

INSTITUTIONAL ACADEMIC FREEDOM—  
A CONSTITUTIONAL MISCONCEPTION:  
DID *GRUTTER V. BOLLINGER*  
PERPETUATE THE CONFUSION?

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Saying that a university has a First Amendment interest in [academic freedom] is somewhat troubling. Both the medical school in *Bakke* and, in our case, the [University of Texas] law school are state institutions. The First Amendment generally protects citizens from the actions of government, not government from its citizens.<sup>1</sup>

Four decades ago, the Supreme Court identified the academic freedom of individual faculty in public colleges and universities as an especially important value protected by the First Amendment. Nevertheless, in recent years, some lower federal court decisions have asserted that colleges and universities *themselves* are somehow entitled to First Amendment academic freedom. One Court of Appeals has held that such institutional academic freedom counterbalances, and thus effectively trumps or nullifies, individual faculty academic claims. Another Circuit has gone so far as to declare, en banc, that *only* academic institutions have academic freedom rights under the First Amendment, and that individual faculty members neither have, nor ever have had, such rights.

Several commentators in recent years have stated that the Supreme Court has held that public colleges and universities themselves are entitled to academic

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1. *Hopwood v. Texas*, 78 F.3d 932, 943 n.25 (5th Cir. 1996) (opinion by Smith, J.). In the Fifth Circuit, this case is known as "*Hopwood II*." *Hopwood v. Texas*, 236 F.3d. 256, 260–61 (5th Cir. 2000) ("*Hopwood III*").

freedom or autonomy under the First Amendment. Language in a number of Court opinions can be read to support this view. The Supreme Court, however, has never actually so held. It is, moreover, difficult to imagine how institutional academic freedom could be grounded upon the First Amendment by any kind of straightforward constitutional analysis. Significantly, no federal court has ever shown how that might be done. Yet, the theory persists. Recently certain amicus curiae briefs before the Court in *Grutter v. Bollinger*<sup>2</sup> urged the Justices to hold that a state university's law school had a First Amendment academic freedom right to establish admission standards. In the course of its opinion deciding *Grutter*, a majority of the Court repeated language from an earlier concurring opinion purportedly identifying such a right. Did the *Grutter* majority thereby intend to give its imprimatur to the theory of institutional academic freedom under the First Amendment? Or did the majority merely refer to this theory in dicta, as part of its discussion of problematic judicial language in the earlier opinion?

Language in both earlier Court opinions, and the majority's opinion in *Grutter*, leave it uncertain as to the Court's understanding of certain critical terms and concepts. In some cases, Justices use the terms "academic freedom" and "autonomy" interchangeably. It is occasionally uncertain whether they mean to say that academic freedom attributed to public colleges or universities is a First Amendment interest, or an important social policy value. Judicial opinions referring to academic freedom or autonomy as First Amendment interests or rights sometimes fail to make clear whether such rights or interests inhere in the respective institutions' faculties, whose actions had been challenged, or in the institutions themselves.

This article begins with a review of language that eventually gave rise to the concept of institutional academic freedom, and includes a summary of lower court decisions embracing that concept or notion. The second part identifies certain constitutional problems in connection with the idea that institutional academic freedom can somehow be derived from or based upon the First Amendment. The third part describes and analyzes language in the Court's *Grutter* decision, language that may or may not have the effect of validating the concept of institutional academic freedom under the First Amendment.

Various Justices from time to time have characterized institutional academic freedom as a First Amendment value. Such characterization, however, has not been, and probably cannot be, sustained on the basis of constitutional law. The article concludes with another suggestion, that the courts may, and in proper circumstances should, acknowledge the important *public policy value* of *institutional autonomy* in matters requiring educational expertise. While such autonomy might well be entitled to judicial deference, especially when plausibly presented as an important state interest, it is not an interest that can be protected by the First Amendment.

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2. 539 U.S. 306, 123 S. Ct. 2325 (2003).

### I. THE PECULIAR ORIGINS AND STRANGE CAREER OF THE IDEA OF “INSTITUTIONAL ACADEMIC FREEDOM”

As will be shown, institutional academic freedom is not so much a theory as an accident, or rather, the product of a series of accidents or unexplained incidents. In quite general terms, what happened was as follows. A distinguished Justice, in a concurring opinion, happened to quote as persuasive authority from a South African book that referred to the “freedoms of a university.”<sup>3</sup> Twenty-one years later, another Justice, also in a concurring opinion, quoted from the earlier quotation, and declared that the freedoms there mentioned constitute *academic freedom*, adding—without explanation—that the First Amendment somehow undergirded that freedom.<sup>4</sup> The next year, a federal district court, without citing any authority for the proposition, announced in dicta that there was such a thing as institutional academic freedom, and that this freedom could be set in opposition to faculty academic freedom.<sup>5</sup> In time, the Seventh and Fourth Circuits established (to their own satisfaction) the doctrine of institutional academic freedom based upon one or both of the earlier Supreme Court concurrences, as if these had somehow been transmogrified into majority holdings, and as if this doctrine was or somehow could be grounded upon the First Amendment.<sup>6</sup>

#### A. *The Open Universities in South Africa*

Core language, found in virtually all judicial opinions referring to the matter, derives, somewhat oddly, from a book published in South Africa in 1957, *The Open Universities in South Africa*.<sup>7</sup> Because of the significance later ascribed to it,

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3. See *infra* Part I.B.

4. See *infra* Part I.C.

5. See *infra* Part I.D.1.

6. See *infra* Part I.D.3, 5, 6. This article does not attempt to describe or analyze the nature, history, or scope of academic freedom as a professional standard, social policy value, or First Amendment right or interest inherent in public college and university faculty, public school teachers, and possibly students and administrators. Classic studies of these important topics include Ralph F. Fuchs, *Academic Freedom — Its Basic Philosophy, Function, and History*, 28 LAW & CONTEMP. PROBS. 431 (1963); THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970); and the several symposia articles published in 66 TEX. L. REV. 1247–1659 (1988); and 53 LAW & CONTEMP. PROBS. 1–418 (1990). The basic professional standard is the *1940 Statement on Principles of Academic Freedom and Tenure*, in AAUP POLICY DOCUMENTS & REPORTS 3–4 (9th ed. 2001).

Important studies of so-called institutional academic freedom include Matthew W. Finkin, *On ‘Institutional’ Academic Freedom*, 61 TEX. L. REV. 817 (1983); J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251 (1989); David M. Rabban, *Academic Freedom, Individual or Institutional?*, 87 ACADEME 16 (Nov.–Dec. 2001); David M. Rabban, *A Functional Analysis of “Individual” and “Institutional” Academic Freedom under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227 (1990); and Terrence Leas & Charles J. Russo, *Waters v. Churchill: Autonomy for the Academy or Freedom for the Individual*, 93 EDUC. L. REP. 1099 (1994). The issue is also discussed in several of the recent law journal articles cited *infra* note 129.

7. CONFERENCE OF REPRESENTATIVES OF THE UNIV. OF CAPE TOWN AND THE UNIV. OF THE WITWATERSRAND, *THE OPEN UNIVERSITIES IN SOUTH AFRICA* (Albert van de Sandt Centlivres et al. eds., Johannesburg: Witwatersrand Univ. Press 1957) [hereinafter CENTLIVRES].

the book's much-quoted language is described in its original setting. The authors, faculty members at two South African universities which previously had been, and at the time still were, open to students of all racial categories, wrote in opposition to the South African government's plan to bar admission of non-whites at these universities as part of that government's apartheid program. The authors wrote, *inter alia*:

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.<sup>8</sup>

This language does not mention *academic* freedom. Nor do the authors elsewhere identify these "freedoms of a university" with academic freedom. The first page of the first chapter, which describes "The South African University System," suggests that the authors may have been thinking of the importance of university *autonomy*:

Each university is a corporate body established by an Act of Parliament which endows the Council with general control of all the affairs of the university, and endows the [university] Senate with specific 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.*<sup>9</sup>

The aspects of university *autonomy* italicized are virtually identical to the institutional functions characterized in the segment from the same publication above as "the four essential freedoms of a university." The authors, themselves faculty members, did not distinguish between a university and its faculty or Senate.

Elsewhere, the authors express concern that imposition of apartheid would adversely affect both university autonomy and faculty academic freedom.<sup>10</sup> At the time, South Africa had no constitutional safeguards similar to the First and Fourteenth Amendments of the U.S. Constitution.<sup>11</sup> In the South African context,

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For a more detailed account, see Richard Hiers, *Institutional Academic Freedom vs. Faculty Academic Freedom in Public Colleges and Universities: A Dubious Dichotomy*, 29 J.C. & U.L. 35, 45–55 (2002).

8. CENTLIVRES, *supra* note 7, at 11–12. The authors quote the expression "the four essential freedoms" from an address by another South African scholar. See Hiers, *supra* note 7, at 53 n.104.

9. CENTLIVRES, *supra* note 7, at 1 (emphasis added).

10. "The open universities declare that legislative enforcement of academic segregation on racial grounds is an unwarranted interference with university autonomy and academic freedom." *Id.* at 5. Elsewhere, the authors refer to academic freedom in terms of the importance of unfettered search for truth, and freedom of thought and expression on the part of individual members of the university communities. See Hiers, *supra* note 7, at 52–55.

11. See CENTLIVRES, *supra* note 7, at 43. See also *infra* notes 44–45. This point is emphasized here because it seems to have been ignored or forgotten in many later instances when judges appropriated the language quoted *supra* in the text accompanying note 8.

both university autonomy and academic freedom were necessarily social or public policy values, not constitutional interests. Moreover, of course, there would have been no way the authors could have grounded either university autonomy or academic freedom on constitutional jurisprudence in the United States. Their concern was to urge that these traditional and highly valued academic procedures not be subverted by the South African government's proposed program of educational apartheid. There was no question of the universities' freedoms or autonomy being somehow in conflict with their faculties' academic freedom.

B. Justice Frankfurter's Concurring Opinion in *Sweezy v. New Hampshire*

*The Open Universities* language quoted above<sup>12</sup> first entered the jurisprudence of federal courts in a concurring opinion by Justice Felix Frankfurter in *Sweezy v. New Hampshire*.<sup>13</sup> Paul Sweezy had declined to answer various questions put to him by the state's Attorney General regarding lectures he had given at the University of New Hampshire.<sup>14</sup> In a plurality opinion, the Court held that the state had violated Sweezy's academic freedom.<sup>15</sup> Justice Frankfurter's concurrence quoted from *The Open Universities* as one of several then recent scholarly statements regarding the perils of "government intervention in the intellectual life of a university."<sup>16</sup> Because it is quoted or cited in nearly every judicial opinion referring to institutional academic freedom, the following portion of Justice Frankfurter's quotation is again repeated here:

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.<sup>17</sup>

In his concurrence, Justice Frankfurter neither characterized the "four essential freedoms of a university" as "academic freedom" or "academic freedoms," nor did he indicate that these four freedoms were somehow based upon the First Amendment. Necessarily, Justice Frankfurter would have realized that he was quoting *The Open Universities* to illustrate sound social policy, not as binding authority. The expression, "[i]t is the business of a university to provide," indicates that he meant to endorse the view that a university itself has the

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12. See *supra* text accompanying note 8.

13. 354 U.S. 234, 262–63 (1957) (Frankfurter, J., concurring, joined by Harlan, J.).

14. *Id.* at 238–44.

15. *Id.* at 250 (plurality opinion) (Warren, C.J., joined by Black, Douglas, and Brennan, JJ.). "We believe that there unquestionably was an invasion of petitioner's liberties in the area of academic freedom and political expression—areas in which government should be extremely reticent to tread." *Id.* The petitioner was Sweezy, not the university where he had lectured.

16. *Id.* at 262.

17. *Id.* at 263 (Frankfurter, J., concurring) (citing CENTLIVRES, *supra* note 7, at 10–12). Justice Frankfurter did not say whether such determinations were to be made by university faculty, by administration, or by both.

responsibility to provide for and protect scholarly “speculation, experiment” and creativity, as well as “the four essential freedoms” so that they might be carried on without governmental interference. It may be reasonable to believe that Justice Frankfurter recognized the distinction between faculty academic freedom and institutional autonomy, and that the latter category included “the four essential freedoms of a university.” Whatever Justice Frankfurter meant, because the quotation from *The Open Universities* is found only in his concurrence, its language could not constitute binding authority.<sup>18</sup>

### C. Justice Powell’s Concurring Opinion in *Bakke*

As is well known, *Board of Regents v. Bakke*<sup>19</sup> concerned the complaint by a student who had been denied admission to the University of California’s Medical School at Davis (“Medical School”), even though minority students with lower test scores had been admitted.<sup>20</sup> Although the Justices wrote several separate opinions, the Court divided evenly on two critical issues. Four Justices<sup>21</sup> found the Medical School’s special admissions program unlawful, while another four Justices<sup>22</sup> held that the portions of the California Supreme Court’s judgment enjoining the Medical School from considering race as a factor for admission should be reversed.<sup>23</sup> Justice Powell wrote separately.<sup>24</sup>

Because Justice Powell was in the majority as the “swing vote” on both of these issues, his separate opinion came to be characterized as the judgment of the Court, in which the two sets of four other Justices respectively concurred on the two issues just mentioned.<sup>25</sup> No Justices, however, concurred in certain other parts of

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18. Even if *Marks* analysis were to be applied retroactively to *Sweezy*, it is clear that Justice Frankfurter’s quotation from *The Open Universities* could not be read as “the narrowest” controlling rationale for the Court’s decision. See *Marks v. United States*, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds . . . .’”) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976)).

The *Sweezy* plurality made no mention of any “four essential freedoms of a university,” but rather focused upon *Sweezy*’s own academic freedom under the First Amendment. *Sweezy*, 354 U.S. at 250. Justice Frankfurter, himself, evidently was concerned about the state’s intrusion upon both faculty academic freedom and university autonomy; however, his concurrence uses neither of these expressions. See *id.* at 261–62.

19. 438 U.S. 265 (1978).

20. *Id.* at 270–71.

21. Stevens, J., joined by Burger, C.J., and Stewart and Rehnquist, JJ. These Justices did not reach the constitutional question, but instead held that the Medical School’s admissions program violated Title VI of the Civil Rights Act of 1964. *Id.* at 408–21.

22. Brennan, J., joined by White, Marshall, and Blackmun, JJ.

23. *Bakke*, 438 U.S. at 324–79. These four Justices held that the Medical School’s “affirmative admission program” was an important state interest, which they deemed constitutional under intermediate scrutiny analysis. *Id.* They would have reversed the California Supreme Court’s judgment on all points. *Id.* at 324–26.

24. *Id.* at 269–324

25. See *id.* at 271–72 (where Justice Powell states that the two four-member sets of fellow Justices concurred in his judgment). But see Brennan, White, Marshall and Blackmun, JJ., *id.* at

Justice Powell's opinion. For want of better terminology, it seems appropriate to designate those parts where Justice Powell was writing only for himself as his "concurring" opinion, although, arguably, "dissenting" opinion might be equally apt. In this article, these parts will be referred to as Justice Powell's "concurring" opinion or "concurrence." The portions of Justice Powell's concurrence pertinent to the present topic are found in Parts IV–D and V–A of his opinion.<sup>26</sup>

These portions of Justice Powell's concurring opinion include several noteworthy misstatements and omissions. He began Part IV–D by stating that the goal of attaining "a diverse student body" is "clearly . . . a constitutionally permissible goal for an institution of higher education."<sup>27</sup> As warrant for this seemingly unproblematic proposition, Justice Powell explained: "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."<sup>28</sup> Again, this statement, taken by itself, seems straightforward. He continued: "The freedom of a university to make its own judgments as to education includes the selection of its student body."<sup>29</sup> In support of this understanding, Justice Powell then quoted from Justice Frankfurter's concurring opinion 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.<sup>30</sup>

Justice Powell introduced this quotation by stating that the "four essential freedoms" noted here "*constitute academic freedom.*"<sup>31</sup> It is unclear whether he was under the mistaken impression that Justice Frankfurter had so described these "four freedoms" or whether he intended this characterization as his own

326 ("Mr. Justice Powell agrees that some uses of race in university admissions are permissible and therefore, *he joins with us* to make five votes reversing the judgment below insofar as it prohibits the University from establishing race-conscious programs in the future.") (emphasis added).

26. *See id.* at 311–18.

27. *Id.* at 311–12. That such a *goal* would be constitutionally permissible does not appear to have been in doubt. The critical issue in the case, rather, was what *means* might be constitutionally employed to attain that goal.

28. *Id.* at 312. Justice Powell did not attribute the proposition that "[a]cademic freedom . . . [is] a special concern of the First Amendment" to its source, namely, *Keyishian v. Board of Regents of University of State of New York*, 385 U.S. 589, 603 (1967), where reference clearly is to *teachers'* academic freedom, not to that of institutions.

29. *Id.* Justice Powell did not here distinguish between "a university" and its faculty.

30. *Id.* (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)). *See supra* text accompanying notes 8, 17.

31. *Id.* (emphasis added). Justice Powell did not identify the source quoted by Justice Frankfurter. *See supra* text accompanying notes 7–18. Justice Powell erroneously stated that Justice Frankfurter had "*summarized* these four essential freedoms." *Id.* (emphasis added) (quotation marks omitted). In fact, Justice Frankfurter had simply *quoted* from *The Open Universities in South Africa*. *See supra* text accompanying notes 8, 17.

contribution. He cited no authority for identifying “the four essential freedoms” of a university as “academic freedom,” nor did he attempt to explain how or why this label might be appropriate. Justice Powell did not intimate that he thought he was saying anything new at this point. It soon became clear, however, where his analysis was going.

Immediately after this quotation from Justice Frankfurter’s concurrence, Justice Powell made the following clearly erroneous statement: “Our national commitment to the safeguarding of *these freedoms* within university communities was emphasized in *Keyishian v. Board of Regents . . .*”<sup>32</sup> In fact, *Keyishian* had said nothing at all about these “four essential freedoms.”<sup>33</sup> Justice Powell then proceeded to quote language from *Keyishian* that clearly focused on the importance of *teachers’* academic freedom and said nothing about any freedoms enjoyed by *universities* under the First Amendment or otherwise:

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.”<sup>34</sup>

Neither here nor elsewhere had the *Keyishian* Court even mentioned “who may be admitted to study.”

Next, Justice Powell stated, evidently as a matter of taking judicial notice: “[I]t is widely believed” that “[t]he atmosphere of ‘speculation, experiment and creation’—so essential to the quality of higher education—is . . . promoted by a

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32. *Bakke*, 438 U.S. at 312 (citing *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)) (emphasis added). *Keyishian* quoted from the *Sweezy* plurality opinion, which referred to “[t]he essentiality of freedom in the community of American universities.” *Keyishian*, 385 U.S. at 603 (quoting *Sweezy*, 354 U.S. at 250) (emphasis added). Neither the *Sweezy* plurality nor *Keyishian* referred to the freedom of public colleges or universities. Both cases concerned the First Amendment speech rights of individual faculty. See *Bd. of Regents v. Southworth*, 529 U.S. 217, 238 n.4 (2000) (Souter, J., concurring, joined by Stevens and Breyer, JJ.) (“Our university cases have dealt with restrictions imposed from outside the academy on individual teachers’ speech or associations.”). Justice Souter’s concurrence cites not only *Keyishian* and *Sweezy*, but also *Shelton v. Tucker*, 364 U.S. 479 (1960) (individual public school and college teachers’ First Amendment free speech and association rights), and *Wieman v. Updegraff*, 344 U.S. 183 (1952). *Southworth*, 529 U.S. at 238 n.4. Other opinions that might be cited include Justice Frankfurter’s concurrence in *Wieman*, 344 U.S. at 194–96 (Frankfurter, J., concurring) (individual faculty members’ freedom of speech, inquiry, and association under the “Bill of Rights” and the Fourteenth Amendment), and *Whitehill v. Elkins*, 389 U.S. 54 (1967) (teachers’ and students’ academic freedom under the First Amendment).

33. *Keyishian* concerned a set of New York state laws and regulations that penalized teachers in state colleges and universities for membership in “subversive” organizations or for disfavored speech. See Hiers, *supra* note 7, at 41–43.

34. *Bakke*, 438 U.S. at 312 (quoting *Keyishian*, 385 U.S. at 603 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 370 (S.D.N.Y. 1943)). Possibly Justice Powell was thinking that the Medical School’s special admissions program had been devised by the *faculty* and was administered jointly by its faculty and administration. See *id.* at 272 & n.1, 278–79.



diverse student body.”<sup>35</sup> Having so stated, he then made the following misleading statement: “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.”<sup>36</sup> The *Keyishian* Court, in fact, had said *nothing at all* about exposure “to the ideas and mores of students as diverse as this Nation of many peoples,” however commendable such exposure might be. In effect, Justice Powell put words into the *Keyishian* Court’s mouth. But that was not all.

Based on the interpolation just described, Justice Powell went on in his next paragraph to conclude:

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 constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.<sup>37</sup>

The “robust exchange of ideas” language, as has been shown, derives from *Keyishian*. In *Keyishian*, the issue had been the importance of *teachers’* freedom to expose students to “that robust exchange of ideas.”<sup>38</sup> Perhaps Justice Powell intended to say that a university’s *selection of students* who might be expected to contribute to the “robust exchange of ideas” was an exercise of its academic freedom which, in turn, was protected by the First Amendment. Thus Justice Powell may have meant that by seeking to enroll diverse student bodies, universities were attempting to bring about conditions under which academic freedom could flourish. In that case, however, such universities would not have been exercising their own First Amendment interest in academic freedom, but instead, acting to bring about conditions where academic freedom could be exercised by faculty and students on their campuses. It is also possible that Justice Powell had in mind the fact that the Medical School’s special admissions policy had been established, and also in part administered by its faculty.<sup>39</sup> If so, he may have meant to say that the Medical School (or the Regents) might properly invoke the First Amendment on behalf of the faculty’s academic freedom. It may be

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35. *Id.* Justice Powell documented this contention by quoting from “the president of Princeton University” as to “benefits derived from a diverse student body,” but did not refer to the trial court’s findings of fact or cite to record evidence. *Id.* at 313 n.48.

36. *Id.* at 312–13. This language is quoted later by the Sixth Circuit in *Grutter v. Bollinger*, 288 F.3d 732, 738–39 (6th Cir. 2002), *aff’d*, 539 U.S. 306, 123 S. Ct. 2325 (2003), but apparently without noticing that the phrase “to the ideas and mores of students as diverse as this Nation of many peoples” did not derive from *Keyishian*, but rather was added by Justice Powell himself. Others also evidently assumed that the phrase in question was found in *Keyishian*. See *infra* text accompanying notes 214–15 and 238–39.

37. *Bakke*, 438 U.S. at 313.

38. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). Original plaintiffs in *Keyishian* were university faculty (and a university librarian). Neither *Keyishian* nor *Sweezy* said anything about college or university admission procedures or about the putative value of ethnically or otherwise diverse student bodies.

39. *Bakke*, 438 U.S. at 272–78, 272 n.1.

significant that his opinion nowhere specifically states that the institution enjoyed a First Amendment academic freedom interest of its own apart from its faculty. And Justice Powell certainly never suggested that a university's "academic freedom" and that of its faculty might be in mutual opposition.<sup>40</sup>

Justice Powell's references to the First Amendment, here and elsewhere in his concurring opinion,<sup>41</sup> are singularly cryptic, if not confused. He nowhere explained how a university's interest in selecting students—an interest or "freedom" he evidently derived from Justice Frankfurter's quotation from *The Open Universities*—could have become a *First Amendment* right. Justice Frankfurter had not so characterized it. Moreover, Justice Frankfurter's *Sweezy* concurrence, though joined by Justice Harlan, was still only a concurring opinion, and as such had no binding authority. *Keyishian*, which Justice Powell cited as authority, had nothing to say about student admissions programs or practices. Justice Powell *possibly* meant that a public college or university's right to select students on the basis of its own judgment, in short its exercise of autonomy in matters requiring educational expertise, was an important social policy value and thus an important state interest that could then be balanced against asserted equal protection claims by students who had been denied admission on the basis of race. He probably intended to provide a constitutional counterweight to Bakke's Fourteenth Amendment Equal Protection claim by referring to a university invoking a First Amendment interest. He did not, however, explain how the Medical School could have both a First Amendment claim and at the same time contend that it had a compelling state interest.<sup>42</sup> The Court had never held that public colleges and universities themselves were entitled to First Amendment protections.<sup>43</sup> Not surprisingly, Justice Powell did not attempt to explain how an academic institution's admission procedure would constitute *speech* under the First Amendment;<sup>44</sup> nor did he undertake to explain how or why a public college or university should be considered a *person* for purposes of the Fourteenth Amendment.<sup>45</sup>

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40. That theory later emerged in certain lower federal courts. *See infra* Part I.D.

41. *See infra* text accompanying notes 46–49.

42. *See* Mark G. Yudoff, *Three Faces of Academic Freedom*, 32 LOY. L. REV. 831, 856 (1981) ("Had [Justice Powell] completely omitted reference to academic freedom in his [*Bakke*] 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 [the notion of] institutional academic freedom.").

43. *See infra* Parts II.A., D.

44. The First Amendment reads, in relevant part: "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." U.S. CONST. amend. I (omitting religion clauses). *See infra* Part II.B.

45. The Fourteenth Amendment, Section 1, reads, in relevant part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. *See infra* Part II.C.

Justice Powell added another problematic statement about the First Amendment in Part V-A of his concurring opinion.<sup>46</sup> This statement only contributes further to the confusion:

The experience of other university admissions programs, which take race into account in achieving the educational diversity valued by the First Amendment, demonstrates that the assignment of a fixed number of places to a minority group is not a necessary means toward that end. An illuminating example is found in the Harvard College program.<sup>47</sup>

Strangely, Justice Powell declared that *educational diversity* is “valued by the First Amendment.” How that might be the case, he did not say.<sup>48</sup> It is uncertain whether, in the final analysis, Justice Powell meant to say that a public college or university has a First Amendment academic freedom interest in selecting students on the basis of sound educational judgment, *or* to say that “educational diversity” itself—whatever that might mean—is *per se* a First Amendment interest or value. Nor did Justice Powell explain how the admissions program at Harvard College, a non-public institution, might exemplify the achievement of a First Amendment value.<sup>49</sup> It could hardly be said that Harvard had a *First Amendment* right either to select students or to achieve educational diversity. Nor could Harvard’s admissions program, however exemplary, constitute a state interest of any sort. Justice Powell very likely intended to use the Harvard plan as an example of the *kind* of admissions program that would pass constitutional muster if sponsored by a public college or university.<sup>50</sup>

It appears that Justice Powell wished to claim the benefit of a First Amendment right on behalf of public universities so as to fortify his argument that race might be a constitutionally permissible factor in admissions decisions. Because Bakke invoked the Fourteenth Amendment’s Equal Protection Clause, Justice Powell may have felt it necessary to counterpose another constitutional interest on the side of educational diversity. As rationale, he first characterized “the four essential

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46. No other Justices joined in this part of Justice Powell’s opinion, either.

47. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 316 (1967). Justice Powell then proceeded to quote from a description of the Harvard admissions plan found in the appendix to an amici brief for Columbia, Harvard, and Stanford Universities and the University of Pennsylvania. *Id.* at 316–17.

48. Such diversity might be viewed as a social or public policy value or interest of the sort that could be considered an important, or possibly compelling state interest. But what it means to say that such diversity is “valued by the First Amendment” is quite unclear. Perhaps Justice Powell meant that student body diversity could enhance viewpoint diversity, thereby contributing to “robust exchange of ideas,” a First Amendment value the *Keyishian* Court had previously identified in upholding individual faculty rights. *See supra* text accompanying notes 27–33.

49. *See* text of the First and Fourteenth Amendments, *supra* notes 39–40. The First Amendment was “incorporated,” that is, first construed as applying to states through the Fourteenth Amendment in *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

50. In the excerpt quoted *supra*, text accompanying note 47, Justice Powell specifically refers to the Harvard plan as an “example.” See also Justice Brennan’s *Bakke* concurrence, referring to “a plan *like* the ‘Harvard’ plan,” 438 U.S. at 326 n.1. (emphasis added). Compare *Grutter v. Bollinger*, 288 F.3d 732, 742 (6th Cir. 2002), *aff’d*, 539 U.S. 306, 123 S. Ct. 2325 (2003), which discusses the Harvard plan as if it were, itself, subjected to judicial review.

freedoms” as “academic freedom,” then, in an attempt to extend such freedoms constitutional support, invoked the authority of *Keyishian*, which had affirmed *teachers’* academic freedom as a “special concern of the First Amendment,”<sup>51</sup> without even attempting to explain how *Keyishian* could apply to *universities*. It may be significant that Justice Powell did not identify the academic freedom of public colleges and universities as a compelling, or even important, state interest.<sup>52</sup> The only interest he characterized as “compelling” was “the interest of diversity . . . in the context of a university’s admissions program.”<sup>53</sup>

In any event, Justice Powell’s entire discussion of academic freedom and the First Amendment is found only in his separate or “concurring” opinion, in parts that were joined by no other Justice.<sup>54</sup> It would seem to follow that none of that discussion carries any legal weight. This point might be underscored by the observation of Justice Stevens, joined by three other Justices, in *Bakke*, itself:

Four [other] 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 or determine what is the “central meaning” of any judgment of the Court.<sup>55</sup>

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51. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). Some lower federal courts have followed Justice Powell’s apparent view that *Keyishian* referred to *institutions’* academic freedom. *See, e.g., Wirsing v. Bd. of Regents*, 739 F. Supp. 551, 552–53 (D. Colo. 1990), *aff’d*, 945 F.2d 412 (10th Cir. 1991) (stating that in *Keyishian* the Court demonstrated its commitment to protecting the academic freedoms of “state and local educational institutions”). Similar language also appears in *Parate v. Isibor*, 868 F.2d 821, 826–27 (6th Cir. 1989), invoking Justice Frankfurter’s *Sweezy* concurrence, Justice Powell’s opinion in *Bakke*, and the Court’s opinion in *Keyishian*. This language appears to derive from dicta in *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985). *See infra* text accompanying notes 94–105.

52. It appears that even if Justice Powell had secured support from four other Justices for his remarks about academic freedom and the First Amendment, such remarks would have been mere dicta. The question of possible institutional academic freedom under the First Amendment was not before the *Bakke* Court, nor did the Court need to decide that question in order to reach its holdings in the case. *See Grutter v. Bollinger*, 288 F.3d 732, 785–87 (6th Cir. 2002), *aff’d*, 539 U.S. 306 (2003) (Bobbs, J., dissenting) (arguing that “[a]t most, the question before the Court in *Bakke* was whether race could ever be used in admissions decisions.”) *Id.* at 787. Whether or not Justice Powell’s comments as to circumstances under which admissions policies might properly consider race as a factor should be considered controlling under *Marks* analysis, it is clear that determining whether race or ethnic diversity may be considered such a factor does not depend on the institution’s entitlement to First Amendment academic freedom. As to *Marks* analysis, *see infra* text accompanying and following notes 56–60.

53. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1967). Not all interpreters noticed this fact. *See, e.g., infra* text accompanying notes 216–17.

54. Justice Powell, himself, may not have recognized this fact. Writing for the Court in 1981, he referred to the portion of his *Bakke* opinion in which he had quoted from Justice Frankfurter’s *Sweezy* concurrence as the “opinion of POWELL, J., announcing the judgment of the Court.” *Widmar v. Vincent*, 454 U.S. 263, 278 (1981). The portion quoted and cited, however, was from Justice Powell’s *Bakke* opinion, Part IV–D of *Bakke*, 438 U.S. at 312–13, which was joined by no other Justice.

55. *Bakke*, 438 U.S. at 408 n.1 (Justice Stevens, joined by Burger, C.J., and Stewart and Rehnquist, JJ.). *See also Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996) (“Justice Powell’s argument in [Part IV–D of his opinion in] *Bakke* garnered only his own vote and has never represented the majority of the Court in *Bakke* or any other case.”). Justice Stevens’ opinion

Nevertheless, lower federal courts, confronting other cases involving public college or university affirmative action or diversity admissions programs and practices, and trying to decipher the legal significance of the several *Bakke* opinions, have looked to Justice Powell's concurring opinion for guidance. In doing so, several such courts have recently attempted to apply the *Marks* test, namely: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of [at least] five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.'"<sup>56</sup>

As the Court had occasion to notice in its reflections on *Grutter*, such efforts have yielded mixed results.<sup>57</sup> The difficulty of applying *Marks* to *Bakke* was emphasized in *Hopwood III*, where a Fifth Circuit panel, expressing disagreement with the Ninth Circuit's construction of Justice Powell's diversity rationale in *Bakke* stated: "With respect, however, we do not read *Marks* as an invitation from the Supreme Court to read its fragmented opinions like tea leaves, attempting to divine what the Justices 'would have' held."<sup>58</sup> It certainly could be argued—as the Sixth and Ninth Circuits later concluded—that under *Marks*, Justice Powell's view that student body diversity can be a compelling state interest is controlling.<sup>59</sup>

Yet when *Marks* is applied to Justice Powell's comments on academic freedom and/or the First Amendment, it is quite apparent that these comments do *not* constitute "that position taken by those Members who concurred in the judgments on the narrowest grounds." *None* of the other eight Justices in *Bakke* even mentioned academic freedom; nor did any of the other eight refer to any First Amendment claims, rights, or interests on the part of the Regents, the Medical School, or its faculty. Both Justice Powell and four other Justices<sup>60</sup> indicated their approval of the Harvard admissions program. Because Harvard was (and is) a private institution, however, its program needed, and had, no First Amendment justification. Notwithstanding, several lower court decisions subsequently proceeded as if *Bakke* somehow had stood for the proposition that public colleges and universities *themselves* were entitled to academic freedom rights or privileges under the First Amendment. Significantly, none of these courts attempted to apply *Marks* analysis to Justice Powell's comments about academic freedom and the

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made no mention of *Marks* which had been decided the previous year. *See infra* text accompanying notes 56–60.

56. *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976)).

57. *See Grutter v. Bollinger*, 539 U.S. 306, \_\_\_, 123 S. Ct. 2325, 2327 (2003).

58. *Hopwood v. Texas*, 236 F.3d 256, 275 n.66 (5th Cir. 2000) (opinion by Wiener, J.). For contrasting results of applying *Marks* analysis to *Bakke*, see, for example, *Grutter v. Bollinger*, 288 F.3d 732, 739–42, 773, 778–85 (6th Cir. 2002) (Boggs, J., dissenting), *aff'd*, 539 U.S. 306, 123 S. Ct. 2325 (2003); and *Johnson v. Board of Regents of University of Georgia*, 263 F.3d 1234, 1247 (11th Cir. 2001).

59. *Grutter*, 288 F.3d at 739–42; *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1199–1201 (9th Cir. 2000).

60. *Bakke*, 438 U.S. at 316–18, 321–25 (Powell, J., concurring); 438 U.S. at 326 n.1 (Brennan, J., concurring in part and dissenting in part, joined by White, Marshall, and Blackmun, JJ.).

First Amendment. Perhaps they were unaware that none of the other Justices in *Bakke* had subscribed to those comments. Or, possibly, these courts assumed without further reflection that a public university's compelling interest in student body diversity somehow depended on its First Amendment interest in academic freedom or institutional autonomy, and that because Justice Powell had said so, public universities might invoke such interests.<sup>61</sup>

#### D. Judicial Misconceptions Spawn Strange Progeny<sup>62</sup>

In *Bakke*, Justice Powell had declared, *ipse dixit*, that public universities have a First Amendment interest in their procedures for selecting students for admission.<sup>63</sup> The issue before the *Bakke* Court, of course, pertained only to student admissions procedures. Ignoring this limitation, various lower federal courts began to assert that public colleges and universities enjoy a broader range of First Amendment rights or interests in academic freedom. In an even greater departure from precedent, these lower courts announced that such academic freedom could be set over against academic freedom claims by individual faculty. In doing so, such courts generally relied either explicitly or implicitly on Justice Powell's quotation of Justice Frankfurter's quotation in *Sweezy* from *The Open Universities*. That quotation referred not only to student admissions procedures, but also to a university's determination "on academic grounds who may teach, what may be taught, [and] how it shall be taught,"<sup>64</sup> and so may have seemed relevant to these other issues as well. Lower federal courts reciting and so construing this quotation generally seemed unaware that it was enshrined only in concurring opinions, and thus had no binding precedential weight.

##### 1. *Cooper v. Ross*: Academic freedom vs. academic freedom

The first federal court to attribute academic freedom to a public educational institution—albeit in dicta—was *Cooper v. Ross*,<sup>65</sup> decided in 1979, a year after *Bakke*. Grant Cooper, an untenured assistant professor of history at a public

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61. By way of contrast, neither the *Smith* nor the *Grutter* court held that its respective state's or public university's compelling interest in student diversity hinged on the university's entitlement to academic freedom or the First Amendment. Neither court's analysis even mentioned institutional academic freedom or the First Amendment. See *Smith*, 233 F.3d at 1197–1201; *Grutter*, 288 F.3d at 738–42.

62. See generally Hiers, *supra* note 7, at 64–110.

63. See *supra* Part I.C. Justice Powell had also stated, without explanation, that "educational diversity" *itself* was a First Amendment value. See *supra* notes 46–49 and accompanying text. This value might be characterized as the desired goal (or result) of the admissions process, but it is unclear how educational diversity *per se* might be conceptualized as a First Amendment value.

64. *Bakke*, 438 U.S. at 312. See also CENTLIVRES, *supra* notes 8, 17, 30 and accompanying text. As previously observed, *The Open Universities* did not distinguish between a university and its faculty in their role as decision-makers with respect to the "four essential freedoms of a university." See *supra* Part I.A., and Hiers, *supra* note 7, at 52–55.

65. 472 F. Supp. 802 (E.D. Ark. 1979) (opinion by Heany, J., Eighth Circuit Court of Appeals judge sitting by designation).

university, announced in class that he was a communist and that he taught from a Marxist viewpoint.<sup>66</sup> The university subsequently terminated his appointment.<sup>67</sup> The district court characterized the issue before it as follows: “The present case . . . 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.”<sup>68</sup> The district court cited neither the *Sweezy* nor *Bakke* concurrences, but may well have based its assertion that “the university” had “the academic freedom . . . to be free of government interference” upon Justice Frankfurter’s quotation from *The Open Universities* concerning the “four essential freedoms of a university,” as quoted in Justice Powell’s concurring opinion in *Bakke*, and there identified as constituting “academic freedom.”<sup>69</sup>

The district court’s declaration that the “academic freedom of the university” included freedom from “judicial interference” was unsupported by any authority or rationale, and probably should be read as merely exuberant hyperbole. Possibly the court was thinking of the social policy value of institutional autonomy, in *Cooper*—as in Justice Powell’s *Bakke* concurrence—mischaracterized as “academic freedom.”<sup>70</sup> The *Cooper* court may have thought, but did not specifically state, that institutional academic freedom was a First Amendment interest.

## 2. Justice Stevens’ Concurrence in *Widmar v. Vincent*

Two years later, concurring in *Widmar v. Vincent*,<sup>71</sup> Justice Stevens made passing reference to “the academic freedom of public universities,”<sup>72</sup> citing Justice Frankfurter’s quotation from *The Open Universities* as authority for the proposition that “[j]udgments [as to use of resources] should be made by academicians, not by

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66. *Id.* at 804–05.

67. *Id.* at 805.

68. *Id.* at 813. This language is dicta since the court did not reach the issue. Oddly, *Cooper* has been read as illustrating the mistaken idea that the Court has “[g]enerally . . . described . . . constitutional academic freedom . . . as primarily an institutional liberty.” Ailsa W. Chang, Note, *Resuscitating the Constitutional “Theory” of Academic Freedom: A Search For a Standard Beyond Pickering and Connick*, 53 STAN. L. REV. 915, 931 n.79 (2001). *Cooper*, of course, was not decided by the Court, and the Court has never held that academic freedom is an institutional liberty.

69. See *supra* text accompanying notes 30–31.

70. No federal court has ever gone so far as to hold that public institutions of higher education are immune from judicial review. But see dicta in *Weinstein*, *infra* text accompanying note 107. The Court recently stated the issues clearly: “Our holding . . . is in keeping with our tradition of giving a degree of deference to a university’s academic decisions within constitutionally prescribed limits.” *Grutter v. Bollinger*, 539 U.S. 306, \_\_\_, 123 S. Ct. 2325, 2339 (2003). See *infra* text accompanying note 233 for a recent and accurate account of the situation by the Court in *Grutter*.

71. 454 U.S. 263 (1981).

72. “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.” *Id.* at 277–78 (1981) (Stevens, J., concurring).

federal judges.”<sup>73</sup> Justice Stevens did not indicate that he thought public universities’ academic freedom was based on the First Amendment. Neither did he distinguish between public universities and their faculties. His reference to “academicians” might more plausibly be read to mean the latter.

The issue in *Widmar* was whether the university in question might constitutionally exclude a student religious group from using a forum open to other student groups.<sup>74</sup> Again, it would have been more apt to characterize the university’s interest in terms of the importance of academic autonomy, rather than as a matter of its “academic freedom.” Although Justice Stevens’ concurrence in *Widmar* necessarily was not binding authority, it may have influenced subsequent Seventh Circuit reflections. Justice Stevens had previously served on the Seventh Circuit, and was (and still is) the Supreme Court’s mentor or liaison “allotted” to that Circuit.

### 3. Seventh Circuit Dicta and Doctrine: Public Colleges and Universities Have Academic Freedom, Too

The Seventh Circuit first mentioned institutional academic freedom, though only in dicta and as a hypothetical, in *Dow Chemical Co. v. Allen*<sup>75</sup> decided the year following *Widmar*. Salient language is as follows: “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.”<sup>76</sup> This language appears to derive from *Cooper*, but aside

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73. *Id.* at 278–79. Justice Stevens misattributed the Frankfurter *Sweezy* concurrence quotation to T. H. Huxley, to whose views, along with those of other educators, Justice Frankfurter had alluded before proceeding to quote from *The Open Universities*. *Sweezy v. New Hampshire*, 354 U.S. 234, 262–63 (1957) (Frankfurter, J., concurring). Justice Stevens also cited to Justice Powell’s mention of academic freedom in his concurring *Bakke* opinion. *Widmar*, 454 U.S. at 278 n.2 (Stevens, J. concurring). Compare Justice Stevens’ statement in *Bakke* “that only a majority can speak for the Court.” *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 408 (1967). See *supra* text accompanying note 55.

74. *Widmar*, 454 U.S. at 276–77. Justice Powell wrote the majority opinion. Although Justice Powell likewise quoted from Justice Frankfurter’s concurrence in *Sweezy* and cited his own opinion in *Bakke*, he did not here characterize the university’s interest or right in this case as a matter of “academic freedom.” Instead, he cited these authorities to support the following statement: “Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources or ‘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.’” *Id.* at 276.

75. 672 F.2d 1262 (7th Cir. 1982).

76. *Id.* at 1275. Here “as opposed to” evidently meant “as distinct from” rather than “in opposition to.” The court went on in the next sentence to say: “But what precedent there is at the Supreme Court level suggests that to prevail over academic freedom the interests of government must be strong and the extent of intrusion carefully limited.” *Id.* In context, the court’s language as to “the interests of government” evidently refers to the interests of university administration. The *Dow* court’s statement quoted here, in its context, would have been an accurate description of competing interests if it had referred to the “academic autonomy” of a university rather than its “academic freedom,” thus faculty academic freedom as distinct from the government’s interest in university autonomy.



from dicta in *Cooper*, there were no cases on point, and thus there was no case law whatsoever purporting to accord colleges or universities any kind of “academic freedom to be free of governmental interference.”<sup>77</sup> The *Dow* court did not characterize the university’s interest in academic freedom as a First Amendment value. Seventh Circuit dicta, hypotheticals, and concurrences would soon blossom into case law purporting to establish institutional academic freedom as a counterweight to faculty academic freedom. In these decisions, both implicitly and explicitly, the Seventh Circuit conceived such institutional academic freedom as a First Amendment right or interest that could be claimed by or on behalf of public colleges and universities themselves.

The first such Seventh Circuit decision was *E.E.O.C. v. University of Notre Dame Du Lac*,<sup>78</sup> where the court recognized what it called “a qualified academic freedom privilege” which, in certain circumstances, would protect “academic institutions against the disclosure of the names and identities of persons participating in the peer review process . . . .”<sup>79</sup> The court held that this privilege barred further investigation by the E.E.O.C. As authority, it quoted “‘the four essential freedoms’ that constitute academic freedom” language from Justice Powell’s “plurality opinion” in *Bakke*, along with Justice Powell’s quotation of “the business of a university” language from Justice Frankfurter’s *Sweezy* concurrence.<sup>80</sup> The *Notre Dame Du Lac* court implied that its newly created “academic freedom privilege” was somehow based on the First Amendment,<sup>81</sup> but did not explain how. In this case, the privilege—however characterized—served to protect the confidentiality of *faculty* discussions, and had nothing to do with institutional interests vs. faculty academic freedom. In 1990, the Supreme Court intimated that it would not recognize institutional claims to such privilege in

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77. The concept of such freedom surfaced again the next year in a Seventh Circuit concurring opinion, *Martin v. Helstad*, 699 F.2d 387, 392 (7th Cir. 1983) (Coffey, J. concurring). Judge Coffey cited and evidently based his ideas as to a university’s academic freedom on Justice Powell’s concurring opinion in *Bakke* and its quotation from Justice Frankfurter’s quotation in *Sweezy* from *The Open Universities*. *Martin*, 699 F.2d at 397 (Coffey, J., concurring).

78. 715 F.2d 331 (7th Cir. 1983) (Coffey, J., writing for the panel).

79. *Id.* at 337. The court cited other decisions which, it said, had previously recognized “a limited academic freedom privilege in the context of challenges to college or university tenure decisions.” *Id.* Though some of the decisions cited referred to a “limited academic privilege,” none of them adopted the expression “academic freedom privilege.” See Hiers, *supra* note 7, at 74 n.223.

80. *Notre Dame Du Lac*, 715 F.2d at 335. Judge Coffey also quoted from his own concurring opinion in *Martin*, 699 F.2d at 397. See *supra* note 77.

81. The *Notre Dame Du Lac* court quoted Justice Powell’s *Bakke* concurrence which seemed to characterize “the freedom of a university to make its own judgments as to education” as an “[a]cademic freedom” right “long viewed as a special concern of the First Amendment.” *Notre Dame Du Lac*, 715 F.2d at 335 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J., concurring)). The *Notre Dame Du Lac* court also cited *Garland v. Torre*, 259 F.2d 545, 549 (2d Cir. 1958) (plaintiff’s defamation and breach of contract claims outweighed defendant’s freedom of the press interest, given that First Amendment rights are not absolute) for the proposition “that the protection of [such interests as] the [University’s] First Amendment [academic freedom privilege] ‘is not absolute’ and must give way in some cases ‘to the paramount public interests in the fair administration of justice.’” *Id.* at 337. The relevance of *Garland* as to this issue is not immediately apparent.

*University of Pennsylvania v. E.E.O.C.*<sup>82</sup> In *University of Pennsylvania*, the Court unanimously declined to accept what it characterized as the University's claim to an "expanded right of academic freedom to protect confidential peer review materials from disclosure,"<sup>83</sup> stating: "[W]e think the First Amendment cannot be extended to embrace petitioner's claim."<sup>84</sup> In view of this holding, it would seem that *Notre Dame Du Lac* was no longer good law after 1990.<sup>85</sup>

Two years after *Notre Dame Du Lac*, in *Piarowski v. Illinois Community College District 415*,<sup>86</sup> another Seventh Circuit panel asserted, again in dicta, that public institutions of higher learning are entitled to academic freedom, and that such academic freedom could conflict with individual faculty academic freedom.<sup>87</sup> Albert Piarowski was chairman of the art department at Prairie State College in Illinois.<sup>88</sup> He chose to display in the college mall, its main gathering place and thoroughfare, three of his own works featuring naked or semi-naked "brown" women apparently carrying out various sexual acts.<sup>89</sup> College officials asked him to move the three items to a less central location which was adjacent to the art department's classrooms.<sup>90</sup> Piarowski contended that the officials had thereby violated his First Amendment rights.<sup>91</sup>

Judge Posner wrote for the panel. Because his dicta would soon morph into Seventh Circuit case law, the relevant language is quoted at some length:

[T]hough many decisions describe "academic freedom" as an aspect of freedom of speech that is protected against government abridgment by the First Amendment, 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 . . . to pursue his ends without

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82. 493 U.S. 182 (1990).

83. *Id.* at 183

84. *Id.* at 199.

85. Since 1996, any newly created privilege probably would also be subject to scrutiny under standards laid out in *Jaffee v. Redmond*, 518 U.S. 1 (1996). The *Jaffee* Court noted that "Rule 501 of the Federal Rules of Evidence authorizes federal courts to define new privileges by interpreting 'common law principles . . . in the light of reason and experience,'" *id.* at 8, adding, however, that "[e]xceptions from the general rule disfavoring testimonial privilege may be justified . . . by a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" *Id.* at 9 (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)). At the same time, the Court explicitly rejected the balancing approach on the ground that "the participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected.'" *Id.* at 18 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 391 (1981)).

86. 759 F.2d 625 (7th Cir. 1985).

87. *See id.* at 629.

88. *Id.* at 626.

89. *Id.* at 627.

90. *Id.* at 628.

91. *Id.* at 627.

interference from the academy; and these two freedoms are in conflict, as in this case.<sup>92</sup>

What is of interest here is Judge Posner's characterization of the term "academic freedom" as "equivocal." Although he refers to "'academic freedom' as an aspect of freedom of speech that is protected against government abridgment by the First Amendment," he did not explicitly ground "the freedom of the academy" on the First Amendment.<sup>93</sup> Quite possibly Judge Posner realized that neither Justice Powell's *Bakke* opinion nor the *Notre Dame Du Lac* court had adequately connected academic freedom to the First Amendment. If so, by referring to "the freedom of the academy," he may have meant to designate the social policy value or importance of *institutional autonomy*. By characterizing such autonomy as "academic freedom," however, Judge Posner framed a false paradox: as if the issue were academic freedom versus academic freedom. Where college or university administrators are alleged to have violated a faculty member's academic freedom, the issue would be framed more aptly as faculty academic freedom versus institutional autonomy.

#### 4. Back to the Supreme Court: *Regents v. Ewing*

Justice Stevens characterized this kind of issue almost correctly in footnote dicta in *Regents of the University of Michigan v. Ewing*.<sup>94</sup> Scott Ewing, a student in the University's six-year undergraduate and medical school program, failed five of seven subjects on an examination where passing was requisite to continued

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92. *Id.* at 629 (internal citations omitted). This language has misled a few courts in other federal appellate jurisdictions into supposing that institutions are endowed with academic freedom and that such academic freedom could conflict with the academic freedom of individual faculty. See, e.g., *Parate v. Isibor*, 868 F.2d 821, 826 (6th Cir. 1989); *Wirsing v. Bd. of Regents*, 739 F. Supp. 551, 552–53 (D. Colo. 1990), *aff'd*, 945 F.2d 412 (10th Cir. 1991).

That Judge Posner's description of faculty academic freedom as the right "to pursue his ends without interference from the academy" could be considered overbroad is here merely mentioned. To the extent that faculty academic freedom is treated as a First Amendment right, it would appear that such freedom necessarily extends only to some reasonably identifiable mode of speech or expression. See *infra* Part II.B.

93. *Piarowski*, 759 F.2d at 629. Judge Posner failed to mention that no other Justices had joined the portion of Justice Powell's *Bakke* opinion that referred to academic freedom, and that such references had at most only persuasive authority. As noted *supra* text accompanying note 80, the Seventh Circuit's decision in *Notre Dame Du Lac* likewise was based only on concurring opinions, those of Justice Frankfurter in *Sweezy* and Justice Powell in *Bakke*. In *Notre Dame Du Lac*, moreover, there was no conflict between purported faculty academic freedom and that of the institution. In a later case, Judge Posner cited *Piarowski* in support of the proposition "that one dimension of academic freedom is the right of academic institutions to operate free of heavy-handed governmental, including judicial, interference." *Osteen v. Henly*, 13 F.3d 221, 225–26 (7th Cir. 1993) (opinion by Posner, C.J.) (student challenged university official's disciplinary action). Here, again, Chief Judge Posner did not specifically base the idea of institutional academic freedom on the First Amendment, but seems to have treated it instead as an important public policy value or state interest. He did not elaborate upon his suggestion that academic institutions should be exempt from judicial review.

94. 474 U.S. 214 (1985) (upholding medical school faculty's dismissal of medical student who claimed due process violation).

registration in that program.<sup>95</sup> A faculty committee reviewed Ewing's academic record and unanimously voted not to permit him to retake the examination.<sup>96</sup> Ewing sued, claiming breach of contract and violation of his "substantive due process rights."<sup>97</sup> The Court upheld the University's refusal to allow Ewing to retake the examination.<sup>98</sup> Academic freedom was not an issue in the case. Nevertheless, Justice Stevens took the occasion to reflect on academic freedom and institutional autonomy in the following dictum: "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself."<sup>99</sup> Possibly Justice Stevens had been misled by Judge Posner's characterization of academic freedom as "equivocal" into imagining some inconsistency. Faculty academic freedom and institutional autonomy may indeed *conflict*, but the meaning of "academic freedom" is "equivocal" or inconsistent only if institutional autonomy is mistakenly (and arbitrarily) labeled "academic freedom."

It is sometimes said that the Supreme Court adopted the concept of institutional academic freedom in *Ewing*.<sup>100</sup> In the text to which the footnote quoted above is appended, the Court stated: "Added to our concern for lack of standards, is a reluctance to trench upon the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, 'a special concern of the First Amendment.'"<sup>101</sup> The *Keyishian* language quoted by the Court referred specifically to individual teacher's academic freedom, not to that of public colleges and universities.<sup>102</sup> Justice Stevens evidently was thinking of "state and local educational institutions" as places where courts "should show great respect for the faculty's professional judgment," and should "override" such judgment only if it "is such a substantial departure from academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."<sup>103</sup> It seems likely that Justice Stevens was thinking of the importance of either the faculty's academic freedom or institutional autonomy, and did not intend, whether casually or surreptitiously, to canonize institutional academic freedom—or autonomy—as a First Amendment right. He may have meant that a university might invoke the First Amendment on behalf of its

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95. *Id.* at 215–16.

96. *Id.* at 216.

97. *Id.* at 215–17.

98. *Id.* at 227–28.

99. *Id.* at 226 n.12, (citing *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) and *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) as authority for the former proposition, and Justice Powell's *Bakke* and Justice Frankfurter's *Sweezy* concurrences as authority for the latter).

100. *See, e.g.*, Brief of Amicus Curiae Michigan Governor Jennifer M. Granholm in Support of Respondents at 9, *Gutter v. Bollinger*, 539 U.S. 306, 123 S. Ct. 2325 (2003) (No. 02-241).

101. *Ewing*, 474 U.S. at 226 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603, (1967)).

102. *See supra* notes 15, 32.

103. *Ewing*, 474 U.S. at 225. It is clear on the facts in *Ewing* and in this statement that by "state and local educational institutions" Justice Stevens was referring to the faculty's exercise of professional judgment.

faculty's policy or decision-making.<sup>104</sup>

In any case, the Court's language about safeguarding institutions' academic freedom is dicta. The question of institutional academic freedom was not before the Court nor was institutional academic freedom part of the Court's holding in *Ewing*. Instead, the *Ewing* Court held that the faculty's decision to dismiss the student from Medical School was not unreasonable and therefore did not offend due process.<sup>105</sup>

### 5. More Seventh Circuit Decisions and Dicta

Nevertheless, on the basis of Judge Posner's language in *Piarowski* opposing institutional academic freedom to that of individual faculty, subsequent Seventh Circuit panels proceeded to declare in a series of cases that these freedoms are mutually opposed. In most of these cases, the court's panels deferred, or would have deferred, to purported institutional interests, finding that these outweighed or trumped faculty members' rights or interests in First Amendment academic freedom.<sup>106</sup>

In some of these cases, the language noted is dicta; in others, it represents the court's holdings or stated rationales. The following cases illustrate the Seventh Circuit's endorsement of the idea of institutional academic freedom: *Weinstein v. University of Illinois*,<sup>107</sup> *Shelton v. Trustees of Indiana University*,<sup>108</sup> *Keen v. Penson*,<sup>109</sup> *Webb v. Board of Trustees of Ball State University*,<sup>110</sup> and *Feldman v.*

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104. In that case, however, the faculty would have been acting as agents for the state. On further reflection, Justice Stevens would very likely have recognized that the University could not have invoked First Amendment protection on its behalf in that capacity. See *infra* Part II. Justice Stevens had no occasion to reflect further on the matter in *Ewing*, since, in his view, that case did not turn on the First Amendment, but rather, on due process. See Justice Souter's concurrence in *Southworth*, *infra* note 105, joined by Justice Stevens.

105. *Id.* at 227–28. See *Bd. of Regents v. Southworth*, 529 U.S. 217 (2000) (“*Ewing* addressed not the relationship between academic freedom and First Amendment burdens imposed by a university, but a due process challenge to a university’s academic decisions.”) *Id.* at 236 (Souter, J. concurring, joined by Stevens and Breyer, JJ.).

106. See *infra* notes 107–15.

107. 811 F.2d 1091 (7th Cir. 1987). In dicta the *Weinstein* court stated: “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.” *Id.* at 1097 n.4. Here again is an expression of the peculiar idea that purported institutional academic freedom is or should be immune from judicial review. See *supra* note 85 and text accompanying notes 60–63. Perhaps the court meant only to say that judges should defer to institutional autonomy on matters of academic policy made by professional educators, absent alleged violation of constitutional or statutory rights. Its use of inappropriate conceptual categories, however, necessarily resulted in confusion. See *infra* Part II.E.

108. 891 F.2d 165, 167 (7th Cir. 1989) (Posner, J., writing for the panel). See also a Sixth Circuit case decided the same year, *Parate v. Isibor*, 868 F.2d 821, 827 (6th Cir. 1989): “[B]ecause the university must remain independent and autonomous to enjoy academic freedom, the federal courts are reluctant to interfere in the internal operations of the academy.”

109. 970 F.2d 252, 257 (7th Cir. 1992). Penson was the university’s chancellor.

110. 167 F.3d 1146 (7th Cir. 1999). “Justices Frankfurter and Harlan referred to the four freedoms *of a university*: ‘to determine for itself on academic grounds who may teach, what may

*Ho*.<sup>111</sup>

All of these opinions cited Justice Frankfurter's concurrence in *Sweezy*, Justice Powell's concurring opinion in *Bakke*, or cases deriving from either, as binding authority. None of these Seventh Circuit opinions undertook to apply *Marks* to Justice Powell's concurrence.<sup>112</sup> Neither *Weinstein*, *Shelton*, *Keen*, or *Webb* specifically stated that universities' academic freedom was rooted in the First Amendment. The *Feldman* court did so, but with reference to "academic independence," not academic freedom.<sup>113</sup>

Writing for the panel in *Feldman*, Judge Easterbrook cited Justice Frankfurter's *Sweezy* concurrence, this time as authority for reversing a jury award to an assistant professor of mathematics whose employment at Southern Illinois University had been terminated after accusing the department chairman of professional misconduct.<sup>114</sup> Judge Easterbrook wrote:

Given the verdict, we must assume that Ho reacted adversely to Feldman's accusation against his colleague and that this led the University to end Feldman's employment. . . . But it does not follow that a jury rather than the faculty determines whether Feldman's accusation was correct. A university's academic independence is protected by the Constitution, just like a faculty member's own speech. Concurring in *Sweezy v. New Hampshire*, Justices Frankfurter and Harlan referred to the four 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."<sup>115</sup>

Evidently Judge Easterbrook and his *Feldman* panel colleagues believed that Justice Frankfurter's concurring opinion in *Sweezy* had somehow endowed public universities (or their administrations) with some kind of constitutional support for their exercise of "academic independence."

While the Seventh Circuit read prior case law to say that public colleges and universities are entitled to academic freedom under the First Amendment, and that such institutional academic freedom can outweigh, that is, be deemed more important than, faculty academic freedom, the Fourth Circuit was prepared to go considerably further in its deference to institutional authority.

## 6. The Fourth Circuit's Reconstruction of Federal Academic Freedom

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be taught, how it shall be taught, and who may be admitted to study." *Id.* at 1149–50 (emphasis added). Compare *Wirsing v. Bd. of Regents*, 739 F. Supp. 551, 553 (D. Colo. 1990), *aff'd*, 945 F.2d 412 (10th Cir. 1991) (citing *Sweezy* as authority for the "four essential freedoms" of a university, likewise without apparently being aware that this language was not that of the Court, but only that of Justice Frankfurter, concurring).

111. 171 F.3d 494 (7th Cir. 1999). The other named appellee was the Board of Trustees of Southern Illinois University.

112. See *supra* text accompanying notes 56–61.

113. *Feldman*, 171 F.3d at 495.

114. *Id.* Subsequently, Feldman charged Ho, the department chairman, and other university officials, with violating his First Amendment speech rights. *Id.*

115. *Id.* (internal citation omitted).

Jurisprudence: Public Institutions Have It; Individual Faculty Do Not

The Fourth Circuit's novel perspective on First Amendment academic freedom evolved only recently. This court's position, set out in a pair of en banc opinions, is that public educational institutions *alone* are entitled to invoke the protection of academic freedom under the First Amendment; moreover, individual faculty are not, and never have been so entitled. The court's articulation of this new doctrine in these cases can be considered without detailing the respective fact situations.<sup>116</sup>

The earlier of these cases, *Boring v. Buncombe County Board of Education*<sup>117</sup> concerned a high school drama teacher, Margaret Boring, who had selected a somewhat unconventional play for her students to perform.<sup>118</sup> Later, the school principal arranged for Boring's involuntary transfer to another school.<sup>119</sup> Her complaint charged that the transfer was "in retaliation for expression of unpopular views through the production of the play and thus in violation of her right to freedom of speech."<sup>120</sup> The en banc court held that Boring had "no First Amendment right to insist on the makeup of the curriculum."<sup>121</sup> As rationale, the court quoted, *inter alia*, from Justice Frankfurter's concurrence in *Sweezy*:

Justice Frankfurter, in concurrence, related the four essential freedoms of a university, which should no less obtain in public schools unless quite impractical or contrary to law:

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.

. . . .

We agree with Plato and Burke and Justice Frankfurter that the school, not the teacher, has the right to fix the curriculum.<sup>122</sup>

The court did not mention that Justice Frankfurter, like the authors of *The Open Universities*, was concerned about external governmental intrusion, not allocation of authority within an academic institution. Justice Frankfurter had not said that institutions (or institutional administrators) might determine curricula but that

116. For description of the fact situations and further analysis of the Fourth Circuit's reasoning in these cases, see Hiers, *supra* note 7, at 88–104.

117. 136 F.3d 364 (4th Cir. 1998) (en banc).

118. *Id.* at 366.

119. *Id.*

120. *Id.* at 367.

121. *Id.* at 370. It is not at all clear that Boring had so insisted. She had consulted the school's principal in advance and, pursuant to his request which had been prompted by a parent's complaint about the play's first performance, modified the script for subsequent performances. *See id.* at 374–75 (Hamilton, J., dissenting); *id.* at 375–77 (Motz, J., dissenting). For present purposes, however, the facts need not be considered.

122. *Id.* at 370 (quoting *Sweezy*, 354 U.S. at 263). Neither Plato nor Burke, of course, was an authority in the field of U.S. Constitutional law. Nor had either stated in the excerpts quoted by the court that schools, rather than teachers, had "the right to fix the curriculum."

teachers might not do so. Boring had not contended that her *academic freedom* was implicated by her transfer; nor did the *Boring* court address academic freedom in the course of its analysis.<sup>123</sup> Nevertheless, the en banc court soon applied its holdings in *Boring* to the question of academic freedom in public colleges and universities.

It did so in *Urofsky v. Gilmore*,<sup>124</sup> decided in 2000. The issue in *Urofsky* was whether a state (or more precisely, Commonwealth) law restricting Commonwealth employees' access to sexually explicit materials on computers owned or leased by the Commonwealth infringed those employees' First Amendment academic freedom rights.<sup>125</sup> Plaintiffs in the case were six professors employed at Virginia public colleges and universities.<sup>126</sup> The district court found in plaintiffs' favor,<sup>127</sup> but its decision was reversed first by a panel,<sup>128</sup> and again by the en banc court.<sup>129</sup>

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123. The majority did quote from *Kirkland v. Northside Independent School District*, 890 F.2d 794, 800 (5th Cir. 1989): "Although the concept of academic freedom has been recognized in our jurisprudence, the doctrine has never conferred upon teachers the control of public school curricula." In *Boring*, the Fourth Circuit was not discussing academic freedom as such, but rather was determining, in the negative, whether Boring's *selection* of the play in question was "a matter of public concern" and thus possibly eligible for protection under the First Amendment. Under *Connick v. Myers*, 461 U.S. 138 (1983), as subsequently construed, for a public employee's speech to be accorded First Amendment protection, the court must first decide, as a matter of law, that the speech addressed or related to "a matter of public concern."

As to the problems of applying the *Connick* line of cases to academic freedom claims, see Chris Hoofnagle, *Matters of Public Concern and the Public University Professor*, 27 J.C. & U.L. 669 (2001); Chang, *supra* note 68, at 915; Damon L. Krieger, Comment, *May Public Universities Restrict Faculty from Receiving or Transmitting Information Via University Computer Resources? Academic Freedom, the First Amendment, and The Internet*, 59 MD. L. REV. 1398 (2000); and Richard Hiers, *Academic Freedom in Public Colleges and Universities: O Say, Does That Star-Spangled First Amendment Banner Yet Wave?*, 40 WAYNE L. REV. 1 (1993).

124. 216 F.3d 401 (4th Cir. 2000) (en banc). This en banc decision reflected considerable disagreement. In addition to the seven-member majority, there were three concurring opinions, and a dissenting opinion joined by three other judges. *Id.* at 404.

125. *Id.*

126. *Id.*

127. *Urofsky v. Allen*, 995 F. Supp. 634 (E.D.Va. 1988).

128. *Urofsky v. Gilmore*, 167 F.3d 191 (4th Cir. 1999).

129. *Urofsky v. Gilmore*, 216 F.3d 401, 416 (4th Cir. 2000). The *Urofsky* decision generated considerable interest and mixed reviews among commentators. See, e.g., Stacy E. Smith, *Who Owns Academic Freedom?: The Standard for Academic Free Speech at Public Universities*, 59 WASH. & LEE L. REV. 299 (2002); Kate Williams, *Loss of Academic Freedom on the Internet: The Fourth Circuit's Decision in Urofsky v. Gilmore*, 21 REV. OF LITIG. 293 (2002); Doug Rendleman, *Academic Freedom in Urofsky's Wake: Post September 11 Remarks on "Who Owns Academic Freedom?"*, 59 WASH. & LEE L. REV. 361 (2002); Donald J. Weidner, *Thoughts on Academic Freedom: Urofsky and Beyond*, 33 U. TOL. L. REV. 257 (2001); *Constitutional Law — First Amendment — Academic Freedom — Fourth Circuit Upholds Virginia Statute Prohibiting State Employees from Downloading Sexually Explicit Material*. — *Urofsky v. Gilmore*, 114 HARV. L. REV. 1414 (2001); Rabban, *Academic Freedom*, *supra* note 6, at 18–20; and Krieger, *supra* note 123. Evaluations range between good result though specious reasoning, and "aberrant," "pernicious," "a triumph for collectivism and conformity." 59 WASH. & LEE L. REV. at 361–62.



The en banc court characterized the professors' claims as follows: "[The professors] first maintain that the Act is unconstitutional as to all state employees; failing this, they argue more particularly that the Act violates academic employees' right to academic freedom."<sup>130</sup> The court initially decided that the statute in question did not violate the rights of Commonwealth employees generally, inasmuch as it applied only to those employees when acting in their *role* as employees:

The speech at issue—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.<sup>131</sup>

Turning to the six Virginia professors' First Amendment academic freedom claim, the en banc court declared:

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.<sup>132</sup>

To justify this remarkable conclusion, the court then revisited a series of Supreme Court decisions, reading the decisions to say that the Constitution

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130. *Urofsky*, 216 F.3d at 406.

131. *Id.* at 408–09. Earlier, in *Boring* the en banc Fourth Circuit had implied that the "role" in which public employees "speak" is virtually dispositive as to any First Amendment challenges they might raise. The court read *Connick* to mean that public employee speech could be protected under the First Amendment only if it related to a "matter of public concern," and that if any employee spoke in the *role* of employee, her speech would fail that threshold test. *Boring v. Buncombe County Board of Education*, 136 F.3d 364, 367–70 (4th Cir. 1998) (en banc). *See also id.* at 375, 379 (Motz, J., dissenting) ("Conceivably, the majority's holding is grounded in misreading *Connick* to make the role in which a public employee speaks determinative of whether her speech merits First Amendment protection.") The en banc *Urofsky* court explicitly adopted this restrictive test: "Thus, critical 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.'" *Urofsky*, 216 F.3d at 407 (quoting *Terrell v. Univ. of Tex. Sys. Police*, 792 F.2d 1360, 1362 (5th Cir. 1986)). *See also id.* at 407–09. Compare *Cockrel v. Shelby County School District*, 270 F.3d 1036, 1050–52 (6th Cir. 2001), *cert. denied*, 537 U.S. 813 (2002), criticizing the Fourth Circuit's decision in *Boring*, and stating: "[T]he key question is not whether a person is speaking in his role as an employee or a citizen, but whether the employee's speech in fact touches on matters of public concern." *Cockrel*, 270 F.3d at 1052.

132. *Urofsky*, 216 F.3d at 410. Perhaps so as to leave no doubt as to its position, the court then added: "Appellees ask us to recognize a First Amendment right of academic freedom that belongs to the professor as an individual. 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." *Id.* at 412. Compare *Berg v. Bruce*, 112 F.3d 322, 329 (8th Cir. 1997) ("Academic Freedom is designed to 'protect the individual professor's classroom method from the arbitrary interference of university officials.'" (quoting *Parate v. Isibor*, 868 F.2d 821, 830 (6th Cir. 1989)).

protected institutional academic freedom but not that of individual faculty.<sup>133</sup> Not surprisingly, perhaps, the court drew substantially upon Justice Frankfurter's concurrence in *Sweezy*<sup>134</sup> and Justice Powell's concurrence in *Bakke*.<sup>135</sup> The *Urofsky* court did not actually hold that in this case the colleges and universities where appellees were employed were protected, somehow, by academic freedom. Rather, its point seems to have been that these faculty members themselves were not so protected. Arguably, therefore, its contention that academic institutions are entitled to academic freedom under the Constitution should be read as dicta. Possibly for that reason the Fourth Circuit did not feel obligated to explain how public colleges or universities, themselves government agencies, might be understood to enjoy a First Amendment academic freedom interest or any other First Amendment right. Nevertheless, in view of its endorsement by a clear majority of the en banc court,<sup>136</sup> it would not be surprising if, following *Urofsky*, Fourth Circuit panels and federal district courts within the Fourth Circuit's appellate jurisdiction adjudicating academic freedom claims were to consider themselves bound by this dicta.

## II. INSTITUTIONAL ACADEMIC FREEDOM: A "CONSTITUTIONAL" CONCEPT WITH NO CONSTITUTIONAL FOUNDATION

As has been shown, a few Justices, either in concurring opinions or in dicta, have proposed that public colleges and universities are endowed with a constitutionally protected interest in academic freedom. No Supreme Court decision, however, has so held. Nevertheless, as has been shown, two federal appellate courts have announced, whether in dicta or decisional law, that public institutions are indeed so endowed. Significantly, no Justice or lower federal court has ventured to establish any constitutional theory connecting the concept of institutional academic freedom with the First Amendment—or with any other constitutional basis. Few, it seems, have considered such theorizing necessary. Instead, judicial proponents of the concept apparently have assumed that the language quoted by Justice Frankfurter in his *Sweezy* concurrence from *The Open Universities* about the "four essential freedoms of a university," subsequently designated "academic freedom" by Justice Powell in his *Bakke* concurrence, somehow granted this concept constitutional status. Perhaps no explanation has been forthcoming because there may be none.

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133. The court's analysis of these opinions is described and critiqued by the present writer, *supra* note 7, at 97–104, and need not be discussed further here. It may be mentioned, however, that the Supreme Court itself had recently identified "danger . . . to speech from the chilling of individual thought and expression" as concerns addressed in both *Sweezy* and *Keyishian*. *Rosenberg v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835–36 (1995) (emphasis added). *See also* Bd. of Regents v. Southworth, 529 U.S. 217 (2000) ("Our university cases have dealt with restrictions imposed from outside the academy on individual teachers' speech or associations."). *Id.* at 238 n.4 (Souter, J., concurring) (emphasis added).

134. *Urofsky*, 216 F.3d at 412–13, 414.

135. *Id.* at 414.

136. *But see id.* at 426, 434–35 (Wilkinson, C.J., concurring) (emphasizing the importance of academic free speech and not endorsing the concept of institutional academic freedom).

There are three major constitutional obstacles that an explanation would have to overcome. Each obstacle alone would seriously undermine the notion that the Constitution somehow undergirds the purported academic freedom of public colleges and universities. In the first place, it is well established that the First Amendment protects the rights of persons against governmental interference; it does not and could not protect government from First Amendment claims asserted by persons. Additionally, in its terms, the First Amendment protects speech or expression, but not the process or act of decision-making. By virtue of its incorporation into the Fourteenth Amendment, moreover, the First Amendment can be said to protect only *persons*, a category that, in U.S. jurisprudence to date, has not been held to include public institutions of higher learning. On those occasions when the Court has considered governmental speech, its analysis has never accorded such speech First Amendment protection. It is further suggested that much of the confusion evident in judicial references to institutional First Amendment interests derives from failure to distinguish carefully between and among important conceptual categories.

A. Under the Constitution the Government has Power; Citizens have Rights.

Since the *Magna Carta*, it has been axiomatic that, while constitutions may endow governments with power or authority, constitutions also set limits to such power. Such is the case, obviously, with the U.S. Constitution. The Bill of Rights necessarily limits the power of the federal government by specifying what the government may not do, and thereby establishes various correlative constitutional rights that citizens, or more broadly, “the people,” may assert against the government’s exercise of its power. The First Amendment clearly illustrates this familiar pattern. Omitting the Religion Clauses, it states: “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.”<sup>137</sup>

These limits to the power of government and correlative rights of the people were extended to the states through the Fourteenth Amendment,<sup>138</sup> which reads in relevant part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>139</sup>

Clearly these provisions limit the power of *government*. The government, whether federal or state, may have *interests*, but under these provisions of the Constitution, it does not have *rights*. A noted constitutional law scholar has written recently:

When I refer to “government,” I refer to any institution or person

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137. U.S. CONST. amend. I.

138. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

139. U.S. CONST. amend. XIV, § 1.

possessing the authority to exercise coercive powers of government to limit the autonomy or freedoms of an individual.

Hence, a dean, who possesses those powers in regard to the interests of a faculty member, is government, even though the dean's powers were delegated by a university (also government) and the university's powers were delegated by the legislature (also government). To the extent that a faculty collective possesses delegated power to make rules or decisions that may be applied coercively (in the sense I have referred to), the faculty is a government decision-maker and its decisions constitute governmental action.

In short, in the context that interests us, government possesses *power* and only *power*, and nothing else. Despite numerous judicial statements to the contrary, government possesses no "rights," except in those contexts in which its status and actions do not involve the exercise of the coercive application of governmental power. . . .

Governments possess the power to create academic institutions, prescribe job qualifications for teachers, prescribe curricula, make teaching assignments and the like. . . . By contrast *vis a vis* government, individuals have no powers, but only rights. Individuals have academic freedom to make teaching decisions within the ambit of job assignments. Individuals also possess academic freedom (i.e., the right) not to be penalized for exercising protected rights (usually speech) both on and off the job. A sometimes important aspect of this is the right not to be selected out for adverse treatment based upon the content or viewpoint of one's point of view when those expressing other viewpoints are not so penalized. The essence of this is that academic freedom in the constitutional sense must find its moorings primarily in the First and Fourteenth Amendments.<sup>140</sup>

Again, as stated succinctly by Judge Smith in *Hopwood II*: "The First Amendment generally protects citizens from the actions of government, not government from its citizens."<sup>141</sup> Public colleges and universities are government agencies. Actions by officials, whether faculty or administrators, on behalf of the institution, are actions of government. Such actions may affect the First Amendment or other constitutional rights of persons. It is, however, well-established law in the Federal Circuit Courts of Appeal that these public institutions themselves, as government agencies, do not have First Amendment

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140. Memorandum from Professor Joseph W. Little, Levin College of Law of the University of Florida, to Richard Hiers (June 18, 2003) (on file with author). The memorandum is quoted with Professor Little's permission.

141. See *Hopwood v. Texas*, 78 F.3d 932, 943 n.25 (5th Cir. 1996). See also *supra* note 1 and accompanying text. The present writer does not propose to endorse the *Hopwood* court's contention that a law school's consideration of race or ethnicity for the purpose of achieving a diverse student body can never be considered a compelling state interest. *Hopwood*, 78 F.3d at 944. However, that court's statement quoted in this article regarding the First Amendment appears to be not only sound, but incontrovertible.

rights.<sup>142</sup>

#### B. The First Amendment Protects Speech, Not Institutional “Determinations” or Actions

In its terms relevant to the present topic, the First Amendment protects speech.<sup>143</sup> It is difficult to see how the language of the First Amendment could be construed to protect institutional decision-making in any of the areas identified in *The Open Universities of South Africa* as “the four essential freedoms of a university”: namely, determining “on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”<sup>144</sup> In public colleges and universities, such decision-making, whether by faculty or administration or both, is an exercise of governmental power. In the course of making such decisions, faculty and administrators typically read various documents, for example, curricula vitae, publications, course syllabi and admissions applications, and discuss relevant matters with one another; but neither making such determinations nor actions taken pursuant to them constitutes speech.<sup>145</sup>

If academic freedom *is* indeed a First Amendment concern—as the Supreme Court has said it is,<sup>146</sup> academic freedom can only be considered to be “within” or protected by that Amendment to the extent that it involves speech or viewpoint expression.<sup>147</sup> Decision-making by persons acting for or as state government

142. See, e.g., *Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634, 638 (11th Cir. 1990) (“When the competing speaker is the government, that speaker is not itself protected by the first amendment . . . .”); *NAACP v. Hunt*, 891 F.2d 1555, 1565 (11th Cir. 1990) (“[T]he First Amendment protects citizens’ speech only from government regulations; government speech itself is not protected by the First Amendment.”) (citing *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring); *Student Gov’t Ass’n v. Bd. of Trs.*, 868 F.2d 473, 481 (1st Cir. 1989) (“The LSO, a state entity, itself has no First Amendment rights . . . .”); *Estiverne v. La. State Bar Ass’n*, 863 F.2d 371, 379 (5th Cir. 1989) (“[T]he first amendment does not protect government speech . . . .”); *Muir v. Ala. Educ. Television Comm’n*, 688 F.2d 1033, 1038 n.12 (5th Cir. 1982) (en banc) (“Government expression [is] unprotected by the First Amendment.”). See also *Columbia Broad. Sys. v. Democratic Nat’l Comm.*, 412 U.S. 94, 139 (Stewart, J., concurring) (“The First Amendment protects the press *from* governmental interference; it confers no analogous protections *on* the Government.”) (emphasis in original).

143. The right of assembly and the right to petition government *could* also be involved in public colleges and universities, but are not implicated in the cases considered in this article.

144. See CENTLIVRES, *supra* notes 8, 17, 30 and accompanying text.

145. See Byrne, *supra* note 6, at 257 (“Why the First Amendment protects administrative activities at some remove from teaching and scholarship has yet to be adequately justified.”). See also *id.* at 312 (distinguishing between speech and institutional decision-making). For a thoughtful effort to establish some nexus between the First Amendment and academic decision-making, see Darlene C. Goring, *Affirmative Action and the First Amendment: The Attainment of a Diverse Student Body is a Permissible Exercise of Institutional Autonomy*, 47 U. KAN. L. REV. 591 (1999).

146. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). The Court has not to date receded from this position. See generally Hiers, *supra* note 7, at 35–109.

147. Also, arguably, the right of the people to assemble or petition government for redress of grievances. See *supra* note 143 and text accompanying note 137.

cannot reasonably be construed as speech.

### C. Public Colleges and Universities are Not Persons

Implicit in the First Amendment is the understanding that “the freedom of speech” inheres in citizens or the people. The Assembly and Petition Clauses refer explicitly to “the right of the people.”<sup>148</sup> By virtue of its “incorporation” into the Fourteenth Amendment, rights protected against state intrusion under the First Amendment necessarily are those of “*persons*”: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>149</sup>

State governments are not persons. The Supreme Court has not intimated that it is prepared to regard either state governments or state agencies as persons for First and Fourteenth Amendment purposes.<sup>150</sup> States and state agencies, including public colleges and universities, may have important or even compelling interests. State interests may be “balanced” against asserted constitutional rights of persons; but such interests, themselves, do not have constitutional status. To date, in U.S. constitutional jurisprudence, public colleges and universities have not been considered persons, and consequently, are not eligible to enjoy First Amendment protections or rights.

### D. The Supreme Court’s Analysis of Government Speech

The Supreme Court has discussed government speech on several occasions. Some cases referred specifically to speech by “the university.” In such cases,

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148. See *supra* text accompanying note 137.

149. See *supra* note 139 and accompanying text.

150. Early in the twentieth century, the Court decided that the Equal Protection Clause of the Fourteenth Amendment prohibited states from taxing foreign corporations at different rates than they taxed domestic corporations. See *Hanover Fire Ins. Co. v. Carr*, 272 U.S. 494 (1926); *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77 (1938); and *Wheeling Steel v. Glander*, 337 U.S. 562 (1949). See also *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (arguably recognizing private corporations as persons for purposes of the Fourteenth Amendment):

The First Amendment . . . serves significant societal interests. The proper question therefore is not whether corporations ‘have’ First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the state law criminalizing banks’ and business corporations’ expenditures for the purpose of influencing referendum proposals] abridges expression that the First Amendment was meant to protect.

*Id.* at 776. Evidently, the *Bellotti* Court, like the Court in the corporation tax cases, wished to side-step the problematic task of analyzing the Fourteenth Amendment’s “person” limitation in order to reach what it considered a desirable social policy result. Thus, for certain purposes, private sector corporations have been deemed “persons” under the First and Fourteenth Amendments. See also *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690–92 (1978) (municipalities may be liable as “persons” for purposes of actions brought under 42 U.S.C. § 1983). Although voluntary associations, for example the NAACP, may invoke the First Amendment on behalf of their members, such analysis is beyond the scope of this article. See *NAACP v. Alabama*, 357 U.S. 449 (1958).

government activity was challenged by private individuals asserting First Amendment rights. In none of these cases did the Court attribute any countervailing First Amendment interests to the government or to government (or public university) speech. The most recent such cases were *Board of Regents of University of Wisconsin System v. Southworth*<sup>151</sup> and *Rosenberger v. Rector and Visitors of the University of Virginia*.<sup>152</sup>

In *Southworth*, the Court considered a First Amendment claim by students at the University of Wisconsin who objected to a mandatory student activity fee used, in part, to support student organizations engaged in “political or ideological” speech.<sup>153</sup> The Court upheld the University’s imposition of the fee, noting that the University “exact[s] the fee . . . for the sole purpose of facilitating the free and open exchange of ideas by, and among, its students.”<sup>154</sup> Inasmuch as the University had disclaimed any of the speech in question as its own, the Court stated:

[W]e do not reach the question whether traditional political controls to ensure responsible government action would be sufficient to overcome First Amendment objections and to allow the challenged program under the principle that the government can speak for itself. If the challenged speech here were financed by tuition dollars and the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker. That is not the case before us.<sup>155</sup>

In effect, the *Southworth* Court held that the University could support a program that advanced the First Amendment of others; but that was not the same as saying that the University itself had a First Amendment speech interest.<sup>156</sup> Had the government (or the University) paid for and thereby implicitly endorsed any particular student speech, it would have been deemed the speaker—but in that case its speech would have been analyzed under principles other than the First Amendment. For analysis of cases where “government” or “the university” (or its officers) are speakers, the *Southworth* Court referred to its earlier decisions in *Rust v. Sullivan*<sup>157</sup> and *Regan v. Taxation With Representation of Washington*.<sup>158</sup>

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151. 529 U.S. 217 (2000).

152. 515 U.S. 819 (1995).

153. *Southworth*, 529 U.S. at 221, 227.

154. *Id.* at 229.

155. *Id.* “The case we decide here . . . does not raise the issue of the government’s right, or, to be more specific, the state-controlled University’s right, to use its own funds to advance a particular message.” *Id.*

156. The Court explained:

The University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall. If the University reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends.

*Id.* at 233.

157. 500 U.S. 173 (1991).

158. 461 U.S. 540, 548–49 (1983). See also *Southworth*, 529 U.S. at 229, 235.

Neither *Rust* nor *Regan* referred specifically to government or public university speakers. Apparently the *Southworth* Court cited these cases because, in both, the government was said to have authority to develop and justify programs based on social policy choices, even though some citizens benefited while others did not.<sup>159</sup>

In *Rust*, the Court upheld federal law and agency regulations that prohibited Title X program fund recipients from “counseling, referral, and the provision of information regarding abortion as a method of family planning.”<sup>160</sup>

The challenged regulations implement the statutory prohibition by prohibiting counseling, referral, and the provision of information regarding abortion as a method of family planning. They are designed to ensure that the limits of the federal program are observed. The Title X program is designed not for prenatal care, but to encourage family planning. . . . This is not a case of the Government “suppressing a dangerous idea,” but of a prohibition on a project grantee or its employees from engaging in activities outside of the project’s scope.<sup>161</sup>

Perhaps the *Southworth* Court conceived the government’s choice of family childbirth, and the establishment of a program to implement that choice as “speech.”<sup>162</sup>

In *Regan*, Taxation with Representation of Washington (“TWR”), a nonprofit corporation, challenged the Internal Revenue Service Code section denying tax-exempt status to organizations that substantially engage in attempts to influence legislation.<sup>163</sup> TWR contended that this section violated its First Amendment speech rights.<sup>164</sup> What *Southworth* characterized as government speech in this case evidently referred to Congress’ decision to enact this provision of the Code as it chose:

The Code does not deny TWR the right to receive deductible contributions to support its non-lobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby. Congress has merely refused to pay for the lobbying out of public

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159. “The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.” *Southworth*, 529 U.S. at 229.

160. *Rust*, 500 U.S. at 193.

161. *Id.* at 193–94.

162. The *Rust* Court determined:

Here the Government is exercising the authority it possesses . . . to subsidize family planning services which will lead to conception and childbirth, and declining to “promote or encourage abortion.” The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.

*Id.* at 193.

163. *Regan*, 461 U.S. at 542.

164. *Id.* at 541–42.



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Perhaps the *Southworth* Court considered that *Regan* dealt with government speech in view of Congress' legislative process, which necessarily would have involved legislators engaging in written and spoken deliberations, and voting.

*Rosenberger* suggests a way in which the government (or "the University") itself might more obviously be identified as "speaker": Where the government in effect *sponsors* particular speech, or at any rate, gives the appearance of adopting it. Wide Awake Productions ("WAP") was one of many campus student groups eligible to have certain types of expenses paid from the University's Student Activities Fund and periodically published a magazine intended to provide "a Christian perspective on both personal and community issues."<sup>166</sup> The University's Student Council denied WAP's request for funds to cover printing costs on the ground that the publication constituted a "religious activity."<sup>167</sup> The Dean of Students signed a letter in which the University's Student Activities Committee sustained the denial.<sup>168</sup> WAP, and various students associated with it, sued in federal district court claiming violation of their First Amendment and other constitutional rights.<sup>169</sup> The Court held that the University's policy abridged the WAP students' right of free speech.<sup>170</sup> Its analysis turned on *whether* the University was speaking—in which case it might regulate speech either "when it is the speaker or when it enlists private entities to convey its own message";<sup>171</sup> *or whether* "the University . . . instead expends funds to encourage a diversity of views from private speakers."<sup>172</sup> In the latter situation, viewpoint restrictions are improper; and in this case, the Court held, the viewpoint restrictions violated petitioners' First Amendment free speech right.<sup>173</sup>

As to the "principles" controlling the University's own speech, the *Rosenberger* Court cited two of its earlier cases, *Westside Community Board of Education v. Mergens*<sup>174</sup> and *Hazelwood School District v. Kuhlmeier*.<sup>175</sup> Neither of these cases

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165. *Id.* at 545.

166. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 822–26 (1995).

167. *Id.* at 827.

168. *Id.*

169. *Id.*

170. *Id.* at 845–46.

171. *Id.* at 833. The Court cited *Rust*, stating that there it had said, "the government . . . used private speakers to transmit specific information pertaining to its own program." *Id.* Subsequently, the Third Circuit construed *Rosenberger* to mean that in such matters as disputes with administration about curriculum and even assigning grades, a university professor had no First Amendment rights because, since the professor was an agent of the university, the university was the speaker. *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491–92 (3d Cir. 1998); *Brown v. Armenti*, 247 F.3d 69, 74–75 (3d Cir. 2001). In neither of these cases did the court say that the university was entitled to First Amendment protection. This article does not consider whether the Third Circuit correctly held that faculty members in these cases had no First Amendment speech or academic freedom interests.

172. *Id.* at 834.

173. *Id.* at 834, 837.

174. 496 U.S. 226, 250 (1990).

175. 484 U.S. 260, 270 (1988).

involved universities, but apparently the Court thought the “principles” indicated were applicable to the analysis of government speech in higher education.

In *Mergens*, Bridget Mergens and other public high school students had been denied permission to form a Christian club that would have had the same status and privileges as other school student clubs.<sup>176</sup> The students claimed violation of their rights under the Equal Access Act, and the Free Speech and Free Exercise Clauses.<sup>177</sup> The Court found that the school had violated the Act, and so did not reach the students’ First Amendment claim.<sup>178</sup> Nevertheless, in dicta, the Court addressed the question of “government speech” in the context of the Religion Clauses:

[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis. . . . The proposition that schools do not endorse everything they fail to censor is not complicated.<sup>179</sup>

Whatever government speech might have been involved had the school endorsed this club or the viewpoint of its members, the Court found no Establishment Clause violation on these facts.<sup>180</sup>

In *Kuhlmeier*, the Court considered whether public school authorities might censor student “speech” in the form of student articles intended for publication in a newspaper, production of which had been found to be “part of the educational curriculum” and a “regular classroom activity,”<sup>181</sup> without infringing upon the students’ First Amendment rights. The Court found no violation in these circumstances. In *Kuhlmeier*, as in *Rust* and *Regan*, the Court did not refer to or otherwise mention government speech or the government as speaker. It did refer to government—or a public school’s—*sponsorship* of particular student speech.<sup>182</sup> The Court focused on the question of “educators’ authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the schools.”<sup>183</sup> It concluded: “It is only when the decision to

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176. *Mergens*, 496 U.S. at 233.

177. *Id.*

178. *Id.* at 248–53.

179. *Id.* at 250 (internal citations omitted).

180. “To the extent a school makes clear that its recognition of respondents’ proposed club is not an endorsement of the views of the club’s participants, students will reasonably understand that the school’s official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech.” *Id.* at 251 (internal citation omitted).

181. *Kuhlmeier*, 484 U.S. at 268.

182. The Court held that the newspaper was not a public forum, but rather was intended “as a supervised learning experience for journalism students,” *id.* at 270, and that school officials were, therefore, “entitled to regulate [its contents] in any reasonable manner.” *Id.*

183. *Id.* at 271.

censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so directly and sharply implicated as to require judicial intervention to protect students' constitutional rights."<sup>184</sup>

In all of these cases, the Court stated, at any rate, in retrospect, that it was or had been discussing principles relating to situations where the government was speaker. Yet in none of these cases did the Court even hint that government speech might be entitled to First Amendment protection. Perhaps it can be assumed that the Court was aware of the constitutional difficulties that would arise were it to do so.<sup>185</sup>

#### E. Significant Semantic and Conceptual Distinctions

In the cases considered so far, a number of terms are used interchangeably, often imprecisely. It is suggested here that academic freedom and institutional autonomy are not identical concepts. Academic freedom normally is understood to refer to the expressive freedom of individual faculty,<sup>186</sup> while autonomy normally refers to the understanding that courts should defer to policies and decisions by educational institutions and those acting on their behalf, absent countervailing constitutional or statutory considerations. Ever since *Bakke*, lower federal courts and even occasionally Supreme Court Justices have confused, or mingled so as to become indistinguishable, a number of significant conceptual categories that instead should be carefully distinguished.

Academic freedom is both an educational and a social policy value in many settings other than in public colleges and universities—notably, for example, in private educational institutions.<sup>187</sup> In public colleges and universities, certain types of faculty expression may be considered within the scope of academic freedom, and also within the protection of the First Amendment. But not everything such faculty say or do is necessarily so protected. For instance, where faculty are acting as agents for their institutions, faculty may in effect be acting as government.<sup>188</sup> Faculty speech that constitutes government speech or action therefore may not be sheltered under the First Amendment. Whether faculty speech in these conditions should, nevertheless, be protected as an exercise of academic freedom favored by sound social or public policy is an important question, but one not considered in this article.

Institutional autonomy, on the other hand, has no discernible basis in the First Amendment or other constitutional language. Nevertheless, courts may well defer to institutional autonomy—that is, as many put it, to decisions involving educators'

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184. *Id.* at 273 (internal quotation marks and citation omitted).

185. *See supra* Parts II.A–C.

186. This article does not attempt to discuss, much less, define, the extent to which students and school, college, or university administrators might also have academic freedom interests. *See supra* note 6.

187. *See, e.g.*, discussions of academic freedom cited *supra* note 6.

188. *See supra* Part II.A., particularly text accompanying note 140.

expertise in matters of academic policy.<sup>189</sup> In public colleges and universities, such decisions may well constitute state action, and thus be subject to challenge on constitutional grounds. When such challenges arise, courts confront the question whether the public institutions'— thus the states'— interests are so important as matters of social policy, as to “outweigh” or be accorded priority over the constitutional claims at issue. Courts' analyses can only be confused by injection of language as to some putative First Amendment basis for either institutional academic freedom or institutional autonomy.

None of the Justices or judges who characterized institutional academic freedom as a constitutional or First Amendment right apparently considered it necessary to examine or explain the constitutional basis for such right. Possibly they were unaware that the Supreme Court language which they read as recognizing such a right was to be found only in concurring opinions and dicta. Justice Powell, perhaps without reflection, declared in *Bakke* that the “four essential freedoms” mentioned in Justice Frankfurter's *Sweezy* concurrence “constituted academic freedom.”<sup>190</sup> Lower courts, relying on such language in *Sweezy* and *Bakke*, apparently failed to appreciate that the language was to be found only in concurring opinions, and therefore lacked binding authority. Later, in its *Notre Dame Du Lac* opinion, the Seventh Circuit panel mistakenly, and perhaps inadvertently, at any rate, without constitutional analysis, designated what other courts had called an educational institution's “academic privilege” against disclosure an “academic freedom privilege.”<sup>191</sup>

Surprisingly few of the judicial opinions considered in this article actually contend specifically that what they call institutional academic freedom is grounded in the Constitution or the First Amendment.<sup>192</sup> Other opinions that identify or allude to institutional academic freedom do not specifically so contend.<sup>193</sup> In these latter cases, the judges may have recognized that institutional academic freedom could not be based on the First Amendment, and instead, intended to indicate that in their view, *institutional autonomy in matters requiring educational expertise* should be honored, where possible, as an important social or public policy value.

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189. See, e.g., *supra* text accompanying notes 71–74, 94–105, and *infra* notes 195, 269, and text accompanying notes 225, 233.

190. See *supra* text accompanying note 31. Cf. *supra* note 10, and text accompanying notes 7–11.

191. See *supra* note 79 and text accompanying notes 78–81.

192. Those that do include Justice Powell, concurring in *Bakke*, *supra* text accompanying notes 37–47; the Seventh Circuit in *Notre Dame Du Lac*, *supra* notes 78–81 and accompanying text; possibly *Piarowski*, *supra* text accompanying notes 86–93; probably *Shelton v. Trustees of Indiana University*, 891 F.2d 165 (7th Cir. 1989); *Feldman*, *supra* text accompanying note 108; and the Fourth Circuit in *Urofsky*, *supra* text accompanying notes 132–35. Also, perhaps, the Court in *Ewing*, though the *Ewing* Court evidently was referring either to faculty academic freedom or to institutional autonomy. See *supra* text accompanying notes 94–105.

193. See, e.g., *Cooper*, *supra* text accompanying notes 65–70; Justice Stevens' concurrence in *Widmar*, *supra* text accompanying and following notes 71–74; *Dow*, *supra* text accompanying and following notes 75–77; possibly *Piarowski*, *supra* text accompanying notes 86–93; *Osteen v. Henley*, 13 F.3d 221 (7th Cir. 1993); *Weinstein*, *supra* note 107 and accompanying text; *Webb v. Bd. of Trs.*, 167 F.3d 1146 (7th Cir. 1999).

In effect, this is what Justice Stevens did say in his footnote dictum in *Ewing*, where he referred to “autonomous decision-making by the academy itself.”<sup>194</sup>

Institutional academic autonomy in matters requiring educational expertise may well be an important public policy value. No known constitutional theory could immunize actions by public colleges and universities from judicial review. As a matter of social policy, however, courts may well leave academic decisions that call for the professional expertise of faculty and administrators to such educators, unless their actions conflict with constitutional, statutory, or other law. Courts can respect the importance of institutional autonomy as a matter of sound public policy without placing that autonomy upon some sort of imaginary constitutional pedestal.<sup>195</sup> Perhaps those courts that mislabeled institutional autonomy as institutional academic freedom had something of the sort in mind. If so, however, it is odd that none of the opinions undertook the kind of constitutional balancing analysis appropriate when social or public policy values or state interests conflict with specific constitutional rights. Instead, these opinions generally seem to *assume* that institutional academic freedom, once invoked, can automatically cancel out or outweigh faculty members’ First Amendment academic freedom rights.

Characterizing institutional autonomy as “academic freedom” is not only careless use of language, but also a source of serious confusion in the courts. As shown in many of the cases considered in this article, it is often unclear whether the courts mean to say that what they call institutional academic freedom is a First Amendment right, or a public policy value. As it is, the concept or doctrine of “institutional academic freedom” has taken on a life of its own, floating above or beyond constitutional analysis, as if it were derived from some sort of transcendent higher law.

Judicial opinions that treat institutional academic freedom as a First Amendment right or value invariably fail to explain how it could be connected to or grounded upon that Amendment. Conversely, judicial opinions that seem to regard institutional academic freedom as an important public policy value or state interest usually fail to explain how this important, but non-constitutional, value is to be appraised and balanced against First Amendment academic freedom claims by individual faculty.<sup>196</sup> The fog of confusion that surrounds the concept of

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194. See *supra* text accompanying notes 99–105, and *infra* note 195. See also *Feldman*, where Judge Easterbrook referred to a “university’s academic independence,” stating, without explanation, however, that such independence “is protected by the Constitution.” See *supra* text accompanying note 106. See also *infra* note 269.

195. See, e.g., *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) (“When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty’s professional judgment.”); *id.* at 226 (“[Federal courts are unsuited] to evaluate the substance of academic decisions that are made daily by faculty members of public educational institutions.”); *Bd. of Curators v. Horowitz*, 435 U.S. 78, 89–91 (1978) (same, as to evaluation of university curriculum). See also Justice Stevens’ concurrence in *Widmar*, *supra* text accompanying notes 71–74. See also *Doherty v. Southern Coll. of Optometry*, 862 F.2d 570, 576–77 (6th Cir. 1988) (as to degree requirements).

196. Apart from the anomalous position taken by the Fourth Circuit in *Urofsky*, all other courts, judges, and Justices appear to acknowledge that, at any rate, since *Keyishian*, the Court

institutional academic freedom derives mainly from judicial failure to distinguish between individual faculty's or teacher's academic freedom, which the Supreme Court long since declared a "special concern of the First Amendment,"<sup>197</sup> and institutional autonomy in matters involving educational expertise. Such institutional autonomy is, by its nature, a social or public policy value which could well be deemed an important, or even, perhaps, under proper circumstances, a compelling state interest; but it has no entitlement to First Amendment protection. The Court had the opportunity to underscore these distinctions and so clear away the fog surrounding these concepts when it took up *Grutter v. Bollinger*.<sup>198</sup>

### III. *GRUTTER V. BOLLINGER*: INSTITUTIONAL ACADEMIC FREEDOM — A FIRST AMENDMENT RIGHT OR A PUBLIC POLICY VALUE?

In 1992, the University of Michigan Law School ("Law School") faculty adopted an admissions program intended to achieve an ethnically diverse student body through means that would be constitutionally permissible within standards intimated by the Court in *Bakke*.<sup>199</sup> The program was particularly intended to attract "students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in [the Law School's] student body in meaningful numbers."<sup>200</sup> The district court held that the Law School's consideration of race and ethnicity in connection with this program violated both the Fourteenth Amendment's Equal Protection Clause and Title VI of the Civil Rights Act of 1964.<sup>201</sup> The Sixth Circuit reversed, and upheld the Law School's admissions program as acceptable under Justice Powell's *Bakke* opinion.<sup>202</sup>

#### A. The Sixth Circuit's Analysis

The Sixth Circuit concluded that "the Law School has a compelling state interest in achieving a diverse student body."<sup>203</sup> In its analysis, the court cited Justice Powell's reference to language from Justice Frankfurter's concurrence in *Sweezy*: "Justice Powell recognized that a diverse student body promotes an

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has recognized individual faculty academic freedom as a First Amendment right. *See generally* Hiers, *supra* note 7, at 35–109.

197. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

198. 539 U.S. 306, 123 S. Ct. 2325 (2003) (opinion by O'Connor, J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.). This article does not take a position as to the Court's holding, but rather focuses on its language regarding institutional academic freedom, autonomy, and the First Amendment.

199. *Grutter v. Bollinger*, 288 F.3d 732, 735–38 (6th Cir. 2002) (opinion by Martin, J.), *aff'd*, 539 U.S. 306, 123 S. Ct. 2325 (2003).

200. *Id.* at 737.

201. *Id.* at 735. *See Grutter v. Bollinger*, 137 F. Supp. 2d 821, 872 (E.D. Mich. 2001).

202. *Grutter*, 288 F.3d at 735–52. Applying *Marks* analysis, the Court of Appeals concluded that it was bound by Justice Powell's opinion in *Bakke*. *Id.* at 739–42. As to *Marks* analysis, *see supra* note 18 and text accompanying and following notes 56–61.

203. *Grutter*, 288 F.3d at 742. The court also found that the Law School's admissions program was sufficiently narrowly tailored. *Id.* at 749–51.

atmosphere of ‘speculation, experiment and creation’ that is ‘essential to the quality of higher education.’”<sup>204</sup> The Sixth Circuit’s opinion consistently identifies the Law School’s—and the state’s interest—in student body diversity in terms of public policy considerations. It refers, for instance, to “the merits of student body diversity,”<sup>205</sup> or the goal of “achieving a diverse student body,”<sup>206</sup> or “an interest in academic diversity.”<sup>207</sup> The Sixth Circuit did not even refer to, much less discuss, any claim to academic freedom or other putative First Amendment values or interests that might have been asserted on behalf of the Law School or its faculty.<sup>208</sup>

### B. Party and Amicus Briefs Before the Supreme Court

Even though the Sixth Circuit made no holdings as to possible academic freedom or First Amendment issues, some of the numerous briefs filed with the Supreme Court following its grant of Grutter’s petition for writ of certiorari did so.<sup>209</sup> Perhaps significantly, Respondents Bollinger, other University of Michigan officers, and the University’s Board of Regents, did not claim that the Law School’s admissions policy could or should be protected under either academic freedom or the First Amendment.<sup>210</sup> Grutter, notwithstanding, contended that the Law School’s First Amendment rights to academic freedom and/or autonomy were the core issues before the Court.<sup>211</sup>

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204. *Id.* at 738 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J. concurring))). The expression “essential to the quality of higher education” evidently was the Sixth Circuit’s own paraphrase; it does not appear in either Justice Frankfurter’s *Sweezy* or Justice Powell’s *Bakke* concurrence.

205. *Id.* at 739.

206. *Id.* at 742.

207. *Id.* at 752.

208. At the district court level, the Law School had moved to stay the court’s injunction prohibiting it “from using race as a factor in its admissions decisions,” arguing, *inter alia*, that its enforcement would infringe “their First Amendment rights to academic freedom and the pursuit of educational goals.” *Grutter v. Bollinger*, 137 F. Supp. 2d 874, 875, 878 (E.D. Mich. 2001). Without further comment on this point, the district court stated: “In any event, the equal protection rights of all applicants to be considered for admission without regard to their race clearly outweighs the First Amendment rights claimed by the law school.” *Id.*

209. The petition was granted Dec. 2, 2002. *Grutter v. Bollinger*, 537 U.S. 1043 (2002). Over one hundred amici briefs were filed subsequently, many of them on behalf of multiple individuals and organizations, the majority in support of respondents Bollinger et al.

210. See Bollinger et al., Brief in Opposition, *Grutter v. Bollinger*, 539 U.S. 306, 123 S. Ct. 2325 (2003) (No. 02-241), and Brief for Respondents Bollinger et al., *Grutter* (No. 02-241).

211. See, e.g., Petition for Writ of Certiorari at 29, *Grutter* (No. 02-241) (“Covering the diversity rationale with arguments about ‘academic freedom’ does not offer it legitimacy under the Constitution . . . : This Court has never held that educational institutions have a First Amendment right to practice race discrimination in admissions.”). See also Petitioner’s Reply Brief on Petition for Writ of Certiorari at 2, *Grutter* (No. 02-241) (“[T]he question presented by this case . . . is whether the particular justification put forth by the Law School—achieving racial diversity through the purported exercise of ‘academic freedom’—is one that rises to the level of a compelling interest.”). See also Petitioner’s Opening Brief at 23–26, *Grutter* (No. 02-241) (arguing that no other Justices joined in Justice Powell’s endorsement of institutional academic

Some of the amici briefs in support of the Respondents Bollinger et al. also addressed these issues, contending that the Law School's admissions policy was within its First Amendment academic freedom or autonomy interest.<sup>212</sup> Several briefs included one or more of the customary misstatements as to *Sweezy*, *Keyishian*, and *Bakke*. For instance, one brief cited Justice Frankfurter's *Sweezy* concurrence for the proposition: "Policy making in higher education . . . enjoys a greater degree of judicial deference because of academic freedoms rooted in the First Amendment."<sup>213</sup> Neither Justice Frankfurter's concurrence nor the excerpt quoted therein from *The Open Universities* mentioned either academic freedom or the First Amendment. At least two briefs quoted Justice Powell's rendition of *Keyishian*<sup>214</sup> apparently unaware that the significant language "to the ideas and mores of students as diverse as this Nation of many peoples" derived not from *Keyishian*, but from Justice Powell's own thinking.<sup>215</sup> Several briefs made erroneous, or at best questionable, statements concerning Justice Powell's opinion in *Bakke*. For instance, in her Petition for Writ of Certiorari, Petitioner stated that in *Bakke* Justice Powell "found only one [of the Davis program's objectives] to be sufficiently compelling: an interest in 'academic freedom' derived from the First Amendment."<sup>216</sup> Actually, the only interest Justice Powell found "compelling" was "the interest of diversity . . . in the context of a university's admissions program."<sup>217</sup> An amicus brief declared: "Justice Powell's opinion is controlling with regard to its statements that rely on the First Amendment's protections for academic freedom because it garnered the support from four Justices of the Brennan plurality."<sup>218</sup> In actuality, none of the other Justices in *Bakke* either subscribed to Parts IV-D and V-A of Justice Powell's opinion, or themselves even mentioned academic freedom or the First Amendment.

The several briefs considered in this article illustrate the need for the kinds of semantic and conceptual distinctions noted above in Part II.E. Again, the terms

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freedom in *Bakke*).

212. See Brief of Michigan Governor Granholm, *supra* note 100. See also Brief of the American Educational Research Association, the Association of American Colleges and Universities, and the American Association for Higher Education as Amici Curiae in Support of Respondents at 11, *Grutter* (No. 02-241). Some amici who might have been expected to make the same argument, did not do so. See, e.g., Brief of Amici Curiae American Council on Education and 53 Other Higher Education Organizations in Support of Respondents, *Grutter* (No. 02-241), and Brief of the School of Law of the University of North Carolina as Amicus Curiae in support of Respondents, *Grutter* (No. 02-241), which made no mention of the Fourth Circuit's discussion of institutional academic freedom in *Urofsky*, *supra* text accompanying notes 124-36. Amici briefs filed by the United States in support of Petitioner did not discuss these issues either. See Brief[s] for the United States of America as Amicus Curiae in Support of Petitioner, *Grutter* (No. 02-241).

213. Brief of the American Educational Research Association et al., *supra* note 212, at 15.

214. See *supra* note 36.

215. Petitioner's Response Brief to Petition for Certiorari by Respondents Kimberly James et al., at 23, *Grutter* (No. 02-241); Brief for Respondents Bollinger et al., *supra* note 210, at 28 *Grutter* (No. 02-241).

216. Petition for Writ of Certiorari, *supra* note 211, at 18.

217. See *supra* text accompanying note 53.

218. Brief of Michigan Governor Granholm, *supra* note 100, at 3 n.2.



“academic freedom” and university “autonomy” are often used as synonyms or otherwise imprecisely.<sup>219</sup>

Some briefs carefully avoid such confusion, and refer consistently to the social policy value of institutional autonomy and related concerns. These briefs make no effort to invoke either academic freedom or the First Amendment in support of the Law School’s admissions program. Most notable in this regard are the briefs of Bollinger, et al. in Opposition to the Petition for Grant of Certiorari, and their Respondents’ Brief. In the former, after discussing several educational and societal benefits resulting from ethnic and racial diversity in the classroom, the brief concluded:

Against this backdrop, law schools surely must have the autonomy and discretion to decide that teaching about the role of race in our society, and preparing their students to function effectively in multiracial environments and as advocates for racial justice . . . after graduation, are critically important aspects of their institutional missions.<sup>220</sup>

Similarly, the Brief of Amici Curiae American Council on Education and 53 Other Higher Education Organizations in Support of Respondents argued consistently that courts—and other branches of government—should exercise “forbearance” with regard to matters of educational policy and respect the autonomy of colleges and universities.<sup>221</sup> In support of this argument, these amici cited not only the classic *Dartmouth College* case, but also several other nineteenth and early twentieth century Court decisions, none of which involved academic freedom or First Amendment claims.<sup>222</sup> The amici also cited *Sweezy*, *Horowitz*,<sup>223</sup> *Bakke*, and *Ewing* as instances where the Court exercised such forbearance.<sup>224</sup> As to *Ewing*, the amici observed: “The Court concluded that academic judgments ‘made daily by faculty members . . . require an “expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.”’<sup>225</sup> The amici did not suggest that any of these

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219. See *id.* at 3 (“It is this educational autonomy, conferred by . . . the First Amendment of the United States Constitution . . . that the Governor seeks to uphold by filing this amicus brief.”). See also *id.* at 12–13 (“In cases such as *Sweezy*, *Griswold*, *Keyishian*, *Bakke*, and *Ewing*, this Court has charged a clear and consistent course of according deference to the academic freedom and autonomy of universities.”). See also Brief for Respondents Kimberly James et al., at 31, *Grutter* (No. 02-241) (“Justice Powell was concerned to protect the autonomy of the universities . . .”). Justice Powell’s *Bakke* opinion did not mention university autonomy.

220. Bollinger et al., Brief in Opposition, *supra* note 210, at 20. Likewise in Bollinger et al., Respondent’s Brief, after reviewing various indications “that diversity has compelling educational benefits,” *id.* at 21–25, Respondents concluded: “Against this backdrop, law schools need the autonomy and discretion to decide that teaching about the role of race in our society and legal system, and preparing their students to function effectively as leaders after graduation, are critically important aspects of their institutional missions.” *Id.* at 25.

221. Brief of American Council on Education et al., *supra* note 212, at 2.

222. *Id.* at 2, 5–6.

223. Bd. of Curators v. Horowitz, 435 U.S. 78 (1978).

224. Brief of American Council on Education et al., *supra* note 212, at 6–8, 11–12.

225. *Id.* at 8 (quoting Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985) (quoting *Horowitz*, 435 U.S. at 89–90)).

cases stood for the proposition that public colleges and universities themselves were entitled to First Amendment protection. These amici made no mention at all of the First Amendment. Instead, they argued, in effect, that courts should defer to college and university educators' beliefs and statements that student diversity is important not only to the fulfillment of the mission or purpose of higher education, but also in order to achieve various other important social policy values.<sup>226</sup> Thus the amici concluded: "Government has a Compelling Interest in the Quality of Higher Education."<sup>227</sup>

Most of the other briefs in support of Respondents likewise urged the Supreme Court to consider the social policy values that were or would be served by diverse student bodies in public colleges and universities.<sup>228</sup> None of these briefs argued that such social policy values or benefits were in any way contingent upon colleges' or universities' purported entitlement to First Amendment interests of any sort.

Thus, among the possible issues confronting the Court were the questions of whether some or all of Justice Powell's *Bakke* opinion was controlling; and if so, what it meant; whether the Court should attribute to public colleges and universities themselves some kind of First Amendment interest in either academic freedom or autonomy; whether—apart from First Amendment considerations—deference to institutional autonomy was appropriate; and whether student diversity itself should be considered a compelling interest, and if so, whether it should be deemed to outweigh Grutter's Equal Protection interest.

### C. The Supreme Court's Holdings and Analysis

The Supreme Court affirmed the Sixth Circuit's judgment in late June 2003, clearly answering the last two questions just posed above in the affirmative: "In summary, the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling state interest in obtaining the educational benefits that flow from a diverse student body."<sup>229</sup> The issue before the Court was: "[W]hether the use of race as a factor in

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226. The amici stated:

Diversity is basic to higher education's main purposes: to enable students to lead 'the examined life'; to ready them to maintain the robust democracy in which we live; and to prepare them to function in the national and global economy. These aims entail breaking down barriers that isolate the student from the world he or she needs to know.

Brief of American Council on Education et al., *supra* note 212, at 3. As to other social policy values said to derive from student diversity, *see id.* at 13–29.

227. *Id.* at 29.

228. *See, e.g.*, Brief of the University of North Carolina Law School, *supra* note 212, at 10–12; Brief of Michigan Governor Granholm, *supra* note 100, at 5; Brief of the American Educational Research Association et al., *supra* note 212, at 2–3, 5–7, 12–13, 15–19. *See also* the other amici briefs cited by the Court in *Grutter v. Bollinger*, 539 U.S. 306, \_\_\_, 123 S. Ct 2325, 2340 (2003), advocating various social policy values or benefits deriving from student body diversity. *See also infra* note 236.

229. *Grutter*, 539 U.S. at \_\_\_, 123 S. Ct. at 2347. *See also id.* at 2339 ("Today, we hold that the Law School has a compelling interest in attaining a diverse student body.").

student admission by the University of Michigan Law School . . . is unlawful.”<sup>230</sup> The Law School had not claimed any First Amendment or academic freedom interest; the question of institutional academic freedom was not before the Court, and the Court did not decide that question.<sup>231</sup> Consequently, it might have been expected that the Court would not find it necessary to discuss these issues.

Nevertheless, the majority opinion by Justice O’Connor considered these matters in dicta. The Court’s holding, which upheld the Law School’s admission program and procedures, does not mention institutional academic freedom or institutional First Amendment rights.<sup>232</sup> The Court, however, observed that its decision was made with due respect to institutional autonomy:

Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.<sup>233</sup>

For reasons that need not be considered, the Court concluded that the Law School’s goal of achieving student body diversity constituted a compelling interest.<sup>234</sup> By virtue of its being a state university law school, this interest was found to be a compelling *state* interest.<sup>235</sup> Although the Court does not say so explicitly, it appears that the Court understood such interest to be an important social or public policy value.<sup>236</sup> The notion of institutional academic freedom or First Amendment interests does not enter into the Court’s discussion as to the Law School’s (or state’s) compelling interest in student diversity.

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230. *Id.* at 2331.

231. The question was raised in Petitioner’s briefs, and in certain amicus briefs, most notably, that of the Governor of Michigan, whose brief was devoted entirely to arguing on behalf of the Law School’s academic freedom. *See supra* notes 211–12 and accompanying text.

232. *See supra* note 229 and accompanying text.

233. *Grutter*, 539 U.S. at \_\_\_, 123 S. Ct. at 2339. The Court might also have mentioned statutory limits, for example, those imposed by Title VII and Title IX.

234. “Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School’s proper mission . . . .” *Id.* at 2339. This article does not inquire as to the cogency of the Court’s conclusion that student body diversity constituted a compelling state interest and that the Law School’s admissions program was narrowly tailored, or the Court’s determination that its interest in student diversity outweighed *Grutter*’s equal protection claim.

235. Somewhat curiously, although noting that “the Law School [asked the Court] to recognize, in the context of higher education, a compelling state interest in student body diversity,” *id.* at 2338, the Court regularly refers to *the Law School’s* compelling interest in student diversity. For purposes of constitutional analysis, of course, the Law School was (and is) “government,” namely, a state agency operating with delegated powers. *See supra* Part II.A.

236. *See id.* at 2340, where the Court describes numerous benefits to society purportedly deriving from student body diversity, some of which had been suggested by various amici curiae: such as not only better “learning outcomes,” but also “break[ing] down racial stereotypes,” better preparation “for an increasingly diverse workforce and society,” better preparation of students “as professionals,” developing “skills needed in today’s increasingly global marketplace,” and improving “the military’s ability to fulfill its principle mission to provide national security.”

The majority's analysis began with a review of the Court's earlier discussion in *Bakke* regarding public universities' or the government's use of race in admissions decisions.<sup>237</sup> In this connect, Justice O'Connor, writing for the majority, referred specifically to academic freedom, but without stating whether she was thinking of the academic freedom of individual faculty, or the purported academic freedom of public academic institutions of higher learning:

With the important proviso that "constitutional limitations protecting individual rights may not be disregarded," Justice Powell grounded his analysis in the academic freedom that "long has been viewed as a special concern of the First Amendment." [quoting *Bakke*, 438 U.S. at 312, 314] Justice Powell emphasized that nothing less than 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." [quoting *Bakke*, 438 U.S. at 313 (quoting *Keyishian*, 385 U.S. at 603)] In seeking the "right to select those students who will contribute the most to the 'robust exchange of ideas,'" a university seeks "to achieve a goal that is of paramount importance in the fulfillment of its mission." [quoting *Bakke*, 438 U.S. at 313]<sup>238</sup>

It is unclear whether the majority was aware that the language as to "the ideas and mores" of diverse students was *not* to be found in *Keyishian*, but rather had been added by Justice Powell, himself, in a part of his opinion that was joined by no other Justice.<sup>239</sup> Apparently the majority meant to say that Justice Powell had determined that a university's right to select students who would contribute to such "exposure" and "exchange" was somehow grounded in the First Amendment. The majority undoubtedly was aware that, as in the case of the Davis Medical School's admissions policy challenged in *Bakke*, the Michigan Law School's admission program had been created by its faculty.<sup>240</sup> If so, the majority may have been thinking that the Law School *faculty's* action in establishing the program was to be understood as an exercise of its academic freedom which was somehow protected under the First Amendment. In any event, the *Grutter* Court's discussion of academic freedom is dicta because its stated holding is based instead on its finding that the Law School (or the state) had a compelling interest in attaining a diverse student body.<sup>241</sup> The *Grutter* Court did not say that the state or the Law School had either an important or a compelling interest in the University's or the Law School's academic freedom or autonomy.

Immediately following its initial discussion of Justice Powell's *Bakke* opinion, the Court pointed to the problems experienced by lower courts in determining

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237. *Id.* at 2335–38.

238. *Id.* at 2336.

239. See *supra* note 36 and accompanying text. On the one hand, the Court's statement properly credits Justice Powell with *emphasizing* the quoted language as to "the ideas and mores" of diverse students; on the other hand, it appears to take at face value Justice Powell's rendition which makes this language appear to derive from *Keyishian*.

240. See *supra* text accompanying notes 39, 199.

241. See *supra* text accompanying notes 230–36.

whether that opinion, which had been joined by no other Justice, was binding authority under *Marks*.<sup>242</sup> The *Grutter* Court, of course, was not bound by *Bakke*, and so found it unnecessary “to decide whether Justice Powell’s opinion [was] binding under *Marks*.”<sup>243</sup> Instead, the Court invoked its own authority, stating: “[T]oday, we endorse Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions.”<sup>244</sup> The Court did not say that it endorsed Justice Powell’s comments regarding institutional academic freedom under the First Amendment. Including a review of such comments in its discussion was unfortunate, however, in view of lower courts’ occasional tendency to ignore the critical distinction between dicta and binding authority.

Having bypassed the problem of deciphering Justice Powell’s concurring language in *Bakke*, and having stated that the state or the Law School “has a compelling interest” in student body diversity,<sup>245</sup> majority once again, strangely, reverted to Justice Powell’s *Bakke* comments regarding a First Amendment basis for institutional authority. Only now, the Court referred to institutional *autonomy*, not institutional academic freedom:

In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: “The freedom of a university to make its own judgments as to education includes the selection of its student body.”<sup>246</sup>

Justice O’Connor and the four subscribing Justices seem to have been unaware that there were no Court decisions recognizing a First Amendment or other constitutional basis for educational autonomy.

Actually, Justice Powell’s concurrence had not even mentioned institutional “autonomy.” Instead, he had asserted that the “four essential freedoms” referred to by Justice Frankfurter in his *Sweezy* concurrence constituted “academic freedom,” and that such “academic freedom,” when invoked by a university claiming “the right to select students who will contribute . . . to the ‘robust exchange of ideas’” was grounded in the First Amendment.<sup>247</sup> Perhaps Justice O’Connor recognized

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242. *Grutter*, 539 U.S. at \_\_\_, 123 S. Ct. at 2337. As to *Marks* analysis, see *supra* text accompanying and following notes 18, 56–60.

243. *Grutter*, 539 U.S. at \_\_\_, 123 S. Ct. at 2337.

244. *Id.*

245. *Id.* at 2337, 2338.

246. *Id.* at 2339 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978)). See *infra* note 248 and accompanying text. Justice Kennedy’s dissent in *Grutter* reflects similar confusion on this point. He wrote: “Justice Powell’s approval of the use of race in university admissions reflected a tradition, grounded in the First Amendment, of acknowledging a university’s conception of its educational mission.” *Grutter*, 539 U.S. at \_\_\_, 123 S. Ct. at 2370 (Kennedy, J., dissenting). Justice Kennedy did not cite any cases that might constitute such a tradition. There was no such tradition or such case law.

247. *Bakke*, 438 U.S. at 312–13, 315–16. Justice Frankfurter’s *Sweezy* concurrence did not claim that “the four essential freedoms of a university” were grounded on the First Amendment. His concurrence did not even mention academic freedom or the First Amendment. Compare comment by Justice Thomas, dissenting in *Grutter*: “Justice Frankfurter went further, however,

that in this context institutional academic freedom is better characterized as institutional autonomy. She evidently considered it unnecessary to explain how either institutional academic freedom or institutional autonomy could be grounded in the First Amendment. Apparently she was under the mistaken impression that prior Court decisions had accorded First Amendment protection to institutional autonomy.<sup>248</sup>

Justice Thomas aptly criticized this lack of explanation in his dissent:

In my view, “it is the business” of this Court to explain itself when it cites provisions of the Constitution to invent new doctrines—including the idea that the First Amendment authorizes a public university to do what would otherwise violate the Equal Protection Clause. The majority fails in its summary effort to prove this point. The only source for the Court’s conclusion that public universities are entitled to deference even within the confines of strict scrutiny is Justice Powell’s opinion in *Bakke*. Justice Powell, for his part, relied only on Justice Frankfurter’s opinion in *Sweezy* and the Court’s decision in [*Keyishian v. Board of Regents*] to support his view that the First Amendment somehow protected a public university’s use of race in admissions. *Keyishian* provides no answer to the question whether the Fourteenth Amendment’s restrictions are relaxed when applied to public universities.<sup>249</sup>

The *Grutter* Court majority’s repetition, in dicta, of various erroneous or misleading statements by Justice Powell in his *Bakke* concurrence<sup>250</sup> was unnecessary and unfortunate. It was unnecessary because the Court decided *Grutter* by finding that the state’s interest in the Law School’s student body diversity was both compelling and narrowly tailored. It was unfortunate because a majority of the Court, albeit in dicta, seemingly gave credence to the notion that at some time or other it had held institutional academic freedom,<sup>251</sup> or at any rate,

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reasoning that the First Amendment created a right of academic freedom that prohibited the investigation.” *Grutter*, 539 U.S. at \_\_\_, 123 S. Ct. at 2357 (Thomas, J., dissenting, joined by Scalia, J.).

248. *Grutter*, 539 U.S. at \_\_\_, 123 S. Ct. at 2338–39. In support of this idea, the Court cited as authority Justice Frankfurter’s concurrence in *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); and *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). None of these cases involved academic freedom or First Amendment claims by educational institutions; none of these decisions held that public colleges or universities are entitled to academic freedom or other First Amendment rights; and none of these cases concerned student admissions policies. *See supra* notes 13–18, 28, 32, 34, 38, and accompanying texts.

249. *Grutter*, 539 U.S. at \_\_\_, 123 S. Ct. at 2357 (Thomas, J., dissenting, joined by Scalia, J.) (internal citations omitted). Justices Thomas and Scalia evidently noticed, as the majority did not, that when writing in *Bakke* about academic freedom and the First Amendment, Justice Powell was expressing only his own views, not those of the Court. In effect, the dissent was saying, two concurring opinions do not make constitutional law.

250. *See supra* notes 28, 31, 32, 38, 48, and text accompanying notes 29–51.

251. *See supra* text accompanying note 238.

institutional autonomy,<sup>252</sup> to be a right somehow sheltered under the First Amendment. Lower courts that neglect to observe the critical distinction between dicta and binding authority may now be misled into supposing that the Court endorsed this notion. The *Grutter* Court missed a splendid opportunity to correct the impression that, at some time in the murky past, the Court had somehow established institutional academic freedom as a constitutionally protected right. By referring, even if only in dicta, to institutional autonomy as a First Amendment right,<sup>253</sup> the Court only compounded the confusion.

#### IV. CONCLUSION

The strange career of *The Open Universities in South Africa* quotation, cited in Supreme Court concurring opinions and dicta, and eventually in lower federal court dicta and decisions as standing for the doctrine that the First Amendment protects institutional academic freedom or autonomy, reveals a remarkable lack of judicial attention. The doctrine rests entirely upon failure to attend carefully to language, in particular, failure to distinguish between persuasive authority—notably, concurrences and dicta—and binding precedent; and between public policy values or state interests on one hand, and constitutionally protected rights or interests on the other. The idea that public colleges and universities themselves are endowed with academic freedom under the First Amendment lacks any authoritative basis in Supreme Court jurisprudence, and is conceptually flawed.

As to conceptual flaws in U.S. constitutional jurisprudence, in summary, the First Amendment protects persons from governmental intrusion upon rights there enumerated; it does not protect the government from persons claiming constitutional violations. The First Amendment protects speech or viewpoint expression, but not institutional decisions or actions. And while the First Amendment protects private persons, public colleges and universities are not persons.<sup>254</sup> Moreover, Supreme Court case law on government speech has never accorded public colleges or universities themselves First Amendment rights or interests.<sup>255</sup>

Relevant Supreme Court case law began with Justice Frankfurter's *Sweezy* concurrence, in which Frankfurter mentioned neither academic freedom nor the First Amendment but quoted from a book by South African scholars who urged the importance of university freedoms or autonomy in an attempt to ward off the South African government's planned imposition of apartheid. The South African scholars' public policy concern—highly important in its own setting—had no relation whatsoever to U.S. First Amendment jurisprudence. In any event, as a concurrence, Justice Frankfurter's observations could have only persuasive authority.<sup>256</sup>

Justice Powell's concurrence in *Bakke* which designated such university

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252. See *supra* text accompanying note 246.

253. *Id.*

254. See *supra* text accompanying notes 137–50.

255. See *supra* text accompanying notes 151–85.

256. See *supra* note 18 and accompanying text.

freedoms as “academic freedom” and declared them grounded in the First Amendment, included a number of misstatements as to prior authority, together with certain additions and policy statements of his own that were not clearly identified as such.<sup>257</sup> When concurring—as when dissenting—Justices and judges are not obliged to work out careful legal theories in support of their positions, and are relatively free to give expression to public policy values they deem important.<sup>258</sup> At any rate, Justice Powell did not venture to address the constitutional issues confronting the notion of institutional academic freedom.<sup>259</sup> An important matter often unnoticed by courts and commentators, moreover, is that Justice Powell’s comments on institutional academic freedom and the First Amendment do not constitute binding authority.<sup>260</sup>

Most, if not all, of the dicta supporting the concept of institutional academic freedom rests either directly or indirectly on Justice Frankfurter’s concurring opinion in *Sweezy* and Justice Powell’s concurring opinion in *Bakke*.<sup>261</sup> Eventually, first in its own dicta and then in certain holdings, the Seventh Circuit, accepting one or both of these concurrences as authority, extrapolated the further idea that academic institutions’ First Amendment academic freedom could stand as a barrier against individual faculty’s or teacher’s assertions of constitutionally grounded academic freedom rights.<sup>262</sup> Neither Justice Frankfurter’s nor Justice Powell’s concurrences had intimated anything of the sort. Completing the picture, the Fourth Circuit recently declared, en banc, that public colleges and universities may enjoy First Amendment academic freedom, but that faculty do not.<sup>263</sup>

When Justices and judges generate dicta, they seldom feel constrained to articulate the legal analysis that justifies their pronouncements. Frequently, questions addressed or commented upon in dicta are not matters that have been argued at trial level or in briefs or at oral argument on appeal, but rather represent

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257. See *supra* text accompanying notes 29–53.

258. The late Fifth Circuit judge, John Minor Wisdom, shared this observation with the present writer during conversation at his New Orleans chambers in November 1989. Judge Wisdom insisted that the Fifth Circuit was a very collegial court, but added that if one wished to trace its members’ social policy or ideological differences, the best place to look for indications would be en banc dissents and concurrences. Justices and judges often do not bother to take issue with their colleagues’ questionable statements when such statements appear in dissents and concurrences. Thus somewhat idiosyncratic views as to both law and social policy may remain uncorrected, yet find their way into the federal reporters. Later readers, including even jurists, coming across such statements may readily mistake them for more than merely persuasive authority—particularly if readers are impressed by the writers’ prestige, or if the statements seem pertinent to cases or issues before them.

259. See *supra* Part II.

260. See *supra* text accompanying and following notes 54–61. Commentators also sometimes mistake Justice Stevens’ concurrence in *Widmar*, *supra* text accompanying notes 64–67, for the opinion of the Court.

261. See *supra* text accompanying notes 65–74, 77 (concurring opinion), 86–105, 107 (dicta), and 124–36. Such dicta and even holdings sometimes also rely on misread Supreme Court or lower court authority. See *supra* notes 79, 110, and text accompanying notes 107–12, 133.

262. See *supra* text accompanying notes 75–112.

263. See *supra* text accompanying notes 116–36.



various Justices' or judges' own beliefs as to desirable social or public policy outcomes or values.<sup>264</sup> Consequently, while legal analysis tends to be neglected, particular policy preferences remain unchallenged yet incorporated into the respective federal reporters as opinions of the courts. The total absence of constitutional analysis in judicial opinions espousing the idea that the First Amendment protects institutional academic freedom—or institutional autonomy<sup>265</sup>—may be accounted for in large part in this way. The absence may also be accounted for on the basis that such theory would have little or no support in either the Constitution or in relevant Supreme Court jurisprudence.<sup>266</sup>

Dicta, particularly when emanating from distinguished Justices and judges, can all too easily mislead busy lower court judges and their clerks. Judicial opinions often do not distinguish clearly between holdings and dicta, and as every law student and attorney knows, it is sometimes difficult to tell the one from the other. Judges and clerks alike may suppose or presuppose that everything they read in judicial opinions has been carefully researched, reasoned, and decided, and, therefore, may be relied upon as representing the law of the jurisdiction—if not of the land. Thus, as has been shown, dicta, along with language in concurring opinions, can become the basis for later decisional law—without supporting legal or constitutional analysis ever having been attempted.

Much of the dicta and some of the lower court holdings that refer to institutional academic freedom can be read as commending institutional autonomy in matters requiring academic professional expertise as an important policy value in our society. Such institutional autonomy may indeed be of great benefit, not only to the institutions in carrying out their educational missions, but also to the larger society.<sup>267</sup> As was hoped for in the case of the situation that prompted South African scholars to write *The Open Universities*,<sup>268</sup> deference to autonomy may serve to afford colleges and universities protection from political pressure or popular prejudice. Yet institutional autonomy remains a public policy value; it is not a constitutional right somehow inherent in public colleges and universities.<sup>269</sup>

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264. See, e.g., *supra* text accompanying notes 27–51, 65–77, 92–105, 124–36.

265. See *supra* Parts I.C–D., III.

266. See *supra* Part II.

267. See, for example, the excellent discussion of the importance of institutional autonomy by Goring, *supra* note 145, at 607–13. Professor Goring suggests that because educational decision-making is of great importance, in particular, in order to implement affirmative action programs, such decision-making *should* be protected by the First Amendment from “unwarranted constitutional scrutiny.” *Id.* at 613.

268. See *supra* text accompanying and following notes 7–11.

269. The matter was clearly stated by the First Circuit nearly two decades ago:

Whether a school sets itself up to attract and serve only the best and the brightest students or whether it instead gears its standards to a broader, more average population, *is a policy decision* which, we think, universities must be allowed to set. And matters such as course content, homework load, and grading policy are core university concerns, integral to implementation of this *policy decision*. See *Regents of University of California v. Bakke*, 438 U.S. 265, 312 . . . (1978) (the “four essential freedoms” of a university are “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”) (quoting

The Court's *Grutter* decision could have made this point clear. In fact, the Court held that the Law School (and the state) had a compelling interest in student body diversity. The Court did not hold that the Law School or the state had a compelling, or even important, interest in either institutional academic freedom or institutional autonomy. Nevertheless, the *Grutter* Court's references in dicta to institutional autonomy and institutional academic freedom as First Amendment interests could confuse lower courts that fail to distinguish between holding and dicta.

Some important issues remain unresolved. For instance, as has been suggested, on the occasions when certain Justices referred to universities' invoking First Amendment academic freedom protections, they may have meant that these universities did so on behalf of their faculty members who had taken the challenged actions.<sup>270</sup> On the other hand, as has also been suggested, it is doubtful whether the First Amendment could be construed to protect actions by faculty when those faculty are acting as agents of public institutions, and thus also as agents of the state.<sup>271</sup> In such circumstances, courts might nevertheless choose to defer to the expertise of the educators responsible for challenged decisions out of respect for institutional autonomy or even the faculty members' academic freedom.<sup>272</sup> In this situation, institutional autonomy or academic freedom might be deemed important social policy values, and thus important state interests; but it remains to be seen whether or how these values or interests could be grounded in the First Amendment.

Again, as in the *Southworth* case,<sup>273</sup> courts may properly conclude that a public college or university may constitutionally provide the conditions for "dynamic" debate and the airing of wide-ranging viewpoints on all kinds of topics, thereby promoting First Amendment values clearly appropriate within the Court's holdings in *Sweezy* and *Keyishian*. In such cases, institutions themselves might even be said to have an obligation to uphold and encourage academic freedom as an essential part of their educational mission. Institutions providing for and promoting the exercise of academic freedom would thus serve the purposes of the First Amendment; but doing so would not qualify the institutions to claim any First Amendment rights or interests for themselves. Nevertheless, courts may and

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*Sweeney* [sic] v. New Hampshire, 354 U.S. 234, 263 . . . (1957)).  
*Lovelace v. Southeastern Mass. Univ.*, 793 F.2d. 419, 425–26 (1st Cir. 1986) (emphasis added) (internal citations omitted). Citing Supreme Court case law, the *Lovelace* court misspelled *Sweezy*, neglected to note that the "four essential freedoms" language came from Justice Frankfurter's concurrence, not from the Court, and did not mention that in this part of his *Bakke* opinion Justice Powell was speaking (or writing) only for himself. Nevertheless, the court here accurately characterized university "freedoms" as policy choices, not as an exercise of "academic freedom" or some kind of First Amendment right.

270. See *supra* text accompanying notes 39–40, 100–04, and 240 as to Justice Powell's concurring opinion in *Bakke*, Justice Stevens' opinion in *Ewing*, and the majority's language in *Grutter*.

271. See *supra* text accompanying notes 140, 143–47.

272. As mentioned *supra* note 6, this article does not undertake to define the scope of academic freedom as a matter of educational or social policy.

273. See *supra* text accompanying notes 151–58.

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perhaps should defer to institutional policies and programs that serve such purposes as a matter of good social policy. This appears to be what the *Grutter* Court in fact did, even though its quotation of “academic freedom” and “First Amendment” language from Justice Powell’s *Bakke* opinion to some extent obscures its analysis.

Perhaps the Supreme Court itself will achieve greater clarity on these questions in the near future. One or more of the cases in the line of recent Seventh or Fourth Circuit academic freedom jurisprudence will conceivably come to its attention. In the meantime, lower federal courts would do well to bear in mind that even though, in given circumstances, institutional *autonomy* might be so important a public policy value that it could be considered at least an important state interest, the Court has not yet determined that public colleges and universities are entitled to either academic freedom or autonomy under the First Amendment.

