
LESSONS FOR ACADEMIC FREEDOM LAW: THE CALIFORNIA APPROACH TO UNIVERSITY AUTONOMY AND ACCOUNTABILITY

KAREN PETROSKI*

INTRODUCTION

In June 2003, the United States Supreme Court issued its opinion in *Grutter v. Bollinger*,¹ finally settling a question that had remained open for decades: are college and university admissions committees allowed to consider applicants' race without violating the Equal Protection Clause? The Supreme Court, in an opinion written by Justice O'Connor, held that under certain conditions, consideration of applicants' racial identities was constitutionally permissible. Justice O'Connor's analysis supporting this conclusion draws not only on equal protection doctrine but also in part on the concept of academic freedom, loosely presented as an institutional prerogative linked to the guarantees of the First Amendment.² As

* Associate, Cooper, White & Cooper, LLP, San Francisco, California; A.B. Duke University, 1990; Ph.D. Columbia University, 1999; J.D. University of California, Berkeley (Boalt Hall), 2004; Law Clerk, Hon. William W Schwarzer, Northern District of California, 2004-05.

1. 539 U.S. 306 (2003).

2. *Id.* at 324-33, 339-40. Justice O'Connor uses the concept of academic freedom to support deference to the conclusions of college or university decisionmakers in the context of equal protection strict scrutiny analysis. Specifically, in the *Grutter* opinion, respect for academic freedom justifies (1) deference to the admission committee's identification of diversity as a compelling educational goal and therefore a compelling state interest, *id.* at 327-33; and (2) some deference to the committee's expertise and choice of specific admissions practices as a means of securing that interest, *id.* at 339-41. Justice O'Connor's opinion involves some slippage between the notion of academic freedom as a positive autonomy right and the notion of academic freedom as a principle of deference. For commentary addressing these issues and arguing that the concept of academic freedom was essential to the *Grutter* holding, see, e.g., Luis Fuentes-Rohwer & Guy-Uriel E. Charles, *In Defense of Deference*, 21 CONST. COMMENT 133, 135-36, 155-68 (2004) (noting centrality of deference to the Court's holding and describing in detail the Court's application of the concept of academic freedom); Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. REV. 461, 464-65, 495-97 (2005); Marisa Lopez, Case Comment, *Constitutional Law: Lowering the Standard of Strict Scrutiny*, 56 FLA. L. REV. 841, 846 (2004) (describing the Court's deference as diluting strict scrutiny analysis); Leland Ware, *Strict Scrutiny, Affirmative Action, and Academic Freedom: The University of Michigan Cases*, 78 TUL. L. REV. 2097, 2108-12 (2004) (describing the Court's use of the concept of academic freedom as resulting in a lowered level of scrutiny). *But see* Mark Tushnet, *United States Supreme Court Rules on Affirmative Action*, 2 INT'L J. CONST. L. 158, 163 (2004) (arguing that the Court's deference to the institution was not a dispositive aspect of its analysis or decision).

Justice Thomas points out in his *Grutter* dissent, however, the concept Justice O'Connor invokes is only roughly articulated in previous statements by the Court and individual Justices.³ Neither Justice O'Connor's reliance on this notion in *Grutter* nor Justice Thomas's critique of it is particularly novel; the concept has been present in Supreme Court opinions for decades, and its constitutional foundations and scope have been unclear for just as long.⁴ But the centrality of this disagreement to the high-profile *Grutter* opinions indicates that the need to clarify the role of the concept in constitutional analysis remains pressing.

This article seeks to clarify that role in a new way. It compares the professional and federal constitutional concepts of academic freedom with a related but distinct area of state law: California constitutional provisions, statutes, and judicial decisions pertaining to the University of California, its autonomy, and accountability in public institutions of higher education. This focus on California law is not arbitrary. The legal framework of California's public system of higher education is, if not unique in all respects, at least distinctive. The University of California is one of a number of public universities deriving their legal authorization and definition from the constitutions of the states they serve, rather than from legislative enactments.⁵ Because of this constitutional foundation, the Regents of the University of California enjoy significant freedom from legislative control.⁶ Moreover, the constitutional recognition of the Regents' powers arguably

3. *Id.* at 362–67. Justice Thomas's critique of the majority's reliance on academic freedom makes up a significant part of his dissent. See generally Mary Kate Kearney, *Justice Thomas in Grutter v. Bollinger: Can Passion Play a Role in a Jurist's Reasoning?*, 78 ST. JOHN'S L. REV. 15 (2004); Ralph D. Mawdsley & Charles J. Russo, *Supreme Court Dissenting Opinions in Grutter: Has the Majority Created a Nation Divided Against Itself?*, 180 ED. LAW REP. 417 (2003). See also Barbara J. Flagg, *Diversity Discourses*, 78 TUL. L. REV. 827, 840–42 (2004) (describing as “unstable” the connection between the Court's deference to the academy and its equal protection analysis).

4. See, e.g., Richard H. Hiers, *Institutional Academic Freedom—A Constitutional Misconception: Did Grutter v. Bollinger Perpetuate the Confusion?*, 30 J.C. & U.L. 531, 544–68 (2004); Neal Kumar Katyal, *The Promise and Precondition of Educational Autonomy*, 31 HASTINGS CONST. L.Q. 557, 563 (2003) (noting confusion in academic freedom precedent).

5. As Professor J. Peter Byrne notes, it can be “difficult to identify all the state universities that have constitutional status, because courts have been willing to interpret often ambiguous constitutional language as imposing limitations on the legislature.” J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251, 327 n.303 (1990). Byrne lists only nine institutions with confirmed constitutional status, but twenty institutions other than the University of California might be able to claim some sort of constitutional status. See ALA. CONST. art. XIV, § 264; ALASKA CONST. art. VII, § 2; ARIZ. CONST. art. XI, § 5; COL. CONST. art. VIII, § 5; CONN. CONST. art. VIII, § 2; GA. CONST. art. VIII, § 4; HAW. CONST. art. X, § 5; ID. CONST. art. VIII, § 3; LA. CONST. art. VIII, § 5; MICH. CONST. art. VIII, § 5; MINN. CONST. art. XIII, § 3; MO. CONST. art. IX, § 9(a); MONT. CONST. art. X, § 9; NEB. CONST. art. VII, § 10; N.M. CONST. art. XII, § 11; N.Y. CONST. art. XI, § 2; N.D. CONST. art. VIII, § 6; OKLA. CONST. art. XIII-A, § 2; TEX. CONST. art. VII, § 10; and WYO. CONST. art. VII, § 5.

6. See generally Caitlin M. Scully, *Autonomy and Accountability: The University of California and the State Constitution*, 38 HASTINGS L.J. 927 (1987); Harold W. Horowitz, *The Autonomy of the University of California Under the State Constitution*, 25 UCLA L. REV. 23 (1977).

gives those powers legal weight comparable to that of the civil liberties guaranteed by the state constitution. California legal sources addressing challenges to Regental action against this backdrop outline a contrasting approach to many of the same concerns that drove the development of the professional and legal notions of academic freedom, without sharing the much-lamented terminological confusions of the federal case law addressing academic freedom.⁷ Despite parallels between the federal and state law and doctrinal difficulties in both areas, however, there has been little cross-pollination between the two areas of law. California courts have only rarely drawn on the concept of academic freedom in addressing challenges to the autonomy of the state's research university system.⁸ The reluctance of federal courts to acknowledge state law-based autonomy doctrine is more understandable but may be equally unfortunate.⁹

In describing the lessons each area of law may hold for the other, this article focuses in particular on tensions within and among principles of professional expertise, institutional pluralism, and participatory governance and the relation of

7. See, e.g., J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 J.C. & U.L. 79, 79 (2004); Byrne, *supra* note 5, at 255; Hiers, *supra* note 4, at 565; Richard H. Hiers, *Institutional Academic Freedom vs. Individual Academic Freedom in Public Colleges and Universities: A Dubious Dichotomy*, 29 J.C. & U.L. 35, 106 (2002); Matthew T. Finkin, *On "Institutional" Academic Freedom*, 61 TEX. L. REV. 817, 818 (1983).

8. *Scharf v. Regents of the University of California* is an exception. 286 Cal. Rptr. 227 (Cal. Ct. App. 1991). See *infra* Part III.C. California courts have been more willing to call on the doctrine of academic freedom in cases involving institutions other than the University of California. See *Lindos v. Governing Bd. of the Torrance Unified Sch. Dist.*, 510 P.2d 361, 372 (Cal. 1972) (refusing to confine operation of academic freedom rights to "conventional teachers" in case involving fired probationary teacher); *Monroe v. Trs. of the Cal. State Colls.*, 491 P.2d 1105, 1113 (Cal. 1971) (citing Supreme Court academic freedom cases in case involving loyalty oath); *California Faculty Ass'n v. Superior Court*, 75 Cal. Rptr. 2d 1, 8–9 (Cal. Ct. App. 1998) (recognizing institutional academic freedom right of San Jose State University to decide "who may teach"); *Dibona v. Matthews*, 269 Cal. Rptr. 882 (Cal. Ct. App. 1990) (holding school administrators' cancellation of community college class involving performance of controversial play to be violation of First Amendment); *Wexner v. Anderson Union High Sch. Dist. Bd. of Trs.*, 258 Cal. Rptr. 26 (Cal. Ct. App. 1989) (depublished) (limiting First Amendment academic freedom right in high school context); *Kahn v. Superior Court*, 233 Cal. Rptr. 662 (Cal. Ct. App. 1987) (discussing academic freedom doctrine in connection with former Stanford faculty member's request for tenure review records); *Dong v. Bd. of Trs.*, 236 Cal. Rptr. 912, 923–24 (Cal. Ct. App. 1987) (citing Supreme Court academic freedom precedent in case involving disciplinary dismissal of faculty member from Stanford University); *Schmid v. Lovette*, 201 Cal. Rptr. 424, 430–31 (Cal. Ct. App. 1984) (noting cases holding that loyalty oaths are a threat to academic freedom in case involving public school teacher); *Bd. of Trs. v. County of Santa Clara*, 150 Cal. Rptr. 109, 112 (Cal. Ct. App. 1978) (holding that purpose of educational tax exemption is academic freedom, described as keeping schools "free from direct governmental control to enable them to fulfill their role as independent critics of government action"); *Oakland Unified Sch. Dist. v. Olicker*, 102 Cal. Rptr. 421, 430 (Cal. Ct. App. 1978) (holding that "there is no violation of academic freedom involved in an inquiry into whether or not the teacher's conduct is such as to constitute evident unfitness to teach").

9. Although federal courts sometimes use the term "autonomy" to refer to institutional academic freedom, they seldom have occasion to address the state law doctrine. See, e.g., *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982) (noting, in suit against San Francisco State University, lower degree of autonomy that California law confers on nonconstitutional California state universities).

all three sets of values to the professional norm of academic freedom, the quasi-constitutional concept of academic freedom, and the state law doctrine of university autonomy. In particular, the article considers how courts have approached these tensions in two areas: faculty politics and participation in institutional governance, and the application of principles of public accountability to the University of California. As the discussion below explains, these are among the central issues plaguing both areas of law. Their analysis can help to clarify both the implications of existing federal judicial statements on academic freedom and the problems with California university autonomy doctrine.

Part I addresses the history of the concepts that divided Justices O'Connor and Thomas in *Grutter*. It first describes nineteenth-century shifts in American educators' and lawmakers' attitudes toward higher education and the eventual solidification of a complex professional norm of academic freedom. Part I then reviews twentieth-century statements on the subject by Supreme Court Justices and proposes a way of reconciling the apparent conflicts they present. It concludes that academic freedom is, and should be, understood as an institutional as well as an individual concern, but that the beneficiary of any institutional prerogative should be understood to be the faculty acting collectively, not non-faculty administrators. To complete the survey of the concept, Part I closes with a brief review of some of the major positions taken in academic commentary on the subject of institutional academic freedom.

Parts II and III turn to an examination of how California law has approached similar concerns in a different way. Part II opens with a description of the legal status and governance structure of the University of California, first addressing the history of its constitutional status. The California Constitution implicitly equates the university as an institution with its Board of Regents, in contrast to the approach to academic freedom suggested in Part I. Despite this constitutional recognition, the Regents' autonomy is not and should not be unconstrained. It has been limited in various ways by statutory enactments and by informal traditions and practices, which Part II also describes. California courts, too, have recognized some constraints on the Regents, but in general the courts have given the Regents plenary authority over faculty decision-makers in conflicts between Regents and faculty. A discussion and critique of the courts' understanding of university autonomy in conflicts over professorial political affiliation closes Part II.

Part III addresses other constraints on nonacademic administrators of public colleges and universities, specifically open-government laws and constitutional provisions. This part opens with a description of the relationship between the purposes of open-government laws and the ideas of academic freedom and university autonomy. It then discusses California case law addressing the application of state open-meetings and open-records laws to the University of California. This area of case law exhibits a pattern of interpretive avoidance that has contributed to an impoverished judicial doctrine with regard to university autonomy. Part III ends with a discussion of the implications for university autonomy doctrine of a recent sunshine amendment to the California Constitution. The amendment could force California courts to address the relationships among autonomy, academic freedom, and accountability more directly than has previously

been necessary, clarifying university autonomy law in the process.

The article concludes, in Part IV, with a review of the issues uniting and dividing these areas of law, a summary of the conflicting and overlapping imperatives that have made them so problematic, and a recapitulation of the lessons each area has to offer the other. Viewed from the perspective offered here, Supreme Court Justices' major statements on constitutional academic freedom need not be considered inconsistent. Placing those statements within a systematic framework that takes into account the full variety of legal purposes and roles that American culture and law have assigned to institutions of higher education offers a new way of thinking about academic freedom law.

I. HISTORY AND CURRENT STATE OF THE CONCEPT OF ACADEMIC FREEDOM

A. Overview of the issues

The perplexities surrounding the federal constitutional concept of academic freedom derive from two sources: confusion over the precedential authority of statements on the subject by various Supreme Court Justices and confusion over the doctrinal substance of, and relationships among, those statements. Few of the leading Supreme Court opinions on the issue have been majority opinions.¹⁰ And to the extent that the opinions addressing the issue identify academic freedom as some kind of constitutionally protected right, they usually do so in language that can plausibly be construed as dicta.¹¹ Finally, while these statements “ground” academic freedom in the First Amendment,¹² they never fully clarify the nature of its relationship to other First Amendment rights.¹³

Substantive confusions regarding the meaning of academic freedom may be partly to blame for the latter problem. These ambiguities cluster mostly in three overlapping areas. First, existing Supreme Court case law presents support for conflicting conclusions about the holder of any such right; some opinions indicate that it is held by individual professors,¹⁴ others that it is also a right held by

10. See Hiers, *supra* note 4, at 531–32; Hiers, *supra* note 7, at 36, 44.

11. See generally Michael Abramowicz & Marshall Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 962–97, 1092–93 (2005) (discussing the difficulties of distinguishing holdings from dicta in the *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) and *Grutter* contexts); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997 (1994).

12. *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

13. See Hiers, *supra* note 4, at 556–68; David M. Rabban, *Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 230 (1990). See also *infra* Part IV.

14. Richard Hiers argues that the Supreme Court case law supports only this conclusion, and that lower courts' identification of an institutional academic freedom right is doctrinally incoherent and unsupported by legal authority. See Hiers, *supra* note 4 (relying mainly on *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) and *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589 (1967)); Hiers, *supra* note 7 (relying on *Sweezy* and *Keyishian*). Others disagree. See, e.g., Todd A. DeMitchell, *Academic Freedom—Whose Rights: The Professor's or the University's?*, 168 ED. LAW REP. 1, 17 (2002) (“What clarity that has been provided by the High Court, points to academic freedom as [a] right of the institution and not a right of the

students,¹⁵ and still others that it is a prerogative of the institution itself.¹⁶ Opinions that may be read as having implicitly identified academic freedom as an institutional right nevertheless largely leave it unclear whether the institution holding the right is to be identified with faculty decision-making bodies¹⁷ or with the administration.¹⁸ Second, whether the right is held by individuals or institutions or both, it is unclear how uniformly it applies across the spectrum of private and public institutions of higher learning. This ambiguity is connected to, and must be discussed together with, a third: against what actions does the right protect its holders? In a private college or university, either individual professors or the institution itself might be able to claim that the right has been invaded by extra-institutional statutory or other governmental action.¹⁹ Indeed, to the extent that private institutions may claim such a right, the right they may claim is arguably stronger than the one at issue in the public-institution context. Public colleges and universities are invariably subject at least to the fiscal control of their state legislatures²⁰ and often to many other legislative controls as well.²¹ Moreover, as public employers and state actors, public institutions are themselves

individual.”); Rabban, *supra* note 13, at 280 (“The accurate perception that the Supreme Court has identified institutional academic freedom as a first amendment [sic] right does not support the additional conclusion that the Court has rejected a constitutional right of individual professors . . .”). See also *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 1998) (en banc), *cert. denied*, 531 U.S. 1070 (2001) (“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 . . .”).

15. See, e.g., *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (“Academic freedom thrives . . . on the independent and uninhibited exchange of ideas among teachers and students.”). Recent calls in various states, including California, for the enactment of “student bills of rights” use the term “academic freedom” in this sense. See Cheryl A. Cameron, Laura E. Meyers & Steven G. Olswang, *Academic Bills of Rights: Conflict in the Classroom*, 31 J.C. & U.L. 243 (2005); Students for Academic Freedom Mission and Strategy Statement, <http://www.studentsforacademicfreedom.org/essays/pamphlet.html> (last visited Oct. 29, 2005). Generally, the question of student academic freedom rights lies beyond the scope of the present discussion.

16. See, e.g., *Ewing*, 474 U.S. at 226 n.12; *Grutter*, 539 U.S. at 324–33.

17. While *Minnesota State Board of Community Colleges v. Knight*, 465 U.S. 271, 287–88 (1984), appears to deny any collective faculty right of academic freedom, the admissions policy decisions identified with academic freedom in both *Regents of University of California v. Bakke*, 438 U.S. 265, 272 (1978), and *Grutter*, 539 U.S. at 314, were made by faculty committees. See discussion *infra* notes 82, 101–103, 139–152 and accompanying text.

18. To the extent that *Knight* rejects a collective faculty right of governance, harmonizing it with opinions such as *Grutter* that clearly recognize an institutional right of academic freedom would seem to require that the right be identified with the non-faculty lay administration of the institution. For a critique of this type of resolution, see Finkin, *supra* note 7; discussion *infra* Parts I.D–E.

19. See *Univ. of Pa. v. EEOC*, 493 U.S. 182 (1990); *cf.* *State v. Schmid*, 423 A.2d 615 (N.J. 1980) (involving a claim by Princeton University to a right of university autonomy); Rabban, *supra* note 13, at 258–62 (discussing *Schmid*); Finkin, *supra* note 7, at 817–21, 854–57 (discussing *Schmid*).

20. See Rabban, *supra* note 13, at 271; *infra* notes 177–178 and accompanying text.

21. See, e.g., discussion *infra* Part III.A.

constrained by constitutional guarantees.²² On the other hand, in the public university context, individual professors or students may be able to claim the right against the institution's administration as a state actor²³ as well as against other arms of the state government.²⁴ To complicate the picture further, it is difficult to see how a public institution, in contrast to a private one, might claim that its constitutional rights have been violated by another state actor.²⁵ But if the institutional right were to be understood as a collective right of faculty, it is at least arguable, as is discussed in more detail below, that such a group should be able to claim that the right entitles their decision-making to a presumption of validity. The question whether academic freedom means all or merely some of these things has never been squarely addressed by the Supreme Court.²⁶

A closer look at these complexities is necessary in order to understand where the California approach may provide enlightenment and caution. To that end, this section next discusses the history and roots of the concept of academic freedom before presenting some initial conclusions about the shape of federal constitutional academic freedom law.

B. Nineteenth-century backdrop and the professional norm of academic freedom

The late nineteenth century was a pivotal period in American higher education. Three developments during this period are relevant to issues of academic freedom and university autonomy. Discussions of academic freedom commonly begin with the first of these developments: the importation into American higher education of the German institutional model of research-oriented higher education and the related institutional norm of *akademische Freiheit*.²⁷ As Matthew W. Finkin

22. See Rabban, *supra* note 13, at 267 (noting that some Supreme Court decisions “suggest first amendment [sic] constraints on the institutional academic freedom of public universities that may not apply to their private counterparts”); *Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) (“[O]ur cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities.”).

23. See, e.g., *Cooper v. Ross*, 472 F. Supp. 802 (N.D. Ark. 1982) (involving claim of infringement of constitutional rights brought by assistant professor denied tenure against public university chancellor, department head, and trustees).

24. See, e.g., *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589 (1967).

25. See Hiers, *supra* note 4, at 556 (noting that “governmental speech” usually does not receive First Amendment protection).

26. See, e.g., Byrne, *supra* note 7, at 79 (“The interpretation of academic freedom as a constitutional right in judicial opinions remains frustratingly uncertain and paradoxical. . . . Confusion reigns.”). The Supreme Court denied certiorari in *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 1070 (2001), in which the Fourth Circuit categorically rejected the concept of a doctrine of individual academic freedom. See discussion *infra* notes 97–99 and accompanying text. But it is difficult to sustain the extreme argument advanced in the *Urofsky* opinion. See also Rabban, *supra* note 13, at 280; see generally Hiers, *supra* note 7.

27. See *Urofsky*, 216 F.3d at 410 (quoting Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1269 (1988)); Byrne, *supra* note 5; Finkin, *supra* note 7; see also THOMAS J. SCHLERETH, *VICTORIAN AMERICA: TRANSFORMATIONS IN EVERYDAY LIFE 1876-1915* 249-50 (1991) (discussing explosion in

explains in his history of the concept of institutional academic freedom, the latter notion “contained three ingredients[:]. . . *Lehrfreiheit* [“teaching freedom,”] . . . *Lernfreiheit* [“learning freedom,” and] . . . the right of the academic institution, under the direction of its senior faculty (the *Ordinarien*, or roughly, the full professors) and its academic officers elected of the faculty to manage its immediate affairs.”²⁸ Professors in nineteenth-century American colleges and universities were attracted to this model for both intellectual and pragmatic reasons. Intellectually, across the disciplines professors were increasingly committed to a research-scientific vocational paradigm, in part borrowed from the German model, according to which they assumed the role of experts engaged in a collective search for truth that involved the critical testing of one another’s ideas.²⁹ Because of its stress on expertise, this research-scientific model made some degree of professional autonomy seem an institutional prerequisite for the attainment of its goals.³⁰ Pragmatically, in a system of higher education consisting primarily of institutions governed by boards of lay trustees, rather than academics, the German model of freedom and self-governance offered an example of success to which American professors could point in support of demands for professional self-determination and even autonomy.³¹ These two attractions of the research-scientific idea are related but distinct. Professors’ self-interest could support a claim for complete professorial autonomy, but the peer-review system envisioned by the rising vocational paradigm suggests significant disciplinary and ethical constraints on individual professors’ autonomy.³² Also, the intellectual justification, far more than the pragmatic one, stresses the virtues of a competitive search for truth in a way parallel to the then-developing notion that the First Amendment exists at least in part to ensure a free “marketplace of ideas.”³³ But the two purposes served by professorial self-determination are also easily conflated, and their conceptual merging may explain some later doctrinal confusion.³⁴

These nineteenth-century trends in thinking about higher education, part of a broader social and cultural trend toward professionalization, were significant influences on the 1915 formation of the American Association of University

research-oriented institutions of higher education in late nineteenth-century United States).

28. Finkin, *supra* note 7, at 822–23.

29. See Byrne, *supra* note 5, at 270–77.

30. See *id.*

31. See *id.* at 273; see also Finkin, *supra* note 7, at 828.

32. See Rabban, *supra* note 13, at 234; David M. Rabban, *Does Academic Freedom Limit Faculty Autonomy?*, 66 TEX. L. REV. 1405, 1409 (1988).

33. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market.”); Rabban, *supra* note 13, at 240–41. Of course, at this time, First Amendment doctrine did not permit college or university professors to claim First Amendment rights against actions by the states. My comment is meant only to indicate the parallels between the professional norm and Justice Holmes’s contemporary articulation of one purpose of the First Amendment’s speech clause.

34. See Finkin, *supra* note 7, at 851–57.

Professors (AAUP).³⁵ In the year of its formation, the AAUP issued a General Declaration of Principles as a statement of its mission. The Declaration opened by citing the concepts of *Lehrfreiheit* and *Lernfreiheit* and went on to address the proper role of lay boards of trustees, the “nature of the academic calling,” and “the function of the academic institution.”³⁶ The Declaration noted the necessity of maintaining the dignity of the profession in order to attract gifted candidates to its ranks. It described professors’ function as

deal[ing] at first hand, after prolonged and specialized technical training, with the sources of knowledge; and . . . impart[ing] the results . . . both to students and to the general public, without fear or favor. . . . [T]he proper fulfillment of the work of the professoriate requires that our universities shall be so free that no fair-minded person shall find any excuse for even a suspicion that the utterances of university teachers are shaped or restricted by the judgment, not of professional scholars, but of inexpert and possibly not wholly disinterested persons outside of their ranks.³⁷

The Declaration accordingly asserted that the faculty “are the appointees, but not in any proper sense the employees, of” lay boards of trustees.³⁸ It identified academic freedom, defined in terms of noninterference with the work of faculty, as crucial to the university’s role of “intellectual experiment station”: “the university cannot perform its . . . function without accepting and enforcing to the fullest extent the principle of academic freedom.”³⁹ Thus, the 1915 Declaration identifies the “freedom” at issue as both individual and collective faculty freedom from the

35. See Byrne, *supra* note 5, at 276–79. See also Thomas Haskell, *Justifying the Right of Academic Freedom in the Era of “Power/Knowledge,”* in *THE FUTURE OF ACADEMIC FREEDOM* 43, 48–60 (Louis Menand ed., 1996). The AAUP’s current mission, as stated on its website, is to “advance academic freedom and shared governance, to define fundamental professional values and standards for higher education, and to ensure higher education’s contribution to the common good.” See AAUP website, <http://www.aaup.org> (last visited Oct. 27, 2005).

36. AAUP, *1915 AAUP General Declaration of Principles* (1915), reprinted in NEIL W. HAMILTON, *ACADEMIC ETHICS: PROBLEMS AND MATERIALS ON PROFESSIONAL CONDUCT AND SHARED GOVERNANCE* 180–82 (2002), available at <http://www.aaup.org> [hereinafter *1915 General Declaration*].

37. *1915 General Declaration*, *supra* note 36, at 181.

38. *Id.* at 182. The 1915 Declaration also notes the different but in some ways analogous interference that state universities might experience from state legislatures:

Where the university is dependent for funds upon legislative favor, it has sometimes happened that the conduct of the institution has been affected by political considerations; and where there is a definite governmental policy or a strong public feeling on economic, social, or political questions, the menace to academic freedom may consist in the repression of opinions that in the particular political situation are deemed ultra-conservative rather than ultra-radical. The essential point, however, is not so much that the opinion is of one or another shade, as that it differs from the views entertained by authorities. The question resolves itself into one of departure from accepted standards; whether the departure is in the one direction or the other is immaterial.

Id. at 185.

39. *Id.* at 184, 186.

interference of governing boards in academic affairs.

In 1940, a Statement of Principles on Academic Freedom and Tenure superseded the 1915 Declaration.⁴⁰ As its name suggests, the 1940 Statement formalized the tenure system that had developed as an institutional mechanism for the attainment of academic freedom as described in the 1915 Statement.⁴¹ Then, in 1966, the AAUP issued a Statement on Governance of Colleges and Universities, identifying a system of shared governance in which faculty have significant authority over academic policy-setting and decision-making as a necessary counterweight to a political and economic context of decreased university autonomy.⁴² None of these statements has legal force, although the AAUP does investigate and censure affiliated institutions according to the statements' precepts and the AAUP's interpretation of their meaning. As will be discussed at more length below, however, many of the concepts cited in these documents find parallels in the concept of constitutional academic freedom that Supreme Court Justices began to articulate around the middle of the twentieth century.

The second major nineteenth-century development in American higher education, in contrast, did find immediate legal realization, perhaps in part because it appealed to the interests of the general electorate rather than primarily to the

40. AAUP, *1940 Statement of Principles on Academic Freedom and Tenure*, in POLICY DOCUMENTS & REPORTS (9th ed. 2001), available at <http://www.aaup.org> [hereinafter *1940 Statement*].

41. See William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS. 79, 79–82 (1990) (discussing the *1940 Statement* in relation to constitutional academic freedom law).

42. AAUP, *Statement on Government of Colleges and Universities*, in POLICY DOCUMENTS & REPORTS (9th ed. 2001), available at <http://www.aaup.org/statements/Redbook/Govern.htm> [hereinafter *Statement on Colleges and Universities*]. The question whether faculty self-governance in colleges and universities remains desirable is hotly debated. For critiques of the practice, see J. Stephen Guffey & Larry C. Rampp, *Shared Governance: Balancing the Euphoria* (1997), <http://eric.ed.gov/> (search "Eric#" for ED418617; then follow the link to the full text in pdf format); Eleanor V. Horne, *Why Does Change Take So Long? Shared Governance on Many Campuses Is Too Slow and Too Consumed With Process*, 2:4 TRUSTEESHIP 5 (July–Aug. 1995). The general trend in American higher education may be away from shared governance. See discussion *infra* note 216; see also American Federation of Teachers, *Shared Governance in Colleges and Universities: A Statement of the Higher Education Program and Policy Council (2002)*, http://www.aft.org/pubs-reports/higher_ed/shared_governance.pdf; Larry G. Gerber, "Inextricably Linked": *Shared Governance and Academic Freedom*, 87 ACADEME 3, at 22–24 (May–June 2001); Neil W. Hamilton, *Academic Tradition and the Principles of Professional Conduct*, 27 J.C. & U.L. 609, 610 (2001); James T. Richardson, *Big Bad Governance*, 7:3 TRUSTEESHIP 16, 20, 22 (May–June 1999).

Generally, the discussion here leaves to one side the question whether shared governance is a universally desirable institutional practice. The position advanced here is simply that where faculty self-governance is the institutional practice, judicial evaluation of faculty decision-making should take into account all of the concept's professional and legal implications. Cf. Byrne, *supra* note 5, at 288 (arguing that "courts are poorly equipped to enforce traditional academic freedom as a legal norm"). This position resembles Byrne's in that it calls for deference toward decisions made on academic grounds but differs from Byrne's in that it assumes that other norms will almost always also be relevant to courts' evaluation of disputes that raise academic freedom concerns. See *infra* Part IV.B.

interests of a profession whose members are, if powerful, nevertheless limited in numbers. This development, unlike the rise of the research-scientific paradigm and the formation of the AAUP, pertained only to public universities. The federal Morrill Act of 1862,⁴³ instituting the land-grant colleges, was probably the most ambitious instantiation of this “democratic” view of higher education, a view in some tension with the German research-university model.⁴⁴ J. Peter Byrne has characterized the democratic model as “reflect[ing] the demands placed on our colleges and universities by the society at large that they help fulfill broad goals of social mobility and general prosperity.”⁴⁵ This populist concept had an intellectual or ideological component as well: it could be used to promote a view of comprehensive higher education as necessary to the health of a democratic civil society, rather than as a luxury for the elite.⁴⁶ Reformers in this vein discussed public institutions of higher education as engines for increasing both the social mobility and the “intellectual liberty” of citizens.⁴⁷

Reformers in the states during this period also began to promote the concept that strong public universities could be seedbeds for innovation and regional economic growth.⁴⁸ The growth of this competitive federalist conception of the role of public colleges and universities is the third of the pivotal nineteenth-century developments in American higher education. This competitive federalist approach paralleled an already existing commitment to “institutional pluralism” that Matthew T. Finkin has identified in nineteenth-century judicial approaches to the question of the legal autonomy of educational institutions.⁴⁹ Drawing on principles of religious toleration and the benefits of political diversity as well as market competition, this concept of competitive pluralism worked together with the democratic and research-scientific ideals to inspire the initial nineteenth-century efforts to emancipate public colleges and universities from the control of state legislatures. Starting with Michigan in 1850, and followed by California in 1879, some states began to confer constitutional status on their public institutions, establishing them as independent arms of state government.⁵⁰

43. Morrill Act, ch. 130, § 5, 12 Stat. 503 (1862), *amended by* CAL. CONST. art IX, § 9.

44. JOHN AUBREY DOUGLASS, *THE CALIFORNIA IDEA AND AMERICAN HIGHER EDUCATION: 1850 TO THE 1960 MASTER PLAN* 46 (2000); *see also* SCHLERETH, *supra* note 27, at 247–48, 252 (noting overlap between democratic ideal and new recognition as professions of such fields as engineering, nursing, social work, science, and business administration); Byrne, *supra* note 5, at 267–83.

45. Byrne, *supra* note 5, at 281.

46. DOUGLASS, *supra* note 44, at 46; *see also* ALLEN NEVINS, *THE STATE UNIVERSITIES AND DEMOCRACY* 17–22, 33 (1962).

47. *See* NEVINS, *supra* note 46, at 17; DOUGLASS, *supra* note 44, at 13, 15, 20, 22, 25, 31, 39, 41, 44, 47, 63, 68.

48. *See, e.g.*, DOUGLASS, *supra* note 44, at 7, 8, 10, 12, 15, 16, 25, 27, 41, 47, 53, 63–64. *See also* CAL. CONST. art. IX, § 1 (“A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.”).

49. Finkin, *supra* note 7, at 833.

50. *See* LYMAN A. GLENNY & THOMAS K. DALGLISH, *PUBLIC UNIVERSITIES, STATE*

Arguably, the competitive pluralist conception of the purpose of higher education is now the prevailing norm. But it does not yet completely dominate legal discourse, and the other two approaches remain potent forces in decision-making within and surrounding institutions of higher education.⁵¹ It was the professional research-scientific norm that most significantly influenced early statements on academic freedom by Supreme Court Justices, as the next section explains.

C. Early judicial pronouncements on academic freedom

The term “academic freedom” first appeared in an opinion written by a Supreme Court Justice in connection with the First Amendment in 1952, in Justice Douglas’s dissent in *Adler v. Board of Education of City of New York*.⁵² In *Adler*, the Court upheld (6-3) the Feinberg Law, a New York state ban on public employment for those advocating the overthrow of government by force. In his dissent, Douglas characterized the law as “certain to raise havoc with academic freedom”⁵³ and compared the regime it created to a “police state,” under which “[t]here can be no real academic freedom.”⁵⁴ He then linked academic freedom clearly to the value of the “the pursuit of truth” and the research-scientific paradigm enshrined in the AAUP documents cited above, linking those values, in turn, to the First Amendment’s protections:

This system of spying and surveillance with its accompanying reports and trials cannot go hand in hand with academic freedom. It produces standardized thought, not the pursuit of truth. Yet it was the pursuit of truth which the First Amendment was designed to protect. A system which directly or inevitably has that effect is alien to our system and should be struck down.⁵⁵

The term “academic freedom” next appeared five years later in *Sweezy v. New Hampshire*, a decision lacking a majority opinion.⁵⁶ In *Sweezy*, the Court overturned a public university lecturer’s contempt conviction for, among other things, refusing to answer a state Attorney General’s questions regarding the content of one of his lectures. Chief Justice Warren’s plurality opinion described principles of academic freedom and First Amendment freedom of expression as parallel, but did not specifically ground academic freedom in the First Amendment.⁵⁷ His formulation appeared to identify academic freedom with the

AGENCIES, AND THE LAW: CONSTITUTIONAL AUTONOMY IN DECLINE 14–19 (1973). *See also* discussion *infra* Part II.A.

51. *See, e.g.*, discussions *infra* Part II.D, IV.B.

52. 342 U.S. 485, 508 (1952) (Douglas, J., dissenting).

53. *Id.* at 509.

54. *Id.* at 510.

55. *Id.* at 510–11. *See also* Van Alstyne, *supra* note 41, at 105–07.

56. 354 U.S. 234 (1957) (Warren, C.J., plurality opinion).

57. Chief Justice Warren wrote:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played

roles and rights of “teachers.”⁵⁸

Justice Frankfurter’s concurring opinion in *Sweezy* has been far more frequently quoted in subsequent judicial opinions addressing academic freedom.⁵⁹ Linking

by those who guide and train our youth. . . . Teachers and students must always remain free to inquiry, to study, and to evaluate . . . ; otherwise our civilization will stagnate and die.

Equally manifest as a fundamental principle of a democratic society is political freedom of the individual. Our form of government is built on the principle that every citizen shall have the right to engage in political expression and association. That right was enshrined in the First Amendment.

Id. at 250. Note that, like Justice Frankfurter’s concurrence, discussed below, Chief Justice Warren’s statements do not recognize any distinction between the public and private members of “the community of American universities.” *Id.*

58. *Id.*

59. A recent citation search indicated that federal courts have quoted Justice Frankfurter’s language about the “four essential freedoms” and an institution’s right “to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who shall be admitted to study,” 354 U.S. at 263 (language that Justice Frankfurter himself quoted from another source; *see infra* note 60), roughly twice as many times as Chief Justice Warren’s language about “[t]he essentiality of freedom in the community of American universities,” 354 U.S. at 250.

Justice Frankfurter’s language is quoted, although not always attributed to Justice Frankfurter or to his source, in, inter alia, *Grutter v. Bollinger*, 539 U.S. 306, 363 (2003); *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194, 226 (2003) (Stevens, J., dissenting); *Bd. of Regents of Univ. of Wisc. Syst. v. Southworth*, 529 U.S. 217, 238 (2000) (Souter, J., concurring); *Univ. of Pa. v. EEOC*, 493 U.S. 182, 196 (1990); *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985); *Widmar v. Vincent*, 454 U.S. 263, 279 n.2 (1981); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978); *Forum for Academic & Institutional Rights v. Rumsfeld*, 390 F.3d 219, 233 n.13 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (2005) (No. 04-1152); *George Washington Univ. v. District of Columbia*, 318 F.3d 203, 212 (D.C. Cir. 2003); *Brown v. Li*, 299 F.3d 1092, 1104 (9th Cir. 2002); *Brown v. Armenti*, 247 F.3d 69, 75 (3d Cir. 2001); *Bonnell v. Lorenzo*, 241 F.3d 800, 823 (6th Cir. 2001); *Weinstock v. Columbia Univ.*, 224 F.3d 33, 47 (2d Cir. 2000); *Urofsky v. Gilmore*, 216 F.3d 401, 413 (4th Cir. 2000) (en banc); *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 456 (2d Cir. 1999); *Feldman v. Ho*, 171 F.3d 494, 495 (7th Cir. 1999); *Webb v. Bd. of Trs. of Ball State Univ.*, 167 F.3d 1146, 1149–50 (7th Cir. 1999); *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 492 (3d Cir. 1998); *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 370 (4th Cir. 1998); *Pollis v. New Sch. for Soc. Research*, 132 F.3d 115, 123 n.5 (2d Cir. 1997); *Fisher v. Vassar Coll.*, 70 F.3d 1420, 1434 (2d Cir. 1995); *Jiminez v. Mary Washington Coll.*, 57 F.3d 369, 383 (4th Cir. 1995); *United States v. Brown Univ.*, 5 F.3d 658, 678 n.15 (3d Cir. 1993); *Brown v. Trs. of Boston Univ.*, 891 F.2d 337, 360 (1st Cir. 1989); *Parate v. Isibor*, 868 F.2d 821, 826 (6th Cir. 1989); *Lovelace v. S.E. Mass. Univ.*, 793 F.2d 419, 426 (1st Cir. 1986); *EEOC v. Franklin & Marshall Coll.*, 775 F.2d 110, 114 (3d Cir. 1985); *NLRB v. Lewis Univ.*, 765 F.2d 616, 625–26 (7th Cir. 1985); *EEOC v. Univ. of Notre Dame Du Lac*, 715 F.2d 331, 335 (7th Cir. 1983); *Martin v. Helstad*, 699 F.2d 387, 397 (7th Cir. 1983) (Coffey, J., concurring); *Gray v. Bd. of Higher Educ.*, 692 F.2d 901, 909 n.15 (2d Cir. 1982); *In re Dinnan*, 661 F.2d 426, 430–31 (5th Cir. 1981); *Lieberman v. Gant*, 630 F.2d 60, 67 (2d Cir. 1980); *Radolf v. Univ. of Conn.*, 364 F. Supp. 2d 204, 216 (D. Conn. 2005); *Sadki v. SUNY Coll. at Brockport*, 310 F. Supp. 2d 506, 512 (W.D.N.Y. 2004); *Myers v. Loudoun Cty. Sch. Bd.*, 251 F. Supp. 2d 1262, 1276 (E.D. Va. 2003); *McFadden v. SUNY Coll. at Brockport*, 195 F. Supp. 2d 436, 446 (W.D.N.Y. 2002); *Mellen v. Bunting*, 181 F. Supp. 2d 619, 626 (W.D. Va. 2002); *Girma v. Skidmore Coll.*, 180 F. Supp. 2d 326, 344 (N.D.N.Y. 2001); *McAlpin v. Burnett*, 185 F. Supp. 2d 730, 735 (W.D. Ky. 2001); *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 818 (E.D. Mich. 2000); *Fisher v. Vassar Coll.*, 852 F. Supp. 1193, 1221 (S.D.N.Y. 1994); *Jew v. Univ. of Iowa*, 749 F.

the concept to both the German model of academic self-government and a principle of democratic openness, but again not expressly to the First Amendment, Justice Frankfurter wrote:

These pages need not be burdened with proof . . . of the dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor. . . . Suffice it to quote the latest expression on this subject. It is also perhaps the most poignant because its plea on behalf of continuing the free spirit of the open universities of South Africa has gone unheeded.

“In a university knowledge is its own end, not merely a means to an end. A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest. A university is characterized by the spirit of free inquiry. . . . This implies the right to examine, question, modify or reject traditional ideas and beliefs. . . . 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.”⁶⁰

Supp. 946, 962 (S.D. Iowa 1990); *Wirsing v. Bd. of Regents of Univ. of Colo.*, 739 F. Supp. 551, 553 (D. Colo. 1990); *EEOC v. Univ. of Notre Dame Du Lac*, 551 F. Supp. 737, 742 (N.D. Ind. 1982); *Jackson v. Harvard Univ.*, 721 F. Supp. 1397, 1407 (D. Mass. 1989); *Orbovich v. Macalester Coll.*, 119 F.R.D. 411, 413 (D. Minn. 1988); *Varma v. Bloustein*, 721 F. Supp. 66, 72 (D.N.J. 1988); *Rollins v. Farris*, 108 F.R.D. 714, 719 (E.D. Ark. 1985); *Zahorik v. Cornell Univ.*, 579 F. Supp. 349, 352 (N.D.N.Y. 1983); *Gray v. Bd. of Higher Educ.*, 92 F.R.D. 87, 91–92 (S.D.N.Y. 1981). This list contains fifty-one opinions.

Chief Justice Warren’s language appears in, inter alia, *Whitehill v. Elkins*, 389 U.S. 54, 60 (1967); *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967); *Brown v. Armenti*, 247 F.3d 69, 74 (3d Cir. 2001); *Bonnell v. Lorenzo*, 241 F.3d 800, 822 (6th Cir. 2001); *Urofsky v. Gilmore*, 216 F.3d 401, 412 (4th Cir. 2000) (en banc); *Bronx Household of Faith v. Cmty Sch. Dist. No. 10*, 127 F.3d 207, 213 (2d Cir. 1997); *Dube v. State Univ. of N.Y.*, 900 F.2d 587, 597–98 (2d Cir. 1990); *Dow Chem. Co. v. Allen*, 672 F.2d 1262, 1274–75 (7th Cir. 1982); *Kim v. Coppin State Coll.*, 662 F.2d 1055, 1063 (4th Cir. 1981); *Browzin v. Catholic Univ. of America*, 527 F.2d 843, 846 n.2 (D.C. Cir. 1975); *N.D. State Univ. v. United States*, 84 F. Supp. 2d 1043, 1050 n.13 (D.N.D. 1999); *Jalal v. Columbia Univ.*, 4 F. Supp. 2d 224, 234 (S.D.N.Y. 1998); *Scallet v. Rosenblum*, 911 F. Supp. 999, 1014 (W.D. Va. 1996); *Silva v. Univ. of N.H.*, 888 F. Supp. 293, 314 (D.N.H. 1994); *Bishop v. Aronov*, 732 F. Supp. 1562, 1565 (N.D. Ala. 1990); *EEOC v. Univ. of Notre Dame Du Lac*, 551 F. Supp. 737, 741 (N.D. Ind. 1982); *Knight v. Minn. Cmty. Coll. Faculty Ass’n*, 571 F. Supp. 1, 9 (1982); *Cooper v. Ross*, 472 F. Supp. 802, 811 (E.D. Ark. 1979); *Gay Students Org. of Univ. of N.H. v. Bonner*, 367 F. Supp. 1088, 1093 (D.N.H. 1974); *Brooks v. Auburn Univ.*, 296 F. Supp. 188, 192 (M.D. Ala. 1969); *Albaum v. Carey*, 283 F. Supp. 3, 10 (E.D.N.Y. 1968); *Dickey v. Ala. State Bd. of Educ.*, 273 F. Supp. 613, 619 (M.D. Ala. 1967); *Fowler v. Wirtz*, 236 F. Supp. 22, 36 (S.D. Fla. 1964). This list contains twenty-three opinions.

60. *Sweezy*, 354 U.S. at 262–63 (Frankfurter, J., concurring) (quoting THE OPEN

This powerful language was the origin of several of the ambiguities noted at the beginning of this section. First, and most obviously, Justice Frankfurter was not writing for the Court. Second, in this passage, Justice Frankfurter does not connect the “four essential freedoms” to the First Amendment or to the Constitution, even indirectly. Finally, and perhaps most problematically, it is unclear who holds the right described, and even whether it is a legal right at all. Clearly, only individuals can “examine, question, modify, or reject traditional ideas and beliefs.”⁶¹ Yet the final sentence of Justice Frankfurter’s quotation from the statement on the open universities in South Africa uses pronouns referring to the university itself—the institution—as possessing the freedom “to determine for itself on academic grounds” the conduct of its academic affairs, without clarifying whether faculty or lay administrators should make these determinations.⁶²

Ten years after *Sweezy*, the Supreme Court struck down the law upheld in *Adler* in *Keyishian v. Board of Regents of University of State of New York*.⁶³ In *Keyishian*, an explicit link between academic freedom and the First Amendment finally appeared in a majority opinion. Nevertheless, the link drawn is diffuse and the identification of the right holder only marginally more clear. Writing for the *Keyishian* majority, Justice Brennan stated:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”⁶⁴

Here, more clearly than in *Sweezy*, the right is identified with individual professors’ more conventional First Amendment expression rights. If the Court had stopped with *Keyishian*, the contours of academic freedom doctrine might have remained relatively clear.⁶⁵ *Sweezy* and *Keyishian*, as well as *Adler*, involved faculty members at public institutions and seemed to implicate the First

UNIVERSITIES IN SOUTH AFRICA 10–12 (Albert van de Sandt Centlivres *et al.*, eds., Johannesburg: Witwatersrand Univ. Press 1957) (the statement of a conference of senior scholars from the University of Cape Town and the University of the Witwatersrand)). For a detailed account of the context of the writing quoted by Frankfurter, see Hiers, *supra* note 7, at 46–57.

61. *Sweezy*, 354 U.S. at 262.

62. *Id.* at 263. The trend described in Part I.D below may explain the more frequent citation of Justice Frankfurter’s concurrence, which, unlike Chief Justice Warren’s plurality opinion, can be construed to be a statement about institutional rights. Cf. Hiers, *supra* note 7, at 44–57. Richard D. Hiers argues that those courts that have read the concurrence as articulating an institutional right have misinterpreted it. *Id.* Hiers’s position on the meaning of Frankfurter’s quotation from THE OPEN UNIVERSITIES IN SOUTH AFRICA, while a helpful counter to the tendency that has turned the passage into an academic freedom shibboleth, does not satisfactorily account for the pronoun usage in the passage quoted. Compare the majority opinion in *Urofsky*, which reads Frankfurter’s concurrence as referring only to institutional, not to individual, rights. 216 F.3d at 412–13.

63. 385 U.S. 589 (1967).

64. *Id.* at 603 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

65. See Byrne, *supra* note 7, at 298.

Amendment straightforwardly in that in each case the state, which was also the faculty member's employer, was attempting to regulate the faculty member's speech and associations. From this perspective, academic freedom doctrine might be characterized as a special, institutionally sensitive approach to the basic First Amendment concern with restrictions on speech and association. In the public educational institution context, the analysis might overlap with public-employee speech doctrine.⁶⁶ Yet Justice Frankfurter's *Sweezy* concurrence in particular suggests that the concept of academic freedom might contain an additional dimension of positive, not just negative, liberty; it seems to imply a right to perform particular institutionally specific functions, possibly in the service of constitutional goals, rather than simply a right to be free from government interference on par with the similar rights of all other citizens.⁶⁷

These implications of Justice Frankfurter's *Sweezy* concurrence are most visible in hindsight. As the next section will discuss, in subsequent opinions members of the Court appeared to depart significantly from the relatively simple doctrinal framework established in these early cases.

D. From individual to institutional academic freedom

Although the language quoted above from *Keyishian* appeared in a majority opinion, many subsequent Supreme Court statements concerning the constitutional meaning of "academic freedom" have been of uncertain weight, appearing in minority opinions or as dicta. Arguably, even the language in *Grutter* is dicta.⁶⁸ Post-*Keyishian* opinions have also appeared to expand the scope of the concept, making it even harder to identify the governing law on the subject. These difficulties have resulted in a large mass of contradictory case law in the lower

66. Some commentators have argued that academic freedom doctrine should be reformulated as an institutionally sensitive variant of public-employee speech doctrine. See, e.g., Rebecca Gose Lynch, *Pawns of the State or Priests of Democracy? Analyzing Professors' Academic Freedom Rights Within the State's Managerial Realm*, 91 CAL. L. REV. 1061 (2003) (arguing that academic freedom rights of individuals at public institutions should be analyzed using a variant of government-speech doctrine). Cf. Horwitz, *supra* note 2, 558–88 (arguing for an institutionally sensitive approach to First Amendment guarantees); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1260, 1274–75 (2005) (supporting the same argument made by Horwitz). But see Jennifer Elrod, *Academics, Public Employee Speech, and the Public University*, 22 BUFF. PUB. INT. L.J. 1 (2003–04) (arguing that government-speech doctrine is inappropriate framework for analysis of professors' academic freedom rights).

67. This possibility is one of the most intractable difficulties of recognizing an individual constitutional academic freedom right; it seems anomalous to recognize a First Amendment right to engage in particular kinds of speech and expressive conduct belonging only to members of a certain profession. Compare *Urofsky*, in which Judge Luttig, concurring, criticized the concept of individual academic freedom on the basis that it would create "special" speech rights in the university setting. 216 F.3d at 417 (2000) (Luttig, J., concurring).

68. See, e.g., Hiers, *supra* note 4, at 576–77 (characterizing references to academic freedom in *Grutter* as dicta); Tushnet, *supra* note 2, at 163 (arguing that the Court's deference to the University of Michigan in *Grutter* was not a dispositive aspect of its analysis or opinion). On the difficulties of identifying the boundaries of dicta, see Abramowicz & Stearns, *supra* note 11; Dorf, *supra* note 11.

courts.⁶⁹

It is clear, for example, that Justice Powell's statements regarding academic freedom in *Regents of the University of California v. Bakke* do not represent the position of the Court; his discussion of academic freedom appears in a part of the opinion joined by no other Justice.⁷⁰ It is equally clear, however, that Justice Powell's statements have been immensely influential both on later circuit court decisions and on the Supreme Court's decision in *Grutter*.⁷¹ Justice Powell's discussion in *Bakke*, drawing heavily on Justice Frankfurter's *Sweezy* concurrence, extended its institutional implications. Justice Powell concluded that "the attainment of a diverse student body" is "clearly . . . a constitutionally permissible goal for an institution of higher education" because "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body."⁷² Justice Powell identified this particular "freedom" as an aspect of "[a]cademic freedom," which, "though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."⁷³ Since *Bakke* did not involve extra-institutional restrictions on individual college or university professors' speech or association, the only academic action at issue was collective or institutional academic action. Justice Powell's formulation thus identified the exercise of academic freedom with institutional decision-making and policy-setting, although it still did not clarify whether such freedom belongs to the faculty acting collectively or to the administration. (The admissions policy in *Bakke* was set by a faculty committee.)⁷⁴ Despite this ambiguity, Justice Powell's invocation of academic freedom clearly departed from the approach of earlier Supreme Court opinions mentioning the concept. At the same time, Justice Powell followed the spirit of Justice Frankfurter's *Sweezy* concurrence in linking academic freedom to both the research-scientific ideal, with its implications of faculty self-governance, and the model of democratic openness.⁷⁵ Although its precedential status is weak, Justice Powell's opinion both affirms and expands previous statements about academic freedom by Supreme Court Justices.

Opinions following *Bakke* have, for better or worse, largely continued this trend

69. See Byrne, *supra* note 7, at 91–112.

70. 438 U.S. 265, 311–15 (1978) (Powell, J.). See also Hiers, *supra* note 7, at 60–62 (discussing status of Powell's opinion in *Bakke*). In 1996, the Fifth Circuit concluded that Justice Powell did not write for the Court in this portion of the *Bakke* opinion. *Hopwood v. Texas*, 78 F.3d 932, 941–44 (5th Cir. 1996).

71. See, e.g., *Grutter v. Bollinger*, 288 F.3d 732, 738–49 (6th Cir. 2002); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1197–1200 (9th Cir. 2000).

72. 438 U.S. at 311–12.

73. *Id.* at 312 (citing *Sweezy v. N.H.*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring), and *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967)).

74. See *Sweezy*, 354 U.S. at 272 ("[T]he faculty devised a special admissions program to increase the representation of 'disadvantaged' students in each Medical School class.").

75. See *id.* at 312–13 ("The atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body. 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.").

of identifying academic freedom with the institution rather than with individual professors. Early statements in this vein also lacked precedential weight. In *Widmar v. Vincent*, for instance, the majority decided a challenge to an institution's policy regarding student access to facilities on the grounds of First Amendment Free Exercise Clause and public forum doctrine, not mentioning academic freedom.⁷⁶ Concurring in the judgment, Justice Stevens questioned the majority's reliance on public forum doctrine, which he feared "may needlessly undermine the academic freedom of public universities."⁷⁷ Justice Stevens quoted Justice Frankfurter's *Sweezy* concurrence and Justice Powell's opinion in *Bakke*, and reiterated the institutional understanding of academic freedom reflected in those opinions, but moved beyond both to suggest that the scope of institutional academic freedom might embrace institutional decisions about student extracurricular activities.⁷⁸

In *Regents of the University of Michigan v. Ewing*, writing for the majority, Justice Stevens again articulated an institutional approach to academic freedom involving significant judicial deference to the decisions of college and university faculty and administrators.⁷⁹ *Ewing* concerned a medical student's due process challenge to his dismissal for substandard academic performance. Justice Stevens presented the university's academic freedom—which he equated with the academic assessment of students by faculty—as an important ingredient of the appropriate due process analysis.⁸⁰ Justice Stevens acknowledged the potential for conflict between this understanding of academic freedom and the academic freedom rights that might be asserted by individual faculty members or students against the state.⁸¹ But Justice Stevens also aligned the type of academic freedom involved in the academic review of student status with the professional norm of faculty autonomy in the setting of academic standards, which in turn he seemed to present as aligned with individual faculty members' First Amendment rights:

When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment. . . . Considerations of profound importance counsel restrained judicial review of the substance of academic decisions. . . . Added to our concern for lack of standards is a reluctance to trench on the prerogatives of state and local educational

76. 454 U.S. 263 (1981).

77. *Id.* at 278 (Stevens, J., concurring).

78. *Id.* at 279 n.2.

79. 474 U.S. 214, 225–28 (1985).

80. *Id.*

81. *See id.* at 226 n.12 ("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.") (citing *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978)).

institutions and our responsibility to safeguard their academic freedom, “a special concern of the First Amendment.”⁸²

This language, not rejected by any other Justice in *Ewing*, might be read to support a rather strong claim for a form of university autonomy deriving from the professional norms of faculty academic freedom and self-governance. But Justice Stevens did not present any such principle of institutional academic freedom as dispositive of the student’s due process claim.

Justice Stevens subsequently appears to have concluded that any deference to institutional decision-making should be closely cabined. In *Board of Regents of the University of Wisconsin System v. Southworth*, Justice Stevens joined Justice Souter’s concurrence, which counseled against equating academic freedom with deference to institutional decision-making.⁸³ In considering a First Amendment challenge by students to a public university’s system for disbursing activity fees to student groups, the majority in *Southworth* indicated that the “important and substantial purposes of the University, which seeks to facilitate a wide range of speech,” supported the application of public forum doctrine to the case.⁸⁴ Justice Souter, concurring and joined by Justice Stevens, noted that the case did not turn on the question of the university’s autonomy and stressed that the Court had never endorsed “broad conceptions of academic freedom that . . . might seem to clothe the University with an immunity to any challenge to regulations made or obligations imposed in the discharge of its educational mission.”⁸⁵

The Court had earlier reached a similar conclusion, rejecting a broad claim to plenary university autonomy, in its unanimous 1990 decision in *University of Pennsylvania v. EEOC*.⁸⁶ In this case, a business professor who was denied tenure filed a Title VII discrimination charge against the University. Investigating the charge, the EEOC requested confidential peer review documents from the tenure committee that had made the challenged decision. The University of Pennsylvania resisted the EEOC subpoena despite repeated court orders seeking to enforce it. The University argued, in part, that its First Amendment right to “determine for itself on academic grounds who may teach” supported its claim that the materials were privileged from disclosure.⁸⁷ The Court, in an opinion written by Justice Blackmun, construed existing academic freedom precedent as relating primarily to government attempts to control the content of faculty speech⁸⁸ and characterized

82. *Id.* at 225–26 (quoting *Keyishian*, 385 U.S. at 603).

83. 529 U.S. 217, 236 (2000) (Souter, J., concurring).

84. *Id.* at 231.

85. *Id.* at 237 (Souter, J., concurring).

86. 493 U.S. 182 (1990).

87. *Id.* at 196 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)). Such a claim of qualified privilege had previously been accepted by the Seventh Circuit in *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331 (7th Cir. 1983). See also Lynda E. Frost, *Shifting Meanings of Academic Freedom: An Analysis of University of Pennsylvania v. EEOC*, 17 J.C. & U.L. 329 (1991).

88. *Univ. of Pa.*, 493 U.S. at 197 (“When, in [*Sweezy*, 354 U.S. at 263, and *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967)] the Court spoke of ‘academic freedom’ and the right to determine on ‘academic grounds who may teach’ the Court was

the connection between this more clearly constitutional issue and the institutional privilege claimed by the University of Pennsylvania as “attenuated.”⁸⁹ The Court also distinguished *Ewing*, the strongest prior statement by a majority of the Court that could be read to suggest a constitutionally based institutional right of academic freedom, by aligning the deference articulated in *Ewing* with the “preservation of employers’ . . . freedom of choice”—that is, not with any rights peculiar to institutions of higher education, but with generally applicable principles of negative liberty.⁹⁰ But *University of Pennsylvania* is perhaps best understood as a clarification of the implications of *Ewing*; in *University of Pennsylvania*, the Court articulated its understanding of the scope of the judiciary’s competence to review the academic judgments of faculty. When a violation of competing constitutional provisions or constitutionally based statutory prohibitions, such as the policy against discrimination on the basis of sex, race, national origin, or religion, is alleged, the Court will not simply defer to an institution’s characterization of its decision as made on “academic grounds.”⁹¹ The Court’s refusal, in *University of Pennsylvania*, to equate *Ewing*’s implied principle of deference with a principle of absolute privilege does not amount to a categorical rejection of deference to institutional decisions made on clearly academic grounds, where no competing concerns are indicated.⁹²

Thus, despite initial appearances, *University of Pennsylvania* does not counter the general trend toward recognition of some kind of institutional academic freedom prerogative grounded in the First Amendment. The opinion is significant for other reasons. For one, although previous statements regarding academic freedom had occurred in litigation concerning public institutions, the Court in

speaking in reaction to content-based regulation.”).

89. *Univ. of Pa.*, 493 U.S. at 199.

90. *Id.* at 198–99. The Court seems to have been using the term “freedom of choice” to refer to the freedom employers have with respect to retention of at-will employees.

91. See Rabban, *supra* note 13, at 290–94. The opinion for the District Court for the District of Massachusetts in *Guckenberger v. Boston University*, 8 F. Supp. 2d 82, 87–91 (D. Mass. 1998), although it involves deference to a faculty committee’s academic decision in an antidiscrimination suit, is not necessarily to the contrary. *Guckenberger* involved a suit by learning-disabled students challenging Boston University’s foreign language course requirement as a violation of the Americans With Disabilities Act. In the cited opinion, the district court held that Boston University had satisfied its burden of showing that abolition of the requirement would “fundamentally alter” its liberal arts mission, *id.* at 85–86 (quoting *Guckenberger*, 974 F. Supp. at 154–55), since the University had shown that it reached this conclusion on the basis of a sequence of seven faculty meetings held pursuant to a prior court order, *id.* at 86–87. The court’s deference to Boston University in this case did not occur in the context of a suit raising constitutional antidiscrimination or information-access principles, and in the court’s view the University’s deliberative process adequately balanced the types of competing considerations that the Supreme Court in *University of Pennsylvania*, 493 U.S. at 202 n.9, left to the discretion of the lower courts on remand. See discussion *infra* note 92.

92. Cf. *Guckenberger*, 8 F. Supp. 2d at 87–91. Further support for this understanding that the decision in *University of Pennsylvania* implies some recognition of a limited degree of deference to institutional decision-making and self-governance norms may be found in the fact that the Court expressly declined to address whether the district court to which it remanded the case should or should not permit redaction of subpoenaed and disclosed peer review materials. See *Univ. of Pa.*, 493 U.S. at 202 n.9.

University of Pennsylvania did not even mention that limitation as a ground for its opinion. The case indicates that there is no doctrinal obstacle to challenges by individual professors at private institutions to state restriction of their expression on grounds of constitutional academic freedom and suggests as well that certain decision-making bodies in private colleges and universities may be able to claim a certain amount of deference to their clearly academic decisions.⁹³ Additionally, the result in *University of Pennsylvania* illustrates one way in which, within the private college and university context, principles of university autonomy and openness or accountability, so often in conflict, may be harmonized. This reconciliation of autonomy and openness requires a different approach in the public institution context, as will be discussed in more detail below.⁹⁴

Taken together, these opinions appear to acknowledge that academic freedom is in part an institutional prerogative but also to reject equation of that prerogative with any strong form of university autonomy or immunity from judicial scrutiny. Some lower courts have interpreted the statements discussed, up to and including *University of Pennsylvania*, as clearly indicating that academic freedom is at least in part an institutional prerogative. For instance, in *Piarowski v. Illinois Community College District 515*, decided the same year as *Ewing* but before *University of Pennsylvania*, the Court of Appeals for the Seventh Circuit acknowledged the potential for conflict between established institutional and individual rights of academic freedom.⁹⁵ More recently, taking this trend to a much-criticized extreme,⁹⁶ the Fourth Circuit in its en banc decision in *Urofsky v. Gilmore* declined to recognize any individual constitutional right to academic freedom at all.⁹⁷ *Urofsky* involved a challenge by several state university professors to a Virginia law prohibiting their access to certain types of electronic content using state-owned computer equipment. The court in *Urofsky*, rejecting the professors' argument that the law violated their academic freedom rights, concluded that the "Supreme Court, to the extent it has constitutionalized a right of academic freedom . . . , appears to have recognized only an institutional right of self-governance in academic affairs."⁹⁸ By adopting this principle and silently aligning the interests of the state with those of the university administration, the Fourth Circuit eliminated the need to address any conflict between faculty members' constitutional interests and the institutional interests of the university. The Supreme Court declined to review this conclusion.⁹⁹

93. Cf. Rabban, *supra* note 13, at 267.

94. See *infra* Part III.

95. 759 F.2d 625, 629 (7th Cir. 1985) (noting that the term "academic freedom" is "used to denote both the freedom of the academy to pursue its ends without interference from the government . . . and the freedom of the individual teacher . . . to pursue his ends without interference from the academy; and these two freedoms are in conflict, as in this case").

96. See, e.g., Lynch, *supra* note 66, at 1099–107; Hiers, *supra* note 7, at 93–104.

97. *Urofsky v. Gilmore*, 216 F.3d 401, 409–15 (4th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 1070 (2001).

98. *Id.* at 412.

99. *Urofsky*, 531 U.S. at 1070. It should be noted that the Seventh and Fourth Circuits may be the strongest proponents, among the lower federal courts, of the position that academic freedom should be understood to be an institutional prerogative. See Hiers, *supra* note 4, at 546–

Arguably, the result in *Urofsky* is incorrect not just because it rejects the notion that individual faculty decisions regarding teaching, curriculum design, and other academic matters might, if within relevant professional and other constitutional limits, be matters of public concern entitled to significant weight in any First Amendment analysis,¹⁰⁰ but also because it equates any institutional right with nonacademic administrators of the institution, and not with the faculty governance structure of the college or university. As discussed above, earlier statements on academic freedom, starting with Justice Frankfurter's concurrence in *Sweezy*, appear to have drawn on the professional norm of faculty self-governance in suggesting an institutional academic freedom right.¹⁰¹ Identification of faculty decision-making and policy-setting bodies as the holders of any institutional right of academic freedom certainly cannot eliminate the possibility of conflict between institutional and individual rights, but this identification does seem more consistent with the commitment to free inquiry underlying those otherwise nebulously described rights in the Court's earliest academic freedom statements. In contrast, a claim that the nonacademic trustees or regents of an institution of higher education are entitled to claim constitutional protection from judicial review of their actions has very little to recommend it: it is directly at odds with the professional norm of academic freedom, which developed at least in part to emancipate faculty from the control of lay trustees, and thus is potentially at odds with the commitment to free inquiry that the professional norm shares with the Court's understanding of the First Amendment, as well as clearly at odds with any commitment to democratic openness, another value arguably closely linked to the First Amendment, in the public college and university context.¹⁰²

It might seem that the Supreme Court foreclosed any such identification of institutional academic freedom with faculty self-governance in *Minnesota State Board of Community Colleges v. Knight*, a 1984 opinion written by Justice O'Connor,¹⁰³ but such a conclusion may be a misreading of that case. Just a few years before *Knight*, the Court had noted the strong tradition of faculty self-governance in private universities, although in the earlier instance the Court had not needed to address any constitutional implications of the tradition.¹⁰⁴ In *Knight*, a group of professors at a public community college challenged a state law requiring all consultations between the faculty and the state, even on matters not relating to the faculty's terms and conditions of employment, to be filtered through

49, 551–56.

100. The court in *Urofsky* held that professors' curricular and research decisions were by definition not instances of speech on matters of public concern and could never be considered instances of such speech. 216 F.3d at 408–09. Lynch, *supra* note 66, at 1099–107, criticizes the opinion primarily on this basis.

101. See *supra* notes 56–67 and accompanying text.

102. See discussion *infra* Part III.A.

103. 465 U.S. 271 (1984).

104. See *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 686–90 (1980) (Powell, J.). In *Yeshiva University*, the Court concluded that as a result of this tradition of self-governance, as well as the facts of the particular case, university professors should be considered “managerial employees” and hence “not employees within the meaning of the National Labor Relations Act.” *Id.* at 674–75.

the unionized faculty's exclusive bargaining representative.¹⁰⁵ The faculty plaintiffs in *Knight* were not union members and contended that the requirement violated their First Amendment petitioning and speech rights. The Court rejected their argument primarily on the grounds that the state law permitted informal communications to the state from non-union faculty and that the First Amendment does not guarantee each citizen a right to have the government heed his or her communications.¹⁰⁶ Justice O'Connor went on to state, in a discussion unnecessary to the Court's constitutional conclusion, that the plaintiffs could claim no additional constitutional academic freedom right to govern themselves:

To be sure, there is a strong, if not universal or uniform, tradition of faculty participation in school governance, and there are numerous policy arguments to support such participation. . . . But this Court has never recognized a constitutional right of faculty to participate in policymaking in academic institutions. . . . Even assuming that speech rights guaranteed by the First Amendment take on a special meaning in an academic setting, they do not require government to allow teachers employed by it to participate in institutional policymaking. Faculty involvement in academic governance has much to recommend it as a matter of academic policy, but it finds no basis in the Constitution. . . . [T]here is no constitutional right to participate in academic governance.¹⁰⁷

The significance of *Knight* in defining the scope and beneficiaries of institutional academic freedom is unclear. On the one hand, the opinion seems to draw a categorical distinction between any constitutional conception of institutional academic freedom and a collective faculty right. The obvious conclusions to draw from this statement would seem to be either that academic freedom is not an institutional right or interest, or that to the extent it is, it is held only by the institution's administration, and not by the faculty collectively. Both options, however, seem to be undercut by Justice O'Connor's opinion for the majority in *Grutter v. Bollinger*.¹⁰⁸ In *Grutter*, the Court apparently reaffirmed that academic freedom is at least in part an institutional concept.¹⁰⁹ Moreover, like *Bakke*, *Grutter* involved a faculty body setting admissions policy.¹¹⁰

One could avoid attempting to reconcile this apparent contradiction by arguing that the discussions of academic constitutional rights in both opinions appear in dicta.¹¹¹ Such an approach seems unsatisfactory, even if the characterization is correct. As the career of Justice Frankfurter's *Sweezy* concurrence indicates,¹¹²

105. 465 U.S. at 273–79.

106. *Id.* at 280–85.

107. *Id.* at 287–88.

108. 539 U.S. 306, 324–33, 339–40 (2003).

109. *Id.*

110. *Id.* at 314–15.

111. Hiers, *supra* note 7, at 59–63; Hiers, *supra* note 4, at 576–77. But it is not clear that the holding-dicta distinction is concrete enough to bear the weight of such an argument. See Abramowicz & Stearns, *supra* note 11; Dorf, *supra* note 11.

112. See *supra* note 59.

lower courts look to the Supreme Court for guidance as well as controlling authority. Conflicting guidance is still problematic even when it is only advisory. A preferable reconciliation of *Knight* and *Grutter* would note the different factual postures of the cases and would read *Knight* narrowly as a rejection of the idea that any individual faculty member, or faculty members as a group, could have a colorable constitutional claim to a right to participate in self-governance.¹¹³ This conclusion does not exclude the possibility that the academic decision-making of a group of faculty engaged in self-governance, up to certain limits such as those suggested by *University of Pennsylvania*, should receive deference, if not protection, deriving from First Amendment concerns.

This interpretation of the case law is not self-evident. As the next section explains, commentators have offered widely varying answers to the questions posed by this less-than-consistent series of statements. Nevertheless, these commentators have tended to converge on certain conclusions consistent with the approach proposed here.

E. Where should the law be?

Recent commentators on the Supreme Court's academic freedom statements are in considerable disagreement regarding the significance of those statements, as well as in their recommendations regarding the shape any legal concept of academic freedom should take. This section assesses the views of several commentators who have investigated whether academic freedom has been, and should be, understood as an individual right of professors and students, as an institutional right of college and university decision-making bodies, or as an amalgam of both. The positions of the four commentators discussed in this section range from complete rejection of institutional academic freedom as a legal concept to endorsement of a very high degree of judicial deference to the academic decisions of institutions of higher education, and include intermediate positions as well. Understanding the differences among these commentators' views helps to identify the issues that any clarification of the principle of academic freedom must confront.

The position taken here—that courts have been approaching and should continue to approach constitutional academic freedom as a qualified prerogative of faculty decision-making bodies, where such bodies exist—rejects the most extreme positions, advanced by Richard H. Hiers¹¹⁴ and J. Peter Byrne.¹¹⁵ Hiers contends that academic freedom should be understood exclusively as a speech right of

113. William W. Van Alstyne suggests a different approach to understanding the scope of Justice O'Connor's statements on self-governance in *Knight*, noting that the case "concerned two-year community colleges" rather than research universities, where a system of faculty governance may be more entrenched. Van Alstyne, *supra* note 41, at 145–46. See also Carol A. Lucey, *Civic Engagement, Shared Governance, and Community Colleges*, 88 *ACADEME* 4, at 27 (July-Aug. 2002), available at <http://www.aaup.org/publications/Academe/2002/02ja/02jatoc.htm> (addressing problems generating faculty engagement in governance in community college systems).

114. See generally Hiers, *supra* note 4; Hiers, *supra* note 7.

115. See generally Byrne, *supra* note 7.

individual professors;¹¹⁶ Byrne argues that constitutional academic freedom is a fundamentally institutional right.¹¹⁷ After discussing these two approaches, this section turns to two intermediate positions that accord more closely with the understanding indicated by the analysis in previous sections: those of David Rabban¹¹⁸ and Matthew T. Finkin,¹¹⁹ who have both suggested that judicial understandings of constitutional academic freedom should remain sensitive to both individual and institutional freedoms and constraints.

Richard H. Hiers has argued repeatedly that academic freedom, in the constitutional sense, may only be understood as an expressive right held by individual professors.¹²⁰ Hiers argues that “institutional academic freedom” is a misnomer for a concept of university autonomy, which, whatever its merits as a social policy, is not a doctrinally coherent constitutional concept.¹²¹ According to Hiers, the opinions courts have uniformly taken as the “points of departure” for the doctrine of academic freedom, Justice Frankfurter’s *Sweezy* concurrence and *Keyishian*, linked to the First Amendment only an expressive and associational right held by individual professors.¹²² He contends that the concept of institutional academic freedom is incoherent because, first, institutions that have not been recognized as legal “persons” cannot claim constitutional rights;¹²³ second, decision-making is not speech;¹²⁴ and third, at least in the context of public colleges and universities, it makes no sense for a government entity, which public college and university faculty or administrators collectively must be considered to be, to assert a constitutional right.¹²⁵ Hiers sees the references to academic freedom in *Grutter*, and Justice O’Connor’s reliance there on Justice Powell’s *Bakke* opinion, as “unnecessary and unfortunate” but perhaps not serious, since the concept is not strictly necessary to the holding in either case.¹²⁶ Nevertheless, Hiers thinks that the courts’ confusion regarding institutional academic freedom threatens “serious adverse consequences” for faculty academic freedom of the type

116. See generally Hiers, *supra* note 4; Hiers, *supra* note 7.

117. See generally Byrne, *supra* note 7.

118. See generally Rabban, *supra* note 13; Rabban, *supra* note 32.

119. See generally Finkin, *supra* note 7.

120. See generally Hiers, *supra* note 4; Hiers, *supra* note 7.

121. See Hiers, *supra* note 4, at 532.

122. Hiers, *supra* note 7, at 39–43.

123. See Hiers, *supra* note 4, at 557, 560. Strong counterarguments exist for each of Hiers’s points. For instance, Meir Dan-Cohen has forcefully argued that organizations should, under certain circumstances, be permitted to claim moral and legal rights. See MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY 74–77 (1986) (making the case for an institutional right of academic freedom).

124. Hiers, *supra* note 4, at 557, 559–60. Decision-making might, however, be considered a form of expressive conduct, and other First Amendment clauses provide protection for activities other than speech. See, e.g., *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (addressing First Amendment right of expressive association).

125. Hiers, *supra* note 4, at 557–59. But college and university faculty, even when acting collectively, need not always be identified as government actors. See, e.g., Byrne, *supra* note 7, for the arguments advanced by Byrne.

126. Hiers *supra* note 4, at 576, 575.

expressed in the AAUP's statements.¹²⁷ Hiers does not completely reject the practice of judicial deference to the academic decisions of college and university faculty acting collectively. He simply suggests that courts should candidly identify this deference as springing from social policy concerns, or as a matter of acknowledging and respecting educators' expertise, instead of misidentifying it as a constitutional principle.¹²⁸

Hiers is unusual among academic commentators on the subject in his categorical rejection of the notion that institutional academic freedom is a meaningful legal concept. J. Peter Byrne, in contrast, argues that "constitutional academic freedom" should be understood primarily as an institutional concept.¹²⁹ Byrne distinguishes the professional norm of "academic freedom," deriving mostly from the research-scientific ideal and articulated in the AAUP's statements, from "constitutional academic freedom," which "should primarily insulate the university in core academic affairs from interference by the state."¹³⁰ In support of this recommendation Byrne points to the parallel concerns of the research-scientific ideal and the First Amendment, which may be seen as analogous means of ensuring that the optimal conditions for the seeking of truth exist.¹³¹ He also contends that courts are "poorly equipped to enforce traditional academic freedom as a legal norm," since they lack the expertise in particular academic areas that is necessary for the process of peer review used to enforce academic freedom as a professional norm.¹³² Byrne finds support for his recommendation of deference to institutional decision-making in both academic abstention doctrine¹³³ and state constitutional provisions for university autonomy, discussed in more detail below.¹³⁴ Byrne considers the recent case law on constitutional academic freedom incoherent¹³⁵ and symptomatic of a general "demise of constitutional academic freedom";¹³⁶ *Urofsky*, in particular, involved "the very type of 'governmental intrusion into the intellectual life of a university'" that, in Byrne's view, the Supreme Court has repeatedly rejected.¹³⁷ Byrne hails *Grutter* as "the most important victory to date for institutional academic freedom."¹³⁸

127. Hiers, *supra* note 7, at 37. One unfortunate example is the Fourth Circuit's decision in *Urofsky* to side with state governments and administrators rather than with faculty members. *See id.* at 102–03.

128. Hiers, *supra* note 4, at 565–67.

129. Byrne, *supra* note 7, at 255.

130. *Id.* Cf. Van Alstyne, *supra* note 41, at 79–82 (comparing AAUP's 1940 *Statement*, *supra* note 40, with Supreme Court case law on academic freedom).

131. Byrne, *supra* note 5, at 260–62, 264.

132. *Id.* at 288, 306–07.

133. *Id.* at 323–27.

134. *Id.* at 327–31; *see also infra* Part II.

135. Byrne, *supra* note 7, at 79.

136. *Id.* at 132; *see also id.* at 122–34.

137. *Id.* at 112.

138. *Id.* at 116. Cf. Fuentes-Rohwer & Charles, *supra* note 2, at 146 ("Rather than elevating one policy preference over another, in the name of the Constitution, it is clear to us that the courts should defer these decisions to those state actors with the knowledge and expertise in this area."); *see also id.* at 170 ("Absent a showing of bad faith, universities must be trusted to make these

Unlike both Hiers and Byrne, David M. Rabban considers constitutional academic freedom to have two aspects, individual and institutional.¹³⁹ This is because the professional norm, from which Rabban understands the constitutional doctrine to be correctly derived, involves real but only limited freedom for individual faculty; their autonomy is constrained but their freedom secured by collective—institutional—mechanisms such as peer review.¹⁴⁰ One of Rabban's chief contributions to the academic freedom debate has been to highlight the importance of this distinction between autonomy and freedom at individual and institutional levels.¹⁴¹ In most respects, Rabban is in agreement with Byrne, although in keeping with his stress on constrained autonomy, Rabban views courts as more competent than Byrne implies¹⁴² and, moreover, understands any institutional incompetence to cut both ways: "Universities . . . are not in a particularly good position to balance other social values against academic freedom."¹⁴³ For this reason, Rabban recommends some judicial deference to institutional decision-making on matters of academic concern, but advises a lesser degree of deference than Byrne does¹⁴⁴ and indicates that virtually no deference should be accorded the academic decisions of lay trustees.¹⁴⁵

The final commentator to be considered was also one of the earliest on the subject, but his views, together with those of Rabban, accord most closely with the approach taken here. Writing in 1983, Matthew T. Finkin, like Byrne and Rabban, traced the concept of "academic freedom" to the German research-scientific model that influenced the professional norm promoted by the AAUP.¹⁴⁶ Like Rabban, Finkin contends that this concept must be differentiated from claims of university autonomy.¹⁴⁷ But Finkin does not take the position that university autonomy is not a legal principle; rather, he traces its origins both to early Supreme Court statements regarding speech and association rights in the educational context¹⁴⁸

difficult choices.").

139. Rabban, *supra* note 32, at 1412; Rabban, *supra* note 13, at 280.

140. Rabban, *supra* note 32, at 1409; Rabban, *supra* note 13, at 234.

141. Rabban, *supra* note 32, at 1409; Rabban, *supra* note 13, at 234.

142. See Rabban, *supra* note 13, at 283–95. See *id.* at 287 ("[J]udges should override 'a genuinely academic decision' only if 'it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.'") (quoting *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985)).

143. Rabban, *supra* note 32, at 1419.

144. Rabban, *supra* note 13, at 300.

145. *Id.* at 285 ("Byrne may be correct that some administrators are presumptively competent to apply professional criteria in judging academic speech, but this presumption weakens as one moves up the hierarchy of university administration, and it is invalid as to trustees.").

146. See Finkin, *supra* note 7, at 822–29.

147. *Id.* at 818 ("Institutional autonomy and academic freedom are related but distinct ideas. Indeed, while they reinforce one another at some points, they may straightforwardly conflict at others.").

148. *Id.* at 829 ("The claim of secular institutions of higher education to be free of the reach of state power draws support from two different sources. The first is the general liberty, associated with the prerogatives of private property, of institutions to devote themselves to the aims charted for them by their founders and trustees The second source is founded in

and to early judicial decisions recognizing the proprietary rights pertaining to the private trusts and corporate charters that created private colleges and universities in America and affirming principles of tolerance and diversity—cases that Finkin reads as articulating a commitment to “institutional pluralism.”¹⁴⁹ Finkin is more critical of the institutional dimension of the concept of academic freedom than is Byrne, and he lays more stress than Rabban does on the importance of distinguishing between institutional actors in recognizing rights of university autonomy.¹⁵⁰ Finkin states:

The potential evil of the theory of “institutional” academic freedom lies in this very lack of differentiation [between the institutional acts of lay trustees and the institutional acts of self-governing faculty groups], because, “the interests insulated are not necessarily those of teachers and researchers but [are those] of the administration and governing board; the effect is to insulate managerial decision making from close scrutiny, even in cases where the rights or interests of the faculty might be adverse to the institution’s administration.”¹⁵¹

Finkin’s point is similar to the suggestions offered in the previous section about the best reading of the Supreme Court’s apparently inconsistent recent statements on the subject of institutional academic freedom. It is difficult to dispute that the foundational links between academic freedom and the First Amendment, in *Sweezy* and *Keyishian*, drew heavily on the professional norm, which in turn derived from the German model and the research-scientific paradigm.¹⁵² This provenance cannot be reconciled with the indisputable recent turn toward recognition of the right as, at least in part, an institutional prerogative without making Finkin’s distinction between the collective faculty as an institutional body and the institutional administration, and identifying the faculty as holders of the institutional right. That right should be understood to involve two types of prerogatives: a presumption of validity for academic decisions challenged by individuals and made by self-governing faculty bodies at public institutions and a presumption of expertise and validity for academic decisions made by self-governing faculty boards that conflict with legislative or other government actions.¹⁵³ In neither case should the presumption be irrebuttable; a showing that the decision-making body acted for other than professional reasons or that its policy or action contravenes other established rights or important public policies should be allowed to overcome the presumption. The suggestion here is simply that the prerogative’s constitutional significance should be candidly recognized and considered in any interest balancing that occurs.

academic freedom in the traditional sense.”); *see also id.* at 830–40.

149. *Id.* at 833.

150. *Id.* at 849–57.

151. *Id.* at 851 (quoting Matthew W. Finkin, *Some Thoughts on the Powell Opinion in Bakke*, 65 *ACADEME* 192, 196 (1979)).

152. *See supra* notes 27–42, 55–67 and accompanying text.

153. This component of the suggested prerogative draws on the example of university autonomy law but locates the prerogative in faculty rather than regents or trustees. *See discussion infra* notes 180–181 and accompanying text.

The California approach, as Parts II and III explain, complicates this picture. The California state constitution grants the university's Regents—a lay body—something close to autonomy from many types of government interference. California courts have arguably expanded this autonomy even further than the state constitution warrants. Still, as state actors, the Regents are under a variety of legal constraints, as well as extralegal pressures. The reasons for the autonomy granted the Regents and the extent to which these countervailing forces offset it, as well as the relations of this dynamic to the various principles underlying the concept of academic freedom, are the subjects of Parts II and III.

II. AUTONOMY OF AND CONSTRAINTS ON THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

A. Constitutional status and general limitations on autonomy

Article IX, section 9, of California's constitution entrusts the Board of Regents of the University of California "with full powers of organization and government" of the university.¹⁵⁴ California courts have consistently read this constitutional provision as providing the Regents with significant legal, managerial, and academic autonomy. This Part describes the history of the original grant of this power to the Regents and the policies lying behind that decision before turning to the constraints on the Regents' autonomy, a discussion continued in Part III.

The University of California did not always have constitutional status. Article IX, section 4, of California's first state constitution, adopted in 1849, provided for legislative establishment of a state land-grant university.¹⁵⁵ Nineteen years later, following hastily enacted legislation intended to take advantage of the land-grant deadline established by the Morrill Act,¹⁵⁶ the California legislature passed an Organic Act chartering the University of California.¹⁵⁷ This statute made a mostly appointive Board of Regents the governing board of the University of California

154. CAL. CONST. art. IX, § 9(a).

155. This section provided in part,

The Legislature shall take measures for the protection, improvement, or other disposition of such lands as have been or may hereafter be reserved or granted by the United States . . . to the State for the use of a University; and the funds accruing from the rents or sale of such lands . . . shall be and remain a permanent fund, the interest of which shall be applied to the support of said University, with such branches as the public convenience may demand for the promotion of literature, the arts and sciences, as may be authorised [sic] by the terms of such grant. And it shall be the duty of the Legislature, as soon as may be, to provide effectual means for the improvement and permanent security of the funds of said University.

CAL. CONST. art. IX, § 4 *available at* http://www.ss.ca.gov/archives/level3_const1849txt.html.

156. Morrill Act, ch. 130, § 5, 12 Stat. 503 (1862), *amended by* CAL. CONST. art. IX, § 9. *See* DOUGLASS, *supra* note 44, at 3, 35–40, 46.

157. Organic Act, 1868 Cal. Stat. 148. An organic law or act is one creating a government or government agency. For an extensive online archive relating to the foundation and development of the University of California, *see* The History of the California Master Plan for Higher Education, http://sunsite.berkeley.edu/uchistory/archives_exhibits/masterplan/index.html. *See also* Part II.C *infra*.

and provided for an Academic Senate to manage the university.¹⁵⁸ For the next nine years, the university and its governance were legislative creatures, under the relatively direct control of the state legislature.

During the 1870s, allegations of Regental mismanagement and corruption led to legislative investigations resulting in a variety of proposed statutory alterations to the university structure established in 1868.¹⁵⁹ One rejected bill would have provided for elected Regents holding office for four-year terms.¹⁶⁰ Further proposals for reform surfaced during a constitutional convention held amid widespread public dissatisfaction with the legislature in 1879. The amendments to California's constitution resulting from this convention included extensive amendments to Article IX. Most significantly, the amendments added a new section 9 incorporating by reference many of the provisions of the Organic Act and elevating the university to the status of a constitutionally defined public trust to be kept "entirely independent of all political or sectarian influence."¹⁶¹

Although Article IX, section 9, was amended in 1918 to delete references to the 1868 Organic Act and to refine the definitions of the university's and Regents' functions, the current section 9 is substantially similar to this 1879 version. Section 9 now reads, in pertinent part:

(a) The University of California shall constitute a public trust, to be administered by the existing corporation known as "The Regents of the University of California," with full powers of organization and government, subject only to such legislative control as may be necessary to insure the security of its funds and compliance with the terms of the endowments of the university . . .

. . . .

(f) The Regents of the University of California shall . . . have all the powers necessary or convenient for the effective administration of its trust, including the power . . . to delegate to its committees or to the faculty of the university, or to others, such authority or functions as it may deem wise. . . . The university shall be entirely independent of all political or sectarian influence and kept free therefrom in the appointment of its regents and in the administration of its affairs . . .¹⁶²

The California delegates responsible for the 1879 amendment, like their predecessors in Michigan, seem to have decided to provide the university with insulation from "political or sectarian influence"¹⁶³ not only to avert future political

158. Organic Act, 1868 Cal. Stat. 248.

159. See DOUGLASS, *supra* note 44, at 51–55.

160. *Id.* at 54–55.

161. *Id.* at 61–72.

162. Section 9 now also defines the composition of an advisory committee to assist the Governor in selecting Regents for appointment, § 9(e), and provides for twelve-year terms in office for the eighteen appointed Regents, § 9(b), as well as for a maximum of two additional student and faculty members of the Board, appointed by the appointive Regents for variable terms, § 9(c).

163. CAL. CONST. art. IX, § 9(f).

scandals but also to ensure that the institution would develop into an asset bringing the state cultural status, economic advantage, and civic health.¹⁶⁴ Although arguments for autonomy based on the research-scientific paradigm also surfaced during the debates over the previous decade, the delegates do not ultimately seem to have given priority to this model, which might have indicated placing some constitutional constraints on the authority of the lay Regents.¹⁶⁵ Rather, the delegates appear to have been motivated primarily by democratic ideals and by a form of competitive state patriotism,¹⁶⁶ a variant of the institutional pluralism that Finkin identifies in early legal justifications for recognizing the autonomy of private trust-based educational institutions.¹⁶⁷ Despite the dominance of the democratic and competitive federalist ideals at the 1879 convention, the research-scientific ideal continued to shape institutional practice within the University of California, particularly early in the twentieth century, as will be discussed in Part II.C below.

A number of other states in the Midwest and West also attempted to give their land-grant universities constitutional status in the mid and late nineteenth century.¹⁶⁸ Not all of these states' courts, however, have been as willing as California's to interpret applicable constitutional provisions as granting the governing boards of their public institutions a significant degree of legal autonomy from legislative control.¹⁶⁹ California judicial decisions have referred to the university, identified with its Regents, as "a branch of the state itself,"¹⁷⁰ "intended

164. See DOUGLASS, *supra* note 44, at 61–72. In insulating the university from "political and sectarian influence," the California delegates adopted the rationale advanced by Michigan lawmakers in support of their earlier decision to grant their own public university constitutional status. GLENNY & DALGLISH, *supra* note 50, at 19 (listing California among the states that "attempted to follow Michigan's lead" in conferring strong constitutional status on their land-grant universities). See also DOUGLASS, *supra* note 44, at 64 ("Enthralled with Michigan's 1849 definition of its university as a 'coordinate branch of state government,' . . . [Regent Joseph Winans, who drafted the 1879 amendments,] advocated a similar level of autonomy for the University of California."). In 1840, a Michigan legislative committee, reporting on methods of improving the University of Michigan's academic status and achievements, had suggested that "[w]hen legislatures have legislated directly for colleges, their measures have been as fluctuating as the changing materials of which the legislatures were composed [I]t is not surprising that State universities have hitherto . . . failed to accomplish, in proportion to their means, the amount of good that was expected of them." GLENNY & DALGLISH, *supra* note 50, at 17–18. Ten years after this report, just after California ratified its first constitution, the Michigan Constitution was amended to provide the University of Michigan with constitutional status and thus to reduce the legislature's power over the institution. *Id.* at 18.

165. See DOUGLASS, *supra* note 44, at 51–54, 61–62, 68–70; see also discussion *supra* notes 27–42 and accompanying text.

166. See *supra* notes 48–53 and accompanying text; see also DOUGLASS, *supra* note 44, at 61–72; GLENNY & DALGLISH, *supra* note 50, at 17–18.

167. Finkin, *supra* note 7, at 833.

168. GLENNY & DALGLISH, *supra* note 50, at 14–19.

169. *Id.* at 31–34. See also Valerie L. Brown, *A Comparative Analysis of College Autonomy in Selected States*, 60 ED. LAW REP. 299, 301–10 (1990) (examining Colorado, Kentucky, New Jersey, New York, and Texas).

170. *Pennington v. Bonelli*, 15 Cal. App. 2d 316, 321 (1936).

to operate as independently of the state as possible.”¹⁷¹ The California Attorney General has characterized the Regents and the university as a “branch of the state government equal and coordinate with” the legislature, the judiciary, and the executive.¹⁷² Relying on characterizations such as these, California courts have prevented numerous legislative attempts to regulate the university as a legal entity by interpreting such legislation as inconsistent with Article IX, section 9.¹⁷³ Despite a widespread sense among commentators that university autonomy in general is now threatened or in decline,¹⁷⁴ California courts continue to recognize the Regents’ autonomy and either to invalidate enactments conflicting with Article IX, section 9, or to recognize the university’s immunity to state and local regulation.¹⁷⁵

These courts have, to be sure, expressly recognized a few areas in which the legislature’s acts may permissibly affect the University of California, that is, areas of constraint on the Regents’ constitutional autonomy.¹⁷⁶ These areas fall into three main categories. First, the legislature has certain fiscal powers over the university. The legislature’s appropriation power “prevent[s] the Regents from compelling appropriations for salaries,”¹⁷⁷ and the University of California is subject to some legislative control to ensure the security of its funds.¹⁷⁸ Second,

171. *Regents of Univ. of Cal. v. Superior Court*, 17 Cal. 3d 533, 537 (1976).

172. 30 Op. Cal. Att’y Gen. 162, 166 (1957).

173. *See, e.g., San Francisco Labor Council v. Regents of the Univ. of Cal.*, 26 Cal. 3d 785 (1980) (holding Education Code prevailing wage rate requirement inapplicable to University because violating Art. IX, § 9); *Regents of the Univ. of Cal. v. City of Santa Monica*, 143 Cal. App. 3d 130 (1976) (holding Regents exempt from local building codes, zoning regulations, and permit and inspection fees in constructing improvements solely for educational purposes).

174. *See CLARK KERR & MARIAN L. GADE, THE GUARDIANS: BOARDS OF TRUSTEES OF AMERICAN COLLEGES AND UNIVERSITIES* 25–26 (1989); GLENNY & DALGLISH, *supra* note 50; HIGHER EDUCATION: FROM AUTONOMY TO SYSTEMS (James A. Perkins & Barbara Baid Israel eds., 1972); Estelle A. Fishbein, *New Strings on the Ivory Tower: The Growth of Accountability in Colleges and Universities*, 12 J.C. & U.L. 381 (1985). For a different view, see David W. Breneman, *Are the States and Public Higher Education Striking a New Bargain?*, Ass’n of Governing Bds. of Universities and Colleges, Public Policy Paper No. 04-02 (July 2004), available at <http://www.agb.org>.

175. *See Kim v. Regents of the Univ. of Cal.*, 80 Cal. App. 4th 160 (2000) (holding Regents constitutionally exempt from overtime wage regulation); *Favish v. Regents of the Univ. of Cal.*, 53 Cal. Rptr. 2d 757 (Cal. Ct. App. 1996) (holding consumer fraud statute inapplicable to the Regents) (depublished); *Scharf v. Regents of the Univ. of Cal.*, 286 Cal. Rptr. 227 (Cal. Ct. App. 1991) (holding University of California-specific open files law invalid as conflicting with Art. IX, § 9). Efforts to give other states’ public institutions constitutional status continue into the present. In 2000, Hawaiian voters approved “a constitutional amendment to allow the University of Hawaii to formulate policy and exercise control over its internal operations without prior legislative authorization,” i.e., to grant the university constitutional status. CENTER FOR PUBLIC HIGHER EDUCATION TRUSTEESHIP AND GOVERNANCE, STATE GOVERNANCE ACTION REPORT, AUTUMN 2001 UPDATE 14 (2001), <http://www.agb.org/content/center/pages/action.pdf>.

176. *See generally* Horowitz, *supra* note 6, at 27–31.

177. *San Francisco Labor Council v. Regents of Univ. of Cal.*, 163 Cal. Rptr. 460, 461 (Cal. 1980), *citing* *Cal. State Employees’ Ass’n v. Flournoy*, 108 Cal. Rptr. 251 (Cal. Ct. App. 1970).

178. *Braun v. Bureau of State Audits*, 79 Cal. Rptr. 2d 791 (Cal. Ct. App. 1998), *cert. denied*, 528 U.S. 818 (1999).

general “police power regulations governing private persons and corporations may be applied to the university.”¹⁷⁹ Finally, legislation “may be made applicable to the university when the legislation regulates matters of statewide concern not involving internal university affairs.”¹⁸⁰

The term “internal university affairs” in California law appears to embrace, but is also certainly broader than, the primarily academic and not managerial sphere of the “four essential freedoms” discussed by Justice Frankfurter in his *Sweezy* concurrence.¹⁸¹ It also bears some resemblance to the concept of “municipal affairs” used by state courts to assess the validity of charter cities’ enactments as against conflicting state law.¹⁸² But neither analogy is exact. “Internal university affairs” clearly includes more than just academic affairs, so the federal case law addressing the concept of academic freedom is not always readily adaptable to the University of California context. Nor is the extensive California case law defining the boundaries of “matters of statewide concern” as against “municipal affairs,” even though the California Supreme Court itself has relied on this analogy in at least one opinion addressing the scope of “internal university affairs.”¹⁸³ It is probably most useful to understand “internal university affairs” simply as the judicially created definition of the appropriate realm of the University of California’s constitutional autonomy. As the next sections indicate, the nebulousness of this category remains a problem; California courts have not satisfactorily defined the concept or its relation to the issues raised by federal case law, including the “four essential freedoms” enumerated by Justice Frankfurter in his *Sweezy* concurrence.¹⁸⁴

179. *San Francisco Labor Council v. Regents of the Univ. of Cal.*, 608 P.2d 277, 279 (Cal. 1980).

180. *Id.*; see also *Tolman v. Underhill*, 249 P.2d 280, 282 (Cal. 1952) (holding university-established loyalty oath for faculty employees invalid because teacher loyalty is a “subject of general statewide concern” and therefore subject to State-legislated loyalty oath instead); *Regents of the Univ. of Cal. v. Superior Court*, 551 P.2d 844, 846 (Cal. 1976) (holding university to be lacking “immunity” from statewide usury laws); Horowitz, *supra* note 6, at 27–31; Scully, *supra* note 6, at 928–29.

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

182. CAL. CONST. art XI, § 5(a). See also, e.g., Horowitz, *supra* note 6, at 34–35 & nn.42–46.

183. See *San Francisco Labor Council*, 608 P.2d at 279 (Cal. 1980). See also Horowitz, *supra* note 6, at 36; Scully, *supra* note 6, at 938–39. Scully notes that in *San Francisco Labor Council*, the California Supreme Court

ignored several significant differences between the “independence” of charter cities and the “independence” of the University. First, the University, unlike charter cities, depends on the legislature for its funds. Second, charter cities elect their local governing authorities as well as their representatives in the state legislature; University Regents are appointed by the governor. Third, the University is a multiunit, multicity employer that transcends local boundaries. To the extent that its employees are to be treated as public employees, they should be treated as employees of the state rather than of any given municipality. Finally, and most significantly, the relationship between separate levels of government is different from that between separate branches of government at the same level.

Scully, *supra* note 6, at 938–39 (citations omitted).

184. *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring).

Besides judicial interpretations of the scope of Article IX, constraints on the Regents' constitutional autonomy include other state constitutional provisions, legislative enactments, and extralegal norms and practices. The following sections discuss these constraints in turn, starting with legislative enactments before moving to the extralegal shared-governance tradition and then to early judicial opinions addressing the Regents' sphere of autonomy. Open government laws and the recent sunshine amendment to the California Constitution, which will also certainly affect the Regents' autonomy and decision-making, are the subjects of Part III.

B. Statutory constraints on the University of California

The University of California was not the state's first institution of higher education. That honor belongs to two "normal schools," training schools for elementary school teachers, founded in San Jose and San Francisco in the 1850s and merged into a San Jose campus, the California State Normal School, in 1862.¹⁸⁵ In 1871, this school came under the jurisdiction of the State Board of Education; from this point forward, a network of affiliated training schools, including polytechnic institutes, was gradually established throughout the state.¹⁸⁶ The normal schools were renamed "State Colleges" in 1935.¹⁸⁷ The democratic ideal discussed above—which saw the purpose of higher education as the provision of useful instruction open to all—clearly drove the foundation and expansion of this network of schools to an even greater degree than it had driven the establishment of University of California, in the foundation of which principles of openness, competitive exclusivity, and research-scientific goals had all been significant.¹⁸⁸

In 1960, after decades of research on the subject, the state legislature adopted a groundbreaking Master Plan for Higher Education in California that brought the State Colleges, California's community colleges, and the University of California together under a single statutory umbrella.¹⁸⁹ This legislation, the Donahoe Act of 1960,¹⁹⁰ established a Coordinating Council for Higher Education,¹⁹¹ which

185. See DOUGLASS, *supra* note 44, at 55–57; Historic Milestones, The California State University, <http://www.calstate.edu/PA/info/milestones.shtml> (last visited Oct. 25, 2005); About the CSU, <http://www.calstate.edu/PA/info/system.shtml> (last visited Oct. 25, 2005); SJSU History, www.sjsu.edu/about_sjsu/history/ (last visited Oct. 25, 2005).

186. See Historic Milestones, The California State University, *supra* note 185.

187. *Id.*

188. See DOUGLASS, *supra* note 44, at 53–57.

189. For a detailed online history of the research leading up to the Master Plan, see The History of the California Master Plan for Higher Education, at http://sunsite3.berkeley.edu/uchistory/archives_exhibits/masterplan/index.html (last visited Oct. 25, 2005). See also DOUGLASS, *supra* note 44, at 246–326, app. 1.

190. Donahoe Act of 1960, ch. 49, 1961 Cal. 392 (codified as amended at CAL. EDUC. CODE §§ 66000–67400 (West 2002 & Supp. 2005)).

191. Donahoe Act of 1960, ch. 49, 1961 Cal. 392, 396–97 (codified as amended at CAL. EDUC. CODE §§ 66000–67400 (West 2002 & Supp. 2005)). In 1976, this Council became the California Postsecondary Education Commission (CPEC). In 1995, the act creating the CPEC was amended to clarify its mission: "to assure the effective utilization of public postsecondary

became the model for similar coordinating bodies in other states,¹⁹² and defined the respective roles of the State Colleges (renamed the California State University in 1982), the community college system, and the University of California.¹⁹³ Under the Master Plan as enacted in 1960 and continued to the present, the University of California is the only branch of this system empowered to grant doctoral degrees and thus the only branch to which the research-scientific ideal pertains with full force.¹⁹⁴

In 1991, the legislature revised the Donahoe Act and relocated it to a different part of the California Education Code.¹⁹⁵ Strictly speaking, although the Donahoe Act defines the role of the University of California within California's educational system, it does not purport to regulate the university. Section 67400 of the Act provides that "[n]o provision of this part shall apply to the University of California except to the extent that the Regents of the University of California, by appropriate resolution, make that provision applicable."¹⁹⁶ Another part of the Education Code,¹⁹⁷ however, contains provisions specific to the University of California in some areas in which the university has been determined not to possess legal autonomy, including certain fiscal matters,¹⁹⁸ the issuance of bonds,¹⁹⁹ and specific employment matters.²⁰⁰ This part of the Education Code also provides for the procedures to be followed at the Regents' meetings, discussed in more detail below.²⁰¹

C. Nonlegal constraints on the Regents: the shared governance tradition

The University of California's internal governance structure has been determined primarily not by the state legislature or in the courts but within the university itself, at the Regental level, and below. Nevertheless, its current internal governance structure was significantly inspired by early legislation. Clearly drawing on the German and research-scientific models, the 1868 Organic Act chartering the university provided that, under the Regents,

[a]ll the Faculties and instructors of the University shall be combined

education resources, thereby eliminating waste and unnecessary duplication, and to promote diversity, innovation, and responsiveness to student and societal needs through planning and coordination." See CPEC website, at <http://www.cpec.ca.gov/SecondPages/CommissionHistory.asp> (last visited Oct. 25, 2005).

192. See DOUGLASS, *supra* note 44, at 314.

193. Donahoe Act of 1960, ch. 49, 1961 Cal. 392, 396 (codified as amended at CAL. EDUC. CODE §§ 66000–67400 (West 2002 & Supp. 2005)).

194. See The Heart of the 1960 Master Plan for Higher Education, at http://sunsite.berkeley.edu/uchistory/archives_exhibits/masterplan/heart.html (last visited Oct. 25, 2005).

195. CAL. EDUC. CODE §§ 66000–67400 (West 2002 & Supp. 2005).

196. *Id.* § 67400.

197. *Id.* §§ 92000–92856.

198. *Id.* §§ 92100–92160.

199. *Id.* §§ 92400–92571.

200. *Id.* §§ 92600–92620.

201. *Id.* §§ 92020–92033.

into a body which shall be known as the Academic Senate, which shall . . . be presided over by the President . . . and which is created for the purpose of conducting the general administration of the University and memorializing the Board of Regents; regulating, in the first instance, the general and special courses of instruction, and to receive and determine all appeals couched in respectful terms from acts of discipline enforced by the Faculty of any college. . . . [E]very person engaged in instruction in the University, whether resident professors, non-resident professors, lecturers or instructors, shall have permission to participate in its discussions; but the right of voting shall be confined to the President and the resident and non-resident professors.²⁰²

When the Organic Act was absorbed into the Constitution in 1879, references to the Academic Senate disappeared from Article IX, section 9. Although the Academic Senate continued to exist following the 1879 amendment, it would not be delegated powers like those it had held under the 1868 Organic Act for another forty years.²⁰³ Benjamin Ide Wheeler, President of the University of California from 1899 to 1919, preferred to deal with the Regents himself rather than to delegate significant powers to the faculty, and no formal Regental delegation of authority to the Academic Senate occurred during his presidency.²⁰⁴

After Wheeler's retirement, the Academic Senate requested more formal authorization of its governance powers.²⁰⁵ In 1920, with the cooperation of the university's new President, the Regents approved a Standing Order officially delegating to the Academic Senate internal administrative roles similar to those envisioned by the 1868 Organic Act.²⁰⁶ Some histories of higher education refer to this event as the "Berkeley Revolution" because it inaugurated an unprecedented system of shared governance within a prominent public university and seemed to realize in a particularly high-profile forum the ideal of professorial self-governance designed to secure academic freedom that had inspired the formation of the AAUP.²⁰⁷

The Regents' 1920 Standing Order remains substantially in effect today as Standing Order 105.²⁰⁸ In its current form, the order gives the Senate power to set

202. 1868 Cal. Stat. 255–56.

203. See John Aubrey Douglass, *Shared Governance at the University of California: An Historical Review*, Center for Studies in Higher Education, Paper CHSE1–98, at 2–5 (Mar. 1998), <http://repositories.cdlib.org/cshe/CHSE1–98/> (last visited Oct. 26, 2005).

204. See *id.* See also ANGUS E. TAYLOR, *THE ACADEMIC SENATE OF THE UNIVERSITY OF CALIFORNIA: ITS ROLE IN THE SHARED GOVERNANCE AND OPERATION OF THE UNIVERSITY OF CALIFORNIA* 1–2 (1998).

205. See TAYLOR, *supra* note 204, at 2–5.

206. See *id.* at 5; Douglass, *supra* note 203, at 5.

207. See Douglass, *supra* note 203, at 5; David A. Hollinger, *Faculty Governance, The University of California, and the Future of Academe*, 87 *ACADEME* 3 (May–June 2001), available at <http://www.aaup.org/publications/Academe/01mj/mj01holl.htm> (noting that the Berkeley division of the University of California academic "senate is one of the most powerful in American higher education" and examining the potential of institutional academic senates as mechanisms for ensuring faculty solidarity and autonomy).

208. Regents of the University of California, *Standing Orders*, available at

standards for the conferral of degrees; to authorize all curricular decisions with the input of faculty involved; to appoint, promote, and grant tenure to faculty; to establish committees to advise chancellors and the university President regarding budget matters; and to lay before the Regents, through the President, “its views on any matter pertaining to the conduct and welfare of the University.”²⁰⁹

Although these powers do not differ significantly from those the Regents granted the Senate in 1920,²¹⁰ the relationship among the Regents, the university’s President, and the Academic Senate has not been static since that time. The balance of power among the three has fluctuated with changes in the composition of the Regents, in the identity and administrative style of successive university presidents, and in the physical expansion and institutional reorganization of the university, as well as with broader cultural, political, and economic shifts.²¹¹ In 1995, for instance, the Regents appeared to many observers to exercise an unusual amount of unilateral power when they approved SP-1 and SP-2, the policies ending affirmative action practices in university admission and hiring.²¹²

However surprising it may have been, the Regents’ approval of SP-1 and SP-2 underlined the Regents’ technical legal supremacy over the other branches of the University of California governance, namely, the President and the Academic Senate.²¹³ Because of their constitutionally derived supremacy, the Regents are

<http://www.universityofcalifornia.edu/regents/bylaws/standing.html>.

209. *Id.*

210. *See* Douglass, *supra* note 203, at 5.

211. *See generally* TAYLOR, *supra* note 204 (tracing shifts in the relationship from 1920 to the 1970s). *See also* WILLIAM TROMBLEY, *THE CALIFORNIA HIGHER EDUCATION POLICY CENTER, UC REGENTS: LOTS OF POMP, LITTLE CIRCUMSTANCE—CAN A PART-TIME BOARD COPE WITH UC’S COMPLEX PROBLEMS?* (1995), available at http://www.capolicycenter.org/ct_1095/cts_1095.html (discussing historical shifts in the amount of power assumed by the Regents); William Rodarmor, *Who Runs UC? The Faculty and the President Take on the Regents*, *CAL. MONTHLY*, Feb. 1996, at 14–16 (discussing similar historical shifts against the backdrop of the Regents’ 1995 approval of SP-1 and SP-2, prohibiting affirmative action in admissions and hiring at the University).

The Regents’ recent ascendancy might be part of a broader trend. Several commentators have noted that college and university governing bodies such as the Regents are increasingly borrowing their guiding principles from the world of business and management, rather than from the world of academia and the AAUP. *See, e.g.*, GOVERNING PUBLIC COLLEGES AND UNIVERSITIES: A HANDBOOK FOR TRUSTEES, CHIEF EXECUTIVES, AND CAMPUS LEADERS 77–112 (Richard T. Ingram ed., 1993); KERR & GADE, *supra* note 174, at 126–27; Joan Wallach Scott, *The Critical State of Shared Governance*, 88 *ACADEME* 41 (July–Aug. 2002), available at <http://www.aaup.org/publications/Academe/02ja/02jasco.htm>; Hollinger, *supra* note 207. This managerialization of university structure and of the Regents’ governance style, some commentators contend, is eroding the solidarity and strength of faculty governing bodies. *See* Hollinger, *supra* note 207; Scott, *supra* at 44 (noting that a “devaluation of the faculty is one of the means by which the restructuring of universities is taking place”). *See also* discussion *supra* note 42.

212. *See* Rodarmor, *supra* note 211.

213. The Regents have the power to appoint and remove the President; their controversial removal of President Clark Kerr in 1967 is perhaps their most notorious exercise of this power. *See* TAYLOR, *supra* note 204, at 69–82. Similarly, despite the considerable influence it has wielded at various points since 1920, the Academic Senate continues to exist at the Regents’ pleasure.

the focus of most analyses of institutional governance, and suggestions regarding the reform of college and university governance focus on them as the site of needed change. Of course, any such reform can occur only through constitutional amendment or, to a lesser degree, through judicial interpretation of Article IX, section 9, of the California Constitution. Some attempts at such reform have been made, but most have effected only modest redefinitions of the Regents' authority. For example, a 1972 constitutional amendment instituted a requirement of Senate approval of the Governor's Regental nominees.²¹⁴ A 1974 amendment reduced the Regents' terms in office from sixteen to twelve years.²¹⁵ Most attempts at more radical structural governance reform have failed. In the 1990s, a proposed initiative constitutional amendment that would have changed the eighteen appointive Regents' offices to elective offices failed to gain the signatures needed for inclusion on the 1994 and 1995 ballots.²¹⁶

Arguably, the security of the Regents' legal supremacy in academic decision-making has not always been and should not be as clear as it now seems to be. Cases such as *Sweezy* and *Keyishian*, as well as later academic freedom statements, might at one time have been read to suggest a federal constitutional basis for potentially competing principles of faculty self-determination. Yet despite the strong tradition of shared governance at the University of California, California courts never reached such a conclusion, as the next section explains.

214. See Historical Notes, CAL. CONST. art. IX, § 9 (1996).

215. See *id.* See also Scully, *supra* note 6, at 931.

216. See Edward Epstein, *Backlash on UC Regents' Affirmative Action Vote: Initiative Would Make Them Elected Officials*, S.F. CHRONICLE, Aug. 29, 1995; Laura Nader & David Flynn, *Should the Regents Be Elected?*, CAL. MONTHLY, Feb. 1994, at 15–16; Virginia Matzek, *A Fortress Under Assault: Electing the UC Regents*, BERKELEY INSIDER, Jan.–Feb. 1994, at 27–30. See also OFFICE OF THE CALIFORNIA SECRETARY OF STATE, TITLE AND SUMMARY, UNIVERSITY OF CALIFORNIA, GOVERNANCE: INITIATIVE CONSTITUTIONAL AMENDMENT, Oct. 5, 1993 (on file at the Institute of Governmental Studies Library, University of California, Berkeley).

One obstacle to substantial legal reform of the Regents' role and powers may be the flexibility of the current system of "shared governance." Ceding some control to the Academic Senate has allowed the Regents to position themselves as a body whose power is limited in fact, if not in law. This positioning may make the legally absolute nature of the Regents' power seem to be a less threatening force. Such positioning is not necessarily opportunistic. One commentator has suggested that the Regents, the President, and the Academic Senate have been able to develop a flexible system of shared governance characterized more by consensus than by political maneuvering because all three bodies share common goals for the University: the "maximization of the University's autonomy" and the "pursuit of preeminence." Martin Trow, *Governance in the University of California: The Transformation of Politics Into Administration*, 11 HIGHER EDUC. POL'Y 201, 201 (1998). Another commentator suggests an alternative explanation for the Regents' ability to avoid substantial reform: University boards of trustees and regents are increasingly characterizing themselves as bound and limited by managerial or business necessity, rather than by deference to faculty concerns. Scott, *supra* note 211; see also Scully, *supra* note 6, at 935–36.

D. Judicial interpretations of Article IX, section 9: affirming plenary
Regental autonomy in controversies over faculty politics

Well before *Sweezy* and *Keyishian*, California courts had concluded that the University of California's constitutional autonomy limited the ability of those outside the institution to control its academic operation.²¹⁷ Although California courts later concluded that the state's interest in uniform regulation of its employees' speech and association required limits on university autonomy,²¹⁸ the courts subsequently affirmed this autonomy, identified as vested in the Regents, against a faculty claim to control over the university's curriculum.²¹⁹ In this way, the courts transformed the doctrine of university autonomy from a principle that protected the institution from outside interference and that could be aligned with the professional norm of academic freedom into a doctrine of plenary Regental power. California courts have also deviated from federal academic freedom law in another way: they have never expressly appealed to the First Amendment or to its counterparts in the California Constitution in these cases.²²⁰ Instead, cases addressing university autonomy and professorial politics in California have focused exclusively on the University of California's constitutional status under Article IX, section 9.

In *Wall v. Regents of the University of California*, decided in 1940, the California Court of Appeal relied on the Regents' constitutional autonomy to reject a citizen's petition for a writ of prohibition to prevent the university's continued employment of philosopher and antiwar activist Bertrand Russell.²²¹ The court in *Wall* focused on the Regents' status as a corporation, suggesting that the courts had no more authority to dictate this body's internal affairs than they would have to dictate the internal affairs of a private corporation.²²² The court did not suggest any link between university autonomy and free speech guarantees, much less faculty self-governance. Rather, even though it concerns a public university, *Wall* clearly falls into the tradition of proprietary autonomy doctrine—committed to an institutional pluralist ideal—identified by Finkin in his history of the concept of university autonomy.²²³

217. See *Wall v. Regents of the Univ. of Cal.*, 102 P.2d 533 (Cal. Ct. App. 1940).

218. See *Tolman v. Underhill*, 249 P.2d 280 (Cal. Ct. App. 1952).

219. See *Searle v. Regents of the Univ. of Cal.*, 100 Cal. Rptr. 194 (Cal. Ct. App. 1972).

220. The California Constitution currently guarantees the "liberty of speech [and] press." CAL. CONST. art. I, § 2. The constitution guarantees to the people "the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good." *Id.* § 3. These guarantees were included in the original 1849 constitution. See *id.* § 9 (providing that "[e]very citizen may freely speak, write, and publish his sentiments on all subjects"); *id.* § 10 (guaranteeing the same rights as the current Art. I, § 3). The text of the 1849 constitution is available online at the California State Archives, http://www.ss.ca.gov/archives/level3_const1849txt.html.

221. 102 P.2d 533 (Cal. 1940).

222. *Id.* at 534 ("The authority of the directors in the conduct of the business of a corporation must be regarded as absolute when they act within the law. The court cannot substitute its judgment for that of the directors.").

223. See Finkin, *supra* note 7, at 830–40.

Judge McComb's concurring opinion in *Wall* hints at the tension between this approach and academic freedom principles. McComb wrote: "[I]t is a matter of international knowledge that the University of California has under the guidance of the board of regents become one of the great universities of the world and that the university possesses a faculty composed of educators of the highest standing."²²⁴ More directly than the majority, McComb appears to endorse competitive evaluation, presumably according to professional academic standards, as a way of measuring the success of California's system and therefore also the validity of the Regents' autonomy. But he rejects the notion that faculty self-governance is necessary to attain that type of success. Attributing the university's preeminence to the Regents and their independence, McComb ignores an equally important source of the institution's distinctiveness: the participation of its "educators of the highest standing" in a system of shared governance.²²⁵

Twelve years after *Wall*, in the leading California faculty loyalty oath case, the California Supreme Court established an important limitation on the university's autonomy but again did not link its reasoning to free speech or association principles or to self-governance. In *Tolman v. Underhill*,²²⁶ decided the same year as *Adler*, the California Supreme Court invalidated a university-specific loyalty oath imposed by the Regents.²²⁷ The court invalidated this oath because it conflicted with a law of statewide applicability "occup[ying] the field" and requiring a less stringent loyalty oath of all public employees.²²⁸ Like the court in *Wall*, the court in *Tolman* grounded its resolution of the controversy entirely in the question of the Regents' constitutional autonomy.²²⁹ Because the court in *Tolman* established a limit on the university's autonomy, it might seem that the decision protected the speech and association rights of professors at the expense of the Regents' power. But the court in *Tolman* did not suggest that the professors in that case had valid individual free expression claims or any interest in self-governance, much less that constraints on their academic decision-making should be considered any "special concern of the First Amendment."²³⁰ Instead, the court held that University of California employees were just like other state employees.²³¹

224. 102 P.2d at 534 (McComb, J., concurring).

225. *Id.*; see also discussion *supra* Part II.C.

226. 249 P.2d 280 (Cal. 1952).

227. *Id.* at 283.

228. *Id.* at 281 ("[W]e are satisfied that [the faculty members'] application for relief must be granted on the ground that state legislation has fully occupied the field and that university personnel cannot properly be required to execute any other oath or declaration relating to loyalty than that prescribed for all state employees."). The Regents' loyalty oath required faculty members to state that they were not Communist Party members as a condition of continued employment. *Id.* The State loyalty oath, in contrast, simply required public employees to affirm their support for the U.S. and California Constitutions. *Id.* at 281 n.1.

229. See *id.* at 712.

230. *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

231. 249 P.2d at 283. Indeed, this was the faculty members' argument. See Timeline: Summary of Events of the Loyalty Oath Controversy 1949-54, http://sunsite.berkeley.edu/uchistory/archives_exhibits/loyaltyoath/symposium/timeline/short.html (part of the online exhibit The University Loyalty Oath: a 50th anniversary retrospective, <http://sunsite.berkeley.edu/>

Although both *Wall* and *Tolman* tacitly rejected the ideal of faculty self-governance, neither case required the California courts to determine whether such university autonomy as the university did possess was vested solely in the Regents or in the Regents together with the faculty as a group. Nor did either case require the courts to decide whether faculty interests grounded in the First Amendment or its equivalent in the California Constitution should constrain Regental autonomy.²³² Not until the 1970s did any dispute between the Academic Senate and the Regents requiring such a determination reach the state courts.²³³ The dispute in which this question eventually arose was a straightforward struggle between faculty and Regents over control of the curriculum and faculty appointment.

In 1968, the Academic Senate, which at that time was vested by the Regents with the power to authorize courses but not the power to appoint faculty, had approved a course involving a large number of lectures by Black Panther leader Eldridge Cleaver.²³⁴ In response, under pressure from then Governor Ronald Reagan, state political leaders, and the university President, the Regents adopted a resolution preventing courses involving more than one lecture by a faculty member not appointed by the Regents from being offered for credit.²³⁵ Cleaver taught the course anyway, and students and faculty sought a writ of mandate to prevent the Regents from withholding credit for it.²³⁶ In *Searle v. Regents of the University of California*, decided in 1972, the California Court of Appeal affirmed denial of the student and faculty petition. The court concluded that the university autonomy vested in the Regents by Article IX, section 9, authorized the Regents' action. The court rejected the petitioners' suggestion that the Regents' delegation of curricular control to the Academic Senate also implied Senate control over the granting of credits for courses approved by the Senate.²³⁷ Just as important for purposes of the present discussion, it also rejected their free expression claims: "The constitutional right of freedom of expression includes, of course, the right to hear as well as the

uchistory/archives_exhibits/loyaltyoath/index.html).

232. It is true that the decision in *Tolman* followed several years of highly visible faculty opposition to the Regents' loyalty oath and that the case was brought by faculty members. See TAYLOR, *supra* note 204, at 16–35. But in 1950, even before *Tolman* was decided, the Academic Senate, on the initiative of members of the faculty sympathetic to the Regents' position, had approved a Senate statement declaring members of the Communist Party "not acceptable as members of the faculty." See *id.* at 29; Horowitz, *supra* note 6, at 28 n.20. The Academic Senate only disavowed this position on Communist faculty in a 1969 resolution, two years after the corresponding statewide oath had been invalidated. See TAYLOR, *supra* note 204, at 99–104. Soon after deciding *Tolman*, the California Supreme Court upheld a statewide loyalty oath resembling the oath struck down in *Tolman*. *Fraser v. Regents of Univ. of Cal.*, 249 P.2d 283 (Cal. 1952). In 1967, the court struck down this statewide oath on First Amendment grounds. *Vogel v. County of L.A.*, 434 P.2d 961 (Cal. 1967). During this period, then, the Academic Senate and the Regents were largely in accord on the question of faculty political qualifications, so any question of their respective claims to primacy did not arise.

233. *Searle v. Regents of Univ. of Cal.*, 100 Cal. Rptr. 194 (Cal. Ct. App. 1972).

234. See *id.* at 451; TAYLOR, *supra* note 204, at 82–84.

235. See TAYLOR, *supra* note 204, at 85–92.

236. *Searle*, 100 Cal Rptr. at 195.

237. *Id.* at 195–96.

right to speak. But it does not include the right to receive or to bestow university credit for the listening to or for the choosing of the speaker.”²³⁸

In confirming the Regents’ power on the basis of the University of California’s constitutional autonomy, the decision in *Searle* defined the Regents’ sphere of power as including at least some of the “four essential freedoms” Justice Frankfurter enumerated in his *Sweezy* concurrence.²³⁹ In rejecting the notion that the petitioners had any valid constitutional claims, the court indicated that it did not consider those freedoms—control over faculty appointments and curricular control—to have any constitutional status apart from their reservation to the Regents under state constitutional law. The court declined to draw the connection between the *Sweezy* freedoms and faculty decision-making, as well as between those freedoms and the First Amendment, that arguably emerged in statements such as Justice Powell’s *Bakke* opinion later in the 1970s.²⁴⁰ *Searle* pointed the way to a very different path for state law pertaining to the University of California.²⁴¹ The result in *Searle* seems problematic because it does not

238. *Id.* at 196.

239. *Sweezy v. N.H.*, 354 U.S. 234, 263 (Frankfurter, J., concurring).

240. See discussion *supra* Part I.C.

241. *Contra* Byrne, *supra* note 5, at 327–31 (arguing that the Supreme Court’s constitutionalization of academic freedom should be viewed as an outgrowth of State constitutional grants of university autonomy to institutional governing boards, and arguing that “[c]onstitutionalizing academic freedom . . . involve[d] . . . adaptation of the traditional legal supports of the college to preserve intellectual independence for the modern university”). See also *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (noting that “[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, . . . but also, and somewhat inconsistently, on autonomous decision-making by the academy itself”).

In the shadow of this apparent expansion of Regental power, university faculty and the Academic Senate recently reasserted their individual and collective academic freedom. In summer 2003, the Academic Senate adopted a new internal policy on academic freedom, APM-010, to replace a policy statement drafted in 1934 and adopted in 1944. See General University Policy Regarding Academic Opportunities: Academic Freedom, <http://www.ucop.edu/acadadv/acadpers/apm/apm-010.pdf>; see also Richard D. Atkinson, Academic Freedom and the Research University, http://www.ucop.edu/ucophome/coordrev/policy/Academic_Freedom_Paper.pdf (describing history of new policy and former policy). The prior policy statement mentioned neither faculty governance nor the relationship between Regents and faculty. Although it was drafted and adopted several decades before the decision in *Searle*, the previous version of APM-010 is aligned with the result and reasoning in that case. The previous policy stated in part:

Essentially the freedom of a university is the freedom of competent persons in the classroom. In order to protect this freedom, the University assumes the right to prevent exploitation of its prestige by unqualified persons or by those who would use it as a platform for propaganda. It therefore takes great care in the appointment of its teachers.

Atkinson, at 2–3. The new APM-010, in contrast, focuses on the autonomy of faculty members:

Academic freedom requires that teaching and scholarship be assessed by reference to the professional standards that sustain the University’s pursuit and achievement of knowledge. The substance and nature of these standards properly lie within the expertise and authority of the faculty as a body. The competence of the faculty to apply these standards of assessment is recognized in the Standing Orders of The Regents, which establish a system of shared governance between the Administration

acknowledge the possibility of competing constitutional interests or policies in the context of academic decision-making. And California law has never satisfactorily resolved this tension between the competing notions of participatory governance, both within and outside institutions of higher education, and Regental autonomy, derived from principles of political insulation, competitive federalism, and institutional pluralism.²⁴² Part III discusses some other ways in which California courts have avoided addressing this conflict, before concluding with a discussion of the reasons they may shortly need to address it.

III. ACCOUNTABILITY AND UNIVERSITY AUTONOMY IN THE CALIFORNIA CONTEXT

A. Open government laws and higher education

The adjacent guarantees of freedom of expression and petitioning rights in both the U.S. and California Constitutions reflect the close connection between the circulation of information and the functioning of a democratic government.²⁴³ Citizens unable to learn what their government is doing cannot effectively mobilize to challenge those government actions that they do not endorse. Citizens given access to only certain approved categories of information are similarly hobbled in their decision-making and political action. Both the research-scientific paradigm and the democratic model of higher education, in slightly different and sometimes competing ways, may be understood to reflect conceptions of higher education as an institutional mechanism for ensuring the existence and wide dissemination of the kind of accurate information needed for full civic participation.²⁴⁴ These understandings are part of the basis for the federal courts' approach to academic freedom and constrained university autonomy as "a special concern of the First Amendment."²⁴⁵

Beginning in the late nineteenth century, lawmakers in the United States began to put into place complementary mechanisms for ensuring free information flow in

and the Academic Senate. Academic freedom requires that the Academic Senate be given primary responsibility for applying academic standards, subject to appropriate review by the Administration, and that the Academic Senate exercise its responsibility in full compliance with applicable standards of professional care.

Members of the faculty are entitled as University employees to the full protection of the Constitution of the United States and of the Constitution of the State of California. These protections are in addition to whatever rights, privileges, and responsibilities attach to the academic freedom of university faculty.

Academic Freedom, *supra*. This proposed replacement explicitly asserts both individual and collective faculty academic freedom rights. But the statement describes these rights as professional, not legal, entitlements. *Id.* The proposed APM-010 seems to acknowledge that any successful faculty legal challenge to Regental assertions of power in the academic sphere will likely need to draw on individual faculty assertions of constitutional speech rights, which the statement reserves to faculty as distinct from academic freedom rights.

242. See Finkin, *supra* note 7, at 833; see also *supra* notes 164–167 and accompanying text.

243. See *supra* note 220.

244. See generally Byrne, *supra* note 5, at 273–83.

245. *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967); see also *supra* Parts I.B–E.

the interest of informed civic participation: open-government, or sunshine, laws.²⁴⁶ One congressional sponsor of the federal Freedom of Information Act (FOIA) acknowledged the overlap between open government and First Amendment concerns when he noted that “[t]he thrust of the Act is the right of the public to know. Inherent in the right to speak and print is the right to know, without which the other two rights become pretty empty.”²⁴⁷ A 2004 sunshine amendment to the California Constitution, Proposition 59, underlines the relationship between the public’s right to access information about government actions and the public’s assembly and petitioning rights by placing statements of open-government principles alongside the statements of assembly and petitioning rights in Article I of the California Constitution.²⁴⁸

Sunshine laws are an increasingly significant part of the legal landscape. The federal government and all fifty states have enacted such laws.²⁴⁹ Sunshine laws include laws requiring certain public bodies to make some of their records available to the public (open-records laws) and laws requiring certain governmental meetings to be open to the public (open-meetings laws). The federal FOIA, enacted in 1967, was initially an open-records law.²⁵⁰ The FOIA inspired a number of similar state laws, including California’s open-records law—the Public Records Act—enacted in 1968.²⁵¹ However, California’s open-meetings laws predated the addition of open-meetings provisions to the FOIA in 1976;²⁵² the Brown Act, requiring California local government bodies’ meetings to be open to the public, was enacted in 1953.²⁵³ An open-meetings law applying to state government bodies and first enacted in 1967 has been known since 1980 as the Bagley-Keene Open Meeting Act.²⁵⁴ Moreover, a handful of states—now including California—have enshrined open-government policies in their state

246. See Harlan Cleveland, *The Costs and Benefits of Openness: Sunshine Laws and Higher Education*, 12 J.C. & U.L. 127, 132 (1985).

247. Edward M. Schaffer et al., Comment, *A Look at the California Records Act and Its Exemptions*, 4 GOLDEN GATE U. L. REV. 203, 204 (1974) (quoting 35 U.S.L.W. 2590 (April 11, 1967)).

248. Article I, section 3(a), of the California Constitution provides that “[t]he people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.” The amendments approved in Proposition 59 constitute section 3(b) of Article I. For relevant portions of the wording of this amendment, see note 319 *infra*.

249. As noted, California is among the states that now also include open government provisions in their constitutions. See CAL. CONST. art. I, § 3(b); FLA. CONST. art. I, § 24; LA. CONST. art. XII, § 3; MONT. CONST. art. II, §§ 8–9; N.H. CONST. art. VIII.

250. 5 U.S.C. § 552.

251. CAL. GOV’T CODE §§ 6250–6270 (West 1995). For a discussion of the relationship between the federal Freedom of Information Act and state open government acts, see Christopher P. Beall, Note, *The Exaltation of Privacy Doctrines Over Public Information Law*, 45 DUKE L.J. 1249, 1284–95 (1996). See also Cleveland, *supra* note 246, at apps. A–C (summarizing state open government laws as of 1985).

252. 5 U.S.C. § 552b (2000).

253. CAL. GOV’T CODE § 54950 (West 1995).

254. *Id.* §§ 11120–11132.

constitutions.²⁵⁵ In 2004, California voters approved Proposition 59, which amended the state constitution to provide that “[t]he people have the right of access to information concerning the conduct of the people’s business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.”²⁵⁶ The amendment also includes a number of other aspects discussed briefly in Part III.D. Most important, since it is a constitutional provision, it applies directly to the constitutionally insulated Regents of the University of California, unlike some of the open-government legislation that preceded it.

Most sunshine laws now in force, like the California and federal versions, date from the mid-twentieth century, the period during which federal courts began to draw connections between academic freedom and constitutional guarantees.²⁵⁷ Not only do sunshine laws overlap in purpose and chronology with academic freedom law, they also directly affect the operation of public institutions, whose administrations are generally subject to their provisions.²⁵⁸ Some of the problems raised by application of open-government laws to public institutions, of course, are not specific to the college or university context. For instance, both federal and state open-government laws recognize that the First Amendment-aligned values that they serve may sometimes collide with other basic interests, such as interests in privacy, public safety, and national security.²⁵⁹ To protect these interests, legislatures have built exemptions into both open-records laws and open-meetings laws. But because of the fundamental nature of the interests that motivated the enactment of open-government laws in the first place, courts have traditionally asserted that these exemptions are to be construed narrowly.²⁶⁰ Proposition 59 enshrines this presumption, providing that “[a] statute, court rule, or other authority . . . shall be broadly construed if it furthers the people’s right of access, and

255. See *supra* note 249.

256. CAL. CONST. art. I, § 3(b)(1).

257. Cleveland, *supra* note 246.

258. See generally *id.*; see also James C. Hearn & Michael K. McLendon, *Sunshine Laws in Higher Education*, 91 *ACADEME* 4 (May–June 2005) (“One university attorney told us, ‘I joke . . . that seven people fully exercising their rights under the California public records act could shut the university down.’”).

259. See, e.g., CAL. GOV’T CODE § 6250 (West, 1995) (“In enacting this chapter [the Public Records Act], the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.”). See also CAL. CONST. art. I, § 3(b)(3) (“Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 . . .”). On the conflict between national security and open government principles, see, e.g., Ava Barbour, *Ready . . . Aim . . . FOIA! A Survey of the Freedom of Information Act in the Post-9/11 United States*, 13 *B.U. PUB. INT. L.J.* 203 (2004); Thomas James Connors, *The End of Access? The Government’s New Information Policy*, 88 *ACADEME* 4 (July–Aug. 2002); Christina E. Wells, “National Security” *Information and the Freedom of Information Act*, 56 *ADMIN L. REV.* 1195 (2004).

260. See *Dept. of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). Some have suggested that judicial assertions of a presumption in favor of disclosure no longer reflect the prevailing judicial practice. See, e.g., Beall, *supra* note 251. Proposition 59 was in part an attempt to reverse this trend. See CAL. CONST. art. I, § 3(b)(2).

narrowly construed if it limits the right of access.”²⁶¹

In the college and university context, open-government laws may collide not only with privacy, public safety, and national security interests, but also with interests in academic freedom and university autonomy. Although it did not involve a public university, *University of Pennsylvania v. EEOC* illustrates one way in which the professional norm of academic freedom could be used to defend an institution’s tight control over information circulation.²⁶² The remaining sections of Part III examine other collisions between the principles of open access to information and university autonomy in the California courts and legislature before discussing the implications of Proposition 59 for both university autonomy and academic freedom.

B. Open-meetings laws and the University of California

Although the Regents are subject, with some qualifications, to California’s open-meetings laws, California courts appear never to have enforced these laws against the Regents or any other governing body at the University of California.²⁶³ In two challenges to university action brought under these laws, the state’s courts construed relevant statutory provisions to prevent their application to the bodies in question and avoided addressing any constitutional issues that might have been raised by the challenges. By reading the open-government laws narrowly, the courts in a general sense respected university autonomy. But however advisable the courts’ avoidance of the state constitutional questions posed may have been as a matter of judicial policy, it has had unfortunate results for university autonomy doctrine.²⁶⁴ The courts’ conclusions in this area imply an excessively broad scope for Regental autonomy, insulating the Regents from public scrutiny. More important, in these cases the courts passed up excellent opportunities to clarify the scope of the Regents’ autonomy by addressing and resolving the overlapping and conflicting concerns underlying the principles of university autonomy and governmental openness.

Before 1971, it was not clear whether the University of California was exempted from the coverage of the Bagley-Keene Act, California’s open-meetings law.²⁶⁵ In 1971, an amendment to Article IX of the state constitution added section

261. CAL. CONST. art. I, § 3(b)(2).

262. 493 U.S. 182, 196–97 (1990) (discussing University of Pennsylvania’s arguments regarding need for confidentiality of tenure review materials); *see also* Scharf v. Regents of Univ. of Cal., 286 Cal. Rptr. 227, 231 & n.6 (Cal. Ct. App. 1991) (discussing AAUP position on confidentiality of peer evaluations in tenure review process).

263. *See* Cleveland, *supra* note 246, at 133 (noting that “[o]nly in Colorado and California . . . have regents . . . been adjudged to be beyond the scope of the sunshine laws”). *See also* ROBERT M. HENDRICKSON, *THE COLLEGES, THEIR CONSTITUENCIES AND THE COURTS* 18–22 (1991).

264. On justifications for the federal version of the avoidance canon, *see* Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CAL. L. REV. 397, 446–55 (2005).

265. The Bagley-Keene Open Meetings Act (Bagley-Keene Act) does not expressly provide

9(d),²⁶⁶ which requires that Regents' meetings "shall be public, with exceptions and notice requirements as provided by statute."²⁶⁷ Pursuant to this provision, in 1976 the legislature enacted legislation imposing particular procedural requirements on meetings of the Regents.²⁶⁸ In 1982, the legislature amended Education Code section 92030 to provide that the Bagley-Keene Act's procedural requirements do apply to meetings of the Regents, with a few exceptions.²⁶⁹

The first case in which a California court addressed the application of these provisions to the University of California involved faculty participation in university governance. In *Tafoya v. Hastings College of the Law*, a group of students at Hastings College of the Law sued to have the law school's faculty meetings declared subject to the open-meeting laws.²⁷⁰ These meetings had not previously been announced or open, but the students believed that they had been used to advise the Hastings Board of Directors on "educational policy and expenditures."²⁷¹ The court held that the students had failed to state a cause of action, paradoxically defining the Hastings faculty meetings as both subject to Educational Code section 92030 and not subject to this section. The faculty meetings were not subject to the section because they were not meetings of the

for or exclude the University of California from its coverage. It provides that it applies to "every state body unless the body is specifically excepted from that provision by law or is covered by any other conflicting provision of law." CAL. GOV'T CODE § 11127 (West 1995). *But see* *Tafoya v. Hastings College of the Law* (concluding from subsequent amendment of the statute that "[w]hen the Bagley-Keene Act was first enacted in 1967, the Legislature did not intend it to govern the meetings of the Regents.") 236 Cal. Rptr. 395, 399 (Cal. Ct. App. 1987).

266. *See* Historical Notes, CAL. CONST. art. IX, § 9 (1996).

267. CAL. CONST. art. IX, § 9(d).

268. CAL. EDUC. CODE §§ 92020-92033 (West 2005); *see also* *Tafoya*, 236 Cal. Rptr. at 399.

269. *See* CAL. EDUC. CODE § 92032. These include an exception for "special meetings," for which the Regents must provide public notice, including information about the agenda of the meeting, but which are otherwise undefined by subject matter. *Id.* § 92032(a). Also excepted are "closed sessions," at which the Regents "consider or discuss" subjects including: litigation, when open discussion of the litigation would be "detrimental to . . . the public interest" *id.* § 92032(b)(5); the appointment and review of "university officers or employees," including "the president of the university," *id.* § 92032(b)(7); and matters "relating to complaints or charges brought against university officers or employees, . . . unless the officer or employee requests a public hearing," *id.* § 92032(b)(8). Other matters as to which "closed sessions" may be held include matters concerning national security, *id.* § 92032(b)(1); the conferral of honorary degrees, *id.* § 92032(b)(2); gifts and bequests, *id.* § 92032(b)(3); the purchase or sale of investments for endowment and pension funds, *id.* § 92032(b)(4); and the disposition of property, when open discussion could "adversely affect the [R]egents' ability to . . . dispose of the property on the terms . . . they deem to be in the best public interest," *id.* § 92032(b)(6). Closed sessions are also permitted for determining the membership of committees, *id.* § 92032(e); and proposing a student regent, *id.* § 92032(f). The Regents also need not give public notice of meetings of presidential search or selection committees. CAL. EDUC. CODE § 92032(g). Not all public colleges and universities conduct confidential presidential searches. *See* Michael J. Sherman, *How Free Is Free Enough? Public University Presidential Searches, University Autonomy, and State Open Meeting Acts*, 26 J.C. & U.L. 665 (2000) (examining benefits and drawbacks of confidential presidential searches).

270. Hastings is a law school campus of the University of California system. *Tafoya*, 236 Cal. Rptr. at 395.

271. *Id.* at 396.

Regents or its subcommittees, the only bodies that section 92030 identified as university bodies subject to the Bagley-Keene Act.²⁷² The students had also, however, argued that if the faculty and governing Hastings Board were not subject to section 92030, then they must be “state bodies” directly subject to the Bagley-Keene Act and required to hold open meetings.²⁷³ The court rejected this argument, reasoning that Hastings was defined in the Donahoe Act as “affiliated” with the University of California, and that its governing bodies were therefore not separate state bodies but bodies legally subordinate to the Regents, which in turn were subject to section 92030.²⁷⁴ Under this logic, it appears that neither the Bagley-Keene Act nor section 92030 will be construed to apply to the meetings of any University governing bodies other than the Regents.

This result is perplexing. On the one hand, it seems to be in tacit alignment with the understanding of academic freedom suggested in Part I, which explained the principle as consisting at least in part of an attitude of deference to the decisions and practices of self-governing faculty bodies, in the absence of allegations that they are engaged in something other than legitimate academic self-governance.²⁷⁵ Moreover, under decisions like *Searle*,²⁷⁶ University of California faculty collectively have little legal autonomy; their power is narrowly circumscribed and probably may even be retroactively redefined by the Regents. Arguably, there is a lesser public interest in holding such a body accountable for its decisions through enforcement of open-meetings requirements. Yet the court in *Tafoya* did not explicitly rest its conclusions on these grounds. Instead, it presented those conclusions as based on a pure question of statutory interpretation and on characterization of the Hastings faculty committee as a mere creature of the Regents. Reiteration of the Regents’ broad power was not strictly necessary, since Regental action was not even at issue in the case, but referring to the breadth of that power provided a powerful principle supporting the court’s conclusion.²⁷⁷ While consistent with the relationship between faculty and Regents articulated in *Searle*,²⁷⁸ the approach taken in *Tafoya* sets an unfortunate example; it illustrates the length to which California courts will go to construe open-government laws narrowly in the context of university decision-making and represents a missed opportunity to clarify the nature and scope of the Regents’ authority.

The California Supreme Court subsequently confirmed these concerns in a case

272. *Id.* at 399–400. Examining the legislative history of Education Code § 92030, the court concluded, “[W]e infer that the Legislature intended that only the meetings of the Regents and certain committees would be subject to the open meeting requirements of the Bagley-Keene Act and that the faculty meetings would be exempt.” *Id.* “Regents” is defined as “the Board of Regents of the University of California and its standing and special committees or subcommittees, other than groups of not more than three regents appointed to advise and assist the university administration in contract negotiations.” CAL. EDUC. CODE § 92020 (West 2005).

273. *Id.* at 400–01.

274. *Id.* at 401.

275. See discussion *supra* Parts I.D–E.

276. *Searle v. Regents of Univ. of Cal.*, 100 Cal. Rptr. 194 (Cal. Ct. App. 1972).

277. *Tafoya*, 236 Cal. Rptr. at 397–99.

278. *Searle*, 100 Cal. Rptr. at 195–97.

involving an attempt to have the Bagley-Keene Act applied directly to the Regents. In *Regents of the University of California v. Superior Court*, decided in 1999, the court construed the Bagley-Keene Act so as to prevent its post hoc application to a Regental decision.²⁷⁹ The case involved challenges to the Regents' 1995 adoption of SP-1 and SP-2, the University of California policies abolishing the use of affirmative action in admissions and hiring. A taxpayer and a student newspaper sued to have the Regents' action declared void under the Bagley-Keene Act, which clearly applied to the decision in question.²⁸⁰ The plaintiffs alleged that, before the open meeting at which the Regents formally voted on the policies, the Regents had "made a collective commitment or promise to approve" the policies via serial telephone calls, which constituted a serial meeting in violation of the Act.²⁸¹ The plaintiffs sued under sections of the Bagley-Keene Act providing interested persons with (1) a right of action to sue "for the purpose of stopping or preventing . . . threatened violations" of the Act²⁸² and (2) a right of action to have decisions based on violations of the Act declared "null and void," if any such action for nullification was commenced "within 90 days from the date the [body's] action was taken."²⁸³ The plaintiffs filed their suit seven months after the Regents' meeting. They explained the delay as resulting from fraudulent concealment of the serial meeting and argued that this estopped the Regents from relying on the thirty-day bar.²⁸⁴

The California Supreme Court concluded that the plaintiffs had not stated a cause of action under either section of the Bagley-Keene Act.²⁸⁵ The court concluded that the section providing a right of action for the purpose of "stopping or preventing . . . threatened violations" of the Act extended "only to present and future actions and violations and not past ones."²⁸⁶ The plaintiffs sought to invalidate an action already taken, so they could not proceed under this section. The court also concluded that the legislature had not intended the thirty-day statute of limitations to be subject to extensions on an equitable basis.²⁸⁷

The court in *Regents v. Superior Court* did not allude to the Regents' constitutional autonomy, although this principle would obviously have supported its narrow construction of the Bagley-Keene Act.²⁸⁸ By presenting its analysis as a

279. 976 P.2d 808 (Cal. 1999).

280. *Id.* at 813–14.

281. *Id.* at 812.

282. CAL. GOV'T CODE § 11130(a) (West 1995).

283. *Id.* § 11130.3(a) (West 1995) (amended 1999).

284. *Regents v. Superior Court*, 976 P.2d at 811.

285. *Id.* at 825.

286. *Id.* at 816–18. The court concluded, "In sum, section 11130(a) grants a right of action: (1) to stop or prevent a present or future violation of the act—but *not* to reach back to a past one; and (2) to determine whether the act is applicable to a present or future action—but *not* a past one." *Id.* at 818.

287. *Id.* at 818–23. The court noted, "[S]ection 11130.3(a)'s 30-day statute of limitations would not preclude the doctrine of fraudulent concealment if the statute contained the doctrine in terms or at least by implication. But it does not do so. The statute is altogether devoid of reference or even allusion to the doctrine." *Id.* at 823.

288. The court instead based its conclusions on lengthy examinations of the language of the

context-free matter of statutory interpretation, the court was able to avoid either addressing or resolving the tension between principles of autonomy and openness in the university context. To the insulation from legislative control afforded the Regents by Article IX, section 9, the court in *Regents v. Superior Court* added a partial insulation from more general public inquiry. The effect of the majority's conclusion was to weaken the Regents' accountability, or in other words, to strengthen their autonomy. Such a result is consistent with a very general and unelaborated notion of Regental autonomy, but it is in tension with the policies underlying the open-government laws, which seek to foster civic participation. Moreover, it is also in tension with the original purposes of Article IX, section 9. The 1879 amendment giving the Regents autonomy sought to insulate them from political or sectarian influence, not from public accountability.²⁸⁹ The court in *Regents v. Superior Court* avoided addressing any of these issues, despite their relevance to the question presented.

The pattern of avoidance illustrated by *Tafoya* and *Regents v. Superior Court* seems unfortunate. As the next section will show, in the context of open-records laws California courts have been more willing to consider the constitutional issues implicated by application of sunshine provisions to the university. Yet the results have been only slightly more illuminating regarding the scope of Regental autonomy.

C. Open-records laws and the University of California

Eight years before *Regents v. Superior Court*, in the context of a challenge to the validity of an open-records law applying to the University of California, a California Court of Appeal explicitly discussed the concept of academic freedom in a decision with a result similar to that in *Regents v. Superior Court*, strongly affirming the Regents' autonomy.²⁹⁰ In this case, the court managed to avoid confronting the contradictions noted above not by avoiding constitutional issues but by divorcing academic freedom and the public-records laws from their relationships to constitutional principles. The court defined the prevailing interest—university autonomy—as constitutional and the countervailing interests—access to information and academic freedom—as statutory and prudential.

Certainly the provisions of the California Public Records Act (PRA) are statutory. But under cases such as *Tolman*, this does not necessarily exempt the

provisions and their legislative history. Yet the California legislature subsequently amended both provisions under which the plaintiffs in *Regents v. Superior Court* had sued, noting in so doing its intent "to supersede the decision of the California Supreme Court in [*Regents v. Superior Court*]." 1999 Cal. Adv. Legis. Serv. ch. 393 (Deering) (amending Government Code sections relating to open meetings). See also *Shapiro v. San Diego City Council*, 117 Cal. Rptr. 2d 631, 639–40 (Cal. Ct. App. 2002) (referring to the 1999 amendment as a legislative attempt to "undo th[e] ruling" in *Regents v. Superior Court*). The provisions now allow suits to have past actions of bodies declared subject to the Act and extend the time to file actions seeking nullification to 90 days.

289. See discussion *supra* Part II.A.

290. *Scharf v. Regents of Univ. of Cal.*, 286 Cal. Rptr. 277 (Cal. Ct. App. 1991).

University of California or its Regents from those provisions.²⁹¹ Whether or not the University must disclose information requested under the PRA in any given case instead turns on several factors. First, the information must fall within the PRA's definition of "public records."²⁹² Second, the information must not fall within one of the exemptions listed in the PRA.²⁹³ Finally, it appears that a court reviewing a PRA request must be satisfied that disclosure would not infringe the Regents' constitutional autonomy or invade the sphere of "internal university affairs."²⁹⁴

This, at least, was the primary basis for the holding in *Scharf v. Regents of University of California*.²⁹⁵ A 1978 addition to the California Education Code,

291. *Tolman v. Underhill*, 249 P.2d 280, 282–83 (Cal. 1952). The PRA defines the State agencies subject to its requirements as including "every state office, officer, department, division, bureau, board, and commission or other state body or agency, except those agencies provided for in Article IV (except Section 20 thereof) or Article VI of the California Constitution." CAL. GOV'T CODE § 6252(a) (West 1995 & Supp. 2005). (Article IV of the constitution is devoted to the state legislature; article IV, section 20 addresses the state Fish & Game Commission. Article VI of the constitution concerns the state judicial branch.) The PRA's definition of its scope thus does not exempt the university, nor are university records as such included among the enumerated PRA exceptions in the California Government Code. *See id.* § 6254.

292. "Public records" are defined to include "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." CAL. GOV'T CODE. § 6252.

293. Exemptions relevant to the college and university context include exemptions for materials pertaining to pending litigation, *id.* § 6254(b) (West 1995), *amended by* 2005 Cal. Adv. Legis. Serv. ch. 22 (Deering); personnel files, the disclosure of which would constitute an unwarranted invasion of personal privacy, CAL. GOV'T CODE § 6254(c); law enforcement or investigatory records, *id.* § 6254(f); test questions or examination data, *id.* § 6254(g); records exempted by other federal or state law, including evidentiary privilege provisions, *id.* § 6254(k); and records relating to employee and labor relations, defined by the PRA as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics," *id.* § 6252(e); as well as records revealing the agency's "deliberative processes, . . . theories, or strategy," *id.* § 6254(p). Section 6254 was amended in 2005, without any material changes to these exceptions. The PRA also specifically exempts records of state agencies relating to actions taken under section 3560 of the California government code. *See id.* § 3560 (addressing higher education employer-employee relations). Scully has described these provisions as a "curtailing of some University autonomy in an effort to promote a broader societal policy—collective bargaining—which the University itself might never have voluntarily promoted." Scully, *supra* note 6, at 952.

294. *Scharf v. Regents of Univ. of Cal.*, 286 Cal. Rptr. 227 (Cal. Ct. App. 1991). In a 1978 decision, the California Court of Appeal held that a disciplined university employee had a right under the PRA to certain aspects of an "audit report" that the university had compiled about her following her reports of financial irregularity by her supervisors. *Am. Fed'n of State, County, & Mun. Employees v. Regents of Univ. of Cal.*, 146 Cal. Rptr. 42 (Cal. Ct. App. 1978). The court's opinion did not address any argument that disclosure of the audit report would invade the sphere of the University of California's affairs, but its reasoning—a straightforward balancing of the public interest in disclosure of the audit report against the privacy interests implicated—suggested that it assumed the public interest in disclosure to be a matter of statewide and general concern. *Id.* at 44–45. In contrast, under a 1975 California Attorney General opinion, the Regents need not disclose records of any of their fiscal transactions until those transactions are completed. 58 Op. Cal. Att'y Gen. 273 (1975).

295. *Scharf*, 286 Cal. Rptr. at 227.

applicable specifically and only to the University of California, allowed employees access to their own personnel files,²⁹⁶ including letters of recommendation or tenure committee reports, so long as the name and affiliation of any sources were deleted from the records.²⁹⁷ In 1990, a number of former University of California faculty members who had been denied tenure sought access to their files under this law. The Alameda County Superior Court declared the law unconstitutional on its face and an invasion of the Regents' autonomy.²⁹⁸ The state Court of Appeal affirmed, rejecting the faculty members' arguments that the law addressed an area of general statewide concern.²⁹⁹ The court noted that the "diverse and conflicting state statutes pertaining to employee inspection of personnel files . . . do[] not constitute a coherent state scheme uniformly applicable to public and private employers," so that the law at issue could not fairly be characterized as an exercise of the state's police power.³⁰⁰ Citing cases and commentary on academic freedom, the court also noted that "the grant or denial of tenure . . . is a defining act of singular importance to an academic institution,"³⁰¹ or an "internal university affair."³⁰² These facts, the court reasoned, distinguished *Scharf* from *Tolman*, in which the California Supreme Court had held that employee loyalty was not an internal university affair but a matter of statewide concern.³⁰³

Scharf is remarkable, however, not for the above conclusions but for its discussion of the relationship between the autonomy of the university and Regents under the California Constitution and principles of academic freedom developed outside of the University of California context.³⁰⁴ In *Scharf*, the court virtually

296. CAL. EDUC. CODE § 92612 (1995).

297. See *Scharf*, 286 Cal. Rptr. at 231 (quoting the text of the law as enacted in 1978). In 1980, the University of California prevailed in a suit it had brought to have the law declared unconstitutional under Article IX, section 9, despite the Attorney General's argument that the law "reflected a statewide legislative policy favoring access by employees to those records which their employers rely upon in making personnel decisions." Scully, *supra* note 6, at 940 (quoting Notice and Motion for Preliminary Injunction, *Deukmejian v. Regents of the Univ. of Cal.*, No. 26642 (Super. Ct. Cal., filed Jan. 19, 1979)). The Los Angeles Superior Court's decision in this case was not appealed, and the legislature did not repeal the law. A decade later, it was challenged again by the plaintiffs in *Scharf*.

298. See *Scharf*, 286 Cal. Rptr. at 229–30.

299. *Id.* at 232–33. In 1993, in response to *Scharf*, the legislature amended section 92612 of the California Education Code to add subsection (d), which provides that the subsections invalidated in *Scharf* are "not . . . applicable to the University of California unless adopted by the regents." See CAL. EDUC. CODE § 92612 (d) (West 1995).

300. *Scharf*, 286 Cal. Rptr. at 233.

301. *Id.* at 234.

302. *Id.* at 233.

303. *Id.* at 234 (distinguishing *Tolman v. Underhill*, 249 P.2d 280 (Cal. 1952)).

304. The only other California opinion to address explicitly both university autonomy and academic freedom is that of the California Court of Appeal in *Smith v. Regents of the University of California*, 65 Cal. Rptr. 2d 813 (Cal. Ct. App. 1997). In this case, the court considered the permissibility of using mandatory student fees collected by the Regents and disbursed to the Associated Students of the University of California (ASUC) to support political advocacy by student groups. The court found that this use of fees did not violate the First Amendment rights of the fee-paying students because the political activity occurring under the ASUC umbrella was an aspect of the University's educational function and because the Regents, who had made the

equated the category of “internal university affairs” with the domain of institutional academic freedom identified in opinions by courts outside California³⁰⁵ and in nonlegal statements concerning the professional norms of academic freedom, tenure, and peer review.³⁰⁶ But the court in *Scharf* did not link any of these concepts to either state or federal constitutional provisions. Nor did it allude to any of the other interests impelling the development of the professional norm of academic freedom, the federal concept of academic freedom, or even the ratification of Article IX, section 9.³⁰⁷ It also refused to recognize that the plaintiffs had any constitutional or other comparable interest in obtaining access to their tenure review materials.³⁰⁸ Rather, the court in *Scharf* presented its result as dictated by a single state constitutional provision: Article IX, section 9.

This approach, like those taken in *Tafoya*³⁰⁹ and *Regents v. Superior Court*,³¹⁰ extols Regental decision-making autonomy without acknowledging the need for principled constraints, specific to the college and university context, on that autonomy. These constraints are necessary because the reasons for the original grant of autonomy to the Regents do not suggest that their autonomy should be unlimited. In particular, those reasons do not indicate that the Regents should be

funding decision in question, were vested with “considerable discretion . . . to determine how best to carry out the university’s educational mission.” *Id.* at 821. The court in *Smith*, in referring to the United States Supreme Court’s long history of decisions concerning the First Amendment, reasoned that academic freedom precedent indicated that institutions’ academic function was to “foster energetic debate and the free interchange of views.” *Id.* at 819. In *Smith*, as in *Scharf*, the Regents’ autonomy and a principle of academic freedom were found to be aligned. However, the concepts of academic freedom used in each case were different. *Smith* appeals to a notion of academic freedom protecting the speech and association rights of students; *Scharf* appeals to a concept of institutional academic freedom.

Smith was the culmination of roughly a decade of litigation on the issue in California. The Court of Appeal was deciding the case on remand from the California Supreme Court. *Smith v. Regents of the Univ. of Cal.*, 844 P.2d 500 (Cal. 1993). In its 1993 opinion ordering remand, the California Supreme Court had suggested that despite the Regents’ autonomy, the student fees might need to be refunded in certain instances. *Id.* at 505, 517–18. This determination was invalidated by the United States Supreme Court’s decision in *Board of Regents of the University of Wisconsin System v. Southworth*. 529 U.S. 217 (2000) (holding that a refund system is not a constitutional requirement for funding of student groups through mandatory fees at a public college or university).

305. See *Scharf*, 286 Cal. Rptr. at 233–34 (citing, inter alia, *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331, 336 (7th Cir. 1983)).

306. See *id.* at 231, 235 n.9 (citing AAUP’s 1940 *Statement*, supra note 40).

307. See, e.g., *id.* at 232.

308. *Id.* at 235–39. The court distinguished *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990), in which the Supreme Court had rejected a university’s claim that qualified privilege attached to tenure review documents, primarily on the basis that the plaintiffs in that case were asserting violations of the Civil Rights Act’s “policy against discrimination, which Congress has indicated is of the ‘highest priority.’” *Scharf*, 286 Cal. Rptr. at 238 (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974)). The plaintiffs in *Scharf* did not allege that they had been discriminated against on any grounds prohibited by civil rights legislation; they contended that the confidentiality of the review materials violated their rights to due process and privacy, in addition to the Education Code provision at issue. *Scharf*, 286 Cal. Rptr. at 235–37.

309. 236 Cal. Rptr. 395 (Cal. Ct. App. 1987).

310. 976 P.2d 808 (Cal. 1999).

exempted from open-government laws. Such laws exist to secure interests very closely related to those impelling the creation of public institutions of higher education.³¹¹ The purpose of Article IX, section 9, was not to shield the actions of the Regents from public view but to protect the Regents from political or sectarian influence.³¹² Since the statutory provision at issue in *Scharf* applied solely to the University of California, there was no need for the court in *Scharf* to consider the boundaries of the Regents' autonomy by addressing whether the Regents should be immune to similar but less targeted legislation. Rather, it could have simply held the statute invalid under Article IX, section 9, because its exclusive focus on the internal affairs of the University of California and its difference from other statutes governing private colleges' and universities' obligations to their faculty employees³¹³ prevented its interpretation as addressing a matter of statewide concern, unlike the public-employee legislation at issue in *Tolman*.³¹⁴ Thus, the court did not need to venture a definition of "internal university affairs" that drew on academic freedom sources.³¹⁵ Having invoked these sources, the court should also have acknowledged that they might be taken to raise either competing or redundant constitutional concerns, or in other words, that academic freedom is "a special concern of the First Amendment."³¹⁶ At the very least, the court should have explained why it rejected the conclusion that academic freedom has a constitutional dimension.³¹⁷ The course the court took—affirming plenary Regental authority over all internal university affairs, and acknowledging Article IX, section 9, as the only constitutional provision relevant to questions of academic freedom, confidentiality, or access to records at the University of California—is in direct conflict with the approach to institutional academic freedom advocated in Part I of this article. Yet institutional administrative autonomy from legislative

311. See *supra* Part III.A.

312. See *supra* Part II.A.

313. See *Scharf*, 286 Cal. Rptr. at 233 ("Significantly, private universities and colleges, which are subject to the general statute regarding inspection of personnel files, may refuse to disclose peer review information . . .") (citations omitted).

314. See *id.* at 234 (discussing *Tolman v. Underhill*, 249 P.2d 280 (Cal. 1952)).

315. Not only did the court draw on such sources, it emphasized them:

Additionally, and perhaps most importantly, the evaluation of scholarship and the grant or denial of tenure or promotion, unlike the ascertainment of loyalty, is a defining act of singular importance to an academic institution. As one court has stated, "the peer review process is essential to the very lifeblood and heartbeat of academic excellence and plays a most vital role in the proper and efficient functioning of our nation's colleges and universities." [*EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331, 336 (7th Cir. 1983).] The process of peer review, which is closely related to academic freedom, . . . is undoubtedly more essential to the separate and independent existence [of the authority] of the University than some acts that have been found to be within the self-governing authority of the University, such as the fixing of minimum salaries.

Scharf, 286 Cal. Rptr. at 234–35 (citation omitted).

316. *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

317. See *Scharf*, 286 Cal. Rptr. at 231 ("[W]e decline to evaluate the competing contentions [regarding the importance of confidentiality to tenure review] just described, as the dispute is, at bottom, one of policy. Our analysis focuses narrowly upon the specific legal issues that have been raised.")

interference, academic freedom based on a norm of faculty self-governance, and open government are not fundamentally incompatible goals; all that is required to reconcile the principles is careful acknowledgment of, and balancing of, the interests behind each.

Under the recent sunshine amendment to the California Constitution, the course of avoidance followed in all three of the open-government opinions discussed here may no longer be available to California courts. The next section explores the possibility that the amendment could force these courts to address more explicitly the relationships among the competing constitutional principles of university autonomy, academic freedom, speech and association rights, and, now, open government.

D. Ramifications of Proposition 59 for university autonomy doctrine

The inclusion of open-government principles in the California Constitution might require a shift in California courts' approach to the doctrine of university autonomy in cases in which parties seek to have open-government laws applied to the University of California. The sunshine provision now appears in Article I, section 3, of the state constitution, which previously provided simply that "[t]he people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good."³¹⁸ The sunshine provision significantly expands Article I, section 3.³¹⁹ But with the arguable exception of a subdivision affirmatively shielding the legislature from sunshine laws, the amendment is largely a policy statement and a positioning of the

318. CAL. CONST. art. I, § 3(a).

319. In pertinent part, the added language provides:

(b)(1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

(2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

(3) Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 [of Article I]

(4) Nothing in this subdivision supersedes or modifies any provision of this Constitution, including the guarantees that a person may not be deprived of life, liberty, or property without due process of law, or denied equal protection of the laws, as provided in Section 7 [of Article I].

(5) This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this subdivision

(6) Nothing in this subdivision repeals, nullifies, supersedes, or modifies protections for the confidentiality of proceedings and records of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses provided by Section 7 of Article IV, state law, or legislative rules adopted in furtherance of these provisions

CAL. CONST. art. I, § 3(b).

newly declared access right relative to other constitutional rights, rather than a guarantee of particular rights and responsibilities. Those tasks are left to existing open-government legislation.³²⁰

Nevertheless, the amendment does perform two important positive tasks. First, it confers constitutional status on the principles underlying current open-government laws. Formerly, these principles existed mainly in legislative history and judicial opinion and therefore carried relatively little weight. Second, the amendment directly instructs courts to avoid narrow interpretations of statutes furthering the public's right to access. Enshrining open-government principles in the Constitution, and commanding courts to construe them generously, would seem to require courts to consider these interests in cases involving open-government laws.³²¹ Together, these components of the sunshine amendment could steer courts away from results like those reached in the cases considered in the preceding sections, and particularly from results like that in *Regents v. Superior Court*.³²²

The amendment provides scant guidance, however, for the alternative course that courts should take in balancing access rights against most other constitutional guarantees. To be sure, the amendment acknowledges some potential conflicts with other constitutional principles and indicates that when they arise, certain other rights, such as individual rights to privacy and due process, should take priority over the public's access rights.³²³ But the implications of these provisions for other unenumerated conflicts are ambiguous. Do these directives imply that access rights are to be subordinated to all other constitutional guarantees in case of conflict? Or that they should be subordinated only to those constitutional guarantees traditionally identified as fundamental by federal and state courts alike? The latter inference seems more reasonable but does not resolve the problem of how such an interest balancing should be conducted in practice. And conflicts seem inevitable.

For instance, although the amendment does not directly conflict with the terms of Article IX, section 9, a court faced with a challenge to legislation implicating both of these sections of the constitution will need to decide which section should

320. *Id.* § 3(b)(5).

321. See Claire Miller, *Sunshine Amendment Puts Burden of Proof on Government for Public Records*, University of California Berkeley Graduate School of Journalism (Nov. 2, 2004), http://journalism.berkeley.edu/projects/election2004/archives/2004/11/sunshine_amendm.html.

322. See discussion *supra* Part III.C. Supporters of a draft amendment identical in relevant respects to Proposition 59 suggested that, in line with these principles of openness, the amendment would place the burden on public bodies to justify exemptions from the open-government laws, instead of placing that burden on citizens seeking information. See *Beef Up Access to Records*, L.A. TIMES, Jan. 17, 2003, at B16. The amendment achieves this goal in part by requiring the inclusion of "findings demonstrating the interest protected by [any] limitation [on openness] and the need for protecting that interest" in any statute or ruling adopted after the amendment. CAL. CONST. art. I, § 3(b)(2). This requirement, too, might require a different analysis than that adopted by the majority in *Regents v. Superior Court*, which focused solely on statutory construction to reach a conclusion constraining openness by restricting rights of action under the Bagley-Keene Act.

323. See CAL. CONST. art. I, § 3(b)(3)–(6).

receive priority. The law at issue in *Scharf* is an example of a law that could implicate both sections of the state constitution.³²⁴ This law regulated the University of California, thus implicating Article IX, section 9, and provided that certain public university employee records should be open to the employees concerned, thus potentially implicating the sunshine amendment.³²⁵ In *Scharf*, as discussed above, the Court of Appeal concluded that Article IX, section 9, was dispositive of the question. Now, however, similarly situated plaintiffs could claim that their access rights under Article I, section 3, require a rule such as that contained in the statute struck down in *Scharf*. Such an argument might not be sound, given the restriction of these access rights to employees, but it would be harder for a court to ignore than the relatively insubstantial privacy and due process arguments that the plaintiffs in *Scharf* did raise.³²⁶ An obligation to perform a direct balancing of access rights against university autonomy principles would not necessarily lead to different results or require courts to second-guess the Regents, but it would presumably require courts to articulate the reasons for both constitutional guarantees, clarifying the boundaries of Regental authority. Such a clarification would help to move California university autonomy doctrine away from its current form, according to which courts treat the Regents as a legal black box, insulated from interference or scrutiny and consequently lacking accountability. Again, this prevailing approach to university autonomy is not required by the text of Article IX, section 9.³²⁷ More important, it conflicts with the reasons Article IX, section 9, was ratified³²⁸ as well as with the First Amendment concerns motivating federal academic freedom law and open-government laws.³²⁹

California university autonomy law would benefit from courts' unshrinking consideration of federal academic freedom law and its purposes in future litigation involving the University of California and the Regents. Consideration of these issues would be especially appropriate in disputes that, like those in *Searle* and *Scharf*, raise the issue of the scope of the Regents' power over "internal university

324. *Scharf v. Regents of Univ. of Cal.*, 286 Cal. Rptr. 227 (Cal. Ct. App. 1991).

325. The amendment identifies a right of access only to "the writings of public officials and agencies" and "the conduct of the people's business." CAL. CONST. art. I, § 3(b)(1). Depending on how courts construe this language, they might not find that it supports an employee's access to tenure review reports filed by other faculty members. However, the language could be construed to allow access to official summaries of actions taken by tenure review committees or minutes of their meetings, which were also covered by the law at issue in *Scharf* and as to which the California Court of Appeal also found the law at issue in that case invalid. *See Scharf*, 286 Cal. Rptr. at 235–38 & n.4.

326. *Scharf*, 286 Cal. Rptr. at 235–38.

327. Article IX, section 9, requires simply that the Regents and the University of California be "kept free" from "all political or sectarian influence" "in the appointment of its regents and in the administration of its affairs." CAL. CONST. art. IX, § 9(f). This requirement does not imply anything about faculty participation in governance or the public's right to access information about the Regents' activities.

328. *See* discussion *supra* Part II.A.

329. *See* discussion *supra* Parts I.C–E, III.A.

affairs.”³³⁰ The court in *Scharf* was on the right path when it noted parallels between university autonomy and academic freedom,³³¹ but it did not go far enough. Of course, for the concept of federal academic freedom to be useful in clarifying university autonomy doctrine, the federal concept would itself need clarification. The next section provides some suggestions for moving beyond this chicken-and-egg problem.

IV. LESSONS FOR ACADEMIC FREEDOM AND UNIVERSITY AUTONOMY DOCTRINE

A. Review of the problems

The problems with the quasi-constitutional federal concept of academic freedom and the state law doctrine of university autonomy, as outlined in the discussion above, are in some ways similar. In both spheres, some legal basis exists to support an argument that the decision-making of lay college and university administrators should be virtually immune to challenge or scrutiny. In both spheres, however, such a conclusion would sometimes be inconsistent with other relevant policy considerations as well as the purposes behind each doctrine. The reasons for this problem are different in each area.

The constellation of sharply differing opinions in *Grutter* exemplifies the problem at the federal level.³³² These opinions push the contested nature of the concept into the spotlight. Justice O’Connor’s opinion for the majority,³³³ like Justice Thomas’s dissent,³³⁴ acknowledges that the precedential pedigree of the concept of academic freedom is unclear.³³⁵ And arguably, the result in *Grutter* does not even turn on the concept of academic freedom;³³⁶ Justice O’Connor uses the term only in an expository discussion of Justice Powell’s *Bakke* opinion.³³⁷ Elsewhere, her opinion declares the consistency of the *Grutter* holding with “our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits”³³⁸ and notes that “universities occupy a

330. *Scharf v. Regents of Univ. of Cal.*, 286 Cal. Rptr. at 232–33; *Searle v. Regents of Univ. of Cal.*, 100 Cal. Rptr. 194, 195–97 (Cal. Ct. App. 1972).

331. *Scharf*, 286 Cal. Rptr. at 234–35.

332. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

333. *Id.* at 324–25 (noting the unclear precedential status of Justice Powell’s opinion in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311 (1978), and the resulting judicial controversy about the weight to be given that opinion).

334. *Id.* at 362–64 (Thomas, J., dissenting) (noting, *inter alia*, that Justice Frankfurter’s reference to the “essential freedoms” of universities in *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957), appeared in a concurring opinion).

335. See also Hiers, *supra* note 4, at 533.

336. See, e.g., *id.*, at 576–77 (characterizing references to academic freedom in *Grutter* as dicta); Tushnet, *supra* note 2, at 163 (arguing that the Court’s deference to the university was not a dispositive aspect of its analysis or decision).

337. *Grutter*, 539 U.S. at 324.

338. *Id.* at 328–29 (citing *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985); *Bakke*, 438 U.S. at 319, n.53; *Bd. of Curators of Univ. of Miss. v. Horowitz*, 435 U.S. 78, 96 n.6 (1978)).

special niche in our constitutional tradition,” citing *Sweezy* and *Keyishian*.³³⁹ This is hardly a clear statement of a constitutional right of institutional academic freedom. But Justice Thomas severely criticizes the majority opinion as just such a statement,³⁴⁰ characterizing that opinion as “invent[ing the] new doctrine[.] . . . that the First Amendment authorizes a public university to do what would otherwise violate the Equal Protection Clause.”³⁴¹ Where Justice Thomas focuses on the lack of authority for such a conclusion,³⁴² Justice Scalia’s dissent focuses on the lack of clarity in the majority’s rationale and anticipates that litigants and lower courts are unlikely to be cautious in their readings of the opinion.³⁴³

As discussed in Part I, the problems with justification and scope identified by Justices Thomas and Scalia are endemic in the case law addressing this question. These problems overlap and may both ultimately be traced to a failure to clarify the relationship of the concept to the First Amendment. Failure to address the nature of the concept’s constitutional grounding is also failure to describe the scope of its constitutional meaning. In attempting clarification of the legal concept, beginning with the similarities between the professional norm and any constitutional guarantees makes sense, but ending with the conclusion that the norm involves professional, not legal, standards and therefore cannot be imported wholesale into legal doctrine may not be the most fruitful approach.³⁴⁴ An alternative approach, suggested here, is to look for answers not only in the professional norm from which the federal legal concept has borrowed its name, but also elsewhere in the law. This involves surveying both the legal principles competing with professional academic freedom interests in particular cases³⁴⁵ and the other legal concepts bearing on the purposes and roles that American culture and law have assigned to institutions of higher education. Identifying where these principles overlap with the professional norm can help to provide a more robust basis for understanding the norm’s relationship to the First Amendment, translating it into legal terms, and clarifying the scope of the legal concept.

The California approach to university autonomy presents a contrast with both the professional norm of academic freedom and federal judicial opinions discussing academic freedom as a quasi-constitutional concept. University autonomy as articulated by California courts places plenary power in the Regents and has nothing to do with speech or association guarantees.³⁴⁶ In a strong sense,

339. *Id.* at 329 (citing, *inter alia*, *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967); *Sweezy*, 354 U.S. at 250).

340. *Id.* at 362–64 (Thomas, J., dissenting).

341. *Id.* at 363.

342. *Id.* at 364.

343. *See id.* at 347–49 (Scalia, J., dissenting) (arguing that the lack of clarity in the majority’s holding and reasoning will induce extensive unnecessary litigation); *see also id.* at 362 (Thomas, J., dissenting) (describing majority’s deference to the university as “antithetical to strict scrutiny”); *Fuentes-Rohwer & Charles, supra* note 2, at 156–68; *Lopez, supra* note 2, at 846; *Ware, supra* note 2, at 2108–12.

344. *See, e.g.*, *Urofsky v. Gilmore*, 216 F.3d 401, 409–13 (4th Cir. 2000) (en banc).

345. *See, e.g.*, *Grutter*, 539 U.S. at 322–33; *Univ. of Pa. v. EEOC*, 493 U.S. 182, 198–201 (1991).

346. *See* discussions *supra* Parts II.D, III.B, III.C.

university autonomy doctrine presents the converse problem to the problems with academic freedom law. The constitutional basis for the doctrine of university autonomy is quite clear; indeed, in California, it seems to be the very lack of ambiguity regarding the legal source of the doctrine that has led to an impoverished articulation of its purposes and scope. As discussed in Parts II and III, California courts have been unwilling to acknowledge any need for constraints on Regental autonomy deriving from the characteristics of the research university context, even though they appear willing to acknowledge professional and legal academic freedom interests in cases that do not involve the Regents or the University of California.³⁴⁷ The result has been a doctrine equating university autonomy with plenary Regental power, virtual immunity from scrutiny, and dramatically decreased accountability, and denying any constitutional dimension to potentially competing notions of academic freedom or faculty self-governance in a university with unusually strong traditions of both. As discussed above, this problem is compounded by the courts' reluctance to acknowledge the underlying justifications for the concept at issue—in this case, the purposes of Article IX, section 9—and the interrelationships of those justifications with other constitutional concerns.³⁴⁸

The chief problems in both areas thus spring from a failure to consider the full range of competing legal and policy principles at issue and to confront the tensions between them. This part next reviews the purposes and legal dimensions of some of the major competing norms and a few of the ways they might be reconciled before suggesting the lessons that the concept of academic freedom may hold for university autonomy doctrine, and vice versa.

B. Three competing norms

This discussion has repeatedly returned to several core concepts relevant to constitutional analysis in litigation involving institutions of higher education: the research-scientific ideal,³⁴⁹ the models of institutional pluralism and competitive federalism,³⁵⁰ and the democratic ideals of openness and civic responsibility.³⁵¹ Each of these principles, or sets of principles, is related in different ways to legal guarantees or goals. But all three have historically played important parts in defining the place and role of colleges and universities in the American legal landscape, and all three continue to influence decision-making within and surrounding institutions of higher education. Considered together, the concepts create a complex dynamic, but the tensions among them are not irreconcilable.

The research-scientific ideal, as pointed out by Byrne, Finkin, and Rabban and detailed in the AAUP's statements, assumes that an important purpose of research colleges and universities is to provide an environment in which a self-regulating

347. See *supra* note 8.

348. See discussions *supra* Parts II.A, II.D, III.B–C.

349. See discussions *supra* Parts I.B–C, I.E.

350. See discussions *supra* Parts I.B, II.A, III.D.

351. See discussions *supra* Parts I.B, II.A, III.A–D.

corps of experts may freely seek the truth in their disciplines.³⁵² The Supreme Court's early academic freedom statements clearly draw on this ideal.³⁵³ The academics who promoted the ideal in the late-nineteenth and early twentieth centuries sought professional autonomy from lay administrators so that they could be free to consider all ideas and information, not just those favored by the trustees or founders of the institutions within which these academics worked.³⁵⁴ The ideal thus presented colleges and universities as places where the "marketplace of ideas" that the First Amendment is arguably meant to protect might receive its purest realization.³⁵⁵ The research-scientific ideal also stresses faculty self-governance as a necessary institutional mechanism for securing academic freedom.³⁵⁶ This mechanism functions to define an arena devoted entirely to free inquiry within certain bounds established by the process of inquiry itself. But the research-scientific ideal has competitive as well as inclusive aspects. By definition, experts are a select group. Even the "experiment station" metaphor invoked in the AAUP's 1915 Declaration as a crucial part of the research-scientific ideal—like the marketplace of ideas metaphor itself—presupposes that unworthy ideas and theories will be discarded.³⁵⁷

The competitive dimension of the research-scientific ideal takes center stage in the models of institutional pluralism³⁵⁸ and competitive federalism,³⁵⁹ both of which propose that institutional excellence emerges from diversity among institutions. The institutional pluralism approach is relevant across the spectrum of public and private colleges and universities, while the competitive federalism approach makes sense only in relation to public institutions, but the concepts are otherwise quite similar. Both focus not on the characteristics of individual institutions and on what such institutions share, but on the benefits of a nonuniform system of diverse institutions. Both apply a marketplace or laboratory metaphor to the entire system of institutions, rather than to the activities that occur within each institution.³⁶⁰ In practice, both approaches thus promote a *laissez-faire* attitude

352. See Byrne, *supra* note 5, at 270–79; Finkin, *supra* note 7, at 822–29; Rabban, *supra* note 13, at 233–41; see also *supra* notes 35–38 and accompanying text.

353. See, e.g., Van Alstyne, *supra* note 41, at 81; see also *supra* notes 56–67 and accompanying text.

354. See, e.g., Byrne, *supra* note 5, at 270–79; Finkin, *supra* note 7, at 826–29; Rabban, *supra* note 13, at 233; see also Jordan E. Kurland, *Commentary on Buttressing the Defense of Academic Freedom*, 22 WM. MITCHELL L. REV. 545, 545 (1996); About AAUP, <http://www.aaup.org/aboutaaup/hist.HTM> (describing incident involving faculty dismissal from Stanford on the basis of research topics disfavored by trustee that inspired founding of the AAUP by Arthur O. Lovejoy and John Dewey).

355. See, e.g., Byrne, *supra* note 5, at 258–61, 332–34; Rabban, *supra* note 13, at 241; Schauer, *supra* note 66, at 1274.

356. See *supra* notes 35–38, 139–151 and accompanying text.

357. See discussion *supra* Part I.B.

358. See Finkin, *supra* note 7, at 830–40.

359. See *supra* notes 48–50 and accompanying text.

360. Cf. *Gonzales v. Raich*, 125 S. Ct. 2195, 2220 (2005) (O'Connor, J., dissenting) ("One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'" (quoting *New State Ice*

toward the decision-making of institutions and states, at least where that decision-making does not threaten other important social policies; this hands-off attitude is understood as a necessary structural prerequisite for the efficient generation of institutional diversity and the provision of incentives for innovation. Appeals to a norm of competitive pluralism can therefore be used to support a high degree of deference to the decision-making of lay administrators in both private and public college and university contexts. Courts have turned to the pluralist ideal, as Finkin describes, to preserve the autonomy of private institutions from government regulation;³⁶¹ competitive federalist concerns also seem to be among the purposes behind the 1879 amendment that provided the constitutional basis for university autonomy doctrine in California.³⁶² Arguably, this model is now the dominant attitude toward higher education in the United States.³⁶³ But it has not yet become the only determinant of institutional practice. Both the research-scientific model and the democratic model, discussed next, remain appropriate to legal analysis. Significantly, the competitive pluralist understanding of the purpose of colleges and universities does not inherently require that administrators' decision-making be given priority over that of faculty in all institutions.³⁶⁴

The democratic model, in contrast, is as concerned with equality as the pluralist model is with competition. The democratic ideal approaches open access to education as a prerequisite for economic mobility and social welfare as well as for civic participation.³⁶⁵ The Morrill Act is probably the preeminent legal expression of this model. Its stress on opening access to educational resources is consonant with the First Amendment principle of open access to information. But the democratic ideal is also congruent with other constitutional goals and guarantees, such as the First Amendment petitioning right and the Equal Protection Clause. The democratic ideal values open access to educational resources and knowledge not as ends in themselves, as the research-scientific paradigm does, but as means of ensuring equality of opportunity and the ability to exercise constitutional rights and perform civic responsibilities.³⁶⁶ Thus, where the scientific-research model is generally faculty-focused and the competitive pluralist model generally institution- or economy-focused, the democratic model is primarily student-focused. As a result, it does not place a premium on institutional self-determination. Rather, it can be used to support government intervention in the actions and decisions of higher education institutions, as in the application of open-government laws to

Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

361. See Finkin, *supra* note 7, at 830–34.

362. See *supra* note 164 and accompanying text.

363. See, e.g., John L. Lahey & Janice C. Griffith, *Recent Trends in Higher Education: Accountability, Efficiency, Technology, and Governance*, 52 J. LEGAL EDUC. 528 (2002); American Federation of Teachers, *supra* note 42, at 4–6; see also *Grutter v. Bollinger*, 539 U.S. 306, 349–62 (2003) (Thomas, J., dissenting) (drawing heavily on this conception).

364. See discussion *supra* notes 42, 216 and accompanying text; see also *supra* notes 221–225 and accompanying text.

365. See *supra* notes 44–48 and accompanying text.

366. See *supra* notes 44–48 and accompanying text; see also Byrne, *supra* note 5, at 281–83; Horwitz, *supra* note 2, at 479, 555.

public colleges and universities³⁶⁷ or of equality principles to public or private institutions.³⁶⁸ But although the democratic model measures academic value differently than the research-scientific ideal does,³⁶⁹ the democratic model does not inherently require government intervention or aggressive review of college and university decision-making.

The contrast between Justice O'Connor's and Justice Thomas's opinions in *Grutter* illustrates the ways in which these principles can blend and collide. Justice O'Connor's approach is preferable, despite its lack of bright lines, because it manages to harmonize the principles; her opinion stresses how, when an institution chooses to incorporate the democratic model and competitive pluralism into its research-scientific self-definition, a court should defer to that institution's expert conclusion that an admissions system focused on equality of opportunity and diversity, rather than competitive evaluation according to a uniform yardstick, ultimately advances both the search for truth and civic participation without compromising innovation.³⁷⁰ Justice Thomas's dissent, in contrast, subordinates the democratic and research-scientific norms to a watered-down norm of competitive pluralism, and more important, refuses to admit the possibility of an approach that could serve all three aims.³⁷¹ Justice Thomas acknowledges the possibility of a purely democratic, open approach to admissions, but presents such an approach as entirely incompatible with merit-based admissions systems,³⁷² and implies that the democratic norm is unavailable to justify the University of Michigan's admissions practices, since so many graduates of that university's law school leave Michigan.³⁷³ Justice Thomas rejects out of hand the legal relevance of the research-scientific model, deriding Justice O'Connor's citations of social science research in support of her conclusions³⁷⁴ and suggesting that appeals to this ideal are usually, if not always, disingenuous³⁷⁵ and pretextual.³⁷⁶ Even his

367. See discussion *supra* Part III.A.

368. See, e.g., *Univ. of Pa. v. EEOC*, 493 U.S. 182 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981).

369. See Byrne, *supra* note 5, at 281–83.

370. *Grutter v. Bollinger*, 539 U.S. 306, 322–33 (2003).

371. *Id.* at 349–78 (Thomas, J., dissenting).

372. *Id.* at 368–69.

373. *Id.* at 360. On this point, Justice Thomas seems to conflate the democratic ideal with the competitive federalist ideal.

374. *Id.* at 364 (Thomas, J., dissenting).

375. *Id.* (“The Court relies heavily on social science evidence to justify its deference. The Court never acknowledges, however, the growing evidence that racial (and other sorts) of heterogeneity actually impairs learning among black students.”) (citations omitted).

376. *Id.* at 369 (“Since its inception, selective admissions has been the vehicle for racial, ethnic, and religious tinkering and experimentation by university administrators. . . . Columbia employed intelligence tests precisely because Jewish applicants, who were predominantly immigrants, scored worse on such tests. Thus, Columbia could claim (falsely) that ‘[w]e have not eliminated boys because they were Jews and do not propose to do so. We have honestly attempted to eliminate the lowest grade of applicant [through the use of intelligence testing] and it turns out that a good many of the low grade men are New York City Jews.’”) (citing letter from Herbert E. Hawkes, dean of Columbia College, to E.B. Wilson, June 16, 1922 (reprinted in H. WECHSLER, *THE QUALIFIED STUDENT* 160–61 (1977))).

allegiance to the competitive pluralistic model is incomplete, since he does not consider deference to the University of Michigan's admissions policy a legally supportable option.³⁷⁷ In rejecting all three principles, Justice Thomas fails to do justice to the roles all have played in defining and strengthening American higher education for more than a century.

In the remaining two sections of this article, I draw on the three norms described here and on Justice O'Connor's example to suggest new approaches to clarifying both university autonomy doctrine and the federal constitutional concept of academic freedom.

C. Lessons for university autonomy doctrine

As described above, university autonomy doctrine derives from Article IX, section 9, of the California Constitution. The motivations of the lawmakers who gave the University of California this status appear to have been most closely aligned with the competitive pluralist model, although both democratic and research-scientific norms influenced the initial formation of the university itself.³⁷⁸ California courts have hewed very closely to the laissez-faire implications of the competitive pluralist model in their interpretations of Article IX, section 9, particularly in their articulation of the meaning of "internal university affairs."³⁷⁹ In so doing, they have not only slighted the historic and continuing relevance of the other two norms to the University of California but also expanded the Regents' power beyond the protections implied by the language of Article IX, section 9.

A better approach to university autonomy doctrine would acknowledge the relevance of these competing norms, which find support in the First Amendment, other aspects of the federal Constitution, and Article I, section 3, of the California Constitution. It would also exhibit more sensitivity to the language of Article IX, section 9, itself, which asserts the Regents' insulation from the legislature but does not purport to diminish their accountability to the public or the faculty to whom they have delegated decision-making responsibility. Taking these other considerations into account would support a modified definition of "internal university affairs" that would under certain circumstances reduce the Regents' plenary power over faculty decision-making relating to strictly academic concerns such as the "four essential freedoms" enumerated in Justice Frankfurter's *Sweezy* concurrence.³⁸⁰ As long as the Regents continue to acknowledge commitment to a system of shared governance, conflicts between faculty and Regents in these areas should prompt not reflexive citation of the broad scope of Article IX, section 9, but judicial inquiry into whether the Regents have shown that they considered relevant faculty input.³⁸¹ As discussed above in Part III.D, a more cautious approach to the

377. *Id.* at 362–64, 367.

378. *See generally* DOUGLASS, *supra* note 44, at 46–71.

379. *See* discussions *supra* Parts II.D, III.B, III.C.

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

381. *See* Regents of the University of California Standing Order 105.2, Duties, Powers, and Privileges of the Academic Senate, *available at* <http://www.universityofcalifornia.edu/regents/bylaws/so1052.html> (last visited Nov. 6, 2005).

scope of Article IX, section 9, in relation to other constitutional provisions would also require a different judicial approach to the construction of open-government provisions applicable to the Regents and the University of California.

Such an approach would harmonize California's constitutional provision for university autonomy with the array of competing constitutional concerns that are equally relevant in the research university context. It would, moreover, further the purposes of Article IX, section 9, by helping to secure the preeminence of California's research university system, a preeminence that must be attributed at least in part to its tradition of shared governance.³⁸²

D. Lessons for academic freedom law

In contrast to university autonomy doctrine, analyses of the federal constitutional concept of academic freedom tend to begin with nonlegal principles—chiefly the professional norm of academic freedom—and to note the consistency of that norm in some respects with First Amendment principles. This tendency has led to difficulties in articulating the legal concept and its connection to the First Amendment. The professional norm in its entirety seeks to perform a function within the community of research colleges and universities that is analogous to the function performed by the First Amendment's speech guarantees in the United States community at large.³⁸³ But because the professional norm embraces interdependent individual and institutional rights and responsibilities,³⁸⁴ it is difficult to shoehorn the professional norm into existing First Amendment doctrine.³⁸⁵ This difficulty may make it tempting for courts confronted with constitutional challenges to institutional actions or decisions in the college or university context to turn to pluralist or democratic norms and constitutional principles to justify the appropriate approach to review of institutional decision-making.³⁸⁶ Recourse to these norms is potentially dangerous because they do not provide any basis for restricting judicial deference to decisions made by faculty acting collectively.³⁸⁷ Yet such decision-making remains a crucial institutional component of the professional norm of academic freedom—and therefore relevant to First Amendment concerns with the protection of a space for academic expression—as well as a significant element of institutional practice in the research college and university context.

A better approach would follow the context-sensitive example set by Justice O'Connor's opinion in *Grutter* and seek to acknowledge and accommodate all three norms along with the appropriate constitutional principles, as those norms

382. See generally Douglass, *supra* note 203.

383. See Rabban, *supra* note 13, at 240–41.

384. See Rabban, *supra* note 32, at 1407–09; Rabban, *supra* note 14, at 286–87, 293–94.

385. Cf. Horwitz, *supra* note 2, at 558–88; Schauer, *supra* note 66, at 1260, 1274.

386. See, e.g., Byrne, *supra* note 5, at 281–83; Finkin, *supra* note 7, at 846–57.

387. See Rabban, *supra* note 32, at 1407–12; see also discussion *supra* Part IV.B. The pluralist or laissez-faire norm indicates deference to institutional decision-making but does not require a distinction between the decision-making of lay boards and that of faculty. The democratic model does not indicate deference at all.

and principles are relevant on a factually specific case-by-case basis.³⁸⁸ Such an approach would, in research colleges and universities, support deference to collective faculty decision-making, or application of a presumption of good faith to such decision-making, but not deference to lay administrators' decision-making in academic areas. This recommendation does not conflict with the Court's statement in *Minnesota State Board of Community Colleges v. Knight* that "there is no constitutional right [of faculty] to participate in governance."³⁸⁹ Deference to the procedurally proper decisions of existing faculty governance bodies does not entail a recognition that the Constitution requires those bodies to exist or requires individuals to be permitted to participate in them. But where such bodies do exist, demonstration of their functional commitment to creating and preserving a space for free inquiry and of their consistency with professional norms should entitle their determinations to a presumption of good faith absent a showing that they have departed from that commitment or those norms.³⁹⁰

This understanding of the legal concept of academic freedom suggests that judicial review of institutional decision-making relating to academic concerns in research institutions should acknowledge the relevance of multiple overlapping norms and constitutional principles to that institutional context and to the various types of expression that occur within it—both the expression of individual faculty members in their professional roles, and the expressive conduct of collective faculty decision-making. This understanding also indicates that when these two types of expression conflict, institutional decisions complying with the relevant professional norms should prevail, since individual faculty members' professional speech is given its meaning and made possible through such mechanisms. But the approach does not categorically subordinate individual academic freedom rights to institutional prerogatives, as did the Fourth Circuit in *Urofsky v. Gilmore*³⁹¹ and as the California university autonomy doctrine may also tend to do in a different way.³⁹² Rather, the approach suggested here recognizes that just as the concept of individual academic freedom rights is defined by a particular type of institutional context, institutions' First Amendment-derived prerogatives are shaped and constrained by the requirement that those institutions function to preserve a sphere of free inquiry. Decisions made in institutions of higher education by bodies other than faculty decision-makers or in furtherance of other goals may in many cases be valid and constitutionally defensible, but their validity must depend on principles other than the First Amendment's guarantees or the constitutional concept of academic freedom, and where the norms described here are institutionally relevant—in research colleges and universities with systems of shared governance—courts should always acknowledge their constitutional weight.

388. See discussion *supra* Part IV.B.

389. 465 U.S. 271, 288 (1984).

390. See *Grutter v. Bollinger*, 539 U.S. 306, 324–33, 339–40 (2003); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–15 (1978) (Powell, J.).

391. See 216 F.3d 401, 410 (4th Cir. 2000) (en banc).

392. See discussion *supra* Parts II.D, IV.C.

CONCLUSION

The problems and paradoxes of federal academic freedom law have been widely acknowledged. This article has sought to suggest a new perspective on those difficulties through a comparison of the concept of constitutional academic freedom as articulated by federal courts, and particularly Supreme Court Justices, with the approach that California courts have taken toward the state law-based university autonomy of the University of California, the research branch of the state's higher education system. The California doctrine of university autonomy is problematic, but the difficulties with this body of law vary in instructive ways from the difficulties that have plagued federal academic freedom law. By widening the scope of the inquiry, this comparison allows a long view of the various legal and policy norms relevant to judicial scrutiny of the decision-making of research institutions. The article concludes that courts, too, should consider all of these norms in assessing the constitutional implications of institutional decision-making in the university context.

