

# OPEN-RECORDS REQUESTS FOR PROFESSORS’ EMAIL EXCHANGES: A THREAT TO CONSTITUTIONAL ACADEMIC FREEDOM?

WILLIAM K. BRIGGS\*

INTRODUCTION .....	601
I. IS ACADEMIC FREEDOM A CONSTITUTIONAL RIGHT OR INTEREST? .....	604
II. THE SCOPE OF CONSTITUTIONAL ACADEMIC FREEDOM.....	610
A. The First Argument.....	611
B. The Second Argument.....	615
III. STATE COURT INTERPRETATION OF OPEN-RECORDS STATUTES.....	616
A. The Majority of Courts .....	617
B. The Minority of Courts .....	621
IV. POSSIBLE STATUTORY REFORMS.....	622
A. Suggested Reforms that are Impractical .....	624
B. An Argument That May Work .....	626
CONCLUSION.....	630

## INTRODUCTION

Early in March 2011, Wisconsin Governor Scott Walker and the republican Wisconsin legislature pushed through legislation that virtually eliminated the collective bargaining rights of the state’s public employees.<sup>1</sup> This action followed weeks of protest, which drew over ten thousand people to the state Capitol building.<sup>2</sup> Following the legislation, some people also chose to protest online, including University of Wisconsin professor William Cronon who began a blog and, on March 15, 2011, wrote a post criticizing the legislation and its motivations.<sup>3</sup>

---

\* William K. Briggs is a law clerk for Hon. Robert Holmes Bell, U.S. District Court for the Western District of Michigan. He holds a B.A. and a J.D. from the University of Michigan. He would like to thank Professor Leonard Niehoff (University of Michigan Law School) for his advice and helpful comments.

1. *Wis. governor officially cuts collective bargaining*, NBC NEWS (Mar. 11, 2011), [http://www.msnbc.msn.com/id/41996994/ns/politics-more\\_politics/t/wis-governor-officially-cuts-collective-bargaining/](http://www.msnbc.msn.com/id/41996994/ns/politics-more_politics/t/wis-governor-officially-cuts-collective-bargaining/).

2. *Id.*

3. William Cronon, *Who’s Really Behind Recent Republican Legislation in Wisconsin and Elsewhere?*, SCHOLAR AS CITIZEN (Mar. 15, 2011),

Two days later, the Wisconsin Republican Party filed an open-records request, pursuant to Wisconsin's Open Records Law, to obtain all emails from Cronon's university email account which referenced multiple terms relating to the ongoing political dispute, including: "republican," "Scott Walker," "recall," "collective bargaining," "rally," and "union."<sup>4</sup> While the Wisconsin Republican Party did not have to declare its motivation under the Open Records Law (and adamantly refused to do so),<sup>5</sup> it likely intended to determine whether Cronon had illegally used public resources for partisan political advocacy.<sup>6</sup> In response to this open-records request, Cronon publicly protested in a blog post entitled, "Abusing Open Records to Attack Academic Freedom."<sup>7</sup>

In the aftermath, many people came to Cronon's defense, echoing the concern he expressed on his blog that this open-records request was an assault on his academic freedom. These supporters included writers of opinion pieces in such media entities as the *New Yorker*,<sup>8</sup> the *New York Times*,<sup>9</sup> and the *Atlantic*.<sup>10</sup> Cronon also received support in the form of public statements by multiple higher-education entities, including the American Historical Association,<sup>11</sup> American Anthropological

---

<http://scholarcitizen.williamcronon.net/2011/03/15/alec/>.

4. John Gardner, *William Cronon and academic freedom*, THE GUARDIAN (Apr. 1, 2011), <http://www.guardian.co.uk/commentisfree/cifamerica/2011/apr/01/wisconsin-republicans?INTCMP=SRCH>.

5. Press Release from Mark Jefferson, Executive Director of the Republican Party of Wisconsin, in response to professor William Cronin's deplorable tactics (Mar. 25, 2011), available at <http://scholarcitizen.williamcronon.net/2011/03/25/republican-party-response/>.

6. Indeed, the University of Wisconsin treated the request as if this was the motivation; taking care to emphasize that it had reviewed Cronon's emails for such partisan advocacy. See Chancellor Biddy Martin, *Chancellor's message on academic freedom and open records*, UNIV. OF WIS. NEWS (Apr. 1, 2011), <http://www.news.wisc.edu/19190> ("We have dutifully reviewed Professor Cronon's records for any legal or policy violations, such as improper uses of state or university resources for partisan political activity. There are none.").

7. William Cronon, *Abusing Open Records to Attack Academic Freedom*, SCHOLAR AS CITIZEN (Mar. 24, 2011), <http://scholarcitizen.williamcronon.net/2011/03/24/open-records-attack-on-academic-freedom/>.

8. Anthony Grafton, *Wisconsin: The Cronon Affair*, THE NEW YORKER (Mar. 28, 2011), <http://www.newyorker.com/online/blogs/newsdesk/2011/03/wisconsin-the-cronon-affair.html>.

9. Paul Krugman, *American Thought Police*, N.Y. TIMES (Mar. 27, 2011), [http://www.nytimes.com/2011/03/28/opinion/28krugman.html?\\_r=0](http://www.nytimes.com/2011/03/28/opinion/28krugman.html?_r=0).

10. James Fallows, 'Have You No Sense of Decency?' *The Wm. Cronon Story*, THE ATLANTIC (Mar. 25, 2011), <http://www.theatlantic.com/national/archive/2011/03/have-you-no-sense-of-decency-the-wm-cronon-story/73010/>.

11. *AHA Deplores Effort to Intimidate William Cronon*, AM. HISTORICAL ASS'N (Mar. 27, 2011), <http://blog.historians.org/news/1293/aha-council-deplores-recent-intimidation-efforts-aimed-at-cronon>.

Association,<sup>12</sup> and the American Association of University Professors (“AAUP”).<sup>13</sup> While the public support in favor of Cronon was not unanimous,<sup>14</sup> the detractors were in the clear minority.

Every state has an open-records statute, which allows the public to obtain the records of public officials.<sup>15</sup> All these statutes also include, within their definitions of public records, emails sent and received by professors at public colleges or universities using their “.edu” email addresses.<sup>16</sup> Of course, these statutes limit which emails may be obtained by including exemptions for such things as personal communications.<sup>17</sup> But no state open-records statute has an explicit exemption for records whose contents are within the scope of academic freedom.<sup>18</sup> Nevertheless, the University of Wisconsin cited academic freedom as its reason for withholding those of Cronon’s emails it considered to be “[i]ntellectual communications among scholars.”<sup>19</sup> Its chancellor explained the rationale:

We are also excluding what we consider to be the private email exchanges among scholars that fall within the orbit of academic freedom and all that is entailed by it. Academic freedom is the freedom to pursue knowledge and develop lines of argument without fear of reprisal for controversial findings and without the premature disclosure of those ideas.<sup>20</sup>

There is a broad professional definition of academic freedom, promulgated by the AAUP, which could conceivably cover Cronon’s email exchanges to his fellow scholars.<sup>21</sup> But this professional academic

---

12. Joslyn O., *Anthropologists Speak Out in Protection of Academic Freedom*, AM. ANTHROPOLOGICAL ASS’N (Apr. 5, 2011), <http://blog.aaanet.org/2011/04/05/anthropologists-speak-out-in-protection-of-academic-freedom/>.

13. Letter from Gregory F. Scholtz, Assoc. Sec. and Dir. of the American Association of University Professors, to Carolyn A. (Biddy) Martin, Chancellor of the Univ. of Wis. (Mar. 28, 2011), *available at* <http://www.aaup.org/NR/rdonlyres/CCED586E-3430-4865-B578-01D8584127B4/0/BiddyMartin.pdf>.

14. For examples of the media not supporting Cronon, *see* Jack Schafer, *There’s No Such Thing as a Bad FOIA Request*, SLATE MAGAZINE (Mar. 25, 2011), [http://www.slate.com/articles/news\\_and\\_politics/press\\_box/2011/03/theres\\_no\\_such\\_thing\\_as\\_a\\_bad\\_foia\\_request.html](http://www.slate.com/articles/news_and_politics/press_box/2011/03/theres_no_such_thing_as_a_bad_foia_request.html); Peter Wood, *Cronon’s Whirlwind*, CHRON. OF HIGHER EDUC. (Mar. 30, 2011), <http://chronicle.com/blogs/innovations/cronons-whirlwind/29016>.

15. *See State Sunshine Laws*, SUNSHINE REVIEW, [http://sunshinereview.org/index.php/State\\_sunshine\\_laws](http://sunshinereview.org/index.php/State_sunshine_laws) (last visited Oct. 30, 2012).

16. *Id.*

17. *Id.*

18. *Id.*

19. Letter from John C. Dowling, Senior Univ. Legal Counsel, Univ. of Wis., to Stephan Thompson, Rep. Party of Wis. (Apr. 1, 2011), *available at* <http://scholarcitizen.williamcronon.net/> [hereinafter *Dowling Letter*].

20. Martin, *supra* note 6.

21. ERIC BARENDT, *ACADEMIC FREEDOM AND THE LAW* 161 (2010).

freedom, although it is endorsed by numerous educational associations, has no direct legal effect and is not embraced within the current case law.<sup>22</sup> For there to be a legal basis to withhold scholarly email exchanges under the guise of academic freedom, the emails would have to fit within the much narrower constitutional definition of academic freedom granted to institutions.

Consequently, Professor Cronon's situation raises the question of whether constitutional academic freedom protects such scholarly email exchanges from disclosure under open-records laws. The overwhelming public reaction in favor of Cronon, and the fact that a similar open-records request unfolded in Michigan later that year,<sup>23</sup> illustrates the importance of this issue. Part I examines constitutional academic freedom in detail to determine how much protection it provides against competing governmental policy interests. It concludes that to the extent academic freedom is recognized by the Supreme Court and lower federal courts, it is as an interest rather than a right and accordingly, is afforded little protection when balanced against competing interests. Part II then examines the facts and reasoning underlying these cases to see if scholarly email exchanges would even implicate constitutional academic freedom. It concludes that they do not implicate academic freedom and that, as a result, open-records laws are constitutional as applied in situations like Professor Cronon's. Part III then turns to state law and finds that even if constitutional academic freedom was implicated by scholarly email exchanges, it would not offer protection in a state court's adjudication of an open-records dispute.

Because the argument that an open-records law is unconstitutional appears nonviable, Part IV asks whether there are policy arguments, outside of constitutional academic freedom, in favor of non-disclosure. Finding valid arguments, Part IV examines statutory reforms that would protect scholarly email exchanges. Ultimately, Part IV rejects statutory amendments and other explicit statutory reforms and instead concludes that the best solution is to advance a statutory interpretation argument that scholarly email exchanges should not even be considered "public records" under existing open-records laws.

#### I. IS ACADEMIC FREEDOM A CONSTITUTIONAL RIGHT OR INTEREST?

The academic community<sup>24</sup> and its supporters have justified the refusal

---

22. *Id.* at 172. See also *id.* at 165–173 for more information on the precise contours of professional academic freedom.

23. Steven Greenhouse, *Group Seeks Labor E-Mails by Michigan Professors*, N.Y. TIMES (Mar. 29, 2011), <http://www.nytimes.com/2011/03/30/education/30professors.html>.

24. This is of course a generalization as not "all" members of the academic community support the idea that academic freedom protects scholarly email exchange. However, for the sake of simplicity, such supporters will be referred to as "academics"

to release scholarly email exchanges following an open-records request on the grounds that such exchanges are protected by a constitutional right to academic freedom found within the First Amendment. In support of this position, academics cite both Supreme Court precedents extolling the importance of academic freedom and federal circuit courts of appeal opinions finding in favor of public university professors withholding documents despite subpoenas. However, a closer analysis of these cases reveal not only that they are not on point, but also, that the existence of a constitutional right of academic freedom is unlikely. At best, these cases support only a constitutional interest in academic freedom.

The difference between rights and interests is important because, although both serve as limitations on government, courts afford more protection to constitutional rights.<sup>25</sup> The increased protection means that the limitations on government actions are more severe when a constitutional right is at stake. Whether academic freedom is classified as a constitutional right or interest can make a difference in the open-records context because if academic freedom is an interest, then it must be balanced against other public policy interests such as open government and disclosure. For example, publically employed scholars are paid by taxpayers, which means that the public has an interest in knowing what activities their tax dollars are funding. If scholars are using public resources to engage in political activities, a violation of state law, the public has a right to know. But whether courts will view these interests as subordinate to academic freedom may depend on the level of protection they are willing to afford academic freedom.

Consider the following example concerning the selling of films; although an oversimplification, this example can illustrate the general distinction between a constitutional right and interest in practice. Because free speech is a constitutional right it protects citizens from prosecution for selling controversial films, even when there are legitimate government interests in favor of prosecution. For example, if a film appears to praise law breaking, then the right of free speech protects it even if the government has an interest in citizens following the law. The sole time in which the right of free speech will not provide protection is when there is a countervailing interest that is especially compelling.<sup>26</sup> Thus, while the pro-

---

throughout.

25. Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415, 429 (1993); Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 222–225 (2008) (“Although rights can be circumscribed, they still have a special status and genuine heft in adjudication.”). *Contra* Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 389 (1993). For a much more comprehensive analysis of the distinctions between constitutional rights and constitutional interests, see also Ronald Dworkin, *Rights as Trumps*, in THEORIES OF RIGHTS 153 (Jeremy Waldron ed., 1984).

26. See, e.g., Schauer, *supra* note 25, at 429 (analogizing a constitutional right as a shield that protects against knives—lower justification interests—but can be

law breaking film is protected, a child pornography film would not be protected because the protection of children is considered a compelling interest and trumps the constitutional right to free speech.<sup>27</sup>

In contrast, if free speech were considered only a constitutional interest,<sup>28</sup> the free speech justification for selling a controversial film would have to be weighed equally against all the competing governmental interests, even those less than compelling. Under this scenario, the filmmaker's free speech interest in making the pro-law breaking film would be weighed against the government's interest in having citizens follow the law, presenting the potential for the government's non-compelling interest to outweigh free speech.

Those who believe academic freedom is a constitutional right on par with free speech, rely on two Supreme Court cases: *Sweezy v. New Hampshire*<sup>29</sup> and *Keyishian v. Board of Regents of the University of the State of New York*<sup>30</sup> as fully endorsing such a right.<sup>31</sup> Both *Sweezy* and *Keyishian* concerned state statutes intended to expose and remove communists from public positions.<sup>32</sup> The Supreme Court, in the course of finding the statutes at issue in these two cases unconstitutional, highlighted the existence of a threat to academic freedom.<sup>33</sup> However, despite its lofty rhetoric regarding academic freedom in these two opinions, the Court never explicitly declared that academic freedom for individual professors was an independent constitutional right.<sup>34</sup> In *Sweezy*, for example, the plurality opinion broadly praised academic freedom, but stopped short of calling it a right:<sup>35</sup>

The essentiality of freedom in the community of American

---

overcome by bombs—higher justification interests).

27. See *New York v. Ferber*, 458 U.S. 747, 760–61 (1982).

28. An example of a constitutional interest is human dignity, which the Supreme Court, in *Trop v. Dulles*, recognized as an interest underlying the Eighth Amendment that must be weighed against the government interests in support of punishment. See *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

29. 354 U.S. 234 (1957).

30. 385 U.S. 589 (1967).

31. See Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 967–82 (2009); David M. Rabban, *Functional Analysis of “Individual” and “Institutional” Academic Freedom under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 330 (1990).

32. See *Sweezy v. New Hampshire*, 354 U.S. 234; *Keyishian v. Bd. Of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589.

33. *Sweezy*, 354 U.S. at 250; *Keyishian*, 385 U.S. 589 at 603.

34. See Larry D. Spurgeon, *A Transcendent Value: The Quest to Safeguard Academic Freedom*, 34 J.C. & U.L. 111 (2007).

35. It is worth pointing out that Justice Felix Frankfurter's concurring opinion implies that academic freedom is a right. However, this concurrence does not represent the Supreme Court's view on academic freedom. *Sweezy*, 354 U.S. at 255–67 (Frankfurter, J., concurring).

universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust.<sup>36</sup>

Notably, despite this language the case was decided on non-academic freedom grounds, with the plurality instead basing its decision on a violation of due process.<sup>37</sup>

Similarly, in *Keyishian*, instead of referring to academic freedom as a right, the Court referred to it as a concern and value: “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.”<sup>38</sup> And just as with *Sweezy*, the Court decided the case on non-academic freedom grounds, this time striking down the New York statutes in question because of vagueness and over-breadth.<sup>39</sup>

In light of these facts, a strong argument can be made that the Court’s references to academic freedom in these two cases were not intended to recognize academic freedom as a genuinely independent right, but rather, to point out an important observation about the different values at stake under the First Amendment.<sup>40</sup> Supreme Court jurisprudence since these two cases has supported this interpretation, offering no other discernible support for a college or university faculty member having an individual right to academic freedom.<sup>41</sup> While the Supreme Court has addressed academic freedom in other contexts, *Sweezy* and *Keyishian* exhaust the Supreme Court’s development of the academic freedom doctrine in regard

---

36. *Id.* at 250–51 (majority opinion).

37. *Id.* at 245, 254–55.

38. *Keyishian*, 385 U.S. at 603 (emphasis added).

39. *Id.* at 604.

40. See Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 908–09 (2006) (“[I]t is doubtful that, except in a surprisingly small number of instances, the Supreme Court’s references to academic freedom were intended to recognize, or had the effect of recognizing, a genuinely distinct individual academic freedom right, as opposed to simply pointing out an important but undifferentiated instantiation of a more general individual right to freedom of speech.”) (footnote omitted); Alan K. Chen, *Bureaucracy and Distrust: Germaneness and the Paradoxes of the Academic Freedom Doctrine*, 77 U. COLO. L. REV. 955, 959 (2006) (“[T]he courts have not carefully delineated when speech is protected specifically because it is academic *and* when speech is protected under generally applicable First Amendment principles in cases when the speaker happens to be a member of the academic community.”).

41. See J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251, 298 (1989).

to individuals.<sup>42</sup> As one scholar has described it, the Court's academic freedom jurisprudence after these two cases has been "[l]acking definition or guiding principle" and "float[ing] in the law, picking up decisions as a hull does barnacles."<sup>43</sup>

Moreover, recent Supreme Court decisions have indicated that if there is a constitutional right to academic freedom, it belongs to institutions not individual professors. In *Regents of the University of Michigan v. Ewing*,<sup>44</sup> the Court suggested the existence of such a protection by noting the Court's responsibility to safeguard the academic freedom of state and local educational institutions.<sup>45</sup> Similarly, in *Grutter v. Bollinger*,<sup>46</sup> the Court noted that Justice Lewis Powell, in his plurality opinion in *Regents of University of California v. Bakke*,<sup>47</sup> had grounded his analysis in institutional academic freedom.<sup>48</sup> The Court then endorsed Justice Powell's opinion<sup>49</sup> and stated that its holding was "keeping with our tradition of giving a degree of deference to a university's academic decisions."<sup>50</sup>

Nor is there much support in the federal circuit courts of appeal for treating individual academic freedom as a constitutional right. The Fourth Circuit has firmly expressed its belief that the academic freedom of professors is not a constitutional right. In *Urofsky v. Gilmore*,<sup>51</sup> the Fourth Circuit declared en banc that "[a]ppellees' insistence that [the Virginia statute in question] violates their rights of academic freedom amounts to a claim that the academic freedom of professors is not only a professional norm, but also a constitutional right. We disagree."<sup>52</sup> *Urofsky* then went on to point out that despite the Supreme Court's high-minded language regarding academic freedom it had never set aside a state regulation on the grounds that a First Amendment right to academic freedom was infringed.<sup>53</sup>

In *Johnson-Kurek v. Abu-Absi*,<sup>54</sup> the Sixth Circuit favorably quoted *Urofsky*'s language regarding the absence of a constitutional right of academic freedom for individual professors.<sup>55</sup> Similarly, the Tenth Circuit

---

42. *Id.*

43. Lawrence White, *Fifty Years of Academic Freedom Jurisprudence*, 36 J.C. & U.L. 791, 813 (2010) (citing Byrne, supra note 41, at 253).

44. 474 U.S. 214 (1985).

45. *Id.* at 226.

46. 539 U.S. 306 (2003).

47. 438 U.S. 265 (1978).

48. *Grutter*, 539 U.S. at 307.

49. *Id.* at 325.

50. *Id.* at 328.

51. 216 F.3d 401 (4th Cir. 2000) (en banc).

52. *Id.* at 411 (footnote omitted).

53. *Id.* at 412.

54. 423 F.3d 590 (6th Cir. 2005).

55. *Id.* at 593 (quoting *Urofsky*, 216 F.3d at 410) ("[T]o the extent the

has rejected the argument that professors at public colleges or universities possess a special constitutional right of academic freedom that is not possessed by other public employees.<sup>56</sup> And in *Bishop v. Aronov*,<sup>57</sup> the Eleventh Circuit held that “we do not find support to conclude that academic freedom is an independent First Amendment right.”<sup>58</sup>

While the Seventh Circuit suggested in *Dow Chemical Company v. Allen*<sup>59</sup> that individual academic freedom might be a constitutional right,<sup>60</sup> it ultimately refused to answer the question, concluding that “[f]or present purposes, our point is simply that respondents’ *interest* in academic freedom may properly figure into the legal calculation of whether forced disclosure would be reasonable.”<sup>61</sup> Admittedly, the Seventh Circuit has not completely foreclosed the possibility of a constitutional right of individual academic freedom.

It is hard to consider individual academic freedom as a constitutional right when the Supreme Court has never recognized it as such. *Sweezy* and *Keyishian* illustrate the Court’s respect for the importance of academic freedom, but the fact that the Court did not expressly decide either of these cases on academic freedom grounds shows the Court’s hesitancy to treat academic freedom as a full-fledged constitutional right. This fact is especially telling considering the Court has shown few qualms about accepting institutional academic freedom as a constitutional right.<sup>62</sup>

The result is that in practice, constitutional academic freedom is a rather toothless limitation on government interference with publicly employed scholars. The lesson from *Sweezy* and *Keyishian* is that, while academic freedom concerns may serve as an underlying influence on a court, the decision as to whether government interference is constitutionally permissible will ultimately be made on independent grounds. Whether academic freedom will have a limited influence on a court’s decision to prevent government action will depend on whether the government action in question actually fits within the scope of academic freedom. As the following section shows, that scope is quite narrow.

---

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.”).

56. *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1266 (10th Cir. 2005).

57. 926 F.2d 1066 (11th Cir. 1991).

58. *Id.* at 1075.

59. 672 F.2d 1262 (7th Cir. 1982).

60. *Id.* at 1275 (“[A]cademic freedom, like other *constitutional rights*, is not absolute, and must on occasion be balanced against important competing interests.”) (emphasis added).

61. *Id.* at 1276–77 (emphasis added) (citation omitted).

62. *See* *Byrne*, *supra* note 41, at 226; *Gutter v. Bollinger*, 539 U.S. 306, 328 (2003).

## II. THE SCOPE OF CONSTITUTIONAL ACADEMIC FREEDOM

The limited nature of the Supreme Court's jurisprudence makes it clear that academic freedom is not implicated just because the government interferes with a professor's speech. It is unclear, however, how far the scope of constitutional academic freedom extends. Multiple scholars have noted the Court's refusal to offer any guidance on the standards that courts should follow in evaluating academic freedom claims.<sup>63</sup> The result of this ambiguity has been that academic freedom analysis, even in lower courts, is highly "context-specific."<sup>64</sup> Frustratingly, lower courts have followed the Supreme Court's lead and consistently refused to define the contours and limits of academic freedom.<sup>65</sup> Adding to this lack of guidance—or perhaps due to it—these lower courts also tend to invoke the doctrine inconsistently.<sup>66</sup>

Harping on this ambiguity, academics have fomented two somewhat indirect arguments in favor of an expansive concept of academic freedom that covers scholarly email exchanges sought through open-records requests. One of these arguments is based on Supreme Court rulings, while

---

63. See Neal H. Hutchens, *A Confused Concern of the First Amendment: The Uncertain Status of Constitutional Protection for Individual Academic Freedom*, 36 J.C. & U.L. 145, 149 (2009) ("Supreme Court decisions have failed to offer clear guidance on standards that courts should follow in evaluating academic freedom claims by faculty members in public higher education."); Byrne, *supra* note 41, at 257–58; Chen, *supra* note 40, at 959 ("For nearly fifty years, the Supreme Court sporadically has made compelling statements about the importance of academic freedom, yet, it has been either unable or unwilling to develop a coherent framework for assessing the scope of constitutional academic freedom rights."); Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. REV. 461, 469 (2005) ("[N]either the Supreme Court nor the lower courts have ever explained fully the scope and meaning of constitutional academic freedom. . .").

64. See Chen, *supra* note 40, at 959 ("Because the Supreme Court has never fully articulated a constitutional doctrine of academic freedom, the extant law can best be described as a set of context-specific legal standards loosely connected by some common principles.").

65. See W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 NEB. L. REV. 301, 302 (1998) ("[C]ourts are remarkably consistent in their unwillingness to give analytical shape to the rhetoric of academic freedom."); Hutchens, *supra* note 56, at 154 ("[I]mportant questions regarding the contours of First Amendment protection for academic freedom remain unanswered."); Byrne, *supra* note 41, at 252–53 ("Attempts to understand the scope and foundation of a constitutional guarantee of academic freedom, however, generally result in paradox or confusion. The cases, shorn of panegyrics, are inconclusive, the promise of their rhetoric reproached by the ambiguous realities of academic life.").

66. See *Hillis v. Stephen F. Austin State Univ.*, 665 F.2d 547, 553 (5th Cir. 1982) (finding that academic freedom's "perimeters are ill-defined and the case law defining it is inconsistent"); *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000) (citing Byrne, *supra* note 41, at 262–64; Stuller, *supra* note 58, at 303); Kimberly Gee, *Establishing a Constitutional Standard that Protects Public School Teacher Classroom Expression*, 38 J.L. & EDUC. 409, 452 (2009) (attributing circuit court struggles to find a workable standard that protects constitutional in-class teacher expression to the Supreme Court's "ambiguous rulings on academic freedom").

the other is primarily based on circuit court rulings. The first argument begins with the assumption that the academic freedom worries that the Supreme Court raised in *Sweezy* and *Keyishian* are applicable to every statute, which in turn, “chills” the freedom of teachers to speak openly and share their thoughts on intellectual matters. From this assumption it follows that because open-records statutes have the potential to limit teachers from sharing intellectual communications over email with each other, these scholarly email exchanges are properly within the scope of academic freedom. The second argument is that circuit court decisions refusing to enforce subpoenas of professors’ research documents support academic freedom covering other documents such as emails that are of a scholarly nature.

Both arguments are well-intended. However, an examination of the factual basis underlying the cases relied upon shows that, at most, academic freedom only prevents direct government action intended to control the content of teaching and research. Teaching plainly encapsulates classroom speech, curriculum, activities, documents, and textbooks. Similarly, research includes the notes, data, papers, reports, and other preparatory activities associated with scholarly publication. But it is unlikely that either teaching or research includes scholarly email exchanges. No court has held as much, and no matter how loosely one defines “teaching” or “research,” political email exchanges between faculty members cannot reasonably fit within the scope of either basis that is advanced in favor of an expansive notion of academic freedom.

#### A. The First Argument

Academics argue that the Supreme Court’s reasoning in *Sweezy* and *Keyishian* serves as a justification for extending academic freedom to cover scholarly email exchanges sought through open-records statutes. *Sweezy* and *Keyishian* warned that academic freedom is implicated when statutory interference with the academic sphere fosters an “atmosphere of suspicion and distrust” that chills intellectual thought.<sup>67</sup> The argument follows that state open-records statutes, like the state statutes in *Sweezy* and *Keyishian* seeking to root out communists in the school house, also interfere with the academic sphere and create a similar atmosphere of suspicion and distrust around scholarly email exchanges.<sup>68</sup> In support of the existence of such an “atmosphere,” academics emphasize that open-records requests of scholarly email exchanges are often done solely to embarrass or harass a

---

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

68. See Rachel Levinson-Waldman, *Academic Freedom and the Public’s Right to Know: How to Counter the Chilling Effect of FOIA Requests on Scholarship*, AM. CONST. SOC’Y FOR LAW AND POLICY, Sept. 8, 2011, at 7, available at [http://www.acslaw.org/sites/default/files/Levinson\\_-\\_ACS\\_FOIA\\_First\\_Amdmt\\_Issue\\_Brief.pdf](http://www.acslaw.org/sites/default/files/Levinson_-_ACS_FOIA_First_Amdmt_Issue_Brief.pdf).

public professor for his or her political views.<sup>69</sup> According to these academics, such a motivation could have many chilling consequences, such as stifling debate rather than fostering it,<sup>70</sup> driving public college and university professors to leave for private colleges and universities,<sup>71</sup> and influencing state legislatures to reduce research funding for public colleges and universities.<sup>72</sup>

Taken in isolation, this comparison to *Sweezy* and *Keyishian* seems to hold weight. But, while these academics correctly quote *Sweezy* and *Keyishian*, they fail to put such language in context. In both cases the Court warned of direct statutory threats to academic freedom in the classroom. There is no mention of threats to non-classroom speech or of indirect threats posed by neutral statutes such as open-records statutes.<sup>73</sup> Also, as examination of these two cases reveals, direct statutory threats to academic freedom that mandate the termination of certain teachers for their classroom speech have much greater potential for chilling academic speech than do indirect statutory threats to non-classroom speech that do not authorize such termination. Thus, while these two cases do not foreclose the possibility of open-records statutes chilling academic speech, *Sweezy* and *Keyishian* alone cannot be used to justify treating the effect of open-records statutes on scholarly email exchanges as implicating constitutional academic freedom.

*Sweezy* concerned a statutory scheme that presented a direct threat to academic freedom. One of the statutes—which were all designed to regulate communist activities—permitted the state attorney general to question potential communists, including professors, and initiate criminal prosecution. One such person questioned, a University of New Hampshire professor, was convicted of contempt for refusing to answer questions relating to his classroom teaching. As a result, the Court’s language stressing the importance of protecting academic freedom emphasized that it was protection from the direct interference of governmental authority that mattered. The plurality opinion expressed concern for “governmental interference” with teaching and referred to the academic sphere as an “area[] in which government should be extremely reticent to tread.”<sup>74</sup>

---

69. *Id.* at 6.

70. *Id.*

71. See *Dowling Letter*, *supra* note 19 (“The consequence for our state of making such communications public will be the loss of the most talented and creative faculty who will choose to leave for universities that can guarantee them the privacy and confidentiality that is necessary in academia.”); Christopher Shea, *William Cronon vs. Wisconsin Republicans*, WALL ST. J. (Mar. 28, 2011), <http://blogs.wsj.com/ideas-market/2011/03/28/william-cronon-vs-wisconsin-republicans/>.

72. Levinson-Waldman, *supra* note 61, at 6.

73. This distinction is consistent with other Supreme Court cases, which invoke academic freedom in the face of direct government pressure. See *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278 (1961); *Wieman v. Updegraff*, 344 U.S. 183 (1952).

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

Justice Felix Frankfurter's concurrence echoed this concern, stressing the importance of "the exclusion of governmental intervention in the intellectual life of a university."<sup>75</sup> It was this context that led the Court to worry about the chilling of academic speech and the creation of an atmosphere of suspicion and distrust.

*Keyishian* also concerned statutes that represented a direct threat on academic freedom in the classroom. The New York Board of Regents had authorized laws that directly required the firing of public college and university professors who, by virtue of belonging to communist organizations, had the potential of bringing communist beliefs into the classroom. For example, New York Civil Service Law § 105(1)(c), which was deemed constitutionally invalid, provided that "membership in the communist party of the United States of America or the communist party of the state of New York shall constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the service of the state or of any city or civil division thereof."<sup>76</sup> In determining that such a statute was overbroad, *Keyishian* quotes language from multiple administrative documents emphasizing the statute's single-minded goal of eliminating certain types of teachers.<sup>77</sup>

As opposed to *Sweezy*, in which it was the state attorney general threatening academic freedom, and *Keyishian*, in which the statute directly mandated the firing of certain teachers, open-records laws only allow a non-governmental entity to obtain certain types of documents without a direct threat to academic freedom or employment. Such entities have no power to use the contents of email exchanges as the basis to directly fire a professor or decrease his funding. All non-governmental entities can hope for is to embarrass and harass the professor, or, at the very most, expose him or her to liability under a different statute or law.

While this indirect effect on professors may still count as chilling a professor's academic speech, or as creating an atmosphere of suspicion and distrust, it is much less evident an assault on constitutional academic freedom than a statute that directs the government to fire professors who express particular political views. And while open-records laws do nothing to prevent third parties from using information attained to chill academic speech by influencing a state legislature to fire a professor or decrease his funding, they do not directly mandate it. Most importantly, open-records statutes are distinct from the statutes discussed in *Sweezy* and *Keyishian* in that they are neither directly aimed at the classroom activities of professors nor motivated by a government desire to interfere with academic freedom.

---

75. *Id.* at 262 (Frankfurter, J., concurring).

76. N.Y. CIVIL SERV. LAW § 105(1)(c) (McKinney 2011). Similar language is affected in the other statute at issue. N.Y. EDUC. LAW § 3022(2) (McKinney 2009).

77. *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 608–09 (1967).

All these differences add up to the conclusion that not all potential chilling of academic speech is equal. *Sweezy* and *Keyishian* concerned statutes intended to chill academic speech in the classroom, and whose enforcement would directly chill academic speech. They cannot be read to support an implication of academic freedom whenever the enforcement of a generally-applicable statute might hypothetically lead to a chain of events with the potential to chill academic speech.

The Supreme Court itself has stressed the importance of reading *Sweezy* and *Keyishian* in a narrow manner as being applicable only when there is a direct threat to academic speech. In the *University of Pennsylvania v. Equal Employment Opportunity Commission*, the Court ignored the petitioner's academic freedom argument, which was based on *Sweezy* and *Keyishian*, and enforced subpoenas requiring the disclosure of peer review evaluations in tenure decisions of former faculty members who had allegedly been discriminated against.<sup>78</sup> The Court stressed that in order for academic freedom to be implicated there had to be more than an attenuated connection of a generally-applicable law to academic freedom. As that was all that was present in the case at hand, the Court deemed the alleged threat to academic freedom to be "speculative."<sup>79</sup> In doing so, the Court indicated that the academic freedom reasoning in *Sweezy* and *Keyishian* was only limited to those cases in which the government "was attempting to control or direct the content of the speech engaged in by the university or those affiliated with it."<sup>80</sup>

Academics try to circumvent this reasoning by arguing that the college and university's academic freedom claim was recognized by the Court but was outweighed by the compelling interest in enforcement of federal anti-discrimination laws.<sup>81</sup> However, this argument ignores the fact that the Court's decision was explicitly *not* based on the avoidance of sexual and racial discrimination being a compelling state interest that trumped an existing right to academic freedom:

Because we conclude that the EEOC subpoena process *does not infringe any First Amendment right* enjoyed by petitioner, the EEOC *need not demonstrate any special justification* to sustain the constitutionality of Title VII as applied to tenure peer review materials in general or to the subpoena involved in this case.<sup>82</sup>

Thus, the Court—despite recognizing that such disclosure may serve to

---

78. *Univ. of Pa. v. Equal Emp't Opportunity Comm'n*, 493 U.S. 182, 201 (1990).

79. *Id.* at 200 ("Indeed, if the University's attenuated claim were accepted, many other generally applicable laws might also be said to infringe the First Amendment.").

80. *Id.* at 197. *See also In re Dinnan*, 661 F.2d 426, 430 (5th Cir. 1981) ("Time after time the Supreme Court has upheld academic freedom in the face of government pressure. However, in all those cases there was an attempt to suppress ideas by the government.") (citations omitted).

81. *See* Levinson-Waldman, *supra* note 61, at 11.

82. *Univ. of Pa.*, 493 U.S. at 201 (emphasis added).

have a minimally chilling effect on the tenure system<sup>83</sup>—refused to find academic freedom implicated and enforced the subpoenas without applying a balancing test or determining whether the state’s interest in preventing discrimination was a substantial justification.<sup>84</sup>

In conclusion, while *Sweezy* and *Keyishian* do warn of the need to avoid the chilling of academic speech, at most they can only stand for the proposition that academic freedom is implicated when there is a direct government threat to a professor’s classroom speech. These two cases say nothing about whether constitutional academic freedom is implicated by the mere existence of a neutral statute, such as an open-records law, that could initiate a chain of events that might eventually threaten a professor’s non-classroom speech. Arguing otherwise requires the same type of attenuated connection of a generally-applicable law to academic freedom that was roundly criticized and called “speculative” in the *University of Pennsylvania* opinion.

#### B. The Second Argument

Academics also try to twist lower court reasoning to fit their argument that constitutional academic freedom should be extended to cover scholarly email exchanges. Primarily, academics cite cases in which federal circuit courts of appeal have held that college and university professors do not need to turn over documents despite having been subpoenaed. For example, the American Constitutional Society (“ACS”) cites the Seventh Circuit opinion in *Dow Chemical Company v. Allen*<sup>85</sup> as an example of circuit courts “articulat[ing] forcefully the [academic freedom] values at stake in these cases.”<sup>86</sup> In *Dow*, following the scheduling of a hearing by the Environmental Protection Agency regarding the cancellation of one of Dow Chemical’s herbicides, the company issued subpoenas to the University of Wisconsin researchers whose research had led to the hearing. The Seventh Circuit refused to enforce the subpoenas. Academics and their supporters, including the ACS, jump on the court’s language that to uphold the subpoenas would “threaten substantial intrusion into the enterprise of university research, and . . . [be] capable of chilling the exercise of academic freedom.”<sup>87</sup>

However, there is a problem with this attempted analogy to *Dow* and other such subpoena cases. First, at issue in *Dow* is ongoing research. The very first paragraph of the opinion emphasizes that the subpoenas were seeking “the notes, reports, working papers, and raw data relating to on-

---

83. *Id.* at 200.

84. *Id.* at 201–202.

85. *Dow Chem. Co. v. Allen*, 672 F.2d 1262, 1274–76 (7th Cir. 1982).

86. Notably, the ACS refers to academic freedom in this quote as a “value” as opposed to a right. See Levinson-Waldman, *supra* note 61, at 9.

87. *Dow Chem. Co.*, 672 F.2d at 1276.

going, incomplete animal toxicity studies . . . .”<sup>88</sup> Similar pre-publication research is also at issue in other opinions which refuse to enforce subpoenas issued to academics.<sup>89</sup> This fact is an important difference from scholarly email exchanges, which tend to be unrelated to ongoing research. As illustration, the University of Wisconsin made no mention of “research” when explaining why it was withholding Cronon’s scholarly email exchanges.<sup>90</sup> While the University stated that scholarly emails could be used to develop lines of argument, it in no way indicated that it meant the development of arguments pertaining to ongoing research.<sup>91</sup>

For the researchers in *Dow*, granting the subpoenas would mean public access to their research data, potentially costing them the ability to publish which would compromise their months of research.<sup>92</sup> In contrast, by all indications the emails Cronon sought to protect were unrelated to any ongoing research. They did not contain research data obtained through months of study. Nor did they contain information that was intended for publication. All they presumably contained was Cronon expressing his opinions on a timely political issue to colleagues. Moreover, it is likely that many of those opinions had already been made public by Cronon in the original blog post that led to the open-records request.

There is little dispute, in this line of subpoena cases, that direct threats to the research and classroom activities of professors implicate constitutional academic freedom to some extent. However, it is unclear how disclosure of Cronon’s email exchanges with other scholars would directly threaten his research or classroom activities, and any argument that it would present such a threat appears likely to be speculative. As already mentioned in regard to the *University of Pennsylvania*, which was also a subpoena case, attenuated, speculative threats do not implicate academic freedom. Thus, without any indication from courts that it would be appropriate to extend academic freedom to scholarly email exchanges that do not concern ongoing research or classroom activity, analogies to cases such as *Dow* offer little support for professors such as Cronon. The only conclusion is that scholarly email exchanges are not protected by constitutional academic freedom.

### III. STATE COURT INTERPRETATION OF OPEN-RECORDS STATUTES

A third consideration is whether state courts would even allow the withholding of scholarly email exchanges if constitutional academic freedom was legitimately threatened. In all likelihood these courts would

---

88. *Id.* at 1266.

89. *See, e.g.,* *Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998); *In re R.J. Reynolds Tobacco Co.*, 518 N.Y.S.2d 729 (N.Y. 1987).

90. *Dowling Letter*, *supra* note 19.

91. *Id.*

92. *Dow Chem. Co.*, 672 F.2d at 1273 (citing affidavits of researchers).

find that scholarly email exchanges do not implicate constitutional academic freedom and would treat them the same as any other public document being sought by ordering their release barring any explicit statutory exemption.<sup>93</sup> But, assuming that a court did find that scholarly email exchanges implicated academic freedom, it is still unlikely that the court would endorse the withholding of the documents. Out of deference to the balancing done by a legislature in drafting an open-records statute (and likely a desire to avoid finding such a statute unconstitutional), most courts are hesitant to give much consideration to policy arguments in favor of withholding documents, even constitutional arguments. While a minority of courts give more consideration to such arguments and engage in a more strenuous case-by-case balancing, those courts would nonetheless be similarly unlikely to find enforcement of a public records request to be an impermissible violation of constitutional academic freedom. Largely because these courts consider the policy interests in favor of open access fundamental and compelling, they have never found that academic freedom concerns trump these interests.<sup>94</sup> This fact holds true whether the courts hearing each case treated academic freedom as a constitutional right or merely a constitutional value.

#### A. The Majority of Courts

It is important to note at the outset the factors in which courts are uninterested when confronted with a claim that an open-records request threatens academic freedom. Courts have not considered the privacy of the documents at hand,<sup>95</sup> or the potential for embarrassment<sup>96</sup> or harassment.<sup>97</sup> Moreover, these same courts do not care about the motivations underlying the request. Occasionally, public records statutes contain provisions

---

93. For information on the open-records laws in all fifty states see *State Sunshine Laws*, SUNSHINE REVIEW, [http://sunshinereview.org/index.php/State\\_sunshine\\_laws](http://sunshinereview.org/index.php/State_sunshine_laws) (last visited Oct. 30, 2012).

94. This conclusion is based off of a review of all state court cases in Westlaw that contain both the terms “academic freedom” and “open records.”

95. See *Capital Newspapers v. Whalen*, 505 N.E.2d 932 (N.Y. 1987) (although the Mayor’s papers concerned matters of a personal nature, that did not change their susceptibility to New York’s open-records law).

96. *Progressive Animal Welfare Soc. v. Univ. of Wash.*, 884 P.2d 592, 597 (Wash. 1994) (“Courts are to take into account the Act’s policy ‘that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.’”); *KUTV, Inc. v. Utah State Bd. of Educ.*, 689 P.2d 1357, 1361 (Utah 1984) (“[T]he Board’s mere unsubstantiated assertion that disclosure of the questionnaire contents would be embarrassing and possibly detrimental to certain individuals is insufficient to support a judicial ruling that disclosure would be contrary to the public interest.”).

97. See *Students for the Ethical Treatment of Animals, Univ. of N.C. Chapter v. Huffines*, 399 S.E.2d 340, 342 (N.C. Ct. App. 1991), *aff’d by* 420 S.E.2d 674 (N.C. Ct. App. 1992) (“We reject respondent’s argument that the entire IACUC application must be protected because of the researcher’s fear of violence and harassment.”).

explicitly stating that the motivations of the party seeking documents are immaterial.<sup>98</sup> But even when the statutes do not have such an explicit caveat, courts tend to read-in one.<sup>99</sup> Thus, the fact that third parties might be seeking scholarly email exchanges only for the purposes of embarrassment, harassment, or to try to have a professor fired is irrelevant to a court's analysis.

Against this backdrop, a party asserting that academic freedom is threatened faces an uphill battle. This fact is especially true with scholarly email exchanges because the argument that academic freedom will be undermined in that context is almost entirely dependent on the motivations of the party seeking the documents. In other words, academic freedom cannot be undermined unless the third party uses the documents to embarrass or harass a professor for his or her political beliefs, a use of open-records laws that is not statutorily intended. Thus, the inability to point to any sinister motives of the requester can leave any allegations regarding academic freedom conclusory at best.

State courts, like the Supreme Court in *University of Pennsylvania*, have not responded favorably to academic freedom claims that are so attenuated. Consider *Progressive Animal Welfare Society v. University of Washington*, which stressed that open-records laws represent government action that is "content-neutral."<sup>100</sup> Despite recognizing that allowing access to the

---

98. *E.g.*, ARK. CODE ANN. § 25-19-105(a)(1)(A) (West 2011); WASH. REV. CODE ANN. § 42.56.080 (West 2011).

(stating that requesters of public documents "shall not be required to provide information as to the purpose for the request" except in very narrow circumstances).

99. *See, e.g.*, *News Press Publ'g Co. v. Gadd*, 388 So.2d 276, 278 (Fla. Dist. Ct. App. 1980) (finding that the Florida open-records act is not concerned with the motivation of the person who seeks the records despite absence of such a provision in the act); *City of Lubbock v. Cornyn*, 993 S.W.2d 461, 465 (Tex. App. 1999) (reading in that motivations are irrelevant even though the Texas open-records act does not explicitly say so); *Mans v. Lebanon Sch. Bd.*, 290 A.2d 866, 867 (N.H. 1972) (finding that the open-records act of New Hampshire's reference to "every citizen" meant that motives are irrelevant); *State Emps. Ass'n v. Dep't of Mgmt. and Budget*, 404 N.W.2d 606, 614 (Mich. 1987) ("In determining whether to withhold information under the privacy exemption [in Michigan's open-records act], a state agency should not consider the requester's identity or evaluate the purpose for which the information will be used. The exemption conspicuously lacks a requirement that such factors be considered."); *State Bd. of Equalization v. Super. Ct.*, 13 Cal.Rptr.2d 342, 350 (Cal. Ct. App. 1992) ("What is material is the *public* interest in disclosure, not the private interest of a requesting party . . . [The California open-records act] does not take into consideration the requesting party's profit motives or needs."); *Finberg v. Murnane*, 623 A.2d 979, 983 (Vt. 1992) ("In any event, the claim is based on the theory that plaintiff's motive disqualifies him from obtaining the list. This theory is inconsistent with the basic disclosure provision of the Act, which gives 'any person' the right to disclosure."); *Coleman v. Boston Redevelopment Auth.*, 809 N.E.2d 538, 542 (Mass. App. Ct. 2004) ("[T]he reference to 'any person' in [Massachusetts's open-records act] . . . means there is no requirement of 'standing' by the person who requests production of records or any issue about the person's motives or purpose in making the request.") (citation omitted).

100. *Progressive Animal Welfare Soc.*, 884 P.2d at 604.

documents in question might have posed a threat to First Amendment concerns, the court declined to extend the First Amendment to cover the situation presented because the alleged threat was “less than direct.”<sup>101</sup> Similarly, the New York Supreme Court declined to prevent the release of documents in a similar case because the alleged threats to academic freedom were what it deemed “conclusory” and not specifically related to the documents at hand.<sup>102</sup>

Even if a court accepted that the arguments concerning academic freedom with respect to scholarly email exchanges were not conclusory, it is still extremely unlikely that a court would overrule the balancing done by the legislature in drafting the statute. Absent a pertinent statutory exemption, most state courts demonstrate hesitancy to even consider public policy concerns related to academic freedom—or, for that matter, any other interest in favor of a party withholding documents.<sup>103</sup> One reason is that state courts are worried about usurping the role of state legislature.<sup>104</sup> This worry remains true even where academic freedom is concerned. For example, in *State ex rel. Thomas v. Ohio State University*, the Ohio Supreme Court refused to entertain the University’s argument that disclosing the names and addresses of animal research scientists would have a chilling effect on academic freedom.<sup>105</sup> Despite recognizing such a possibility, the court held that such competing public policy concerns had already been “weighed and balanced” by the state legislature in formulating the open-records law.<sup>106</sup>

---

101. *Id.* See also *Students for the Ethical Treatment of Animals*, 399 S.E.2d at 342 (refusing to extend the First Amendment to cover respondent’s documents after rejecting the respondent’s argument that the release of the documents would have a chilling effect on university research).

102. *Am. Soc’y for Prevention of Cruelty to Animals v. Bd. of Trs.*, 556 N.Y.S.2d 447, 452 (N.Y. 1990).

103. See *News Press Publ’g Co.*, 388 So.2d at 278 (“Absent a statutory exemption, a court is not free to consider public policy questions regarding the relative significance of the public’s interest in disclosure and the damage to an individual or institution resulting from such disclosure.”); *State ex rel. Thomas v. Ohio State Univ.*, 643 N.E.2d 126, 130 (Ohio 1994) (“[I]n enumerating very narrow, specific exceptions to the public records statute, the General Assembly has already weighed and balanced the competing public policy considerations between the public’s right to know how its state agencies make decisions and the potential harm, inconvenience or burden imposed on the agency by disclosure.”) (citing *James v. Ohio State Univ.*, 637 N.E.2d 911, 913–14 (Ohio 1994)); see also *Progressive Animal Welfare Soc.*, 884 P.2d at 604 (“Neither the people nor the Legislature created a general exemption from the Act for public universities or for academics. We see no constitutionally compelling reason to do so.”).

104. See *Times Publ’g Co. v. City of Clearwater*, 830 So.2d 844, 848 (Fla. Dist. Ct. App. 2002) (“It may be difficult to find a solution to this problem that balances individual privacy and the public’s right of access. . . . This issue, however, is a matter that must be addressed by the legislature.”).

105. See *State ex rel. Thomas*, 643 N.E.2d at 129.

106. *Id.* at 130.

Notably, a similar result is reached even when state courts recognize academic freedom as a distinct constitutional right. For example, the Florida Supreme Court recognized that academic freedom should be exercised “without fear of government reprisal” when considering the implications of an open-records request.<sup>107</sup> Nevertheless, it did not find the open-records statute at issue unconstitutional. Likely due to the constitutional avoidance canon of statutory interpretation, the court refused to overrule the legislature’s balancing, stating that it considered the purposes underlying the Florida open-records law to represent compelling interests: “Were the chilling effect respondents apprehend balanced against any less *compelling a consideration* than Florida’s commitment to open government at all levels, we might agree that the burdens herein imposed were unduly onerous.”<sup>108</sup> Thus, despite recognizing “the necessity for the free exchange of ideas in academic forums,” the court stressed that academic freedom was “not to be used as a shield which could, in some other case on other facts, be used to mask abuses of the rights of others.”<sup>109</sup>

The compelling consideration of open government mentioned by the Florida Supreme Court has been described by other courts as “basic to our society”<sup>110</sup> and as “nothing less than the preservation of the most central tenets of representative government.”<sup>111</sup> These courts echo that such interests can only be satisfied by full access.<sup>112</sup> This high-minded language is borrowed from the state statutes themselves, which explicitly declare the importance of the public policy underlying open government.<sup>113</sup> The foundational nature of these interests has led courts interpreting open-records acts to emphasize the need to construe the acts broadly and any exemptions narrowly.<sup>114</sup> As one court explained, “any doubt must be resolved in favor of disclosure of public records.”<sup>115</sup> These compelling interests, combined with courts’ demonstrated deference to state legislatures and use of the canon of constitutional avoidance, illustrate how unviable an option it is in the majority of state courts to even argue that academic freedom—already ambiguous under the Constitution—should

---

107. Wood v. Marston, 442 So.2d 934, 941 (Fla. 1983).

108. *Id.* (emphasis added).

109. *Id.*

110. Russo v. Nassau Cnty. Cmty. Coll., 623 N.E.2d 15, 17 (N.Y. 1993).

111. Progressive Animal Welfare Soc’y v. Univ. of Wash., 884 P.2d 592, 597 (Wash. 1994).

112. *See, e.g., id.* (quoting WASH. REV. CODE. § 42.17.010 (2011) (current version at WASH. REV. CODE. § 42.17A.001 (2012)) (“[F]ull access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society.”).

113. *See, e.g.,* WASH. REV. CODE. ANN. § 42.17A.001 (West 2012).

114. *See, e.g.,* State *ex rel.* Thomas v. Ohio State Univ., 643 N.E.2d 126, 128 (Ohio 1994); Wood v. Marston, 442 So.2d 934, 938 (Fla. 1983); Russo, 623 N.E.2d at 19; Hearst Corp. v. Hoppe, 580 P.2d 246, 249 (Wash. 1978).

115. State *ex rel.* Thomas, 643 N.E.2d at 128 (citation omitted).

protect documents from disclosure.

### B. The Minority of Courts

Despite the reluctance of the majority of courts to give much consideration to policy arguments in favor of the withholding of documents, a minority of courts will give such arguments more consideration and engage in case-by-case balancing if specifically instructed to by the governing statute. In some states, such as Michigan, this instruction comes only when a narrow statutory exemption might apply.<sup>116</sup> In Utah, however, courts are encouraged to engage in balancing even when there is no relevant statutory exemption.<sup>117</sup> But even in Utah, in order to find that documents should not be released, a Utah court must determine both that there are compelling interests favoring restriction of access to the record, and that these interests clearly outweigh the interests favoring access.<sup>118</sup> Moreover, the key word in the statute is “may”; courts may undertake this balancing but are in no way obligated to do so.<sup>119</sup> Stronger support for such a balancing test lies in California’s Open Records Act, which provides that “[t]he agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.”<sup>120</sup> California courts have interpreted this provision to require a case-by-case balancing process when reviewing an agency’s justifications for withholding documents.<sup>121</sup>

In one instance, the Wisconsin Supreme Court read in a balancing test that was not explicitly stated in the governing statute.<sup>122</sup> Wisconsin’s Open Records Law declares that there is a “presumption of complete public access.”<sup>123</sup> However, it leaves open the possibility that public access can be denied in an “exceptional case.”<sup>124</sup> Courts have construed this phrase to permit a balancing inquiry, provided that the custodian of the documents has justified its refusal to comply on the grounds that the public interest in keeping a particular record confidential outweighs the public’s right to

---

116. *See, e.g.*, Mich. Fed’n of Teachers & Sch. Related Pers., v. Univ. of Mich., 753 N.W.2d 28, 38 (quoting Mager v. Dep’t of State Police, 595 N.W.2d 142, 147 (Mich. 1999) (“[A] court must balance the public interest in disclosure against the interest Congress intended the exemption to protect.”)).

117. UTAH CODE ANN. § 63G-2-405(1) (West 2010).

118. *Id.*

119. *Id.*

120. CAL. GOV’T CODE § 6255(a) (West 2011).

121. *See, e.g.*, San Diego Cnty. Emps. Ret. Ass’n v. Super. Court of San Diego, 127 Cal. Rptr. 3d 479, 485 (Cal. Ct. App. 2011).

122. *See, e.g.*, Osborn v. Bd. of Regents of the Univ. of Wis. System, 647 N.W.2d 158, 166 (Wis. 2002).

123. WIS. STAT. ANN. § 19.31 (West 2011).

124. *Id.*

open access.<sup>125</sup>

Nevertheless, even in those states where case-by-case judicial balancing is encouraged, there are no instances of a state court finding that an interest in academic freedom outweighed the public policy underlying open-records laws.<sup>126</sup> One reason for this result is perhaps small sample size—the number of open-records disputes that make it to court is small, and of those cases that do, many of the arguments in favor of keeping the records confidential are based on claims other than academic freedom.

However, a more likely reason is the fact that these courts, as instructed to by their governing statutes, accord the same strong respect to the public policy interests in favor of open access as the courts discussed in Part III.A. The California Public Records Act declares that access to information is a “fundamental and necessary right of every person in this state.”<sup>127</sup> Similarly, Wisconsin’s open-records act declares such access to information to be an “essential function of a representative government and an integral part of the routine duties of officers and employees.”<sup>128</sup>

The interests are especially strong when it comes to the email exchanges of publicly employed scholars on their college or university email accounts. As mentioned in Part I, the salaries of these scholars come directly from taxpayers. Because the public’s money is at stake, the public has a right to know how scholars are using their college or university email accounts. For example, the public has an interest in monitoring these scholars to ensure that they are not taking advantage of their positions to engage in fraud or law-breaking. In Professor Cronon’s case, the public had an interest in knowing if he was violating state law by using public resources to engage in political activities. The magnitude of these interests in favor of disclosure makes it unlikely that they will be outweighed in balancing by a tenuous academic freedom concern.

#### IV. POSSIBLE STATUTORY REFORMS

Based on the foregoing analysis of the state of constitutional academic freedom, open-records laws, and court interpretation of both, it appears unlikely that scholarly email exchanges would be protected from release. Any argument that an open-records law is unconstitutional as applied in such a situation is likely to fail. However, as a policy matter, laws, even if constitutional, should not restrict the “marketplace of ideas” any more than is reasonably necessary to carry out their own publicly-valuable objectives. And just because academic freedom is not implicated or protected in open-records cases in a constitutional sense, does not mean that the academic freedom concerns of academics are frivolous as a matter of policy.

---

125. See, e.g., *Osborn*, 647 N.W.2d at 166.

126. See *supra* note 88.

127. CAL. GOV’T CODE § 6250 (West 2011).

128. WIS. STAT. ANN. § 19.31 (West 2011).

Academic freedom is an important value in a democratic society, and the recent trend of using open-records laws for harassment purposes unnecessarily threatens that value.<sup>129</sup> *The Washington Post* illustrated the threat in an editorial response to one such misuse of an open-records law:

Academics must feel comfortable sharing research, disagreeing with colleagues and proposing conclusions — not all of which will be correct — without fear that those who dislike their findings will conduct invasive fishing expeditions in search of a pretext to discredit them. That give-and-take should be unhindered by how popular a professor's ideas are or whose ideological convictions might be hurt.<sup>130</sup>

If academics do not feel comfortable as a result of such harassment, it could stifle research and debate that is valuable to society. The harassment could also drive public college and university professors to private colleges and universities. And, perhaps most worrisome, such harassment could culminate in political maneuverings to terminate a professor or decrease his funding.

Of course, there are certainly competing interests in favor of disclosure, such as taxpayers' interest in monitoring the use of their money and possible law-breaking by recipients of that money.<sup>131</sup> And, as discussed earlier, these interests are of sufficient magnitude to outweigh, in a state court adjudication, academic freedom interests. However, one of the main reasons for that outcome is that the motivations of the record-seeker are ignored by courts,<sup>132</sup> meaning that courts assume that the policy interests in favor of disclosure are actually implicated. But with the recent incidents regarding email exchanges, the motivation of the record-seeker has been more ideologically-charged harassment than an interest in monitoring taxpayer money. When that is the case, the policy interests in favor of disclosure are lessened and are likely outweighed by the academic freedom interests. Thus, while record-seeker motivation may be unimportant as a matter of law, it is important as a matter of policy and suggests that, in the scholarly email context, legislatures should offer more protection from disclosure.

Consequently, although the current open-records statutory system does not protect scholarly email exchanges from disclosure, if a reform existed that would protect such exchanges without undermining the public policy goals of open government, such a reform would be worth serious consideration. Academics, noticing the reluctance of courts to protect such email exchanges, have suggested a handful of reforms. These reforms accept the constitutionality of open-records laws and instead focus on

---

129. See *supra* notes 62–65 and accompanying text.

130. Editorial, *Harassing Climate-Change Researchers*, WASH. POST, May 30, 2011, at A22.

131. See *supra* Part III.B.

132. See *supra* notes 89–93 and accompanying text.

policy arguments for removing scholarly email exchanges from their scope. However, suggested reforms such as mandatory balancing and new statutory exemptions prove to be impractical and unlikely to achieve the desired result of protecting scholarly email exchanges without undermining open government. Indeed, the best way to protect scholarly email exchanges might be with a novel statutory interpretation argument rather than an explicit statutory reform. A viable argument can be made that the current text and purpose behind the definitions of “public records” in open-records statutes should be interpreted to not include scholarly email exchanges within their meaning.

#### A. Suggested Reforms that are Impractical

In the ACS’s issue brief on this topic, it recognized the unlikelihood of courts protecting scholarly email exchanges from disclosure and the futility of arguing that an open-records law is unconstitutional as applied in such a case.<sup>133</sup> In response, it suggested mandatory balancing and specific statutory exemptions as ways to protect scholarly email exchanges without having to argue in court for the overturning of an open-records statute. But while these two reforms are well-intended, both would be difficult to implement and are unlikely to achieve the desired result of protecting scholarly email exchanges without undermining open government.

The first suggested ACS reform, specific statutory exemptions for scholarly email exchanges, is appealing for multiple reasons. First, by protecting these exchanges from disclosure it would ensure the desired open communication among professors without self-censorship.<sup>134</sup> In doing so, it would “provide certainty and concrete guidance” as to whether professors’ emails would be disclosable.<sup>135</sup> Second, providing a specific exemption in this manner would not be that unique, as some states already provide narrow exemptions for such documents as faculty members’ papers.<sup>136</sup> But what makes this reform the most appealing is that it is narrowly-tailored. It would protect scholarly email exchanges from disclosure while not upsetting the status quo for the vast majority of documents sought under open-records statutes.

Despite the appeal, this reform would be difficult to implement. It would be up to each individual state legislature to amend current open-records laws to specifically exempt scholarly email exchanges. Not only will state legislatures be hesitant to re-open discussion of statutes already

---

133. See Levinson-Waldman, *supra*, note 61, at 10–12.

134. See *id.* at 12.

135. See *id.*

136. Levinson-Waldman points to New Jersey’s protection of scholarly records and Ohio’s protection of intellectual property records. See *id.* See also N.J. STAT. ANN. § 47:1A-1.1 (West 2011); OHIO REV. CODE ANN. § 149.43(A)(5) (West 2011).

on the books, but they also have more pressing concerns. It is unrealistic to think that such an amendment, even if proposed, would succeed in being approved. Admittedly, it is possible that, in light of the recent publicity surrounding professor Cronon's situation, state legislatures would be more willing to recognize the public policy interests in favor of such an exemption. But there is no guarantee that such concerns were not considered before or would be deemed sufficient to support a new exemption. It seems inadequate to leave the protection of scholarly email exchanges up to the whims of fifty different legislatures.

Another suggested reform is mandatory balancing. The theory behind mandatory balancing is that for every disputed open-records request, courts will have to weigh the competing interests. It would be the same type of analysis already used for open-records disputes in states such as Utah and California, which currently allow for balancing.<sup>137</sup> The ACS stressed the fact that this reform is advantageous because it avoids the hesitancy that state legislatures might have to enact specific statutory exemptions protecting scholarly email exchanges.<sup>138</sup> However, this argument is misleading. While it is true that there does not necessarily have to be specific language in a statute mandating balancing for a court to engage in such, courts are still bound to follow statutory intent. And with precedent in most states holding that balancing is inappropriate under open-records statutes, evidence of changed statutory intent would probably have to be present for a court to overturn its prior decisions. The result is that the legislatures of nearly every state would most likely have to reconsider their open-records statutes and enact amendments eliciting a desire for courts to engage in balancing.

Another problem with this reform is that the existing usage of this balancing analysis in states such as Utah and California, rather than illustrating that the reform would be easy to implement,<sup>139</sup> instead evidences that the reform of mandatory balancing does not provide the desired solution of protecting scholarly email exchanges. What the ACS failed to take into account is that such balancing in Utah, California, and other states has failed to result in a single case in which a court has deemed academic freedom concerns to outweigh the public interest in disclosure.<sup>140</sup> This failure results from the fact that, even with balancing, scholars are stuck having to make the seemingly futile argument that academic freedom (1) is a constitutional right, (2) covers scholarly email exchanges, and (3) outweighs the public policy in favor of open access.

A final hurdle is that there would be three issues with narrowly tailoring this solution. First, the natural tendency, when a legislator identifies an

---

137. See *supra* notes 111–15 and accompanying text.

138. See Levinson-Waldman, *supra* note 61, at 13.

139. See *id.* at 14.

140. See *supra* note 88.

important problem and calls for a robust response, is for a legislature to respond by over-legislating, which in this case could harm the open government interests at stake. A second issue with this narrow tailoring is that even if the legislature did attempt to limit the mandatory balancing to scholarly email exchanges, delineating clear boundaries for the category of scholarly email exchanges would be difficult. And lastly, there are well-documented problems with balancing analyses.<sup>141</sup> As one scholar described it, “[t]he problem with balancing is that it is indeterminate and unpredictable on the one hand and subjective and value laden on the other.”<sup>142</sup> Similarly, former United States Supreme Court Justice Hugo Black once said that the “ever-present danger of the balancing test” was that the end result was “necessarily tied to the emphasis particular judges give to competing societal values.”<sup>143</sup> While these problems do not necessarily mean that a balancing test should be avoided, they do mean that it may not be the best solution to protect the interests of academic freedom while not harming the interests in open government. Considering the unlikelihood that balancing would even protect scholarly email exchanges in the first place, this solution appears untenable.

#### B. An Argument That May Work

The ACS also suggested that scholarly email exchanges could be protected if courts interpreted open-records statutes as not applying to publicly employed scholars as a matter of statutory intent. The main argument in support of this statutory interpretation argument is that scholars do not perform the government functions to which the statutes are designed to provide access. However, this argument proves too much; almost no one doubts that open-records laws to some extent cover scholars at public universities. Still, the reasoning underlying the ACS’s argument is sound and can be used to support a more narrow statutory interpretation argument: open-records statutes should be interpreted to not include scholarly email exchanges within the ambit of “public records,” as it is defined in the statutes.

The reasoning behind interpreting open-records laws to not apply to scholars in any capacity is that professors at public universities, although government employees, have little to do with the workings of government:

Most government employees are elected, hired, or appointed to carry out

---

141. For an in-depth, comprehensive examination of balancing and its shortcomings, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

142. Alan Brownstein, *The Religion Clauses as Mutually Reinforcing Mandates: Why the Arguments for Rigorously Enforcing the Free Exercise Clause and Establishment Clause are Stronger When Both Clauses are Taken Seriously*, 32 CARDOZO L. REV. 1701, 1722 (2011).

143. *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 74 (1961) (Black, J., dissenting) (internal quotation marks omitted).

a particular governmental agenda; either they participate in forming government policy and thus engage in official acts, or they are working under the direction of those who are and thus carry out duties for the public. Faculty members at public institutions, by contrast, are hired not to pursue a particular governmental agenda, but instead to participate as equal members of the academic community and to engage in creative and innovative scholarship, research, and teaching.<sup>144</sup>

Some open-records statutes, such as Wisconsin's Public Records Law and Michigan's Freedom of Information Act, are written as if they are aimed only at government employees performing government functions.<sup>145</sup> Wisconsin's Public Records Law limits "public records" to those records regarding "the affairs of government and the official acts of those officers and employees who represent them."<sup>146</sup> Similarly, Michigan's Freedom of Information Act describes a public record as "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function. . . ."<sup>147</sup> The ACS endorses understanding this language as only implicating records relating to a government function and extends such an understanding to the open-records statutes in all the states.<sup>148</sup>

This argument finds support in the Wisconsin courts. While the Wisconsin Supreme Court has not foreclosed the use of the state's Public Records Law to obtain records from a public college or university in some situations,<sup>149</sup> it has foreclosed its use to obtain personal emails sent and received by teachers on a public school district's email system. In *Schill v. Wisconsin Rapids School District*,<sup>150</sup> the Wisconsin Supreme Court held that such personal emails were not records under the Public Records Law, declaring that to be a public record "the content of the document *must have a connection to a government function.*"<sup>151</sup> This assertion distinguishes Wisconsin from other states where the public nature of the record holder himself is deemed sufficient to make a record appropriate for disclosure barring any exemptions.<sup>152</sup>

However, the ACS proves too much by taking the next step of arguing

---

144. Levinson-Waldman, *supra* note 61, at 19.

145. *See id.* at 18.

146. WIS. STAT. ANN. § 19.31 (West 2011).

147. MICH. COMP. LAWS ANN. § 15.232(e) (West 2011).

148. *See* Levinson-Waldman, *supra* note 61, at 18–20.

149. *See* *Osborn v. Bd. of Regents*, 647 N.W.2d 158 (Wis. 2002) (reversing lower court's finding that the Board of Regents of the University of Wisconsin did not have to turn over records relating to admissions applications).

150. 786 N.W.2d 177 (Wis. 2010).

151. *Id.* at 185 (emphasis added).

152. *See, e.g.*, IND. CODE ANN. § 5-14-3-2 (West 2012); IOWA CODE ANN. § 22.1(3) (West 2011); KAN. STAT. ANN. § 45-217 (West 2011); MASS. GEN. LAWS ANN. ch. 4, § 7 (West 2012); N.Y. PUB. OFF. LAW § 86 (McKinney 2011); OHIO REV. CODE ANN. § 149.43 (West 2011).

that this government function limitation means that Wisconsin's Open Records Law (and by implication the open-records laws in every state that ties public records to government functions) does not affect scholars at public universities. There is no doubt that these scholars are covered by open-records laws in every state, at least in some situations. Even in states like Wisconsin, which tie the definition of "public records" to documents made or received in the course of official business, scholarly records have been deemed suitable for disclosure when related to research or classroom activities. For example, Washington's definition of "public records" is "writing containing information relating to the conduct of government or the performance of any governmental or proprietary function. . . ."<sup>153</sup> Nonetheless, Washington's Supreme Court has deemed unfunded grant proposals filled out by scholars to be appropriate for disclosure.<sup>154</sup> Similarly, North Carolina describes "public records" as documents "made or received pursuant to law or ordinance in connection with the transaction of public business,"<sup>155</sup> yet still has deemed research applications to be subject to disclosure.<sup>156</sup> Thus, according to the practice of courts, the research and classroom activities of public professors constitute government functions under these open-records statutes.

If the ACS's solution is accepted, these research applications and grant proposals would not be deemed subject to disclosure. This solution is unacceptable because it is consistent with the statutory language in these states to consider research performed by professors at public universities as relating to their official function and thus, as public records. Such a reform would require courts to overturn previous holdings and contradict statutory definitions of "public records" despite statutory directives to interpret open-records laws broadly and in favor of disclosure.

However, the ACS's reasoning can be used to come up with a simpler solution that would remain consistent with the statutory directives to interpret open-records laws broadly and also preserve the public interest in open government. As the ACS indicates, the proper interpretation of the language in the statutes of such states as Wisconsin and North Carolina is that public records do not include any records of a public official unrelated to his or her government function.<sup>157</sup> If that is the case, scholarly email exchanges, because they are unrelated to the official function of professors—research and classroom activities—are not public records

---

153. WASH. REV. CODE ANN. § 42.56.010 (West 2012).

154. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 884 P.2d 592 (Wash. 1994).

155. N.C. GEN. STAT. ANN. § 132-1 (West 2011).

156. *See Students for the Ethical Treatment of Animals, Univ. of N.C. Chapter v. Huffines*, 399 S.E.2d 340 (N.C. Ct. App. 1991), *aff'd* by 420 S.E.2d 674 (N.C. Ct. App. 1992).

157. *See Levinson-Waldman, supra* note 61, at 19.

capable of being requested under open-records laws as currently written.<sup>158</sup> Indeed, it would be hard to argue that emails between scholars, discussing current events or swapping ideas, are related to any official function of being a scholar at a public college or university.

But rather than using this analysis to conclude that scholars are exempt from open-records laws as a matter of statutory interpretation, the ACS should let it speak for itself. The conclusion that scholarly email exchanges are not public records in states such as Wisconsin is enough to protect the email exchanges of professor Cronon and other similarly situated scholars from disclosure. And the argument can even be made that such interpretive reasoning should be extended to states where the definition of “public records” is not explicitly connected to government functions. Reading in such a limitation would be consistent with the expressed policy and goals underlying the open-records statutes in those states. For example, while Kentucky does not describe “public records” as having to relate in any way to an official function, it would not be untoward to find this limitation implied given Kentucky’s expressed underlying policy that access to public records is important “to ensure the efficient administration of government and to provide accountability of government activities.”<sup>159</sup> Similar expressed policies can be found as well in other states that do not limit the definition of “public records.”<sup>160</sup> The disclosure of scholarly email exchanges in these states would do nothing to further these expressed policies, meaning that these email exchanges could be protected while still preserving the states’ interest in open government. And as no court has yet addressed the issue of scholarly email exchanges, such an argument would not call for the overturning of precedent.

Admittedly, the argument to extend the government function limitation on public records to states that do not explicitly provide for it will face skepticism from some courts. Courts in at least one state, New York, have explicitly declared that the scope of their open-records statute “should not be restricted to the purpose for which a document was produced or the function to which it relates.”<sup>161</sup> But given that New York’s expressed reason for its open-records law is explicitly tied to governmental decision-making,<sup>162</sup> it cannot be said that the possibility of New York courts

---

158. Such a solution has been mentioned in passing by the media. *See, e.g.*, Gardner, *supra* note 4.

159. KY. REV. STAT. ANN. § 61.8715 (West 2011).

160. *See, e.g.*, HAW. REV. STAT. ANN. § 92F-2 (West 2011) (expressing the goal of “opening up the government processes to public scrutiny”); IND. CODE ANN. § 5-14-3-1 (West 2012) (“[A]ll persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.”); N.Y. PUB. OFF. LAW § 86 (McKinney 2011).

161. *Russo v. Nassau Cnty. Cmty. Coll.*, 623 N.E.2d 15, 18 (N.Y. 1993) (internal quotation marks omitted) (quoting *Westchester Rockland Newspapers v. Kimball*, 408 N.E.2d 904, 907 (N.Y. 1980)).

162. N.Y. PUB. OFF. LAW § 86 (McKinney 2011) (“The people’s right to know the

changing their interpretation of New York's open-records statute is foreclosed, especially when many states already limit the scope of their "public records" definitions this way.

Additionally, the argument that open-records statutes should be interpreted in this manner is more likely to succeed than convincing fifty state legislatures to amend their open-records laws to implement a mandatory balancing test or specific exemptions for scholars. Another benefit is that this argument can be made in cases that may be brought into court under the current system. Colleges, universities, and professors can depend on the statutory language itself to seek protection for their documents rather than having to rely on the troublesome argument that academic freedom is a constitutional right and scholarly email exchanges implicate that right.

### CONCLUSION

The use of open-records statutes to request emails sent and received from professors' public college or university email accounts is in accord with current state court interpretation of open-records statutes, regardless of the purpose behind such a request. Constitutional academic freedom, to the extent it exists, does not appear to extend to these scholarly email exchanges which are unrelated to research or classroom activities. And, even if it did extend to these exchanges, academic freedom appears to be only a constitutional interest and is unlikely to make a difference in state courts that are highly unlikely to find the policy interests in favor of open access outweighed.

Nevertheless, academic freedom is vital to our society. Just because constitutional academic freedom is not implicated by this use of open-records statutes does not mean that important academic freedom considerations are not at stake. While the open-records system should by no means be overhauled, there is room for minor reform that protects academic freedom while not sacrificing the public policy considerations underlying open-records statutes.

However, such a reform should not come from unduly burdensome statutory amendments that lead to mandatory balancing or specific exemptions for public professors. Nor should it consist in trying to convince courts to expand constitutional academic freedom to protect scholarly email exchanges.

Instead, the most sensible solution is a new statutory interpretation argument rather than an explicit statutory reform. Based on the statutory definitions of public records and the expressed statutory purposes underlying these definitions, a strong case can be made that, as a matter of statutory interpretation, the category of public records should only be

---

process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society.").

limited to those records related to a government function. As scholarly email exchanges do not relate to the understood government function of professors, under this interpretation of open-records statutes there is no reason for courts to treat such email exchanges as public records capable of being requested.

