)

The panel majority did not consider it necessary to determine whether the content of the materials in question or the plaintiffs' teaching and research for which the materials would have been used [\[FN346\]](#) related to matters of public concern. In its view, it would not make any difference if the content of the "speech" related to matters of public concern. [\[FN347\]](#) All that matters is whether the employee spoke as a citizen or as an employee. [\[FN348\]](#) By this logic, any academic "speech" by a teacher or professor would be unprotected. The Urofsky panel did not consider any issues pertaining to academic freedom. The Fourth Circuit en banc would do so and reach somewhat extraordinary conclusions.

3. Urofsky v. Gilmore [FN349]

A majority of the Circuit's active judges voted to hear the appeal en banc. Like the Urofsky panel, the en banc court reversed the district court, and again held the Virginia statute "consistent with the First Amendment." [FN350] And, like the panel, the en banc court, following its earlier decision in Boring, found the faculty "speakers" role dispositive: "[C]ritical to a determination of whether employee speech is entitled to First Amendment protection is whether the speech is made primarily in the employee's role as citizen or primarily in his role as employee." [FN351] The en banc court likewise recited *96 other considerations set out in Connick: "To determine whether speech involves a matter of public concern, we examine the content, context, and form of the speech at issue in light of the entire record." [FN352] But the court did not use these factors in analyzing the complaint. Instead, its Connick analysis focused solely on "role":

The speech at issue here -- access to certain materials using computers owned or leased by the state for the purpose of carrying out employment duties -- is clearly made in the employee's role as employee. Therefore, the challenged aspect of the Act does not regulate the speech of the citizenry in general, but rather the speech of state employees in their capacity as employees Because as Appellees acknowledge, the challenged aspect of the Act does not affect speech by Appellees in their capacity as private citizens speaking on matters of public concern, it does not infringe the First Amendment rights of state employees. [FN353]

In a footnote, the en banc court added another rationale for governmental restrictions on employee -- and faculty -- speech: ineffect, "He who pays the piper calls the tune:"

[R]estrictions on speech by public employees in their capacity as employees are analogous to restrictions on government-funded speech. For example, in Rust v. Sullivan, 500 U.S. 173, 111 S.Ct. 1759 ... (1991) ... In both situations -- public employee speech and government-funded speech -- the government is entitled to control the content of the speech because it has, in a meaningful sense, "purchased" the speech at issue through a grant of funding or payment of a salary. The limits of government control are similar in both types of cases, as well: Just as the government as provider of funds cannot dictate the content of speech made outside the confines of the funded program, see id. at 198, 111 S.Ct. 1759, the government as employer is restricted in its ability to regulate the speech of its employees when they speak not as public employees, but as private citizens on matters of public concern. [FN354]

Possibly the court had some difficulty interpreting Justice White's rather contorted language in Connick. [FN355] That language does, however, appear to say that speech would be unprotected only when "a public employee speaks ... [both] as an employee [and] upon matters of personal interest." [FN356] Connick did not say that an employee's speech would be unprotected simply if she spoke "as an employee."

*97 The en banc court also addressed an issue not considered by the panel: the professors' alternate claim that the Virginia Act violated their First Amendment academic freedom rights. [FN357] The court rejected that claim as well.

Our review of the law ... leads us to conclude that to the extent the Constitution recognizes any right of "academic freedom" above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors, and is not violated by terms of the Act. [FN358]

The court acknowledged that the American Association of University Professors (AAUP) statement on academic freedom, embedded in the 1940 Statement of Principles on Academic Freedom and Tenure, [FN359] had "been endorsed by every major higher education organization in the nation." [FN360] But the court considered it important that this Statement represents only a professional, not a legal standard:

Significantly, the AAUP conceived academic freedom as a professional norm, not a legal one: The AAUP justified academic freedom on the basis of its social utility as a means of advancing the search for truth, rather than its status as a manifestation of First Amendment rights. [FN361]

The en banc court then undertook to construe the Supreme Court's academic freedom decisions in such a way as to justify its view that academic freedom inheres, if at all, in institutions, not their faculties. One method was to dismiss the Court's statements about academic freedom as mere or pious "homage ... paid to the ideal of academic freedom." [FN362] Another was to urge *98 that the Supreme Court's academic freedom decisions had recognized only an institutional right, not an individual faculty right as claimed by the Virginia faculty members. The court proceeded to review Sweezy, Justice Frankfurter's Sweezy concurrence, Keyishian, Justice Powell's discussion in Bakke, Ewing, and University of Pennsylvania, in order to so demonstrate. [FN363] Because language in these opinions has already been examined in this article, the en banc court's characterization of each can be examined rather briefly. As has already been seen, none of these cases distinguishes a university's academic freedom from that of its faculty; and each involved claims affecting the academic freedom of individual faculty.

The court first considered the Sweezy plurality's statement about "[t]he essentiality of freedom in the community of American universities." [FN364] "This paean to academic freedom notwithstanding," the en banc court wrote, "the plurality did not vacate Sweezy's conviction on First Amendment grounds, but rather concluded that because the Attorney General lacked authority to investigate Sweezy, the conviction violated due process." [FN365] The Due Process Clause, however, does not operate in a vacuum. It protects either property interests or liberty interests. In Sweezy, the petitioner contended that his First Amendment rights were violated by the Attorney General's interrogation, and the Supreme Court agreed:

Merely to summon a witness and compel him, against his will, to disclose the nature of his past expressions and associations is a measure of governmental interference in these matters. These are rights which are safeguarded by the Bill of Rights and the Fourteenth Amendment. We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression -- areas in which the government should be extremely reticent to tread. [FN366]

The pluralities "paean" to "[t]he essentiality of freedom in the community of American universities ..." followed immediately after the language just quoted. Clearly the plurality meant that Sweezy's academic freedom was one of these liberties protected by the Fourteenth Amendment's Due Process Clause. This understanding is also implicit in the plurality's final statement of its rationale:

Our conclusion does rest upon a separation of the power of a state legislature to conduct investigations from the responsibility to direct the *99 use of that power insofar as that separation causes a deprivation of the constitutional rights of individuals and a denial of due process of law. [FN367]

In both statements from Sweezy quoted above, it may be noted that the plurality was referring to the liberty interests of individuals. [FN368]

The en banc court then turned to Justice Frankfurter's concurrence in Sweezy:

Justice Frankfurter ... relied explicitly on academic freedom in concluding that Sweezy's contempt conviction offended the Constitution. The right recognized by Justice Frankfurter, however, was not the individual right claimed by Appellees, but rather an institutional right belonging to the University of New Hampshire. [FN369]

This statement appears counter-intuitive, given the facts that the University of New Hampshire had not been interrogated by the Attorney General or convicted of contempt and was not a party to the suit before the Court. The en banc court's own summary just quoted notes that Justice Frankfurter concluded that Sweezy's "contempt conviction offended the Constitution." Nevertheless, the court found justification for its interpretation in Justice Frankfurter's statement about "grave harm resulting from governmental intrusion into the intellectual life of a university" when a witness was compelled to discuss the contents of his lecture. [FN370] As might be expected, the en banc court quoted from Justice Frankfurter's quotation from The Open Universities in South Africa concerning "the four essential freedoms of a university," [FN371] which it interpreted as follows: "Significantly, at no point in his concurrence does Justice Frankfurter indicate that individual academic freedom rights had been infringed; in his view, the constitutional harm fell

entirely on the university as an institution." [FN372] As previously discussed at some length, no such dichotomy or disjunction between a university's academic freedom and individual faculty academic freedom is intimated in either Justice Frankfurter's concurrence or in *The Open Universities in South Africa* from which he quoted. Both sources refer unquestionably to the freedoms of teachers or scholars. [FN373]

In the en banc court's view, *Keyishian* referred to institutional academic freedom, not that of individual faculty. [FN374] "*Keyishian* involved the right of a professor to speak and associate in his capacity as a private citizen, and thus *100 is not germane to Appellee's claim." [FN375] Here the court apparently read its own version of Connick's role theory back into *Keyishian*. It may be recalled that the complex of state laws and regulations at issue in *Keyishian* required, inter alia, that every publicly employed teacher in the state be monitored "to determine whether any utterance or act of his, inside the classroom or out, came within the sanctions of the laws." [FN376] The laws and regulations obviously were not concerned only with teachers in their roles as private citizens. Moreover, the *Keyishian* majority's language characterization of "academic freedom" as a "transcendent value" both for "the teachers concerned," and "for all of us," as well as other related expressions in *Keyishian* referred unmistakably to individual teachers. Nothing is said in *Keyishian* about institutional academic freedom. [FN377] In *Keyishian*, of course, plaintiff-appellees were individual faculty members. The State University of New York, as such, was not a party to the suit; the Court had no occasion to rule on its putative academic freedom, and did not do so.

The en banc majority commented briefly on Justice Powell's concurring opinion in *Bakke*:

This emphasis on institutional rights is particularly evident in more recent Supreme Court jurisprudence. For example, in *Bakke* Justice Powell discussed academic freedom as it related to a program of admissions quotas established by a medical school. Relying on *Keyishian* and on Justice Frankfurter's concurrence in *Sweezy*, Justice Powell characterized academic freedom as "[t]he freedom of a university to make its own judgments as to education." [FN378]

The majority did not mention that the admissions program in question was developed by the medical school's faculty or that it was the faculty's program that *Bakke* challenged. [FN379] Indeed, Justice Powell quoted the *Keyishian* Court's affirmation of academic freedom as a "transcendent value" both for teachers and for the larger society. [FN380] There is no basis in Justice Powell's *Bakke* opinion for supposing that he intended to distinguish between the university's and its faculty's interests in academic freedom. [FN381]

The en banc court also found support for its conception of academic freedom in the Supreme Court's opinion in *Ewing*: "Similarly, in *Ewing* the Court described academic freedom as a concern of the institution." [FN382] The text from *Ewing* from which this excerpt derived reads:

*101 Added to our concern for lack of standards is a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, "a special concern of the First Amendment." ... If a "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies," ..., far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions -- decisions that require "an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking." [FN383]

In this discussion of academic freedom, the Supreme Court referred explicitly to "academic decisions ... made by faculty members of public educational institutions." Justice Stevens' enigmatic "somewhat inconsistently" footnote comment [FN384] has been considered earlier in this article, where it was observed that Justice Stevens was referring to the faculty's decisionmaking. [FN385] The en banc court touched only lightly on *University of Pennsylvania v. EEOC*:

The vice of the New York provisions [at issue in *Keyishian*] was that they

impinged upon the freedom of the university as an institution. See *University of Pa. v. EEOC*, 493 U.S. 182, 198, 110 S.Ct. 557, 107 L.Ed.2d 571 (1990) (noting that *Keyishian* was a case involving governmental infringement on the right of an institution "to determine for itself on academic grounds who may teach" (internal quotation marks omitted)). [\[FN386\]](#)

The en banc court did not mention that it was a faculty committee's actions that the University of Pennsylvania was attempting to shelter with its claim to an academic freedom privilege against disclosure of confidential peer review evaluations. [\[FN387\]](#) Nor did the court mention that the Supreme Court rejected the University's academic freedom claim. [\[FN388\]](#)

The en banc majority was troubled by the thought that public college and university faculty, if accorded protection for their academic freedom under the First Amendment, would enjoy a freedom not shared by others. In his concurring opinion, Chief Judge Wilkinson [\[FN389\]](#) disagreed with the majority's reduction of Connick analysis to consideration only of a speaker's role, and its attendant virtual elimination of the concept of faculty academic freedom. [\[FN390\]](#) In response, the majority complained:

***102** Judge Wilkinson writes as though he believes that professors possess a special constitutional right of academic freedom not enjoyed by other citizens. [\[FN391\]](#)

Irrespective of the validity of this claim as a matter of constitutional law, we note that the argument raises the specter of a constitutional right enjoyed by only a limited class of citizens Indeed, the audacity of Appellees' claim is revealed by its potential impact in this litigation. If Appellees are correct that the First Amendment provides special protection to academic speakers, then a professor would be constitutionally entitled to conduct a research project on sexual fetishes while a state-employed psychologist could constitutionally be precluded from accessing the very same materials. Such a result is manifestly at odds with a constitutional system premised on equality. [\[FN392\]](#)

The issue between the majority and Chief Judge Wilkinson [\[FN393\]](#) comes down to the function of an institution of higher learning in contemporary American society and of the free speech in the community of American public colleges and universities for this society. Replying to the majority's and Judge Luttig's concern lest academic freedom endow faculty with privileged status denied to others, Chief Judge Wilkinson wrote:

***103** The majority and concurrence also characterize my approach as one of academic privilege. They contend I believe that "professors possess a special constitutional right of academic freedom," ante at 408 n.7, and that "the academy has a special contribution to make to society," ante at 417 (Luttig, J., concurring).

But the Supreme Court itself has emphasized that "academic freedom ... is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian*, 385 U.S. at 603, 87 S.Ct. 675 (emphasis added). Indeed, "[t]he essentiality of freedom in the community of American universities is almost self-evident." *Sweezy*, 354 U.S. at 250, 77 S.Ct. 1203 (emphasis added). By its talk of special rights and privileges, I fear the majority somehow sees academic speech and democratic values as inconsistent or at odds. With all respect, this need not be our view. I had always supposed that democracy and speech, including academic speech, assisted one another and that democracy functioned best when the channels of discourse were unfettered. It would be folly to forget this fundamental First Amendment premise in complex times when change of every sort confronts us. Those who have worked to acquire expertise within their given fields can aid popular representatives in reaching decisions and in shaping an informed response to rapid change. Democratic representatives may often choose to reject academic proposals, but rejection, not suppression, is the constitutionally protected course. In all events, for speech to function usefully and creatively it cannot be subject, as my colleagues in the majority would now have it, to the unexamined legislative will. [\[FN394\]](#)

The conflicting perspectives articulated in the Fourth Circuit's en banc Urofsky decision underscore the critical issue whether individual faculty members in

American institutions of higher education are or should enjoy academic freedom -- "a special concern of the First Amendment" -- in view of its importance to the larger society. Or whether, academic freedom, if protected at all under the First Amendment, should be regarded as a right vested solely in academic institutions themselves -- or in their administrations -- apart from and sometimes in opposition to their faculties' freedom of speech and expression as faculty. [FN395] And an additional question is implicit in the foregoing. If the academic freedom of college and university faculty is deemed an important constitutional value, how should speech by such faculty be evaluated so as to recognize other important considerations, including the *104 effective and productive functioning of the universities themselves as public agencies?

E. Conclusions.

The somewhat peculiar state of college and university academic freedom jurisprudence, particularly in the Seventh and, more recently, Fourth Circuits, appears to derive largely from two sources. One is what might be called the strange career of Justice Frankfurter's 1957 *Sweezy* concurrence in which he quoted language from *The Open Universities* in South Africa. The other could be described as the Fourth Circuit's attempt to decipher a contorted, but critical, sentence in Justice White's opinion in *Connick*.

In his *Sweezy* concurrence, Justice Frankfurter quoted from *The Open Universities* in South Africa, a book written by faculty members of South Africa's two open universities in opposition to the South African government's plan to institute academic apartheid. The quoted text referred to "'the four essential freedoms' of a university." [FN396] Twenty years later, in his *Bakke* opinion, commenting on this text, Justice Powell stated that Justice Frankfurter had there "summarized the 'four essential freedoms' that constitute academic freedom." [FN397] There is no indication either in Justice Frankfurter's or Justice Powell's concurring opinion that they intended to distinguish between a university's and its faculty's academic freedom, much less, that they meant to set two such freedoms in mutual opposition. A year later, however, in *Cooper v. Ross*, a district court, in dicta, stated that there was "a fundamental tension" between "the academic freedom of the individual teacher," and "the academic freedom of the university." [FN398] The court cited no authority for creating this dichotomy, but presumably was familiar with Justice Powell's language in *Bakke*.

Two years later, in 1981, concurring in *Widmar*, Justice Stevens objected to the majority's application of close or "exacting" scrutiny in analyzing a university's allocation of space to student organizations. Such scrutiny, in Justice Stevens' view, could "needlessly undermine the academic freedom of public universities." [FN399] Justice Stevens cited Justice Frankfurter's concurrence in *Sweezy* but misattributed the language to T.H. Huxley. [FN400] Justice Stevens did not distinguish between institutional and faculty academic freedom.

The following year, in *Dow Chemical*, a Seventh Circuit panel, apparently drawing on *Cooper*, distinguished between the "academic freedom of the university" and the "academic freedom of the individual teacher." [FN401] Here, as in *Cooper*, the distinction appears in dicta, since the question before the court was whether enforcement of an ALJ's subpoena would impinge upon the *105 university faculty's academic freedom. [FN402] The panel quoted from a portion of Justice Frankfurter's *Sweezy* concurrence, expressing concern lest "governmental intrusion in the intellectual life of a university" restrain "the ardor and fearlessness of scholars." [FN403]

The next year, Judge Coffey expressed his own personal belief while discussing a hypothetical situation in his concurring opinion in *Martin*, a Seventh Circuit case decided in 1983. He believes that academic freedom inheres in a university's administration, which thereby has the "right" or "prerogative" to "determine and direct its faculty" and determine "the makeup" of its faculty. [FN404] As authority for these beliefs, he cited the Powell- Frankfurter-Open Universities language. [FN405] Judge Coffey's expression of concern is significant as the first judicial

construction of that language as if it referred to university administration's rights or privileges over against faculty. Here, again, this construction was in dicta.

The same year, in Notre Dame, another Seventh Circuit panel, relying on the Powell-Frankfurter quotation from *The Open Universities in South Africa*, held that a university might invoke "a qualified academic freedom" privilege in order to resist compliance with an EEOC administrative subpoena and thereby preserve the confidentiality of its peer review tenure process. [FN406] In 1990, however, the Supreme Court rejected a similar claim by the University of Pennsylvania. Under present Supreme Court jurisprudence, a university does not enjoy an academic freedom right or privilege to withhold relevant documents from EEOC investigations.

In *Piarowski*, a case decided before University of Pennsylvania, another Seventh Circuit panel found the term "academic freedom" "equivocal," since it could, the panel said, "denote both the freedom of the academy to pursue its ends" and "the freedom of the individual teacher." The court added that "these two freedoms are in conflict." [FN407] The *Piarowski* court cited as authority Judge Powell's *Bakke* concurrence and *Notre Dame*. Since the latter was effectively over-ruled in University of Pennsylvania, the *Piarowski* concept of two academic freedoms in conflict rests solely on Justice Powell's version of Justice Frankfurter's concurrence in *Sweezy*. Nevertheless, subsequent Seventh Circuit panels have continued to invoke the *Piarowski* dichotomy doctrine, if not *Piarowski* itself. [FN408] Even Justice Stevens appears to have been influenced by this doctrine as an interpretation of the Powell-Frankfurter language, though it may be noted that Justice Stevens did not refer to two academic freedoms or a university's academic freedom as distinct from or *106 opposed to faculty academic freedom. [FN409] The *Piarowski* doctrine was later adopted in the Fourth Circuit's *Boring* decision. [FN410]

In actuality, neither Justice Frankfurter's concurrence, nor any language found in *The Open Universities in South Africa*, nor Justice Powell's concurring opinion in *Bakke* makes any distinction whatsoever between the academic freedom of the university and the academic freedom of university faculty. The idea that a university's academic freedom is or can be divorced from that of its faculty is totally without support in these sources. Moreover, it is important to observe that neither Justice Frankfurter's *Sweezy* concurrence nor Justice Powell's discussion of academic freedom in *Bakke* are opinions of the Court. [FN411] Not all courts or commentators have recognized this rather important fact.

Were the Supreme Court to adopt the concept of institutional academic freedom, that concept would be analytically problematic. "The four essential freedoms of a university" set out in *The Open Universities in South Africa*, of necessity, were not grounded in the First Amendment to the United States Constitution. It is difficult to see how the First Amendment, in its terms, [FN412] could be expanded to embrace these freedoms. People speak. Institutions do not. Determining "on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study" are not obviously aspects or functions of speech. [FN413] Courts may for good policy reasons respect universities' autonomy. But university autonomy need not be confused with academic freedom, whether the latter is grounded in the Constitution or otherwise. Rather, university autonomy is essential as a pre-condition for academic freedom to function within the university. "It is the business of a university to provide that atmosphere ... in which there prevail 'the four essential freedoms' of a university" [FN414]

In *Sweezy*, by a plurality plus Justice Frankfurter, concurring, and in *Keyishian*, by a clear majority, the Supreme Court did embrace teachers' academic freedom as an important First Amendment value or right. Beginning in 1968, the Supreme Court has also evolved a line of decisions with respect to the First Amendment speech rights of public employees generally. [FN415] To *107 date, the Supreme Court has not considered how academic freedom -- "a special concern of the First Amendment" -- should be analyzed in connection with this line of cases.

The Fourth Circuit has recently proposed to treat university faculty academic

freedom claims like any other kind of public employee speech. Moreover, it has construed Connick, one of the public employee speech line of cases, to mean that any speech by an employee in the capacity or role of employee is unprotected under the First Amendment. [FN416] The Fourth Circuit majorities necessarily have endeavored both to discount and to re-construe the Supreme Court's decisions in Sweezy and Keyishian [FN417] as well as other Supreme Court language. [FN418]

It may be possible, however, to recognize the Supreme Court's endorsement of individual faculty academic freedom as "a special concern of the First Amendment" and at the same time acknowledge the importance of institutional autonomy within the framework of the Court's Pickering-Mt. Healthy-Givhan-Connick-Rankin-Waters-National Treasury line of cases. [FN419] The following is merely the sketch of a suggestion as to how this merger or combination might be accomplished.

If teachers -- and college and university professors -- play a vital role in our democracy, and if academic freedom is an important value not only to teachers, but also to the larger society, its importance could figure in Pickering analysis at three points.

First, as to "matters of public concern." Both the Sweezy plurality -- in language later incorporated into Keyishian--and the Keyishian Court itself recognized the "essentiality" of academic free speech for the good of the larger society, indeed, for the future of the Nation and of our civilization. [FN420] Chief Judge Wilkinson recently emphasized such importance in his Urofsky concurrence. [FN421] Viewed in this light, academic free speech is necessarily a matter of great public concern. No further analysis of its content or the *108 speaker's role should be required for such speech to pass the Connick-Rankin "threshold test." [FN422]

Second, as to "balancing" or evaluating the relative importance of competing interests, [FN423] the Pickering line of cases calls for balancing the speaker's "interest" in his speech with the government agency's interest in the efficient or effective delivery of services to the public. [FN424] If academic freedom in public colleges and universities is "of transcendent value" to "the faculty concerned," that value should be accorded considerable weight in Pickering balancing. In addition, because academic freedom is "of transcendent value to all of us," that is, because of its importance for our democracy and for the Nation's future, the public's interest in academic freedom also should be "weighed" on the side of academic free speech. The Pickering formula did not specifically call for including the public's interest in "balancing," though its language about "matters of public concern" may have been intended to factor in the public's interest. Recently, the Supreme Court itself has provided for considering the public's interest in speech when courts undertake Pickering balancing:

The Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's "necessary impact on the actual operation" of the Government. [FN425]

Finally, the Supreme Court has implied that academic freedom is in the nature of a fundamental right. [FN426] Given the importance of academic free *109 speech, courts arguably should apply close or "exacting" scrutiny [FN427] to claims by government (whether external, political or internal administrative) that speech interferes with the college's or university's effective performance of its services to the public. [FN428] As many have observed, part of the task of college and university faculty is to call into question popular ideas or regnant hypotheses, to challenge authoritative pronouncements, and, through robust debate and controversy, to seek new paradigms or visions of reality. [FN429]

The Supreme Court has not sanctioned either splitting academic freedom into two separate and opposing parts or the reduction of "matters of public concern" analysis to labeling the speaker's "role." It may address these questions at some point, perhaps in the near future. Courts that have subscribed to these doctrines, of course, are free to revisit their positions in the meantime. Courts have often insisted, properly, that academic decisions must be left to academicians not to judges. [FN430]

But courts must not abdicate their responsibility for correcting abuses of power by government officials when such abuses implicate constitutional rights. [FN431]

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[FN1]. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (Justice Brennan, writing for the majority, 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)).

[FN2]. The First Amendment right of free speech applied to the states though the Fourteenth Amendment may protect employees of public institutions, but not those of private colleges and universities. Faculty in private institutions, however, may enjoy academic freedom based on other sources of authority, for example, widely recognized professional standards, most notably the American Association of University Professors, 1940 Statement of Principles on Academic Freedom and Tenure, in AAUP POLICY DOCUMENTS & REPORTS 3-4 (9th ed. 2001); contractual provisions; and institutional policies. The 1940 Statement was prepared by both the AAUP and the Association of American Colleges. *Id.* at 3.

[FN3]. U.S. Const. amend. I [religion clauses omitted]. The First Amendment was initially applied to the states through the Fourteenth Amendment in Gitlow v. New York, 268 U.S. 652, 666 (1925). The Fourteenth Amendment in its terms protects the rights of persons. Its Due Process Clause reads: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. See *infra* notes 143 and 413.

[FN4]. Keyishian, 385 U.S. at 603. See *supra* note 2 and accompanying text.

[FN5]. This article does not attempt to define the scope or parameters of academic freedom either as a professional standard or as a First Amendment concern. Numerous studies have undertaken to do so. See, e.g., THE CONCEPT OF ACADEMIC FREEDOM (Edmund L. Pincoffs ed., 1972), Mark G. Yudoff, Three Faces of Academic Freedom, 32 LOY. L. REV. 831 (1987), J. Peter Byrne, Academic Freedom: A "Special Concern of the First Amendment," 99 YALE L.J. 251 (1989), and symposium articles in 66 TEX. L. REV. no. 7, 1247-1659 (1988) and 53 LAW & CONTEMP. PROBS. no. 3, 1-418 (1990), reprinted in FREEDOM AND TENURE IN THE ACADEMY (William W. Van Alstyne, ed., 1993). Instead, this article focuses on the emergence and problematic character of the idea that colleges and universities themselves are entitled to academic freedom as a First Amendment right and that such institutional academic freedom conflicts with faculty academic freedom and can even reduce the latter to a nullity.

[FN6]. Urofsky v. Gilmore, 216 F.3d 401, 410 (4th Cir. 2000) (en banc).

[FN7]. Id. at 412.

[FN8]. Keyishian, 385 U.S. at 603.

[FN9]. THE OPEN UNIVERSITIES IN SOUTH AFRICA (Albert van de Sandt Centlivres et al., eds., Johannesburg: Witwatersrand Univ. Press 1957).

[FN10]. See infra parts II and III of this article. As will be noted, this evolution has occurred particularly in the Seventh and Fourth Circuits. See generally, J. Peter Byrne, Academic Freedom: A "Special Concern of the First Amendment," 99 YALE L. J. 251 (1989) and David M. Rabban, Academic Freedom, Individual or Institutional?, 87 ACADEME 16 (Nov.-Dec., 2001).

[FN11]. Keyishian, 385 U.S. at 603. This article focuses on faculty academic freedom in public colleges and universities in the United States under the First Amendment. It does not examine the nature or extent of academic freedom that might properly be enjoyed by public school teachers or students at various levels of instruction. Curiously, in dicta, courts often refer to cases involving speech or expression by students or public school teachers as if without further explanation these cases somehow also applied to faculty in public colleges and universities. Such commonly cited cases include Bd. of Curators v. Horowitz, 435 U.S. 78 (1978) (holding that medical student's dismissal from medical school did not violate the student's Fourteenth Amendment due process rights); Healy v. James, 408 U.S. 169 (1972) (holding that college's regulation of student organizations did not violate students' First Amendment right of association); Tinker v. Sch. Dist., 393 U.S. 503 (1969) (holding that school's prohibiting students' wearing armbands to protest Vietnam war did not violate students' First Amendment right of expression); and Epperson v. Arkansas, 393 U.S. 97 (1968) (holding that state law challenged by high school teacher criminalizing teaching of evolution violated First Amendment religion clause). See generally Gary Pavela, A Balancing Act: Competing Claims for Academic Freedom, 87 ACADEME 21 (Nov.-Dec., 2001).

[FN12]. Keyishian, 385 U.S. at 603.

[FN13]. 342 U.S. 485, 508 (1952) (Douglas, J., dissenting, joined by Black, J.).

[FN14]. Id. at 486-87.

[FN15]. Id. at 491.

[FN16]. Id. at 487, 508 (Douglas, J., dissenting, joined by Black, J.).

[FN17]. Id. at 510.

[FN18]. 344 U.S. 183 (1952).

[FN19]. The Court held that the required oath "offends due process." Id. at 191. The Court so held again, nine years later, in regard to a Florida employees' loyalty oath requirement. Cramp v. Bd. of Pub. Instruction, 368 U.S. 278, 279-81 (1961).

[FN20]. 344 U.S. 194 (Frankfurter, J., concurring).

[FN21]. Id. at 196.

[FN22]. Id.

[FN23]. See infra note 126 and accompanying text.

[FN24]. See infra notes 124-29 and accompanying text.

[FN25]. 354 U.S. 234 (1957) (plurality opinion by Warren, C.J., joined by Black, Douglas, and Brennan, J.J.). Both the plurality opinion and Justice Frankfurter's much-quoted concurrence are considered further, infra notes 46- 130 and accompanying text.

[FN26]. 354 U.S. at 250.

[FN27]. Additional facts are summarized infra notes 46-50 and accompanying text in connection with discussion of Justice Frankfurter's much-quoted concurring opinion in *Sweezy*.

[FN28]. Conversely, in *Shelton v. Tucker*, 364 U.S. 479 (1960), an Arkansas anti-subversive law case, the Court's majority referred to teachers' First Amendment rights of free speech and association, but not specifically to their academic freedom. Appellants and petitioners in *Shelton* included a college professor and two public school teachers. The Arkansas law in question applied to both public school teachers and faculty in public institutions of higher learning. Id. at 480-81.

[FN29]. See notably, *Keyishian*, 385 U.S. at 603. See also *Whitehill v. Elkins*, 389 U.S. 54 (1967), a Maryland loyalty oath case. Here, as in *Keyishian*, the Court linked academic freedom with the First Amendment, and, repeating at some length from *Sweezy*, reiterated the "essentiality" of academic freedom not only for the Nation but also for "our civilization." See *Shelton*, 364 U.S. at 487, quoting *Sweezy*, 354 U.S. at 250: "Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate . . ." At the beginning of the same paragraph and immediately preceding this quotation from *Sweezy*, the *Shelton* Court quoted at length from Justice Frankfurter's concurring opinion in *Wieman*, 344 U.S. at 195, which had referred specifically to "freedom of speech and freedom of inquiry" and freedom of thought as rights "safeguarded by the Bill of Rights and by the Fourteenth Amendment." *Shelton*, 364 U.S. at 487. See infra note 125 and accompanying text.

[FN30]. *Keyishian*, 385 U.S. 589 (opinion by Brennan, J.). See supra note 2 and accompanying text. Clark, Harlan, Stewart, and White, J.J., dissented. *Keyishian*, 385 U.S. at 620.

[FN31]. The *Keyishian* Court considered a series of New York laws including the so-called Feinberg Act it had been asked to review in *Adler*.

[FN32]. Four, including *Keyishian*, were members of the faculty of the State University of New York at Buffalo. A fifth was "a nonfaculty library employee and part-time lecturer in English." Id. at 592.

[FN33]. Id. at 603. Supra note 2 and accompanying text.

[FN34]. Keyishian, 385 U.S. at 597.

[FN35]. Id. at 599-601.

[FN36]. Id. at 602.

[FN37]. Id. at 606-10.

[FN38]. Id. at 603-04. It is unclear whether the Court was referring here to the entire statutory and regulatory "maze" or to only certain portions of it.

[FN39]. 385 U.S. at 603 (internal citations omitted).

[FN40]. Supra note 1 and accompanying text.

[FN41]. Supra note 26 and accompanying text (emphasis added). The Keyishian Court then proceeded to quote this language from Sweezy immediately following the statement quoted supra note 39 and accompanying text. See infra notes 43-44 and accompanying text.

[FN42]. Academic freedom issues also were addressed in a number of subsequent Supreme Court opinions. See, e.g., Bd. of Regents v. Roth, 408 U.S. 564, 579, 581-82 (1972) (Douglas, J., dissenting); Minnesota State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 296-97 (1984) (Brennan, J., dissenting). Only those cases relating to the idea of institutional academic freedom are considered in this article.

[FN43]. The Court refers to "teachers" and "American schools." However, since plaintiff-petitioners in Keyishian were university faculty members (except for the one who was a university librarian and part-time lecturer), the Court necessarily had to be thinking of university faculty members' academic freedom. See generally William W. Van Alstyne, Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review, 53 LAW & CONTEMP. PROBS., no. 3, 79, 113-14 (1990).

[FN44]. 385 U.S. at 603 (quoting Sweezy, 354 U.S. at 250).

[FN45]. Keyishian, 385 U.S. at 603.

[FN46]. Sweezy gave a guest lecture before a class of 100 students in a humanities class at the University of New Hampshire in March, 1954. He had presented guest lectures in this course in each of two previous years. Wyman v. Sweezy, 121 A.2d 783, 788 (N.H., 1956); Sweezy, 354 U.S. 243. Sweezy, himself, evidently was not a professor at the University, but the Supreme Court's plurality and concurring opinions addressed more broadly the speech rights of university faculty.

[FN47]. Sweezy, 354 U.S. at 236.

[FN48]. Id. at 238-44. When Sweezy subsequently refused to answer these questions in court, he was held in contempt and ordered to be "committed to the county jail until purged of the contempt." Id. at 244-45.

[FN49]. Id. at 242-44.

[FN50]. Id. at 250 (Plurality opinion by Warren, C.J., joined by Black, Douglas, and Brennan, J.J.). Justice Frankfurter concurred in the result in a separate opinion joined by Justice Harlan.

[FN51]. Id. at 250.

[FN52]. Id.

[FN53]. The Court's reference to students' academic freedom, though noteworthy, is dicta since that question was not an issue in Sweezy.

[FN54]. 354 U.S. at 255-67 (Frankfurter, J., concurring, joined by Harlan, J.). See generally Matthew W. Finkin, On "Institutional" Academic Freedom, 61 TEX. L. REV. 817 (1982).

[FN55]. Sweezy, 354 U.S. at 262.

[FN56]. Id. at 263.

[FN57]. Id. at 262-63. The complete citation for The Open Universities in South Africa is given supra note 9. This publication and its South African context will be examined infra notes 62-116 and accompanying text.

[FN58]. Id. at 262-63 (Frankfurter, J., concurring). Omissions here are as in Justice Frankfurter's concurring opinion. Following the quotation, Justice Frankfurter added:

I do not suggest that what New Hampshire has here sanctioned bears any resemblance to the policy against which this South African remonstrance was directed. I do say that in these matters of the spirit inroads on legitimacy must be resisted at their incipiency. This kind of evil grows by what it is allowed to feed on.

Id. at 263.

[FN59]. Id.

[FN60]. Id. at 262-63.

[FN61]. Id. at 263 (Frankfurter, J., concurring, quoting from The Open Universities in South Africa) (emphasis added).

[FN62]. See , e.g., THE OPEN UNIVERSITIES IN SOUTH AFRICA AND ACADEMIC FREEDOM 1957-1974 (B. Beinart et al. eds., Juta & Co., Ltd., 1974); MICHAEL CROSS, IMAGERY OF IDENTITY IN SOUTH AFRICAN EDUCATION, 1880-1990 (Carolina Academic Press 1999); AFRICAN EDUCATION: SOME ORIGINS, AND DEVELOPMENTS UNTIL 1953 (Muriel Horrell, ed., South African Institute of Race Relations 1963); LAWS AFFECTING RACE RELATIONS IN SOUTH AFRICA (Muriel Horrell, ed., South African Institute of Race Relations 1978) [hereinafter Horrell, Laws]; LEO D. LEONARD, APARTHEID AND EDUCATION IN THE REPUBLIC OF SOUTH AFRICA, Utah State Univ. Ed.D. dissertation, 1969, facsimile edition, University Microfilms Int'l, Ann Arbor, 1977); JOHN A. MARCUM, EDUCATION, RACE, AND SOCIAL CHANGE IN SOUTH AFRICA (Univ. of California Press 1982); BRIAN ROSE AND RAYMOND TUNMER, DOCUMENTS IN SOUTH AFRICAN EDUCATION (A.D. Donker 1975); JOHN DAVID SHINGLER, EDUCATION AND POLITICAL ORDER IN SOUTH AFRICA, 1902-1961 (Yale Univ. Ph.D. dissertation, 1973, facsimile edition, University Microfilms Int'l, Ann Arbor, 1977).

[FN63]. See infra notes 85-116 and accompanying text.

[FN64]. HORELL, AFRICAN EDUCATION, supra note 62, at 68.

[FN65]. Id. at 67-68.

[FN66]. Id. at 66-67. However, few non-white students had been admitted or attended in the early years of these open universities. Classes at the University of Natal were conducted in separate buildings, though often by the same professors and lecturers. The University of South Africa only provided correspondence courses. Id.

[FN67]. MARCUM, supra note 62, at 3.

[FN68]. CROSS, supra note 62, at 77-78. See id. at 71-72 n.5 as to the term "apartheid." See also CHRISTOPHER SAUNDERS & NICHOLAS SOUTHEY, "Apartheid," HISTORICAL DICTIONARY OF SOUTH AFRICA 20-22 (Scarecrow Press, 2d ed. 2000).

[FN69]. Id. at 77, Dr. H.F. Verwoerd, Address at the South African Parliament (Sept. 3, 1948) (quoting from APARTHEID -- A DOCUMENTARY STUDY OF MODERN SOUTH AFRICA 5, 13 (E. H. Brookes, ed., Routledge & Kegan Paul 1968) (internal citation omitted)).

[FN70]. See LEONARD, supra note 62, at 9.

[FN71]. Id. at 154; see also CROSS, supra note 62, at 83-85; ROSE AND TUNMER, supra note 62, at 244.

[FN72]. Cross suggests that the concept of "Bantu culture" was largely a social construction by Afrikaner nationalists and associated intellectual theorists. CROSS, supra note 62, at 71-75.

[FN73]. See ROSE & TUNMER, supra note 62, at 244-58.

[FN74]. Id. at 258-66.

[FN75]. *Id.* at 265-66 (quoting Dr. H.F. Verwoerd, Address at the South African Senate (Jun. 7, 1954)) (internal citations omitted).

[FN76]. Horrell, *LAWS*, *supra* note 62, at 361. See also *CENTLIVRES*, *supra* note 9, at 17-18; *MARCUM*, *supra* note 62, at 3.

[FN77]. *Id.*

[FN78]. See *MARCUM*, *supra* note 62, at 2 n.1 ("Under South African law, "African" is a racial classification referring to any person 'who is, or is generally accepted as, a member of any aboriginal race or tribe of Africa.' The term "Coloureds" denotes South Africans of mixed race, generally Afrikaans-speaking and of Afro-European descent.").

[FN79]. *CENTLIVRES*, *supra* note 9, at 18-19.

[FN80]. Horrell, *Laws*, *supra* note 62, at 362.

[FN81]. *Id.*

[FN82]. *Id.* See also *CROSS*, *supra* note 62, at 186-88; *CENTLIVRES*, *supra* note 9, at 4-5 (quoting from resolutions adopted by the Councils of the Universities of Cape Town and Witwatersrand in December, 1956).

[FN83]. *BEINART*, *supra* note 62, at 8-13.

[FN84]. See *MARCUM*, *supra* note 62, at 3-4. See also *GEOFF BUDLENDER, LOOKING TOWARD THE UNIVERSITY IN A DEMOCRATIC SOUTH AFRICA* (University of Cape Town 1978).

The Extension of University Education Act took effect in 1960. It provided that non-white students who had begun their studies at the open universities in 1959 or earlier might continue provided they remained academically qualified. *A SURVEY OF RACE RELATIONS IN SOUTH AFRICA 1959-1960* 229 (Muriel Horrell, ed., South African Institute of Race Relations 1960). In 1960 non-white student enrolments were as follows. University of Cape Town: 362 Coloured, 139 Asian, and 27 African; Witwatersrand: 30 Coloured, 184 Asian, and 52 African; Natal: 46 Coloured, 561 Asian, and 82 African (excluding medical students). The Minister of Bantu Education that year approved 4 out of 190 applications from African students for admission to the formerly open universities. Two of these matriculated. *Id.* at 230-31. Data as to declining non-white enrollments in 1961 and 1965 can be found in, *A SURVEY OF RACE RELATIONS IN SOUTH AFRICA 1963* 240 (Muriel Horrell, ed. South African Institute of Race Relations 1964); and *A SURVEY OF RACE RELATIONS IN SOUTH AFRICA 1965* 274 (Muriel Horrell, ed., South African Institute of Race Relations 1966).

[FN85]. *CENTLIVRES*, *supra* note 9.

[FN86]. Pages 1-47 are preceded by five un-numbered pages, beginning with a two-page Preface by Albert Van de Sandt Centlivres, Chancellor of the University of Cape Town, and Richard Feetham, Chancellor of the University of the Witwatersrand, Johannesburg.

[FN87]. See infra note 92 and accompanying text.

[FN88]. CENTLIVRES, supra note 9, at Preface, first unnumbered page. In this book, the term "staff" refers to university faculty members. See id. at 44: "Consider, for example, the question of staff. A university's standing depends primarily on the calibre of its teaching and research staff."

[FN89]. Letter from Brian du Toit, Professor, to author (Oct. 18, 2001) (on file with author).

[FN90]. CENTLIVRES, supra note 9, at unnumbered 1-2.

[FN91]. Id. at un-numbered 5 (emphasis in original).

[FN92]. A footnote defines the Council as follows:

In the South African universities the Council is predominantly a lay body, though it includes representatives of the professoriate. In all cases provision is made for the appointment of Government nominees, who are invariably a minority (about one-third). Provision is also made for representation of the local civic authority, graduates, and benefactors.

Id. at 1 n.1.

[FN93]. A footnote describes the university Senates: "The Senate is essentially a professorial body." Id. at 1 n.2.

[FN94]. CENTLIVRES, supra note 9, at 1.

[FN95]. Id. at 3-4 (quoting an "official statement" by Mr. J. H. Viljoen, Minister of Education, reported in the Star, Johannesburg, Nov. 22, 1956. See id. at 4 n.4. The same footnote quotes a statement by Dr. Verwoerd reported in Cape Times, Sept. 17, 1956: "Where there is no segregation as is the position at certain universities, it must be established or enforced.") (internal citations omitted).

[FN96]. Id. at 5.

[FN97]. Id. at 5-7.

[FN98]. Id. at 5.

[FN99]. The Commission of Enquiry on Separate Training Facilities for Non- Europeans at Universities, 1953-54. Id. at 8 n.5.

[FN100]. Id. at 8-9.

[FN101]. Id. at 10. Justice Frankfurter selected the next paragraph for the beginning of his quotations from the book, the paragraph beginning "In a university knowledge is its own end" See supra note 58 and first paragraph quoted in

accompanying text.

[FN102]. See supra note 58 and first paragraph quoted in accompanying text.

[FN103]. CENTLIVRES, supra note 9, at 11-12.

[FN104]. Cited as reported in the Cape Times, Feb. 28, 1953. Id. at 12 n.10. See also BUDLANDER, supra note 84, at 1. Here Budlander states that Dr. Davie had been vice-chancellor of the University of Cape Town from 1948 to 1955, and had been "a fearless defender of the principles of academic freedom from the time when the first suggestions of university apartheid were being made by supporters of the government of the day." Id.

[FN105]. See supra note 104 and accompanying text.

[FN106]. CENTLIVRES, supra note 9, at 14-16. "It follows, therefore, that the several aspects of academic freedom cannot be separated from each other." Id. at 16.

[FN107]. Id. at 15.

[FN108]. Id. at 17.

[FN109]. Id. at 19.

[FN110]. Id. at 24-25.

[FN111]. Id. at 33.

[FN112]. Id. at 33-34.

[FN113]. Id. at 40.

[FN114]. Id. at 43. Possibly The Open Universities in South Africa authors felt it necessary to rely on the idea of academic freedom to support their open admissions policy in part because South Africa did not have any equivalent to the Fourteenth Amendment Equal Protection Clause on which to ground their position. Likewise, of course, there were no South African equivalents to the First Amendment protections enjoyed in the United States.

[FN115]. For instance, the authors ask, "If one denies a student belonging to a particular ethnic group the privilege of studying under a great teacher in one university, is it sufficient justification to point to the fact that he may attend the lectures of somebody else in the university set aside for his race?" Id. at 44. The authors note also the benefit of students associating with one another in extra-curricular activities such as debating, literary, and scientific societies, "in promoting mutual understanding, tolerance, and respect." Id.

[FN116]. Id. at 45-47.

[FN117]. Sweezy, 354 U.S. at 260-61. See also id. at 267-68; (Clark, J., dissenting) ("My brothers FRANKFURTER and HARLAN ... join in the reversal ... on the ground that Sweezy's rights under the First Amendment have been violated.")

[FN118]. Id. at 262. See also infra note 119 and accompanying text.

[FN119]. Sweezy, 354 U.S. at 261-62. Justice Frankfurter, as a member of the law faculty at Harvard University, was, of course, himself familiar with the ideals and aspirations of great universities. Rabban, supra note 10, at 17. Not many Supreme Court Justices or lower federal court judges had such familiarity with the academic world. See also Finkin, supra note 54, at 841 n.121 (discussing Frankfurter's engagements with academic freedom issues while at Harvard).

[FN120]. Sweezy, 354 U.S. at 262-63; supra note 58 and accompanying text.

[FN121]. See supra notes 63-116 and accompanying text.

[FN122]. Later, however, Justice Frankfurter indicated that his concurring opinion in Sweezy concerned "academic freedom." Shelton, 364 U.S. at 495- 96 (Frankfurter, J., dissenting). The authors of The Open Universities in South Africa themselves refer elsewhere to academic freedom as a core concern. See supra notes 99-100 and 105-107 and accompanying text.

[FN123]. 344 U.S. at 194 (Frankfurter, J., concurring).

[FN124]. Id. at 184-85.

[FN125]. In addition to the quotation that follows in the text, Justice Frankfurter's concurrence in Wieman made several other references to the importance of First Amendment protections for teachers:

By limiting the power of the state to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers ... has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers.
Id. at 195 (Frankfurter, J., concurring).

[FN126]. Justice Frankfurter later cited his concurring opinion in Wieman as expressing his position as to academic freedom. See Shelton, 364 U.S. at 495-96 (Frankfurter, J. concurring).

[FN127]. The significance of this emphasis for contemporary academic free speech jurisprudence will be considered in part V of this article.

[FN128]. Conceivably the authors of *The Open Universities in South Africa* drew upon Justice Frankfurter's concurrence in *Wieman*. Both refer to academic "atmosphere," and both contrast "freedom" and "inquiry" with "dogma." And both Chancellor Hutchins' remarks quoted by Justice Frankfurter in *Wieman*, *infra* note 129, and *The Open Universities in South Africa* statement mention the Socratic ideal or model.

[FN129]. *Wieman*, 344 U.S. at 196-97 (Frankfurter, J., concurring). Justice Frankfurter then proceeded to quote from a 1952 statement by Robert M. Hutchins. Among Hutchins' quoted comments, the following provide further evidence that Justice Frankfurter understood "free universities" to be places where faculty enjoy freedom of thought and expression -- again, not so much for their own sake as "for the benefit of society:"

Now, a university is a place that is established and will function for the benefit of society, provided it is a center of independent thought. It is a center of independent thought and criticism that is created in the interest of the progress of society, and the one reason that we know that every totalitarian government must fail is that no totalitarian government is prepared to face the consequences of creating free universities.

It is important for this purpose to attract into the institution men of the greatest capacity, and to encourage them to exercise their independent judgment.

A university, then, is a kind of continuing Socratic conversation on the highest level for the very best people you can think of, you can bring together, about the most important questions, and the thing you must do to the uttermost possible limits is to guarantee those men the freedom to think and express themselves.

Id. at 197-98 (Frankfurter, J. concurring). Whether or not Chancellor Hutchins used the noun "men" in a gender-inclusive sense need not be considered here. He evidently was thinking of university faculty.

[FN130]. See *supra* notes 25 and 85 and accompanying text.

[FN131]. See American Association of University Professors, 1940 Statement, *supra* note 2, at 1 and 291-301.

[FN132]. 438 U.S. 265 (1978).

[FN133]. *Id.* at 277-81.

[FN134]. 42 U.S.C. § 2000d et seq.

[FN135]. *Bakke*, 438 U.S. at 269-71.

[FN136]. *Id.* at 269.

[FN137]. *Id.* at 271-72. Justices Brennan, White, Marshall, and Blackmun joined Parts I and V-C of Justice Powell's opinion, and Justice White joined Part III-A. See *id.* at 272 n.* and 326. Part I summarized the facts and procedural history of the case; Part V-C reversed the California Supreme Court's judgment which had enjoined the Regents "from ever considering the race of any applicant." *Id.* at 320. Part III-A discusses application of the Fourteenth Amendment's equal protection clause to racial or ethnic classification by state action, and concludes: "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Id.* at 291.

[FN138]. Id. at 311-15.

[FN139]. Id. at 312. See supra note 2 and accompanying text (discussing the earlier characterization of academic freedom as "a special concern of the First Amendment").

[FN140]. Bakke, 438 U.S. at 312. Justice Powell did not mention, and possibly did not notice, that here Justice Frankfurter was quoting from The Open Universities in South Africa. This document, however, excellent and apropos in its South African context, could have at most only persuasive authority for U.S. First Amendment or academic freedom jurisprudence. Justice Frankfurter's concurring opinion in Sweezy, of course, had no more than persuasive authority, either. See infra note 160 and accompanying text.

[FN141]. Bakke, 438 U.S. at 312 (quoting Sweezy, 354 U.S. at 263). This language also derived from The Open Universities in South Africa. See supra note 58 and accompanying text. See also note 104 and accompanying text (discussing the language's original source).

[FN142]. Bakke, 438 U.S. at 312.

[FN143]. Id. (emphasis added). It is unlikely that Justice Powell intended to say that either the University of California at Davis or its Medical School as such was entitled to academic freedom under the First Amendment. Neither the University nor the Medical School was a person. While the Supreme Court has recognized corporations as persons for the Fourteenth Amendment purposes, see First Nat'l Bank of Boston v. Bellotti, 435 U.S.765 (1978), it has not, to date, construed its reference to "persons" to include academic institutions as such.

[FN144]. Bakke, 438 U.S. at 312 (internal footnotes omitted) (omission and bracketed addition as in Justice Powell's quotation).

[FN145]. Id. at 312-13. As read, this statement might be understood to say that Keyishian stood for the proposition that educational institutions should provide for student diversity which would expose its rising generation of leaders to a fully diverse range of "ideas and mores." Keyishian of course did not so state. See supra notes 1 and 30-44 and accompanying text. Very likely Justice Powell meant to say that the importance of kind of "robust discussion" that Keyishian emphasized as an aspect of academic freedom would be enhanced by enrollment of a diverse student body.

[FN146]. Bakke, 438 U.S. at 313. But see Yudof, supra note 5, at 856:

Had [Justice Powell] completely omitted reference to academic freedom in his opinion and simply stated that the goal of student body diversity is a compelling state interest that permits race to be taken into account in admissions decisions, he would have reached the same result without muddying further institutional academic freedom. But few judges, at least in dicta, can resist the temptation to endorse parenthood, family, patriotism, and academic freedom.
Id.

[FN147]. Justice Powell's implicit First Amendment theory might be reconstructed as follows: Academic freedom is a special concern of the First Amendment. Academic

freedom requires that universities provide an "atmosphere" which is "conducive to speculation, experiment, and creation." Moreover, a university should be free "to determine for itself on academic grounds ... who may be admitted to study," since it is in the Nation's interest for universities to admit ethnically diverse students. Such students would expose one another to diverse "ideas and mores," thereby contributing to "the robust exchange of ideas" which can obtain only if academic freedom is duly safe-guarded. In short, in order to promote an atmosphere conducive to academic freedom on campus, a college or university might reasonably seek to admit students from a wide range of racial or ethnic backgrounds.

[FN148]. Bakke, 438 U.S. at 289-310.

[FN149]. Id. Bakke had contended, and the California courts had held that the Regents' "dual admission program [was] a racial classification that impermissibly infringe[d] his rights under the Fourteenth Amendment." Id. at 314. Justice Powell agreed but none of the other Justices concurred on this issue. Id. at 318-20. Justice Stevens, joined by Chief Justice Burger and Justices Stewart and Rehnquist concurred in finding the Medical School's admissions program unlawful; however, instead of finding it unconstitutional, they concluded that it violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et. seq. Id. at 408-21 (Stevens, J., concurring).

[FN150]. Id. at 312.

[FN151]. Id. at 272.

[FN152]. Id. at 272 n.1, 272-78 (discussing where Justice Powell refers to admissions decisions "based on race or ethnic origin by faculties and administration of state universities") (emphasis added).

[FN153]. Id. at 312.

[FN154]. Read as justification for such claims, Justice Powell's comments on academic freedom would have to be construed as dicta, since the question of a university's (or university administration's) versus a faculty member's academic freedom was not before the Court. Necessarily, the Bakke Court neither addressed nor decided this question.

[FN155]. See supra notes 149 and 133-135 and accompanying text.

[FN156]. Bakke, 438 U.S. at 277-78, 298.

[FN157]. Id. at 320 (opinion by Powell, J.); Id. at 421 (opinion by Stevens, J., joined by Burger, C.J. and Stewart and Rehnquist, JJ.). Justices Brennan, White, Marshall and Blackmun concurred in the judgment ordering Bakke admitted, writing in separate opinions.

[FN158]. Nor did any of the other Justices discuss academic freedom in their respective opinions.

[FN159]. Justice Powell's discussion of academic freedom is located in Part IV-D of his opinion. *Id.* at 311-14. No other Justice joined in this portion of Justice Powell's opinion. It therefore would be inexact to refer to this portion of his opinion as a "plurality" opinion. In effect, it should have no more weight than would a concurring opinion. In fact, Part IV-D is merely a concurring opinion, and is so characterized in this article. See *infra* note 160. But see Byrne, *supra* note 10, at 315 (referring to Justice Powell's discussion of academic freedom in Bakke as if it were the opinion of the court).

[FN160]. See Bakke, 438 U.S. at 408 n.1 (Stevens, J., concurring, joined by Berger, C.J., and Stewart and Rehnquist, JJ.) ("Four members of the Court have undertaken to announce the legal and constitutional effect of this Court's judgment It is hardly necessary to state that only a majority can speak for the Court."). Needless to say, a single Justice's opinion can have at most only persuasive authority.

[FN161]. 472 F.Supp. 802 (E.D. Ark. 1979).

[FN162]. Judge Heany was sitting by designation. Id. at 804.

[FN163]. Id. at 805.

[FN164]. Id. at 813. Judge Heany also here specifically states that faculty academic freedom includes the right to be "free of restraints from the university administration[.]" *Id.* Earlier U.S. Supreme Court cases had not yet specifically so determined. This dimension of academic freedom, while arguably implicit in the profession's main standard, the 1940 Statement, is not stated there in these terms. The 1940 Interpretations relate to administrative sanctions as do other procedural and policy statements included in AAUP POLICY DOCUMENTS & REPORTS, *supra* note 2, at 4-5, 11-32.

[FN165]. Curiously, his opinion makes no mention of either Justice Frankfurter's concurrence in *Sweezy*, Justice Frankfurter's quotations from *The Open Universities in South Africa*, or Justice Powell's concurring opinion in *Bakke*. The *Bakke* decision had been announced just a year earlier, and quite probably Judge Heany derived the concept of a university having academic freedom from that source.

[FN166]. Shelley v. Kraemer, 334 U.S. 1 (1948) (holding state court enforcement of racially restrictive covenants in violation of the Fourteenth Amendment equal protection clause is no exception). This case maintained "[t]hat the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment[.]" Id. at 14. Subsequent case law appears to disfavor this conclusion. At any rate, *Shelley* and the cases cited in it all relate to state courts. Moreover, *Shelley* had to do with judicial enforcement of a restrictive covenant. There was no suggestion that judicial review of such enforcement constituted governmental action or intrusion. Cases such as Dow Chemical v. Allen, 672 F.2d 1262 (7th Cir. 1982), considered *infra*, would not have been exceptions either. In *Dow*, the question was whether federal court enforcement of an administrative law judge's subpoena intruded upon faculty members' constitutionally protected rights. There was not, nor could there have been, any suggestion that judicial review of the constitutional claim constituted governmental intrusion.

[FN167]. Cooper, 472 F.Supp. at 813 (citing a series of cases and law journal articles on this point). On the following page, the Court noted and quoted several decisions holding "that academic freedom protects a teacher's choice of teaching

methodology at least when, as here, the school has failed to establish standards or otherwise to notify the teacher that his methods are unacceptable." Id. at 814.

[FN168]. Id. at 813.

[FN169]. Id. at 814.

In summary, the Court concludes that Cooper's membership in the PLP and his public acknowledgment of his beliefs, both inside and outside the University classroom, were protected conduct under the First and Fourteenth Amendments. The Court finds that this protected activity was a substantial or motivating factor in the University's decision not to reappoint Cooper. The University failed to prove by a preponderance of the evidence that the same non- reappointment decision would have been made absent Cooper's exercise of First Amendment rights.

Id. at 814-15.

[FN170]. 429 U.S. 247 (1977). The Cooper court specifically cites Mt. Healthy as controlling authority. Cooper, 472 F.Supp. at 809.

[FN171]. Mt. Healthy was one of a series of Supreme Court decisions concerning First Amendment speech rights of public employees generally. See *infra* note 288 and accompanying text (listing these decisions).

[FN172]. 454 U.S. 263 (1981).

[FN173]. The university was the University of Missouri at Kansas City. Id. at 265.

[FN174]. Id. at 276-77.

[FN175]. Id. at 277 (Stevens, J., concurring).

[FN176]. 454 U.S. 277-78 (Stevens, J., concurring).

[FN177]. Here Justice Stevens cited Justice Frankfurter's concurring opinion in Sweezy, 354 U.S. at 261, "Justice Frankfurter forcefully spoke of 'the grave harm resulting from governmental intrusion into the intellectual life of a university'" Id. at 279 n.2 (Stevens, J., concurring). Justice Stevens added, "Justice Frankfurter quoted with approval portions of an address by T.H. Huxley: 'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation'" Id. Actually, Justice Frankfurter was quoting from The Open Universities in South Africa, not T.H. Huxley. See Sweezy, 354 U.S. at 263 (Frankfurter, J. concurring). See *supra* notes 54-55 and accompanying text.

[FN178]. Widmar, 454 U.S. at 278-79 (Stevens, J., concurring).

[FN179]. See *supra* notes 139-142 and accompanying text. Justice Stevens did not cite Cooper v. Ross. See *supra* notes 161-172 and accompanying text. See Finkin, *supra* note 54, at 846-47.

The sole support Justices Powell and Stevens supply for their conclusions [in Bakke and Widmar, respectively] is the Sweezy concurrence. On close examination,

however, it appears that they make far too much of Justice Frankfurter's admonishing aside. Justice Frankfurter did invoke the freedom to select students "on academic grounds" as one of the four pillars of university freedom. The document he relied upon, however, the South African remonstrance, merely recalled the medieval idea of a university as a place where all were welcome solely on the basis of academic qualification The remonstrance did not discuss whether a public institution should be allowed to prefer one race over another under a constitutional regime that affords equal protection to all, black and white.

Id. As describe earlier in this article, The Open Universities in South Africa authors were not merely invoking a medieval idea. But Professor Finkin properly notes here that the South African authors were not in a position to invoke U.S. constitutional provisions. Conversely, what might be good academic practice in South Africa would not necessarily fall within the rubric of U.S. constitutional protection.

[FN180]. See supra note 178 and accompanying text.

[FN181]. 672 F.2d 1262 (7th Cir. 1982).

[FN182]. Id. at 1266; United States v. Allen, 494 F.Supp 107, 108-10, 113 (W.D. Wisc. 1980) (summarizing the factual and procedural history).

[FN183]. Dow Chemical Co., 672 F.2d at 1274-77.

[FN184]. Id. at 1274.

[FN185]. Id. at 1275. The Supreme Court had not addressed the question whether academic freedom extends to faculty research or publication. The court cited and quoted as authority THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970). Id.

[FN186]. Id. at 1276-77.

[FN187]. Id. at 1275. The court cited no authority for this bifurcated characterization of academic freedom.

[FN188]. The quoted (and paraphrased) language evidently derives from Cooper v. Ross, 472 F.Supp. 802, 813 (E.D.Ark. 1979). Supra text notes 161- 172 and accompanying text. The Dow court cited Cooper in the previous paragraph as authority for stating "[t]he precise contours of the concept of academic freedom are difficult to define." Dow Chemical Co., 672 F.2d at 1275. The Cooper court had stated, "Case law considering the extent to which the First Amendment and academic freedom protect a teacher's choice of teaching methodology is surprisingly sparse" 472 F.Supp. at 813 (emphasis added). The Dow court evidently borrowed the expression, "Case law considering ... is surprisingly sparse" and misapplied it to the dubious dichotomy "between the academic freedom of the individual teacher to be free of restraints from the university administration, and the academic freedom of the university to be free of government ... interference" which had been articulated in dicta by the Cooper court. Id. at 813.

[FN189]. Language in the court's discussion of academic freedom refers, inter alia, to "teachers" (several times), "the individual faculty member," "the scholar," "a university professor," "the professor's liberty of academic freedom," "the

professor," "the researchers" (several times), and "respondents' academic freedom interest." Dow Chemical Co., 672 F.2d at 1274-76.

[FN190]. Id. at 1276 (quoting from Sweezy, 354 U.S. at 262) (Frankfurter, J., concurring in result) (bracketed omission as in the court's quotation from Sweezy).

[FN191]. Id. at 1276-77.

[FN192]. See *supra* notes 189, 164 and 182 and accompanying text.

[FN193]. 699 F.2d 387, 392 (7th Cir. 1983).

[FN194]. For a summary of facts, see Martin v. Helstad, 699 F.2d 387, 388 (7th Cir. 1983).

[FN195]. Id. at 390.

[FN196]. 424 U.S. 319, 335 (1976).

[FN197]. Martin, 699 F.2d at 391 (internal footnotes omitted).

[FN198]. Id. at 391 (citing Bakke, 438 U.S. at 311-15 (Powell, J.)). The panel did not identify any language in Bakke referring specifically to academic dismissals, or linking academic dismissals to academic freedom, or contrasting academic dismissals with admissions decisions. A review of the cited pages in Bakke fails to reveal such language.

[FN199]. The majority did not discuss the role of the Law School's faculty in connection with its admission procedures or its revocation of Martin's acceptance; however, the concurring opinion notes that faculty were involved in the revocation decision. Id. at 394-95 (Coffey, J., concurring).

[FN200]. Id. at 391.

[FN201]. Id. at 392 (Coffey, J., concurring).

[FN202]. Id. at 399.

[FN203]. Id. at 395-96.

[FN204]. Id. at 396-97 (emphasis in original).

[FN205]. Id. at 397 (Coffey, J., concurring) (emphasis added).

[FN206]. Id. at 397 (emphasis in original).

[FN207]. See supra text accompanying note 139.

[FN208]. Martin, 699 F.2d at 397 (Coffey, J., concurring). Like Justice Powell's decision in Bakke, Judge Coffey's concurrence did not mention the fact that Justice Frankfurter was here quoting from The Open Universities in South Africa. Nor did Judge Coffey mention that the part of Justice Powell's Bakke opinion in which he discussed academic freedom - including the quotation from Justice Frankfurter's concurrence in Sweezy - had not been joined by any other Supreme Court Justices. See supra notes 159 and 160, and text accompanying notes 158-60.

[FN209]. Judge Coffey did not refer to faculty members' academic freedom.

[FN210]. See supra text accompanying notes 204-206.

[FN211]. 715 F.2d 331 (7th Cir. 1983) (opinion by Coffey, J.).

[FN212]. Id. at 337.

[FN213]. Id. at 332.

[FN214]. Facts and procedural history are summarized at E.E.O.C. v. Univ. of Notre Dame du Lac, 715 F.2d 331, 332-34 (7th Cir. 1983).

[FN215]. Here the Seventh Circuit panel described, in a footnote, the peer review process followed at the University, commenting that it was "similar if not almost identical to the process utilized by many other institutions of higher learning." The process as described involves, not surprisingly, peer review: that is, consideration by the tenure applicant's department (faculty) committee, which, inter alia, "solicits written evaluations regarding the applicant's scholarship, teaching and service from the applicant's academic peers at the university and from eminent scholars at other respected institutions of higher education," after considering that, "the committee votes by secret ballot to determine whether the applicant is to be granted tenure." Notre Dame, 715 F.2d at 333-34, n.1.

[FN216]. Id. at 333-34.

[FN217]. No such claim is mentioned in the district court's opinion either. See E.E.O.C. v. Univ. of Notre Dame du Lac, 551 F.Supp. 737 (N.D. Ind. 1982). The district court held that "no academic privilege exists" which would protect the requested information from disclosure to the E.E.O.C. Id. at 745.

[FN218]. Notre Dame, 715 F.2d at 335. The Notre Dame court did not note that this language derived from The Open Universities in South Africa or that it was Justice Powell, not Justice Frankfurter, who characterized "the four essential freedoms" as constituting academic freedom.

[FN219]. In this connection, he cited his own concurring opinion in Martin v.

Helstad, 699 F.2d. 387, 397 (7th Cir. 1983) and Dow Chemical Co. v. Allen, 672 F.2d 1262, 1274-76 (7th Cir. 1982). Id. at 336. See supra text accompanying notes 193-210 and 182-92, respectively.

[FN220]. Notre Dame, 715 F.2d at 337.

[FN221]. As noted supra notes 215-16 and accompanying text, the University had claimed simply "a qualified academic privilege." The court did not explain why it re-named the claimed privilege. In its conclusion to this discussion, the court referred to it simply as a "qualified academic privilege." Id. at 340.

[FN222]. Id. at 337.

[FN223]. The cases cited were Gray v. Bd. of Higher Educ., City of New York, 692 F.2d 901 (2d Cir. 1983); McKillop v. Regents of the Univ. of Cal., 386 F.Supp. 1220 (N.D.Cal. 1975); Zautinsky v. Univ. of Cal., 96 F.R.D. 622 (N.D.Cal. 1983); and In re Dinnan, 661 F.2d 426 (5th Cir. 1981). Id. The Notre Dame court may have been misled in regard to the Gray case by West Publishing Company's summary and headnote which incorrectly stated that the Gray court held that the college tenure committee's "votes were subject to qualified academic freedom privilege." 692 F.2d at 901. Both the Gray and Zautinsky courts cited Note, Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege, 69 CAL. L. REV. 1538, 1551-52 (1981).

The Dinnan court rejected the Georgia University System Board of Regents' claim to shelter under an "academic freedom" privilege. 661 F.2d at 427, 431. "Though we recognize the importance of academic freedom, we must also recognize its limits. The public policy of the United States prohibits discrimination; Professor Dinnan and the University of Georgia are not above that policy. To rule otherwise would mean that the concept of academic freedom would give any institution of higher learning a carte blanche to practice discrimination of all types." Id. A few years later, the Third Circuit likewise declined to adopt a "proffered qualified academic peer review privilege." E.E.O.C. v. Franklin and Marshall Coll., 775 F.2d 110, 111, 113 (3d Cir. 1985). Here, as in Gray, the institution claimed entitlement to such privilege against an E.E.O.C. subpoena compelling disclosure of confidential peer review material. "In Kunda v. Muhlenberg College [621 F.2d 532, 548 (3d Cir. 1980)], this court concluded from the legislative history of Title VII and its amendments that, notwithstanding principles of academic freedom, tenure decisions fall within the intended scope of the Act." Id. at 115.

[FN224]. Notre Dame, 715 F.2d at 340 (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)). The court substituted "educators" for "teachers". Possibly this substitution was intended to extend academic freedom to institutional administrators sub silentio. More likely, the court used the more inclusive term in recognition that the case concerned university professors rather than high school or secondary school teachers.

[FN225]. Id. at 336 (internal citations omitted).

[FN226]. Compare the Supreme Court's summary of petitioner University's contention in another case: "[I]t argues that the First Amendment is infringed by disclosure of peer review materials because disclosure undermines the confidentiality which is central to the peer review process, and this in turn is central to the tenure process, which, in turn, is the means by which petitioner seeks to exercise its asserted academic-freedom right of choosing who will teach." Univ. of Pa. v. E.E.O.C., 493 U.S. 182, 199-200 (1990).

[FN227]. 493 U.S. 182 (1990).

[FN228]. The University wished to exclude as "confidential peer review information ... (1) confidential letters written by Tung's evaluators; (2) the department chairman's letter of evaluation; (3) documents reflecting the internal deliberations of faculty committees considering applications for tenure, including the Department Evaluation Report summarizing the deliberations relating to Tung's application for tenure; and (4) comparable portions of the tenure-review files" of five named male faculty members. See id. at 186.

[FN229]. See id. at 185-88, citing E.E.O.C. v. Univ. of Pa., 850 F.2d 969 (3d Cir. 1988).

[FN230]. 715 F.2d 331, 337 (1983); see supra notes 211-26 and accompanying text.

[FN231]. 493 U.S. 188.

[FN232]. Id. at 196-97.

[FN233]. Id. at 196 (emphasis in original). The University was not distinguishing itself from its faculty in asserting an academic freedom claim. What was at issue was disclosure of peer evaluations, i.e., evaluations by other faculty, which were then considered by faculty in making their recommendation. See id. at 196: "Petitioner ... maintains that the peer review process is the most important element in the effective operation of a tenure system. A properly functioning tenure system requires the faculty to obtain candid and detailed written evaluations of the candidate's scholarship, both from the candidate's peers at the university and from scholars at other institutions."

[FN234]. The University also contended that it was entitled to a common law privilege based on Federal Rule of Evidence 501. The Court rejected this claim. See id. at 188-95.

[FN235]. Id. at 197 (emphasis in original).

[FN236]. Id. (emphasis added).

[FN237]. See supra text accompanying note 58. The Court did not mention The Open Universities in South Africa as Justice Frankfurter's source for this statement. Justice Blackmun was not the only one to mistake concurring opinions for holdings of the Court. See, e.g., Rabban, supra note 10 at 18: "... Bakke and Widmar, the first Supreme Court cases that recognized a distinctive category of institutional academic freedom" Compare supra text accompanying notes 158-60 and 170-80.

[FN238]. See supra note 160. Possibly in an effort to elevate this language to constitutional status, the Court re-characterized the significance of Keyishian. "In Keyishian ... government was attempting to substitute its teaching employment criteria for those already in place at the academic institutions, directly and completely usurping the discretion of each institution." 493 U.S. at 198 (emphasis in original). This statement is not accurate either. In Keyishian, state laws and

attendant regulations added to the state's academic institution's employment criteria, but did not replace them. More importantly, while the Court's re-characterization may partially describe the fact situation in *Keyishian*, the Court's decision in that case at no point discusses any attempt by "government" to "substitute its teaching employment criteria for those already in place at the academic institutions." *Id.* That issue, was not before the *Keyishian* Court, and that Court did not address it, let alone rule on it as a matter of law. *Keyishian* was about state actions that violated the academic freedom of individual faculty. See *supra* notes 30-44 and accompanying text.

[FN239]. 493 U.S. at 199 (emphasis in original) (citing *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985)).

[FN240]. *Id.* (emphasis in original). The University had not specifically claimed an "academic" or "academic freedom privilege." Compare Seventh Circuit cases cited *supra* note 223 and text accompanying notes 211-26.

[FN241]. 493 U.S. at 199.

[FN242]. See *supra* note 223 and text accompanying notes 211-26.

[FN243]. The Court noted that it did not address the question whether, how or to what extent the University might redact personnel files before turning them over to the E.E.O.C., but referred that issue for consideration on remand. 493 U.S. at 202 n.9.

[FN244]. 759 F.2d 625 (7th Cir. 1985).

[FN245]. *Id.* at 627.

[FN246]. *Id.* at 628.

[FN247]. *Id.* at 627.

[FN248]. *Id.* at 629.

[FN249]. See *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) ("Our cases have required the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content.").

[FN250]. 759 F.2d at 632-33.

[FN251]. *Id.* at 629-30. It is not clear whether either Piarowski or the College officials argued that they were entitled to academic freedom, or whether the court addressed this question *sua sponte*.

[FN252]. Here the panel cited *Sweezy* (both plurality and concurring opinions), *Keyishian*, *Dow*, and *Gray*, and Note, *Academic Freedom in the Public Schools: The*

Right to Teach, 48 N.Y.U. L. REV. 1176 (1973).

[FN253]. 759 F.2d at 629 (internal citations omitted). The court did not explain its implicit equation or aggregation of student academic freedom with faculty academic freedom. See supra note 11. The Supreme Court's decisions in *Sweezy*, *Keyishian*, and *Whitehill* pertained only to faculty members' academic freedom. See supra notes 29 and 46, and text accompanying notes 27, 46-49.

[FN254]. See supra text accompanying notes 161-71.

[FN255]. 759 F.2d at 629.

[FN256]. *Id.* Moreover, this discussion was not joined by any other Justices, and even if it had been, it would have been only dicta, since Justice Powell proposed to resolve *Bakke* on equal protection grounds. See supra note 159 and text accompanying notes 147-49 and 158-60.

[FN257]. See supra text accompanying notes 139-46 and 150-54.

[FN258]. See supra text accompanying notes 155-57 and note 157.

[FN259]. See supra notes 224-25 and accompanying text.

[FN260]. See supra text accompanying notes 215-20. Compare *Univ. of Pa. v. E.E.O.C.*, supra text accompanying notes 227-43, in which the Supreme Court held against the University's claim that its academic freedom meant that it could withhold faculty committee records subpoenaed by the E.E.O.C. To the extent that University of Pennsylvania effectively overruled *Notre Dame*, the only cited authority supporting Piarowski's conception of two academic freedoms "in conflict" would be Justice Powell's opinion in *Bakke*. But that part of his opinion did not gain the support of any other Justices, supra notes 158-60 and accompanying text. Moreover, Justice Powell's authority was Justice Frankfurter's concurring opinion in *Sweezy*, which, of course, is only persuasive authority.

[FN261]. See supra text accompanying notes 212-16.

[FN262]. 759 F.2d at 630. Compare Judge Coffey's statement in *Martin* as to his beliefs, supra text accompanying notes 205-06.

[FN263]. See supra note 247 and accompanying text.

[FN264]. *Id.* at 630-33. The court began this analysis citing *Young v. Amn. Mini Theatres, Inc.*, 427 U.S. 50 (1976), a case that obviously had nothing to do with academic freedom. In the course of this analysis, the court stated, inter alia, "[t]o hold the defendants liable to Piarowski for ordering his work relocated would have disturbing implications for the scope of federal judicial intervention in the affairs of public museums and art galleries." *Id.* at 631.

[FN265]. See supra note 250 and accompanying text.

[FN266]. 474 U.S. 214 (1985).

[FN267]. Id. at 215-17.

[FN268]. Id. at 225 (emphasis added) (citing Bd. of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78, 96 n.6 (1978)).

[FN269]. 474 U.S. at 226 n.12.

[FN270]. Sweezy v. New Hampshire, 354 U.S. 234, 263 (Frankfurter, J., concurring), cited in Univ. of Cal. Bd. of Regents v. Bakke, 438 U.S. 265, 312 (1978) (opinion by Powell, J.), cited by Justice Stevens in Ewing, 474 U.S. at 226 n.12. Justice Stevens did not identify The Open Universities in South Africa as the source quoted by Justice Frankfurter in his Sweezy concurrence. See generally, David M. Rabban, A Functional Analysis of "Individual" and "Institutional" Academic Freedom under the First Amendment, 53 LAW & CONTEMP. PROBS. 227 (1990).

[FN271]. See supra text accompanying note 268. Compare *id.* with Byrne, supra note 5 at 317 ("In 1985, a unanimous Supreme Court accepted [the concept] of institutional academic freedom in Regents of the Univ. of Mich. v. Ewing.").

[FN272]. The Supreme Court has determined that faculty may function as primary decision-makers in university governance. *Nat'l Labor Relations Bd. v. Yeshiva Univ.*, 444 U.S. 673 (1980). Yeshiva was a private university; however, the role of faculties in public colleges and universities where governance is shared between faculty and administration does not necessarily differ substantially.

[FN273]. See supra notes 252-53 and accompanying text.

[FN274]. See also Shelton v. Tr.'s of Ind. Univ., 891 F.2d 165 (7th Cir. 1989) (opinion by Posner, J.). Stephen Shelton had been a resident assistant in one of the University's dormitories. In the face of his supervisor's explicit instructions to the contrary, Shelton insisted that he had a right to keep a partly disabled rifle in his room. Judge Posner wrote:

A public university does not violate the First Amendment when it takes reasonable steps to maintain an atmosphere conducive to study and learning by designating the time, place, and manner of verbal and especially nonverbal expression; and the principles of academic freedom counsel courts to defer broadly to a university's determination of what those steps are. *Id.* at 167 (citing Piarowski v. Ill. Comty. Coll., 759 F.2d 625 (7th Cir. 1985)).

Evidently Judge Posner's comments here about "the principles of academic freedom" were dicta, since the panel affirmed the district court's finding that Shelton was terminated because the administration considered him unsuitable for the position on the basis of his handling of the rifle incident, in effect, for insubordination, not for exercising his claimed right of free speech. *Id.* at 167-68.

[FN275]. 811 F.2d 1091 (7th Cir. 1987) (opinion by Easterbrook, J.; other panelists were Cudahy and Posner, J.J.).

[FN276]. See id. at 1092-93. The panel majority characterized his claims as

frivolous and on its own motion awarded the University attorney fees. Id. at 1098. Judge Cudahy found the suit not entirely devoid of merit and dissented as to attorney fees. Id. at 1098-99.

[FN277]. Id. at 1097 n.4. The panel had concluded that Weinstein had no property interest in his position at the University. Id. at 1097.

[FN278]. Id. at 1097 n.4 (internal citations omitted).

[FN279]. See supra notes 252-53 and accompanying text.

[FN280]. See supra note 262 and accompanying text.

[FN281]. 970 F.2d 252 (7th Cir. 1992).

[FN282]. Id. at 252-56.

[FN283]. Id. at 256-57.

[FN284]. Id. at 259. The district court held that Keen's letters were unprotected by the First Amendment because they did not address a matter of public concern, and that giving a grade is not within the scope of academic freedom. Id. at 257. Likewise, see Brown v. Armenti, 247 F.3d 69, 75 (3d Cir. 2001) (public university professor has no First Amendment right to expression in assigning or refusing to change student's grade). The Brown court reasoned that, under Bakke, "the assignment of the grade is subsumed under the university's freedom to determine how a course is to be taught." Id. The Brown court did not mention that this purported freedom was based upon Justice Powell's concurring opinion in Bakke, quoting Justice Frankfurter's concurring opinion in Sweezy, which quoted The Open Universities in South Africa, rather than upon any holding by the Court. Compare id. with Parate v. Isibor, 868 F.2d 821, 827-29 (6th Cir. 1989) (act of university officials ordering professor to change grade violated professor's First Amendment academic freedom rights).

[FN285]. Keen, 970 F.2d at 257.

[FN286]. See supra notes 252-53 and 269 and accompanying text.

[FN287]. Here as in several other cases, the University's purported academic freedom was exercised largely by its faculty. The University's faculty reviewed Keen's conduct and recommended sanctions.

[FN288]. 288 391 U.S. 563 (1968). These cases then included also Mount Healthy Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410 (1979); Connick v. Myers, 461 U.S. 138 (1983); and Rankin v. McPherson, 483 U.S. 378 (1987). As to this line of cases, see generally, Richard H. Hiers, First Amendment Speech Rights of Government Employees: Trends and Problems in Supreme Court and Fifth Circuit Decisions, 45 SW. L.J. 741 (1991), and Public Employees' Free Speech: An Endangered Species of First Amendment Rights in Supreme Court and Eleventh Circuit Jurisprudence, 5 U. FLA. J.L. & PUB. POL'Y 169 (1993).

Later the Court added two other decisions to the series: Waters v. Churchill, 511 U.S. 661 (1994); and United States v. Nat'l Treasury Employees Union, 513 U.S. 454 (1995).

[FN289]. Rankin, 483 U.S. at 384; see also Connick, 461 U.S. at 147.

[FN290]. Connick, 461 U.S. at 148 n.7.

[FN291]. Keen, 970 F.2d at 257.

[FN292]. Id. at 258-59.

[FN293]. Compare Shelton, supra note 274 at 167-68 (resident assistant terminated because he was considered unsuitable for position, not because of his speech) with Blum v. Schlegel, 18 F.3d 1005 (2d Cir. 1994) (plaintiff faculty member failed to show causal nexus between his protected speech and purportedly adverse personnel action) and Megill v. Bd. of Regents, 541 F.2d 1073 (5th Cir. 1976) (tenure denial based on faculty member's unprofessional conduct, not speech).

[FN294]. See supra text accompanying notes 284-86.

[FN295]. 167 F.3d 1146 (7th Cir. 1999) (court denies professors' request for preliminary injunction to bar university from retaliating against them for speech).

[FN296]. 171 F.3d 494 (7th Cir. 1999) (reversing jury award to professor terminated after he accused colleagues of plagiarism and falsely claiming co- authorship with famous scholar).

[FN297]. 167 F.3d at 1149. "Justices Frankfurter and Harlan referred to the four freedoms of a university: 'to determine for itself on academic grounds ... what may be taught, how it shall be taught ...'" (emphasis in original). Id. at 1149-50. It also cited, as if relevant, a case and a law journal article concerned with curricular decisions in public schools: Webster v. New Lenox Sch. Dist. No. 122, 917 F.2d 1004 (7th Cir. 1990); Stephen R. Goldstein, The Asserted Constitutional Right of Public School Teachers to Determine What They Teach, 124 U. PA. L. REV. 1293 (1976). Id. at 1150. See supra note 11, noting courts' tendency to apply public school case law to claims by faculty in institutions of higher learning.

[FN298]. Id. at 1148. The court apparently viewed this re-assignment as merely a curricular decision rather than a retaliatory action by Webb's chairman. See supra note 297 and accompanying text.

[FN299]. 167 F.3d at 1149 and 171 F.3d at 495, respectively.

[FN300]. See 171 F.3d at 495.

[FN301]. Id.

[FN302]. See supra note 288 and accompanying text.

[FN303]. See supra notes 289-90 and accompanying text.

[FN304]. See, e.g., Pickering, 391 U.S. at 568: "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

[FN305]. 167 F.3d at 1150 and 171 F.3d at 496-97, respectively, quoting Waters v. Churchill, 511 U.S. 661, 675 (1994) (plurality opinion by O'Connor, J.). For critiques on Waters, see Comment, Edward J. Velazquez, Waters v. Churchill: Government-Employer Efficiency, Judicial Deference, and the Abandonment of Public-Employee Free Speech by the Supreme Court, 61 BROOK. L. REV. 1055 (1995), and Terrence Leas & Charles J. Russo, Waters v. Churchill: Autonomy for the Academy or Freedom for the Individual, 93 EDUC. L. REP. 1099 (1994).

[FN306]. Supra notes 287-90 and accompanying text.

[FN307]. See supra notes 287-89, 300-05, and accompanying text.

[FN308]. 136 F.3d 364 (4th Cir. 1998) (en banc) (opinion by Widener, J.). Six judges joined Judge Widener's majority opinion. Two of the six wrote concurring opinions, one of which was joined by two of the other six. Two judges wrote dissenting opinions. One was joined by one of the other dissenting judges. The other dissent was joined by all five dissenting judges, including the writer of the first dissent and the judge who had joined in it. The court was closely and deeply divided, 7 to 6, as to the result.

[FN309]. Boring, 136 F.3d at 366. In her eventual suit, Boring characterized the play as "powerfully" depicting "the dynamics within a dysfunctional, single-parent family -- a divorced mother and three daughters: one a lesbian, another pregnant with an illegitimate child." Id.

[FN310]. Id. at 366-67. Basic facts are summarized on those two pages. See also id. at 375-76 (Motz, J., dissenting).

[FN311]. Id. at 367. She also alleged due process violation and related claims under the North Carolina Constitution. Id.

[FN312]. Boring v. Buncombe County Bd. of Educ., 98 F.3d 1474 (4th Cir. 1996).

[FN313]. Procedural history is reviewed at 136 F.3d 367.

[FN314]. Boring, 136 F.3d at 370. The court referred for authority, inter alia, to Webster's Third New International Dictionary, 1971, p. 557 (for definition of "curriculum"), and Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (a student speech in school newspaper case).

[FN315]. The court found the following quotation from Plato relevant to "the very subject at hand": "For a young person cannot judge what is allegorical and what is literal; anything that he receives into his mind at that age is likely to become indelible and unalterable; and therefore it is most important that the tales which the young first hear should be models of virtuous thoughts." 136 F.3d at 370 (internal footnotes omitted).

[FN316]. The court cited the following passage from Edmund Burke's writings as equally relevant: "The magistrate, who in favor of freedom thinks himself obligated to suffer all sorts of publications, is under a stricter duty than any other well to consider what sort of writers he shall authorize He ought to be cautious how he recommends authors of mixed or ambiguous morality. He ought to be fearful of putting into the hands of youth writers indulgent to the peculiarities of their own complexion, lest they should teach the humors of the professor, rather than the principles of science." Id. at 370 (citation omitted).

[FN317]. 136 F.3d at 370.

[FN318]. Id. To what extent if any that meaning can be found in the quoted remarks by Plato and Burke need not be considered here.

[FN319]. Judge Hamilton's dissenting opinion viewed the curriculum question in a different light:

This is also a case about a dedicated teacher who, contrary to the implications of the majority and concurring opinions, in no way violated any aspect of an approved curriculum; who followed every previously required standard set forth for the selection and approval of the school production; who, when requested to do so, redacted certain portions of the production and only permitted its performance after that performance had been explicitly approved by her principal, ...; yet, who nevertheless lost her position as a result of the production, all for the sole purpose of shielding the principal and the Board from the wrath of the public outcry.

136 F.3d at 374 (Hamilton, J., dissenting, joined by Murnaghan, J.) Compare Finkin's anticipation of future misuse of Sweezy's concurrence as already adumbrated in Justice Powell's opinion in Bakke and Justice Stevens' concurrence in Widmar:

[B]ecause [] the interests insulated are not necessarily those of teachers and researchers but of the administration and governing board [,] the effect is to insulate managerial decision making from close scrutiny, even in cases where the rights or interests of the faculty might be adverse to the institution's administration. [] Consequently, the theory of "institutional" academic freedom would provide institutional authority with more than a prudential claim to judicial deference; it provides a constitutional shield against interventions that would not ordinarily seem inappropriate, for example, judicial intervention on behalf of a faculty whose civil or academic rights had been infringed by the institution. Finkin, *supra* note 54 at 851 (internal citations and quotation marks omitted).

[FN320]. See *supra* text accompanying notes 244-64.

[FN321]. See *supra* text accompanying notes 274-79.

[FN322]. 461 U.S. 138 (1983) (opinion by White, J.).

[FN323]. 136 F.3d at 368, quoting Connick, 461 U.S. at 147. Elsewhere in the

opinion, the Connick Court likewise, oddly, referred to "behavior" rather than "speech" or "expression."

[FN324]. The Connick decision is critiqued, inter alia, by Stephen Allred, From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern, 64 IND. L.J. 43, 50-56 (1988), and Cynthia L. Estlund, Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category, 59 GEO. WASH. L. REV. 1 (1990). See also Hiers, supra note 288.

[FN325]. Boring, 136 F.3d at 369. The court relied also on Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794 (5th Cir. 1989) (teacher's selection of unapproved reading list without required approval by school authorities unprotected), and on Searcey v. Harris, 888 F.2d 1314, 1319 (11th Cir. 1989) (the makeup of a curricular program is a pedagogical concern). 136 F.3d at 369-70.

[FN326]. 136 F.3d at 369.

[FN327]. See supra note 308.

[FN328]. See comments by Judge Hamilton: "[T]he facts as alleged in the complaint suggest strongly that this case is far from an 'ordinary employment dispute,' i.e., a case involving only speech of a private concern, as the majority dismissively states [T]his dispute originated in, and was entirely the result of, public debate ..." 136 F.3d at 374 (Hamilton, J., dissenting). See also Judge Motz's dissenting opinion: "Although Boring's in-class speech does not itself constitute pure public debate, obviously it does 'relate to' matters of overwhelmingly public concern - family life, divorce, motherhood, and illegitimacy Thus, if the Connick analysis did apply to in-class speech, then Boring's choice and production of a play that raises a number of important social issues obviously falls within the Supreme Court's broad definition of 'public concern,' which includes speech 'relating to any matter of political, social, or other concern to the community.'" Connick, 461 U.S. at 146 (emphasis added). 136 F.3d at 378 (Motz, J., dissenting).

[FN329]. 136 F.3d at 378 (Motz, J., dissenting).

[FN330]. Sweezy, 354 U.S. at 250.

[FN331]. See supra text accompanying notes 43- 44.

[FN332]. Boring, 136 F.3d at 379.

[FN333]. 136 F.3d at 379 (Motz, J., dissenting) (internal footnotes omitted).

[FN334]. 167 F.3d 191 (4th Cir. 1999), vacated, Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000) (en banc) (opinion by Wilkins, J.).

[FN335]. Id. at 193.

[FN336]. Id., (quoting Va. Code Ann. § 2.1-805. Other statutory provisions are also

reproduced 167 F.3d 193-94, 193 n.2 and 194 n.3.).

[FN337]. Urofsky v. Allen, 995 F.Supp. 634, 635 (E.D. Va. 1998). George Allen was then Governor of the Commonwealth of Virginia.

[FN338]. Id. at 635.

[FN339]. Id. at 644.

[FN340]. Urofsky v. Gilmore, 167 F.3d at 191, 193, 196. James S. Gilmore, III, succeeded Allen as Governor and was substituted as party in the suit. Id. at 193 n.1.

[FN341]. Id. at 196 (quoting Boring, 136 F. 3d at 368-369).

[FN342]. Compare Judge Motz's concern, expressed in her dissent in Boring, that the majority meant that a teacher's role is dispositive as to the "matters of public concern" test. *Supra* note 329 and accompanying text.

[FN343]. See *supra* notes 28 & 29, and text accompanying notes 25-44.

[FN344]. Judge Hamilton, who dissented in Boring, wrote a concurring opinion in which he stated: "Left to my own devices, I would hold that the Plaintiffs' speech in this case is entitled to some measure of First Amendment protection, thus triggering application of the Connick / Pickering balancing test. However, being bound by the en banc court's decision in Boring, I concur in the court's opinion." Urofsky, 167 F.3d at 197 (Hamilton, J., concurring).

[FN345]. Id. at 196. The Urofsky panel cited Terrell v. Univ. of Tex., 792 F.2d 1360, 1362 (5th Cir. 1986) for the proposition that whether a speech was "made primarily in the [employee's] role as citizen or primarily in his role as employee" is "[c]ritical to a determination of whether [the] speech touches on a matter of public concern." Id. Terrell was criticized by the Eleventh Circuit in Kurtz v. Vickery, 855 F.2d 723, 727 (11th Cir. 1988), but some subsequent Eleventh Circuit decisions have, like Terrell, emphasized the employee's purported "role" to the virtual exclusion of other factors.

[FN346]. See *supra* text accompanying note 338.

[FN347]. See Urofsky, 167 F.3d at 195: "An inquiry into whether a matter is of public concern does not involve a determination of how interesting or important the subject of an employee's speech is." In its previous sentence, however, the majority cited Connick, 461 U.S. at 146, for the proposition: "[T]o determine whether speech involves a matter of public concern, we examine the content, context, and form of the speech at issue in the light of the entire record." Id. If or where the panel undertook such examination is not apparent.

[FN348]. The last two sentences of the panel's opinion read: "The Act regulates the speech of individuals speaking in their capacity as Commonwealth employees, not as citizens, and thus the Act does not touch upon a matter of public concern."

Consequently, the speech may be restricted consistent with the First Amendment." Id. at 196.

[FN349]. 216 F.3d 401 (Wilkins, J.). Judge Wilkins had also written the panel's opinion.

[FN350]. Id. at 404, 416. See supra note 346. As to the impact of the Fourth Circuit's Urofsky decision on faculty in Virginia public colleges and universities, see Terry L. Meyers, Recently Deceased: The First Amendment in Virginia, 88 ACADEME 5, 28-32 (2002).

[FN351]. Urofsky, 216 F.3d at 407 (internal quotation marks and brackets omitted).

[FN352]. Id. at 406 (citing Connick, 461 U.S. at 147-48).

[FN353]. Id. at 408-09.

[FN354]. Id. at 408 n.6.

[FN355]. See supra text accompanying note 323.

[FN356]. Connick, 461 U.S. at 147.

[FN357]. Urofsky, 216 F.3d at 409. This claim was not addressed by the district court and apparently was raised for the first time on appeal before the en banc court.

[FN358]. Id. at 410. Later in a footnote, the court adds, "[W]e note that the Act places the authority to approve or disapprove research projects with the agency, here the university. Thus, the Act leaves decisions concerning subjects of faculty research in the hands of the institution." Id. at 415 n.17.

[FN359]. See supra note 2.

[FN360]. Urofsky, 216 F.3d at 411, (quoting BYRNE, supra note 5, at 279). This statement may exaggerate. The Ninth Edition of AAUP POLICY DOCUMENTS does list approximately 150 endorsing organizations and associations, supra note 2, at 7-10.

[FN361]. Id. The 1940 Statement was published seventeen years before Sweezy was decided and twenty-seven years before Keyishian. In 1940, the Supreme Court had not yet recognized academic freedom as a right protected under the First Amendment. The critical legal question, of course, is not whether the AAUP recognized academic freedom as a constitutionally protected right, but whether the courts have done so. See generally William W. Van Alstyne, Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review, 53 LAW & CONTEMP. PROBS. 79 (1990), and David M. Rabban, A Functional Analysis of "Individual" and "Institutional" Academic Freedom under the First Amendment, 53 LAW & CONTEMP. PROBS. 227 (1990).

[FN362]. Id. See also id. at 412 ("... these accolades ..."; "This paeon to academic freedom ...") Following a listing of the Supreme Court's academic freedom cases, the en banc court stated: "Despite these accolades, the Supreme Court has never set aside a state regulation on the basis that it infringed a First Amendment right to academic freedom." Id. Possibly the court's clerks neglected to bring this aspect of Keyishian to the judges' attention. See supra text accompanying notes 38-39 and 235.

[FN363]. Id. at 412-14. The en banc court also mentioned Whitehill, Shelton, and Wieman, id. at 413, but implied that these cases had been over-ruled sub silentio: "Even if Whitehill, Shelton, and Wieman could be said to have established a constitutional right of academic freedom enjoyed by publicly employed teachers, such a holding would be of little significance in light of the historical context." Id. As to these cases, see supra text accompanying notes 18-24 and notes 28-29.

[FN364]. 354 U.S. at 250.

[FN365]. Urofsky, 216 F.3d at 412 (citing 354 U.S. at 254-55).

[FN366]. Sweezy, 354 U.S. at 250.

[FN367]. 354 U.S. at 255 (emphasis added).

[FN368]. See also supra text accompanying notes 46-55.

[FN369]. Urofsky, 216 F.3d at 412. As noted supra text accompanying note 122, Justice Frankfurter's concurrence in Sweezy did not mention academic freedom.

[FN370]. Id. at 412-13 (quoting 354 U.S. at 261).

[FN371]. Id. at 413.

[FN372]. Id.

[FN373]. See supra text accompanying notes 57-61, 86-89, 100, 106-07, 111- 12, and 117-23. See also Justice Frankfurter's statements about teachers in Wieman, supra notes 125 and 129, and text accompanying notes 124-29.

[FN374]. Urofsky, 216 F.3d at 414.

[FN375]. Id.

[FN376]. Keyishian, 385 U.S. at 602. See also supra notes 31-36 and accompanying text.

[FN377]. See supra notes 31-43 and accompanying text.

[FN378]. 216 F.3d at 414 (citing and quoting Baake, 438 U.S. at 312). The en banc majority did not mention here that Justice Frankfurter was quoting from The Open Universities in South Africa. Nor did it note that no other Supreme Court Justice joined Justice Powell in this portion of his Bakke opinion. See *supra* notes 158-60 and accompanying text.

[FN379]. See *supra* note 152 and text accompanying notes 132-33 and 150-52.

[FN380]. Bakke, 438 U.S. at 312.

[FN381]. See *supra* text accompanying notes 153-55.

[FN382]. 216 F.3d at 414 (citing Ewing, 474 U.S. at 226).

[FN383]. Ewing, 474 U.S. at 226 (emphasis added) (internal citations omitted).

[FN384]. Id. at 226 n.12.

[FN385]. See *supra* text accompanying notes 266-73.

[FN386]. Urofsky, 216 F.3d at 414. The correct citation to the SUPREME COURT REPORTER is 110 S.Ct. 577, 587 (1990).

[FN387]. See *supra* note 228 and text accompanying note 239.

[FN388]. See *supra* text accompanying notes 235 & 241.

[FN389]. Urofsky, 216 F.3d at 426-35 (Wilkinson, C.J., concurring). Chief Judge Wilkinson was formerly a law professor at the University of Virginia. Rabban, *supra* note 10, at 19.

[FN390]. See, e.g., id. at 434, where Chief Judge Wilkinson wrote:

Under the majority's view, even the grossest statutory restrictions on public employee speech will be evaluated by a simple calculus: if speech involves one's position as a public employee, it will enjoy no First Amendment protection whatsoever.

[FN391]. 216 F.3d at 408 n.7. In an unusually polemical concurrence directed almost entirely against Chief Judge Wilkinson's concurrence, Judge Luttig stated a similar concern:

[Chief Judge Wilkinson] ... express[es] the opinion ... that there is a First Amendment right of "academic freedom" and that other public employees do not possess an analogous First Amendment right to pursue matters that they believe are important to performance of their public responsibilities. Id. at 416-17 (Luttig, J., concurring).

[Chief Judge Wilkinson's] entire discussion focuses on the need for such a special right for those in the academic community ... Judge Wilkinson simply, and

quite genuinely, believes that the academy has a special contribution to make to society, beyond that that the ordinary citizen is able to make, and that its "speech" should enjoy constitutional protection that other public employees' speech should not. Id.

[FN392]. Id. at 411 n.13. This note somewhat obscures the issue in Urofsky. Under terms of the Act, a state psychologist or any other state employee could request approval from her agency superior to access on-line materials needed for work. See supra text accompanying note 335. The appellees were contending that they should not be required to ask for such approvals, given their positions and responsibilities as university professors. Neither they nor Chief Judge Wilkinson proposed that other state employees should be denied access to the kinds of materials in question if the respective agency authorities gave their approval. In fact, the appellees first challenge to the Virginia Act -- which the court rejected -- was that it was "unconstitutional as to all state employees." Id. at 406.

[FN393]. See also dissenting opinion by Judge Murnaghan, joined by three other Circuit Court judges, Id. at 435-41 (Murnaghan, J., dissenting). Judge Murnaghan emphasized the importance of academic free speech both to speakers and to the public, potential audiences, and concluded that the Virginia Act "does not survive the heightened scrutiny applied to statutory restrictions on employee speech." Id. at 441 (Murnaghan, J., dissenting) (citing United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 468 (1995)).

[FN394]. Id. at 434-35 (Wilkinson, C.J., concurring).

[FN395]. See Kevin F. O'Shea, First Amendment Cases in Higher Education, 27 J.C. & U.L. 229, 233 (2000):

The Seventh Circuit's broad definition of the university's right to academic freedom in Webb sounds very much like that of the Fourth Circuit in Urofsky What had been assumed to be a shield for professors is developing into a sword for the university. To mix metaphors, the academic freedom doctrine can now be characterized as a hurdle for plaintiffs to overcome in many cases in which they are attempting to make a First Amendment case against a public college or university.

[FN396]. Sweezy, 354 U.S. at 263.

[FN397]. Bakke, 438 U.S. at 312 (emphasis added).

[FN398]. See supra note 164 and accompanying text.

[FN399]. See supra note 176 and accompanying text.

[FN400]. See supra note 180 and accompanying text.

[FN401]. See supra notes 189 at 1275 and 190 and accompanying text.

[FN402]. See supra note 190 and accompanying text.

[FN403]. See supra note 191 at 1275-76 and accompanying text.

[FN404]. See supra notes 205-06 and accompanying text.

[FN405]. See supra notes 207-08 and accompanying text.

[FN406]. See supra notes 211 at 337 and accompanying text.

[FN407]. See supra notes 250-51 and accompanying text.

[FN408]. See supra notes 274-306 and accompanying text.

[FN409]. See supra notes 266-73 and accompanying text.

[FN410]. See supra notes 314-21 and accompanying text.

[FN411]. See supra notes 158-60 and accompanying text.

[FN412]. See supra text accompanying note 3.

[FN413]. See Byrne, supra note 10, at 290 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)). Id. at 257: "Why the First Amendment protects administrative activities at some remove from teaching and scholarship has yet to be adequately justified." Moreover, the Fourteenth Amendment, through which the First Amendment has been "incorporated," protects the rights of persons. See supra note 3. While the Supreme Court has recognized corporations as persons for the Fourteenth Amendment purposes, it has not, to date, recognized public academic institutions as persons. See supra note 143.

[FN414]. Sweezy, 354 U.S. at 262-63 (Frankfurter, J., concurring) (quoting THE OPEN UNIVERSITIES IN SOUTH AFRICA 10-12 (1957)). See supra note 58 and accompanying text. See also Rabban, supra note 10, at 17.

[FN415]. See supra note 288.

[FN416]. See supra notes 307-94 and accompanying text.

[FN417]. See supra notes 362-77 and accompanying text.

[FN418]. See supra note 363 and accompanying text.

[FN419]. See supra note 289. But see Kimberly K. Caster, Note, Burnham v. Ianni: The Eighth Circuit Forges Protection for the Free Speech Rights of Public University Professors outside the Pickering-Connick-Waters Analysis, 32 CREIGHTON L. REV. 883 (1999). Caster proposes that in order to preserve academic freedom in public colleges and universities, the Pickering case line should not apply in courts'

analysis of free speech cases in those settings. The present writer has described elsewhere the several major legal hurdles created by the Supreme Court's Pickering through Rankin public employee speech decisions, hurdles that faculty in public colleges and universities must somehow get over if they wish to vindicate their First Amendment speech rights. Academic Freedom in Public Colleges and Universities: O Say, Does that Star-Spangled First Amendment Banner Yet Wave?, 40 WAYNE L. REV. 1 (1993).

[FN420]. See supra notes 26, 28-29 and 39-44 and accompanying text.

[FN421]. See supra note 392 and accompanying text.

[FN422]. See supra notes 289-90 and accompanying text. See Bonnell v. Lorenzo, 241 F.3d 800, 817 (6th Cir. 2001): "[T]here is a public interest concern involved in the issue of the extent of a professor's independence and unfettered freedom to speak in an academic setting." As noted earlier, supra note 5, this article does not undertake to define the scope of academic freedom. It is suggested here that academic freedom protects or should protect everything faculty say or do. See supra notes 278 and 273 and accompanying text. No doubt courts and commentators will give further attention to this important issue.

[FN423]. As elsewhere in Supreme Court jurisprudence, the image of "balancing" seems to imply some sort of objective if not scientific procedure according to which the Court determines the "weight" of competing interests. In effect, however, "balancing" generally seems to refer to the Court's determination as to the relative normative importance of such interests. See Richard H. Hiers, Normative and Norm-Neutral Conventions in Contemporary Judicial Discourse, 14 LEGAL STUDIES FORUM 107 (1990).

[FN424]. Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

[FN425]. United States v. Nat'l Treasury Employees' Union, 513 U.S. 454, 468, (1995). (citing Pickering, 391 U.S. at 571). National Treasury had to do with a federal law prohibiting government employees from accepting honoraria or other compensation for unofficial and nonpolitical writing and speaking appearances. Why the Court applied Pickering analysis, previously employed only in cases involving ex post punishment of individuals' speech, to this ex ante prohibition need not be considered in this article. The Fourth Circuit in Urofsky drew on National Treasury in concluding that Pickering analysis could be applied appropriately in examining Virginia's statutory restriction on speech based on content.

[FN426]. See supra note 1, 25-44, 29 and 394 and accompanying text.

[FN427]. See supra note 175 and accompanying text. Michael J. Sherman has suggested that university professors (but not administrators) should have heightened First Amendment protection for reasons analogous to those supporting judicial immunity. See Michael J. Sherman, The Leonard Jeffries Problem: Public University Professors/Administrators, Controversial Speech, and Constitutional Protection for Public Employees, 30 LOY. U. CHI. L.J. 651 (1999). "Just as a judge cannot be expected to perform her job effectively if she is forced to operate under threat of suit from unhappy litigants, a professor cannot be expected to perform her job effectively if she is forced to work under threat of punishment for expressing her views." Id. at 662.

[FN428]. See, e.g., *Burnham v. Ianni*, 119 F.3d 665, 678-79 (8th Cir. 1997) (en banc) (chancellor failed to demonstrate that appellant's speech adversely affected efficiency of the university's operations); *Tucker v. State of Calif. Dept. of Educ.*, 97 F.3d 1204, 1211 (9th Cir. 1996) (state failed to show its interests were substantial, that the employee speech had any adverse impact on the operation of government, or that the state's interests outweighed the employee's free expression).

[FN429]. See 1940 Statement of Principles on Academic Freedom and Tenure, 1970 Interpretive Comments, *supra* note 2, at 5: "The intent of this statement is not to discourage what is 'controversial.' Controversy is at the heart of the free academic inquiry which the entire statement is designed to foster."

[FN430]. See, e.g., *supra* notes 178 and 206 and accompanying text.

[FN431]. See *supra* note 319.

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