

FIFTY YEARS OF ACADEMIC FREEDOM JURISPRUDENCE

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I. INTRODUCTION

In 2008, when Congress passed the final version of the Higher Education Opportunity Act,¹ the legislation included a provision designed to drive down the cost of textbooks and other instructional materials. The provision—commonly referred to as the “textbook provision”²—starts with

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1. Pub. L. No. 110-315, 122 Stat. 3078 (2008) (codified at parts of 20 U.S.C. §§ 1001–1094a (Supp. II 2008)).

2. *Id.* § 112, 122 Stat. at 3107–10, (codified at 20 U.S.C. § 1015b) (emphasis added). The provision was obscure at the time it was enacted because, as a small item in a thousand-page rewrite of the nation’s most important higher-education law it prompted nothing more than muted expressions of concern when the bill was drafted. Now, with its July 1, 2010, effective date approaching, the higher-education community is waking up to some of the practical implications latent in the textbook provision. See, e.g., Tamar Lewin, *Bookstores and Beyond*, N.Y. TIMES, November 1,

a short “purpose and intent” clause that reads in part:

It is the intent of this section to encourage . . . faculty, students, administrators, institutions of higher education, bookstores, distributors, and publishers, to work together to identify ways to decrease the cost of college textbooks and supplemental materials for students while supporting *the academic freedom of faculty members* to select high quality course materials for students.³

That passing reference to “academic freedom” marks the first time in American history that the term has been used in federal legislation. The legislation’s authors assumed we would know what the term means—or at least we must infer as much since “academic freedom” is not defined in the Act or anywhere else in the United States Code. The inclusion of that reference to academic freedom in the final version of the Act prompted no discussion in the legislative history, and we are left wondering why Congress thought that a bill imposing practical restrictions on faculty control over the “selection, purchase, sale, and use of course materials” could fairly be described as a measure “*supporting* the academic freedom of faculty members” under any commonly understood definition of support.⁴

The phrase “academic freedom” first appeared in a reported American court decision seventy years ago in the form of a semi-contemptuous aside in a state trial court decision.⁵ Over the decades since then, courts—with

2009, at Education Life Supplement 8; American Council on Education, *Implementing the Textbook Provision of the Higher Education Opportunity Act*, September 24, 2008, <http://www.acenet.edu/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=29289> (last visited April 7, 2010).

3. 20 U.S.C. § 1015b(a) (emphasis added).

4. *Id.*

5. That notorious case was *Kay v. Board of Higher Education of the City of New York*, 18 N.Y.S.2d 821 (1940). When the City College of New York extended an offer of employment to the eminent British philosopher Bertrand Russell, the appointment created a furor because of Lord Russell’s professed religious skepticism and advocacy of “immoral and salacious doctrines” in some of his popular writings. *Id.* at 826. Proceedings were commenced to revoke the appointment under New York’s Education Law, which effectively prohibited the Board of Higher Education from “appoint[ing] persons of bad moral character as teachers in the colleges of the City of New York.” *Id.* at 827. In the course of his decision ordering the revocation of Lord Russell’s appointment, the trial judge referred to an amicus brief filed by “three organizations”—unnamed, although one is known to be the American Civil Liberties Union—arguing that the college’s right to make the appointment was protected by “so-called ‘academic freedom.’” *Id.* at 829. Said the judge:

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.

Id.

altogether too rare exceptions—have treated academic freedom much as the United States Congress did in the 2008 Higher Education Opportunity Act: in passing; without definitional clarity; inconsistently; and with startlingly little regard for what the American Association of University Professors, in the most important explication of the term ever uttered, characterized as the reason why academic freedom exists in the first place: to foster “the free search for truth and its free exposition” on the nation’s college and university campuses.⁶

This article endeavors to trace the arc of more than half a century of academic-freedom jurisprudence in the United States. It argues that, to paraphrase the late Justice Potter Stewart’s malleable but by now overworked phrase, courts know academic freedom when they see it,⁷ but are consistently unwilling or unable to ascribe to the concept a unitary, coherent, or (above all) useful meaning. It took the United States Supreme Court decades just to embrace the term and many years more to give it substance. Notwithstanding the sturdy foundation laid by two great decisions in the 1950s and ’60s—*Sweezy v. New Hampshire*⁸ and *Keyishian v. Board of Regents of the University of the State of New York*⁹—American courts, including the Supreme Court, have spent a goodly portion of the last forty years stifling the evolution of academic freedom. Courts are coy about the constitutional underpinnings of academic freedom, persistently unclear about the meaning of the term, and unpredictable in the application of the principle of academic freedom to facts in particular cases.

Part II of this article addresses—all too briefly and in a manner not intended to be more than suggestive—the concept of academic freedom as defined and developed by scholars of American educational history and philosophy and as initially adopted by the United States Supreme Court in the landmark cases of the 1950s and ’60s. Borrowing from German concepts of faculty rights and responsibilities in the great medieval universities of Europe, “academic freedom” as that term was initially used by John Dewey, the American Association of University Professors, and other early twentieth-century higher-education theoreticians had a meaning that was, if not precise, at least clearly understood. Academic freedom, as one leading American scholar put it, meant “the right of professors to speak without fear or favor [and] the atmosphere of consent that surrounded the

6. American Association of University Professors, *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, in AAUP POLICY DOCUMENTS & REPORTS 3–11 (10th ed. 2006).

7. “I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . .” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

8. 354 U.S. 234 (1957).

9. 385 U.S. 589 (1967).

whole process of research and instruction.”¹⁰

In Part III, we take a close look at the Supreme Court decisions in *Sweezy* and *Keyishian*—decisions we recognize in hindsight as the high-water mark for the judicial embrace of academic freedom. These two cases seemed, by the breadth of the language employed and the sweep of the holdings enunciated, to embody the continental view of academic freedom and promised strong judicial protection for academic freedom.

In Part IV, we examine ensuing lines of decisions that can best be described as retreats from a promising start. While referring in fits and starts to academic freedom, the Supreme Court has declined invitation after invitation to clarify the meaning and reach of the term, leaving the law in what can only be described as a confused state. Lower courts have further muddied the waters by drawing distinctions (for example, between “individual” and “institutional” academic freedom and “student” and “faculty” academic freedom) that do not reflect a sophisticated understanding of the origins of the term. We conclude Part IV with a brief discussion of a recent opportunity lost: the Supreme Court’s deliberate sidestep in *Garcetti v. Ceballos*¹¹ of the chance to draw distinct constitutional lines when professors speak candidly on matters of institutional governance.

II. ACADEMIC FREEDOM: THE INITIAL ITERATION¹²

Academic freedom and the associated concept of academic tenure are relatively new phenomena in American higher education. The privately supported, predominantly sectarian institutions of higher education founded in this country in the seventeenth, eighteenth, and early nineteenth

10. ROBERT HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 386–87 (1955).

11. 547 U.S. 410 (2006).

12. It is impossible to write about the history of academic freedom in this country without borrowing heavily from the work of Professors Richard Hofstadter and Walter Metzger, the subject’s preeminent authorities. Although more than a half a century old, their 1955 book *The Development of Academic Freedom in the United States* remains the best starting point for serious scholarship on the subject. Published as part of Columbia University’s extraordinary “American Academic Freedom Project,” this 527 page treatise comprehensively surveys the history of academic freedom and its relationship to academic tenure at American colleges and universities. Part I, written by Professor Hofstadter, focuses on what the authors call “the prehistory of academic freedom in our own country” from the founding of Harvard College in 1636 to the end of the Civil War. See HOFSTADTER & METZGER, *supra* note 10, at 78–113. Part II, written by Professor Metzger, chronicles the coming of the modern university and the development of “[a] self-conscious and well-formulated rationale for academic freedom” based on freedoms asserted by faculty and students in the great German universities of that epoch. *Id.* at xii, 275–506. Like other authors who have preceded me in exploring the history of academic tenure in the United States, I gratefully acknowledge the contributions of these two great Columbia University historians, reflected in what follows.

centuries used governance structures and instructional methods derived in large measure from Oxford and Cambridge, the institutions from which most of the colony's educators had graduated.¹³ Governance was the responsibility of self-perpetuating boards of "fellows," who in turn appointed "tutors" to perform the mundane task of instructing students in class.¹⁴ Until the middle of the eighteenth century, there was no rank higher than "tutor" on most American college faculties. Tutors were appointed for short fixed terms, with no guaranteed right to reappointment for successive terms.¹⁵

For much of the eighteenth century, faculty rights were defined more by what they were not than by what faculty status actually signified. Eighteenth-century tutors were ordinarily engaged under short "term" appointments and were required to stand for reappointment every two or three years.¹⁶ Bequests establishing new professorships frequently fixed the appointment "durante vita"—for the life of the incumbent. Professors were freed from the obligation to apply for reappointment at periodic intervals, although, as historians observed, this was far from tenure in the modern sense, given the ease with which professors could be dismissed by governing boards for the most inconsequential of reasons.¹⁷

The modern concept of academic tenure owes its existence to three great shaping events of the nineteenth and early twentieth centuries: exposure of American educators to the German university and the German concept of *lehrfreiheit*, loosely translated as a faculty member's academic freedom as a teacher and researcher; enactment of the Morrill Act in 1862; and a series of path-breaking court cases decided a century ago known collectively as the "Economics" cases—cases that precipitated the establishment of the American Association of University Professors in 1915.

A. The German Influence

In the eighteenth and early nineteenth centuries, American colleges were overwhelmingly sectarian and served the avowed vocational purpose of preparing seminarians for careers as clergy members. Faculty did little original research and scarcely imagined their mission to include training in scholarship.¹⁸ But in the nineteenth century, more than nine thousand

13. Walter Metzger, *Academic Tenure in America: A Historical Essay*, in COMM'N ON ACADEMIC TENURE IN HIGHER EDUCATION, FACULTY TENURE 114–16 (1973).

14. *Id.* at 110–11.

15. *Id.* at 120. For a lively description of higher education in colonial America, see *id.* at 114–51. See generally SAMUEL ELIOT MORISON, *THREE CENTURIES OF HARVARD 1636–1936* (1936); LAURENCE R. VEYSEY, *THE EMERGENCE OF THE AMERICAN UNIVERSITY* (1965).

16. HOFSTADTER & METZGER, *supra* note 10, at 230.

17. Metzger, *supra* note 13, at 120.

18. HOFSTADTER & METZGER, *supra* note 10, at 229, 369.

Americans studied in what were at that time the world's preeminent research universities, the universities of Germany, and many of them joined the teaching ranks when they completed their studies and returned to the United States.¹⁹ While overseas, they studied and socialized with colleagues who envisioned their jobs as members of university faculties quite differently, due in part to the German concept of *lehrfreiheit*. "By *lehrfreiheit*," wrote Professors Hofstadter and Metzger, "the German educator meant two things[:]"

He meant that the university professor was free to examine bodies of evidence and to report his findings in lecture or published form—that he enjoyed freedom of teaching and freedom of inquiry. . . . This freedom was not, as the Germans conceived it, an inalienable endowment of all men, nor was it the superadded attraction of certain universities and not of others; rather, it was the distinctive prerogative of the academic profession, and the essential condition of all universities. In addition, *lehrfreiheit* . . . also denoted the paucity of administrative rules within the teaching situation: the absence of a prescribed syllabus, the freedom from tutorial duties, the opportunity to lecture on any subject according to the teacher's interest. Thus, academic freedom, as the Germans defined it, was not simply the right of professors to speak without fear or favor, but the atmosphere of consent that surrounded the whole process of research and instruction.²⁰

Exposure to German academic governance opened the eyes of nineteenth-century American scholars to the hitherto radical notion that academic freedom protected faculty members from the very powers that were responsible for their appointment and continued employment: trustees and administrators. In a florid passage from his 1869 inaugural address as President of Harvard University, Charles W. Eliot extolled freedom from

19. *Id.* at 367.

20. *Id.* at 386–87; see Walter P. Metzger, *The German Contribution to the American Theory of Academic Freedom*, in *THE AMERICAN CONCEPT OF ACADEMIC FREEDOM IN FORMATION: A COLLECTION OF ESSAYS AND REPORTS* 215 (Walter P. Metzger ed., 1977); FREDERICK RUDOLPH, *THE AMERICAN COLLEGE AND UNIVERSITY: A HISTORY* 412 (1962). In their treatise, Professors Hofstadter and Metzger reproduced correspondence exchanged in 1815 between the man who was soon to be the first president of the University of Virginia, Thomas Jefferson, and a young Harvard faculty member named George Ticknor whom Jefferson hoped to lure away to his new university. After Ticknor visited the University of Gottingen, he wrote to Jefferson:

No matter what a man thinks, he may teach it and print it; not only without molestation from the government but also without molestation from publick [sic] opinion If truth is to be attained by freedom of inquiry, as I doubt not it is, the German professors and literati are certainly on the high road, and have the way quietly open before them.

HOFSTADTER & METZGER, *supra* note 10, at 391.

institutional interference as the quintessential faculty right:

A university must, . . . above all, . . . be free. The winnowing breeze of freedom must blow through all its chambers. It takes a hurricane to blow wheat away. An atmosphere of intellectual freedom is the native air of literature and science. This university . . . demands of all its teachers that they be grave, reverent and high-minded; but it leaves them, like their pupils, free.²¹

In 1876, the Johns Hopkins University was founded as the first American institution offering graduate education on the German model.²² The avowedly nonsectarian universities that opened their doors at the end of the century—Chicago and Stanford foremost among them—hired faculty members who were expected for the first time to engage in rigorous research.²³ As curricular boundaries expanded, so did the potential for ideological friction between faculty and institutional benefactors—and the perceived need for procedures to protect the faculty prerogative to conduct research free from external interference.

B. The Morrill Act

The Morrill Act of 1862 expanded and democratized American higher education in the years after the Civil War by making public lands available for the establishment of so-called “land-grant colleges.”²⁴ The origins of the Morrill Act trace back to the great London and New York expositions of the 1850s, which showcased the scientific and technological advances of the Industrial Revolution and persuaded a generation of American educators that the standard curriculum of the day was “hopelessly antiquated.”²⁵ The Morrill Act gave to every state that remained in the Union a minimum grant of 90,000 acres of public land to establish colleges dedicated to engineering, agriculture, mechanical arts, and vocational training. Subsequent legislation, enacted in 1890, extended the land-grant college program to the southern states that had seceded during the Civil War.²⁶

21. *Id.* at 394.

22. DONALD KENNEDY, *ACADEMIC DUTY* 26 (1997). Of the fifty-three professors who served on the Johns Hopkins faculty when the university was founded, nearly all had studied at German universities. They adopted the German method of instruction, relying on lectures, seminars, and laboratories. So profound was the German influence on pedagogy at Hopkins that the new university was playfully referred to as “Gottingen at Baltimore.” HOFSTADTER & METZGER, *supra* note 10, at 377.

23. KENNEDY, *supra* note 22, at 26–27.

24. Morrill Act, ch. 130, 12 Stat. 503 (1862) (which “apportioned to each State a quantity [of public land] equal to thirty thousand acres for each senator and representative in Congress”).

25. ALLAN NEVINS, *THE STATE UNIVERSITIES AND DEMOCRACY* 2 (1962).

26. Morrill Act, 26 Stat. 417 (1890) (giving funds from the sale of public lands to “each State and Territory for the more complete endowment and maintenance of

The nineteenth-century land-grant college enactments enormously increased the number of college and university faculty members. The new additions to the profession were primarily state government employees who enjoyed defined employment rights under state law. The land-grant colleges were the first to develop two of the most significant modern features of academic due process: codified procedures governing advancement from one academic rank to the next and the notion of “probationary service” prior to advancement to a tenured rank with the correlative “up or out” rule at the end of the probationary period.²⁷

C. The Celebrated “Economics” Cases, the Founding of the AAUP,
and the AAUP’s 1940 Statement of Principles on Academic
Freedom and Tenure

Ideological turbulence roiled the economics profession at the beginning of the twentieth century, as traditional business-oriented departments of economics were challenged by a new generation of progressive faculty members who espoused free trade, the abandonment of the gold standard, the regulation of monopolies, public ownership of utility companies, and other positions deemed heretical by the corporate magnates serving as trustees at most of the public and private institutions of the day.²⁸

Not surprisingly, schisms developed within leading economics departments and between radical economists and conservative university presidents and trustees. For the first time in the nation’s history, industrialists were making large fortunes and using them to support universities on an unprecedented scale. “Inevitably,” Hofstadter and Metzger dryly observed, “the increase in the size of gifts changed the relations of donor and recipient. Borrowing a term from economic history, one may say that the givers became entrepreneurs in the field of higher education.”²⁹ Just as inevitably, enormous gifts were rewarded with appointments to institutional governing boards; “thus, big businessmen and professors came into fateful contact.”³⁰

Economics departments proved to be a particularly combustible meeting place. In 1901, the former President of Kansas State Agricultural College,

colleges”). See also METZGER & HOFSTADTER, *supra* note 10, at 380–82.

27. Metzger, *supra* note 13, at 121, 123.

28. HOFSTADTER & METZGER, *supra* note 10, at 413–18.

29. *Id.* at 413–14.

30. *Id.* at 418. Before the Civil War, the largest philanthropic gift ever given to an American college was Abbott Lawrence’s \$50,000 gift to Harvard. In the 1880s, the estate of a California railroad magnate contributed the hitherto unimaginable sum of \$24 million to establish Stanford University; John D. Rockefeller gave \$34 million to the University of Chicago and contributed another \$46 million to establish a foundation called the General Education Board to provide financial support to secondary and postsecondary schools throughout the United States. *Id.* at 413–14.

Thomas Elmer Will, wrote that at least twelve faculty members from economics and political science departments had been removed from tenured positions in the preceding eight years for espousing “heretical social and economic writings” on such topics as the need to regulate monopolies, the advantages of free silver, the anti-democratic impulses of imperialism, and the need for immigration reform.³¹ The most notorious of these cases involved Edward A. Ross, a tenured professor of economics at Stanford University. In 1900, Stanford President David Starr Jordan dismissed Professor Ross at the insistence of university trustee Jane Lathrop Stanford, the widow of the University’s founder, Leland Stanford.³² Mrs. Stanford’s well-connected industrialist friends were offended by Professor Ross’s unorthodox advocacy of populist economic policies. Because of Ross’s national prominence as secretary of the American Economic Association, Ross’s firing captured the attention of national media, who “seized upon the incident as a parable of the fate of liberal professors in institutions dominated by the moneyed class.”³³

Matters worsened in 1913, when another prominent economics professor, William Fisher, resigned from the Wesleyan University faculty at the insistence of the institution’s president. Professor Fisher’s offense was the off-campus delivery of a speech that advocated relaxing the rigid rules for the observance of the Sunday Sabbath. Professor Fisher’s colleagues were outraged when they learned of the president’s action and the Economics Department chairman—who had himself resigned in protest from the Stanford faculty in the wake of the Ross firing—attempted to organize a faculty boycott of the president’s efforts to hire a replacement for Professor Fisher. Other faculty members sought to interest the American Economic Association in conducting an investigation, but their effort yielded no published result because, as Professor Metzger tersely reports, “the chairman [of the investigating committee] became convinced that Fisher had not been faultless in conduct and because he wished to reserve full reportage for the worthy pure.”³⁴

These cases offered important lessons for thoughtful proponents of faculty rights. They showed that presidents, trustees, and other powerful

31. *Id.* at 420–21. President Will viewed the decade’s developments from a unique vantage point. In the election of 1896, Republican Party majorities in both houses of the Kansas legislature were displaced by a coalition of Democrats and Populists, who immediately assumed control of the governing board of the state land-grant college. All faculty contracts in the economics department were terminated and Will, an advocate of reform and a friend of Populist legislators, was appointed to the presidency. Two years later, the Republican Party returned to power. Will was dismissed, a new president was installed, the appointments of all the new members of the economics department were terminated, and their places were filled with loyal Republicans. *Id.* at 424–25.

32. Metzger, *supra* note 13, at 138.

33. *Id.* at 139.

34. *Id.* at 146–48.

people who were opposed to the expression of unorthodox views and willing to use their power to suppress such expression could repeatedly threaten the employment of faculty members who espoused progressive or unorthodox views. By the beginning of the twentieth century, leaders in the American academic community were tentatively beginning to draw the connection between two strands of thought—one philosophical, one legal. The German-inspired notion that a university could achieve greatness only by according faculty the unfettered right to determine for themselves what to teach and how to teach it became linked to the need for a codified system of procedural protections that would shield faculty members who exercised their academic freedom from the intemperate reactions of administrators and trustees. Professors Hofstadter and Metzger describe the moment these two strands first converged in a significant way, when Harvard's venerated President Charles W. Eliot delivered the Phi Beta Kappa address at that institution's commencement exercises in 1907.³⁵ Invoking more than a decade's turbulence in departments of economics at Harvard and other universities, Eliot focused his remarks on fractious relations between professors and lay boards of trustees: "So long as . . . boards of trustees of colleges and universities claim the right to dismiss at pleasure all the officers of the institution in their charge, . . . there will be no security for the teachers' proper freedom."³⁶ Eliot's statement was one of the first explicit references to professorial "freedom"—Eliot's term—to conduct research and propound ideas without external interference.

In 1913 Arthur Lovejoy, a philosophy professor at the Johns Hopkins University, and seventeen other Hopkins professors circulated a letter to colleagues at nine leading American universities urging them to support the formation of a national association of professors. Six hundred professors accepted Professor Lovejoy's invitation to become charter members of the new organization, christened the American Association of University Professors ("AAUP").³⁷

Professor Lovejoy proposed two principal tasks for the new organization: (1) "the gradual formulation of general principles respecting the tenure of the professional office and the legitimate ground for the dismissal of professors," and (2) the establishment of "a representative judicial committee to investigate and report in cases in which freedom is alleged to have been interfered with by the administrative authorities of any university."³⁸ Professor Metzger captures the significance of Professor

35. HOFSTADTER & METZGER, *supra* note 10, at 398.

36. *Id.*

37. The founding of the AAUP is amply chronicled in essays, reports, and books authored, in the main, by members of the AAUP's Committee A on Academic Freedom and Tenure. See, e.g., Ralph F. Fuchs, *Academic Freedom—Its Basic Philosophy, Function, and History*, 28 LAW & CONTEMP. PROBS. 431 (1963); HOFSTADTER & METZGER, *supra* note 10, at 468–90.

38. Metzger, *Academic Tenure*, *supra* note 13, at 135–36 (citation omitted).

Lovejoy's formulation of the AAUP's two principal undertakings:

The first proposal looked forward to tenure rules that would be shaped to the interest of professors rather than to the interest of lay controllers and that would be standardized for the entire nation rather than left to each campus ward. The second proposal, remarkable for its audacity, urged the organized professors to set themselves up as the judges of administrative conduct in all those tangled and bristling affairs that end in academic dismissals. But it was in the joining of these two proposals that their historic significance can be said to lie. For many years, professors had evidenced concern about their security of tenure. And for many years . . . professors had sought "academic freedom"—immunity from institutional sanctions in matters of expression and belief. What was so unusual and worthy of mark was the marriage of these two concerns in one professional plan of action.³⁹

The AAUP's first significant achievement was the formulation in 1915 of the *General Declaration of Principles*.⁴⁰ The *1915 General Declaration* was one of the first efforts to draw an explicit analytic connection between academic freedom as the defining characteristic of American higher education and tenure as the most effective means for preserving and protecting academic freedom.⁴¹ Ten years later, the American Council on Education called a conference for the purpose of discussing the principles of academic freedom and tenure.⁴² Representatives of the AAUP and other higher-education organizations were invited to attend. The conference's tangible product was the 1925 statement from its Conference on Academic Freedom and Tenure, a document remarkable for two reasons: first,

39. *Id.* at 136. As Professor Peter Byrne observed in one of the most widely cited articles on the origins of academic freedom in the United States:

[A]cademic freedom became conceived as an adjustment of rights among participants. Professors simultaneously demanded that no ideological test be applied to their work and that evaluation be performed by professional peers. These demands were justified largely by appeal to the exigencies of science: The error in any theory could be perceived only by trained specialists, and error must be tolerated if truth is to advance. The opinions of laypersons were not scientific; lay interference with scientists would only retard the discovery of truth.

J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 *YALE L.J.* 251, 273 (1989) (footnote omitted).

40. *1915 General Report of the Committee on Academic Tenure*, reprinted in *FREEDOM AND TENURE IN THE ACADEMY* 393 (William W. Van Alstyne, ed., 1993).

41. *Id.* at 399, 405–06. For comprehensive treatments of the *1915 General Report*, see Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 *GEO. L. REV.* 945, 953–61 (2009); Byrne, *supra* note 39, at 276–79.

42. Walter P. Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, 53 *LAW & CONTEMP. PROBS.* 3, 26 (1990).

because it constituted an explicit endorsement by a body of college presidents of the principle that academic tenure is essential to safeguard the academic freedom of faculty members; and second, because it was the first effort to develop codified rules of fair procedure for the adjudication of academic-freedom-related disputes by faculty bodies.⁴³

The AAUP's 1940 *Statement of Principles on Academic Freedom and Tenure* ("1940 *Statement of Principles*") is widely accepted and widely cited as the most influential expression of academic freedom principles to be found anywhere in the extensive literature on American higher education.⁴⁴ Elaborating on themes tentatively expressed in the 1915 General Declaration and 1925 Conference Statement, the *1940 Statement of Principles* explains academic freedom's essential purpose in one hundred precise and carefully chosen words:

Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.

Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.⁴⁵

The *1940 Statement of Principles* follows these general precepts with three substantive rules, one pertaining to research, one to teaching, and one to expression outside of the research or pedagogical context. Each substantive rule is true to the structure of the general precepts, in that each rule enunciates a precise academic freedom followed by a "correlative" duty—a "but" clause—circumscribing or limiting that right:

Teachers are entitled to *full freedom in research and in the publication of the results*, subject to the adequate performance of their other academic duties; *but research for pecuniary return*

43. Metzger, *supra* note 13, at 151–52. The 1925 Conference Statement is reprinted in XI AAUP BULL. 99 (1925).

44. The definitive history of the *1940 Statement of Principles* was written in 1990, on the fiftieth anniversary of its adoption, by none other than Professor Walter Metzger. See Metzger, *supra* note 42, at 3. For other treatments of the central role of the 1940 Statement of Principles in the history and development of academic freedom and tenure in the United States, see HARRY T. EDWARDS & VIRGINIA DAVIS NORDIN, HIGHER EDUCATION & THE LAW 218 (1979) ("[T]he definition of tenure which is most prevalent in American higher education is found in the 1940 Statement of Principles."); Matthew W. Finkin, *Regulation by Agreement: The Case of Private Higher Education*, 65 IOWA L. REV. 1119, 1150–51 (1980) (noting that "the 1940 Statement . . . has become so widely accepted throughout American higher education that it has achieved judicial recognition as a usage of the profession" (footnote omitted)).

45. American Association of University Professors, *supra* note 6, at 3–11.

should be based upon an understanding with the authorities of the institution.

Teachers are entitled to *freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject.* Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they 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.⁴⁶

Here, then, in 1940—the year in which the phrase “academic freedom” appeared for the first time in an American court decision—was the essence of what the phrase meant to academic philosophers and scholars. Academic freedom was a right bestowed upon college and university *faculty members*—not institutions, and decidedly not trustees, administrators or students—as a form of “insulation . . . from lay interference.”⁴⁷ It emanated from what a perceptive contemporary scholar of academic freedom referred to as the conviction on the part of college and university faculty members that adherence to the principle of external non-interference “eliminates the gravest evils of lay control over universities—ignorant interference with painstaking investigation and discussion of controversial problems—by [guaranteeing] that professors be evaluated only for professional competence and only (in the first instance) by peers.”⁴⁸ It encompassed three interconnected but conceptually distinct sub-rights: the right to conduct scholarly research without ideologically motivated interference; the right to make pedagogical decisions about what to teach students and how to engage in teaching; and the right to free expression both as a citizen (on matters of civic and political substance) and as a member of the campus community (on matters of institutional governance and management). In the wonderful phrase of former Harvard dean Henry Rosovsky, academic freedom is a component part of the “social contract” between faculty member and institution, “ensuring the

46. *Id.* (emphasis added).

47. Byrne, *supra* note 39, at 278.

48. *Id.* at 279.

right to teach what one believes, to espouse unpopular academic and non-academic causes, [and] to act upon knowledge and ideas as one perceives them without fear of retribution from anyone Nothing can diminish the need for academic freedom; its absence has reduced universities to caricatures in many parts of the contemporary world.”⁴⁹

III. ACADEMIC FREEDOM IN THE COURTS: THE QUARTER-CENTURY EVOLUTION FROM DISSENT TO CONCURRENCE TO “SPECIAL CONCERN OF THE FIRST AMENDMENT” (1940 TO 1967)

Not until 1952—a dozen years after the AAUP formulated the lasting definition of academic freedom in the *1940 Statement of Principles*—did a United States Supreme Court Justice mention the concept for the first time. The case was *Adler v. Board of Education of the City of New York*,⁵⁰ the first in a series of Cold War public-employee loyalty-oath cases to reach the Court in the 1950s and 1960s. The Justice in question was William O. Douglas, a former professor at Columbia and Yale who by then had emerged as one of the Court’s champions of First Amendment rights.

Adler involved a facial challenge to the constitutionality of a New York statute—the so-called “Feinberg Law,” part of New York’s Education Law—denying employment to any public schoolteacher or applicant for a teaching position upon a showing that the jobholder or job applicant was a “subversive person.” The law defined a subversive as a person who “willfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means.” The law required the Board of Regents—the governing board for the state’s public school systems—to draw up a list of subversive organizations, and declared that membership in a subversive organization constituted “prima facie evidence of disqualification for appointment to or retention in” any teaching position in the state.⁵¹ The Court rejected arguments to the effect that the Feinberg Law chilled speech and associational rights protected by the First Amendment. Describing employment in a state job as a “privilege,” the Court held:

It is clear that [teachers] have the right under our law to assemble, speak, think and believe as they will. It is equally clear that they have no right to work for the State in the school system on their own terms. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere.

49. HENRY ROSOVSKY, *THE UNIVERSITY: AN OWNER’S MANUAL* 179, 180, 183 (1990).

50. 342 U.S. 485 (1952).

51. *Id.* at 490–91.

Has the State thus deprived them of any right to free speech or assembly? We think not.⁵²

Justice Douglas, in a dissent joined by Justice Hugo Black, warned that disqualifying persons from continued employment as teachers would “raise havoc with academic freedom”—a term he used but did not explain or define.⁵³ “What happens under this law is typical of what happens in a police state,” Justice Douglas continued. “A pall is cast over the classrooms. There can be no real academic freedom in that environment.”⁵⁴

Justice Douglas’s references to academic freedom must have struck a chord in Justice Felix Frankfurter, another Associate Justice whose service on the Court was preceded by years of experience as a full-time faculty member (in his case at Harvard).⁵⁵ In another loyalty-oath case decided the same term as *Adler—Wieman v. Updegraff*⁵⁶—the Court struck down an Oklahoma statute that automatically disqualified persons from serving as faculty members at state universities for belonging at any time in their pasts to Communist or subversive organizations. Observing that “[a] state servant may have joined a proscribed organization unaware of its activities and purposes,”⁵⁷ the Court ruled that the Oklahoma statute deprived state employees of procedural due process by making disqualification automatic and not affording affected state employees notice and an opportunity to show that they joined organizations “innocently” without awareness of their subversive intent.⁵⁸ Justice Frankfurter, joined by Justice Douglas, filed a concurring opinion that, while not using the term “academic freedom,” lyrically likened faculty members to “the priests of our democracy.” Faculty members, Justice Frankfurter wrote:

must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against

52. *Id.* at 492 (citations omitted).

53. *Id.* at 509 (Douglas, J., dissenting).

54. *Id.* at 510–11 (Douglas, J., dissenting).

55. As Professor Aren notes in her recent law review article on academic freedom, Frankfurter had a long and honorable record of championing academic freedom while serving on the Harvard Law School faculty in the 1920s and '30s. Aren, *supra* note 41, at 968 n.104 (2009).

56. 344 U.S. 183 (1952).

57. *Id.* at 190.

58. *Id.* at 191.

infraction by national or State government.⁵⁹

Almost a third of the concurrence was given over to a lengthy excerpt from testimony delivered that year—1952—by former University of Chicago President Robert Hutchins before the House of Representatives’ infamous Cox Committee.⁶⁰ Dr. Hutchins’s testimony—although, again, not using the phrase “academic freedom”—incorporated concepts and themes straight out of the AAUP’s *1940 Statement of Principles*:

Now, a university is a place that is established and will function for the benefit of society, provided it is a center of independent thought. It is a center of independent thought and criticism that is created in the interest of the progress of society, and the one reason that we know that every totalitarian government must fail is that no totalitarian government is prepared to face the consequences of creating free universities.

It is important for this purpose to attract into the institution men of the greatest capacity, and to encourage them to exercise their independent judgment. . . .

A university, then, is a kind of continuing Socratic conversation on the highest level for the very best people you can think of, you can bring together, about the most important questions, and the thing that you must do to the uttermost possible limits is to guarantee those men the freedom to think and to express themselves.⁶¹

Five years later, in *Sweezy v. New Hampshire*,⁶² the Court dealt for the first time not with a facial challenge to a loyalty-oath statute, but with a case involving an adverse employment action directed against a specific professor. Paul Sweezy, a noted economist and co-editor of a progressive economics journal, was invited to give a guest lecture at the University of New Hampshire in 1954. He titled the lecture “Socialism,” for which

59. *Id.* at 196–97.

60. The Cox Committee—formally the Select Committee to Investigate Tax-Exempt Foundations and Comparable Organizations—was a relic of the McCarthy era on Capitol Hill. Established in 1952, the Cox Committee conducted a series of hearings to determine whether tax-exempt organizations “were using their resources . . . for un-American activities and subversive activities or for purposes not in the interest or tradition of the United States.” H.R.J. Res. 561, 82d Cong. (1952). Witnesses who testified before the Cox Committee included university presidents and faculty members, foundation executives, and union leaders. See THE NONPROFIT SECTOR: AN OVERVIEW 114–15 (J. Steven Ott ed., 2000).

61. 344 U.S. at 197–98 (Frankfurter, J., concurring). “By quoting Hutchins, Justice Frankfurter emphasized both how the academic workplace differs from other public workplaces, and the value of that difference to the nation. We might not want the state bureau of motor vehicles to be a hotbed of independent thought, but colleges and universities need to be if they are to produce new knowledge for the benefit of students and the nation.” Areen, *supra* note 41, at 970.

62. 354 U.S. 234 (1957).

transgression he was summoned to appear before the state attorney general and asked detailed questions about the substance of his lecture. Invoking his constitutional right against self-incrimination, he refused to answer the questions, and told the attorney general:

I stated under oath that I do not advocate or in any way further the aim of overthrowing constitutional government by force and violence. I did not so advocate in the lecture I gave at the University of New Hampshire. In fact, I have never at any time so advocated in a lecture anywhere. Aside from that I have nothing I want to say about the lecture in question.⁶³

Sweezy then refused to respond to a series of specific questions about the substance of his lecture.⁶⁴ He was held in contempt, and subsequently challenged his contempt citation on the ground that the state statute authorizing the attorney general's investigation unconstitutionally infringed upon his First Amendment rights.

For a four-Justice plurality of the Court, Chief Justice Warren ruled in Sweezy's favor, albeit on fairly narrow due-process grounds. The Chief Justice held that Sweezy had a constitutionally protected "right to engage in political expression and association"⁶⁵ and that the state statute authorizing the attorney general's investigation did not establish with sufficient clarity that "the legislature wanted the information the Attorney General attempted to elicit from petitioner. It follows that the use of the contempt power, notwithstanding the interference with constitutional rights, was not in accordance with the due process requirements of the Fourteenth Amendment."⁶⁶ With some lack of clarity, the Chief Justice also expressed his view that Sweezy enjoyed "liberties in the areas of academic freedom," a phrase he explained in seven oddly clipped sentences:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly

63. *Id.* at 260.

64. The attorney general asked him:

"Didn't you tell the class at the University of New Hampshire on Monday, March 22, 1954, that Socialism was inevitable in this country?"

"Did you advocate Marxism at that time?"

"Did you express the opinion, or did you make the statement at that time that Socialism was inevitable in America?"

"Did you in this last lecture on March 22 or in any of the former lectures espouse the theory of dialectical materialism?"

Id. at 243–44.

65. *Id.* at 250.

66. *Id.* at 250, 254–55.

comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. 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.⁶⁷

Sweezy is not remembered for Chief Justice Warren's indirect and somewhat stunted embrace of academic freedom. *Sweezy* warrants its status as one of the Supreme Court's great academic freedom cases on the strength of Justice Frankfurter's soaring concurring opinion, written for himself and Justice John Marshall Harlan. Rather than relying, as the plurality did, on the peculiar structure of New Hampshire's statute and the due process implications of a vague delegation of legislative authority to the state attorney general, Justice Frankfurter shone the spotlight where it belonged: on what he termed "the intellectual life of the university" and the threat posed by "governmental intervention."⁶⁸ He then quoted at length from *The Open Universities in South Africa*, a conference report prepared by two eminent South African jurists and educators in 1957:⁶⁹

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. The concern of its scholars is not merely to add and revise facts in relation to an accepted framework, but to be ever examining and modifying the framework itself.

Freedom to reason and freedom for disputation on the basis of observation and experiment are the necessary conditions for the advancement of scientific knowledge. A sense of freedom is also necessary for creative work in the arts which, equally with scientific research, is the concern of the 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

67. *Id.* at 250.

68. *Id.* at 262.

69. Conference of Representatives of the Univ. of Cape Town and the Univ. of the Witwatersrand, *THE OPEN UNIVERSITIES IN SOUTH AFRICA* (1957).

*grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.*⁷⁰

Justice Frankfurter's delineation of the "four freedoms" enjoyed by American colleges and universities has evolved over the years into what Professor Judith Areen rightly characterizes as "a touchstone for understanding constitutional academic freedom" in the United States.⁷¹ Justice Frankfurter's concurring opinion also—Professor Areen's words again—"broke important, new conceptual ground"⁷² by characterizing academic freedom not simply as a set of rights possessed by *faculty members* but as essential freedoms belonging to *the university* as an institutional whole. One wonders, with the benefit of hindsight, why Justice Frankfurter ignored the *1940 Statement of Principles*, by then more than a decade and a half old and already the subject of sustained scholarly commentary,⁷³ and focused instead on a new analytic strand imported from the intellectual history of South Africa—particularly in a case involving the assertion of protected constitutional rights by an *individual* scholar (Paul Sweezy), not the institution at which he gave his lecture. Still, Justice Frankfurter's concurrence in *Sweezy* remains to this day the fullest treatment ever accorded the principle of academic freedom in a Supreme Court case, and its quadripartite delineation of "the four essential freedoms" at the core of the principle is almost invariably the starting point for analysis when faculty members invoke their right to academic freedom.

70. 354 U.S. at 262–63 (emphasis added).

71. Areen, *supra* note 41, at 971.

72. *Id.*

73. In 1952, Yale Professors Thomas Emerson and David Haber published the first edition of their magisterial work *Political and Civil Rights in the United States*. The book quickly became the nation's standard reference work on civil and political liberties and exerted an enormous influence on jurisprudence in those areas during and in the immediate aftermath of the McCarthy era. The Emerson-Haber treatise included a chapter on academic freedom, which was hailed by the scholarly community as the first systematic treatment of the subject in any widely circulated legal text. Will Maslow, Book Review, 53 COLUM. L. REV. 290, 290 (1952). Much of the scholarly writing on academic freedom in the 1940s and '50s highlighted the leading role played by the American Association of University Professors and the *1940 Statement of Principles* in defining and giving content to the concept of academic freedom. *E.g.*, HOFSTADTER & METZGER, *supra* note 10; ROBERT M. MACIVER, ACADEMIC FREEDOM IN OUR TIME (1955). (Curiously, however, it was not until 1969 that any federal or state court saw fit to cite the *1940 Statement of Principles* in a published judicial decision. In that case—*Greene v. Howard University*, 412 F.2d 1128 (D.C. Cir. 1969)—a tenure-track faculty member at a private university claimed that AAUP standards for notice of non-reappointment contained in the *1940 Statement of Principles* applied in his case because the faculty handbook contained a general reference to the applicability of AAUP standards in matters of academic tenure. In a footnote in *Greene*, the court declared that it could take judicial notice of the *1940 Statement of Principles* in determining how much notice was due under institutional policies. *Id.* at 1134 n.7.)

Ten years after *Sweezy*, in *Keyishian v. Board of Regents*,⁷⁴ the Supreme Court delivered the last of its great academic freedom decisions. Here, for the first time, the principle of academic freedom was invoked, not in a dissenting opinion, a concurring opinion, or a decision announced by a Court plurality, but in the decision of a Court majority—albeit a bare majority of five Justices. The plaintiffs in *Keyishian* were faculty members at the University of Buffalo who, when their private university was merged into the public State University of New York system in 1962, were required to take loyalty oaths under the very same statute—New York’s Feinberg Law—to which public school teachers in *Adler* had been subjected fifteen years earlier. In 1953, the New York General Assembly adopted legislation extending the Feinberg Law to state college and university faculty members. Under the law, faculty members were subject to removal for “treasonable or seditious utterances or acts,” and the faculty members in *Keyishian* attacked the law on the theory that its references to “treason” and “sedition” were unconstitutionally vague. This question, said the Court, had been expressly reserved and left unresolved in the *Adler* decision a decade and a half earlier. The Supreme Court agreed with the plaintiffs, struck down the Feinberg Law, and ruled that “no teacher can know just where the line is drawn between ‘seditious’ and nonseditious utterances and acts,” rendering the law unconstitutionally vague and for that reason unenforceable.⁷⁵

In a short passage, the Court for the first time suggested—without quite coming out and saying so directly—that academic freedom had constitutional underpinnings:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. *That freedom is therefore a special concern of the First Amendment*, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the marketplace of ideas. The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection.⁷⁶

74. 385 U.S. 589 (1967).

75. *Id.* at 599. Three years earlier, in *Baggett v. Bullitt*, 377 U.S. 360 (1963), a seven-member majority of the Court relied on the same grounds to invalidate loyalty oaths required of applicants for employment on the University of Washington faculty. The Court, without addressing the petitioners’ academic-freedom arguments, found the state loyalty-oath statute unconstitutional on vagueness and overbreadth grounds. *Id.* at 366.

76. *Keyishian*, 385 U.S. at 603 (quoting *United States v. Associated Press*, 52 F.

By 1967, the Supreme Court and lower courts had comfortably taken to using the term “academic freedom” in their opinions. Academic freedom was established as a legitimate jurisprudential principle protecting faculty members from censure or termination based on ideologically motivated resistance to their teaching, scholarship, political associations, or civic utterances.⁷⁷ The vast majority of academic freedom cases decided by courts in the first quarter-century after the formulation of the *1940 Statement of Principles* involved loyalty-oath challenges, and given the narrow range of factual situations in which faculty members asserted their right to academic freedom, it is perhaps not surprising that the precise contours of the right were still hazy and something of a doctrinal muddle. Supreme Court pronouncements suggested—but did not quite hold—that academic freedom was a constitutionally derived right emanating from free-speech and associational freedoms in the First Amendment. Justice Frankfurter had introduced some confusion by departing from the AAUP’s notion of academic freedom as a right possessed by faculty members and suggesting instead that it was a right enjoyed by the institutions that employed those faculty members. The distinction between individual and institutional academic freedom may have been insignificant in the 1940s and ’50s, when litigants were provoked largely by what Professor Areen and other scholars called “external challenges to academic freedom”⁷⁸: challenges mounted by state legislators and policymakers in an attempt to dictate who was eligible to teach on college and university faculties—an effect just as offensive to academic institutions themselves as to faculty members. While external threats to academic freedom have never diminished and can probably never be expected to, new threats—internal

Supp. 362, 372 (1943) (emphasis added; quotation marks and citations omitted, modification in original)); see also *Whitehill v. Elkins*, 389 U.S. 54 (1967). In *Whitehill*, another loyalty-oath case, the Court alluded to the constitutional dimension of academic freedom in a curiously elliptical way without coming straight out and finding that faculty members at state institutions enjoy a constitutionally protected right to academic freedom: “We are in the First Amendment field. The continuing surveillance which this type of law places on teachers is hostile to academic freedom.” *Id.* at 59.

77. E.g., *Dickey v. Ala. State Bd. of Ed.*, 273 F. Supp. 613, 616 (M.D. Ala. 1967); *Hammond v. S.C. State College*, 272 F. Supp. 947, 949 (D.S.C. 1967); *Egan v. Moore*, 245 N.Y.S.2d 622, 624 (N.Y. App. Div. 1963) (“[T]he tradition of our great society has been to allow our universities in the name of academic freedom to explore and expose their students to controversial issues without government interference.”).

78. Areen, *supra* note 41, at 967; see Jonathan R. Cole, *Academic Freedom under Fire*, DAEDALUS, Spring 2005, at 1–5 (arguing that academic freedom protects against “the influence of external politics on university decision making”); Robert J. Tepper & Craig G. White, *Speak No Evil: Academic Freedom and the Application of Garcetti v. Ceballos to Public University Faculty*, 59 CATH. U.L. REV. 125, 134 (2009) (describing *Sweezy* and *Keyishian* as cases in which “the interest of the university in presenting diverse ideas and the interest of individual employees in retaining their employment were aligned against state interference, which presented an external threat to academic freedom”).

threats—surfaced in the 1970s, '80s and '90s as faculties unionized, faculty handbook provisions became more codified, economic hard times jeopardized faculty security, and faculty members sought more frequently to invoke academic freedom as an obstacle to actions directed against them by university administrators. As the next several decades would illustrate, inconsistent doctrinal principles were strained to the breaking point when faculty interests did not align with institutions' and academic freedom assumed a new and more expansive meaning within the halls of academe.

IV. DIFFUSION OF THE CONCEPT OF ACADEMIC FREEDOM (1968 TO THE PRESENT)

The Supreme Court decisions in *Sweezy* and *Keyishian*, in the words of one leading scholar, “led some commentators to predict that the Court would eventually provide extensive protection for the academic judgments of individual faculty against interference by university administrators, thus giving constitutional status to traditional notions of academic freedom.”⁷⁹ An influential note in the *Harvard Law Review* one year after *Keyishian* predicted that the decision presaged “a more expansive judicial role” in vindicating the rights of aggrieved faculty members;⁸⁰ other commentators of the era characterized the two Supreme Court decisions in hyperbolic terms as the harbinger of a new “law of academic status”⁸¹ and a jurisprudential breakthrough establishing an “emerging constitutional right”⁸² of academic freedom.⁸³

Today, we can see clearly that academic freedom as a jurisprudential principle has not evolved as expected. In the assessment of one leading scholar, academic freedom cases decided after *Keyishian*

[A]re inconclusive, the promise of their rhetoric reproached by the ambiguous realities of academic life There has been no adequate analysis of what academic freedom the Constitution protects or of why it protects it. Lacking definition or guiding

79. Byrne, *supra* note 39, at 301 (footnote omitted). Professor Byrne’s article is arguably the most illuminating work of scholarship on academic freedom produced in the last half-century, and even today, more than twenty years after it was written, it is timely, topical, and full of insights. For anyone interested in academic freedom, Professor Byrne’s article is mandatory reading, and its many trenchant observations inform much of the analysis to follow.

80. *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1051 (1968).

81. Mathew W. Finkin, *Toward a Law of Academic Status*, 22 BUFF. L. REV. 575, 575 (1973).

82. William P. Murphy, *Academic Freedom—An Emerging Constitutional Right*, 28 LAW & CONTEMP. PROBS. 525 (1963).

83. Thomas I. Emerson & David Haber, *Academic Freedom of the Faculty Member as Citizen*, 28 LAW & CONTEMP. PROBS. 525 (1963); see also Larry D. Spurgeon, *A Transcendent Value: The Quest to Safeguard Academic Freedom*, 34 J.C. & U.L. 111, 130 (2007).

principle, the doctrine floats in the law, picking up decisions as a hull does barnacles.⁸⁴

Other commentators have been just as direct: as one recently wrote in his introduction to a survey of post-*Keyishian* case law, “academic freedom is a term that is often used, but little explained, by federal courts. Academic freedom is largely unanalyzed, undefined, and unguided by principled application, leading to its inconsistent and skeptical or questioned invocation.”⁸⁵ In the concluding part of this article, we examine the sources of and reasons for doctrinal confusion over the meaning of academic freedom, we take a quick peek at the implications, and we end wistfully by ruing a recent opportunity for authoritative clarification of academic freedom in the 2006 *Garcetti* case—an opportunity the Supreme Court missed.

A. Origins

As for the origins of the problem, we can discern four. First, seeds of confusion were sown in the initial Supreme Court decisions in *Sweezy* and *Keyishian*—incautiously worded and inadequately explained decisions that employed exaggerated rhetoric in defense of points that (in the phrase of a leading commentator) were “symbolic rather than practical.”⁸⁶ Second—again, an assertion of Professor Byrne’s provides the starting point—“American law operates on an impoverished understanding of the unique and complex functions performed by our universities,”⁸⁷ a truism that translates into pronounced and consistent judicial reluctance to intrude too deeply into academic decision making. Third, from *Sweezy* and *Keyishian* to the present day court decisions on academic freedom have been linked analytically to the First Amendment and the broader civil liberties of speech and assembly protected by the First Amendment.⁸⁸ That link—what Professor Byrne calls the “constitutionalization” of academic freedom⁸⁹—has deflected academic freedom jurisprudence in new and not necessarily salutary directions. And fourth, a case law schism has developed between (on the one hand) decisions describing academic freedom as an *individual* right and (on the other) decisions casting academic freedom as a right attaching to the *institution*. We will explore each of these themes in

84. Byrne, *supra* note 39, at 252–53.

85. R. George Wright, *The Emergence of First Amendment Academic Freedom*, 85 NEB. L. REV. 793, 794 (2007) (internal quotations and footnotes omitted), *quoting in part* Urofsky v. Gilmore, 216 F.3d 401, 410 (4th Cir. 2000) (en banc).

86. Byrne, *supra* note 39, at 296.

87. *Id.* at 254.

88. In the nice phrase of one scholar, courts have always approached academic freedom by defining it as a right that “exists in, around, or at least near, the First Amendment.” Frederick Schauer, *Is There A Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 907 (2006).

89. Byrne, *supra* note 39, at 291.

succeeding sections of this article.

1. Lack of Doctrinal Integrity in *Sweezy* and *Keyishian*

We start with the obvious observations—expressed best by Professor Byrne—that “the Supreme Court’s cases [on academic freedom] are few and vague”⁹⁰ and that the Court’s initial pronouncements in *Sweezy* and *Keyishian* were less than pellucidly clear. “These two cases,” Professor Byrne wrote more than twenty years ago, “exhaust the Supreme Court’s development of a university faculty member’s right of academic freedom.”⁹¹ That is still true today.

In his trenchant critique of the Supreme Court’s reasoning in *Sweezy*, Professor Byrne describes “significant oddities about the plurality and concurring opinions” in that case.⁹² The opinions are remarkable for “the vehemence of the rhetoric with which they praised” academic freedom, which may have “made the legal reach of the right of academic freedom appear soaring and expansive; observers might understandably have predicted a major role for the Court in identifying and rectifying violations of this vital principle.”⁹³ Professor Byrne continues:

Today we can see how misleading such a reading would have been. At the time of the *Sweezy* decision, the AAUP was deeply ambivalent about the constitutionalization of academic freedom, because some members feared the long-term consequences of having judges rather than professors elaborate and apply the protective rules of academic life. As a result of this reluctance, the AAUP did not file a brief in *Sweezy*, depriving the Court of knowledgeable counsel on the virtues and risks of its course.⁹⁴

Another “curious feature” of the *Sweezy* decision, in Professor Byrne’s words, lay in the approach Justice Frankfurter took to crafting his influential concurring opinion:

Frankfurter’s opinion . . . looks solely to non-legal sources to describe the content of the right of academic freedom. In an important sense, this reliance was inevitable because the Court’s decision had no legal precursors and the words “academic freedom” had no meaning apart from their usage in academic contexts. Frankfurter never pauses, however, to comment on the different meanings words can have in different professional and social contexts. Thus he quotes with approval an aspirational

90. *Id.* at 288.

91. *Id.* at 298.

92. *Id.* at 290.

93. *Id.* at 291 (citing and quoting Robert K. Carr, *Academic Freedom, the American Association of University Professors, and the United States Supreme Court*, 45 A.A.U.P. Bull. 5, 19–20 (1959)).

94. *Id.* at 291 (citing and quoting Carr, *supra* note 93, at 19–20).

political statement by academics about the four freedoms of a university, leaving ambiguous whether these four freedoms henceforth constitute positive limitations on state power. Frankfurter does not signal whether he is writing a judicial opinion or a professorial tract.⁹⁵

When the Supreme Court next visited this terrain a decade later in *Keyishian*, it muddied the waters still more by producing an opinion that was “extraordinarily vague about the dimensions of the right of academic freedom.”⁹⁶ Describing the Court’s rhetoric as “fervid” and “quasi-religious,” Professor Byrne points out—in a criticism that could be applied more broadly to *all* the Court’s academic freedom cases before and after *Keyishian*—that the Court “failed to develop a principled distinction between protected and punishable academic speech” and fostered “ambiguity” by grounding academic freedom in “symbolic rather than practical” academic values.⁹⁷

95. Byrne, *supra* note 39, at 292 (footnote omitted). As Professor Byrne perceptively observes, Justice Frankfurter’s concurring opinion also introduced an element of doctrinal impurity by conflating professorial academic freedom with rights possessed by the university itself—one of the earliest manifestations of what subsequently ripened into confusion over the distinction *vel non* between so-called “individual” and “institutional” academic freedom:

Frankfurter’s loose and essayistic writing creates a further source of fertile ambiguity. The structures of both Warren’s and Frankfurter’s opinions follow the established First Amendment convention that the rights claimed by Sweezy were personal to him: As a speaker, he asserted his constitutional right as a limitation on state power. Yet, in finding a violation of academic freedom, Frankfurter repeatedly addresses the right of the university itself—rather than those of its faculty members as individuals—to be free from wrongful governmental interference. On the facts of the case, the distinction is unimportant because the “villain” was the state itself—the attorney general acting as an agent of the legislature to enforce political norms—and both the professor and the university were its “victims.” The confusion is crucial, nonetheless, because academic freedom had traditionally been understood as a personal right of the faculty member against university administrators and trustees.

Id.

96. *Id.* at 295.

97. *Id.* at 295–66. To do Professor Byrne’s argument justice, let me quote the critical paragraph:

The Court does not posit any direct benefit to the average citizen from academic freedom, such as higher wages or longer life. Rather, the value is found in the acculturation of the future leaders of the political order in a critical attitude toward authoritarian dogma and in tolerance of dissent. The view seems to be that a free education of this sort will graduate political leaders tolerant toward dissent within society as a whole The rhetoric of the *Keyishian* Court implies that the elements of free inquiry, discussion, dissent, and consensus are not important primarily because they lead to truth—although the attainability of such truth may be a formal premise of the doctrine—but because they express an invaluable sense of what kind of society we, as a people, desire; their value is symbolic rather than practical.

2. The Inhibiting Impact of Judicial Deference to Academic Decision Making

As a general rule, courts defer to the academic judgments colleges and universities make concerning the academic freedom of faculty candidates. This principle of judicial deference cautions courts not to substitute their own judgments for “academic decisions that are made daily by faculty members of public educational institutions—decisions that require ‘an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decision making.’”⁹⁸

Courts consistently adhere to the general rule that the merits of academic decisions made by colleges and universities are presumptively correct and not subject to judicial review.⁹⁹ Academic decisions “are usually highly decentralized”¹⁰⁰ and often involve a series of independent, successive judgments involving academic departments, deans, other academic professionals, and ultimately the president and governing board. Decisions in the academic realm are “a source of unusually great disagreement.

Id. at 296.

98. *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985) (quoting *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 89–90 (1978)). As Professor Byrne points out, the doctrine of judicial deference to academic decision making dates back to the early twentieth century. Byrne, *supra* note 39, at 324. In *Ward v. Board of Regents*, 138 F. 372, 377 (8th Cir. 1905), an appellate court held:

Questions concerning the efficiency of a teacher in an institution of learning, his usefulness, his relations to the student body and to the other members of the faculty, are so complicated and delicate that they are peculiarly for the consideration of the governing authorities of the institution. It may be perfectly apparent to them that the presence of a teacher is prejudicial to the welfare and discipline of the college, although it would be difficult, if not impossible, to make it so appear to a jury by the production of evidence in court.

99. *E.g.*, *Sola v. Lafayette Coll.*, 804 F.2d 40, 42–43 (3d Cir. 1986) (expressing “reluctance to interfere with the internal operations of academic institutions” and warning that judicial review “may threaten the college’s institutional academic freedom”); *EEOC v. Univ. of Notre Dame du Lac*, 715 F.2d 331, 339 (7th Cir. 1983) (“[C]ourts must be vigilant not to intrude into [discretionary academic determinations], and should not substitute their judgment for that of the college.”); *Lieberman v. Gant*, 630 F.2d 60, 67 n.12 (2d Cir. 1980); *Kunda v. Muhlenberg Coll.*, 621 F.2d 532 (3d Cir. 1980) (“Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and . . . must be left for evaluation by the professionals, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges.”); *Faro v. New York University*, 502 F.2d 1229, 1231–32 (2d Cir. 1974) (“Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision.”); *Rowe v. N.C. Agric. & Tech. State Univ.*, 630 F. Supp. 601, 608 (M.D.N.C. 2009); *Huang v. Coll. of the Holy Cross*, 436 F. Supp. 639, 653 (D. Mass. 1977); *Johnson v. Univ. of Pittsburgh*, 435 F.Supp. 1328, 1353–55 (W.D. Pa. 1977); *Peters v. Middlebury Coll.*, 409 F. Supp. 857, 868 (D. Vt. 1976).

100. *Zahorik v. Cornell Univ.*, 729 F.2d 85, 92 (2d Cir. 1984).

Because the stakes are high, the number of relevant variables is great and there is no common unit of measure by which to judge scholarship, the dispersion of strongly held views is greater in the case of [academic] decisions than with employment decisions generally.”¹⁰¹ Were a reviewing court, therefore, to wade into the substance of a particular academic dispute, it would find itself confronting an unwieldy record illuminating a high-stakes decision informed by the views of many academic professionals. The complexity of academic processes is one factor frequently cited by courts as a reason for deferring to the more experienced views of academic professionals.¹⁰²

The principle of “academic abstention,” as Professor Byrne labels it,¹⁰³ is often cited by institutional defenders as one of the defining characteristics of institutional academic freedom (a term with which we will become familiar in a subsequent part of this article). That might be characterized—from the advocate’s perspective—as the useful part of the principle. But it should dawn on anyone who claims membership in the higher-education community that judicial deference to academic decision making has a downside as well: by discouraging courts from examining in detail what faculty members actually do, judicial deference fosters a jurisprudence “lacking in consistency” and in which courts and litigants are encouraged to “invoke the doctrine [of academic freedom] in circumstances where it arguably has no application.”¹⁰⁴

3. First Amendment Distortion

One final factor—possibly the most significant—explains why academic freedom has received such an uneven and ultimately unsatisfying response in the four decades since the Supreme Court’s decision in *Keyishian*. It is encapsulated in what Professor Byrne calls the “constitutionalization” of academic freedom and the resulting importation into academic freedom jurisprudence of extraneous legal principles derived generally from First Amendment law.¹⁰⁵ The scholarship in this area tends to be turgid: put

101. *Id.* at 93.

102. *E.g.*, *Negussey v. Syracuse Univ.*, 95-CV-1827, 1997 U.S. Dist. LEXIS 3853, at *25 (N.D.N.Y. March 24, 1997) (basing its dismissal of the plaintiff faculty member’s denial-of-tenure lawsuit in part on “the complex, multilayered process of tenure review”); *Goulianos v. Ramapo Coll. of N.J.*, No. 82-3129, 1986 U.S. Dist. LEXIS 23141, at *40 (D.N.J. July 7, 1986) (citing “the complex procedures used for determining tenure” as a ground for denying plaintiff faculty member the relief he sought in a tenure-denial case).

103. Byrne, *supra* note 39, at 323.

104. *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000) (en banc) (citing W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 NEBR. L. REV. 301, 303 (1998). Its name notwithstanding, Mr. Stuller’s article effectively synthesizes much of the law on academic freedom in the college and university setting.

105. Byrne, *supra* note 39, at 291.

simply (perhaps too simply), it can be summarized by stating that academic freedom is diminished when faculty members are categorized *first* as state employees and only secondarily as specially entitled professionals. When we define academic freedom as a *constitutional* right, we dilute it—on the simplest level by disqualifying faculty members at private institutions from its protection, and on another level by treating professors like public school custodians.¹⁰⁶ Let me explain.

At the heart of what we have described as the original meaning of academic freedom—the meaning borrowed from medieval continental universities and subsequently embodied in the AAUP’s 1915 *General Declaration of Principles* and 1940 *Statement of Principles*¹⁰⁷—is the concept of an individual faculty member’s autonomous control over his own teaching and research. Professor Byrne refers to this nuclear kernel of academic freedom as “academic speech,” and his lovely explanation of the term warrants quotation nearly in full:

Academic speech—a term I use to encompass both scholarship and teaching—has unique value because of the disciplinary and ethical constraints under which it is produced. Scholars work within a discipline, primarily addressing other scholars and students. Their audience understands and evaluates their speech within a tradition of knowledge, shared assumptions and arguments about methodology and criteria, and common objectives of exploration or discovery. This learned and critical audience provides comfort and challenge to the academic speaker; he knows that his auditors will listen with care, consider with knowledge, and challenge with intelligence. The speaker cannot persuade her colleagues by her social standing, physical strength or the raw vehemence of her argument; she must persuade on the basis of reason and evidence (concepts vouchsafed, if only contingently, by her discipline). The ordinary criterion of success is whether, through mastery of the discipline’s discourse, the scholar improves the account of some worthy subject that the discipline has previously accepted.

Academic speech is rigidly formalistic. Every lecture or article must presuppose the history and current canon of the discipline; every departure from common understandings must be explained and justified To enter the discourse, the scholar must proceed through the university course of study—at great expense and personal sacrifice—in order to be certified by her peers as competent to engage in scholarly exchange. Students, even

106. “Since the 1960’s, the First Amendment has protected state employees from employment penalties for exercising general civil rights of free speech, but it does not distinguish among professors, prosecutors, or janitors.” Byrne, *supra* note 39, at 264.

107. See *supra* notes 40–49 and accompanying text.

though adults in civil society, are admitted as neophytes and treated as intellectual dependents so long as they lack mastery or certification. Students and junior professors suffer real punishment for speech deemed inadequate by the masters

Yet within these constraints, the academic speaker in control of his methodology is free to reach conclusions that contradict previous dogma, whether within the academy or throughout the larger society. Indeed, such contradiction is prized as new knowledge, the mark of contribution, the *sine qua non* of the doctoral dissertation. Moreover, the community of scholars will close ranks behind even the most mediocre scholar whenever civil authority threatens to punish unorthodox scholarship. Those instances where it has failed to defend its fellows are incidents of permanent shame and regret.

This essential freedom has been at the core of professorial insistence on faculty autonomy within the university power structure. . . . The unique point is that academic speech can be more free than the speaker; that the speaker may be driven to conclusions by her respect for methodology and evidence that contradict her own preconceptions and cherished assumptions. The scholar cannot argue merely for her political party, religion, class, race, or gender; she must acknowledge the hard resistance of the subject matter, the inadequacies of friends' arguments, and the force of those of her enemies. That is what scholars mean by disinterested argument—not indifference to the outcome, but insistence that commitment not weaken the rigor and honesty by which the argument is pursued.¹⁰⁸

Academic speech under this construct is something affirming and positive. It “contributes profoundly to society at large”¹⁰⁹ by empowering speech that is “truthful, gracious, well-considered, and generous to opponents.”¹¹⁰ We protect it under the rubric of academic freedom, not just because we fear the negative consequences of suppressing speech (the default justification for vindicating First Amendment free-speech rights), but also because social and educational goals are furthered when the academy “holds expression to high standards.”¹¹¹ Conceived in this light, academic freedom emanates from qualities that are unique to the academy and “include[s] only rights unique or necessary to the functions of higher education.”¹¹² When faculty members are told what to teach, how to teach, or where their research interests should be confined, we are closest to the

108. Byrne, *supra* note 39, at 258–59.

109. *Id.* at 261.

110. *Id.* at 260.

111. *Id.* at 261.

112. *Id.* at 264.

nub of academic freedom. To state a corollary, if faculty members stretch the concept of academic freedom by invoking it outside the core area—for example, by claiming freedom in their extramural utterances, freedom to criticize institutional officers, or an entitlement to a certain office or a certain parking space—then they may conceivably be asserting rights protected by the First Amendment or the Due Process Clause (if they teach at public institutions) but they are *not* articulating a colorable claim to infringement of their academic freedom in the pure sense of that term.

The constitutionalization of academic freedom has two practical consequences. First and most fundamentally, efforts by faculty members to invoke academic freedom by virtue of their status as members of the professoriate collide out of the box with one of the fundamental precepts of constitutional law: that constitutional rights are not profession-specific and membership in a particular profession does not bestow constitutional privileges unavailable to citizens at large. As courts and commentators have noted, journalists have had a notoriously difficult time getting courts to accept the argument that special evidentiary privileges derived from the First Amendment protect reporters' sources,¹¹³ and some courts have used similar logic to find that faculty members do not enjoy special First Amendment privileges simply by virtue of their status as faculty members.¹¹⁴

Second, couching academic freedom as a constitutional right means perforce that it is a right enjoyed *only* by faculty members at public institutions and not available to professors at private institutions. In general terms, the Constitution imposes limitations only on the actions of state officers and employees; a private college or university is typically not considered an agency of state government and—at least as a matter of constitutional law—is free to regulate speech, association and assembly.¹¹⁵

113. *Pell v. Procnier*, 417 U.S. 817, 829–35 (1974); Frederick Schauer, *supra* note 88, at 907; William Van Alstyne, *The First Amendment and the Free Press: A Comment on Some New Trends and Some Old Theories*, 9 HOFSTRA L. REV. 1, 18–24 (1980). Professor Byrne writes:

Journalists obviously perform professional functions protected by the First Amendment, yet the freedom of the press protects any citizen who wishes to publish information or opinion. Indeed, the argument that the press should have a special right of access to government-controlled information has been resisted, in part, on the ground that First Amendment rights should not be reserved for members of a particular profession.

Byrne, *supra* note 39, at 264 n.47.

114. *E.g.*, *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488 (3d Cir. 1998).

115. *See Logan v. Bennington Coll.*, 72 F.3d 1017, 1028 (2d Cir. 1995) (holding that a private college's sexual harassment policy did not violate a charged faculty member's due-process rights because the college's disciplinary action against the professor "was in no way dictated by state law or state actors"); *see also State v. Schmid*, 423 A.2d 615, 619 (N.J. 1980) (citations omitted):

A private college or university, however, stands upon a different footing in relationship to the state. Such an institution is not the creature or instrument of

The anomalous result, as Professor Byrne observes, is that:

[f]aculty and students at state universities enjoy extensive substantive and procedural constitutional rights against their institutions while faculty and students at private institutions enjoy none. This is so despite the substantially similar functions usually served by state and private institutions; the dean of the University of Virginia Law School does not need to be restrained from instituting an assault against liberty any more than does the dean of the Harvard Law School.¹¹⁶

4. Individual Versus Institutional Academic Freedom

Over the last half-century, nothing has introduced more confusion into the case law than the schism between one line of cases describing academic freedom as a right possessed by individual faculty members and another line recognizing academic freedom as a right possessed by and exercisable only in the name of the faculty member's employing institution. The schism originates in two dramatically variant conceptions of academic freedom: the individualistic conception embodied in the AAUP's 1940 *Statement of Principles*, with its explicit, reiterative emphasis on academic freedom as an entitlement belonging to "teachers," as contrasted with the notion embraced by Justice Frankfurter in his *Sweezy* concurrence that

state government. Even though such an institution may conduct itself identically to its state-operated counterparts and, in terms of educational purposes and activities, may be virtually indistinguishable from a public institution, a private college or university does not thereby either operate under or exercise the authority of state government.

See generally WILLIAM KAPLIN & BARBARA LEE, *THE LAW OF HIGHER EDUCATION* § 1.5 (4th ed. 2006); Robert M. O'Neil, *Private Universities and Public Law*, 19 *BUFF. L. REV.* 155 (1969); Richard Thigpen, *The Application of Fourteenth Amendment Norms to Private Colleges and Universities*, 11 *J.L. & EDUC.* 171 (1982); Note, *Legal Relationship Between the Student and the Private College or University*, 7 *SAN DIEGO L. REV.* 244 (1970); Annotation, *Action of Private Institution of Higher Education as Constituting State Action, or Action Under Color of Law, for Purposes of Fourteenth Amendment and 42 U.S.C.S § 1983*, 37 *A.L.R. FED.* 601 (1978).

116. Byrne, *supra* note 39, at 299. Professor Byrne's legal distinction between private and public universities may not, as a practical matter, be as significant as his treatment of the issue may suggest. Many private colleges and universities have voluntarily chosen to incorporate references to the AAUP's 1940 *Statement of Principles* in their faculty handbooks or other governing documents, and what public institutions may be prohibited from doing by the Constitution many private institutions commit themselves not to do as a matter of contract law. See *Greene v. Howard Univ.*, 412 F.2d 1128, 1133 n.7 (D.C. Cir. 1969) (holding that a private university's faculty handbook—which "accept[ed] as guiding principles the policy of the American Association of University Professors"—constituted contractually binding institutional obligations); Jim Jackson, *Express and Implied Contractual Rights to Academic Freedom in the United States*, 22 *HAMLIN L. REV.* 467 (1999); R. George Wright, *The Emergence of First Amendment Academic Freedom*, 85 *NEB. L. REV.* 793, 803–04 (2007).

academic freedom vindicates “four essential freedoms” possessed by *the university*, not the men and women who teach there. Fifty years ago, in an era when the preponderance of academic freedom cases arose in the context of loyalty-oath challenges, the distinction between individual and institutional academic freedom mattered little because threats to academic freedom came from sources external to the academic institution—legislative committees, state attorneys general—and the interests of individual faculty members aligned with their institutions.’ In the last thirty years, by contrast, almost all academic freedom cases have arisen in the context of “internal university disputes rather than threats from outside the university,”¹¹⁷ and therein lies the most profound source of doctrinal complexity in the case law: when a faculty member alleges that his academic freedom is abridged because of a decision made by the institution’s own officials—a decision, for example, to deny tenure, or change a grade, or command that certain books be removed from a course syllabus—then individual and institutional prerogatives collide and the outcome of the case can hinge on which variant of academic freedom the court adopts.

On this most important of academic freedom issues, the Supreme Court, sad to relate, has sent mixed signals. In its earliest academic freedom case, Justice Frankfurter never used the phrase “academic freedom” and made no reference to the *1940 Statement of Principles*; instead, his concurring opinion focused on threats to institutional freedoms and the need to protect the autonomy of colleges and universities, rather than violations of the individual rights of the faculty member who brought the case.¹¹⁸

In its 1971 decision in *Tilton v. Richardson*,¹¹⁹ the Court for the first time made reference to the *1940 Statement of Principles*—more than three decades after its promulgation—in a case involving the constitutionality of federal aid to sectarian institutions of higher education. Under Establishment Clause jurisprudence of the era, government funds could flow to support capital projects for the benefit of religious institutions only upon a judicial finding that facilities were not to be used for religious purposes. In *Tilton*, taxpayers filed suit to block the appropriation of federal funds to support the construction of libraries and classroom

117. Areen, *supra* note 41, at 976.

118. *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (Frankfurter, J., concurring). As Professor Byrne notes:

Frankfurter writes as if the university were the real party to the suit, not Sweezy, to whom he refers at one point as “the witness,” rather than as the petitioner. Academic freedom is described by Frankfurter not as a limitation on the grounds or procedures by which academics may be sanctioned but as “the exclusion of governmental intervention in the intellectual life of a university.”

Byrne, *supra* note 39, at 312 (footnote omitted).

119. 403 U.S. 672 (1971).

buildings at four Catholic colleges in Connecticut. In asserting the constitutionality of federal aid for that purpose, the Court pointed to the lack of evidence to support the taxpayers' claim that the buildings would be used for religious purposes: "the schools were characterized by an atmosphere of academic freedom rather than religious indoctrination. All four institutions, for example, subscribe to the 1940 Statement of Principles on Academic Freedom and Tenure endorsed by the American Association of University Professors."¹²⁰ While *Tilton* did not directly address the scope or meaning of academic freedom, it can be read to stand for the proposition that academic institutions traditionally protect the academic freedom of professors not only from the kinds of external threats that surfaced in *Sweezy* but also from threats that arise internally—the kinds of individual threats to which the *1940 Statement of Principles* is addressed.

Two years after *Tilton*, the pendulum swung in the other direction in *Regents of the University of California v. Bakke*.¹²¹ In his opinion for the Court, Justice Lewis Powell held that a First Amendment-derived right of academic freedom permitted a state university to take race into account in admitting students when doing so furthered the academic goal of promoting diversity in the student body. Justice Powell rested his opinion on the fourth of Justice Frankfurter's "four essential freedoms": the right of the university to determine for itself on academic grounds who may be admitted to study.¹²²

Justice Powell—like Justice Frankfurter before him—spent no time analyzing the rights of faculty members in making admission or other academic decisions. The faculty role was addressed explicitly, however, in *Regents of the University of Michigan v. Ewing*,¹²³ a case characterized by some scholars as the high water mark for academic freedom as an individual right possessed by individual members of the faculty.¹²⁴ *Ewing* involved the academic dismissal of a medical student after he failed the benchmark National Board of Medical Examiners test. The medical school's Promotion and Review Board—a nine-member faculty body—reviewed the student's academic record and recommended that he be dismissed. The student then filed suit alleging that his dismissal violated his procedural due process rights in a number of respects. For a unanimous Court, Justice John Paul Stevens affirmed the decision to dismiss the student, holding that "the faculty's decision was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing's

120. *Id.* at 681–82.

121. 438 U.S. 265 (1978) (opinion by Powell, J.)

122. *Id.* at 312.

123. 474 U.S. 214 (1985).

124. Professor Areen's treatment of the *Ewing* decision is particularly complete and helpful. Areen, *supra* note 41, at 978–79.

academic career.”¹²⁵ Using classic academic abstention language, Justice Stevens said that courts should defer to academic decisions appropriately entrusted to faculty members; otherwise, courts would violate the “responsibility to safeguard their academic freedom.”¹²⁶ Courts are not “the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies,” and are not equipped to evaluate “the multitude of academic decisions that are made daily by faculty members of public educational institutions.”¹²⁷

In a short but significant footnote, Justice Stevens attempted to synthesize the Supreme Court’s academic freedom decisions over the preceding three decades. He acknowledged that academic freedom has both an individual and institutional component, and that the two coexist uneasily and in some respects inconsistently:

Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, see *Keyishian v. Board of Regents*, 385 U.S., at 603; *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957), but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself, see *University of California Regents v. Bakke*, 438 U.S. 265, 312 (1978); *Sweezy v. New Hampshire*, 354 U.S., at 263.¹²⁸

125. 474 U.S. at 225.

126. *Id.* at 226.

127. *Id.* (quoting *Bishop v. Wood*, 426 U.S. 341, 349 (1967)).

128. *Id.* at 226 n.12. “In other words,” Professor Areen concludes in her treatment of *Ewing*, “constitutional academic freedom protects both individual faculty members and institutions.” Areen, *supra* note 41, at 979. Professor Areen goes on to make an interesting point by deconstructing Justice Stevens’ choice of words in that footnote:

Justice Stevens used the word “academy,” however, rather than “institution.” (The word “academy” was also employed by Judge Posner in an academic freedom decision handed down eight months earlier.) The word “academy,” which commonly refers to a society or association of scholars, suggests that the Court agreed with the [AAUP’s] 1915 Declaration that academic freedom belongs to the faculty as a body rather than to the *institution* in a corporate sense.

Id. (footnotes omitted). The decision referred to in the parenthetical is *Piarowsky v. Illinois Community College, District 515*, 759 F.2d 625 (7th Cir. 1985). Judge Richard Posner in a characteristically pithy summation stated that academic freedom “is used to denote both the freedom of the academy to pursue its ends without interference from the government . . . and the freedom of the individual teacher . . . to pursue his ends without interference from the academy . . .” *Id.* at 629. Fourteen years later, in a short dissenting opinion in *Central State University v. American Association of University Professors, Central State University Chapter*, 526 U.S. 124 (1999), Justice Stevens was more explicit in defining the contours of academic freedom. “Buried beneath the legal arguments advanced in this case lies a debate over academic freedom,” he wrote. *Id.* at 130 (Stevens, J., dissenting). His opinion left no doubt that, in his view, academic freedom was a right protecting “individual faculty members”—not institutions—from what he termed “constraint” by department chairs, trustees, state legislators, and judges. *Id.* at 130–31. (Stevens, J., dissenting).

The next academic freedom decision of interest, *University of Pennsylvania v. Equal Employment Opportunity Commission*,¹²⁹ involved a question that up until that point had divided the federal appellate courts: whether academic freedom compelled the recognition of a common-law privilege protecting confidential peer review evaluations of faculty tenure candidates from production through civil discovery in race and sex discrimination cases. The University of Pennsylvania denied tenure to a female faculty member, and she filed an employment discrimination charge with the Equal Employment Opportunity Commission under Title VII¹³⁰ alleging that “her qualifications were ‘equal to or better than’ those of five named male faculty members who had received more favorable treatment.”¹³¹ The EEOC undertook an investigation and issued a documentary subpoena requiring the university to produce the complete tenure dossiers—including confidential evaluations by external peer reviewers—of the complainant and her five male comparators. The university moved to quash the subpoena on the ground that academic freedom warranted a common-law evidentiary privilege protecting confidential peer review materials generated during the tenure review process.

Writing for a unanimous Court, Justice Harry Blackmun rejected the university’s First Amendment claim and called its reliance on what he called the “so-called academic-freedom cases”—by which he apparently meant *Sweezy* and *Keyishian*—“misplaced.”¹³² The Court’s reasoning was, to put it charitably, obtuse: earlier cases, Justice Blackmun wrote, involved “direct” infringements of academic freedom, while in this case the impact of an EEOC subpoena on academic freedom was “extremely attenuated”—a characterization the Court did not effectively explain.¹³³ For our purposes, the significance of the *University of Pennsylvania* decision lies in its myopia with respect to the “individual” (as opposed to institutional) strand of academic freedom; perhaps because the party invoking academic freedom was a university, the Court made no mention, even obliquely, to the interests a faculty member might have in engaging in peer review without external coercion.

In *Grutter v. Bollinger*,¹³⁴ Justice Sandra Day O’Connor for a slender five-justice majority of the Court returned to ground plowed a quarter-century earlier in *Bakke* and held that the University of Michigan Law School was entitled to take race into account in making admission

129. 493 U.S. 182 (1990).

130. Civil Rights Act of 1964, tit. VII, 78 Stat. 241, 253–266 (codified at 42 U.S.C. §§ 2000e–e17).

131. 493 U.S. at 185.

132. *Id.* at 183.

133. *Id.* at 198–99.

134. 539 U.S. 306 (2003).

decisions. Justice O'Connor reiterated Justice Powell's holding in *Bakke* that the First Amendment protects "four essential [academic] freedoms," one of which was the freedom to decide "who may be admitted to study."¹³⁵

Justice O'Connor's decision left no doubt that in her mind and the minds of the other justices in the majority those freedoms belonged, not to individual faculty members, but to the university: "*universities*," she wrote, "occupy a special niche in our constitutional tradition."¹³⁶ Nothing in her opinion suggested that faculty members were entitled to assert academic freedom in their own names—although, as Justice Stevens had done in *Ewing*, Justice O'Connor mentioned in passing that a faculty body (in this instance, the law school's admission committee) had had a hand in formulating the challenged policy. Using academic abstention language borrowed from *Ewing*, Justice O'Connor stated that the faculty's "educational judgment" on the importance of racial diversity "is one to which we defer," citing *Ewing* as an exemplar of the Court's "tradition of giving a degree of deference to a university's academic decisions."¹³⁷

To summarize: in the relatively small number of academic freedom cases it decided in the last half-century, the Supreme Court managed to be less than precise in distinguishing between two strands of doctrinal thought on what academic freedom means and what it protects. Its language has been predominantly *institutional* in outlook and it has more often than not characterized academic freedom as a right exercisable by universities—not faculty members—and grounded in freedoms belonging to universities in their own names. At the same time, the Court has occasionally toyed with the notion—expressed directly by Justice Stevens in his largely ignored dissent in the 1999 *Central State University* case¹³⁸—that the First Amendment "protect[s] the academic freedom of *university faculty members*," not just institutional employers.¹³⁹ Pragmatically, the need to distinguish between the two strands has never been pressing because the Supreme Court has never decided an academic freedom case in which institutions and faculty members were not aligned. In every case, it mattered little to the outcome whether the particular "freedom" asserted—to teach, to admit students, to conduct research—protected faculty members or institutions, because faculty and institution occupied common ground in seeking to repel what Professor Areen and other scholars have called "external challenges" to academic freedom¹⁴⁰—challenges mounted

135. *Id.* at 363, 364.

136. *Id.* at 329 (emphasis added).

137. *Id.* at 328.

138. *See supra* note 115.

139. *Cent. State Univ. v. Am. Assoc. of Univ. Professors*, *Cent. State Univ. Chapter*, 526 U.S. 124, 134 (1999) (Stevens, J., dissenting) (emphasis added).

140. Areen, *supra* note 41, at 967; *see* Jennifer Elrod, *Critical Inquiry: A Tool for Protecting the Dissident Professor's Academic Freedom*, 96 CALIF. L. REV. 1669, 1679

by agencies and instrumentalities beyond campus boundaries.

However, as Professor Areen has cogently pointed out, academic-freedom litigation for much of the last forty years has “involved internal rather than external challenges to academic freedom.”¹⁴¹ What should happen when a faculty plaintiff invokes academic freedom as insulation against an adverse institutional decision while in the same case the institution invokes its academic freedom to be free of external control? As one thoughtful appellate court observed, “the asserted academic freedom of a professor can conflict with the academic freedom of the university to make decisions affecting that professor.”¹⁴² In such a case, which claim prevails? On that critical question, the Supreme Court has provided no guidance. Lower federal courts have come up with answers in a fashion that can only be described as maladroit, inconsistent, and ultimately unsatisfying.

B. Practical Consequences

In general (and generalizations are notoriously dangerous when the subject is academic freedom), courts appear more willing to sustain claims of academic freedom when they arise in the context of nuclear academic speech—what one commentator has called the exercise of “profession-specific privileges”¹⁴³—than when the subject matter of a faculty member’s lawsuit relates only distantly (or not at all) to the classroom or the laboratory. When the institution interferes with a faculty member’s freedom to select topics for classroom discussion, assemble a syllabus, assign grades, or conduct scholarly research and publish the results thereof, faculty members more often than not prevail when they claim that academic freedom protects their prerogatives in those areas. It is nevertheless fair to say that, even in the realms of teaching and scholarship, the cases do not line up, the logic of court decisions is inconsistent, and faculty members probably lose more often than they win when they challenge adverse institutional decisions on academic freedom grounds.

1. Freedom in the Classroom

In *Cohen v. San Bernadino Valley College*,¹⁴⁴ for example, a tenured

(2008); Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third “Essential Freedom,”* 45 STAN. L. REV. 1835, 1840 (1993); cf. Matthew W. Finkin, *On “Institutional” Academic Freedom*, 61 TEX. L. REV. 817, 839 (1983); David M. Rabban, *A Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 231 (Summer 1990).

141. Areen, *supra* note 41, at 967.

142. *Keen v. Penson*, 970 F.2d 252, 257 (7th Cir. 1992).

143. Schauer, *supra* note 88, at 914.

144. 92 F.3d 968 (9th Cir. 1996).

faculty member successfully invoked academic freedom as a defense when a student complained that the faculty member had violated the college's policy against sexual harassment by using sexually oriented metaphors during classroom instruction.¹⁴⁵ And in *Dube v. State University of New York*,¹⁴⁶ an assistant professor of Africana studies equated Zionism with racism in a class titled "The Politics of Race."¹⁴⁷ Following complaints from the Anti-Defamation League of B'nai Brith and the American Jewish Committee, he was not allowed to teach the class again and was subsequently denied tenure.¹⁴⁸ In ensuing litigation, the faculty member prevailed on his argument that the institution had based its tenure denial decision on dissatisfaction with his discussion of controversial topics in the classroom.¹⁴⁹ Quoting *Keyishian*, the court held that "the First Amendment tolerates neither laws nor other means of coercion, persuasion or intimidation 'that cast a pall of orthodoxy' over the free exchange of ideas in the classroom."¹⁵⁰

It goes without saying that many lower court decisions squarely contradict the holdings in *Cohen* and *Dube*. In *Edwards v. California University of Pennsylvania*,¹⁵¹ for example, the court brusquely rejected a faculty member's contention that the institution's president and vice president for academic affairs had infringed his academic freedom by ordering him not to include "doctrinaire material" in his course syllabus: "we conclude," held the court without citation to a single higher-education case, "that a public university professor does not have a First Amendment right to decide what will be taught in the classroom."¹⁵² In *Lovelace v. Southeastern Massachusetts University*,¹⁵³ a faculty member whose appointment was not renewed asserted that the institution had retaliated against him because "he refused to inflate his grades or lower his expectations and teaching standards."¹⁵⁴ The court rejected his assertion that the decision violated his academic freedom:

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

145. *Id.* at 970–71.

146. 900 F.2d 587 (2d Cir. 1990).

147. *Id.* at 589.

148. *Id.* at 588–89.

149. *Id.* at 589.

150. *Id.* at 598 (quoting *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967)).

151. 156 F.3d 488 (3d Cir. 1998).

152. *Id.* at 490, 491.

153. 793 F.2d 419 (1st Cir. 1986).

154. *Id.* at 425.

university concerns, integral to implementation of this policy decision. To accept plaintiff's contention that an untenured teacher's grading policy is constitutionally protected and insulates him from discharge when his standards conflict with those of the university would be to constrict the university in defining and performing its educational mission. The first amendment does not require that each nontenured professor be made a sovereign unto himself.¹⁵⁵

2. Assignment of Grades

In *Parate v. Isibor*,¹⁵⁶ a civil engineering professor alleged that his appointment was not renewed because he refused to change a student's grade from B to A.¹⁵⁷ The court found that the university had violated his constitutionally protected academic freedom:

[T]he individual professor may not be compelled, by university officials, to change a grade that the professor previously assigned to her student. Because the individual professor's assignment of a letter grade is protected speech, the university officials' action to compel the professor to alter that grade would severely burden a protected activity.¹⁵⁸

Another court reached a contrary conclusion in *Brown v. Armenti*,¹⁵⁹ a lawsuit by a tenured faculty member alleging that the university's president had ordered him to change a student's course grade from an F to an incomplete, which Brown refused to do.¹⁶⁰ The court dismissed the plaintiff's claim, concluding that a "public university professor does not have a First Amendment right to expression via the school's grade assignment procedures."¹⁶¹ The court explicitly elected not to follow *Parate* on the ground—not clearly explained—that *Parate* did not reflect a "realistic view of the university-professor relationship."¹⁶²

155. *Id.* at 425–26 (citations and footnotes omitted).

156. 868 F.2d 821 (6th Cir. 1986).

157. *Id.* at 823–24.

158. *Id.* at 828.

159. 247 F.3d 69 (3d Cir. 2001).

160. *Id.* at 72–73.

161. *Id.* at 75.

162. *Id.* at 74, 75; see *Lovelace v. Se. Mass. Univ.*, 793 F.2d 419 (1st Cir. 1986); *Hillis v. Stephen F. Austin State Univ.*, 665 F.2d 547 (5th Cir.). See generally Kevin A. Rosenfield, *Brown v. Armenti and the First Amendment Protection of Teachers and Professors in Grading Their Students*, 97 NW. U. L. REV. 1471 (2003); Evelyn Sung, *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).

3. Research and Scholarship

An early and somewhat troubling case involving a faculty member's claim to academic freedom in the conduct of research was *McElearney v. University of Illinois at Chicago Circle Campus*, decided in 1979.¹⁶³ The plaintiff, a non-tenured faculty member, alleged that his contract was not renewed in part because his area of research "overlapped that of an already tenured professor, [and] the University thereby chilled [his] freedom of expression in violation of his First Amendment rights."¹⁶⁴ Describing his claim as "patently frivolous," the court affirmed summary judgment in the university's favor, holding that "[a]cademic freedom does not empower a professor to dictate to the University what research will be done using the school's facilities or how many faculty positions will be devoted to a particular area."¹⁶⁵

Faculty plaintiffs fared better in two interesting cases that raised the same issue: whether academic freedom protected a faculty member's research results from discovery by corporate defendants in civil litigation. In *Dow Chemical Co. v. Allen*,¹⁶⁶ the manufacturer of a potentially carcinogenic herbicide sought administrative subpoenas to compel disclosure of an academic researcher's notes, working papers, and raw data relating to ongoing animal toxicity studies.¹⁶⁷ The researcher sought to quash the subpoenas on the ground that "scholarly research is an activity which lies at the heart of higher education, that it comes within the First Amendment's protection of academic freedom, and therefore judicially authorized intrusion into that sphere of university life should be permitted only for compelling reasons, which do not exist here."¹⁶⁸ The court agreed with the researcher:

[The subpoenas] threaten substantial intrusion into the enterprise of university research, and there are several reasons to think they are capable of chilling the exercise of academic freedom [E]nforcement of the subpoenas would leave the researchers with

163. 612 F.2d 285 (7th Cir. 1979) (per curiam).

164. *Id.* at 287.

165. *Id.* at 287, 288. I describe the decision as troubling because summary judgment had been entered in the university's favor in the trial court, and on appeal the plaintiff-appellant was supposedly entitled to a presumption that the facts asserted in his complaint would be construed in the light most favorable to him. The assertion—if I may characterize it in these terms—that a tenure-track faculty member was terminated because a tenured member of his department resented an asserted overlap between the pair's research interests strikes me as non-frivolous. The cases cited by the court in support of the proposition that "[a]cademic freedom does not empower a professor to dictate to the University what research will be done using the school's facilities" were not cases involving academic research and were not even (in all instances) higher education cases. *Id.* at 288.

166. 672 F.2d 1262 (7th Cir. 1982).

167. *Id.* at 1265–66.

168. *Id.* at 1274.

the knowledge throughout continuation of their studies that the fruits of their labors had been appropriated by and were being scrutinized by a not-unbiased third party whose interests were arguably antithetical to theirs. It is not difficult to imagine that that realization might well be both unnerving and discouraging. Indeed, it is probably fair to say that the character and extent of intervention would be such that, regardless of its purpose, it would “inevitably tend[] to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor.”¹⁶⁹

To the same effect was *Cusumano v. Microsoft Corp.*,¹⁷⁰ decided a decade and a half after *Dow Chemical*. The case arose out of an antitrust prosecution against the Microsoft Corporation following its alleged efforts to monopolize the web-browser market by driving Netscape Communications out of business.¹⁷¹ As part of its defense to a federal antitrust lawsuit, Microsoft subpoenaed research notes and recorded interviews from two faculty members—one from Harvard and one from the Massachusetts Institute of Technology—who were in the process of writing a book about the browser war between Netscape and Microsoft.¹⁷² The two faculty members moved to quash the subpoena on the ground that “forcing them to disclose the contents of the notes, tapes, and transcripts would endanger the values of academic freedom safeguarded by the First Amendment and jeopardize the future information-gathering activities of academic researchers.”¹⁷³ The court agreed with the researchers, describing them as “information gatherers and disseminators” whose access to research materials could conceivably dry up if “their research materials were freely subject to subpoena.”¹⁷⁴ A drying-up of sources, continued the court, “would sharply curtail the information available to academic researchers and thus would restrict their output [and generate] fewer, less cogent analyses.”¹⁷⁵

Dow Chemical and *Microsoft* were both cases in which researchers successfully invoked academic freedom to parry *external* subpoenas for production of research materials. *McElearney*, by contrast, was a paradigmatic example of an unsuccessful attempt to interpose academic freedom as a shield against *internal* university decision making. As a generalization, it is fair to summarize decades of lower court case law by reference to that dichotomy. Academic freedom shields sensitive research

169. *Id.* at 1276 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957)).

170. 162 F.3d 708 (1st Cir. 1998).

171. *Id.* at 710–711.

172. *Id.* at 711.

173. *Id.* at 713.

174. *Id.* at 714.

175. *Id.*

results from externally compelled disclosure; it rarely aids a faculty member asserting research-related rights in the face of internal regulation or discipline. Faculty members have not prevailed on claims that they had an academic-freedom right to devote time to research¹⁷⁶; occupy specific laboratory space¹⁷⁷; submit applications for grants¹⁷⁸; engage graduate students to perform work in their laboratories¹⁷⁹; or travel for the purpose of conducting field research.¹⁸⁰

Academic freedom for faculty research reached its nadir in *Urofsky v. Gilmore*.¹⁸¹ *Gilmore* arose when six professors at public institutions of higher education in Virginia challenged a state law prohibiting state employees from accessing sexually explicit material on state-owned computers.¹⁸² The professors argued that academic freedom guaranteed them the right to determine for themselves, without the input of the university, the subjects of their research and writing.¹⁸³ In a decision that drew widespread comment in the higher education community, the court rejected the proposition that academic freedom *ever* protected individual faculty members from the consequences of institutional decision making:

[T]o the extent the Constitution recognizes any right of “academic freedom” above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors, . . . 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.

Moreover, a close examination of the cases indicates that the right praised by the Court is not the right Appellees seek to establish here. Appellees ask us to recognize a First Amendment right of academic freedom that belongs to the professor as an individual. The Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs.

176. *Martinez v. Univ. of P.R.*, No. CIV.06 1713 JAF, 2006 WL 3791360 (D.P.R. Dec. 22, 2006).

177. *Naftchi v. N.Y. Univ.*, 14 F. Supp. 2d 473 (S.D.N.Y. 1998).

178. *Radolf v. Univ. of Conn.*, 364 F. Supp. 2d 204 (D. Conn. 2005).

179. *San Filippo v. Bongiovanni*, 961 F. 2d 1125 (3d Cir. 1992).

180. *Faculty Senate of Fla. Int’l Univ. v. Winn*, 477 F. Supp. 2d 1198 (S.D. Fla. 2007).

181. 216 F. 3d 401 (4th Cir. 2000) (en banc).

182. *Id.* at 404–05.

183. *Id.* at 405–06.

....

Significantly, the Court has never recognized that professors possess a First Amendment right of academic freedom to determine for themselves the content of their courses and scholarship, despite opportunities to do so. . . . [T]he Court has focused its discussions of academic freedom solely on issues of institutional autonomy. We therefore conclude that because the [Virginia law prohibiting computer use to access pornographic sites] does not infringe the constitutional rights of public employees in general, it also does not violate the rights of professors.¹⁸⁴

The *Urofsky* decision, by essentially abandoning what we have called the “individual” strand in academic freedom jurisprudence and holding explicitly that academic freedom “inheres in the University, not in individual professors,”¹⁸⁵ generated strong dissent in the scholarly community.¹⁸⁶ It has also developed considerable judicial traction over the last decade.¹⁸⁷ It sounds an apt cautionary note on which to conclude this portion of the article: *Urofsky*, if nothing else, serves as an exemplar of contemporary judicial hostility to claims by faculty members for special exemption from expectations of behavior that apply to other state employees and other community members.

4. “Speech as an Institutional Citizen”¹⁸⁸

Garcetti v. Ceballos,¹⁸⁹ although not a higher-education case, promises to effect more change in academic freedom jurisprudence than any other

184. *Id.* at 410, 411, 414, 415.

185. *Id.* at 410.

186. *See, e.g.*, Marni M. Zack, *Public Employee Free Speech: The Policy Reasons for Rejecting a Per Se Rule Precluding Speech Rights*, 46 B.C. L. REV. 893 (2005); Ruth L. Davison & John L. Strobe, *Permission v. Academic Freedom and Free Speech: A Review of Urofsky v. Gilmore*, 149 ED. LAW REP. 1 (2001); Note, *Constitutional Law—First Amendment—Academic Freedom—Fourth Circuit Upholds Virginia Statute Prohibiting State Employees from Downloading Sexually Explicit Material*, 114 HARV. L. REV. 1414 (2001).

187. *E.g.*, *Stronach v. Va. State Univ.*, No. 3:07CV646-HEH, 2008 WL 161304, at *3 (E.D. Va. Jan. 15, 2008) (“However definite the university’s right to academic freedom is after *Sweezy*, it is clear that it is the *university’s* right and not the *professor’s* right.”); *Martinez v. Univ. of P.R.*, No. CIV.06 1713 JAF, 2006 WL 3791360, at *3 (D.P.R. Dec. 22, 2006) (“Plaintiff’s academic freedom claims must fail because ‘[t]o the extent the Constitution recognizes any right of “academic freedom” above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the university, not in individual professors.’”) (quoting *Urofsky v. Gilmore*, 216 F.3d 401, 409 (4th Cir. 2000)).

188. This phrase appears in Am. Ass’n of Univ. Professors, *Protecting an Independent Faculty Voice: Academic Freedom After Garcetti v. Ceballos*, ACADEME (Nov.-Dec. 2009), at 69.

189. 547 U.S. 410 (2006).

recent Supreme Court decision.

The question presented in *Garcetti* was “whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee’s official duties.”¹⁹⁰ Richard Ceballos was a long-serving deputy district attorney in the Los Angeles County District Attorney’s Office.¹⁹¹ A defense attorney contacted Ceballos about a pending criminal case and told Ceballos that the affidavit that a sheriff’s deputy had prepared in support of a search warrant contained lies and serious factual errors.¹⁹² The defense attorney said he had prepared a motion to challenge the warrant, and asked Ceballos to review the case; Ceballos read the deputy sheriff’s affidavit, then visited the location described in the affidavit.¹⁹³ With his own eyes Ceballos saw serious discrepancies in the affidavit’s description of the location.¹⁹⁴ Ceballos spoke on the telephone to the deputy sheriff who had prepared the affidavit and did not receive a satisfactory explanation for the discrepancies in the affidavit.¹⁹⁵ So Ceballos prepared a disposition memorandum recommending that the criminal proceeding be discontinued on the basis that the affidavit supporting the search warrant failed to establish probable cause for the search.¹⁹⁶

Ceballos informed the defense attorney that he believed the affidavit contained false statements, and the attorney subpoenaed him to testify at the motion hearing.¹⁹⁷ In his testimony, Ceballos expressed his misgivings about the validity of the warrant. The court nevertheless denied the defense attorney’s motion to quash, and the criminal prosecution proceeded.¹⁹⁸ Ceballos claimed that, after he testified as a defense witness at the motions hearing, he was subjected to retaliatory employment actions by his supervisor, including transfer to another courthouse and denial of a promotion.¹⁹⁹ He filed suit, alleging that his supervisor had violated his First Amendment free-speech rights by retaliating against him because of what he had said in his disposition memorandum and court testimony.²⁰⁰

The starting point for the Supreme Court’s analysis was the venerable balancing test for public employee speech in *Pickering v. Board of Education*.²⁰¹ In that case, *Pickering*, a public school teacher, wrote a letter

190. *Id.* at 413.

191. *Id.*

192. *Id.* at 413–14.

193. *Id.* at 414.

194. *Id.*

195. *Garcetti v. Ceballos*, 547 U.S. 410, 414 (2006).

196. *Id.*

197. *Id.* at 414–15.

198. *Id.*

199. *Id.* at 415.

200. *Id.*

201. 391 U.S. 563 (1968).

to the editor criticizing the local board of education and superintendent of schools for the way in which they had handled past proposals to raise revenue. Under *Pickering*, the First Amendment protects a public employee's right to speak as a citizen addressing matters of public concern.²⁰² *Pickering* requires a reviewing court to balance the interests of the teacher, as a citizen, in commenting upon matters of public concern against the interest of the employer in promoting the efficiency of the public services it performs through its employees. The Court found in *Pickering* that the teacher's speech "neither [was] shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally."²⁰³

"The controlling factor in Ceballos' case," stated the Court:

[I]s that his expressions were made pursuant to his duties as a calendar deputy. That consideration—the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case—distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline. 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.²⁰⁴

The Court's holding, however, came with two caveats. First, it was important to the Court's reasoning that the parties stipulated that Ceballos's speech was made pursuant to his employment duties.²⁰⁵ The Court recognized that, in some instances, it might be difficult to draw the line between employment-related and non-employment-related utterances. "We thus have no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate."²⁰⁶

Second, and the reason why *Garcetti* subsequently received so much attention in higher education circles, Justice Anthony Kennedy's opinion for the Court, in a carefully worded dictum, carved out a potential special rule for academic speech. Justice Kennedy was responding to a short sentence in Justice David Souter's dissent, in which Justice Souter said, "I have to hope 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 . . .

202. *See id.* at 568.

203. *Id.* at 572.

204. *Garcetti*, 547 U.S. at 421.

205. *See id.*

206. *Id.* at 424.

official duties.”²⁰⁷ Justice Kennedy responded:

Justice Souter suggests today’s decision may have important ramifications for academic freedom, at least as a constitutional value. There is some argument 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. We 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*.²⁰⁸

In the four years since *Garcetti* was decided, the academic community has watched anxiously to see what content lower courts would give the academic freedom caveat in Justice Kennedy’s opinion.²⁰⁹ Case results are decidedly mixed.

In *Hong v. Grant*,²¹⁰ a tenured professor asserted that the University of California, Irvine’s decision to deny him an annual merit raise was motivated in part by administrative irritation over his criticisms of his department chair and dean.²¹¹ The university filed a motion for judgment in its favor, arguing to the court that under *Garcetti* the faculty member had not engaged in constitutionally protected speech when he took it upon himself to criticize the department chair.²¹² The question under *Garcetti*, the court said at the outset, was whether the professor’s words were uttered pursuant to his official duties—if they were, then they were not protected by the First Amendment because an employer has the right to restrict speech that owes its existence to the employee’s professional responsibilities.²¹³ To determine the scope of his official duties, the court examined the faculty handbook and other institutional policies and concluded that faculty members were expected to perform “a wide range of academic, administrative and personnel functions As an active participant in his institution’s self-governance, [the professor] has a professional responsibility to offer feedback, advice and criticism about his department’s administration and operation from his perspective as a tenured, experienced professor.”²¹⁴ The court concluded that, because the faculty member’s comments related to institutional governance, they “were

207. *Id.* at 438 (Souter, J., dissenting).

208. *Id.* at 425 (emphasis added).

209. The AAUP maintains a special link on its web site for the compilation and analysis of post-*Garcetti* cases in higher education. The link takes the form of a bright red button on the AAUP home page labeled “Speak Up—Speak Out—Protect the Faculty Voice.” <http://www.aaup.org/AAUP/protectvoice> (last visited April 8, 2010).

210. 516 F. Supp. 2d 1158 (C.D. Cal. 2007).

211. *Id.* at 1160.

212. *Id.* at 1160–61.

213. *Id.* at 1161.

214. *Id.* at 1166–67.

made pursuant to his official duties as a faculty member and therefore do not deserve First Amendment protection. [The University] is entitled to unfettered discretion when it restricts statements an employee makes on the job and according to his professional responsibilities.”²¹⁵

In *Renkin v. Gregory*,²¹⁶ a tenured professor applied for a grant from the National Science Foundation (NSF), and submitted a proposed budget along with his application.²¹⁷ The budget included a university salary match that committed university funds to defray a portion of the project budget.²¹⁸ The university approved the proposal.²¹⁹ But when the faculty member subsequently refused to execute a standard-form university letter apportioning the university’s matching funds and accused the dean of underbudgeting the project and contravening NSF regulations by allocating portions of the matching funds for improper purposes, the university cancelled the NSF grant and returned the funds to NSF.²²⁰ The professor instituted suit against the university and the dean, alleging that the university had effectively reduced his pay by returning the grant funds and damaged his standing in the professional community by terminating the NSF grant, all as retaliation for the exercise of his First Amendment rights when he complained about the University’s misuse of matching funds.²²¹

The Court’s analysis was straight out of *Garcetti*. When public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the First Amendment does not insulate their communications from disciplinary consequences.²²² Determining what falls within the scope of an employee’s duties is a practical exercise that focuses on the duties an employee actually is expected to perform. The court quoted from the faculty handbook to the effect that faculty members are “responsible for teaching, researching, and public service.”²²³ Under the research heading, the court found language in the university’s promotion and tenure policy gauging research productivity by “a faculty member’s grants and the projects developed from the grants.”²²⁴ The court rendered judgment in the university’s favor:

215. *Id.* at 1168. The court made no mention of Justice Souter’s reference in his *Garcetti* dissent to academic freedom or Justice Kennedy’s caveat about the applicability or non-applicability of the *Garcetti* decision to “academic scholarship or classroom instruction.” *Garcetti*, 547 U.S. at 425.

216. 541 F.3d 769 (7th Cir. 2008).

217. *Id.* at 770–71.

218. *Id.* at 771.

219. *Id.*

220. *Id.* at 771–72.

221. *Id.* at 773.

222. *Renkin v. Gregory*, 541 F.3d 769, 773 (7th Cir. 2008).

223. *Id.*

224. *Id.* at 770.

Renken complained to several levels of University officials about the various difficulties he encountered in the course of administering the grant as a PI [Principal Investigator] In so doing, Renken was speaking as a faculty employee, and not as a private citizen, because administering the grant as a PI fell within the teaching and service duties that he was employed to perform.²²⁵

Hong, Renkin and the vast majority of cases applying *Garcetti* in the faculty context involved faculty utterances at some remove from what Professor Byrne called “academic speech”²²⁶—speech made during the course of classroom teaching or the conduct of research. *Sheldon v. Dhillon*²²⁷ is one of the few reported cases in which a faculty member was disciplined for speech uttered in a classroom—and, perhaps not surprisingly, the outcome was different from the outcomes in *Hong* and *Renkin*. June Sheldon taught biology and microbiology at San Jose Community College.²²⁸ In the summer of 2007 she taught a course in human genetics.²²⁹ During class a student asked Ms. Sheldon to explain how heredity does or does not affect homosexual behavior in males and females.²³⁰ Sheldon answered the student’s question by “noting the complexity of the issue, providing a genetic example mentioned in the textbook, and referring students to the perspective of a German scientist named Dr. Gunter Dörner, who had “found a correlation between maternal stress, maternal androgens, and male sexual orientation at birth,” while cautioning that his “views were only one set of theories in the ‘nature versus nurture’ debate.”²³¹ She briefly described what the students would learn later in the course, that “homosexual behavior may be influenced by both genes and the environment.”²³²

After class, a student filed an anonymous complaint with the dean accusing Sheldon of making “offensive and unscientific statements.”²³³ The student’s complaint was investigated by the dean in accordance with institutional policy, and several months later the dean sent Ms. Sheldon her findings: “Sheldon was teaching misinformation as science, and her

225. *Id.* at 774. As in the *Hong* case, the court in *Renkin* rendered its judgment with no mention or discussion of Justice Souter’s dissenting reference to academic freedom or Justice Kennedy’s suggestion that *Garcetti* might apply differently to “academic scholarship or classroom discussion.”

226. *See supra* note 99 and accompanying text.

227. No. C-08-03438 RMW, 2009 WL 4282086 (N.D. Ca. Nov. 25, 2009).

228. *Id.* at *1.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at *2.

misstatements were grievous enough” to warrant her termination.²³⁴ Ms. Sheldon filed a lawsuit against the college alleging that the college had retaliated against her in violation of her First Amendment rights by terminating her employment based on her answer to a question posed by a student in one of her classes.²³⁵

For one of the few times since the *Garcetti* case was decided, the faculty member prevailed. The court started by noting that the college premised its argument on the fact that, when she was teaching her class, Ms. Sheldon was performing her duties as a college employee, meaning that her speech was not constitutionally protected under *Garcetti*.²³⁶ Not so, said the court, and quoted Justice Kennedy’s caveat on speech in the classroom. “Thus,” said the court, “*Garcetti* by its express terms does not address the context squarely presented here: the First Amendment’s application to teaching-related speech. For that reason, defendants’ heavy reliance on *Garcetti* is misplaced.”²³⁷ The court framed a decisional rule that, to faculty proponents of academic freedom, undoubtedly acted as a healing balm after some of the language in other post-*Garcetti* decisions: “[T]eachers have First Amendment rights regarding their classroom speech. . . . If the [institution] acted in retaliation for her instructional speech, those rights will have been violated unless the defendants’ conduct was reasonably related to legitimate pedagogical concerns.”²³⁸

Two factors complicate the *Garcetti* holding when it is applied in the context of college and university faculty speech. One is that there is substantial lack of clarity as to what a faculty member’s “official duties” are. Faculty litigants typically advocate a narrow view, while—at least in the post-*Garcetti* cases decided so far—courts have taken a more expansive view as to the official duties of faculty members. The second factor complicating *Garcetti* analysis is the uncertainty over the meaning of Justice Kennedy’s academic-speech savings provision, and the very scant attention it has received in ensuing lower court decisions. Even when a faculty member speaks squarely within the ambit of his official duties, the Kennedy caveat suggests that there are certain categories of expression at the epicenter of the faculty member’s identity as a faculty member—remarks made to students during a class or views expressed in scholarly publications.

Once faculty expression leaves the classroom or the journal publication, it is still an open question whether courts will recognize other duties—even duties that look for all intents and purposes like duties that warrant academic freedom protection, duties like giving students mentoring advice,

234. *Id.*

235. *Id.*

236. *Id.* at *3.

237. *Id.*

238. *Id.* at *4.

serving as the advisor for a student club or fraternity, participating in rank and tenure decisions, expressing to a dean one's displeasure over an administrative decision, or managing a grant budget—as meriting an academic freedom exception to the pretty straightforward rule enunciated for public-sector employees in *Garcetti*.

In a knowledgeable treatment of the *Garcetti* case that appeared in this journal a year after the case was decided, Larry Spurgeon described the holding in *Garcetti* as “elusive.”²³⁹ Professor Spurgeon warned that if *Garcetti* is applied to the utterances of faculty members at public universities without teasing out the meaning of Justice Kennedy's academic-speech caveat, “it could provide a blunt weapon to those who would challenge the content of a professor's expression.”²⁴⁰ Other scholars have sounded the same note: Professor Michael Olivas, who serves as General Counsel of the AAUP, wrote in an article that appeared on the Association's web site that “[d]isappointing rulings are already flowing from the decision. I am concerned about the more generalized *Garcetti* fears and silencing that occur in hard economic and political times. The professoriate is being restructured, and it is occurring on cats' feet.”²⁴¹ The AAUP commissioned a task force to study *Garcetti*, and in a report published in its journal *ACADEME* last year the Association sounded a dire warning about the implications of *Garcetti* for faculty nationwide²⁴²:

[I]n several [post-*Garcetti*] cases squarely addressing faculty speech, the lower federal courts have so far largely ignored the *Garcetti* majority's reservation, posing the danger that, as First Amendment rights for public employees are narrowed, so too may be the constitutional protection for academic freedom at public institutions, perhaps fatally. This report reaffirms the professional notion of academic freedom as existing apart from, and regardless of, any given mechanism for recognition of a legal right to academic freedom and situates a range of faculty speech firmly within the reservation articulated by the *Garcetti* majority.²⁴³

It is, of course, too soon to tell whether dire predictions about *Garcetti*'s

239. Larry D. Spurgeon, *A Transcendent Value: The Quest to Safeguard Academic Freedom*, 34 J.C. & U.L. 111, 149 (2007).

240. *Id.*

241. Michael A. Olivas, *Garcetti: More Chilling than the Unabomber* (undated), <http://www.aaup.org/AAUP/protectvoice/opinions/Olivasop.htm> (last visited on April 8, 2010).

242. Am. Ass'n of Univ. Professors, *supra* note 188.

243. *Id.* at 67. See, e.g., *Kerr v. Hurd*, 2010 U.S. Dist. LEXIS 24210 (S.D. Ohio Mar. 15, 2010) (the southern district of Ohio decided that (a) an academic physician's speech to his medical students on various types of delivery is speech on a matter of public concern, and (b) although that speech was within his 'hired' speech as a teacher of obstetrics, and that there is an academic exception to *Garcetti*).

potential impact on faculty expression will be realized in lower court interpretations of Justice Kennedy's cryptic language. Four years out, however, two conclusions can be voiced with confidence. Lower courts will continue to render inconsistent decisions. And as time passes *Garcetti* will be viewed by faculty members and administrators alike as a missed opportunity—a chance the Supreme Court could have seized to harmonize doctrinally divergent lines of cases on academic freedom, but for some reason chose instead to duck.

V. CONCLUSION

Here, then, are the salient features of a half-century of decided case law on the academic freedom rights of the nation's faculty members:

Those rights have been articulated in precious few Supreme Court decisions—hardly more than a half-dozen significant cases in fifty years.

Those rights have been diluted by lack of consensus over what academic freedom protects and who can invoke its protections. Some courts interpret Supreme Court precedents to extend academic freedom protections to individual faculty members; others interpret the same Supreme Court precedents as holding that only colleges and universities themselves are entitled to invoke academic freedom.

When threats to institutional autonomy arise from state legislatures and other sources external to the academic community, and when faculty members and institution are allied in an effort to oppose external meddling interference, academic freedom as a decisional determinant is strongest. When faculty members raise academic freedom as a defense to institutional discipline or adverse action, courts are surprisingly but consistently hostile and faculty members lose far more cases than they win.

More than half a century after the AAUP cogently articulated the rationale for academic freedom in the 1940 *Statement of Principles*, and more than half a century after the Supreme Court used the phrase for the first time in *Adler v. Board of Education of the City of New York*, academic freedom remains “poorly understood and ill-defined” as a jurisprudential principle guiding courts in the adjudication of disputes between faculty members and the institutions for which they work.²⁴⁴

244. Olivas, *supra* note 140, at 1835.