

A TRANSCENDENT VALUE:
THE QUEST TO SAFEGUARD ACADEMIC
FREEDOM

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INTRODUCTION

If any man is able to convince me and show me that I do not think or act right, I will gladly change; for I seek the truth by which no man was ever injured. But he is injured who abides in his error and ignorance.¹

Academic freedom is our legacy from the dreamers. Since the dawn of human curiosity, shamans and philosophers, artists and poets, scientists and scholars have been given leeway in the pursuit of truth. More of an abstract principle than an enforceable right, this privilege is not intended to establish an elite class; rather, it is a means to the ultimate end of extending the boundaries of knowledge for the benefit of all.

Over time colleges and universities have come to represent intellectual sanctuaries for truth-seekers. Today academic freedom is both a professional principle and a “special concern of the First Amendment.”² Justifiably cherished by the scholar, it is too often presumed an absolute right or simply misunderstood. Without reasoned reflection on its origins, academic freedom can be a hollow phrase—a mantra without meaning—when it is balanced against the counterweight of the professional responsibilities that come with it.

Scholars and judges disagree about the very definition of “academic freedom,” the extent of its coverage, and whether it is entitled to judicial protection. This article was inspired by a brief discussion of academic freedom in *Garcetti v. Ceballos*,³ in which the Supreme Court held that when public employees make statements pursuant to official duties they are “not speaking as citizens for First Amendment purposes, and that the Constitution does not insulate their communications from employer discipline.”⁴ While *Garcetti* did not involve academia, Justice Souter, in his dissent, expressed concern for the impact that the ruling could have on public colleges and universities, noting the Court’s deep commitment to “safeguarding academic freedom, which is of transcendent value to all of us.”⁵

Writing for the majority, Justice Kennedy acknowledged that “expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence.”⁶ But the Court declined to decide whether its analysis “would apply in the same manner to a case involving speech related to scholarship or teaching.”⁷

Someday an academic free speech case will come before the Court. This article attempts to set the stage for that case. Context is everything, and, to understand

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1. MARCUS AURELIUS, *MEDITATIONS* 34 (George Long trans., Peter Pauper Press 1957).
 2. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).
 3. 126 S.Ct. 1951 (2006).
 4. *Id.* at 1960.
 5. *Id.* at 1970 (Souter, J., dissenting) (quoting *Keyishian*, 385 U.S. at 603).
 6. *Id.* at 1962 (majority opinion).
 7. *Id.*

where the Court might go, it is first necessary to review the background of academic freedom, both as a professional doctrine and as a concept developed by courts.

Too much has been read into the Supreme Court's decisions on academic freedom. The Court has recognized academic freedom as a "transcendent value" and as a "special concern of the First Amendment."⁸ These words are not metaphorical. They must be taken at face value with an informed perspective of the tradition of academic freedom in both academia and society. Academic speech for public college or university professors is often protected, albeit under the aegis of normal First Amendment principles that are applicable to all public employees. Academic freedom for the "institution" is neither a right nor a predicate for a cause of action. Rather, it is a qualified immunity—a policy recognition that, most of the time, courts should stay out of academic matters. To understand the Court's reasoning, as well as the rationale for this article's conclusions, it is necessary to explain, at length, the history of academic freedom for both the professors and for the institution.

Part I presents an overview of academic freedom and defines key terms. Part II traces the origins of "professional" academic freedom. Part III explores the scope of constitutional protection for academic speech. Part IV discusses the public employee speech doctrine developed by the Supreme Court in a series of cases culminating with *Garcetti*. Part V examines whether the Supreme Court has recognized separate constitutional rights of academic freedom for the professor and the college or university. Finally, Part VI discusses the future landscape of academic freedom in the wake of *Garcetti*.

I. ACADEMIC FREEDOM—AN OVERVIEW

A. Defining "Academic Freedom"

Definitions of academic freedom are nearly as plentiful as authors on the subject. The only consensus reached thus far seems to be that it is "poorly understood and ill-defined."⁹ Arthur Lovejoy, one of the principal founders of the American Association of University Professors (AAUP),¹⁰ defined it as follows:

Academic freedom is the freedom of the teacher or research worker in higher institutions of learning to investigate and discuss the problems of his science and to express his conclusions, whether through publication or in the instruction of students, without interference from political or ecclesiastical authority, or from the administrative officials of the institution in which he is employed, unless his methods are found by qualified bodies of his own profession to be clearly incompetent or

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

9. Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third "Essential Freedom,"* 45 STAN. L. REV. 1835, 1835 (1993).

10. Donald J. Weidner, *Academic Freedom and the Obligation to Earn It*, 32 J.L. & EDUC. 445, 446 (2003).

contrary to professional ethics.¹¹

For Lovejoy, freedom of speech claimed for a college or university professor is not significantly different from that claimed for other citizens.¹² The difference is merely an economic paradox that “those who buy a certain service may not (in the most important particular) prescribe the nature of the service to be rendered.”¹³

Most commentators divide academic freedom into two categories: “professional academic freedom,” which generally refers to the tradition of societal deference to the scholar in the search for truth, and “constitutional academic freedom,” which refers to legally-recognized protection from unwarranted restrictions by courts and legislatures.¹⁴ Walter P. Metzger, a leading scholar, regarded the definitions of these two concepts as “seriously incompatible and probably ultimately irreconcilable.”¹⁵ J. Peter Byrne wrote that academic freedom has “different, if related, meanings in the mouths of academics and in the mouths of judges and that both the academy and the courts have suffered from the confusion.”¹⁶

Due to the efforts of the AAUP, and others, professional academic freedom, as distinguished from constitutional academic freedom,¹⁷ is well established in American colleges and universities.¹⁸ Yet, it carries no “legal or constitutional sanction,” and is not “bestowed by law or some governmental entity.”¹⁹ It is a “‘freedom,’ (i.e., a liberty marked by the absence of restraints or threats against its exercise) rather than a ‘right’ (i.e., an enforceable claim upon the assets of others).”²⁰ It is an exemption from something other than what people are required to do, somewhat like the common law privilege that one cannot be compelled to

11. Arthur O. Lovejoy, *Academic Freedom*, in I ENCYCLOPEDIA OF THE SOCIAL SCIENCES 384, 384 (Edwin A. Seligman ed., 1930).

12. *See id.*

13. *Id.*

14. *See* Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1266 (1988) (referring to the two predominant definitions of academic freedom).

15. *Id.* at 1267. Metzger commented that it was only a “modest exaggeration to say that, as far as academic freedom was concerned, law was law, profession was profession, and the twain hardly ever met.” *Id.* at 1296.

16. J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251, 254 (1989).

17. *See generally infra* Part III.D.

18. Phillipa Strum, *Why Academic Freedom? The Theoretical and Constitutional Context*, in ACADEMIC FREEDOM AFTER SEPTEMBER 11, 143, 145 (Beshara Doumani ed., 2006). The AAUP’s 1940 *Statement of Principles on Academic Freedom and Tenure* “has been endorsed by more than 190 professional organizations and learned societies as well as incorporated into hundreds of university and college faculty handbooks.” Brief for Thomas Jefferson Ctr. for the Protection of Free Expression & Am. Ass’n of Univ. Professors as Amici Curiae Supporting Respondents at 4, *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006) (No. 04-473).

19. ANTHONY J. DIEKEMA, ACADEMIC FREEDOM AND CHRISTIAN SCHOLARSHIP 7-8 (2000).

20. William Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, in THE CONCEPT OF ACADEMIC FREEDOM 59, 71 (Edmund L. Pincoffs ed., 1972).

testify against a spouse.²¹ And, as will be explained,²² the term “constitutional academic freedom” may be a misnomer, implying more judicial protection for academic speech under the First Amendment than is warranted under the case law.

B. Other Key Terms

1. Individual Academic Freedom vs. Institutional Academic Freedom

Scholars disagree on whether the Supreme Court recognizes a constitutional right of academic freedom at all,²³ and, if so, whether it is a right for professors (individual academic freedom), the college or university (institutional academic freedom), or both.²⁴

2. Categories of Speech

Professors speak and write both as private citizens and as college or university employees. Much of the confusion surrounding the analysis of Supreme Court case law appears to be the result of technical analyses of individual rights versus institutional rights. Such analyses seem to supplant the approach whereby cases are viewed under traditional First Amendment principles relating to the context of the speech—where it is made and under what circumstances. The following definitions of speech are useful in the analysis of the scope of protection for academic speech by teachers.

a. Core Academic Speech

A professor’s expression in the classroom or in connection with research is at the heart of academic speech. The term “core academic speech” will be used to refer to speech within the professor’s sphere of expertise. While potentially fraught with problems, this term at least captures what appears to be the primary

21. Frederick Schauer, *Academic Freedom: Rights as Immunities and Privileges*, in *ACADEMIC FREEDOM AND THE INCLUSIVE UNIVERSITY* 13–19 (Sharon E. Kahn & Dennis Pavlich eds., 2000).

22. See generally *infra* Part IV.

23. See Metzger, *supra* note 14, at 1289 (“A sizeable literature of legal commentary asserts that the Supreme Court constitutionalized academic freedom without adequately defining it”). However, Metzger believed that the Supreme Court knew what it meant when it first introduced the concept of constitutional academic freedom. *Id.* at 1291. And though the concept was “imperfectly communicated to the lower courts,” the Court never disavowed it. *Id.* Others view the Court’s discussion of academic freedom as anything but clear. See Byrne, *Academic Freedom*, *supra* note 16, at 257 (observing that the Court has “been far more generous in its praise of academic freedom than in providing a precise analysis of its meaning”). See also David M. Rabban, *A Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment*, 53 *LAW & CONTEMP. PROBS.* 227, 230 (1990) (noting that the Court has “never explained systematically the theory behind its relatively recent incorporation of academic freedom into the first amendment [sic]”).

24. Rebecca Gose Lynch, *Pawns of the State or Priests of Democracy? Analyzing Professors’ Academic Freedom Rights Within the State’s Managerial Realm*, 91 *CALIF. L. REV.* 1061, 1072 (2003).

concern of the Supreme Court in its academic freedom decisions.²⁵

b. Extramural Speech

The term “extramural speech” is normally used to signify speech outside of the classroom and unrelated to academic scholarship.²⁶ Some leading scholars believe the term “academic freedom” should be reserved for core academic speech, because the right of a professor to speak or engage in political activity should be no greater than that of any other governmental employee.²⁷ But, from the beginning, the AAUP consciously included extramural speech within the meaning of academic freedom.²⁸ Those who advocated this approach before 1950 did so because “civil liberty had not yet developed to the point where those who exercised rights were protected against losing public employment.”²⁹

c. Intramural Speech

The term “intramural speech” has been used in different contexts. Sometimes it is used to refer to speech critical of college or university officials or academic colleagues.³⁰ On other occasions, it may refer to speech purely pertaining to personnel issues or other issues of public concern, such as quality of curriculum or instruction.³¹ Thus far, the Supreme Court has not specifically addressed intramural speech.³²

25. See *Garcetti v. Ceballos*, 126 S.Ct. 1951, 1962 (2006) (stating that there is some argument that “expression related to academic scholarship or classroom instruction implicates additional constitutional interests”). The AAUP argued in its joint amicus curiae brief in *Garcetti* that lessening First Amendment protection for job-related speech would threaten academic freedom, because much of the “potentially controversial expression by university professors relates to the subject matter of the speaker’s academic expertise.” Brief for Thomas Jefferson Ctr. for the Protection of Free Expression & Am. Ass’n of Univ. Professors as Amici Curiae Supporting Respondents at 6–7, *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006) (No. 04–473).

26. See Risa L. Lieberwitz, *The Corporatization of the University: Distance Learning at the Cost of Academic Freedom?*, 12 B.U. PUB. INT. L.J. 73, 83 (2002) (“The Declaration’s coverage of extramural speech was intended to cover speech outside a faculty member’s professional duties or disciplinary expertise . . .”).

27. See Byrne, *Academic Freedom*, *supra* note 16, at 264 (citing Van Alstyne, *The Specific Theory of Academic Freedom*, *supra* note 20, at 59).

28. See Metzger, *supra* note 14, at 1274–75.

29. Byrne, *Academic Freedom*, *supra* note 16, at 264.

30. Ailsa W. Chang, Note, *Resuscitating the Constitutional “Theory” of Academic Freedom: A Search for a Standard Beyond Pickering and Connick*, 53 STAN. L. REV. 915, 936 (2001).

31. Matthew W. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323, 1337–38 (1988). While discussing intramural speech, Finkin noted:

Speech by an academic over any matter of academic concern was considered protected. Thus, protest over the coerced resignation of a colleague, admission standards, athletics, library policy, the award of a degree, the quality (and probity) of administrative leadership, salary policies, and appeals to outside agencies such as accreditation associations, and the AAUP itself, were all encompassed.

Id. (citations omitted).

32. Chang, *supra* note 30, at 936–37.

II. ORIGINS OF PROFESSIONAL ACADEMIC FREEDOM

A. The Academy

Today the popular image of an “academy” is a landscaped collection of ivy-covered buildings. But the first academy was a place just outside the walls of Athens, a *gymnasion*, or public park in a grove of trees, named after the Greek hero Hekademos.³³ Philosophers met there to discuss ethics, philosophy, and science. Plato purchased an adjacent property that enabled him to move easily from public park to private quarters with his chosen followers—a useful metaphor for intramural and extramural aspects of academic freedom today.³⁴

To his successors,³⁵ Plato passed on “something of a physical plant and a fairly distinctive, though still quite open-ended, intellectual tradition.”³⁶ Members of the Academy may have had a desire to better their fellow citizens, but they were primarily dedicated to truth.³⁷ Academic freedom is a direct descendant of this search for truth, much as it has existed since “Socrates’ eloquent defense of himself against the charge of corrupting the youth of Athens.”³⁸

B. The Early European Colleges and Universities

The earliest colleges and universities in Europe were established and funded by the Church. Despite obvious practical boundaries, medieval colleges and universities were autonomous corporations, essentially self-governing, where faculty made the rules.³⁹ They were allowed a considerable degree of intellectual freedom because of the belief that learning was important not only for religion but also for the sake of learning itself.⁴⁰

The historian Henry Steele Commager observed that, over time, four major functions of colleges and universities evolved and eventually merged. The first function was to train young men for the professions, such as medicine, law, and the

33. JOHN DILLON, *THE HEIRS OF PLATO: A STUDY OF THE OLD ACADEMY (347 – 274 BC)* 2 (2003).

34. *Id.* at 3–4. When Plato was 80 and losing his memory, Aristotle ambushed him in the public area and began to question him aggressively. Plato walked inside his quarters with his companions to get away from Aristotle. A few months later, a friend returned from a trip and asked why Plato was not to be seen in the public area. He was told that Aristotle had been giving him a bad time, and that Plato was “philosophizing in his own garden.” *Id.*

35. *Id.* at 29. The first successor was Plato’s nephew, Speusippus.

36. *Id.*

37. RUSSELL KIRK, *ACADEMIC FREEDOM: AN ESSAY IN DEFINITION* 11 (1955).

38. RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 4 (1955). Socrates observed, rhetorically, that some may ask why he could not hold his tongue and go to another city where no one would interfere with him. His answer is one of the most quoted statements in history, that the greatest good of man is to daily converse about virtue, and “the life which is unexamined is not worth living.” 3 PLATO, *Apology*, in *THE WORKS OF PLATO* 89, 129 (Benjamin Jowett, trans., Tudor Publishing Co. 1937).

39. HOFSTADTER & METZGER, *supra* note 38, at 6.

40. *Id.* at 5.

clergy.⁴¹ The second function, arising in Oxford and Cambridge, was to communicate the heritage of the past and train the young in “intellectual discipline and in character.”⁴² The third function, emerging in Germany in the nineteenth century, was to “carry on research” to “expand the boundaries of knowledge.”⁴³ The fourth function, which was unique to American colleges and universities, was “to combine teaching, character development, professional training, and service to the community.”⁴⁴

C. The German Influence

The modern research institution is modeled on the nineteenth-century German university.⁴⁵ Rather than focusing on vocational training, the German university was dedicated to educating not “pastors but theologians, not lawyers but jurists, not practitioners but medical scientists.”⁴⁶ Three distinct types of academic freedom evolved in Germany: academic freedom for students (*lernfreiheit*), for faculty (*lehrfreiheit*), and for the university (*freiheit der wissenschaft*).⁴⁷

1. *Lernfreiheit*—Academic Freedom for Students

Lernfreiheit was originally more important in Germany than *lehrfreiheit*.⁴⁸ It was intended to provide freedom to learn, to study whatever one chose, and to attend or avoid any class.⁴⁹ In 1963, Commager wrote that America had largely lost sight of *lernfreiheit* and that it was “high time that it be restored,” so that “our universities are not to be merely advanced preparatory schools.”⁵⁰ He concluded that “nowhere else in the world do young persons talk so much about their liberty and do so little with it when they have it as in the United States.”⁵¹

Lernfreiheit was reserved for the best students, as a reward for achievement. It was also a disclaimer by universities of any control over their students’ curricula and their private lives.⁵² More than 9,000 Americans studied in Germany during the latter part of the nineteenth century.⁵³ James Morgan Hart’s account of his

41. Henry Steele Commager, *The University and Freedom: “Lehrfreiheit” and “Lehrfreiheit,”* 34 J. HIGHER EDUC. 361, 361 (1963).

42. *Id.*

43. *Id.*

44. *Id.*

45. HOFSTADTER & METZGER, *supra* note 38, at 369.

46. *Id.* at 373–74. Johns Hopkins University, founded in 1876, was the first American college or university based on the German model. *Id.* at 377. Of the fifty-three professors at Johns Hopkins in 1884, nearly all had studied in Germany. *Id.*

47. Metzger, *supra* note 14, at 1269–70. This section focuses on the first two types of academic freedom. Academic freedom for the institution was ignored for many years but seems to have made a comeback of sorts in the development of institutional academic freedom, discussed *infra* Part VI.

48. Commager, *supra* note 41, at 364.

49. *Id.*

50. *Id.*

51. *Id.*

52. Metzger, *supra* note 14, at 1270.

53. HOFSTADTER & METZGER, *supra* note 38, at 367.

years at the university in Göttingen in the 1860s provides an interesting glimpse of the experience from an American's perspective:

By a course of lectures in a German university is meant a series of lectures on one subject, delivered by one man, during one semester. A German university has, strictly speaking, *no course of instruction*; there are no classes, the students are not arranged according to their standing by years, there are no recitations, there is no grading, until the candidate presents himself at the end of three or four years for his doctor's degree All students stand on a footing of perfect equality in the eye of [the] university, and that theoretically each one is free to select such lectures in his faculty as he sees fit to hear.⁵⁴

Practically speaking, German students were expected to have definite objectives in mind, such as becoming a theologian, lawyer, or physician.⁵⁵ Allowing students to attend lectures of their choice, thus providing a form of competition among the professors, was deemed important.

It is practically the only way that newly matriculated students have of deciding between rival lecturers or of selecting some lecture that is not embraced in the ordinary routine of study. On this, as on so many points, the Germans display a great deal of practical sense. The student is free to roam about for two or three weeks, but at the end of that time it is expected of him that he come to a decision and settle down either to steady work or to steady idleness.⁵⁶

But that decision was largely up to students.⁵⁷ To a nineteenth-century German student, *lernfreiheit* was a "precious privilege, a recognition of his arrival at man's estate."⁵⁸

54. JAMES MORGAN HART, *GERMAN UNIVERSITIES: A NARRATIVE OF PERSONAL EXPERIENCE* 45 (1874) (emphasis in original).

55. *Id.* at 46.

56. *Id.* at 47–48.

57. HOFSTADTER & METZGER, *supra* note 38, at 386 (describing the right of the German student to be "free to roam from place to place, sampling academic wares; that wherever they lighted, they were free to determine the choice and sequence of course, and were responsible to no one for regular attendance; that they were exempted from all tests save the final examination; that they lived in private quarters and controlled their private lives").

58. *Id.* at 387.

2. *Lehrfreiheit*—Academic Freedom for Teachers

Lehrfreiheit means “teaching freedom”—the absence of classroom censorship.⁵⁹ In addition to seeking truth for truth’s sake, a university professor was outside the chain of command common to most government employees.⁶⁰ While, to some, the American version purports to permit a professor to say or write virtually anything, *lehrfreiheit* was more limited to the role of the professor in connection with his or her field.⁶¹ It was a limited privilege, holding teachers accountable for political and social conduct as private citizens.⁶² Inside the academic sphere, German professors saw themselves as “oracles of transcendent truths.”⁶³ Outside the academy, it was assumed that professors, as civil servants, were to be “circumspect and loyal.”⁶⁴

To German professors, their professional status as university scholars and their attendant right of *lehrfreiheit* combined to elevate them to a special status in society.⁶⁵ Academic freedom distinguished professors from other civil servants and freed them to pursue scholarship without the approval of church or state—a distinct privilege not available to most citizens.⁶⁶

D. Academic Freedom in the United States

1. The Early American Colleges & Universities

The first colleges and universities in the United States were founded by Protestants and were largely governed by lay officials. As Richard Hofstadter noted “it was not a very drastic step from admitting men . . . who were not teachers into the government of colleges,” and lay church governance became the model for the Protestant colleges and universities.⁶⁷ Since the lay trustees had neither the expertise nor the time for day-to-day oversight they delegated it to presidents of the colleges and universities, creating a powerful post, especially since there were few professional teachers in the schools at the time.⁶⁸ American colleges and universities were “mostly no more than academies or high schools,” lacking the professional faculties of their European counterparts.⁶⁹

59. Metzger, *supra* note 15, at 1269.

60. *Id.*

61. Arthur Schlesinger, Jr., *Academic Freedom: A Review Essay*, 27 J. HIGHER EDUC. 338, 339 (1956).

62. Metzger, *supra* note 14, at 1269–70.

63. HOFSTADTER & METZGER, *supra* note 38, at 388.

64. *Id.* at 389.

65. *See id.* at 387.

66. Paul Horwitz, *Grutter’s First Amendment*, 46 B.C. L. REV. 461, 474–75 (2005).

67. HOFSTADTER & METZGER, *supra* note 38, at 122.

68. *See id.* at 125.

69. Schlesinger, *supra* note 61, at 339.

2. Academic Freedom for Students

Charles W. Eliot, the legendary president of Harvard University from 1869 to 1909, proposed academic freedom for all students from the traditional curriculum of a single set of required courses, regardless of “individual differences in capacity, interest, and aim.”⁷⁰ In an 1885 speech, Eliot addressed the arguments that young people need a required course of study.

An elective system does not mean liberty to do nothing. The most indifferent student must pass a certain number of examinations every year I must add that the policy of an institution of education, of whatever grade, ought never to be determined by the needs of the least capable students; and that a university should aim at meeting the wants of the best students at any rate, and the wants of inferior students only so far as it can meet them without impairing the privileges of the best. A uniform curriculum, by enacting superficiality and prohibiting thoroughness, distinctly sacrifices the best scholars to the average. Free choice of studies gives the young genius the fullest scope without impairing the chances of the drone and the dullard.⁷¹

Andrew F. West of Princeton responded sharply to Eliot, arguing that the proposal “forces upon our American colleges a crisis greater than any they have hitherto been called upon to meet.”⁷² West agreed that students should be allowed, at some stage, the freedom to choose their studies and govern themselves and acknowledged that colleges and universities were, in theory, the proper place.⁷³ To West, however, the American institution was “not in any sense a university, and [had] no early prospect of becoming one.”⁷⁴ He pointed out that before entering the college or university, German students had been through a rigorous course of study, including the gymnasium—a nine year course of study consisting of Latin, Greek, German, French, religious instruction, mathematics, history, geography, writing, drawing, exercise, and music—and that students were required to pass a severe final examination after completing the gymnasium.⁷⁵

In 1907, Eliot gave a speech entitled *Academic Freedom*.⁷⁶ He asserted that college and university students should find an enlargement of their freedom to choose their studies and professors.⁷⁷

[I]n a college or university there is perfect solidarity of interests between teachers and taught in respect to freedom. A teacher who is

70. Charles H. Russell, *Charles W. Eliot and Education*, 28 J. HIGHER EDUC. 433, 434 (1957).

71. CHARLES W. ELIOT, *EDUCATIONAL REFORM: ESSAYS AND ADDRESSES* 141–42 (1909).

72. Andrew F. West, *What is Academic Freedom?*, 140 N. AM. REV. 432 (1885). See also HOFSTADTER & METZGER, *supra* note 38, at 397.

73. West, *supra* note 72, at 432.

74. *Id.*

75. *Id.* at 436–37. West also pointed out that the German gymnasium averaged about thirty lessons a week while the average in the United States was about twenty lessons a week. *Id.* at 437.

76. Charles W. Eliot, *Academic Freedom*, 26 SCIENCE 1 (1907).

77. *Id.* at 7.

not supposed to be free never commands the respect or personal loyalty of competent students, and students who are driven to a teacher are never welcome, and can neither impart nor imbibe enthusiasm.⁷⁸

Students today enjoy significant freedom of choice as to electives and majors, although *lernfreiheit* is rarely mentioned. The Supreme Court has recognized the rights of student expression under the First Amendment,⁷⁹ but one that is a subset of First Amendment law rather than the German concept of academic freedom for students.⁸⁰

3. Academic Freedom for Faculty—The Role of the AAUP

At the AAUP's 1915 organizational meeting, the Committee on Academic Freedom and Academic Tenure, sometimes called "Committee A," was formed and was headed by Arthur O. Lovejoy of Johns Hopkins University and E.R.A. Seligman of Columbia University. In that year, the committee wrote the *General Report of the Committee on Academic Freedom and Academic Tenure*.⁸¹ Seligman and Lovejoy were directly familiar with the firing of economist Edward A. Ross in 1900 from Stanford University.⁸² Ross had advocated for free silver and against Asian labor importation, to the distress of Stanford's proprietor, Mrs. Leland Stanford,⁸³ who famously wrote to the president of Stanford: "I must

78. *Id.* at 9.

79. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (holding that the wearing of black armbands by minor students in protest of the Vietnam War was akin to "pure speech" and thus protected, so long as it did not "materially and substantially interfere" with the requirements of appropriate discipline and collide with the rights of others). *But see Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (holding that a high school was justified in suspending a student who used a graphic and explicit sexual metaphor during a mandatory assembly, contrasting the political viewpoint at stake in *Tinker*); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272–73 (1988) (upholding the right of a high school to exercise some censorship control in a student newspaper that was part of a journalism course, and distinguishing *Tinker* by noting the difference between tolerating student expression and school-sponsored activities); *Morse v. Frederick*, 127 S.Ct. 2618, 2627 (2007) (holding that the high school was justified in suspending a student for refusing to take down a banner that read "BONG HiTS 4 JESUS," on the ground that the speech in question could be seen as promoting drug use, in violation of a legitimate school policy).

80. Ironically, one of the few references to the concept of *lernfreiheit*, although not by name, is found in *Edwards v. Aguillard*, 482 U.S. 578 (1987). A Louisiana statute required the teaching of creationism where evolution was taught. The legislature's stated purpose was to protect academic freedom. *Id.* at 586. The Supreme Court struck down the statute on Establishment Clause grounds. Writing for the majority, Justice Brennan agreed with the Fifth Circuit Court of Appeals that academic freedom embodies the principle that individual instructors are at liberty to teach what they deem appropriate in the exercise of their professional judgment, and concluded that the statute actually served to diminish academic freedom. *Id.* n.6. Justice Scalia, in his dissent, argued that the legislature's meaning of the term academic freedom was "freedom from indoctrination," as it gave students a "choice" rather than being subjected to "indoctrination on origins." *Id.* at 628 (Scalia, J., dissenting).

81. Metzger, *supra* note 14, at 1267.

82. Robert Post, *The Structure of Academic Freedom*, in *ACADEMIC FREEDOM AFTER SEPTEMBER 11*, 65 (Beshara Doumani ed., 2006).

83. *Id.*

confess I am weary of Professor Ross, and I think he ought not to be retained at Stanford University I trust that before the close of this semester Professor Ross will have received notice that he will not be re-engaged for the new year.”⁸⁴ Eventually, the president obliged and Lovejoy resigned from Stanford in protest.⁸⁵ Consequently, the “first professorial inquiry into an academic freedom case was conceived and brought into being—the predecessor if not directly the parent of Committee A of the AAUP.”⁸⁶

a. *1915 Declaration*

The Committee drafted the *1915 Declaration of General Principles on Academic Freedom and Academic Tenure*, commonly known as the *1915 Declaration*.⁸⁷ The opening lines acknowledged the German tradition.

The term “academic freedom” has traditionally had two applications—to the freedom of the teacher and to that of the student, *Lehrfreiheit* and *Lernfreiheit*. It need scarcely be pointed out that the freedom which is the subject of this report is that of the teacher. Academic freedom in this sense comprises three elements: freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extra-mural utterance and action. The first of these is almost everywhere so safeguarded that the dangers of its infringement are slight. It may therefore be disregarded in this report. The second and third phases of academic freedom are closely related, and are often not distinguished. The third, however, has an importance of its own, since of late it has perhaps more frequently been the occasion of difficulties and controversies than has the question of freedom of intra-academic teaching. All five of the cases which have recently been investigated by committees of this Association have involved, at least as one factor, the right of university teachers to express their opinions freely outside the university or to engage in political activities in their capacity as citizens.⁸⁸

From the beginning, the AAUP rejected academic freedom for students as a concern.⁸⁹ About half the members of the Seligman committee studied in Germany, so it was clearly not an oversight; it was a deliberate amputation of the

84. *Id.* (citing ORRIN LESLIE ELLIOTT, *STANFORD UNIVERSITY: THE FIRST TWENTY-FIVE YEARS* 341 (1937)).

85. *Id.*

86. Thomas Haskell, *Justifying the Rights of Academic Freedom in the Era of “Power / Knowledge,”* in *THE FUTURE OF ACADEMIC FREEDOM* 51 (Louis Menand ed., 1996) (citing HOFSTADTER & METZGER, *supra* note 38, at 442–43). See Haskell, *supra* at 49–53 (providing a detailed description of the Ross controversy).

87. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *1915 Declaration of Principles on Academic Freedom & Academic Tenure*, in *POLICY DOCUMENTS & REPORTS* 291 (10th ed. 2006) [hereinafter *1915 Declaration*].

88. *Id.* at 292.

89. Horwitz, *supra* note 66, at 477.

concept.⁹⁰ Interestingly, the *1915 Declaration* indicates that the Seligman committee did not perceive core academic speech to be at risk. The focus was on extramural speech—something that went beyond the German doctrine.⁹¹

The AAUP was obviously not obliged to clone *lehrfreiheit*. But why should professors be given a special form of protection, as compared to any other professional? William Van Alstyne, writing in 1972, argued that this expanded use of academic freedom had created a disservice to the profession.

[B]y heaping up so much in reliance upon “academic freedom,” while saying so little about freedom of speech as a universal civil right irrespective of one’s vocation, . . . we now find ourselves committed to a view that logically allows to academics less ordinary freedom of speech than other persons may be entitled to exercise.⁹²

According to Van Alstyne, academic freedom harmed the profession.⁹³ First, “it provided substance to a widespread belief that the *professoriate* sees itself as an extraordinary elite.”⁹⁴ This led to a loss of public goodwill. Of greater relevance, “the price we pay is the much greater cost of the lad who cried ‘wolf’ so often when it was false that few would pay attention when it was true,” leading to public indifference when an authentic issue of academic freedom arises.⁹⁵ Second, it “delayed the specific assimilation of academic freedom into constitutional law.”⁹⁶ It is therefore a “marvelous irony” that constitutional law had developed to protect other public employees subjected to retaliation for the exercise of free speech, while the Supreme Court seemed willing to protect professors’ speech rights only outside the confines of academia.⁹⁷

A principle concern of the AAUP was the power of trustees and overseers.⁹⁸

90. Metzger, *supra* note 14, at 1271. Metzger pointed out that in the late 1960s the AAUP joined other groups in drafting a “cautious magna carta of student rights,” but had never investigated a campus incident involving an alleged violation of student freedom as the sole complaint. *Id.* at 1272. He observed that the AAUP has always assumed that student freedom is “something different—and something less.” *Id.* This “magna carta” is the *Joint Statement on Rights and Freedoms of Students*. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *Joint Statement on Rights and Freedoms of Students*, in *POLICY DOCUMENTS & REPORTS* 273, 273 (10th ed. 2006). Among other things, it encourages freedom of expression by students, as well as freedom of association. *Id.*

Similarly, the authors of the *1915 Declaration* wrote *freiheit der wissenschaft* out of the scope of academic freedom. According to some, however, courts have placed it squarely within the scope of legal academic freedom. Horwitz, *supra* note 66, at 477.

91. Schlesinger, *supra* note 61, at 339. The Committee was divided on this point, however, with some members believing that “academic freedom would lose its rationale if it were stretched to protect activities not performed in the course of professional duty.” Metzger, *supra* note 14, at 1274. Meanwhile, others on the Committee thought it could extend beyond the classroom and laboratory, “but only when academics stuck to topics pertinent to their discipline.” *Id.*

92. Van Alstyne, *The Specific Theory of Academic Freedom*, *supra* note 20, at 60.

93. *Id.* at 63.

94. *Id.* (emphasis added).

95. *Id.* at 64.

96. *Id.*

97. *See id.* at 68.

98. *1915 Declaration*, *supra* note 87, at 292.

The authors first took on the proprietary school, acknowledging that the trustees are confined by the scope of the terms of the endowment as established by the proprietors, who are entitled to demand that everything be subordinated to that end.⁹⁹ Similarly, institutions founded and funded by wealthy persons can have as their purpose not the advancement of knowledge by impartial and unrestricted research but the subsidization of their opinions.¹⁰⁰ The authors of the *1915 Declaration* then compared private institutions to public ones, arguing that public institutions hold a public trust and thus “have no moral right to bind the reason or the conscience of any professor.”¹⁰¹ Those in academia are in a unique, even exalted position.

The above-mentioned conception of a university as an ordinary business venture, and of academic teaching as a purely private employment, manifests also a radical failure to apprehend the nature of the social function discharged by the professional scholar. While we should be reluctant to believe that any large number of educated persons suffer from such a misapprehension, it seems desirable at this time to restate clearly the chief reasons, lying in the nature of the university teaching profession, why it is to the public interest that the professional office should be one both of dignity and of independence.¹⁰²

If education is the cornerstone of society and progress in scientific knowledge is essential to civilization, then “few things can be more important than to enhance the dignity of the scholar’s profession, with a view to attracting into its ranks [people] of the highest ability, of sound learning, and of strong and independent character.”¹⁰³ The authors of the report argued that the pecuniary rewards of a teaching career “are not, and doubtless never will be” equal to other professions, and it is not even “desirable that [people] should be drawn into this profession by the magnitude of the economic rewards.”¹⁰⁴ Instead, people of “high gifts and character” should be attracted to the profession by the assurance of an “honorable and secure position, and of freedom to perform honestly and according to their own consciences the distinctive and important function which the nature of the profession lays upon them.”¹⁰⁵

99. *Id.* at 292–93.

100. *Id.* at 293. Somewhat disingenuously, the Committee wrote that it did not desire to “express any opinion” on the desirability of such institutions, “[b]ut [that] it is manifestly important that they should not be permitted to sail under false colors.” *Id.*

101. *Id.* at 293.

102. *Id.* at 294.

103. *Id.*

104. *Id.*

105. *Id.*

With the *1915 Declaration*, the AAUP began the process of persuading authorities that faculty members should not be considered “employees” in the traditional sense. This was in direct response to the traditional treatment of college and university professors as ordinary employees under the common law master-servant doctrine, where employment-at-will meant that professors could be terminated for any cause.¹⁰⁶ The Committee believed that professors should be treated as having a unique status, thus being entitled to special privileges, in return for their sacrifices.

So far as the university teacher’s independence of thought and utterance is concerned—though not in other regards—the relationship of professor to trustees may be compared to that between judges of the federal courts and the executive who appoints them. University teachers should be understood to be, with respect to the conclusions reached and expressed by them, no more subject to the control of the trustees than are judges subject to the control of the President with respect to their decisions¹⁰⁷

Robert Post asserts that we have forgotten that the original purpose of academic freedom was to redefine the employment relationship. He also states that this “amnesia is unfortunate,”¹⁰⁸ for the following reasons:

[I]t has facilitated the rise of an entirely different conception of academic freedom. In the past half-century, America has developed a culture of rights, and we have accordingly come to conceive of the structure of academic freedom in terms of “rights of free expression, freedom of inquiry, freedom of association, and freedom of publication.” We now tend to conceptualize academic freedom on the model of individual First Amendment rights possessed by all “citizens in a free society.” The difficulty is that this reconceptualization of academic freedom can neither explain the basic structure of faculty obligations and responsibilities within the universities, nor provide an especially trenchant defense of the distinctive freedoms necessary for the scholarly profession.¹⁰⁹

Nevertheless, Post concluded that the claim to self-regulation has “proved remarkably durable and successful,” compared to other professions which have seen increasing government regulation.¹¹⁰ This may be due to public indifference to self-governance by professors as compared to doctors and lawyers. But it may be attributable to the success of the *1915 Declaration* in persuading the public that colleges and universities have generally fulfilled their function and that success would be jeopardized by a limitation on academics.¹¹¹

The authors of the *1915 Declaration* linked academic freedom to the three

106. Metzger, *supra* note 14, at 1278.

107. *1915 Declaration*, *supra* note 87, at 295.

108. Post, *supra* note 82, at 62.

109. *Id.* (citations omitted).

110. *Id.* at 71.

111. *See id.* at 71–72.

purposes of a college or university. The first is to “promote inquiry and advance the sum of human knowledge” through research.¹¹² Colleges and universities increasingly were becoming home to scientific research, and, in all areas of knowledge, “the first condition of progress is complete and unlimited freedom to pursue inquiry and publish its results.”¹¹³ The second function is teaching, which, for a long time, was the only function of American colleges and universities.¹¹⁴ No professor can be successful without the respect of students and “their confidence in his intellectual integrity.”¹¹⁵ If students do not believe that the professor is true to himself, the “virtue of the instruction as an educative force is incalculably diminished.”¹¹⁶ The third function of “modern” colleges or universities is to develop experts for the community, to be “of use to the legislator or the administrator,” and, for this, professors must “enjoy their complete confidence in the disinterestedness of his conclusions.”¹¹⁷ Colleges and universities cannot perform these functions without “accepting and enforcing to the fullest extent the principle of academic freedom,” because their responsibilities are to the community at large.¹¹⁸

Today, college and university professors are in a delicate position. They fought to achieve professional status, and, having achieved it, their status became an obstacle to public acceptance of academic freedom. In 1956, Arthur Schlesinger, Jr. observed that perhaps the reason for the erosion of academic freedom, ironically, was the status of college and university teaching as a profession—the higher the status “the more sensitive a group often becomes to real or fancied threats.”¹¹⁹ But an attack on the professoriate’s status, or an end-around as Schlesinger characterized it, is damaging because “if the campaign against their status succeeds, then the battle against their liberty becomes only a mopping-up operation.”¹²⁰ The privilege concept is important to understanding the way courts have treated academic freedom in a constitutional sense. As Sidney Hook suggested, a professional right such as academic freedom must be earned, while other rights, such as human rights, are inherent.¹²¹

While professors owe a duty to the community and depend on it to fund their work, they want no interference from it. The *1915 Declaration* was not only

112. *1915 Declaration*, *supra* note 87, at 295.

113. *Id.*

114. *Id.* at 296.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* See also John R. Searle, *Two Concepts of Academic Freedom*, in *THE CONCEPT OF ACADEMIC FREEDOM* 87 (Edmund L. Pincoffs ed., 1972) (“The purpose of the university is to benefit the community that created and maintains it, and mankind in general, through the advancement and dissemination of knowledge.”).

119. Schlesinger, *supra* note 61, at 341.

120. *Id.* at 342.

121. See SIDNEY HOOK, *ACADEMIC FREEDOM AND ACADEMIC ANARCHY* 35 (1970). Hook whimsically added that while anyone “has a human right to talk nonsense about anything, anywhere, anytime . . . one must be professionally qualified to talk nonsense in a university.” *Id.* at 36.

concerned with funding; it was concerned with something more elusive—public opinion.

The tendency of modern democracy is for men to think alike, to feel alike, and to speak alike. Any departure from the conventional standards is apt to be regarded with suspicion. Public opinion is at once the chief safeguard of a democracy, and the chief menace to the real liberty of the individual. It almost seems as if the danger of despotism cannot be wholly averted under any form of government. In a political autocracy there is no effective public opinion, and all are subject to the tyranny of the ruler; in a democracy there is political freedom, but there is likely to be a tyranny of public opinion.¹²²

The report's most memorable phrase was that a college or university is an "inviolable refuge from such tyranny" and an "intellectual experiment station, where new ideas may germinate and where their fruit, though still distasteful to the community as a whole, may be allowed to ripen."¹²³

The *1915 Declaration* is important to the doctrine of professional academic freedom as it exists today. But it must always be kept in mind that it is a "professional norm of ethics . . . not grounded in any constitutional or other legal right and is not specifically enforced by courts."¹²⁴ Unlike a constitutional right, academic freedom, as empowered by the AAUP, applies equally to public and private colleges and universities, so long as they have signed onto the *1915 Declaration* or the AAUP's *1940 Statement of Principles*.¹²⁵

b. *1940 Statement of Principles*

Since the *1915 Declaration* had no legal enforcement mechanisms,¹²⁶ the AAUP sought to establish relationships with other organizations, such as the American Association of Universities and the American Association of Colleges.¹²⁷ The result was the *1940 Statement of Principles* ("*1940 Statement*") which was based on certain key assumptions: (1) colleges and universities exist for the common good; (2) academic freedom is essential to that purpose; (3) tenure is essential to academic freedom, as well as job security; and (4) academic freedom carries with it duties which are correlative with rights.¹²⁸

122. *1915 Declaration*, *supra* note 87, at 297.

123. *Id.*

124. Lynch, *supra* note 24, at 1067.

125. *Id.*

126. Jennifer Elrod, *Academics, Public Employee Speech, and the Public University*, 22 BUFF. PUB. INT. L.J. 1, 19–20 (2003–2004) ("[T]here was no avenue through which the AAUP could require or compel a particular university or college to comply with AAUP principles and practices, because the organization had no powers other than persuasion to enforce its policies, goals, and principles.").

127. R. Kenton Bird & Elizabeth Barker Brandt, *Academic Freedom and 9/11: How the War on Terrorism Threatens Free Speech on Campus*, 7 COMM. L. & POL'Y 431, 438 (2002).

128. *Id.* at 439. See AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *1940 Statement of Principles on Academic Freedom and Tenure*, in POLICY DOCUMENTS & REPORTS 3, 3 (10th ed. 2006) [hereinafter *1940 Statement*].

The *1940 Statement* provides, in relevant part, that professors “should be careful not to introduce into their teaching controversial matter that has no relation to their subject.”¹²⁹ Further, as officers of educational institutions, when professors speak or write as citizens, the *1940 Statement* provides:

[Professors] should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge [their] profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.¹³⁰

Responsibilities that come with genuine academic freedom are sometimes overlooked. Professors have considerable latitude within their respective fields, but they should not claim absolute license for expression outside of their field.¹³¹

The AAUP has no legal enforcement mechanisms,¹³² but its definition of academic freedom has been endorsed by most colleges and universities and incorporated into their handbooks.¹³³ The most that the AAUP can do is to place a school on its list of censored colleges and universities, though some critics question the impact that this list has on administrative decisions.¹³⁴ Yet, because they “do not wish to place themselves outside the community of colleges and universities,”¹³⁵ most colleges and universities respond to AAUP action. In any case, the AAUP’s success in obtaining the involvement of other organizations, along with its investigations and censure list, has undoubtedly led to a greater understanding and respect for academic freedom.¹³⁶

c. *A Statement on Extramural Utterances*

In 1964, Committee A of the AAUP issued *Committee A Statement on Extramural Utterances* to clarify sections of the *1940 Statement* relating to extramural speech.¹³⁷ This brief statement referred to an interpretation of the *1940 Statement* which stated that if a college or university administration believed a professor had not observed his “special position in the community,” or that the

129. Bird & Brandt, *supra* note 127, at 439.

130. *Id.* at 439.

131. Post, *supra* note 82, at 82 (observing that like the *1915 Declaration*, the *1940 Statement* seems simultaneously to claim the right of faculty to speak as citizens and yet to diminish that freedom by imposing on professors the special obligations to be accurate and to exercise appropriate restraint).

132. Elrod, *supra* note 126, at 20.

133. Metzger, *supra* note 14, at 1266.

134. Elrod, *supra* note 126, at 23.

135. Bird & Brandt, *supra* note 127, at 439.

136. *Id.*

137. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *Committee A Statement on Extramural Utterances*, in *POLICY DOCUMENTS & REPORTS* 32, 32 (10th ed. 2006) [hereinafter *Committee A*].

“extramural utterances” of the professor raised “grave doubts concerning his fitness for his position, it may proceed to file charges.”¹³⁸ In cases involving these charges, “it is essential that the hearing should be conducted by an appropriate—preferably elected—faculty committee,” that the “controlling principle” is that extramural utterances “cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member’s unfitness for his position,” and that the “final decision should take into account the faculty member’s entire record as a teacher and scholar.”¹³⁹

E. Professional Academic Freedom Today

Professional academic freedom is alive and well. Its protections come from a tradition of societal deference and professional respect, often incorporated into college and university policies. It is more meaningful than a legal right because it is more accessible to the professor and more practical. Litigation is expensive and emotionally draining, not to mention it is always dangerous to shoot at the king. Moreover, because this type of academic freedom is a professional doctrine, it operates on a daily basis at all colleges and universities. However, occasionally there is a breach in the academic fortress, and the next line of defense, in some instances, is the court.

III. CONSTITUTIONAL ACADEMIC FREEDOM

Seventy years ago the author of a Yale Law Journal article wrote that it is “extremely difficult to frame a legal action” for violations of academic freedom, because it is neither a property right nor a constitutional privilege.¹⁴⁰ Consequently, the issue of academic freedom was “seldom clearly raised, and, in fact, scarcely ever mentioned in the cases.”¹⁴¹

Contrasting those bleak observations to then-recent case law, a law professor in 1963 was encouraged about the possibility of a “substantial degree of judicial protection” for academic freedom under the Constitution.¹⁴² Whether his enthusiasm was ultimately warranted is debatable, though professors have a better chance of finding protection in the courts today than seventy years ago. A first source of protection can be found in the professor’s contract with the college or university if academic freedom has been incorporated into that contract. In that situation, a breach of contract claim may arise from an express provision, a source incorporated by reference, or a custom or tradition of academic freedom.¹⁴³ Contractual enforcement through college or university policies or faculty

138. *Id.*

139. *Id.* (“Extramural utterances rarely bear upon the faculty member’s fitness for his position.”).

140. Comment, *Academic Freedom and the Law*, 46 YALE L.J. 670, 671 (1937).

141. *Id.* at 676.

142. William P. Murphy, *Academic Freedom—An Emerging Constitutional Right*, 28 LAW & CONTEMP. PROBS. 447, 449 (1963).

143. Jim Jackson, *Express and Implied Contractual Rights to Academic Freedom in the United States*, 22 HAMLIN L. REV. 467, 473 (1999).

handbooks is possible,¹⁴⁴ though contract law in this area is not well defined.¹⁴⁵ A second potential source for judicial protection lies in the constitutions of some states,¹⁴⁶ which effectively limit state legislatures' abilities to interfere with the governance of colleges and universities.¹⁴⁷

Constitutional academic freedom is the focus of this Part. While, in some situations, it is an important safeguard of academic freedom, it suffers from some serious limitations. First, because of the state action doctrine, which effectively limits First Amendment protection to governmental action, there is virtually no constitutional protection for professors at private colleges and universities.¹⁴⁸ That gap is significant, since about one-third of all full-time faculty in the United States teach in private colleges or universities.¹⁴⁹ At best, then, constitutional academic freedom covers two-thirds of the profession. Second, as will be discussed in Part V, even professors at public colleges or universities may find their speech to be outside the scope of constitutional protection under the public employee speech doctrine.

We will begin the story of judicial treatment of academic freedom with what appears to be the first reported case to use the term "academic freedom," and then turn to the evolution of constitutional treatment of academic freedom by the Supreme Court.

144. *Id.* at 477–78.

145. Bird & Brandt, *supra* note 127, at 440.

146. Byrne, *Academic Freedom*, *supra* note 16, at 327.

147. *Id.* The focus of these provisions is on the institution, however, and, according to Byrne, the tradition of constitutional autonomy for state universities has contributed to the federal right of institutional academic freedom. *Id.*

148. *Id.* at 299. Interestingly, California has extended legal protection to student speech at private postsecondary institutions through the "Leonard Law." CAL. [EDUC.] CODE § 94367 (West 1992).

149. For the academic year 2004–05, of the 530,000 faculty members at Title IV degree-granting institutions, 359,509 faculty members, of all ranks, were at public institutions, and 170,491 were at private institutions. National Center for Education Statistics, *Full-time instructional faculty at Title IV degree-granting institutions, by academic rank, 2004–05*, http://nces.ed.gov/das/library/tables_listings/show_nedrc.asp?rt=p&tableID=2613 (last visited Sept. 18, 2007). A Title IV institution is one that has a written agreement with the Secretary of the Department of Education to participate in federal student financial assistance programs under 20 U.S.C. § 1070. National Center for Education Statistics, *The Integrated Postsecondary Education Data System (IPEDS)*, <http://nces.ed.gov/ipeds/glossary/index.asp?id=465> (last visited Sept. 18, 2007).

A. False Start—The Bertrand Russell Case

Academic freedom had been firmly embedded in the AAUP documents for more than twenty-five years when a reported case first included the words “academic freedom” in its opinion. In *Kay v. Board of Higher Education of the City of New York*,¹⁵⁰ a taxpayer, Jean Kay,¹⁵¹ challenged the appointment of philosopher and mathematician Bertrand Russell to the philosophy chair at the City College of New York on several grounds.¹⁵² The principal ground was that his appointment was against public policy because Russell had “taught in his books immoral and salacious doctrines.”¹⁵³ The Board moved to dismiss the petition. Justice McGeehan ruled on the merits that Russell was unfit to teach at the college.¹⁵⁴ The opinion is devoid of adherence to procedure, and it is replete with inconsistencies and rationalizations.¹⁵⁵ McGeehan’s comments should be recounted at length to remind us of the need for a clear and principled legal basis for academic freedom.

[H]is appointment violates a perfectly obvious canon of pedagogy, namely, that the personality of the teacher has more to do with forming a student’s opinion than many syllogisms. A person we despise and who is lacking in ability cannot argue us into imitating him. A person whom we like and who is of outstanding ability, does not have to try. It is contended that Bertrand Russell is extraordinary. *That makes him the more dangerous* When we consider how susceptible the human mind is to the ideas and philosophy of teaching professors, it is apparent that the board of higher education either disregarded the probable consequences of their acts or were more concerned with advocating a cause that appeared to them to present a challenge to so-called

150. 18 N.Y.S.2d 821 (Sup. Ct. 1940).

151. According to a contemporary account, it was not clear what Jean Kay’s capacity was, but it appears that she was merely a taxpayer. Walton H. Hamilton, *Trial by Ordeal, New Style*, 50 YALE L.J. 778, 780 (1941).

152. *Kay*, 18 N.Y.S.2d at 825.

153. *Id.* at 827. The trial judge stated that it was “not necessary to detail here the filth which is contained in the books,” but went on to provide some examples, including the following:

For my part, while I am quite convinced that companionate marriage would be a step in the right direction, and would do a great deal of good, I do not think that it goes far enough. I think that all sex relations which do not involve children should be regarded as a purely private affair, and that if a man and a woman choose to live together without having children, that should be no one’s business but their own. I should not hold it desirable that either a man or a woman should enter upon the serious business of a marriage intended to lead to children without having had previous sexual experience.

Id. (quoting BERTRAND RUSSELL, MARRIAGE AND MORALS 165–66 (1929)).

154. *Id.* at 824. He “held trial, rendered judgment, and closed the case.” Hamilton, *supra* note 151, at 779. The unfitness was allegedly due to Russell’s writings on sex, though Russell was appointed to teach mathematics. *Kay*, 18 N.Y.S.2d at 826–27.

155. One example will suffice. Judge McGeehan conceded for the purposes of argument “that the board of higher education has sole and exclusive power to select the faculty of City College and that its discretion cannot be reviewed or curtailed by this court or any other agency,” but then proceeded to curtail the Board’s decision. *Id.* at 829.

“*academic freedom*” without according suitable consideration of the other aspects of the problem before them. While this court would not interfere with any action of the board in so far as a pure question of “valid” *academic freedom* is concerned, it will not tolerate *academic freedom* being used as a cloak to promote the popularization in the minds of adolescents of acts forbidden by the Penal Law. This appointment affects the public health, safety and morals of the community and it is the duty of the court to act. *Academic freedom does not mean academic license. It is the freedom to do good and not to teach evil.*¹⁵⁶

This definition of academic freedom is perhaps unique, but it is surely memorable. Russell was tossed out.¹⁵⁷

B. The Supreme Court

Academic freedom did not exist at common law.¹⁵⁸ Not surprisingly, the Bill of Rights does not refer to academic freedom, a fact duly noted by the Supreme Court.¹⁵⁹ One does not need to be an originalist to acknowledge that the Founders probably never contemplated academic freedom as a discrete concept.¹⁶⁰ But does anyone seriously question how Franklin, Jefferson, and Madison would feel about the importance of intellectual freedom in scientific and scholarly research today?

Whether the Founders contemplated academic freedom is not dispositive. While some delegates to the 1787 convention refused to sign the Constitution because it lacked a bill of rights,¹⁶¹ others believed that spelling out specific rights was unnecessary. Alexander Hamilton went even further, writing that a bill of rights might even be dangerous, asking, “Why declare that things shall not be done which there is not power to do?”¹⁶² Simply put, even some of the leading Founders believed that certain rights were inherent and that their omission does not mean that no such right existed.

In any event, the Supreme Court has extolled the virtues of academic freedom for more than fifty years. Whether it has been recognized as a distinct right is not clear.¹⁶³ Walter Metzger, perhaps the most prolific and erudite writer on academic

156. *Id.* (emphasis added).

157. *Id.* at 831.

158. Byrne, *Academic Freedom*, *supra* note 16, at 256.

159. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978).

160. See Rabban, *supra* note 23, at 237 (“It is inconceivable that those who debated and ratified the first amendment [sic] thought about academic freedom.”). See also Byrne, *Academic Freedom*, *supra* note 16, at 331–32 (“To be sure, there is not even a colorable claim that the founders specifically intended to provide any constitutional status for higher education.”).

161. George Mason and Edmund Randolph, in particular, refused to sign the Constitution, in part because it had no protection for individual rights. See RICHARD LABUNSKI, *JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS* 7–8 (2006).

162. THE FEDERALIST NO. 84 (Alexander Hamilton) (Benjamin F. Wright ed., 1961). As an example, Hamilton wrote, “Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?” *Id.*

163. Byrne, *Academic Freedom*, *supra* note 16, at 256.

freedom, believed the Court firmly acknowledged a constitutional right,¹⁶⁴ while other writers are not so sure.¹⁶⁵ We turn now to the Supreme Court's development of the concept of academic freedom.

1. The Holmes's Epigram

The Supreme Court first referred to academic freedom by name in *Adler v. Board of Education*.¹⁶⁶ At issue was New York's Feinberg Law, which provided that no person could hold a state or local government position if he had deliberately advocated or taught that the government should be overthrown by "force, violence or any unlawful means."¹⁶⁷ The majority opinion famously stated that government employees have the right to assemble, speak, think and believe what they will but that they have no right to work for the government on their own terms.¹⁶⁸

In his dissent, Justice Douglas challenged the "recent doctrine that a citizen who enters the public service can be forced to sacrifice his civil rights."¹⁶⁹ Though the doctrine had recently been exploited, it was actually a vestige of the "Holmes's Epigram," from an opinion by Oliver Wendell Holmes, Jr., which provides:

The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him.¹⁷⁰

William Van Alstyne observed that, ironically, Holmes later changed his views on freedom of speech,¹⁷¹ as exemplified by his dissent in *Abrams v. United States*,¹⁷² where he wrote that the "best test of truth is the power of [a] thought to get itself accepted in the competition of the market."¹⁷³

164. See Metzger, *supra* note 14, at 1291 ("I believe it can be shown that Supreme Court Justices knew what they meant by academic freedom when they introduced it, and that this inaugural definition—though imperfectly communicated to the lower courts and subsequently overlaid with a different definition by the Court itself—was never disavowed, but continued to influence Court opinions until a decade ago as a subsurface guide, and since then more overtly.").

165. See Bird & Brandt, *supra* note 127, at 443 ("The promise of a well-articulated First Amendment basis for academic freedom represented by these cases has not been borne out by the Court.").

166. 342 U.S. 485, 509 (1952).

167. *Id.* at 488 n.4.

168. *Id.* at 492.

169. *Id.* at 508 (Douglas, J., dissenting).

170. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517–18 (Mass. 1892). See also Metzger, *supra* note 14, at 1287.

171. 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, 97 (1990).

172. 250 U.S. 616 (1919).

173. *Id.* at 630 (Holmes, J., dissenting). See Van Alstyne, *Academic Freedom*, *supra* note 171, at 98.

Justice Douglas argued in his dissent in *Adler* that the Constitution guarantees freedom of thought and expression to everyone, but “none needs it more than the teacher.”¹⁷⁴ He feared that laws like the Feinberg Law were directed at turning the school system into a spying project.¹⁷⁵

What happens under this law is typical of what happens in a police state. Teachers are under constant surveillance; their pasts are combed for signs of disloyalty; their utterances are watched for clues to dangerous thoughts. A pall is cast over the classrooms. There can be no real academic freedom in that environment.¹⁷⁶

Justice Douglas wrote eloquently, as he often did, and he believed that academic freedom should have constitutional rank. But he was on the losing side. The Feinberg Law was upheld.¹⁷⁷

2. Priests of Our Democracy

A few months after *Adler* was decided, the Court unanimously invalidated an Oklahoma loyalty oath statute in *Wieman v. Updegraff*.¹⁷⁸ Several professors at Oklahoma A & M University refused to sign an oath affirming that within the past five years they had not been affiliated directly or indirectly with any organization officially determined by the United States government to be a communist front or subversive organization.¹⁷⁹ The Court distinguished *Wieman* from *Adler* on the ground that New York’s Feinberg Law was based on advocacy of subversion whereas the Oklahoma statute targeted mere association.¹⁸⁰ Significantly, the Court began to distance itself from the Holmes’s Epigram, stating that it did not need to decide whether an abstract right to public employment exists. It was “sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.”¹⁸¹

In his concurrence, Justice Frankfurter went beyond utilitarian concerns, and connected academic freedom to a higher principle—survival of democracy.

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

To regard teachers—in our entire educational system, from the

174. *Adler v. Bd. of Educ.*, 342 U.S. 485, 508 (1952) (Douglas, J., dissenting).

175. *Id.* at 509.

176. *Id.* at 510.

177. *Id.* at 495 (majority opinion).

178. 344 U.S. 183 (1952).

179. *Id.* at 185.

180. *Id.* at 191.

181. *Id.* at 192.

primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole.¹⁸²

This is heady stuff. Justice Frankfurter proclaimed academic freedom as a vital public policy. But *Wieman* is not a First Amendment case; it was decided on due process grounds.¹⁸³

3. The Four Essential Freedoms of Colleges and Universities

Five years later, in *Sweezy v. New Hampshire*,¹⁸⁴ the Court came closer to recognizing a constitutional right of academic freedom, although the case was ultimately decided by a plurality on due process grounds.¹⁸⁵ Paul Sweezy had been invited to give a guest lecture to a humanities course at the University of New Hampshire.¹⁸⁶ Later, he was subpoenaed to appear before the New Hampshire State Attorney General as part of a legislative inquiry into communist infiltration. He denied having been a member of the Communist Party,¹⁸⁷ though he did describe himself as a “classical Marxist” and a “socialist.”¹⁸⁸ He declined to answer questions such as whether he had informed his class that socialism was inevitable.¹⁸⁹ The New Hampshire Attorney General asked the Superior Court to propound certain questions to Sweezy, but, again, Sweezy refused to answer the questions, and the Superior Court held him in contempt and committed him to the county jail.¹⁹⁰ The decision was affirmed by the New Hampshire Supreme Court.¹⁹¹ The United States Supreme Court granted Sweezy’s petition for writ of certiorari.¹⁹²

Writing for four justices, Chief Justice Warren voted to reverse Sweezy’s contempt conviction.¹⁹³ He explained that to compel someone against his will to disclose past expressions and associations is government interference under the Bill of Rights and the Fourteenth Amendment.¹⁹⁴ Chief Justice Warren wrote:

We believe that there unquestionably was an invasion of [Sweezy’s] liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread.

The essentiality of freedom in the community of American

182. *Id.* at 196 (Frankfurter, J., dissenting).

183. *But see* Van Alstyne, *Academic Freedom*, *supra* note 171, at 109 (crediting Justice Frankfurter’s dissent in *Wieman* with linking academic freedom into the “hard law of the first and fourteenth amendments [sic] as well”).

184. 354 U.S. 234 (1957).

185. *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000). *See also* Van Alstyne, *Academic Freedom*, *supra* note 171, at 110.

186. *Sweezy*, 354 U.S. at 243. *See also* *Wyman v. Sweezy*, 121 A.2d 783, 788 (N.H. 1956).

187. *Sweezy*, 354 U.S. at 238.

188. *Id.* at 243.

189. *Id.* at 243–44.

190. *Id.* at 244–45.

191. *Wyman*, 121 A.2d 783.

192. *Sweezy*, 354 U.S. at 236–37.

193. *Id.* at 235–55.

194. *Id.* at 250.

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.¹⁹⁵

Sweezy is best known, however, for the “four essential freedoms of a university,” set out in Justice Frankfurter’s concurrence:

In a university knowledge is its own end, not merely a means to an end. A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest. A university is characterized by the spirit of free inquiry, its ideal being the ideal of Socrates—‘to follow the argument where it leads.’ This implies the right to examine, question, modify or reject traditional ideas and beliefs. Dogma and hypothesis are incompatible, and the concept of an immutable doctrine is repugnant to the spirit of a university. . . .

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail “the four essential freedoms” of a university, to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.¹⁹⁶

Most of the time, the interests of the academic institution and the individual professor are in unison. When the state, itself, restricts the professor’s expression or association, the institution and professor are aligned against the state. Only when an institution attempts to proscribe what the professor may say, or when it takes punitive action because of the professor’s associations or utterances, may a potential constitutional clash occur. *Sweezy* did not contemplate such a clash.¹⁹⁷

195. *Id.*

196. *Id.* at 262–63 (Frankfurter, J., concurring) (quoting A. v. d. S. Centlivres et al., Statement of a Conference of Senior Scholars from the University of Cape Town and the University of Witwatersrand, in OPEN UNIVERSITIES IN SOUTH AFRICA, at 10–12).

197. See Rabban, *supra* note 23, at 238 (noting that the AAUP chose not to file an amicus brief in *Sweezy*, in part, because it was concerned with judicial appropriation of the concept that it had successfully advocated).

4. A Limited Right

Two years later, in *Barenblatt v. United States*,¹⁹⁸ the Court signaled that academic freedom has limits. Lloyd Barenblatt was summoned before the infamous Subcommittee of the House Committee on Un-American Activities after he was identified by another witness as a member of the Haldance Club of the Communist Party while he was a graduate student and instructor at the University of Michigan.¹⁹⁹ After being served with the summons but prior to appearing before Congress, Barenblatt's four-year contract with Vassar College expired and was not renewed.²⁰⁰

When Barenblatt refused to answer certain questions, he was convicted of contempt of Congress—a conviction that was later affirmed by the District of Columbia Circuit Court of Appeals.²⁰¹ In a per curiam opinion, the Supreme Court vacated and remanded the case to the Court of Appeals,²⁰² in light of its recent decision in *Watkins v. United States*.²⁰³ The Court of Appeals reaffirmed Barenblatt's conviction for contempt of Congress, citing several distinctions between the two cases, including the fact that Barenblatt had been informed by the Committee Chairman of the scope of the inquiry, which was the investigation into Communist Party activities in education.²⁰⁴

The Supreme Court again granted certiorari to consider Barenblatt's claim that his conviction could not stand in light of *Watkins*.²⁰⁵ The Court, in a five-to-four decision written by Justice Harlan, found in favor of the government, holding that the provisions of the First Amendment were not offended by the Congressional questioning.²⁰⁶ Unlike the self-incrimination privilege, the First Amendment does not afford a witness the right to resist inquiry in all circumstances.²⁰⁷ Instead, there must be a balancing of competing private and public interests.²⁰⁸ The Court concluded that the investigatory power of Congress was not to be denied solely because education was involved, and it distinguished the case from *Sweezy* on the

198. 360 U.S. 109 (1959).

199. *Barenblatt v. United States*, 240 F.2d 875, 877 (D.C. Cir. 1957).

200. *Barenblatt*, 360 U.S. at 134.

201. *Barenblatt*, 240 F.2d at 884.

202. *Barenblatt v. United States*, 354 U.S. 930 (1957).

203. 354 U.S. 178 (1957). *Watkins* was convicted of contempt of Congress, under the same federal statute, 2 U.S.C. § 192. *Watkins* did not plead the Fifth Amendment, and agreed to answer any questions about himself and about people he knew to have been, and still were, members of the Communist Party. *Watkins*, 354 U.S. at 185. But he stated he would not answer any questions about other people with whom he had associated in the past. *Id.* Focusing on the vagueness of the scope of inquiry by the congressional subcommittee, the Supreme Court held that *Watkins* was "not accorded a fair opportunity to determine whether he was within his rights in refusing to answer, and his conviction is necessarily invalid under the Due Process Clause of the Fifth Amendment." *Id.* at 215.

204. *Barenblatt v. United States*, 252 F.2d 129, 136 (D.C. Cir. 1958).

205. *Barenblatt*, 360 U.S. at 113.

206. *Id.* at 134.

207. *Id.* at 126.

208. *Id.*

ground that Mr. Sweezy had not been a member of the Communist Party and that he had been asked about connections with the Progressive Party, which was on the ballots in twenty-six states.²⁰⁹ This was “very different,” noted the Court, from Barenblatt’s questioning, which involved “inquiring into the extent to which the Communist Party has succeeded in infiltrating into our universities, or elsewhere, persons and groups committed to furthering the objective of overthrow.”²¹⁰ To the majority, Congress was legitimately trying to determine the extent of infiltration of the Communist Party in universities.²¹¹

A vigorous dissent by Justice Black, joined by Justices Warren and Douglas, posited three reasons why Barenblatt’s contempt conviction should be overturned.²¹² The first reason was that the congressional rule that created the Committee authorized such sweeping and indiscriminating “compulsory examination of witnesses in the field of speech, press, petition and assembly that it violates the procedural requirements of the Due Process Clause of the Fifth Amendment.”²¹³ Second, Barenblatt’s freedom of speech and association was violated by the nature of the questions that he was asked.²¹⁴ Third, the Committee’s proceedings were part of an effort to stigmatize and punish the witnesses by exposing them to public identification as having Communist affiliations, which amounted to improperly seeking to “try, convict, and punish suspects, a task which the Constitution expressly denies to Congress and grants exclusively to the courts.”²¹⁵

5. A Right Like Free Speech

One year after *Barenblatt*, in *Shelton v. Tucker*,²¹⁶ the Supreme Court struck down an Arkansas statute that required all public school and college and university faculty to annually submit an affidavit listing all organizations to which he or she had belonged in the previous five years.²¹⁷ The validity of the statute, passed in 1958,²¹⁸ was challenged in both state and federal courts.²¹⁹ The Court explained

209. *Id.* at 129.

210. *Id.*

211. *Id.* The Court noted that the AAUP’s amicus brief acknowledged that the claims of academic freedom cannot be asserted unqualifiedly, but rather that there must be a “demonstrable justification” for governmental action that endangers a freedom guaranteed by the Constitution. *Id.* at 130 n.29.

212. *Id.* at 136 (Black, J., dissenting).

213. *Id.*

214. *Id.*

215. *Id.* at 136–37.

216. 364 U.S. 479 (1960).

217. *Id.* at 480–81.

218. The statute was Act 10 of the Second Extraordinary Session of the Arkansas General Assembly of 1958. It provided, in part, that:

[N]o person shall be employed or elected to employment as a superintendent, principal or teacher in any public school in Arkansas, or as an instructor, professor or teacher in any public institution of higher learning in that State until such person shall have submitted to the appropriate hiring authority an affidavit listing all organizations to which he at the time belongs and to which he has belonged during the past five years, and also listing all organizations to which he at the time is paying regular dues or is

that to compel an instructor to disclose every associational tie was to impair the instructor's "right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society."²²⁰ Further, the Court noted that the "vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools," because of its unmistakable tendency to create a chilling effect on free inquiry.²²¹

Justice Frankfurter, the guiding spirit of the four essential freedoms, dissented, not because he "put a low value on academic freedom"²²² but because "that very freedom, in its most creative reaches, is dependent in no small part upon the careful and discriminating selection of teachers."²²³ This seeming contradiction between Frankfurter's position in *Sweezy* and his position in *Shelton* can still be seen as supporting a *practical* institutional academic freedom. If the college or university is selective in the hiring of a professor, more academic freedom is warranted, because the best professors will exercise that freedom responsibly.

6. A Transcendent Value and a Special Concern of the First Amendment

The most important Supreme Court academic freedom case is *Keyishian v. Board of Regents*.²²⁴ Once again, New York's Feinberg Law was before the Court.²²⁵ Several professors at the State University of New York ("SUNY") sued the Board of Regents for declaratory and injunctive relief on the ground that SUNY violated the Constitution by requiring every professor to sign a certificate that he was not and had never been a Communist and, if so, that he had disclosed any prior affiliation to SUNY.²²⁶ A three-judge panel upheld the statutory requirement.²²⁷ The Supreme Court reversed and remanded the case, holding the statutes invalid, because it "proscribe[d] mere knowing membership without any showing of specific intent to further the unlawful aims of the Communist Party of the United States or of the State of New York."²²⁸

Keyishian, unlike *Sweezy*, was grounded on the First Amendment.²²⁹

making regular contributions, or to which within the past five years he has paid such dues or made such contributions.

Shelton, 364 U.S. at 480–81 (quoting *Shelton v. Tucker*, 174 F. Supp. 351, 353 (1959)). The Supreme Court noted that the scope of the associational inquiry was unlimited; it required a teacher to list "every conceivable kind of associational tie—social, professional, political, avocational, or religious." *Id.* at 488. Many of these relationships "could have no possible bearing upon the teacher's occupational competence or fitness." *Id.*

219. *Id.* at 480.

220. *Id.* at 485–86 (citing *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937)).

221. *Id.* at 487.

222. *Id.* at 495–96.

223. *Id.* at 496.

224. 385 U.S. 589 (1967).

225. *See id.* at 593.

226. *Id.* at 592–93.

227. *Keyishian v. Bd. of Regents*, 255 F. Supp. 981 (W.D.N.Y. 1966).

228. *Keyishian*, 385 U.S. at 609–10.

229. Horwitz, *supra* note 66, at 487; Van Alstyne, *Academic Freedom*, *supra* note 171, at 114 (noting that *Sweezy* was grounded on the First Amendment at its core).

Nevertheless, the *Keyishian* opinion had little to do with academic freedom directly, as the law was struck because it was vague.²³⁰ Nonetheless, perhaps the most eloquent Supreme Court statement on academic freedom comes from *Keyishian*:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.²³¹

As Peter Byrne observed, this passage is “quasi-religious” in tone.²³² Professors should cherish these words. But what exactly is a “special concern”? Is it a right available only to professors? Does it have different legal standards than ordinary speech? Or is it simply hyperbole, laying gifts at the altar of intellectuals?

Since *Keyishian* the Court has used the term academic freedom many times.²³³ Despite the homage paid to the principle, *Sweezy* and *Keyishian* remain the two major cases for academic freedom, at least insofar as individual rights may be concerned.²³⁴

230. Horwitz, *supra* note 66, at 487.

231. *Keyishian*, 385 U.S. at 603.

232. Byrne, *Academic Freedom*, *supra* note 16, at 296.

233. The Supreme Court has referred to academic freedom in the context of alleged infringements on academic speech by college and university professors. *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006). *See also* *Grutter v. Bollinger*, 539 U.S. 306 (2003) (see discussion in Section VI.C.1 *infra*); *Cent. State Univ. v. Am. Ass'n of Univ. Professors*, 526 U.S. 124 (1999) (where Justice Stevens, dissenting, wrote that there was a debate about academic freedom at the root of a ruling by the majority that an Ohio statute that required state universities to develop faculty workloads did not violate the Equal Protection Clause); *Univ. of Pa. v. EEOC*, 493 U.S. 182 (1990) (holding that the First Amendment right of academic freedom would not be extended to shield the production of tenure files); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (holding that a Louisiana statute that required creation science to be taught in schools if evolution was taught did not serve any secular purpose, including the advancement of academic freedom); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985) (see discussion in Section VI.C.2 *infra*); *Minn. State Bd. of Cmty. Colls. v. Knight*, 465 U.S. 271 (1984) (where the dissent argued that academic freedom was at stake in a challenge by twenty community college instructors to a Minnesota statute which required all discussions between the colleges and the faculty to be through union representatives); *N.L.R.B. v. Yeshiva Univ.*, 444 U.S. 672 (1980) (see discussion in Section VI.C.4 *infra*); *Regents of the Univ. of Cal. v. Bakke*, 385 U.S. 265 (1978) (see discussion in Section VI.C.1 *infra*); *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564 (1972) (finding no liberty or property interest for non-tenured teachers at Wisconsin State University – Oshkosh in a Fourteenth Amendment claim by the professor); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (striking down an Arkansas statute that prohibited the teaching of evolution in public schools and colleges and universities on religion grounds, but stating that while courts “cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values,” the “vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools”); *Whitehill v. Elkins*, 389 U.S. 54, 59–60 (1967) (holding that a loyalty oath at the University of Maryland was unconstitutionally vague, and stating that this type of law is “hostile to academic freedom”).

234. *See* Byrne, *Academic Freedom*, *supra* note 16, at 298 (noting that “these two cases

Part V will explore whether the Court has recognized distinct constitutional rights of academic freedom and, if so, whether there are separate rights for professors and the colleges or universities. First, however, it is necessary to explore the scope of protected speech for government employees, as Part V will do.

IV. THE PUBLIC EMPLOYEE SPEECH DOCTRINE

A. The *Pickering* Balancing Test

The first important case on the scope of protected speech for government employees was *Pickering v. Board of Education*.²³⁵ To determine whether the speech of a government employee has First Amendment protection, the Court balances two competing interests: the employee's interest in commenting on public issues and the employer's interest in providing services to the public.²³⁶ The employee's speech as a citizen in "commenting on matters of public concern" must outweigh the employer's interest "in promoting the efficiency of the services it provides to the public."²³⁷

Marvin Pickering, a high school teacher, was fired for criticizing the school board about athletic funding in a letter to a newspaper.²³⁸ The Court concluded that Pickering was speaking as a citizen about an important public issue.²³⁹ The fact that he was a professor did not disqualify him from this right, because the letter was not directed at anyone with whom he would come into contact at work.²⁴⁰ There was no question of maintaining discipline, nor was there a disruption of harmony among co-workers.²⁴¹ Unless there is proof that a professor knowingly or recklessly made false statements, the Court explained, his speech on "issues of public importance may not furnish the basis for his dismissal from public employment."²⁴² Oddly, the Court did not rely upon academic freedom, citing *Keyishian* "only for the proposition that public employees do not shed the free speech rights enjoyed by all citizens simply because they are in the public's employ."²⁴³

B. *Connick*

The *Pickering* balancing test was modified in *Connick v. Myers*.²⁴⁴ As in

exhaust the Supreme Court's development of a university faculty member's right of academic freedom").

235. 391 U.S. 563 (1968).

236. *Id.* at 568.

237. *Id.*

238. *Id.* at 564-65.

239. *Id.* at 571-72.

240. *Id.* at 569-70.

241. *Id.*

242. *Id.* at 574.

243. Bird & Brandt, *supra* note 127, at 444.

244. 461 U.S. 138 (1983).

Garcetti, the plaintiff was an assistant district attorney. Unhappy about a transfer, Sheila Myers prepared a questionnaire soliciting the views of other employees about the transfer policy, office morale, level of confidence in supervisors, and whether employees felt compelled to work on political campaigns.²⁴⁵ The District Attorney told Myers that she was terminated for refusing to accept the transfer and considered the questionnaire to be an act of insubordination.²⁴⁶ Myers brought a § 1983 action alleging that her speech was protected.²⁴⁷ The district court agreed, ordering Myers to be reinstated and awarded back pay, among other damages. The Fifth Circuit Court of Appeals affirmed.²⁴⁸

The Supreme Court reversed, noting that in all of *Pickering's* precedents,²⁴⁹ “the invalidated statutes and actions sought to suppress the rights of public employees to participate in public affairs.”²⁵⁰ Speech on public issues “occupies the ‘highest rung of the hierarchy of First Amendment values,’ and is entitled to special protection.”²⁵¹ The Court concluded that:

Pickering, its antecedents, and its progeny lead us to conclude that if Myers’ questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.²⁵²

When a public employee speaks as an employee on matters of only personal interest, and not as a citizen, absent the most unusual circumstances, courts are not the appropriate fora in which to review personnel decisions.²⁵³ Thus, *Connick* added a threshold requirement to the mix: the speech must concern a public matter.²⁵⁴

245. *Id.* at 141.

246. *Id.*

247. *Id.*

248. *Id.* at 142.

249. The precedents cited by the Supreme Court were: *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Sherbert v. Verner*, 374 U.S. 398 (1963) (involving a freedom of religion claim by a Seventh Day Adventist who was denied unemployment compensation because she refused to work on Saturday); *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278 (1961) (striking down on vagueness grounds a Florida statute which required state employees to swear in writing that they had never lent aid or support to the Communist Party); *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961) (holding that the government could not deny employment because of previous membership in a particular party); *Torcaso v. Watkins*, 367 U.S. 488 (1961) (holding that a provision in the Maryland Constitution that allowed a religious test based on a declaration in the belief in God invaded a notary applicant’s freedom of belief and religion); *Wiemann v. Updegraff*, 344 U.S. 183 (1952) (holding that a state could not require employees to establish loyalty through an oath denying past affiliation with Communists).

250. *Connick*, 461 U.S. at 144–45.

251. *Id.* at 145 (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)).

252. *Id.* at 147.

253. *Id.* at 146.

254. Marni M. Zack, *Public Employee Free Speech: The Policy Reasons for Rejecting a Per*

The Court found that only one question in the Myer's questionnaire—the question asking whether office employees felt pressured to work in political campaigns²⁵⁵—fell under the “rubric of matters of ‘public concern.’”²⁵⁶ But that was enough to proceed with the *Pickering* test to determine whether the employer was justified in discharging Myers.²⁵⁷ The Court criticized the district court's decision to place the burden of proof on the employer, a burden that required the employer to “‘clearly demonstrate’ that the speech substantially interfered with [Myers'] official responsibilities.”²⁵⁸ The Court read *Pickering* to hold that this determination “varies depending upon the nature of the employee's expression.”²⁵⁹ The Supreme Court did agree, however, that Myers failed to establish that the questionnaire impeded her ability to perform her job duties.²⁶⁰

The Court also emphasized the importance of giving “a wide degree of deference to the employer's judgment” about the context of the speech, with a “stronger showing necessary if the . . . speech more substantially involve[s] matters of public concern.”²⁶¹ The Court concluded that private expression may “bring additional factors to the *Pickering* calculus.”²⁶²

C. *Waters*

In *Waters v. Churchill*,²⁶³ the Court added another twist to the *Pickering* test. The Supreme Court was asked whether that test should be applied to speech as the employer understood it to be or whether the fact finder should first determine the actual facts.²⁶⁴ Cheryl Churchill was fired after co-workers told the supervisor that she had made negative comments about work conditions.²⁶⁵ Not surprisingly, Churchill's version was different. She claimed that her comments were intended to improve patient care.²⁶⁶

The trial court determined that neither version of the conversation was protected speech.²⁶⁷ The Seventh Circuit reversed, finding that the speech was a matter of public concern, that it was not disruptive, and that the employer should conduct an investigation to determine what the speech actually was.²⁶⁸ In holding that the speech was not protected, the Supreme Court rejected the Seventh Circuit's approach.

Se Rule Precluding Speech Rights, 46 B.C. L. REV. 893, 897 (2005).

255. *Connick*, 461 U.S. at 149.

256. *Id.* at 148.

257. *Id.* at 149–50.

258. *Id.* at 150.

259. *Id.*

260. *Id.* at 151.

261. *Id.* at 152.

262. *Id.* at 152–53.

263. 511 U.S. 661 (1994).

264. *Id.* at 664.

265. *Id.* at 665.

266. *Id.* at 666. Two other workers who heard the conversation later sided with Churchill, but they were not interviewed before the termination. *See id.*

267. *Id.* at 667.

268. *Id.*

[I]t would force the government employer to come to its factual conclusions through procedures that substantially mirror the evidentiary rules used in court. The government manager would have to ask not what conclusions she, as an experienced professional, can draw from the circumstances, but rather what conclusions a jury would later draw. If she relies on hearsay, or on what she knows about the accused employee's character, she must be aware that this evidence might not be usable in court. If she knows one party is, in her personal experience, more credible than another, she must realize that the jury will not share that personal experience.²⁶⁹

To mitigate the impact of its holding, the Court added a caveat: although the employer did not have to determine the actual facts surrounding the speech, the employer must reach its conclusion in good faith, rather than as a pretext, and the trial court should look into the reasonableness of the conclusions.²⁷⁰

D. *Garcetti*

Richard Ceballos was a deputy district attorney in Los Angeles County, working in the Pomona branch.²⁷¹ A defense attorney filed a motion to challenge a search warrant and then asked Ceballos to review the warrant for alleged inaccuracies.²⁷² Ceballos concluded that the affidavit contained serious misrepresentations.²⁷³ He prepared a memo explaining his concerns and recommending dismissal of the case.²⁷⁴ After a heated meeting, his supervisor decided to proceed with the case, pending disposition of the motion.²⁷⁵ Ceballos was called as a witness at the hearing where he recounted his observations about the affidavit. The trial court subsequently rejected the challenge to the warrant.²⁷⁶

Ceballos alleged that he was later subjected to retaliatory actions, including reassignment, transfer to another courthouse, and denial of a promotion.²⁷⁷ He filed suit alleging that the District Attorney violated his First and Fourteenth Amendment rights.²⁷⁸ The District Attorney argued that the memo was not protected speech under the First Amendment, and the trial court granted summary judgment to the employer.²⁷⁹

269. *Id.* at 676. *See also* Chang, *supra* note 30, at 926 (observing that the Court clarified the efficiency concern to mean expectation of disruption); Elrod, *supra* note 126, at 47–48 (explaining that the “result of *Waters* is the elevation of the government employer’s interest in efficiency over any other value, including expression by public employees,” virtually eliminating the employee’s right to speak about matters of public concern while “in the workplace”).

270. *Waters*, 511 U.S. at 677.

271. *Garcetti v. Ceballos*, 126 S.Ct. 1951, 1955 (2006).

272. *Id.*

273. *Id.*

274. *Id.* at 1955–56.

275. *Id.* at 1956.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

The Ninth Circuit reversed, holding that the allegations of wrongdoing in the memo constituted protected speech under the First Amendment.²⁸⁰ Applying the *Pickering/Connick* test, the Ninth Circuit held that the alleged governmental misconduct—falsification of an affidavit—was “inherently a matter of public concern.”²⁸¹ The court did not consider whether the speech was made in Ceballos’s capacity as a citizen, relying instead upon Ninth Circuit precedent, which rejected the idea that a public employee’s speech has no First Amendment protection if made pursuant to an employment responsibility.²⁸²

The Supreme Court reversed and remanded.²⁸³ The Court clarified that under *Pickering* and its progeny the first inquiry is whether the speech involves a matter of public concern. If the answer is no, there is no First Amendment protection.²⁸⁴ If the answer is yes, a possibility of a First Amendment claim arises. The next question is whether the “relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.”²⁸⁵ The Court explained:

When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. Government employers, like private employers, need a significant degree of control over their employees’ words and actions; without it, there would be little chance for the efficient provision of public services. Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.²⁸⁶

So long as a government employee speaks as a citizen on matters of public concern, the employee faces only those speech restrictions that are necessary for the employer to operate efficiently and effectively.²⁸⁷ The controlling factor was that Ceballos’s statements were made in his capacity as a calendar deputy. “We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”²⁸⁸ The Court stressed that since the memo was written pursuant to his official duties, there was no infringement of any liberties Ceballos might have had as a private citizen.²⁸⁹

Concerned about imposing a precedent that would require judicial oversight of communications between government employees and their supervisors, the Court explained :

280. *Id.*

281. *Id.*

282. *Id.* (citing, *inter alia*, *Roth v. Veteran’s Admin.*, 856 F.2d 1401 (9th Cir. 1988)).

283. *Id.* at 1962.

284. *Id.* at 1958.

285. *Id.*

286. *Id.* (citation omitted).

287. *Id.*

288. *Id.* at 1960.

289. *Id.*

When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences. When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny. To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.²⁹⁰

The Court attempted to explain the doctrinal anomaly raised by the Ninth Circuit—that it would be inconsistent to require government employers to tolerate speech by their employees made publicly but not when the speech is made pursuant to their duties.²⁹¹ Calling this argument a misconception of the “theoretical underpinnings” of previous Supreme Court decisions,²⁹² the Court defended its new ruling:

Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. The same goes for writing a letter to a local newspaper When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees.²⁹³

The goal of establishing a simple threshold is understandable, but it introduces a troubling paradox for academia. When is speech by a college or university professor made pursuant to his or her official duties? Chief Justice Roberts posed this question to counsel for the District Attorney, Cindy Lee, in the initial oral argument in *Garcetti*: “What do you do if a public university professor, who is fired for the content of his lectures? [sic] Certainly, in the course of his employment, that’s what he’s paid to do. That has no first amendment [sic] protection?”²⁹⁴

Ms. Lee answered that “if the assigned job duties of that university professor was [sic] to speak on a particular topic or content, and they [sic] were paid for doing that,” then “that is a job-required speech,” and “should not be entitled, presumptively, to first-amendment [sic] protection.”²⁹⁵ The Chief Justice inquired further, asking whether the District Attorney was contending there might be First Amendment protection, depending on the context of the speech.²⁹⁶ Ms. Lee responded that the problem with the Ninth Circuit’s ruling below was that anytime a public employee speaks on a matter of public concern that speech is

290. *Id.* at 1961.

291. *See id.*

292. *Id.*

293. *Id.* (citation omitted).

294. Transcript of Oral Argument at 6, *Garcetti*, 126 S.Ct. 1951 (No. 04–473).

295. *Id.* at 6–7.

296. *Id.* at 7.

presumptively entitled to First Amendment protection.²⁹⁷

Justice Scalia interposed that the “professor would still be able to contend that the university fired him because it disagreed with the political content of his speech or because of the university’s politics.”²⁹⁸ Ms. Lee acknowledged that the approach advocated by the District Attorney would not prohibit that type of challenge.²⁹⁹ Concluding the line of questioning, the Chief Justice noted that he would have expected the District Attorney to have “argued that it’s speech paid for by the Government, that’s what they pay him for, it’s their speech; and so, there’s no first-amendment [sic] issue at all.”³⁰⁰

In his dissent, Justice Souter argued that the majority’s ruling was “spacious enough” to include the teaching of a professor,³⁰¹ adding that he hoped that “today’s majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write ‘pursuant to official duties.’”³⁰²

Justice Kennedy responded in his majority opinion that “expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence.”³⁰³ This statement, though dicta, is telling. Justice Kennedy is transparently referring to core academic speech, acknowledging that an exception to *Garcetti* may be required. But since the issue was not directly before the Court, he wrote that the justices “need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”³⁰⁴

In some ways the Court’s actual holding is elusive. The fact that Ceballos’s statements were made “inside his office rather than publicly, is not dispositive,” as expression at work can be given First Amendment protection.³⁰⁵ That the memo concerned his employment is not controlling, because the “First Amendment protects some expressions related to the speaker’s job.”³⁰⁶ The line drawn by the Court appears to be a new one, a *per se* rule.³⁰⁷ The profession of the speaker is of no moment, nor is the relative significance of the speech. If it is made in

297. *Id.*

298. *Id.*

299. *Id.* at 8.

300. *Id.* As counsel for the District Attorney responded, the Chief Justice was apparently referring to *Rust v. Sullivan*, 500 U.S. 173 (1991). *Id.* at 6–7.

301. *Garcetti*, 126 S.Ct. at 1969 (Souter, J., dissenting).

302. *Id.*

303. *Id.* at 1962 (majority opinion).

304. *Id.* The exchange between Justices Souter and Kennedy was not spontaneous. The academic freedom concern had been raised in a brief submitted by the AAUP, referring to the *1915 Declaration* and the *1940 Statement*, which codified the *1915 Declaration* and “has been endorsed by over 190 professional organizations and learned societies as well as incorporated into hundreds of university and college faculty handbooks.” Brief for Thomas Jefferson Ctr. for the Protection of Free Expression & Am. Ass’n of Univ. Professors as Amici Curiae Supporting Respondents at 4, *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006) (No. 04–473).

305. *Garcetti*, 126 S.Ct. at 1959.

306. *Id.*

307. See generally Zack, *supra* note 254 (analyzing the *per se* approach prior to *Garcetti*).

connection with one's job description, presumably it cannot be a matter of public concern and therefore fails to satisfy the first prong of the *Pickering/Connick* test. Justice Kennedy's majority opinion holds out the possibility, however, that other readings of *Garcetti* are available.

Government-employed professors have long been subject to the *Pickering/Connick* test. The significance of *Garcetti* is that if it is applied to public college or university employees, it could provide a blunt weapon to those who would challenge the content of a professor's expression. A controversial statement by a professor made in connection with his job could then be attacked on the ground that the professor is a government employee and that his speech is therefore paid for by the taxpayer.

This takes the focus off the pertinence of the speech to society and shifts it to the relatively mundane question of whether it falls within the technical job description of the employee. In short, *Garcetti* may have resurrected the Holmes's Epigram. Part VI will discuss the landscape of academic freedom in the wake of *Garcetti*. But first, Part V returns to constitutional academic freedom, and examines whether professors have a distinct right to that freedom.

V. INDIVIDUAL RIGHT VS. INSTITUTIONAL RIGHT

Academic freedom has been placed in the constitutional firmament, but its coordinates are a bit fuzzy. A leading commentator argued that there are separate constitutional rights for professors and institutions.³⁰⁸ Another commentator took the position that the Supreme Court seemed to be defining academic freedom solely in institutional terms.³⁰⁹ A third concluded that the Supreme Court had not given academic freedom for institutions a specific rationale and indeed had never extended constitutional rights to "non-natural persons."³¹⁰

How can there be such different interpretations by leading scholars? The answer to this question is deceptively simple. The Supreme Court has never recognized a constitutional right of academic freedom for individuals or institutions. The Supreme Court's characterizations of academic freedom should be taken at face value. Some commentators have missed the point by adding their own gloss.

There is no need to read between the lines: the Supreme Court knew very well what it meant when it described academic freedom as a "special concern of the First Amendment" and a "transcendent value."³¹¹ A transcendent value hearkens to the tradition of academic freedom as a professional doctrine and a societal principle. A "special concern" means that courts should be particularly vigilant

308. See Rabban, *supra* note 23, at 230.

309. Byrne, *Academic Freedom*, *supra* note 16, at 255. See also *Urofsky v. Gilmore*, 216 F.3d 401, 415 (4th Cir. 2000) (observing that the Supreme Court has "focused its discussions of academic freedom solely on issues of institutional autonomy"). But see Rabban, *supra* note 23, at 230 (noting his disagreement with Byrne); see also J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 J.C. & U.L. 79, 89-92 (2004) (providing a discussion of the disagreement between Byrne and Rabban).

310. Metzger, *supra* note 14, at 1318.

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

when an alleged assault on the First Amendment involves academic speech. This approach is analogous to an explanation of clear and convincing evidence in a civil case; it is not a “quantum of proof, but rather a quality of proof.”³¹²

The premise of this article is that the Supreme Court has never recognized a distinct constitutional right of academic freedom, either for professors or colleges and universities. It did not need to do so for professors because the First Amendment already covers individuals. Moreover, the Court has not extended such a “right” to colleges and universities to be exercised affirmatively. Rather, the Court has expressed a policy that the academic community should make academic decisions with minimal court interference.³¹³ In short, institutional academic freedom is a sort of qualified immunity to be used as a shield against unwarranted interference by the state, not a right to be wielded as a sword.

A. Individual Academic Freedom

The Supreme Court has never expressly recognized a distinct free speech right for professors.³¹⁴ No professional caste system has been constructed under the First Amendment. Prior to *Garcetti* there was not a compelling need to differentiate on the basis of professional status. First Amendment principles were applied subject to the *Pickering/Connick* test. Yet, it is also true that the Supreme Court has never declared that no such right exists. Clarification by the Court is needed, especially in the wake of *Garcetti*. Until then, however, we must read the tea leaves as best we can. Support for the conclusion that no such right exists can be found in a twenty year old Supreme Court decision³¹⁵ and from a sampling of recent circuit court opinions.³¹⁶

1. The Deputy Constable

Ardith McPherson was a nineteen year old probationary employee in the office of the Constable of Harris County, Texas.³¹⁷ Like everyone else in the office, her title was deputy constable.³¹⁸ Her duties were purely clerical: she wore no

312. *Foster v. AlliedSignal Inc.*, 293 F.3d 1187, 1194 (10th Cir. 2002) (quoting from *Barbara Oil Co. v. Kan. Gas Supply Corp.*, 827 P.2d 24, 32 (Kan. 1992)).

313. See *infra* Parts VI.C.1–2 for a discussion of the institutional focus of academic freedom in the Supreme Court’s decisions in *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985) and *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). See also Richard H. Hiers, *Institutional Academic Freedom or Autonomy Grounded Upon the First Amendment*, 30 *HAMLIN L. REV.* 1, 56 (2007) (arguing that the “Supreme Court has never held that public colleges and universities are entitled to either academic freedom or institutional autonomy under the First Amendment”).

314. See Rabban, *supra* note 23, at 244. See also Van Alstyne, *The Specific Theory of Academic Freedom*, *supra* note 20, at 67 (“Despite these dicta of the Court, and despite the writings of those who have urged the judiciary to acknowledge a separately-identifiable First Amendment right to academic freedom, it is clear that closure between the First Amendment and a distinct right of academic freedom has not yet been made.”) (citation omitted).

315. *Rankin v. McPherson*, 483 U.S. 378 (1987).

316. See *infra* Part VI.B.2.

317. *Rankin*, 483 U.S. at 380.

318. *Id.*

uniform, could not make arrests, and could not carry a gun.³¹⁹ On March 30, 1981, McPherson heard a radio report of the attempted assassination of President Reagan.³²⁰ She said to a co-worker, who was also her boyfriend, that “if they go for him again, I hope they get him.”³²¹ Another employee overheard the remark and reported it to the constable, who then summoned McPherson to his office.³²² McPherson was fired after she admitted that she had made the remark, despite her claim that she meant nothing by the statement.³²³

Although McPherson could have been discharged for any reason or no reason at all, the Supreme Court held that “she may nonetheless be entitled to reinstatement if she was discharged for exercising her constitutional right to freedom of expression.”³²⁴ The threshold question was whether her speech could be fairly characterized as speech on a matter of public concern, which is “determined by the content, form, and context of a given statement, as revealed by the whole record.”³²⁵ The Supreme Court concluded that the statement dealt with a matter of public concern—if it had been a threat to kill the President it would not have been protected—but it was not a threat under the federal statute.³²⁶ The Court reasoned that the “inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.”³²⁷ Applying the *Pickering* balancing test, the Court determined that, while her statement was made at work, there was no evidence that it had interfered with the efficient functioning of the office.³²⁸

Contrast the result in *Rankin* to a potential case involving controversial speech by a college or university professor. How could that professor hope to have any greater constitutional protection than that given to McPherson? The Court’s focus was not on the speaker’s profession or her right to continued employment. What the Court cared about was whether her speech touched upon a matter of public concern and whether it had caused a disruption to the workplace. Whatever a special concern of the First Amendment may be, it is plainly not a right that affords greater protection for a professor than it did for a nineteen-year-old probationary deputy constable who, while at work, expressed a death-wish for the president.

2. Circuit Courts

A good starting point in the review of circuit court decisions is *Urofsky v. Gilmore*,³²⁹ a case criticized for its approach³³⁰ but which undeniably provides a

319. *Id.* at 380–81.

320. *Id.* at 381.

321. *Id.*

322. *Id.* at 381–82.

323. *Id.* at 382.

324. *Id.* at 383–84.

325. *Id.* at 385 (quoting *Connick v. Myers*, 461 U.S. 138, 147–48 (1983)).

326. *Id.* at 386–87.

327. *Id.* at 387.

328. *Id.* at 388–89.

329. 216 F.3d 401 (4th Cir. 2000) (en banc).

330. For a thorough analysis of the impact of *Urofsky*, see Zack, *supra* note 254. See also

thorough examination of academic freedom. Six professors challenged the constitutionality of a Virginia law that restricted state employees from accessing sexually explicit material on state computers.³³¹ The district court granted summary judgment to the professors, holding the Act violated their First Amendment rights.³³² A Fourth Circuit panel reversed that decision,³³³ reasoning that the Act regulated only “state employees’ speech in their capacity as state employees, as opposed to speech in their capacity as citizens addressing matters of public concern.”³³⁴ That decision was reviewed *en banc* by the Fourth Circuit, which then reversed the lower court’s decision.³³⁵ Addressing the professors’ argument that the law violated the First Amendment academic freedom rights of professors at state universities, the court wrote:

Appellees’ insistence that the Act violates their rights of academic freedom amounts to a claim that the academic freedom of professors is not only a professional norm, but also a constitutional right. We disagree. It is true, of course, that homage has been paid to the ideal of academic freedom in a number of Supreme Court opinions, often with reference to the First Amendment Despite these accolades, the Supreme Court has never set aside a state regulation on the basis that it infringed a First Amendment right to academic freedom.³³⁶

The court explained that the “audacity” of claimants’ argument was revealed by the facts of the case and that if the professors were correct that the First Amendment provides special protection for academic speech, “a professor would be constitutionally entitled to conduct a research project on sexual fetishes while a state-employed psychologist could constitutionally be precluded from accessing the very same materials.”³³⁷ To the extent that the Supreme Court had “constitutionalized a right of academic freedom at all,” it appeared to have done so only as an “institutional right of self-governance in academic affairs.”³³⁸

The Fourth Circuit observed that despite the “paean to academic freedom” in *Sweezy v. New Hampshire*,³³⁹ “the plurality did not vacate Sweezy’s contempt conviction on First Amendment grounds, but rather concluded that because the Attorney General lacked authority to investigate Sweezy, the conviction violated due process.”³⁴⁰ As for *Sweezy’s* four essential freedoms, the Fourth Circuit observed that at no point did Justice Frankfurter indicate that the academic

Byrne, *The Threat to Constitutional Academic Freedom*, *supra* note 309, at 110–11 (describing *Urofsky* as “the worst academic freedom decision since the notorious Bertrand Russell case in 1940”).

331. *Urofsky*, 216 F.3d at 404.

332. *Id.*

333. *Urofsky v. Gilmore*, 167 F.3d 191 (4th Cir. 1999), *aff’d*, 216 F.3d 401 (4th Cir. 2000) (*en banc*).

334. *Urofsky*, 216 F.3d at 404.

335. *Id.*

336. *Id.* at 411–12 (citation omitted).

337. *Id.* at 411 n.13.

338. *Id.* at 412.

339. 354 U.S. 234 (1957).

340. *Urofsky*, 216 F.3d at 412.

freedom rights of the individual had been infringed.³⁴¹ Thus, the court concluded that *Sweezy* did not “adopt” academic freedom as a right, and even if it did, “such a holding would not advance Appellees’ claim of a First Amendment right pertaining to their work as scholars and professors, because *Sweezy* involved only the right of an individual to speak in his capacity as a private citizen.”³⁴²

The *Urofsky* court also distinguished its case from *Keyishian v. Board of Regents*,³⁴³ because it also involved the right of a professor to speak as a private citizen. Further, the *Urofsky* Court wrote that the Supreme Court in *Keyishian* was “not focusing on the individual rights of teachers, but rather on the impact of the New York provisions on schools as institutions.”³⁴⁴ The Fourth Circuit concluded its analysis as follows:

Taking all of the cases together, the best that can be said for Appellees’ claim that the Constitution protects the academic freedom of an individual professor is that teachers were the first public employees to be afforded the now-universal protection against dismissal for the exercise of First Amendment rights. Nothing in Supreme Court jurisprudence suggests that the “right” claimed by Appellees extends any further. Rather, since declaring that public employees, including teachers, do not forfeit First Amendment rights upon accepting public employment, the Court has focused its discussions of academic freedom solely on issues of institutional autonomy. We therefore conclude that because the Act does not infringe the constitutional rights of public employees in general, it also does not violate the rights of professors.³⁴⁵

341. *Id.* at 413.

342. *Id.*

343. 385 U.S. 589 (1967).

344. *Urofsky*, 216 F.3d at 414.

345. *Id.* at 415.

The Third Circuit reached the same conclusion in *Edwards v. California University of Pennsylvania*.³⁴⁶ Dilawar Edwards was a tenured professor who taught a course entitled “Introduction to Educational Media” which originally focused on the use of classroom tools such as projection equipment, chalkboards, photographs, and films.³⁴⁷ Over time, Edwards’s syllabus included an emphasis on “issues of bias, censorship, religion, and humanism.”³⁴⁸ A student complained to the University that Edwards used the class to advance religious ideas.³⁴⁹ The administration instructed Edwards to “cease and desist” from using “doctrinaire material[s]” of a religious nature.³⁵⁰ Later, a new department chair concluded that Edwards was teaching from a non-approved syllabus and that the course had a distinct religious bias.³⁵¹ Eventually, book orders for Edwards were canceled, and he was assigned to teach a new course.³⁵² The situation continued to deteriorate with the chair calling Edwards an embarrassment to the department. Eventually Edwards was suspended with pay for some time.³⁵³

Edwards brought suit claiming that by restricting his choice of materials in the classroom, the University violated his rights of free speech, due process, and equal protection.³⁵⁴ The court held that a “public university professor does not have a First Amendment right to decide what will be taught in the classroom.”³⁵⁵ For support, the court quoted *Rosenberger v. Rector and Visitors of the University of Virginia*:³⁵⁶

[W]hen the State is the speaker, it may make content-based choices. 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.³⁵⁷

On its face, this quote, taken from the Supreme Court’s decision in *Rosenberger*, reads suspiciously like the Holmes’s Epigram, fully resurrected. But the Third Circuit’s reliance on *Rosenberger* may be misplaced given the context of this statement.

In *Rosenberger*, the University of Virginia was sued by several members of a student organization called Wide-Awake Productions (WAP), an organization that was established to “publish a magazine of philosophical and religious expression,”

346. 156 F.3d 488 (3d Cir. 1998). The opinion was written by Justice Samuel Alito while he was on the Third Circuit Court of Appeals. *Id.*

347. *Id.* at 489.

348. *Id.*

349. *Id.*

350. *Id.* at 490.

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.* at 489.

355. *Id.* at 491.

356. 515 U.S. 819 (1995).

357. *Edwards*, 156 F.3d at 491–92 (quoting *Rosenberger*, 515 U.S. at 833).

and to “facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints.”³⁵⁸ WAP qualified as a “contracted independent organization” under the University guidelines, even though the guidelines excluded organizations “whose purpose is to practice a devotion to an acknowledged ultimate reality or deity.”³⁵⁹ However, the University denied a request by WAP to pay for its newspaper’s printing costs, despite the fact that the University covered similar costs for many other student organizations.³⁶⁰ The students filed a § 1983 suit, alleging that their constitutional rights of speech, press, religion, and equal protection had been violated.³⁶¹ The trial court held for the University, finding no viewpoint discrimination, and concluded that the University’s concern about the Establishment Clause was sufficient to deny the funding request.³⁶² The Fourth Circuit disagreed on the freedom of speech argument, holding there had been discrimination based on content but upheld the trial court’s decision on the ground that the discrimination was justified due to the University’s compelling interest in maintaining a strict separation of church and state.³⁶³

The Supreme Court reversed, holding that the University’s regulation, which denied the funding request, was a denial of the students’ right of free speech³⁶⁴ and that the Establishment Clause had not been violated.³⁶⁵ The University of Virginia relied on the Supreme Court’s decision in *Widmar v. Vincent*,³⁶⁶ where in striking down a public university’s policy that excluded religious groups from using its facilities, the Supreme Court noted, “Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources.”³⁶⁷ In *Rosenberger*, the Court noted that the language in *Widmar* was merely “a proper recognition . . . that when the State is the speaker, it may make content-based choices,” and when the college or university determines educational content it is the institution speaking.³⁶⁸

Since neither *Widmar* nor *Rosenberger* involved curricula or the alleged rights of academic freedom for teachers or the colleges or universities, the Third Circuit’s reliance upon *Rosenberger* in *Edward* as precedent for its holding that the teacher has no right of academic freedom in the choice of educational content is questionable. Indeed, in *Rosenberger* the Supreme Court went to great lengths to stress the vital importance of the First Amendment principles at stake:

358. *Rosenberger*, 515 U.S. at 825–26.

359. *Id.* at 826.

360. *Id.* at 827.

361. *Id.*

362. *Id.* at 827–28.

363. *Id.* at 828.

364. *Id.* at 837.

365. *Id.* at 845–46.

366. 454 U.S. 263 (1981).

367. *Rosenberger*, 515 U.S. at 833 (quoting *Widmar*, 454 U.S. at 276 (1981)).

368. *Id.*

The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.³⁶⁹

In any case, the Supreme Court does not appear to have directly addressed the question of whether there is a constitutional right of academic freedom for the professor or the institution itself.

Grading is another area where, presumably, professors assume that academic freedom gives them the right to assign a grade. That assumption is incorrect. For example, in *Brown v. Armenti*,³⁷⁰ Robert Brown, a tenured professor, alleged that he was suspended because he refused the University President's instruction to change a student's grade from an "F" to an incomplete and was later terminated because he criticized the President in writing for this act.³⁷¹ In ruling against Brown, the court cited *Edwards v. California University of Pennsylvania*,³⁷² holding that since "grading is pedagogic, the assignment of [a] grade is subsumed under the university's freedom to determine how a course is to be taught," and therefore, a "professor does not have a First Amendment right to expression via the school's grade assignment procedures."³⁷³

*Johnson-Kurek v. Abu-Absi*³⁷⁴ involved a refusal by a teacher to fully explain what was expected of students in her syllabus.³⁷⁵ The Sixth Circuit cited its earlier decision in *Parate v. Isibor*,³⁷⁶ which compared the right of a professor to issue a grade to a college or university's power to override that grade assignment. The court explained:

Our concern in *Parate* was not with the University's insistence that the grade be changed, but only with the insistence that Parate himself make and endorse that change. A professor's own evaluation of a student's work, and the grade that he or she decides to assign to reflect that evaluation is an important part of a professor's teaching method. The grade that is affixed to a student's transcript, however, is the concern of the university In other words, the university may override the professor's evaluation, and change the assigned grade. It may not

369. *Id.* at 835.

370. 247 F.3d 69 (3d Cir. 2001).

371. *Id.* at 72.

372. 156 F.3d 488 (3d Cir. 1998).

373. *Brown*, 247 F.3d at 75. For a helpful summary of academic freedom applied to grading cases in the circuit courts, see Evelyn Sung, Note, *Mending the Federal Circuit Split on the First Amendment Right of Public University Professors to Assign Grades*, 78 N.Y.U. L. REV. 1550 (2003).

374. 423 F.3d 590 (6th Cir. 2005).

375. *Id.* at 591-92.

376. 868 F.2d 821 (6th Cir. 1989).

require him to publicly endorse those changes.³⁷⁷

Given this ruling, the court had little trouble holding that Johnson-Kurek's rights were not implicated, much less violated, since the dispute did not involve grading but rather her refusal to spell out what was required in the class.³⁷⁸

The Tenth Circuit rejected a separate right of academic freedom for individuals in *Schrier v. University of Colorado*.³⁷⁹ Robert Schrier, a professor of medicine, alleged that his termination as chair of the Department of Medicine was in retaliation for speaking out about a move of the medical facility from Denver to a former Army medical center in Aurora, Colorado.³⁸⁰ Applying the *Pickering* test, the court found that the subject matter of his speech—the expenditure of public funds and the potential impact relocation would have on patient care—addressed matters of public concern.³⁸¹ The professor lost because his speech impaired harmony with his co-workers.³⁸² Responding to the professor's academic freedom arguments, the court explained that “an independent right” does not arise outside of normal free speech principles.³⁸³ The idea “that professors possess a special constitutional right of academic freedom not enjoyed by other governmental employees” was rejected because it would promote inequality with similarly situated citizens.³⁸⁴

As the court succinctly concluded in *Omoegbon v. Wells*,³⁸⁵ “[a]cademic freedom rights are rooted in the First Amendment,” but they must be balanced against competing interests³⁸⁶ and are “subject to all the usual tests that apply to assertions of First Amendment rights.”³⁸⁷ In short, some academic speech is protected, but it is because of the same First Amendment principles available to all government employees.

377. *Johnson-Kurek*, 423 F.3d at 594 (citations omitted).

378. *Id.* at 594–95.

379. 427 F.3d 1253 (10th Cir. 2005).

380. *Id.* at 1257.

381. *Id.* at 1263.

382. *Id.* at 1265.

383. *Id.* at 1266.

384. *Id.* See also *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1293 (10th Cir. 2004) (holding that academic freedom is not a “separate right apart from the operation of the First Amendment within the university setting”).

385. 335 F.3d 668 (7th Cir. 2003). Indiana State University (ISU) decided not to renew the contract of an untenured faculty member, Oladele Omoegbon, who alleged that his due process and academic freedom rights under the First and Fourteenth Amendments respectively were violated. *Id.* at 674. He relied upon a statement in ISU's handbook that the “teacher is entitled to full freedom in research, . . . subject to adequate performance.” *Id.* at 676. He complained that he was told by the department chair not to associate with two other faculty members in the department, and that he was told to change the focus of his community activities. *Id.* He filed suit in Indiana state court. ISU removed the case to federal district court, which then granted summary judgment to ISU. *Id.* at 671. The Seventh Circuit held that his academic freedom claims must fail because he did not allege that he was ever restricted from speaking publicly about an issue, and the restrictions had to do with the performance of his duties as a university employee and a member of the department. *Id.* at 677.

386. *Id.* at 676.

387. *Id.* at 677.

B. Institutional Academic Freedom is an Immunity Not a Right

1. Back to the Four Essential Freedoms

Conventional wisdom holds that institutional academic freedom originated with the four essential freedoms in *Sweezy v. New Hampshire*.³⁸⁸ These freedoms are for colleges and universities to determine “who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”³⁸⁹ The fourth freedom was a basis for Justice Powell’s concurring opinion in *Regents of the University of California v. Bakke*,³⁹⁰ a case more famous for its limited support of race-conscious admissions programs than for its teaching on institutional academic freedom. According to one commentator, *Bakke* represented a significant shift in constitutional law from what had previously been considered to be an individual right to a qualified right of the institution from government interference with core administrative activities.³⁹¹ Justice Powell referred to the four essential freedoms in explaining the University’s freedom to make its own judgment as to education, including the selection of the students.³⁹²

This theme was revisited in *Grutter v. Bollinger*.³⁹³ In upholding the University of Michigan Law School’s admission program, the Court viewed its ruling as “keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.”³⁹⁴ Citing *Bakke*, the Court held that the “freedom of a university to make its own judgments as to education includes the selection of its student body.”³⁹⁵ The *Grutter* Court held that the Law School has a compelling interest in a diverse student body.³⁹⁶ No doubt, the Court believed that it should defer to the academic community in academic matters most of the time. But did the Court elevate that policy to a constitutional right?

388. 354 U.S. 234, 263 (1957). See Byrne, *Academic Freedom*., *supra* note 16, at 292.

389. *Sweezy*, 354 U.S. at 263.

390. 438 U.S. 265 (1978) (Powell, J., concurring). See Horwitz, *supra* note 66, at 465 (citing Byrne, *Academic Freedom*, *supra* note 16, at 257). See also Susan L. Pacholski, *Title VII in the University: The Difference Academic Freedom Makes*, 59 U. CHI. L. REV. 1317, 1325 (1992); Rabban, *supra* note 23, at 256.

391. Horwitz, *supra* note 66, at 465.

392. *Bakke*, 438 U.S. at 311–12 (Powell, J., concurring).

393. 539 U.S. 306 (2003).

394. *Id.* at 328.

395. *Id.* at 329 (citing *Bakke*, 438 U.S. at 312).

396. *Grutter*, 539 U.S. at 332.

2. The Amazing Footnote

Some commentators refer to a brief comment by the Supreme Court in a footnote in *Regents of the University of Michigan v. Ewing*³⁹⁷ as evidence of the Court's acknowledgment of its intent to establish separate rights of academic freedom.³⁹⁸

In *Ewing* a student challenged his dismissal from the University of Michigan on due process grounds.³⁹⁹ When the case reached the Supreme Court, the Court first stressed its "reluctance to trench on the prerogatives" of educational institutions and its responsibility to safeguard academic freedom.⁴⁰⁰ Once again, the Court's language should be read carefully. The Court is not talking about a right; it is reiterating its reluctance to interfere in academic matters. Citing both *Keyishian* and *Sweezy*, the Court then observed, in a now famous footnote, that academic freedom thrives 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."⁴⁰¹

This statement is nothing more than a bow to the tradition of deference to the academic community. It is also the Court's acknowledgement that an occasional by-product of judicial deference is that the rights of the individuals within the academic community will sometimes clash with the decisions of the institution. It is hard to see how this simple statement can be evidence of a constitutional right of academic freedom for a college or university as an institution. The rights in *Ewing* belonged to the student, but they were curtailed by the state interest against which they were balanced. It is no more appropriate to label this state interest a "right" of the college or university than it is to label any other exercise of governmental

397. 474 U.S. 214 (1985).

398. See Stacy E. Smith, Note, *Who Owns Academic Freedom?: The Standard for Academic Free Speech at Public Universities*, 59 WASH. & LEE L. REV. 299, 321 (2002) ("The Court first explicitly acknowledged the existence of institutional academic freedom in *Regents of University of Michigan v. Ewing*."). See also Strum, *supra* note 18, at 150. Strum quoted Justice Stevens' statement in *Ewing* that federal courts are not suited to evaluate the substance of the "multitude of academic decisions that are made daily by faculty members of public educational institutions." *Id.* (quoting *Ewing*, 474 U.S. at 226). From this statement, Strum reasoned that Justice Stevens was "suggesting that academic freedom inheres in faculty members." *Id.* at 150. This is another example of a leap of logic towards a constitutional right of academic freedom, when Justice Stevens was only referring to the Court's tradition of deference in academic matters. See also Rabban, *supra* note 23, at 281 ("No case to date has presented the Court with a direct conflict between institutional and individual claims of first amendment [sic] academic freedom. The closest the Court has come to analyzing this issue is a footnote by Justice Stevens in *Regents of the University of Michigan v. Ewing*.").

399. *Ewing*, 474 U.S. at 217.

400. *Id.* at 226.

401. *Id.* at 226 n.12. See Strum, *supra* note 18, at 150 (arguing, without any real explanation, that this statement by the Court logically means that both teachers and students must be the possessors of academic freedom). See also Byrne, *Academic Freedom*, *supra* note 16, at 317-18 (commenting on the *Ewing* case before it was decided by the Supreme Court, that the strength and reach of institutional academic freedom remained in doubt, and noting that the Court had an opportunity in the *Ewing* case to decide whether there is a privilege for peer review evaluations).

power a “right.” As a governmental power to curtail the student’s liberty, it stands in contradistinction to what we think of as “rights.”

3. A Qualified Immunity?

Academic freedom is not inviolable, as one university found out in *University of Pennsylvania v. EEOC*.⁴⁰² After the University of Pennsylvania (“Penn”) denied tenure to Rosalie Tung, she filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), alleging race, sex, and national origin discrimination.⁴⁰³ Penn refused to comply with the EEOC’s subpoena of its tenure review files of both Tung and her male colleagues, and the EEOC sought to enforce the subpoena.⁴⁰⁴

Penn made two arguments. First, it urged the Court to recognize a common-law privilege against disclosure of confidential peer-review materials.⁴⁰⁵ Second, it asserted a First Amendment right of academic freedom against wholesale disclosure of the documents.⁴⁰⁶ Penn relied on one of the four essential freedoms—determining “who may teach”—to support its position that requiring disclosure of peer-review files on a finding of mere relevance would undermine the process of tenure and result in a significant infringement of Penn’s First Amendment right of academic freedom.⁴⁰⁷ Here, Penn was using academic freedom to fend off the government’s intrusion on the tenure process. The Court parried the attack. Surveying its *Sweezy* and *Keyishian* decisions, the Court concluded:

In those cases [the] government was attempting to control or direct the content of the speech engaged in by the university or those affiliated with it. In *Sweezy*, for example, the Court invalidated the conviction of a person found in *contempt* for refusing to answer questions about the content of a lecture he had delivered at a state university. Similarly, in *Keyishian*, the Court invalidated a network of state laws that required public employees, including teachers at state universities, to make certifications with respect to their membership in the Communist Party. When, in those cases, the Court spoke of “academic freedom” and the right to determine on “academic grounds who may teach” the Court was speaking in reaction to content-based regulation.⁴⁰⁸

The Court declined to define the precise contours of academic freedom in connection with governmental attempts to influence academic speech through faculty selection, because the EEOC subpoena did not involve direct infringement on that process.⁴⁰⁹ The EEOC did not prevent the University from using any

402. 493 U.S. 182 (1990).

403. *Id.* at 185.

404. *Id.* at 186–87.

405. *Id.* at 188.

406. *Id.*

407. *Id.* at 196.

408. *Id.* at 197.

409. *Id.* at 198.

criteria it wished in tenure decisions, “except those—including race, sex, and national origin—that are proscribed under Title VII.”⁴¹⁰ Stressing that it was not retreating from its earlier decisions, the Court indicated that it simply was not prepared to extend the scope of academic freedom any further.⁴¹¹

Justice Souter appears to read some of the Court’s decisions as recognizing a qualified immunity for colleges and universities from state interference. In his concurring opinion in *Board of Regents of the University of Wisconsin System v. Southworth*,⁴¹² Justice Souter stated that the Court’s decisions had emphasized “broad conceptions of academic freedom that if accepted by the Court might seem to clothe the University with an immunity to any challenge to regulations made or obligations imposed in the discharge of its educational mission.”⁴¹³

Like most modern Supreme Court cases on academic freedom, *Southworth* involved a clash between a university and its students. Students at the University of Wisconsin challenged a mandatory student activity fee on First Amendment grounds because it was used, in part, to support student organizations that were engaged in political or ideological speech.⁴¹⁴ When the case reached the Supreme Court, the majority opinion, written by Justice Kennedy, noted that the University had not claimed that the speech in question was its own; rather, the student activity fee was exacted for the “free and open exchange of ideas by, and among, its students.”⁴¹⁵ Thus, the Court held that the “objecting students may insist upon certain safeguards with respect to the expressive activities which they are required to support.”⁴¹⁶ The Court concluded that the program’s viewpoint neutrality requirement was sufficient to protect these rights.⁴¹⁷

Justice Souter concurred in the outcome but wrote that the Court did not need to impose a “new standard of viewpoint neutrality.”⁴¹⁸ Citing to the *Ewing* footnote, Justice Souter explained that *Ewing* did not address the “relationship between academic freedom and First Amendment burdens imposed by a university” and that, instead, it was a “due process challenge to a university’s academic decisions, while as to them the case stopped short of recognizing absolute autonomy.”⁴¹⁹ He further explained:

While we 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 . . . we have never held that universities lie entirely

410. *Id.*

411. *Id.* at 199.

412. 529 U.S. 217 (2000) (Souter, J., concurring).

413. *Id.* at 237.

414. *Id.* at 221 (majority opinion).

415. *Id.* at 229.

416. *Id.*

417. *Id.* at 230.

418. *Id.* at 236 (Souter, J., concurring).

419. *Id.* at 238 (citing *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985)).

beyond the reach of students' First Amendment rights.⁴²⁰

Justice Souter was talking about a policy of deference—a qualified immunity for colleges and universities on academic matters.

4. The Professors Are the University

For institutional academic freedom to exist at all, conceptually, there needs to be both a logical distinction between the individual teacher and the institution, as well as a recognition of their separate interests. Again, some have missed the forest for the seedling. When the Court refers to colleges or universities, it does not mean a technical legal entity; it is referring to the academic community.

From its formation, the AAUP fought to persuade trustees and administrators that professors are not mere employees serving at the whim of their masters but rather professionals.⁴²¹ In *NLRB v. Yeshiva University*,⁴²² the Court conceded the profession's victory to some extent and in some contexts, in effect acknowledging that from the Court's vantage point, professors *are* the college or university. *Yeshiva* involved a battle over the rights of professors to have standing for collective bargaining under the National Labor Relations Act.⁴²³ The Court was required to decide whether professors are supervisors and managers and thus not covered by the Act.⁴²⁴

The controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught.⁴²⁵

The Court's own words are telling. Institutional academic freedom supposedly emanates from the four essential freedoms, but, in *Yeshiva*, the Court noted that the professors call the shots, at least at colleges and universities that are structured in the same manner as Yeshiva University. Undoubtedly, although many professors believe the Court seriously misperceives reality, the salient point is that the Court does not distinguish between the college or university as a corporate entity and the people who teach there.

The Court's concern is to show deference to the academic community to the extent possible. This simple theme was stated clearly by the Supreme Court. When asked to review the "substance of a genuinely academic decision," courts should "show great respect for the faculty's professional judgment."⁴²⁶ That is not to say that the desires and interests of the teacher always align with the decisions of the college or university. The courts see the college or university as an institution that is largely self-governed by its faculty, with far greater autonomy

420. *Id.* at 238–39.

421. *See Metzger, supra* note 14, at 1279.

422. 444 U.S. 672 (1980).

423. *Id.* at 674.

424. *Id.*

425. *Id.* at 686.

426. *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985).

than most any other organization.

A good summary of the respective roles of the college or university and the teacher, as seen by judges, is found in *Feldman v. Chung-Wu Ho*.⁴²⁷ Southern Illinois University did not renew the contract of an assistant professor of mathematics, Marcus Feldman, and Feldman sued, alleging a violation of his freedom of speech.⁴²⁸ The claim submitted to the jury was that Feldman was fired after he had accused a faculty colleague of lying about writing a paper with a famous mathematician.⁴²⁹ The jury awarded a monetary judgment under a state law claim of contract interference and decided against the university on Feldman's First Amendment claim.⁴³⁰ When the case reached the Seventh Circuit, Judge Easterbrook observed that a "university's academic independence is protected by the Constitution, just like a faculty member's own speech."⁴³¹ He summarized the difference between the type of speech protected because the speaker is a citizen, and the limits on speech by professors in the academic setting:

"The government" as an abstraction could not penalize any citizen for misunderstanding the views of Karl Marx or misrepresenting the political philosophy of James Madison, but a Department of Political Science can and should show such a person the door—and a public university may sack a professor of chemistry who insists on instructing his students in moral philosophy or publishes only romance novels. Every university evaluates *and acts* on the basis of speech by members of the faculty.⁴³²

In *Chung-Wu Ho*, Judge Easterbrook wrote that the University erred in telling Feldman to seek employment elsewhere and "that is unfortunate, but the only way to preserve academic freedom is to keep claims of academic error out of the legal maw."⁴³³ Judge Easterbrook contrasted *Jeffries v. Harleston*,⁴³⁴ which he described as a "hard case," because the professor was accused of making "hateful and repugnant" comments about Jewish people in a speech given off campus to a group which had no affiliation to his university, to *Chung-Wu Ho*, which he described as an "easy" case, because Feldman "charged a colleague with academic misconduct," the University investigated the claim and vindicated the colleague, and it later concluded that it "could obtain better mathematicians than Feldman for its faculty."⁴³⁵ Finally, Judge Easterbrook reasoned that if the decision by Southern Illinois University was "mete for litigation, then we might as well commit all tenure decisions to juries, for all are equally based on speech."⁴³⁶

427. 171 F.3d 494 (7th Cir. 1999).

428. *Id.* at 495.

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.* at 496 (citing *Feldman v. Bahn*, 12 F.3d 730, 732–733 (1993) (emphasis in original)).

433. *Id.* at 497.

434. 52 F.3d 9 (2d Cir. 1995).

435. *Chung-Wu Ho*, 171 F.3d at 497.

436. *Id.*

C. Summation

The Supreme Court has not slighted professors at government run colleges and universities. They are covered by the First Amendment, but they are given no greater *rights* than any other government employee.

Institutional academic freedom exists, but it is not a right. Rather, it is a qualified immunity based upon the long tradition of deference to the academic community, or, as J. Peter Byrne called it, of “academic abstention.”⁴³⁷ It was not a doctrine, he wrote, because the courts have never developed a consistent body of rationales for it.⁴³⁸ He observed that “most cases . . . of academic abstention involve complaints by students against college discipline or application of academic standards” but that the same principle also applies when a faculty member who complains about being rebuffed is met with the same court attitude that it should not interfere.⁴³⁹

VI. ACADEMIC FREEDOM IN THE WAKE OF *GARCETTI*

As this article explains, academic freedom is not a distinct constitutional right. College and university professors have received the same First Amendment protection as other government employees. But what is the future landscape for academic freedom in the wake of *Garcetti*?

Prior to *Garcetti*, courts applied the *Pickering* test.⁴⁴⁰ Some professor expressions in the classroom and in connection with research may involve matters of public concern. In those cases, a portion of the *Pickering/Connick* test will be satisfied. Indeed, it can be argued that all academic speech touches on public concern. Some commentators—one writing well before *Garcetti*—made this very suggestion.⁴⁴¹

However, *Garcetti* requires a new threshold determination. A court must first determine whether the speech is made pursuant to the employee’s official duties.⁴⁴² In a post-*Garcetti* world, the initial focus will not be on the importance of the speech to the public but on whether it was technically part of the professor’s job description. Those in academia should be concerned with the Supreme Court’s tendency to stir the ghost of the Holmes’s Epigram, as it did in *Rosenberger v. Rector and Visitors of the University of Virginia*⁴⁴³ and to hint that what matters is whether the state paid for the speech.

Context of the speech matters more than ever. Extramural speech has the best chance of protection precisely because it is not normally made pursuant to one’s official job duties. Almost a century ago, the AAUP fought to include extramural

437. Byrne, *Academic Freedom*, *supra* note 16, at 323.

438. *Id.*

439. *Id.* at 324.

440. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

441. See Finkin, *supra* note 31 at 1346 (1988). See also Chang, *supra* note 30, at 941 (“[I]t is possible to argue that what a professor chooses to teach her students in a public university is *inherently* and *always* of public concern”) (emphasis in original).

442. *Garcetti v. Ceballos*, 126 S.Ct. 1951, 1960 (2006).

443. 515 U.S. 819 (1995).

speech under the academic freedom umbrella. One writer deemed that decision to be a “serious weakness under the logic of the 1915 Declaration itself,” because when scholars speak as ordinary citizens and not within their areas of expertise, they are “not engaging in speech to which academic freedom should apply.”⁴⁴⁴ Ironically, after *Garcetti*, that very distance from the ivy-covered walls may give extramural speech the greatest protection.

Core academic speech has always been considered sacrosanct—the subject of eloquent homilies. Nevertheless, it is endangered if *Garcetti* is applied literally. Professors are paid to teach. Curricula are often established by colleges and universities, especially in this age of outcome-based assessments. Unless the Supreme Court carves out a specific exception for academic speech, *Garcetti* will be the weapon of choice by would-be censors. That is precisely why Justice Souter voiced his concerns in *Garcetti*.⁴⁴⁵

Intramural speech is simply an enigma. Prior to *Garcetti*, this type of speech was sometimes protected. For example, in *Perry v. Sindermann*,⁴⁴⁶ a teacher at a two-year college, and president of the state’s association for junior college teachers, became involved in public disagreements with the Board of Regents about elevating his college to four-year status.⁴⁴⁷ He wrote a newspaper ad critical of the Regents.⁴⁴⁸ His contract was not renewed, and he received no explanation or hearing.⁴⁴⁹

He brought suit alleging that the decision not to renew his contract was due to his public criticism of the college administration, thus infringing his freedom of speech and that the failure to provide him a hearing was a denial of his Fourteenth Amendment right of procedural due process.⁴⁵⁰ The district court granted summary judgment to the defendants.⁴⁵¹ The Fifth Circuit reversed, holding that despite his lack of tenure, not renewing his contract violated the Fourteenth Amendment if it was based on protected speech and that the failure to provide a hearing would violate the guarantee of due process if the teacher had an “expectancy” of re-employment.⁴⁵² The Supreme Court affirmed, explaining that for at least twenty-five years, it was clear that although a person has no right to a valuable governmental benefit, and that benefit could be denied for a number of reasons, “there are some reasons upon which the government may not rely,” especially if that denial infringed constitutionally-protected speech or association.⁴⁵³ The professor’s speech was held intramural, and he won.⁴⁵⁴ In the wake of *Garcetti*, however, the same outcome is less certain.

444. Rabban, *supra* note 23, at 243.

445. *Garcetti*, 126 S.Ct. at 1969.

446. 408 U.S. 593 (1972) (Souter, J., dissenting).

447. *Id.* at 594–95.

448. *Id.* at 595.

449. *Id.*

450. *Id.* at 596.

451. *Id.*

452. *Id.*

453. *Id.* at 596–97.

454. *Id.* at 602–03.

If, for example, a professor should speak out post-*Garcetti* as part of assigned committee work, the speech may be part of the professor's job duties, which means it cannot get past the *Garcetti* threshold and the teacher will lose the First Amendment challenge. But suppose that a professor complains about a personnel issue. That speech probably was not made pursuant to his or her official job duties, which means that it satisfies the threshold requirement in *Garcetti* and moves the inquiry to the public concern determination of the *Pickering* test. But it may not be deemed to be a matter of public concern, and the teacher will still lose the case.

Intramural speech cases are much like obscenity cases—fact specific and hard to define.⁴⁵⁵ They run the gamut from a complaint about faculty parking to a statement by a professor as part of his college or university service. The former is too mundane for constitutional protection, while the latter relates to administrative matters, and may well deserve it.⁴⁵⁶ Neither is directly related to core academic speech.

The Supreme Court has addressed academic speech disputes which relate to intramural matters, but the analysis seems to have been nothing different from the typical *Pickering/Connick* approach. Matthew W. Finkin argued that protection of intramural speech is essential:

[A]lthough intramural criticism, debate, and protest do not contribute to the discovery of a disciplinary truth, they conduce toward something almost as important in the life of the university. In developing and executing its policies, institutions seek not truth but wisdom: a decision on admission, curriculum, or tenure is not true nor untrue, but is wise or unwise.⁴⁵⁷

Intramural utterance is connected to both freedom of teaching and learning.⁴⁵⁸ Finkin argued that in considering the capacity in which his or her speech will be uttered—is it within the discipline, extramural, etc.—professors will normally weigh the risks before speaking, and they will steer clear of the forbidden zone.⁴⁵⁹ That is the chilling effect courts have long tried to avoid.

While *Garcetti* involved a government-lawyer and not an academic, the language of the Court was very broad, seemingly covering all public employees. Indeed, that is why Justice Souter expressed concern about the fate of academic freedom in his dissent.⁴⁶⁰ Yet, this author thinks that the Supreme Court will carve out an exception for academic freedom when it is faced with a case squarely on

455. This is a reference to Justice Potter Stewart's famous concurring opinion in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), that was an appeal from a criminal conviction of a movie theater owner for showing a French film alleged to be obscene. Justice Stewart wrote, "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of obscenity]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Id.* at 197.

456. See Rabban, *supra* note 23, at 295.

457. Finkin, *supra* note 31, at 1341.

458. *Id.* at 1342.

459. *Id.* at 1342–43.

460. *Garcetti v. Ceballos*, 126 S.Ct. 1951, 1969 (2006) (Souter, J. dissenting).

point. That exception, however, will not be because there is a separate and distinct constitutional right of academic freedom, either for individuals or institutions. Rather, the exception will be attributable to the long tradition of professional academic freedom, as well as the Court's reluctance to interfere with academic matters.

Though *dicta*, Justice Kennedy's comments in *Garcetti* indicate that the Court may well search for ways to honor its commitment to academic freedom. One way is for the Court to recognize that inherent in every professor's official job duties is freedom of expression, at least with respect to core academic speech. As with professional academic freedom, the purpose would not be to exalt those in academia to an elite status; rather, it is to benefit democracy itself. In other words, the Court should connect its own jurisprudence of academic abstention and incorporate professional academic freedom into the law of public employee speech protection.

As support, the Court can cite the utilitarian mission of academic freedom—to enhance the “marketplace of ideas”⁴⁶¹—because we turn to professors to “foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion.”⁴⁶² The important public policy of molding independent and informed citizens can be accomplished only by carving out a special right of freedom for professors. By this approach, the Court can clarify its rulings, unite the constitutional and professional aspects of academic freedom, and fortify the academic breastworks against future sieges by enemies of academic independence.

CONCLUSION

Academic freedom is endlessly fascinating and critically important, not only for the teacher and scholar but also for the public they serve. The pursuit of truth has always required some leeway or an exemption of sorts from the restraints most citizens face. To follow the argument where it leads, to have the necessary elbow room to find a cure for a disease, or to make a scientific discovery, requires a disconnect from political opinions and financial strings.

For many years this principle has been understood, and it is embedded in our colleges and universities today. Professional academic freedom is the advance guard against would-be attackers—the academic Maginot Line. Our courts have paid tribute to the principle, calling it a “transcendent value”⁴⁶³ and honoring professors as “priests of our democracy.”⁴⁶⁴

As for judicial protection, scholars will continue to debate the technicalities. As things stand today, constitutional academic freedom is important, though perhaps overrated as a means to provide judicial protection. It does not protect professors at private colleges and universities because of the state action doctrine. Professors at public colleges and universities have always been subject to the limits imposed

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

462. *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).

463. *Keyishian*, 385 U.S. at 603.

464. *Wieman*, 344 U.S. at 196 (Frankfurter, J., concurring).

by the public employee speech doctrine, and now *Garcetti* has the potential to further restrict academic speech. We should therefore join Justice Souter in hoping that someday the Supreme Court will declare core academic speech and intramural speech exceptions to the *Garcetti* ruling.