
STATE UNIVERSITY V. STATE GOVERNMENT: APPLYING ACADEMIC FREEDOM TO CURRICULUM, PEDAGOGY, & ASSESSMENT

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I. INTRODUCTION

Outside interference with college and university governance has come from business, in the form of conditions attached to grants and endowments,¹ and from religion because historically, most colleges and universities had a church affiliation.² The federal government also has some impact, such as via regulation that affects colleges and universities as employers³ or via immigration laws that restrict faculty hiring.⁴ For issues of curriculum, pedagogy, and assessment, however, modern state colleges and universities face the most pressure from other state entities. State legislatures that have constitutional authority over colleges and universities use their power of the purse to politicize education.⁵ Boards of regents, typically a group of appointed individuals and high government officials who provide oversight for a single institution or university system,⁶ may lack understanding of the profession of education “and the character of a true university.”⁷ Further, because these boards typically oversee a system that

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1. Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1277 (1988).

2. Matthew W. Finkin, *On “Institutional” Academic Freedom*, 61 TEX. L. REV. 817, 822 (1983).

3. HARRY T. EDWARDS, *HIGHER EDUCATION AND THE UNHOLY CRUSADE AGAINST GOVERNMENTAL REGULATION* 9 (1980).

4. John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarran-Walter Act*, 66 TEX. L. REV. 1481, 1485 (1988).

5. Metzger, *supra* note 1, at 1277.

6. *E.g.*, CAL. CONST. art. IX, § 9(a). States often call the members of their governing boards by different titles, including trustees and curators, but for clarity, I will use “regent” as a generic term unless referring to a specific institution or case.

7. Metzger, *supra* note 1, at 1278.

includes numerous colleges and universities,⁸ the priorities of the board may not coalesce with those of each member institution. Finally, some state agencies are charged specifically with regulating higher education,⁹ and other agencies may indirectly influence curriculum, as with professional programs like teaching that require state certification.¹⁰

In an ideal world, these law- and rule-making entities would not infringe on the individual college or university's academic freedom. As a former professor, however, I have observed that some state requirements, such as enacting a standardized core curriculum that is transferable among state institutions, may run counter to the judgment of the institution's faculty and administration. When an individual college or university administration feels that legislation or regulation harms its curriculum, pedagogy, or assessment, it normally does what any other professional or business organization would do—lobby the legislature or agency for concessions.¹¹ As government regulation has increased in all facets of life over the last century, colleges and universities have of necessity become more effective at helping to craft the laws that affect them.¹² Sometimes, though, an individual institution cannot persuade lawmakers to change the law, whether because of political pressure or financial constraints or adverse effects on other state universities. This prompted me to ask what legal means a state college or university administration might employ to challenge unwanted interference by state government entities that affect purely academic areas.

The strongest legal right may be the institution's First Amendment claim of academic freedom. Numerous scholarly works over the past seventy-five years have addressed the legal contours of academic freedom.¹³ The consensus is that as a legal concept, academic freedom is vaguely defined by the Supreme Court and therefore difficult to apply.¹⁴ Accordingly, these scholars and commentators have

8. For example, the Board of Regents of the University System of Georgia oversees every public university in the state. GA. CONST. art. 8, § 4, para. I(a)–(b).

9. The purpose of the Texas Higher Education Coordinating Board is “to provide leadership and coordination for the Texas higher education system, institutions, and governing boards.” TEX. EDUC. CODE ANN. § 61.002(a) (Vernon 2006).

10. E.g., CAL. EDUC. CODE § 44227(a) (West 2006) (permitting California Commission on Teacher Credentialing to accept recommendations of teacher education programs that meet the Commission's standards).

11. EDWARDS, *supra* note 3, at 45.

12. *Id.* at 2–3, 45.

13. The earliest legal examination looked more to faculty-university relationships. Comment, *Academic Freedom and the Law*, 46 YALE L.J. 670 (1937). Broader scholarly examinations followed the Supreme Court's first mention of academic freedom in the 1950's. See, e.g., WALTER P. METZGER, *ACADEMIC FREEDOM IN THE AGE OF THE UNIVERSITY* (1961). The 1980's saw more interest in academic freedom as it applies to colleges and universities as institutions. E.g., David M. Rabban, *A Functional Analysis of “Individual” and “Institutional” Academic Freedom under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227 (Summer 1990); J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment”*, 99 YALE L.J. 251 (1989); Metzger, *supra* note 1; Finkin, *supra* note 2. Scholars have continued to maintain a steady interest in academic freedom, particularly its application at an institutional level. See *infra* notes 15–17, 22.

14. See, e.g., Rabban, *supra* note 13, at 236.

explored its limits and attempted to fill in the gaps, particularly with regard to institutional versus individual academic freedom, such as professor-institution disputes over the authority to assign grades¹⁵ or student-institution disputes over diversity in admissions.¹⁶ Only two rather recent articles have explored in any depth a public college or university's academic freedom as against other state entities,¹⁷ and none have singled out state laws that affect day-to-day operations regarding curriculum, pedagogy, and assessment.¹⁸ Unlike the drama that swirls around diversity admissions or unjust terminations, these three areas appear quite tame. Yet they are the academic bread and butter of a college or university; state actions that affect curriculum, pedagogy, and assessment affect every administrator, professor, and student.

Another legal protection for colleges and universities results from academic abstention, which involves judicial deference to academic decision-making. Because of the unique functions of colleges and universities, courts desire to avoid excessive judicial oversight in purely academic matters.¹⁹ When forced to decide, a court tends to defer to the expertise of college and university administrators and will uphold actions that relate to academic matters.²⁰ Although courts could potentially be state actors that infringe on academic freedom, they usually do not because of academic abstention. As a judicial doctrine,²¹ it does not afford the

15. E.g., Rebecca Gose Lynch, Comment, *Pawns of the State or Priests of Democracy? Analyzing Professors' Academic Freedom Rights Within the State's Managerial Realm*, 91 CAL. L. REV. 1061, 1092 (2003); David M. Dumas et al., Case Comment, *Parate v. Isibor: Resolving the Conflict Between the Academic Freedom of the University and the Academic Freedom of University Professors*, 16 J.C. & U.L. 713 (1990).

16. Richard H. Hiers, *Institutional Academic Freedom—A Constitutional Misconception: Did Grutter v. Bollinger Perpetuate the Confusion?*, 30 J.C. & U.L. 531 (2004).

17. Karen Petroski, *Lessons for Academic Freedom Law: The California Approach to University Autonomy and Accountability*, 32 J.C. & U.L. 149 (2005) (discussing tensions between university faculty and regents); Laura A. Jeltema, Comment, *Legislators in the Classroom: Why State Legislatures Cannot Decide Higher Education Curricula*, 54 AM. U. L. REV. 215, 220 (2004) (arguing that universities "should be afforded the academic freedom to make curriculum decisions without legislative interference").

18. Of the three terms that are the subject of this Note, curriculum embraces individual courses as well as their sequencing and subject matter: "1 : the courses offered by an educational institution[.]; 2 : a set of courses constituting an area of specialization." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 307 (11th ed. 2003). Pedagogy relates to classroom practice, the "art, science, or profession of teaching." *Id.* at 912. I chose the term "assessment" over "grading" because it connotes standards for evaluation and because it encompasses non-graded evaluation such as clinical performance.

19. EDWARDS, *supra* note 3, at 25.

20. E.g., *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90 (1978) (deferring to expertise of educators in making academic decisions). Judicial deference to official decision-making and action is not limited to the college and university setting; courts have also deferred to military officers and prison wardens. STEVEN G. POSKANZER, *HIGHER EDUCATION LAW: THE FACULTY* 282 n.3 (2002).

21. Even though courts continually apply academic abstention with consistent results, "doctrine" may be too strong a word for academic abstention "because courts have never developed a consistent or thorough body of rationales or followed a uniform group of leading cases." Byrne, *supra* note 13, at 323.

same protection as the constitutional right of academic freedom. This doctrine, however, resonates with the same justifications undergirding academic freedom²² and could function as its corollary. Because many decisions have invoked it, the parameters and results for academic abstention are fairly well-understood.²³ Another legal concept that could supplement academic freedom is separation of powers: a few state constitutions grant constitutional status to their regents, making these bodies co-equal with state legislatures.²⁴

This Note explores the extent to which administrators at individual state colleges and universities could apply a combined concept of academic freedom and academic abstention to challenge the actions of law- and rule-making state entities. Section II summarizes the current concepts of academic freedom, noting how it applies to state colleges and universities, state governments, and curriculum, pedagogy, and assessment. Then, Section III presents some of the limitations of academic freedom as an applicable legal concept. Section IV discusses academic abstention to show how this judicial doctrine can function as a corollary to make academic freedom more usable; it also discusses the limited applicability of separation of powers between legislatures and regents. Section V then discusses the particular features of the college or university's relationship with each of the three main state entities: legislatures, regents, and regulatory bodies. The Note closes in Section VI with sample applications: the considerations faced by an individual college or university's administration in applying this augmented concept of academic freedom to challenge current state laws and regulations that affect curriculum, pedagogy, and assessment.

II. CURRENT CONCEPTS OF ACADEMIC FREEDOM

The Supreme Court has called academic freedom a "special concern of the First Amendment."²⁵ Although one might think that a First Amendment right applies more to faculty members and students as individuals,²⁶ the reverse is true for academic freedom: this legal principle has developed so that the college or university as an institution has the most explicit right against interference by outside bodies.²⁷ This section explores the background for institutional academic

22. *Id.* at 323–37; Edward N. Stoner II & J. Michael Showalter, *Judicial Deference to Educational Judgment: Justice O'Connor's Opinion in Grutter Reapplies Longstanding Principles, as Shown by Rulings Involving College Students in the Eighteen Months Before Grutter*, 30 J.C. & U.L. 583, 584–85 (2004); Leland Ware, *Strict Scrutiny, Affirmative Action, and Academic Freedom: The University of Michigan Cases*, 78 TUL. L. REV. 2097, 2110 (2004).

23. Byrne, *supra* note 13, at 323.

24. *Id.* at 327.

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

26. Metzger, *supra* note 1, at 1318; William A. Kohlburn, Note, *The Double-Edged Sword of Academic Freedom: Cutting the Scales of Justice in Title VII Litigation*, 65 WASH. U. L.Q. 445, 449 (1987).

27. The Fourth Circuit wrote, "The Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs." *Urofsky v. Gilmore*, 216 F.3d 401, 412 (4th Cir. 2000). See Petroski, *supra* note 17, at 165–66; Rabban, *supra* note 13, *passim* (comparing and contrasting individual and institutional concepts of academic freedom); Metzger, *supra* note 1, at 1316. *But*

freedom in America and subsequent Supreme Court decisions that transformed this theory into a constitutionally-protected area. We turn first to scholarly definitions of academic freedom.

A. Institutional Academic Freedom Defined

One of the principal points among scholars is that academic freedom as a legal concept is hazy and complex;²⁸ much theoretical backing and several explanations exist, however, that provide some framework. Academic speech encompasses both scholarship and teaching.²⁹ Because of “its commitment to truth . . . , its honesty and carefulness, its richness of meaning, its doctrinal freedom, and its invitation to criticism,” academic speech must be allowed the utmost free expression.³⁰ Such freedom helps preserve the “unique functions” of the college and university as an institution, above individual student or faculty freedoms.³¹

Accordingly, one explanation of academic freedom is a “conscious *deference* by judicial or other governmental authorities to a college or university . . . on decisions that are fundamentally academic in content.”³² Another states that it “represents the ability to make decisions concerning internal affairs free from outside interference.”³³ One eminent scholar, Walter P. Metzger, traces the current concept to nineteenth-century German *Freiheit der Wissenschaft*, or academic self-government, which is “the university’s right, under the direction of its senior professors organized into separate faculties and a common senate, to control its internal affairs.”³⁴ J. Peter Byrne writes, “constitutional academic freedom should primarily insulate the university in core academic affairs from interference by the state.”³⁵ Finally, “the most basic conception of academic freedom inheres in the notion that educational institutions, acting through their constituent faculties, have the right to determine their own teaching and research agenda.”³⁶

These explanations share several important features. First, the individual college or university is autonomous; it operates apart from other colleges and universities and state entities. Second, this separation is limited to academic concerns like teaching and research and does not extend to governmental functions

see Hiers, *supra* note 16, *passim* (arguing that institutional academic freedom is a constitutional misconception).

28. *E.g.*, David M. Rabban, *Does Academic Freedom Limit Faculty Autonomy?*, 66 TEX. L. REV. 1405, 1408 (1988) (calling the traditional conception of academic freedom “complex”); Metzger, *supra* note 1, at 1318 (“[T]he Court has not given academic freedom for institutions a specific constitutional rationale.”).

29. Byrne, *supra* note 13, at 258.

30. *Id.* at 259–60.

31. *Id.* at 262–63. Steven G. Poskanzer uses similar language when he refers to the “critical functions” of a university in preserving old knowledge and disseminating all knowledge via teaching and publication. POSKANZER, *supra* note 20, at 67.

32. POSKANZER, *supra* note 20, at 65.

33. Dumas et al., *supra* note 15, at 713.

34. Metzger, *supra* note 1, at 1270.

35. Byrne, *supra* note 13, at 255.

36. Scanlan, *supra* note 4, at 1481.

like health and safety. Finally, we see the basic association between academic freedom and academic abstention: as government entities, courts should ordinarily defer to college and university decisions and actions based on purely academic grounds.

B. Professional Theories and Practical Concerns

Following the Civil War, American colleges and universities underwent a paradigm shift. Rather than adhering to religious principles to prepare young men to be upstanding citizens by following a classics-oriented education, private colleges and universities and the growing number of state colleges and universities embraced an intellectual orientation of relative truths continuously revised by scientific endeavor.³⁷ Several sources contributed to this shift. One was the model of the German university.³⁸ In theory, this was a collection of faculty drawn together to exchange research and ideas free from any external control, including that of the state.³⁹ A second, more practical contribution came from the Morrill Land Grant Act, which provided states with land for colleges and universities dedicated to practical, society-improving fields, such as agriculture and mechanical arts like mining and engineering.⁴⁰ Scientific pursuits such as these require conditions for research and study that are free from political interference or oversight.⁴¹ These changes attracted more and better-credentialed faculty to colleges and universities, so the intellectual life of the institutions continued to expand.⁴²

From these roots of academic freedom, the American Association of University Professors (“AAUP”) formulated a concise statement in 1915.⁴³ This report announced that the modern college and university was the home of three fields of human inquiry—natural science, social science, and philosophy and religion—which, though they sound limited, encompass liberal arts, hard and applied sciences, and professional studies.⁴⁴ “In all of these domains of knowledge, the first condition of progress is complete and unlimited freedom to pursue inquiry and publish its results. Such freedom is the breath in the nostrils of all scientific activity.”⁴⁵ Notably, the 1915 Report did not promote the freedom of the individual faculty member *per se*; rather, the AAUP was interested in keeping the college and university as a whole free from the actions of “bodies not composed of

37. Byrne, *supra* note 13, at 270–71.

38. *Id.* at 270.

39. Metzger, *supra* note 1, at 1270–71.

40. Byrne, *supra* note 13, at 270.

41. *Id.* at 273.

42. *Id.* at 272.

43. *Id.* at 276; see AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, REPORT OF THE COMMITTEE ON ACADEMIC FREEDOM AND TENURE (1915), reprinted in 2 AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY 860, 860 (Richard Hofstadter & Wilson Smith eds., 1961) [hereinafter 1915 REPORT].

44. 1915 REPORT, *supra* note 43, at 867.

45. *Id.*

members of the academic profession.”⁴⁶

C. Supreme Court Recognition of University Academic Freedom: A Special Concern of the First Amendment and the Four Essential Freedoms

Several Supreme Court cases reveal that state colleges and universities have a constitutional right, derived from the First Amendment, to the four essential freedoms of “who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”⁴⁷ This right has limits, such as when the institution makes decisions not based on academic grounds or acts in a way that impermissibly infringes on an individual’s constitutional rights, as well as when the state has exigent and compelling reasons to intrude.⁴⁸ Although the language of the Court could encompass both public and private colleges and universities, this subsection covers the application of academic freedom for state colleges and universities. One reason is that the focus of this Note is on the position of a state college or university relative to other state entities; private institutions usually are not subject to specific legislative and regulatory control of curriculum, pedagogy, and assessment.⁴⁹ Another reason is that some scholars question whether private institutions can even claim academic freedom under the First Amendment, a topic worthy of separate treatment beyond this article.⁵⁰ Finally, the relevant Supreme Court cases have all involved state colleges and universities.

The Court first addressed academic freedom in the 1950’s in *Sweezy v. New Hampshire*.⁵¹ In that case, Paul Sweezy was summoned to testify before the state attorney general under authority of state anti-subversion statutes.⁵² He refused to answer numerous questions, including those related to a lecture he had delivered for the humanities course at the public University of New Hampshire.⁵³ When the attorney general petitioned a state court to propound the same questions, Sweezy continued to refuse to answer. The court convicted him of contempt and ordered him incarcerated, and the New Hampshire Supreme Court affirmed.⁵⁴ The United States Supreme Court reversed this conviction, holding that the state had violated Sweezy’s liberties in the areas of academic freedom and political expression when

46. *Id.* at 872.

47. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (citation omitted). For a general discussion of the history of Supreme Court jurisprudence regarding academic freedom, see William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 *LAW & CONTEMP. PROBS.* 79 (Summer 1990).

48. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315, 319–20 (1978).

49. Rabban, *supra* note 13, at 266–71 (discussing how public universities have more constraints than private universities).

50. See e.g., Comment, *Testing the Limits of Academic Freedom*, 130 *U. PA. L. REV.* 712, 712 (1982).

51. 354 U.S. 234 (1967).

52. *Id.* at 238–42.

53. *Id.* at 243.

54. *Id.* at 244–45.

it compelled him to disclose the subject of his teaching.⁵⁵ In a plurality opinion announcing the judgment of the Court, Chief Justice Warren based this reversal in part on violations of academic freedom:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.⁵⁶

This case involved the rights of an individual against state laws, but Chief Justice Warren hinted at the institutional aspect of academic freedom with phrases like an “atmosphere” for scholarship and “the community of American universities.”⁵⁷

Of more importance for the legal development of academic freedom is Justice Frankfurter’s concurrence.⁵⁸ He argued that intellectual pursuits like social sciences are based on “hypothesis and speculation” and that “inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible.”⁵⁹ To him, a free society depends on free colleges and universities, so that “[p]olitical power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people’s well-being, except for reasons that are exigent and obviously compelling.”⁶⁰ Ultimately, Frankfurter found that the anti-subversion statutes failed this exception: “When weighed against the grave harm resulting from governmental intrusion into the intellectual life of a university, such justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate.”⁶¹

Frankfurter also quoted at length from a statement of The Open Universities in South Africa, which he called the “most poignant” and “latest expression on this subject”:

“In a university knowledge is its own end, not merely a means to an end. A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest. . . .”

. . . .

“It is the business of a university to provide that atmosphere which is

55. *Id.* at 249–50.

56. *Id.* at 250.

57. *Id.*

58. *Id.* at 255 (Frankfurter, J., concurring).

59. *Id.* at 261–62.

60. *Id.* at 262.

61. *Id.* at 261.

most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail ‘the four essential freedoms’ of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”⁶²

This statement is significant because it established a line of demarcation between the individual college or university and the state. Although the state may have some influence over the college or university, the college or university is free to make its own judgments in matters that relate to education. These four essential freedoms embrace a wide range of concerns: hiring and termination, admissions and dismissal, and curriculum, pedagogy and assessment.

Less than a decade later in his majority opinion in *Keyishian v. Board of Regents of the University of the State of New York*,⁶³ Justice Brennan made the strongest statement about academic freedom when he called it “a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”⁶⁴ Borrowing from Justice Holmes, he called the classroom the “marketplace of ideas,” which must be protected against “authoritative selection” because the future of the nation “depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues.’”⁶⁵ He wrote that the nation “is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.”⁶⁶ The Court relied upon this grounding to strike down “complicated and intricate” New York anti-subversion statutes that had a “chilling effect” on free speech and restricted the “breathing space” of First Amendment freedoms.⁶⁷ This case therefore suggests that a court may act to protect a public college or university from the state when state action has a chilling effect upon First Amendment rights.

The four essential freedoms and the First Amendment came together in *Regents of the University of California v. Bakke*, where a non-minority applicant challenged the race-based set-asides for admission to the UC-Davis Medical School.⁶⁸ In his separate yet controlling opinion,⁶⁹ Justice Powell first noted that “[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.”⁷⁰ He then

62. *Id.* at 262–63 (quoting *The Open Universities in South Africa* 10–12).

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

64. *Id.* at 603.

65. *Id.* (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)). One commentator has called this equation of the public university with the marketplace of ideas as a significant distinction between universities and other governmental bodies. Jeltema, *supra* note 17, at 227. This distinction is important because it gives public universities a reason to deserve more constitutional protection than other state agencies against the state itself.

66. 385 U.S. at 603.

67. *Id.* at 604.

68. 438 U.S. 265 (1978).

69. Byrne, *supra* note 13, at 313.

70. 438 U.S. at 312.

quoted the four freedoms from Frankfurter's *Sweezy* concurrence, thus making them part of this controlling opinion.⁷¹ Under the freedom of who may be admitted to study, Powell argued that a diverse student body promoted the atmosphere of "speculation, experiment and caution" essential to a college or university.⁷² The college or university's right to select students to achieve diversity therefore presented a First Amendment "countervailing constitutional interest" to the non-minority student's Fourteenth Amendment equal protection concerns.⁷³ Powell recognized that diversity admissions further a compelling state interest so that a state college or university could use race and ethnicity as a factor in admissions.⁷⁴ Powell also set a limit for academic freedom: the medical school could not show that setting aside a fixed number of seats open only to certain minorities was necessary to achieve the state's interest in diversity; therefore, it impermissibly infringed on the non-minority student's Fourteenth Amendment rights.⁷⁵ A majority of the Court in *Grutter v. Bollinger* specifically endorsed Powell's view when it held that the University of Michigan Law School's use of race as a "plus" factor in admissions was a narrowly tailored means to achieve a compelling state interest in a diverse student body.⁷⁶ *Grutter* is discussed more fully in Section IV, which explores the link between academic freedom and academic abstention.

One implication of *Bakke* and *Grutter* for this Note is that academic freedom provides public colleges and universities with a constitutional right that distinguishes them from other governmental entities. Typically, when state action is based on race, it can survive strict scrutiny only by showing that its actions are necessary for the compelling government interest in remedying past discrimination.⁷⁷ The sole interest that justifies a state college or university's consideration of race in admissions, however, is the attainment of a diverse student body.⁷⁸ Diversity is grounded not in a governmental function to benefit society but in the institution's own self-interest to preserve its First Amendment freedom of admissions.⁷⁹ When narrowly tailored, diversity admissions do not merely survive strict scrutiny. Rather, the institution has a constitutional right superior to an individual's: when college or university admissions programs properly "take race into account in achieving the educational diversity valued by the First Amendment," students not admitted "have no basis to complain of unequal treatment under the Fourteenth Amendment."⁸⁰ The institution's academic

71. *Id.* (citing *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring)).

72. *Id.* (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring)).

73. *Id.* at 313.

74. *Id.* at 315.

75. *Id.* at 319–20.

76. 539 U.S. 306, 329 (2003).

77. *Id.* at 328.

78. *Id.* at 324–25; *Bakke*, 428 U.S. at 311.

79. *Grutter*, 539 U.S. at 323–34.

80. *Bakke*, 428 U.S. at 316, 318. See also *Grutter*, 539 U.S. at 343 ("[T]he Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a

freedom is therefore akin to an individual constitutional right. The implication is powerful: “A state university is a unique state entity in that it enjoys federal constitutional rights against the state itself.”⁸¹

In *Regents of the University of Michigan v. Ewing*, the Supreme Court addressed the essential freedoms of “who may be admitted to study” and “how it shall be taught.”⁸² After repeated poor performance in various areas, Scott Ewing was dismissed from an accelerated medical school program, even though some students had been permitted a retest for one of the subjects.⁸³ The district court found no violation of Ewing’s due process rights because the University’s decision was not based on bad faith, ill will, or other ulterior motives; the Sixth Circuit reversed, holding that the University’s decision was inconsistent with its treatment of other students.⁸⁴ A unanimous Supreme Court reversed again, holding that the dismissal was an academic judgment based upon the student’s entire academic career.⁸⁵ Of note, the Court specifically recognized that academic freedom is an institutional right: “Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself.”⁸⁶ The Court thus recognizes a speech protection for individuals and something more for the college or university—an ability to make decisions unfettered by outside interference.⁸⁷

Combined, these cases reveal that state colleges and universities have a federal constitutional right, which may be enforceable against their creators and paymasters.⁸⁸ The Court has struck down legislation that has a “chilling effect” upon academic freedom.⁸⁹ This federal right makes state colleges and universities akin to individuals in many matters of hiring, admissions, curriculum, and pedagogy and assessment, so the Supremacy Clause could limit attempts by state law- and rule-makers to control individual state colleges and universities in these areas.⁹⁰

III. LIMITATIONS ON ACADEMIC FREEDOM AS AN APPLICABLE LEGAL CONCEPT

In trying to understand the contours of academic freedom as a First Amendment right, we turn first to the Supreme Court, which has the ultimate interpretive authority for the Constitution. The Court embraces the idea of academic freedom,

diverse student body.” (emphasis added)).

81. Byrne, *supra* note 13, at 300.

82. 474 U.S. 214, 226–28 (1985).

83. *Id.* at 215–17.

84. *Id.* at 220–21.

85. *Id.* at 227–28.

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

87. *Keyishian*, 385 U.S. at 604.

88. Jeltema, *supra* note 17, at 253.

89. *Keyishian*, 385 U.S. at 604.

90. Jeltema, *supra* note 17, at 253 (“If universities and students do have rights under the First Amendment, these rights trump the state legislatures’ authority to establish curricula in public universities because of the Supremacy Clause.”).

but a state college or university counsel or administrator would have difficulty applying these decisions to resolve a dispute with a state entity. Scholars have pointed out that the grand style of the Court does not equal clarity of meaning: "The Court has been far more generous in its praise of academic freedom than in providing a precise analysis of its meaning."⁹¹ Other problems further limit the utility of these Supreme Court decisions.

A. A Law of Concurrences and Footnotes

Academic freedom originated and developed through concurrences and footnotes.⁹² Some of the fullest statements of academic freedom therefore have limited precedential value. This fact suggests that the Court turns first to other legal doctrines on which to base its decisions, relegating academic freedom to a secondary position.

Although Chief Justice Warren noted the importance of academic freedom in *Sweezy*, only Justice Frankfurter's concurrence addressed curriculum, pedagogy, and assessment.⁹³ Even the next major case, *Keyishian*, did not note the four essential freedoms;⁹⁴ Justice Powell brought them back up twenty years later in *Bakke*,⁹⁵ and they were not fully embraced by a majority of the Court until almost thirty years after that in *Grutter*.⁹⁶ The clearest statement of institutional academic freedom from any case is contained in a footnote in *Ewing*: "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself."⁹⁷

This trend continues, such as in cases where students have alleged violations of their First Amendment rights by colleges and universities. In *Widmar v. Vincent*, a religious group challenged the University of Missouri-Kansas City's ("UMKC") policy of excluding such groups from its facilities.⁹⁸ The Court ruled against UMKC, holding that since it had created an open forum, content-based exclusion of religious speech violated the First Amendment.⁹⁹ In one sentence, the majority mentioned that it did not question UMKC's right to make academic judgments about allocating scarce resources or decisions related to the four freedoms.¹⁰⁰ The only analysis of academic freedom came in Justice Stevens' concurrence.¹⁰¹ He

91. Byrne, *supra* note 13, at 257. See Rabban, *supra* note 13, at 230.

92. See Petroski, *supra* note 17, at 153.

93. 354 U.S. at 263 (Frankfurter, J., concurring).

94. 385 U.S. at 603.

95. 438 U.S. at 312.

96. 539 U.S. at 329.

97. 474 U.S. 214, 226 n.12 (1985).

98. *Widmar v. Vincent*, 454 U.S. 263, 265–66 (1981).

99. *Id.* at 277.

100. *Id.* at 276 ("Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources or 'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted study.'" (citing *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring))).

101. *Id.* at 278–80 (Stevens, J., concurring).

wrote that the “managers of a university” should be able to decide on academic grounds what content they find favorable to their educational mission, but that they must justify denial of individual constitutional rights.¹⁰²

Similarly, in *Board of Regents of the University of Wisconsin System v. Southworth*, students sued the University of Wisconsin over mandatory student fees, part of which funded organizations with which they disagreed.¹⁰³ The Court remanded after providing principles related to viewpoint neutrality.¹⁰⁴ Again, the only discussion of academic freedom comes in a concurrence, this time by Justice Souter.¹⁰⁵ Of note, the University did not argue the case on academic freedom grounds; nevertheless, Souter framed his concurrence in institutional academic freedom terms, saying, “protecting a university’s discretion to shape its educational mission may prove to be an important consideration in First Amendment analysis of objections to student fees.”¹⁰⁶ Also, this concurrence makes the most explicit statement of institutional academic freedom against other government entities in issues of curriculum, pedagogy, and assessment: “[W]e have spoken in terms of a wide protection for the academic freedom and autonomy that bars legislatures (and courts) from imposing conditions on the spectrum of subjects taught and viewpoints expressed in college teaching”¹⁰⁷ As has been the history of academic freedom, this statement comes from a concurrence, and concurrence is not precedent. Both *Widmar* and *Vincent* implicate the limits of academic freedom—college and university administrative decisions that impermissibly infringe on individual constitutional rights—but the Court provided little guidance for applying academic freedom by failing to take up the concept more thoroughly.

B. Few Legal Challenges by Colleges & Universities Against Legislatures or Regents

Although the Supreme Court has validated a college or university’s academic freedom as a legal concept, this issue has reached the Court in only a few cases, none of which has included disputes between a public institution and the state that created it and that controls its resources.¹⁰⁸ For example, *Sweezy* and *Keyishian* used academic freedom concepts to reject McCarthy-era anti-subversion statutes, subjects that may be of historical interest only.¹⁰⁹ More recent decisions have addressed admissions and assessment, two of the four essential freedoms, but these were challenges by individuals against college and university authority.¹¹⁰ Metzger writes that although some lower courts have alluded to academic freedom in cases involving individual professors’ pedagogical choices, the majority of

102. *Id.*

103. *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000).

104. *Id.* at 235.

105. *Id.* at 237–239 (Souter, J., concurring).

106. *Id.* at 239.

107. *Id.* at 238–39.

108. Metzger, *supra* note 1, at 1319.

109. 354 U.S. at 254–55; 385 U.S. at 609–10.

110. *E.g.*, *Bakke*, 438 U.S. 265.

courts do not mention this right.¹¹¹ Because “the Supreme Court has taken on such cases too infrequently to reveal its mind,”¹¹² a state college or university administration trying to resist legislation or regulation that relates to curriculum, pedagogy, or assessment has only limited legal arguments available. It can attempt to extend the concept of academic freedom contained in cases like *Bakke* and *Grutter*, or it can turn to more specific circuit and district court opinions. Only a handful of these latter opinions exist, so in most jurisdictions they would be merely persuasive, rather than mandatory, authority.

C. Questionable Constitutionality of Academic Freedom for Public Institutions

These shortcomings add up to the strongest criticism: academic freedom as a right inherent in the college or university, particularly for public institutions,¹¹³ may have no constitutional authority.¹¹⁴ Specific criticisms include that the First Amendment as applied to the states via the Fourteenth Amendment protects persons and not institutions of higher education, particularly where one government entity challenges another.¹¹⁵ This lack of authority stems from the origin of the concept: it received its first legal voice in a concurrence that cited professional theory rather than legal precedent.¹¹⁶ It has since been embraced by justices, and in turn by lower courts, but without the requisite critical inquiry to show exactly how the First Amendment protects academic freedom for government institutions.¹¹⁷ Hiers writes that this uncritical acceptance by the courts results from a desire to “acknowledge the important *public policy value* of *institutional autonomy* in matters requiring educational expertise” by granting constitutional authority, not just judicial deference, to academic decisions.¹¹⁸ We see this applied in cases like *Ewing*, where the Court mentions academic freedom in a footnote, but without explication and without applying it to the holding.¹¹⁹ Such treatment prompted Chancellor Yudof to write that “institutional academic freedom in the public sector is a make-weight. It does not allocate authority within the governing structure of universities, rather it is used only to emphasize the need to insulate the established order of governmental decision-making from challenges to its authority.”¹²⁰

Although the Court has not provided “a specific constitutional rationale”¹²¹ for the institutional theory of academic freedom, that does not mean that none exists.

111. Metzger, *supra* note 1, at 1319.

112. *Id.*

113. Mark G. Yudof, *Three Faces of Academic Freedom*, 32 LOY. L. REV. 831, 855 (1987).

114. Hiers, *supra* note 16, at 531.

115. *Id.* at 557.

116. *Id.* at 577–78.

117. *Id.* at 578.

118. *Id.* at 532.

119. 474 U.S. at 226 n.12.

120. Yudof, *supra* note 113, at 857.

121. Metzger, *supra* note 1, at 1318.

Scholars have filled in the gaps by theorizing that institutions, through their administration, can claim the individual First Amendment rights of their students and faculty in the aggregate,¹²² most notably the right to receive information.¹²³ Perhaps the most compelling argument links the function of a college and university education with the rationale behind the First Amendment.¹²⁴ Colleges and universities offer not just practical skills but also liberal studies, “the capacity of such an education to liberate the student from provincial self-interest” by instilling “a capacity for mature and independent judgment.”¹²⁵ Liberal studies are therefore “necessary for the exchange of ideas contemplated by the First Amendment, and they exist in constant danger from majorities.”¹²⁶ The Supreme Court echoed this language when it referred to the “expansive freedoms of speech and thought associated with the university environment” in *Grutter v. Bollinger*,¹²⁷ discussed more fully below.

Even without such justifications, “a norm without a constitutional plank is not necessarily without constitutional weight.”¹²⁸ Metzger interpreted this statement to mean that the Court’s lack of explanation linking the First Amendment and institutional academic freedom “may have given it a footloose quality that increased its general influence” among lower courts.¹²⁹ The “plank / weight” statement suggests another interpretation: lack of a specific constitutional warrant does not mean denial of constitutional protection. Consider that entities as well as individuals have asserted aspects of the First Amendment, such as the free exercise clause, to invalidate infringing government laws.¹³⁰ And although some people have difficulty comprehending one state entity invoking First Amendment protection against another state entity—particularly when that other entity is the

122. *Testing the Limits of Academic Freedom*, *supra* note 50, at 724.

123. Edward F. Sherman, *The Immigration Laws and the “Right To Hear” Protected by Academic Freedom*, 66 TEX. L. REV. 1547, 1548 (1988). Among the cases cited by Sherman are *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the [constitutional] right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences . . .”) and *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“It is now well established that the Constitution protects the right to receive information and ideas.”). *Id.* at 1548 n.7. The aggregation approach is not without flaws. Sherman calls vicarious assertion a limited concept because it protects institutional academic freedom only to the extent it furthers these individual rights. *Id.* at 1548. And at least one state appellate court, in a case that did not involve a claim of institutional academic freedom, has denied a university’s vicarious assertion of constitutional rights on behalf of its students. *Native Am. Heritage Comm’n v. Bd. of Trs.*, 59 Cal. Rptr. 2d 402, 408–09 (Cal. Ct. App. 1996). The court noted, however, that its holding would not apply if the students lacked notice of the affecting conduct or if they would otherwise be unable to assert their rights. *Id.*

124. *Byrne*, *supra* note 13, at 336.

125. *Id.* at 335.

126. *Id.* at 336.

127. 539 U.S. at 329.

128. Metzger, *supra* note 1, at 1319.

129. *Id.*

130. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525, 528 (1993) (invalidating a city ordinance banning animal sacrifice as infringing upon the free exercise clause right of petitioner church, a not-for-profit corporation).

legislature and hence its “paymaster”¹³¹—nothing in the Constitution forbids this result. After all, the Supreme Court has already declared that “a state university system is quite different in very relevant respects from primary and secondary schools.”¹³² Further, unlike other state units such as corrections and public safety, colleges and universities receive only a fraction of their funding from the state because much of it comes from tuition and private grants and endowments.¹³³

Such reasoning may address the criticisms of Chancellor Yudof and Professor Hiers on the surface, but we should not easily dismiss the heart of their complaints: academic freedom for public colleges and universities has received insufficient explanation from the Supreme Court, and circuit and district courts in turn have failed to develop the concept. College and university administrators do not know the extent of their institution’s academic freedom, state entities have little guidance in crafting laws, and trial courts have insufficient precedent from which to rule. Interestingly, both critics indicate—without themselves exploring—another stage of analysis: since courts wish to maintain the integrity of colleges and universities by deferring to academic decisions of college and university administrators, we can look to cases—both federal and state—that involve academic abstention to find support for public institutional academic freedom.

IV. ACADEMIC ABSTENTION AND SEPARATION OF POWERS: COROLLARIES TO INSTITUTIONAL ACADEMIC FREEDOM

“The constitutional right of institutional academic freedom appears to be a collateral descendent of the common law notion of academic abstention.”¹³⁴ In fact, courts justify academic abstention as necessary to maintain academic integrity, thus invoking the four essential freedoms.¹³⁵ One drawback with academic abstention standing alone is that it does not have a “coherent rationale” for application.¹³⁶ By looking at academic abstention through the lens of curriculum, pedagogy, and assessment, however, we can refine our understanding of this doctrine as a corollary that makes academic freedom more usable. Though limited to a few states, separation of powers is a second corollary that arises in states that grant constitutional status to their regents.

A. Academic Abstention: High Courts Defer to Academic Decision Making

Academic abstention is a judicial practice that affords the university freedom

131. Metzger, *supra* note 1, at 1318.

132. *United States v. Fordice*, 505 U.S. 717, 728–29 (1992).

133. For example, tuition at the University of Kansas pays for approximately one-third of the total cost of an in-state student’s attendance and 60 percent of an out-of-state student’s attendance. Also, appropriations from the state legislature account for only 24 percent of KU’s total annual revenue. Tuition: 2006–2007, The University of Kansas, <http://www.tuition.ku.edu> (last visited Feb. 13, 2007).

134. Byrne, *supra* note 13, at 326.

135. *Id.* at 326–37; see *Gutter v. Bollinger*, 539 U.S. 306, 328–29 (2003) (equating the freedom of whom to admit with judicial deference).

136. Byrne, *supra* note 13, at 325.

from judicial oversight in most cases.¹³⁷ “It describes the traditional refusal of courts to extend common law rules of liability to colleges where doing so would interfere with the college administration’s good faith performance of its core functions.”¹³⁸ Judges tend not to disturb the bona fide academic decisions of academics.¹³⁹ Byrne offers two rationales for this doctrine. First, academia is a realm separate from society as a whole; it pursues values related to collegial, pedagogical, or disciplinary models of personal relations.¹⁴⁰ “Second, judges feel themselves incompetent to evaluate the merits of academic decisions.”¹⁴¹

The leading Supreme Court case is *Curators of the University of Missouri v. Horowitz*, which involves assessment.¹⁴² In *Horowitz*, a medical student received poor performance evaluations in clinicals; after failing to improve while on probationary status, she was denied re-enrollment by the medical school.¹⁴³ She sued, alleging a violation of due process, but the district court found for the University; the Eighth Circuit reversed and remanded.¹⁴⁴ The Court sided with the University and held that the Due Process Clause requires neither notice nor a hearing before dismissing a student for academic reasons. Justice Rehnquist’s majority opinion held that an academic decision “requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.”¹⁴⁵ The Court recognized the “historic judgment of educators” and declined to enlarge the judicial presence in the academic community because to do so would “risk deterioration of many beneficial aspects of the faculty-student relationship.”¹⁴⁶

Federal courts following *Horowitz* have deferred to the decisions of college and university educators made on academic bases.¹⁴⁷ For example, the University of Illinois at Chicago (“UIC”) dismissed an anesthesiology intern after it learned that he had lied on his application about being dismissed from another internship program.¹⁴⁸ He brought suit in district court alleging violation of due process, and the district court granted summary judgment in UIC’s favor.¹⁴⁹ The Seventh Circuit affirmed.¹⁵⁰ After a discussion of *Horowitz*, it wrote, “We have no

137. *Id.* at 323.

138. *Id.*

139. *Id.* at 326.

140. *Id.* at 325.

141. *Id.*

142. 435 U.S. 78, 90 (1978).

143. *Id.* at 80–82.

144. *Id.* at 79–80.

145. *Id.* at 90.

146. *Id.* at 89–90.

147. *See, e.g.,* *Wheeler v. Miller*, 168 F.3d 241, 248 (5th Cir. 1999) (holding that a school’s decision to terminate a student from its doctoral program satisfied the minimal due process requirements under *Horowitz* since it was based on careful and deliberate ratings of academic performance); *Harris v. Blake*, 798 F.2d 419 (10th Cir. 1986) (dismissing a graduate student for attendance was an academic rather than a disciplinary decision under *Horowitz*).

148. *Fenje v. Feld*, 398 F.3d 620, 621–22 (7th Cir. 2005).

149. *Id.* at 623–24.

150. *Id.* at 622.

difficulty concluding that Dr. Fenje's dismissal falls within the ambit of an academic dismissal.¹⁵¹ The court also wrote, "As in *Horowitz*, this represents an academic judgment by school officials, expert in the subjective evaluation of medical doctors."¹⁵²

State cases follow the federal approach, including a decision by the Alaska Supreme Court that specifically mentions curriculum and assessment.¹⁵³ In *Bruner v. Petersen*, a nursing student challenged the School's decision that he take a basic English class before re-enrolling in a required nursing class that he had failed.¹⁵⁴ The Alaska Supreme Court affirmed the trial court's finding that the School's requirement was proper by writing that faculty are in the best position to determine how to help the student to succeed and must have the discretion necessary to maintain the integrity of the curriculum and the degree.¹⁵⁵ For these reasons, the Alaska Supreme Court affords college and university faculty and administrators substantial discretion "[i]n matters of academic merit, curriculum, and advancement."¹⁵⁶ This and other state decisions indicate that courts, if confronted with litigation between a state and one of its colleges or universities, may consider activities that harm the faculty-student relationship as infringing upon academic freedom.

B. A Link Between Academic Abstention and Academic Freedom

Academic abstention can be the key to transform academic freedom into a concept usable for state college and university administrators. Byrne calls institutional academic freedom a "collateral descendent" of academic abstention.¹⁵⁷ He cites *Ewing* and *Sweezy* when he describes academic freedom as academic abstention raised to constitutional status, "so that judges can consider whether statutes or regulations fail to give sufficient consideration to the special needs or prerogatives of the academic community."¹⁵⁸

Fourteen years after this characterization, the Supreme Court reinforced the link between academic freedom and academic abstention. The Court in *Grutter v. Bollinger* recognized a compelling state interest in a diverse student body in upholding the diversity admissions policies of the Law School of the University of Michigan.¹⁵⁹ As grounds for this compelling interest, the Court first turned to academic abstention, reiterating its tradition from *Ewing*, *Horowitz*, and *Bakke* of deference to "academic decisions" based on "complex educational judgments" that

151. *Id.* at 625.

152. *Id.*

153. *Bruner v. Petersen*, 944 P.2d 43 (Alaska 1997). *See also* *Yarcheski v. Reiner*, 669 N.W.2d 487, 492 (S.D. 2003) ("Evaluating academic performance is a venture beyond our expertise and our jurisdiction."); *Swartley v. Hoffner*, 734 A.2d 915 (Pa. Super. Ct. 1999) (using similar language of judicial deference).

154. 944 P.2d at 48.

155. *Id.*

156. *Id.*

157. Byrne, *supra* note 13, at 326.

158. *Id.* at 327.

159. 539 U.S. 306, 328 (2003).

lie “primarily within the expertise of the university.”¹⁶⁰ In the next sentence, the Court wrote, “given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”¹⁶¹ The Court then cited the First Amendment as providing a constitutional dimension for “educational autonomy” and institutional judgments. It endorsed Justice Powell’s *Bakke* opinion and his discussion of the essential freedom of ‘who may be admitted to study’: “Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School’s proper institutional mission”¹⁶²

In *Gratz v. Bollinger*, a companion to *Grutter*, students who were denied admission to the University of Michigan’s College of Literature, Science and the Arts sued in district court, alleging the same causes of action as *Grutter*.¹⁶³ The district court certified two questions to the Sixth Circuit, but while they were still pending, the Supreme Court granted certiorari to resolve this case with *Grutter*.¹⁶⁴ Although the Court deferred to the judgment of the administrators in using diversity as a basis to consider race as a factor in admissions,¹⁶⁵ it recognized constitutional limits in effecting this goal: “Nothing in Justice Powell’s opinion in *Bakke* signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by our strict scrutiny analysis.”¹⁶⁶ The Court applied strict scrutiny to strike down the college’s admission program, which awarded all minority applicants 20 points on a 150-point scale, because it was not narrowly tailored to account for individual applicants.¹⁶⁷

Combined, these cases reveal the interplay between academic abstention and academic freedom. Both make clear that the courts must scrutinize academic decisions that affect constitutional rights like equal protection, yet they both reinforce the judicial doctrine of abstention from the purely academic judgments of college and university educators. *Grutter* indicates the Court’s willingness to defer to certain academic decisions. A decision affecting the institutional mission and encompassed within the four essential freedoms will, by its nature, reflect a compelling state interest. *Gratz* likewise recognizes academic abstention but tells courts when to intervene: when those decisions involve means that are not

160. *Id.*

161. *Id.* at 329.

162. *Id.* at 328–29 (citing *Bakke*, 438 U.S. at 318–19). Academics have a split view of this recently-decided case. Because it did not provide sufficient analysis, Hiers sees this decision as perpetuating the confusion regarding the questionably constitutional institutional academic freedom and academic abstention. Hiers, *supra* note 16, *passim*. Stoner and Showalter, however, claim this decision applied long-standing principles of judicial deference. Stoner & Showalter, *supra* note 22.

163. *Gratz v. Bollinger*, 539 U.S. 244, 251 (2003).

164. *Id.* at 259–60.

165. *Id.* at 268.

166. *Id.* at 275.

167. *Id.*

narrowly tailored to achieve a compelling state interest related to one of the four freedoms. Resisting state laws or rules that infringe on purely academic areas seems the most narrowly tailored means possible to preserve academic freedom.

C. Circuit Courts Defer to Institutional Decisions for Reasons that Justify Academic Freedom for Public Universities

One criticism of public college and university academic freedom is that, outside of diversity in admissions, the Supreme Court has not applied the concept of institutional academic freedom as essential to a holding.¹⁶⁸ If we turn to circuit court opinions that defer to the decisions of state institutions regarding pedagogy and assessment, however, we find that their reasoning implicates the essential freedoms. Although these opinions show how academic abstention is a powerful concept, one significant limitation is that they seldom—if ever—involve state entities as opposing parties. Viewing these cases through *Grutter* and *Gratz*, however, which united academic abstention and academic freedom under the First Amendment, application of these decisions against the state is plausible. An analysis of these opinions reveals a more thorough basis for constitutional authority for institutional academic freedom: each college or university has a mission that it expresses through hiring and admissions—and most importantly for this Note via institutional standards and norms for curriculum, assessment, and pedagogy—and that expression warrants protection against state action that has a chilling effect on this First Amendment right.

Although the courts have not addressed curriculum, several cases defer to institutions for the essential freedom of “how it shall be taught.” The Sixth Circuit confronted one aspect of this freedom directly and held that a college or university may terminate a teacher “whose pedagogical style and philosophy do not conform to the pattern prescribed by the school administration.”¹⁶⁹ Administrators at Eastern Kentucky University considered their students as having “somewhat restrictive backgrounds” and expected their faculty to teach on a more basic level by stressing fundamentals and conventional teaching patterns.¹⁷⁰ Because the teacher in question had emphasized student responsibility and freedom to organize in-class and out-of-class assignments, which generated numerous student complaints, the administration terminated her.¹⁷¹ The court affirmed the reasoning of the district court, which had held that “a State University has the authority to refuse to renew a non-tenured professor’s contract for the reason that the teaching methods of that professor do not conform . . . with those approved of by the University.”¹⁷²

168. Hiers, *supra* note 16, at 579–80. Although *Ewing* involved dismissal of a student and hence implicated assessment, Chancellor Yudof argues that academic freedom was not *essential* to the holding, since the only mention was in a footnote. Yudof, *supra* note 113, at 857.

169. *Hetrick v. Martin*, 480 F.2d 705, 706 (6th Cir. 1973).

170. *Id.* at 707.

171. *Id.* at 706–07.

172. *Id.* at 708. A recent South Dakota Supreme Court opinion relied in part on *Hetrick* in holding that institutional academic freedom means that a university does not have to tolerate “any

Several circuit court decisions have addressed the second facet of “how it shall be taught,” assessment, and have placed a college or university’s authority in assessment standards above that of professors. For example, *Parate v. Isibor*, a Sixth Circuit case that has received some scholarly attention, involved a dispute between administrators at Tennessee State University and an engineering professor over his too-flexible grading policy, which led to a decision not to renew the professor.¹⁷³ The actual holding was that the assignment of a grade by a professor was symbolic communication protected by the First Amendment.¹⁷⁴ The Court noted, however, that *Parate* had “no constitutional interest in the grades which his students ultimately receive,” meaning that administrators could change a student’s final grade (such as when a student appeals).¹⁷⁵ In the First Circuit case *Lovelace v. Southeastern Massachusetts University*, a state university similarly declined to renew a non-tenured faculty member.¹⁷⁶ The court held that the University was justified in discharging the professor when he refused to change his individual grading standards, which conflicted with established policies.¹⁷⁷ Unlike the Sixth Circuit in *Parate*, the First Circuit found that the instructor had no First Amendment protection for his grading policies.¹⁷⁸ Both decisions nevertheless reinforce the ultimate authority of the college or university to determine institution-wide grading standards and policies.

Lovelace is important for another reason: in it, all four essential freedoms come together as integral to the holding. The Court declared that an institution must have academic freedom in curriculum, pedagogy, and assessment to effectuate its admissions policies:

Whether a school sets itself up to attract and serve only the best and the brightest students or whether it instead gears its standard to a broader, more average population is a policy decision which, we think, universities must be allowed to set. And matters such as course content, homework load, and grading policy are core university concerns, integral to implementation of this policy decision.¹⁷⁹

The court refused to acknowledge any First Amendment protection for the instructor’s grading policies, which conflicted with the University’s, because to do so “would be to constrict the university in defining and performing its educational

manner of teaching method a professor may choose to employ.” *Yarcheski v. Reiner*, 669 N.W.2d 487, 498 (S.D. 2003) (citing *Hetrick*, 480 F.2d at 707).

173. *Parate v. Isibor*, 868 F.2d 821 (6th Cir. 1989). For a more thorough discussion of *Parate*, see Dumas et al., *supra* note 15.

174. 868 F.2d at 830.

175. *Id.* at 829.

176. *Lovelace v. Se. Mass. Univ.*, 793 F.2d 419, 425 (1st Cir. 1986).

177. *Id.* at 425–26.

178. *Id.* at 426. The Third Circuit has similarly rejected the *Parate* distinction between the faculty’s right to assign a grade and the university’s right to note the final transcript grade. *Brown v. Armenti*, 247 F.3d 69, 75 (3d Cir. 2001) (holding that “a public university professor does not have a First Amendment right to expression via the school’s grade assignment procedures”).

179. *Lovelace*, 793 F.2d at 425–26.

mission.”¹⁸⁰ Rather than mere dicta, this concept was central to the court’s holding that the University could dismiss a non-tenured professor because his grading standards were more rigorous than those adopted by the University.¹⁸¹

In another case that involved assessment and pedagogy, *Brown v. Armenti*, the Third Circuit cited *Lovelace*.¹⁸² Professor Brown refused to change a student’s “F” to “Incomplete” at the request of a state university’s president, Armenti; Brown was suspended and then terminated.¹⁸³ The district court denied Armenti’s motion for summary judgment,¹⁸⁴ but the Third Circuit reversed.¹⁸⁵ It quoted the Supreme Court’s decision in *Rosenberger*: “When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.”¹⁸⁶ *Rosenberger* thus recognized that a college or university has its “own speech, which is controlled by different principles.”¹⁸⁷ Because the university restricted speech but did not itself speak, the Court in *Rosenberger* did not reach those principles.¹⁸⁸ The Third Circuit, though, found that a college or university speaks when it or its proxy fulfills one of the functions involved in the four essential freedoms; it wrote, “Because grading is pedagogic, the assignment of the grade is subsumed under the university’s freedom to determine how a course is to be taught.”¹⁸⁹ Concluding that the University had this First Amendment right but that Brown had none, the Third Circuit invoked academic abstention and declined to interfere with the University’s grading policies.¹⁹⁰

Ultimately, *Lovelace* and *Brown* suggest a fusion of academic freedom and academic abstention that state college and university administrators could use to challenge other state actors. First, both cases involve public state institutions, Southeastern Massachusetts University¹⁹¹ and California University of Pennsylvania. Second, both cases invoked academic abstention by incorporating academic freedom, providing a foundation for deferring to institutional decisions related to the four freedoms: standards in these areas are speech because they express university policy. In other words, each institution has an identity, formulated in mission and policy statements, which is expressed as standards for

180. *Id.* at 426.

181. *Id.*

182. 247 F.3d at 75 (citing *Lovelace*, 793 F.2d at 426).

183. *Id.* at 72.

184. *Id.* at 71.

185. *Id.* at 72.

186. *Id.* at 74–75 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995)).

187. *Id.* (quoting *Rosenberger*, 515 U.S. at 834).

188. 515 U.S. at 834.

189. *Brown*, 247 F.3d at 75.

190. *Id.*

191. This school has since been renamed the University of Massachusetts Dartmouth. History of UMass Dartmouth, <http://www.umassd.edu/about/history.cfm> (last visited Feb. 13, 2007).

admissions, hiring, curriculum, pedagogy, and assessment. As *Bakke* and *Grutter* have indicated, expression of the institutional mission implicates the First Amendment;¹⁹² and the Court in *Keyishian* has already denied application of state laws when they had a chilling effect on the First Amendment.¹⁹³ Although neither *Lovelace* nor *Brown* involved action against the institution by the state, these considerations combine to suggest a test for academic freedom: because state action that has a chilling effect on institutional curriculum, pedagogy, and assessment standards infringes on a college or university's academic freedom, a court should defer to the judgment of college and university administrators who resist such action.

D. Indirect Infringement

The facts in the circuit court cases discussed in subsection C involve actions that directly implicate curriculum, assessment, or pedagogy.¹⁹⁴ Sometimes a state action may not directly target academics but may nonetheless create some burden upon a college or university's policies, such as when a court hears a lawsuit for breach of contract even when institutional rules make a termination decision final.¹⁹⁵ Finkin suggests a balancing test for indirect infringement: "In the absence of a direct infringement of freedom of teaching, research, and publication, the determination of whether a particular intervention is an impermissible invasion of autonomy should turn upon the relation of the constraint to the exercise of academic freedom and to the institution's intellectual life."¹⁹⁶ Because a lawsuit for breach of employment contract would not burden the academic or intellectual aspects of the institution, courts should not follow the doctrine of academic abstention in such circumstances.

E. Constitutional Authority of a Different Sort: Separation of Powers

The First Amendment is not the only constitutional protection available for college and university academic freedom. Some state constitutional provisions endowing state colleges and universities with the status of separate branches of government provide a second legal source for constitutional academic freedom.¹⁹⁷ Although separation of powers under the Federal Constitution does not extend to

192. *Grutter*, 539 U.S. at 329. Even before *Grutter*, the Supreme Court recognized that selection of newspaper content is an expression of editorial policy and therefore protected by the First Amendment. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). One scholar analogized that academic standards are an expression of a college or university's education policies. *Testing the Limits of Academic Freedom*, *supra* note 50, at 725–27.

193. 385 U.S. at 604.

194. *See supra* Part IV.C.

195. *Manes v. Dallas Baptist Coll.*, 638 S.W.2d 143 (Tex. App. 1982).

196. Finkin, *supra* note 2, at 854.

197. *Byrne*, *supra* note 13, at 327. The Supreme Court of Michigan has said its board of regents is not a separate branch of government; it has instead called it an independent branch of government. *Federated Publ'ns, Inc. v. Bd. of Trs. of Mich. State Univ.*, 594 N.W.2d 491, 497–98 (Mich. 1999).

state governments,¹⁹⁸ many state constitutions and court decisions interpreting them do provide for separation of powers between college and university regents and other state government entities.¹⁹⁹ In *Sterling v. Regents of the University of Michigan*, the Supreme Court of Michigan found that the Board of Regents and the state legislature were two “separate and distinct constitutional bodies.”²⁰⁰ Because the powers of the Regents were clearly defined, the court held that neither could “encroach upon [n]or exercise the powers conferred upon the other.”²⁰¹ This reasoning has been consistently applied through the decades, including a 1999 Michigan decision that upheld separation of powers for one of the academic freedoms, “who may teach.”²⁰² In that case, a newspaper company brought suit against the trustees of Michigan State University, which have constitutional authority, to enforce the state’s Open Meetings Act (OMA) for the university’s presidential hiring committee.²⁰³ The trial court found that the OMA did not apply to the university, but the court of appeals reversed, holding that the policy behind the OMA made it applicable to the university.²⁰⁴ The Supreme Court of Michigan reversed, holding: “Given the constitutional authority to supervise the institution generally, application of the OMA to the governing boards of our public universities is . . . beyond the realm of legislative authority.”²⁰⁵ The court wrote that “regulation cannot extend into the university’s sphere of educational authority.”²⁰⁶

Separation of powers as a basis for institutional administrators to challenge state action suffers from two drawbacks. First, the college and university systems in no more than eleven states enjoy constitutional status, so this strong protection does not apply to the majority of institutions.²⁰⁷ Second, college and university administrators can face a dilemma, whether or not their regents have constitutional authority. While regents can defend the institution from interference by the legislature, sometimes regents could be the rule-making body that the individual institution seeks to challenge. This dilemma is addressed more fully in the next section.

198. *Sweezy*, 354 U.S. at 255.

199. Byrne claims that specifying these state regents is difficult because some state courts have extended constitutional status to regents in the face of ambiguous constitutional language; he nevertheless includes California, Georgia, Hawaii, Idaho, Michigan, Minnesota, Montana, Nebraska, and Oklahoma. Byrne, *supra* note 13, at 327 n.303. Opinions from Mississippi and Utah have also confirmed that their constitutionally-created state regents have powers separate and distinct from other state agencies. State *ex rel.* Allain v. Bd. of Trs. of Inst. of Higher Learning, 387 So. 2d 89, 93 (Miss. 1980); Univ. of Utah v. Bd. of Exam’rs of State of Utah, 295 P.2d 348 (Utah 1956).

200. 68 N.W. 253, 257 (Mich. 1896).

201. *Id.*

202. *Federated Publications*, 594 N.W.2d 491.

203. *Id.* at 494.

204. *Id.* at 494–95.

205. *Id.* at 498.

206. *Id.* at 497.

207. Byrne, *supra* note 13, at 327 n.303.

V. UNDERSTANDING THE STATE COLLEGE OR UNIVERSITY'S RELATIONSHIPS WITH LEGISLATURES, REGENTS, AND GOVERNMENT REGULATORY AGENCIES

Though combining academic freedom with academic abstention and separation of powers makes for a more usable legal concept for college and university administrators, it does not offer a one-size-fits-all solution. As the Introduction suggests, the individual institution has different relationships with the various state actors.²⁰⁸ The ultimate effectiveness of academic freedom as a means of resisting state interference will depend to a great extent on the identity of the state actor. This section treats in turn the relationships between an individual state college or university and the state legislature, board of regents, and state regulatory agencies.

A. Limits of Legislative Authority over State Colleges and Universities

The legal and theoretical conceptions of college and university academic freedom describe this right in terms of the individual institution, such as the freedom of the University of California at Davis Medical School to consider diversity in admissions.²⁰⁹ Cases that deal with a college or university's challenge to a legislative mandate, however, typically involve a board of regents as representative of the college or university.²¹⁰ Further, not all boards of regents are created alike: they have constitutional authority in some states, but only legislative authority in others.²¹¹ Two concerns arise. First, what is the authority of a statutorily-created board compared to a constitutionally-created one in challenging a legislature? Second, what happens when an individual college or university wishes to challenge the legislature but does not have the support of its regents?

1. Constitutional Regents as University Representatives Have Strong Power

When their powers derive directly from a state constitution, regents "enjoy significant freedom from legislative control."²¹² The nineteenth-century Michigan case *Sterling* demonstrates this freedom.²¹³ For fifteen years after its founding, the University of Michigan, now one of the premier institutions in the nation, "was not a success under [the] supervision [of] the legislature."²¹⁴ At the state constitutional convention of 1850, power over the "control and management" of the University was taken from the legislature and given to a permanent board of regents.²¹⁵

208. See *supra* Part I.

209. *Bakke*, 438 U.S. at 272 (stating that the faculty of the Medical School had developed a special admissions process for disadvantaged minorities).

210. *E.g.*, *Sterling*, 68 N.W. 253 (Mich. 1896).

211. Petroski, *supra* note 17, at 150. Compare MICH. CONST. art. VIII, §§ 6–8 (authorizing Board of Regents for University of Michigan via state constitution) with TEX. EDUC. CODE § 65.11 (Vernon 2006) (authorizing Board of Regents for University of Texas System via legislative statute).

212. Petroski, *supra* note 17, at 150.

213. 68 N.W. 253.

214. *Id.* at 254.

215. *Id.* at 254–55.

Removed from the political caprice of the legislature, the University thrived over the next forty years under the management of the regents, who at various points resisted the legislature.²¹⁶ Accordingly, the Michigan Supreme Court supported the regents' refusal to enforce a legislative act that would have moved the medical school from Ann Arbor to Detroit.²¹⁷ As backing for this holding, the court wrote that "the board of regents is a constitutional body, charged by the constitution with the entire control of that institution. . . . [and] was held not to be a state institution under the control and management of the legislature."²¹⁸ Further, this court said, where two different bodies are created from the same document, and different sets of powers are conferred upon each, then neither body may encroach upon the other.²¹⁹

Decisions from other states with constitutionally-created regents have similarly held that the boards have exclusive power over the management and control of the college or university.²²⁰ For example, the Mississippi Supreme Court interpreted the "management and control" language from its state constitution as giving the Board of Trustees, rather than the State Building Commission, exclusive authority over campus building construction.²²¹ California uses slightly different language—"full powers of organization and government"—but goes further when it describes policies established by the Board of Regents of the University of California ("UC") as enjoying a status equivalent to that of state statutes.²²² This affords the UC regents "a significant degree of legal autonomy from legislative control," including "immunity to state and local regulation."²²³ This extends to "internal university affairs," and thus to managerial and not just academic concerns.²²⁴

These broad grants of autonomy are not boundless, however, and they tend to dissolve the further one moves away from academic and administrative issues. In Michigan, for example, regents are subject to legislation that falls outside the "confines of the operation and the allocation of funds of the University," such as the state public employee relations act.²²⁵ The California constitution recognizes specific powers that the legislature retains by stating that the regents' authority is:

subject only to such legislative control as may be necessary to insure the

216. *Id.* at 255–56.

217. *Id.* at 258.

218. *Id.* at 257.

219. *Id.*

220. *E.g.*, *Bd. of Regents of Univ. of Okla. v. Baker*, 638 P.2d 464, 469 (Okla. 1981); *Bd. of Regents of Higher Educ. of State of Mont. v. Judge*, 543 P.2d 1323, 1331–35 (Mont. 1975).

221. *Allain*, 387 So. 2d at 91, 93.

222. *Campbell v. Regents of the Univ. of Cal.*, 106 P.3d 976, 982 (Cal. 2005) (quoting CAL. CONST. art. IX, § 9(a)); *Regents of the Univ. of Cal. v. Benford*, 27 Cal. Rptr. 3d 441, 444 (Cal. Ct. App. 2005) (quoting CAL. CONST. art. IX, § 9(a)).

223. *Petroski*, *supra* note 17, at 179–80 (quoting *S.F. Lab. Council v. Regents of the Univ. of Cal.*, 608 P.2d 277, 279 (Cal. 1980)).

224. *Id.* at 181.

225. *Federated Publications*, 594 N.W.2d at 497 (citing *Regents of the Univ. of Mich. v. Employment Relations Comm.*, 204 N.W.2d 218, 224 (Mich. 1973)).

security of its funds and compliance with the terms of the endowments of the university and such competitive bidding procedures as may be made applicable to the university by statute for the letting of construction contracts, sales of real property, and purchasing of materials, goods, and services.²²⁶

Similarly, the case law has recognized three general areas in which the legislature may limit college and university autonomy: authority over the appropriation of state monies; exercise of the general police power, such as workers' compensation laws; and legislation on matters of statewide concern not involving internal college or university affairs.²²⁷

2. Less Clear Authority of Statutorily-Created Regents or Individual Institutions against Legislature

The strong grants of authority described in the previous subsection may not apply to the boards of regents in most states because they are the product of their legislature rather than their constitution.²²⁸ In the few opinions where statutory regents have resisted legislation, those regents tend to lose in litigation. The dicta in these opinions nevertheless suggest that statutory regents and trustees can claim some level of autonomy. More importantly, for issues of curriculum, pedagogy, and assessment, both the regents and individual institutions can still assert their constitutional right to academic freedom.

The clearest suggestion that statutory regents may have less autonomy to resist the legislature comes from California: the Board of Regents for the University of California ("UC") has constitutional status, but the Board of Trustees for the California State University ("CSU") was created by statute.²²⁹ Accordingly, just as the courts have held that the UC regents enjoy autonomy from the California legislature, they have also held that the CSU trustees do not.²³⁰ In one case involving a CSU institution, an engineer at Sonoma State University who had left the University and returned to employment there two years later wanted to apply his prior-accrued sick leave; this accorded with state statute and regulations but contradicted trustee regulations.²³¹ In finding that the University must follow state law, and hence legislative mandate, over trustee regulation, the court contrasted the authority of the UC regents: "No such autonomy is accorded by the Constitution to the State University and Colleges. They have only such autonomy as the Legislature has seen fit to bestow."²³² The court also wrote that the Board of

226. CAL. CONST. art. IX, § 9(a).

227. 106 P.3d at 982.

228. *E.g.*, TEX. EDUC. CODE ANN. §§ 65.11, 85.11, 111.20(a) (Vernon 2006) (authorizing boards of regents for University of Texas System, Texas A&M University System, and University of Houston System).

229. *Compare* CAL. CONST. art IX, § 9 *with* CAL. EDUC. CODE § 89030 (West 2006).

230. *Slivkoff v. Bd. of Trs.*, 137 Cal. Rptr. 920 (Cal. Ct. App. 1977).

231. *Id.* at 921–22.

232. *Id.* at 924.

Trustees was not free from legislative regulation.²³³

Although *Slivkoff* suggests that statutory trustees have no autonomy compared with constitutional ones, a careful reading limits such a belief. First, even constitutional regents are subject to legislative authority in some areas; the regents in Michigan must follow the state public employee's act, similar to the provisions at issue in *Slivkoff*.²³⁴ Second, other states suggest that constitutional and statutory regents have equal footing. In New Mexico, for example, the state constitution empowered the legislature to create the board of regents, which it did by statute.²³⁵ The New Mexico Supreme Court recognizes the same level of autonomy for its regents as Michigan and California do for their constitutional regents.²³⁶ Finally, and most significantly, *Slivkoff* did not involve an issue of academic freedom: the word "attenuated" inadequately describes the argument that the freedom to decide who may teach creates a constitutional right to compute sick leave.

Recognition that regents may successfully challenge the legislature comes from dicta in older state cases that ironically enough denied the universities relief. The Missouri Supreme Court denied the authority of the curators of the University of Missouri to resist enforcing legislation that added engineering to the curriculum with the reasoning that "all legislative authority not denied the General Assembly by the Constitution resides in it."²³⁷ The court then stated that "the General Assembly certainly may legislate as it wills, *subject only to the limitations imposed by the Constitution of the United States*."²³⁸ The Supreme Court of Mississippi, in upholding enforcement of an anti-fraternity law, wrote: "The trustees are mere instruments to carry out the will of the Legislature in regard to the educational institutions of the state. *Both the institutions and the trustees* are under the absolute control of the Legislature."²³⁹ In another part of the opinion, the court wrote: "All acts of a Legislature are valid *unless they conflict with the Constitution of the state or United States*."²⁴⁰

In recognizing that the Supremacy Clause could limit legislative control, these cases offer the modern state college and university a link to assert academic freedom. First, these decisions assign equal power to resist unconstitutional legislation in constitutional curators, statutory trustees, and the state college or university itself. Second, both opinions state that the courts would have upheld the

233. *Id.* at 926.

234. *Federated Publications*, 594 N.W.2d at 498.

235. *Regents of the Univ. of N.M. v. N.M. Fed'n of Teachers*, 962 P.2d 1236, 1250 (1998). The New Mexico Supreme Court, however, cites cases from three states with constitutional regents—Michigan, Montana, and Oklahoma—in recognizing that legislative exercise of its police power is acceptable but that intrusion on the regent's authority over educational policy is unconstitutional. *Id.*

236. *Id.*

237. *State v. Bd. of Curators of Univ. of Mo.*, 188 S.W. 128, 131 (Mo. 1916).

238. *Id.* (emphasis added).

239. *Bd. of Trs. of Univ. of Miss. v. Waugh*, 62 So. 827, 830 (Miss. 1913) (emphasis added). *Waugh* refers to the Mississippi Board of Trustees as statutory regents, but above I claimed they were constitutional regents; a 1944 amendment awarded them constitutional status. See *Allain*, 387 So. 2d at 91.

240. *Waugh*, 62 So. at 829 (emphasis added).

institutional challenges if the statutes were unconstitutional. Several decades after these opinions, the Supreme Court constitutionalized academic freedom in *Sweezy* and its progeny. The Missouri decision might have come out differently if litigated today since it involves the essential freedom of curriculum.

B. Regents: A Love-Hate Relationship

The functions, and hence relative places, of legislatures and colleges and universities as state entities are fairly clear. This is not so with regents, which in some states are constitutional and in others statutory;²⁴¹ which in some states have college and university administrators as members and in others only outside members.²⁴² As discussed in the previous subsection, regents represent their institutions to the world outside the college or university, but to an extent regents are themselves outsiders who regulate college and university affairs, approving, for example, fields of study much as legislatures approve budgets.²⁴³ In contrast to the more definitive conclusions when a college or university opposes the state legislature, we have more uncertain and hazy results when a college or university administration opposes its own regents.

To faculty members, regents are most often viewed as outsiders.²⁴⁴ Appointed boards of regents, trustees, and curators exert “considerable influence over institutional choice.”²⁴⁵ In fact, the AAUP developed its principles of academic freedom in large part because it was wary of the power of lay trustees over the institution.²⁴⁶ Metzger writes that, to the AAUP, “the most serious threats of violation from within were posed by members of academic governing boards who held dangerously errant views about the basis of their authority, the nature of the academic calling, and the character of a true university.”²⁴⁷ The *professional* concept of academic freedom thus sees the administration and faculty of the individual college or university as needing freedom from regents.

The *legal* concept, however, may be the reverse: the regents may possess academic freedom to which individual institutions are subject. Because both the state institution and its governing board of regents are usually statutory creations, courts may hold that regent regulations are an exercise of, not an infringement on, a college or university’s academic freedom. A New York state case bears this out. A community college of the City University of New York (“CUNY”) system required a basic writing exam, but administrators at one campus allowed a waiver of the test based upon passing intensive English courses.²⁴⁸ The board of trustees

241. Petroski, *supra* note 17, at 150.

242. Compare CAL. CONST. art. IX, § 9 (stating that the president of University of California is a member of Board of Regents) with GA. CONST. art. VIII, § 4, para. 1(a) (providing for one member drawn from each congressional district plus five at-large regents).

243. See *supra* Part V.A.

244. Yudof, *supra* note 113, at 852.

245. Scanlan, *supra* note 4, at 1481.

246. Byrne, *supra* note 13, at 278.

247. Metzger, *supra* note 1, at 1278.

248. *Mendez v. Reynolds*, 665 N.Y.S.2d 402, 403 (N.Y. Sup. Ct. 1997).

denied graduation to several students who met the waiver but had failed the system-wide exam, even though they did not clarify that the test was an exit exam until a few days before graduation ceremonies.²⁴⁹ The students brought suit to enjoin the trustees from preventing their graduation; the lower court issued an injunction, reasoning that the trustees' actions were undertaken in bad faith and that their conduct was arbitrary and capricious.²⁵⁰ The appellate court reversed, holding, "The City University Board of Trustees possesses the sole and exclusive statutory authority to impose graduation and course requirements for all CUNY colleges."²⁵¹ The court wrote further that "individual colleges of the CUNY system . . . lack the authority to modify, unilaterally, course prerequisites."²⁵² These statements clearly subordinate the administration's actions at an individual institution, even in issues of curriculum and assessment, to its regents.

Despite this holding, a college or university administration wishing to deny the authority of its regents over curriculum, pedagogy, or assessment still has arguments available. For example, one may easily distinguish *Mendez*: individual students and not the institution itself brought the suit, and these students did not even challenge the authority of the trustees over curriculum and graduation.²⁵³ A different outcome could have occurred if the administration that had granted the waiver had challenged the regents on academic freedom grounds: authority granted to regents via state statute might yield to the First Amendment claims of institutional representatives based on the four essential freedoms.²⁵⁴

We find support for the proposition that administrators could represent the institution in litigation against all state entities, including regents, from Professor Byrne, who argues that institutional administrators have the strongest claim of academic freedom. To him, "constitutional academic freedom should primarily insulate the university in core academic affairs from interference by the state."²⁵⁵ He refers to the "corporate right of the university against the state,"²⁵⁶ a right wielded by the executives of this corporation, the administration. "Through its administration, a school makes choices about admissions, hiring, and expenditures which shape its educational character and mission."²⁵⁷ Accordingly, state officials cannot interfere with core academic administrative decisions without impairing academic freedom.²⁵⁸

Byrne bases this view on Justice Stevens' concurrence in *Widmar*, where Stevens argued that the substantive decisions of college and university administrators deserve to be protected as academic freedom because they create

249. *Id.*

250. *Id.* at 404.

251. *Mendez v. Reynolds*, 681 N.Y.S.2d 494, 496 (N.Y. App. Div. 1998) (citation omitted).

252. *Id.*

253. *Id.*

254. Petroski, *supra* note 17, at 212–14.

255. Byrne, *supra* note 13, at 255.

256. *Id.*

257. *Id.* at 316.

258. *Id.*

the atmosphere of a college or university.²⁵⁹ The Supreme Court elsewhere describes academic freedom in terms of individual institutions: the four essential freedoms inhere in the college or university,²⁶⁰ and academic freedom thrives in “autonomous decisionmaking by the academy itself.”²⁶¹ Justice Frankfurter in his *Sweezy* concurrence wrote that academic freedom is necessary to protect universities from “[p]olitical power.”²⁶² Though he spoke of a state legislature, regents are themselves government entities, composed primarily of individuals appointed from outside the institutions, and some members are state officials like the lieutenant governor and the secretary of education.²⁶³ Because one purpose of a board of regents is to govern from outside the institution, one can argue that they cannot simultaneously be part of the institution.

This concept of regents as an outside state entity breaks down in some instances, though. For example, some boards, such as the Board of Regents of the University of California, have administrators from individual institutions among their members.²⁶⁴ Not only can such boards not be characterized as wholly outside the college or university, but the regulations of these boards thus incorporate institutional views.

Even decisions that invoke academic abstention send mixed signals about the relative position of regents and institutional administration. Although academics might view the decisions only of those with academic credentials—such as a Ph.D., tenured or tenure-track, peer-reviewed publications, and classroom experience—as worthy of judicial deference, the language of some Supreme Court opinions indicates that deference should extend to a broader group of people. The Court in *Ewing* encouraged judges to “show great respect for the *faculty’s* professional judgment.”²⁶⁵ In *Horowitz*, however, the court acknowledged respect for the “academic judgment of school officials” while it “decline[d] to ignore the historic judgment of educators,” and it wished to refrain from enlarging “the judicial presence in the academic community.”²⁶⁶ At first glance, such language suggests deference toward the decisions of college and university administrators, but the task of regents to regulate colleges and universities makes them also “school officials” who are part of the “academic community.” If a college or university were to challenge or ignore the mandates of its regents, a court deciding the issue would not have clear guidance about whose “academic” decisions deserve its deference: administrator or regent.

C. Government Agencies: Strong Claims Against Actual Infringement

Seldom addressed in the scholarship about academic freedom, state agencies

259. *Widmar v. Vincent*, 454 U.S. 263, 280 (1981) (Stevens, J., concurring).

260. *Bakke*, 438 U.S. 265.

261. *Ewing*, 474 U.S. at 226 n.12 (citations omitted).

262. 354 U.S. at 262 (Frankfurter, J., concurring).

263. CAL. CONST. art. IX, § 9.

264. *Id.*

265. 474 U.S. at 225 (emphasis added).

266. 435 U.S. at 89–91.

have a tremendous influence upon state colleges and universities.²⁶⁷ Although numerous regulatory agencies affect non-academic aspects of a college or university, such as department of health regulations for on-campus dining, other state agencies that regulate professions like teaching, nursing, and even law establish standards that affect curriculum, assessment, and pedagogy. Whether claims of academic freedom are sufficient to resist this infringement depends largely on the type of agency that issues the regulation. A college or university could resist general regulatory agencies in the same way that it resists legislatures, but the college or university would have little justification for resisting agencies that indirectly infringe upon its academic freedom, such as those that promulgate educational standards for professional licensing.

On its face, colleges and universities seemingly have the strongest academic freedom claims against infringement of curriculum, pedagogy, and assessment by state agencies as compared to other state actors. Unlike regents, most state agencies do not represent institutions directly, so unlike *Mendez*, no statute grants them clear authority over colleges or universities.²⁶⁸ Also the language of the academic abstention doctrine, which requires deference to the academic decisions of educators, does not draw in the rule-making of regulators.²⁶⁹ Further, the broad language of the Supreme Court regarding academic freedom limits regulatory agencies: “government may regulate in the area only with narrow specificity.”²⁷⁰ Finally, just as regents may represent colleges and universities against the legislature, they could similarly represent the college or university against regulatory agencies. As mentioned above, claims by the regents on behalf of the college or university against another state entity may be strongest, particularly when those regents are constitutionally created.²⁷¹ For example, the Supreme Court of Mississippi held that the constitutional Board of Trustees of Institutions of Higher Learning of Mississippi was not subject to regulation by the State Building Commission.²⁷²

One First Circuit case has stated that courts would protect the constitutional rights of the college- or university-as-institution against state regulatory interference.²⁷³ In *Cuesnongle v. Ramos*, the Puerto Rican Department of Consumer Affairs heard and resolved several claims for tuition reimbursement by students related to lack of courses and a delayed semester start because of a faculty strike at the Universidad Central de Bayamon.²⁷⁴ Although the University

267. Harry T. Edwards addresses the topic of government regulation in the most depth, but his focus is on regulation by the federal, rather than the state, government. Edwards, *supra* note 3, at 3. Such regulation typically targets worker safety, social security, and financial accountability for grants, topics which have no relationship with curriculum, pedagogy, and assessment. *Id.*

268. 681 N.Y.S.2d at 496.

269. *Horowitz*, 435 U.S. at 89–91.

270. *Keyishian*, 385 U.S. at 604 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

271. *See supra* Part V.A.

272. *Allain*, 387 So. 2d at 93.

273. *Cuesnongle v. Ramos*, 835 F.2d 1486 (1st Cir. 1987).

274. *Id.* at 1487–88.

vigorously opposed the jurisdiction of the agency even to consider the claims,²⁷⁵ the court upheld the agency's authority to resolve what it characterized as contract claims.²⁷⁶ Significantly, the court wrote: "If a university is able to show that any particular decision, order, or compelled procedure of the agency impermissibly intrudes upon the academic freedom protected by the First Amendment, it may be afforded relief in federal court."²⁷⁷ This is an explicit statement by a court, albeit in dictum, that public colleges and universities have First Amendment protection against government regulatory agencies, and that colleges and universities can seek judicial remedies to enjoin state actions that violate academic freedom.

This seemingly straightforward proposition is complicated by agencies that have a specific purpose to regulate higher education. For example, the Texas Higher Education Coordinating Board oversees all state public colleges and universities by:

provid[ing] leadership and coordination for the Texas higher education system, institutions, and governing boards, to the end that the State of Texas may achieve excellence for college education of its youth through the efficient and effective utilization and concentration of all available resources and the elimination of costly duplication in program offerings, faculties, and physical plants.²⁷⁸

Because it represents "the highest authority in the state in matters of public higher education,"²⁷⁹ it functions as a sort of *über*-board of regents.

A Texas appellate court relied upon this statutory language in affirming the Board's denial of a proposed affiliation agreement between the public Texas A&M University and the private South Texas College of Law.²⁸⁰ The court found that the statute further granted the Board exclusive authority over initiation of new degree programs as well as mandatory approval over any change in the role or mission of a college or university.²⁸¹ Because Texas A&M's mission description did not include law or legal studies, the court said the University exceeded its own authority and infringed on the Board's.²⁸² This decision suggests two things. First, agencies tasked specifically with college and university oversight have some authority over college or university governance. Second, although a desire to have a Juris Doctor program certainly is curricular and thus invokes academic freedom, the affiliation agreement exceeded the University's mission statement, which delineates the boundaries of academic freedom as against another state entity.²⁸³

275. *Id.* at 1488.

276. *Id.* at 1502.

277. *Id.*

278. TEX. EDUC. CODE ANN. § 61.002(a) (Vernon 2006).

279. *Id.* § 61.051(a).

280. *S. Tex. Coll. of Law v. Tex. Higher Educ. Coordinating Bd.*, 40 S.W.3d 130, 136–37 (Tex. App. 2000).

281. *Id.* at 135; *see* TEX. EDUC. CODE ANN. §§ 61.051(d)–(e) (Vernon 2006).

282. *S. Tex. Coll. of Law*, 40 S.W.3d at 137–38.

283. *See supra* Part IV.C.

VI. APPLICATIONS OF AUGMENTED ACADEMIC FREEDOM CONCEPT

The previous section discussed the state college or university's relationships with other state entities to demonstrate how academic freedom would be more or less effective depending upon which state actor was involved. This section applies the augmented academic freedom concept to actual laws or rules that affect curriculum, assessment, or pedagogy at state institutions, discussing the merits and drawbacks to the various arguments available to an individual university. These laws and rules are drawn from the author's experiences as a professor in Texas and Georgia, as well as from California, which has both constitutional regents and statutory trustees for its state colleges and universities. This section aims not so much to flesh out every contour of academic freedom as applied by a state institution against a state actor; rather, it reveals how to start thinking about academic freedom as a usable concept.

A. Laws from the Legislature

1. Direct: Mandated Curricula in Texas and California

A college or university administration may have its strongest academic freedom claim against legislation that prescribes required subjects of study or particular classes. For example, the California legislature requires the regents of all three state systems—University of California, California State University, and California Community Colleges—to maintain a core curriculum of general education classes among state institutions.²⁸⁴ Any student who completes this core at one institution and then transfers to another will be considered to have completed it at the other state institution.²⁸⁵ The Texas Education Code also addresses the core curriculum, but it does so with specificity: it requires six hours of American History,²⁸⁶ three of which may be satisfied with Texas History,²⁸⁷ and six hours of government and political science²⁸⁸ for all undergraduates at colleges and universities that receive state funding. One can see why legislatures would pass such laws: they protect the interests of residents in pursuing a public education by aligning the basic standards at all state institutions, thus promoting easier transfer among institutions and ensuring that all graduates have studied certain subjects.

One can also immediately see why an individual state college or university might challenge these requirements. Most bachelor's degree programs require about 120 credit hours to graduate,²⁸⁹ so that the Texas 12-hour requirement comprises 10 percent of an undergraduate's total hours. Further, students must

284. See CAL. EDUC. CODE § 66720 (West 2006).

285. See *id.*

286. TEX. EDUC. CODE ANN. § 51.302 (Vernon 2006).

287. *Id.*

288. TEX. EDUC. CODE ANN. § 51.301 (Vernon 2006).

289. For example, the Bachelor of Arts, Plan I at the University of Texas requires 120 hours. THE UNIVERSITY OF TEXAS AT AUSTIN: UNDERGRADUATE CATALOG 2006–2008 295 (2006), available at <http://www.collegesource.org/displayinfo/pdflist.asp?institutionid=12112>.

typically take many hours in upper-division courses, particularly from their major and minor,²⁹⁰ and satisfy a core curriculum of math and science, social studies, communication, and liberal arts.²⁹¹ By requiring 12 hours of history and government, the Texas legislature forces institutions to make curricular choices: should the college or university satisfy this requirement via a large core curriculum, which then limits the number of electives students can take, or should it make room by eliminating second composition or math classes from the core curriculum?²⁹² At least Texas institutions have choices; in California, UCLA must have the same classes in its transfer core curriculum as Cal-Polytechnic and as every state community college.²⁹³

In challenging such curricular legislation, the Board of Regents of the University of California would have the strongest claims. After all, the Board has constitutional authority on a par with its legislature.²⁹⁴ It could resist legislation on grounds of separation of powers, even without asserting academic freedom. For example, a UC system employee was terminated, and the trial court held that she was not entitled to judicial relief because she had failed to exhaust the administrative remedies provided under Regent's regulations.²⁹⁵ She argued that the exhaustion rule should not apply to her since the damages remedies under legislatively-created statutes provided superior relief.²⁹⁶ The California Supreme Court treated the Regent's policy as a statute and held that the exhaustion doctrine applied, thus rejecting Campbell's argument that legislation was superior.²⁹⁷

The other boards of governors, as well as the administrators at individual institutions, also have strong claims of infringement of their academic freedom. Because the sole purpose of this legislation is to require that certain courses be taught by the institution, it obviously targets the essential freedom of what to teach. State cases acknowledge trustee and college and university authority to reject legislation that interferes with Constitutional rights.²⁹⁸ Applying the augmented academic freedom test discussed *supra* in Section IV.C, a court might defer to a college or university—either alone or via its regents—that defies such legislation if the college or university shows a chilling effect on institutional policy:²⁹⁹ the institution must accept the entire core curriculum of students who transfer in, even

290. Plan I students at UT must take 36 upper-division hours, and they are required to have a major and minor as well as meet other degree requirements. *Id.* at 268–69.

291. The Core Curriculum applicable to all undergraduates at UT requires forty-two total hours in nine different subject areas. *Id.* at 12–13.

292. *Id.* at 295–96. The twelve-hour requirement is complicated by the mandatory core curriculum requirements from the Texas Higher Education Coordinating Board. *See infra* Part VI.C.

293. *See* CAL. EDUC. CODE § 66720 (West 2006).

294. *See* *Campbell v. Regents of the Univ. of Cal.*, 106 P.3d 976, 982 (Cal. 2005) (quoting CAL. CONST. art. IX, § 9(a)); *Regents of the Univ. of Cal. v. Benford*, 27 Cal. Rptr. 3d 441, 444 (Cal. Ct. App. 2005) (quoting CAL. CONST. art. IX, § 9(a)).

295. *See Campbell*, 106 P.3d at 983–84.

296. *Id.* at 983.

297. *Id.*

298. *See, e.g., Waugh*, 62 So. at 829–30.

299. *See supra* Part IV.C.

when that core does not satisfy institutional standards. For example, a flagship engineering and agricultural university like Texas A&M might prefer more math and science for its students, while a regional university like Tarleton State might want its students to have more writing courses. Other justifications come from First Amendment arguments about individual aggregation of rights and the essential functions of a college or university: heavy basic course requirements prevent students from taking more upper level courses relevant to their fields of study, in effect prohibiting the free exchange of ideas within the college or university.

2. Indirect: Georgia's HOPE Scholarship

The Georgia HOPE (Helping Outstanding Pupils Educationally) Scholarship indirectly affects curriculum and assessment. This scholarship provides tuition, fees, and books to state colleges and universities for all Georgia residents who graduate from high school with at least a B average.³⁰⁰ To keep the scholarship, the statute authorizing HOPE requires students to maintain a 3.0 average on a 4.0 scale while in college.³⁰¹ As a result, students at Georgia state colleges and universities often pressure faculty members to change a high "C" to a "B"; in one 1997 article in *The Chronicle of Higher Education*, some professors admitted that their awareness of the 3.0 threshold factored into decisions to round grades up.³⁰² Further, the review for whether a student has maintained a 3.0 occurs after he or she has completed thirty, sixty, and ninety hours.³⁰³ This means that if a student takes fewer than the expected fifteen hours in each of the first two semesters, then he or she could enter the sophomore year with fewer than thirty hours, thereby retaining the HOPE Scholarship for another semester, no matter his or her grades. The thirty-hour review indirectly encourages students to take lighter semester loads and thereby reduces their chances for timely graduation. This result is troubling since many colleges and universities nationwide have implemented efforts to encourage timely graduation.³⁰⁴

300. GA. CODE ANN. § 20-3-519.2(a) (2005 & Supp. 2006).

301. *Id.* § 20-3-519.2(b)-(e).

302. Patrick Healy, *HOPE Scholarships Transform the University of Georgia*, CHRON. HIGHER EDUC., Nov. 7, 1997, <http://72.14.203.104/search?q=cache:7Lw0J5mQORgJ:chronicle.com/colloquy/97/inflation/background.htm+http://chronicle.com/colloquy/97/inflation/background.htm&hl=en&ct=clnk&cd=1&gl=us>.

303. GA. CODE ANN. § 20-3-519.2(b)-(e) (2005 & Supp. 2006).

304. For example, the Texas Board of Regents supported a plan by the Provost of the University of Texas System and the President of the University of Texas at Austin to impose a flat-rate tuition that would encourage timely graduation. In the College of Liberal Arts and College of Science, the number of students who did not complete 30 hours after their first year dropped from 1,000 to 400 under a flat-rate tuition program. The reason is that students who take more than the minimum flat-rate hours save money, whereas those who take fewer pay more per hour. Larry Faulkner, then-president of UT, had recommended a 15-hour flat-rate plan. See Melissa Mixon, *Regents Approve 14-Hour Flat-Rate Tuition*, DAILY TEXAN, Mar. 11, 2005, *available at* <http://media.www.dailytexanonline.com/media/storage/paper410/news/2005/03/11/TopStories/Re>

Here a college or university can make only tenuous claims for infringement on institutional freedom because, unlike the core curriculum statutes, the HOPE statute contains requirements for students and not institutions. Even if individual professors or students might take account of the scholarship in their grading and course selection, the law does not force colleges and universities to alter grading standards or curriculum sequences, so student admission policies remain unaffected. One could argue that, because some students take longer to graduate because of the HOPE incentives, the scholarship affects the number of incoming students who may be selected. Such a tenuous basis would not tip the balance as needed for the augmented academic freedom test advocated in this Note: even if this legislation affects admissions, it does not have a chilling effect on the institution's stated *standards* for admissions, assessment, or the other freedoms. Further, student access to courses remains intact, so the free exchange of ideas on the campus remains uninhibited; even if a student loses the scholarship, her standing in the college or university remains unaffected. The best remaining argument is for a college or university administration to challenge the 3.0 GPA or the thirty-hour review, or both, claiming not that individual students are burdened by these requirements but that institutional standards are affected in ways that reduce the quality of the education the student body receives. Even if the college or university can justify such a claim, it must still prove that HOPE, and not other factors, such as increased student employment or extracurricular involvement or a general desire to take fewer classes, leads to decreased timely graduation rates.

Rather than press such attenuated arguments, an institution could consider Finkin's test for indirect infringement that was discussed above: "In the absence of a direct infringement of freedom of teaching, research, and publication, the determination of whether a particular intervention is an impermissible invasion of autonomy should turn upon the relation of the constraint to the exercise of academic freedom and to the institution's intellectual life."³⁰⁵ If we apply the first prong of the test, the statute affects the exercise of academic freedom only slightly: pressure to give B's may influence some instructors to give fewer rather than more B's, and some students may try to get more "free" hours of courses by taking two heavy semesters their freshman year, thus balancing out those who take lighter loads.³⁰⁶ With respect to the second prong, the HOPE Scholarship actually increases the intellectual life of the college or university by attracting an overall brighter student body.³⁰⁷ If infringement of academic freedom involves a balancing test, on balance such indirect infringement does not warrant constitutional protection.

gents.Approve.14Hour.FlatRate.Tuition-892315.shtml.

305. Finkin, *supra* note 2, at 854.

306. See Healy, *supra* note 302.

307. For example, from 1999 to 2004, the student population at Georgia Southern increased from about 14,500 to about 16,100, while the average SAT for entering students rose almost 100 points, from a composite of 987 to 1080. GEORGIA SOUTHERN UNIVERSITY FACT BOOK 22, 30 (2004-2005), available at <http://services.georgiasouthern.edu/osra/fb0405.pdf>.

B. Regent Regulations

1. Georgia Regent's Review Course

The Regents of the University System of Georgia require a writing exam: college and university students must write a passing essay based on one of a number of topics; if they fail to take and pass the test before completing forty-five credit hours, they have to take a no-credit Regent's Review Course every semester until they pass the exam.³⁰⁸ Many writing faculty distrust standardized tests, particularly when they see no appreciable benefit from a single timed essay when composition theory favors drafting and collaboration and revision.³⁰⁹ Further, all students at Georgia Southern University already have to take two semesters of Composition.³¹⁰ Yet composition instructors routinely devote two class sessions to timed essay writing just so the students can pass the exam and be done with it. By altering their curriculum, they help students avoid the non-credit review course. This also serves college and university aims of promoting timely graduation by allowing students to avoid registering for courses that do not count toward the degree.³¹¹

An individual institution may have a good pedagogical reason to resist offering these courses: if students pass other writing courses, like composition, the institution may decide that those students have already met its expectations for effective writing. That institution might challenge the regent requirement, or it may simply refuse to offer these courses, thus prompting the regents to bring suit to enforce it.

The institution will probably lose. The Regent's Writing Course, though part of an exit requirement like the one at issue in *Mendez*, differs in that it requires each institution to offer courses. If we look further to the Board of Regent's power, we see that, although it does not have any college or university administrators as its members,³¹² it has the authority "[t]o exercise any power usually granted to such corporation, necessary to its usefulness, which is not in conflict with the Constitution and laws of this state."³¹³ Such broad power certainly encompasses a system-wide aim of requiring basic proficiency for all students, especially since a court might defer as readily to the Board's as to the institution's academic

308. See BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA ACADEMIC AFFAIRS HANDBOOK § 2.08.01 (Aug. 4, 2004), available at <http://www.usg.edu/academics/handbook/>.

309. E.g., ERIKA LINDEMANN, A RHETORIC FOR WRITING TEACHERS 22–34 (3d ed. 1995) (summarizing steps of the writing process, including writing, rewriting, and social interaction).

310. Core Curriculum Requirements, Georgia Southern University, <http://academics.georgiasouthern.edu/fye/core.pdf> (last visited Jan. 24, 2007).

311. This discussion is based on my experience as a professor in the Department of Writing and Linguistics at Georgia Southern and as a rater for the Regents' writing exam.

312. GA. CONST. art. VIII, § 4, para. I(a).

313. GA. CODE ANN. § 20-3-31(4) (2005); see GA. CONST. art. VIII, § 4, para. I(b) ("The government, control, and management of the University System of Georgia and all of the institutions in said system shall be vested in the Board of Regents of the University System of Georgia.").

judgment. Even if a court were to view regents as outsiders, the Regent's Review course is required only of students who do not pass the Regent's Writing Exam; in other words, it represents a curriculum and assessment standard of the Board, not of the college or university. College and university degree programs and assessment standards related to its courses remain unaffected; the only burdens are that the college or university must offer and staff several sections of the course and that some students who take the course might be delayed in finishing their degree. A court applying Finkin's indirect test might see on balance that such burdens are light: the course targets only students who have failed to pass the examination, it requires only one hour of instruction per semester until passage, and as a non-credit course it does not affect the student's degree or the college or university's regular academic offerings.

2. Whole Letter Grades in University System of Georgia

The individual college or university might have a stronger claim in another area: assessment. One suggestion for addressing potential grade inflation attributable to the HOPE Scholarship—a statutory provision—is for a college or university to alter its grading scale to include pluses and minuses.³¹⁴ Because pluses and minuses allow professors to assign grades with more precision, they would feel less pressure to round a 78 average to a 3.0 “B” since they can award a 2.33 “C+,” which is not as harmful to the student's GPA as a 2.0 “C.” Currently, the Board of Regents for the University System of Georgia requires all institutions to assign whole letter grades for computing a student's GPA: “A” equals 4 points, “B” 3 points, and so forth until a zero for “F.”³¹⁵ Any deviation would thus violate Regent policy.

Institutional grading norms are an assessment issue that falls clearly within the four essential freedoms. Circuit courts have addressed and upheld the college or university's freedom to maintain the integrity of its institutional grading norms, particularly when those standards are tied to the college or university's mission.³¹⁶ Ultimately, however, a college or university challenge here would probably also fail. The biggest hurdle remains the uncertainty about academic abstention: courts may view a system as an aggregation of the colleges and universities within it, and regents as educators as much as administrators and faculty, so courts may defer to the grading policy of the Board of Regents. Also, while the requirement for whole letter grades affects assessment, it does not infringe on the grading standards of an individual institution. In other words, although the Board requires the university to award “A's,” “B's,” and “C's,” a college or university itself still determines what level of work merits an “A” as opposed to a “B” or a “C.” Further, the Regent policy specifically allows individual colleges and universities to apply different grading standards in addition to the official policy, though only for institutional

314. Healy, *supra* note 302.

315. UNIVERSITY SYSTEM OF GEORGIA ACADEMIC AFFAIRS HANDBOOK § 2.05 (Dec. 7, 1988), *available at* <http://www.usg.edu/academics/handbook/contents.phtml> [hereinafter HANDBOOK].

316. *Parate*, 868 F.2d at 829; *Lovelace*, 793 F.2d at 426.

purposes.³¹⁷ A college or university would have a hard time showing how the Regent policy has a chilling effect on assessment standards when that same policy permits the institution to set its own internal assessment standards.

C. Other Government Agencies: Professional Licensing v. Direct Curricular Regulation

1. Professional Licensing Does Not Infringe Academic Freedom

Even if regulatory agencies dictate standards for curriculum, pedagogy, and assessment, often individual colleges and universities will acquiesce for reasons related to professional licensing or certification. For example, the California Commission on Teacher Credentialing has authority over certification of primary and secondary school teachers.³¹⁸ It has established educational requirements for persons who wish to enter the profession, such as a bachelor's degree and completion of certain areas of study.³¹⁹ To receive automatic credentialing of its graduates, a college or university must have Commission approval of its teacher education program.³²⁰ Though the Commission possesses enormous leverage, it is unable to infringe on the college or university's academic freedom: the Commission has no direct authority over institutions, so a college or university could choose to ignore Commission guidelines and teach what it wants, how it wants. The downside is obvious: students who graduate from that college or university will not receive automatic certification. To serve the needs of this profession and of the students who wish to enter it, a college or university is likely to structure its programs to meet Commission requirements, although technically not required to do so.

2. Texas Higher Education Coordinating Board

A college or university may wish to challenge other types of regulation, however. For example, departments at West Texas A&M University ("WTAMU") had to suggest changes to the core curriculum based on new guidelines from the Texas Higher Education Coordinating Board. Those guidelines included minimum and maximum total hours and hours required for certain subject areas.³²¹ The purpose of the Board's core curriculum regulations is to facilitate transfer. A student at one state institution who fulfills the core curriculum can transfer credit for the entire core to another state college or university, even if particular courses in that institution's core are different.³²² As discussed in the section about regents,

317. HANDBOOK, *supra* note 315, § 2.05.

318. CAL. EDUC. CODE § 44225 (West 2006).

319. *Id.*

320. *Id.* § 44227(a).

321. 19 TEX. ADMIN. CODE, §§ 4.24–4.25 (West, WESTLAW through Oct. 31, 2005). This example comes from my experience on the Curriculum Committee of the Department of English and Modern Languages at WTAMU.

322. *Id.* § 4.21.

such requirements obviously limit a college or university's choice in curriculum, particularly when combined with the Texas legislative mandate for 12 hours in history and government.³²³ At WTAMU, the Board's mandates affected subjects like Western World Literature that had long been a staple of the undergraduate education at that institution.

As discussed above, the Board is a statutorily-authorized body tasked with regulating all public higher education in Texas. One could argue that for academic freedom and abstention purposes, it should be treated as a statutory board of regents. Accordingly, even if on balance these requirements infringe on the institution's academic freedom, a court might defer to the Board's academic judgment rather than that of the individual college or university.

The institution may have the better academic freedom argument, though. Each university system in Texas has its own board of regents, so no argument can be made that the Coordinating Board serves the same function as regents. In fact, the regents of one system could challenge the Board on behalf of its member institutions, but the Board does not represent individual colleges or universities against other parties. Accordingly, while the regents have both insider and outsider status relative to each institution, the Board is a state government entity that stands completely outside the college or university and the college or university systems. As such, its decisions do not warrant academic abstention, so we should apply the academic freedom/academic abstention test from Section IV.C. Unlike the situation where the mission of Texas A&M did not account for a program in law, the Mission Statement at WTAMU provides for core liberal arts and sciences education as essential to preparation for each student's major field of study.³²⁴ Accordingly, WTAMU could argue that the Board's core curriculum has a chilling effect on college and university curricular standards that inhibit the educational policies articulated in the mission statement. *Cuesnongle* provides that a court would at least consider this claim of academic infringement.³²⁵ Rather than litigate, WTAMU might craft its own core curriculum in violation of Board policy, forcing the Board to bring suit, and a state court just might recognize the college or university's First Amendment rights in this purely academic decision and defer to the university's judgment.

VII. CONCLUSION

This Note has provided the foundation for turning academic freedom into a usable concept: what does the administrator at a state college or university do when faced with a law or rule that is unfavorable to the institution? Although it

323. TEX. EDUC. CODE ANN. §§ 51.301–51.302 (Vernon 2006).

324. “West Texas A&M University’s major areas of emphasis include but are not limited to teacher preparation, business, agriculture, fine arts, health care and sciences. All programs shall be built upon a solid foundation of required courses in communication, history and political science, and studies which develop strong critical thinking and problem-solving skills as well as an understanding of cultural diversity and an appreciation for the fine arts and humanities.” WEST TEXAS A&M UNIVERSITY: 2004–2005 ACADEMIC YEAR 6, available at <http://www.wtamu.edu/academic/catalog/>.

325. *Cuesnongle v. Ramos*, 835 F.2d 1486, 1502 (1st Cir. 1987).

has not answered this question conclusively, it has suggested ways in which to answer it. The administrator must consider several factors, including which state entity has promulgated the law or rule, whether state action affects purely academic aspects of the college or university, whether the regents support or oppose the institution, and whether the state action directly or indirectly infringes on college or university academic freedom. Section VI's analysis and applications indicated various approaches to address these factors by augmenting academic freedom with academic abstention and separation of powers. Although I framed the applications from a litigation standpoint of a college or university resisting state actions, my hope is that administrators, legislatures, regents, and agencies will better understand their respective rights and work together to fashion laws that improve curriculum, pedagogy, and assessment.