

# CONSTITUTIONAL ACADEMIC FREEDOM AND ANTI-AFFIRMATIVE ACTION LAWS

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## INTRODUCTION

In the wake of the passage of state “anti-affirmative action” constitutional provisions, most recently in Michigan, some who wish affirmative action to continue have turned to the courts. The adoption of Proposal 2 in Michigan sparked litigation challenging the new state constitutional provisions on equal protection, Title VI, and Title IX grounds.<sup>1</sup> So far, the challenges have been unsuccessful.<sup>2</sup> After the adoption of Proposition 209—California’s Proposal 2 counterpart—similar challenges were similarly unsuccessful.<sup>3</sup> The Michigan and California laws prohibit discrimination or preferential treatment on the basis of race, sex, color, ethnicity, or national origin in public employment, public

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1. *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237 (6th Cir. 2006); *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 592 F. Supp. 2d 948 (E.D. Mich. 2008).

2. *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.* is, at the time of this article, on appeal awaiting a decision. A list of pending cases at the Sixth Circuit Court of Appeals can be found at [http://www.ca6.uscourts.gov/case\\_reports/rptPendingDistrict\\_MIE.pdf](http://www.ca6.uscourts.gov/case_reports/rptPendingDistrict_MIE.pdf).

3. *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997).

education, and public contracting. While the possible scope of the laws cut broadly, the flash point has been college and university admissions.<sup>4</sup>

In addition to the legal challenges, the wisdom of these laws has been questioned on more practical grounds. For instance, the plunging minority enrollment in the California school system since the passage of Proposition 209 in 1996 has been highlighted as an alarming yet inevitable result of the race-blind admissions process.<sup>5</sup> There has been a similar result in Michigan.<sup>6</sup> Also questioned is the appropriateness of the ballot initiative system, with its susceptibility to political whim and majority rule, as a tool to eliminate a method of minority protection.<sup>7</sup> Both California and Michigan have provisions in their state constitutions granting their institutions of higher education substantial autonomy from the state legislature.<sup>8</sup> The purpose behind these provisions is to provide colleges and universities some insulation from the political whims of state legislatures so that they can effectively serve their proper functions—teaching and research. But by enacting constitutional provisions though the use of ballot initiatives, proponents of the anti-affirmative action laws have effectively breached those political safeguards. If legislatures are considered improper forums for making delicate academic decisions, then the blunt tool of the electorate at large<sup>9</sup> would be an even less desirable decision maker. This article asks whether colleges and universities receive protection from the Federal Constitution; more specifically, whether academic freedom is a right protected by the First Amendment to the Federal Constitution and whether it protects the admissions processes of institutions of higher education.

After the passage of Proposal 2 in Michigan, several advocacy groups joined together in a lawsuit seeking a preliminary injunction preventing the

4. See BARBARA A. PERRY, *THE MICHIGAN AFFIRMATIVE ACTION CASES* 166–70 (2007) (describing how the Supreme Court's decisions in the well-publicized admissions policy cases *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003) led to Proposal 2).

5. Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075, 1133–43 (2009).

6. At University of Michigan Law School, the minority admittance rate has fallen from 39.6% before the adoption of Proposal 2, to 5.5%. JUDITH AREEN, *HIGHER EDUCATION AND THE LAW* 655 (2009), citing Elizabeth Reden, *Now and Then: Minorities and Michigan*, INSIDE HIGHER ED, June 25, 2007, available at <http://insidehighered.com/news/2007/06/19/michigan>.

7. Jodi Miller, “*Democracy in Free Fall*”: *The Use of Ballot Initiatives to Dismantle State-Sponsored Affirmative Action Programs*, 1999 ANN. SURV. AM. L. 1 (1999). For a withering attack on direct democracy more generally see Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293 (2007).

8. Neal H. Hutchens, *Preserving the Independence of Public Higher Education: An Examination of State Constitutional Autonomy Provisions for Public Colleges and Universities*, 35 J.C. & U.L. 271 (2009).

9. Aside from the unlikelihood that most voters are well informed in areas such as college and university admissions, ballot initiatives by their nature must boil the issue down to a yes or no question. Miller, *supra* note 7, at 31.

abandonment of the old admissions policies at Michigan's state universities.<sup>10</sup> The universities, defendants in the action, argued by way of a cross claim against the governor—also a defendant—that the anti-affirmative action law violated their academic freedom. In *Coalition to Defend Affirmative Action v. Granholm*, the Sixth Circuit Court of Appeals responded to the universities' argument this way:

[I]t is one thing to defer to a state university's judgment in deciding who may attend that university—and to defer in the process to the university's academic freedom that “long has been viewed as a special concern of the First Amendment . . .” [and] quite another to say that the First Amendment in general and academic freedom in particular prohibit a State from eliminating racial preferences. . . . The Universities mistake interests grounded in the First Amendment—including their interest in selecting student bodies—with First Amendment rights.<sup>11</sup>

This assertion, however, begs the question. It is true that the phrase “academic freedom” appears nowhere in the text of the Constitution. It also would be hard to argue that academic freedom is “deeply rooted in this Nation's history and tradition.”<sup>12</sup> (As public colleges and universities as we now know them did not materialize in the United States until after the Civil War, it is exceedingly unlikely that academic freedom was thought of or debated by the drafters or ratifiers of the Constitution.<sup>13</sup>) But the paucity of textual and historical support for a constitutional right of academic freedom has not stopped courts from recognizing that colleges and universities receive some type of special status under the Constitution. So the question remains whether academic freedom rises to the level of a constitutional right, or is it merely a deferential gloss used by courts to favor a particularly valuable First Amendment actor—a First Amendment “interest.”

It has been said that academic freedom is “a law of concurrences and footnotes.”<sup>14</sup> This statement captures well the secondary role academic freedom has played in many of the cases in which it has appeared. But it should not be taken to indicate that the line has limited precedential value. It is true that some of the seminal statements made by the Supreme Court

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10. The Michigan Constitution specifically incorporates three universities: University of Michigan, Michigan State University, and Wayne State University. See MICH. CONST. OF 1963 art VII, § 5. These three universities were defendants in the case.

11. *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 247 (6th Cir. 2006).

12. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

13. David M. Rabban, *A Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment*, LAW & CONTEMP. PROBS., 227, 237–38 (1990).

14. Jeff Todd, Note, *State Universities v. State Government: Applying Academic Freedom to Curriculum, Pedagogy, & Assessment*, 33 J.C. & U.L. 387, 389 (2007).

regarding academic freedom have appeared in concurring opinions, but they have been endorsed by subsequent majority opinions.<sup>15</sup> And the fact that a statement appears in a footnote does not necessarily indicate its importance.<sup>16</sup> Academic freedom's relegation to the periphery of the Court's opinions, however, *has* affected its precedential value in that it has prevented academic freedom from receiving a solid grounding in the First Amendment—one that distinguishes it from and likens it to other First Amendment rights.

When the courts have invoked academic freedom, it has usually been in one of two ways. The first way has been on behalf of professors when state statutes threaten their ability to execute their duties without fear of reprisal.<sup>17</sup> Because of the posture of these cases—an individual alleging state interference with their speech or expression—the courts' application of academic freedom can be seen as invoking a gloss on, or crafting a particular application of, individual First Amendment rights of speech or expression. But it can also be interpreted as an application of a distinct right, also grounded in the First Amendment, supported by particular First Amendment values.

The second way academic freedom comes up in opinions has been in controversies between students or potential students and the institutions themselves. In this category academic freedom is usually invoked on behalf of the college or university. This has led courts to balance the particular right invoked by the student (usually speech, expression, equal protection, or due process) with the interests of the college or university. This has often resulted in students' rights being subordinated to those of colleges and universities in the name of academic freedom.<sup>18</sup> In those opinions where academic freedom has been invoked to protect the decision of an academic institution, the particular court could merely be deferring to a decision-maker with greater expertise—as the Sixth Circuit seems to be suggesting in *Granholm*<sup>19</sup>—or recognizing a distinct constitutional right of the college or university grounded also in particular First Amendment values.

It is because the two areas where the courts have granted special

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15. The famous concurrences are *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). They were incorporated into majority opinions in *Keyishian v. Bd. of Regents of the State of New York*, 385 U.S. 589 (1967) and *Grutter v. Bollinger*, 539 U.S. 306 (2003). *See infra* Part II.

16. *See, e.g.*, *United States v. Caroline Prods. Co.*, 304 U.S. 144, n. 4 (1938) (articulating, in a footnote, the idea that different levels of review would be used for different types of constitutional claims).

17. *See, e.g.*, *Sweezy*, 354 U.S. at 234; *Keyishian*, 385 U.S. at 589.

18. *See, e.g.*, *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985); *Bakke*, 438 U.S. at 265; *Grutter*, 539 U.S. at 306.

19. *See Granholm*, 473 F.3d and accompanying text.

recognition to academic freedom don't necessarily intersect, and because the controversies tend to implicate other constitutional rights, that the contours of academic freedom have remained murky. But there certainly seems to be a constitutional enclave inhabited by colleges and universities *and* their faculty. The two areas of special First Amendment treatment can be thought of as particular manifestations of a constitutional value that might, in fact, have the force of a constitutional right.

Part I of this article looks at the values underpinning the First Amendment for evidence that it includes a constitutional right of academic freedom among its protections. Part II will analyze the Supreme Court's line of academic freedom cases with an eye towards whether the Court has recognized a constitutionally supported right of academic freedom. Finally, in order to discern whether constitutional academic freedom can protect college and university admissions policies—and thereby provide a shield against the anti-affirmative action laws—Part III addresses the question whether academic freedom protects the faculty, the students, the institution or whether academic freedom primarily protects the *academic endeavor itself* and therefore protects each higher education actor only insofar as they are furthering that endeavor.

#### I. THE UNIQUE FIRST AMENDMENT VALUE OF THE COLLEGE OR UNIVERSITY

As an initial matter, it is important to establish why a value analysis should be a compelling method of interpreting the First Amendment. The text of the First Amendment does not, without some supporting theory, provide meaningful guidance to those charged with applying it. For instance, it certainly is uncontroversial to state that the text of the Speech Clause—“Congress shall make no law . . . abridging the freedom of speech”<sup>20</sup>—is over-inclusive. Ever since the Supreme Court first began developing its First Amendment jurisprudence in 1919<sup>21</sup> it has been understood that it was not “intended to give immunity for every possible use of language.”<sup>22</sup> Most would also agree that a strict reading is under-inclusive; it must protect more than merely the “interchange of thoughts in spoken words”<sup>23</sup>; it contemplates other manner of expression as well. Thus courts and scholars—when developing judicial constructs for applying the First Amendment—rely on the animating values behind the Amendment. And it is a commitment to the underlying values—which give meaning to the text—that has shaped the doctrine of the First Amendment. Amongst the most commonly cited values that the First Amendment protects are

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20. U.S. CONST. amend. I.

21. *Schenk v. United States*, 249 U.S. 47 (1919).

22. *Frohwerk v. United States*, 249 U.S. 204, 206 (1919).

23. Webster's Collegiate Thesaurus 767 (1976).

truth-seeking and the democratic value of dissent.<sup>24</sup> The modern college or university plays a unique role under both these theories. To identify more clearly how a university specially serves these values, it is necessary to keep in mind the two major functions of the college or university—research and teaching. The way that a college or university promotes these First Amendment values differs depending on whether it is viewed in its teaching or research capacity.

#### A. Truth-Seeking Theory

This theory, most famously advanced by John Stuart Mill<sup>25</sup> and first noted in the Supreme Court through Justice Holmes' dissent in *Abrams v. United States*<sup>26</sup>, begins with the presumption that nobody is infallible and no idea unchallengeable. It continues with the proposition that the veracity of an idea is best proved by whether it survives when tested. Thus the more ideas floating around testing each other, the better. This is the concept alluded to when the metaphor of “the marketplace of ideas” is used.

Colleges and universities, in their research capacities, are first and foremost truth-seeking institutions. There is a difference, though, between the truth-seeking nature of the college or university and that which is protected by the First Amendment when applied more broadly. The “marketplace of ideas” envisioned by Mill or Holmes encompasses society as a whole, a quasi-Darwinian bazaar where the profound, the absurd, and the mundane battle, with truth coming out on top. Anyone can participate; any idea must be heard. Whether such a chaotic market actual leads to truth may well be debated,<sup>27</sup> but it is in contrast to it that the unique truth-seeking value of the college or university becomes clear. As noted in the *AAUP 1915 Declaration of Principles on Academic Freedom and Academic Tenure*<sup>28</sup>, the professors' value to their college or university—and by extension, the college or university's value to society—is realized when they “deal at first hand, after prolonged and specialized technical training, with the sources of knowledge; and [when they] impart the results

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24. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRACTICE AND PRINCIPLES* (3rd ed. 2006).

25. JOHN STUART MILL, *ON LIBERTY*, reprinted in *THE FIRST AMENDMENT: A READER* 58–65 (John H. Garvey & Frederick Schauer eds., 1996). Holmes studied Mill as a young man and met him several times when he traveled to Europe in 1866. MARK DEWOLFE HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS 1841–1870* 226–29 (1957). For an interesting discussion of the effect of Mill's philosophy on Holmes see *id.* at 212–14.

26. 250 U.S. 616 (1919).

27. See *infra* note 30 and accompanying text.

28. 1915 DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM AND ACADEMIC TENURE reprinted in *AAUP POLICY DOCUMENTS & REPORTS* 291–301 (10th ed. 2006) [hereinafter “1915 DECLARATION”]. For a discussion of this document and its surrounding circumstances see *infra* notes 133–35 and accompanying text.

of their own and of their fellow-specialists' investigations and reflection, both to students and to the general public, without fear or favor."<sup>29</sup>

The college or university can thus be seen as serving a special truth-seeking role—separate from that of free speech more generally—in two ways. First, in a world of enormous complexity and specialization, truth-seeking in many areas can be done only with a foundation of background knowledge. The college and university system provides society with such experts by vetting the professor at the tenure stage and by supporting the professor in his or her research. Second, the existence of a structured, self-policed truth-seeking regime cures some of the flaws in the marketplace of ideas analogy. For instance, it is not too hard to imagine that the idea that wins out is not the most truthful one, but instead is the most attractive one, or the one spoken the loudest.<sup>30</sup> The college or university, with its careful self-policing through peer review and professional standards, may well provide a better version of the marketplace of ideas than that provided by society overall. So, if the First Amendment's protections are to be applied in a way that fosters truth-seeking, the college or university should be at the center of that protection.

The truth-seeking value of the college or university in its teaching capacity is not as direct. The primary way that colleges and universities serve truth-seeking by teaching is by producing the next generation of truth-seekers. By training students in their respective disciplines, as well as in such general truth-seeking skills as critical thinking, the college or university is providing society with better equipped truth-seekers. Students also aid in assuring that the college or university is serving its research function well. As with any self-policing group, entrenchment and orthodoxy could hamper the proper truth-seeking function of the professoriate. The professors' contact with students—from deciding how best to teach basic level course to fielding an unexpected question—should force them to readdress the basics of their profession, those things that they may have otherwise taken for granted long ago. In doing so, the foundation of their discipline—that which they are teaching the students—is tested. It should be noted that a diverse student body, bringing as it would varied perspectives, background knowledge, and learning styles, would be more effective in this regard than a monolithic student body.

### B. Democratic Theory

Democratic theory is rooted in the idea of self-governance and thus places the First Amendment in a structural posture within the Constitution. It has two related aspects. The first is that a government based on universal

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29. 1915 DECLARATION, *supra* note 28, at 294.

30. For a fuller explanation of this theory see CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987); Owen Fiss, *Why the State?* 100 HARV. L. REV. 781, 787–88 (1987).

suffrage presumes an informed electorate. The First Amendment, on this account, protects against those things that would stand in the way of the electorate becoming informed or capable. Some argue that a democratic theory of the First Amendment should protect only political discourse.<sup>31</sup> But, as Alexander Meiklejohn put it, “Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express.”<sup>32</sup> Meiklejohn’s formulation includes something more than merely being informed about public issues. It goes further to stress that complete personal development is important for public decision-making. This understanding extends the ambit of First Amendment protection far beyond just the political.

A second aspect of democratic theory, closely related to the first, is that criticism of the government is an important check on abuse of power.<sup>33</sup> This has been recognized by the Supreme Court as “the central meaning of the First Amendment.”<sup>34</sup> The theory is that when government oversteps its constitutionally prescribed bounds, public outcry will chase it back. This idea fits well with the structure that our Constitution created—one of checks and balances. The idea’s potency is regularly reinforced by news of governments around the world suppressing dissident speech.<sup>35</sup>

The valuable role that the college or university plays under a democratic theory of the First Amendment is primarily rooted in its teaching function. That is, the role that education in general and higher education in particular play in developing “the intelligence, integrity, sensitivity, and generous devotion to the general welfare” that Meiklejohn argued was required of all voters.<sup>36</sup> The importance of schooling to the health of a democracy was well recognized by the Founding Fathers. Benjamin Franklin, in a proposal

31. For an argument that *only* neutral principles and some political speech is protected by the First Amendment see Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

32. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961).

33. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 523 (1977).

34. *New York Times v. Sullivan*, 376 U.S. 254, 273 (1964).

35. See, e.g., *Egypt Severs Internet Connection Amid Growing Unrest*, BBC, Jan. 28, 2011, available at <http://www.bbc.co.uk/news/technology-12306041> (describing Egypt’s attempt to control mass protests by eliminating internet access); *Internet Censorship in China*, N.Y. TIMES, July 9, 2010, available at [http://topics.nytimes.com/topics/news/international/countriesandterritories/china/internet\\_censorship/index.html](http://topics.nytimes.com/topics/news/international/countriesandterritories/china/internet_censorship/index.html) (describing Chinese government control over internet in that country); Farnaz Fassihi, *Iranian Crackdown Goes Global*, WALL ST. J., Dec. 3, 2009, available at [http://online.wsj.com/article/SB125978649644673331.html?mod=googlenews\\_wsj](http://online.wsj.com/article/SB125978649644673331.html?mod=googlenews_wsj) (last visited January 16, 2011) (Iranian authorities intimidating expatriates who are speaking out against the current government).

36. Meiklejohn, *supra* note 32, at 255.



to start an academy in Pennsylvania said this: “The good Education of Youth has been esteemed by wise Men in all Ages, as the surest Foundation of the Happiness both of private Families and of Commonwealths.”<sup>37</sup> Benjamin Rush, in an effort to promote a national university said, “To conform the principles, morals, and manners of our citizens to our republican form of government, it is absolutely necessary that knowledge of every kind, should be disseminated through every part of the united states. [sic]”<sup>38</sup> As President, George Washington also supported a national university. In a speech to Congress, he said,

Nor am I less persuaded that you will agree with me in opinion, that there is nothing which can better deserve your patronage than the promotion of Science and Literature. Knowledge is, in every country, the surest basis of public happiness. In one in which the measures of government receive their impression so immediately from the sense of the community as in ours, it is proportionably essential. To the security of a free constitution it contributes in various ways; by convincing those who are entrusted with the public administration, that every valuable end of government is best answered by the enlightened confidence of the people; and by teaching the people themselves to know and to value their rights; to discern and provide against invasions of them; to distinguish between oppression and the necessary exercise of lawful authority; between burthens proceeding from a disregard to their convenience and those resulting from the inevitable exigencies of society; to discriminate the spirit of liberty from that of licentiousness—cherishing the first, avoiding the last, and uniting a speedy, but temperate vigilance against encroachments, with an inviolable respect to the laws.<sup>39</sup>

While the educational institutions envisioned by these founding fathers differ in important ways from those young people attend today, modern colleges and universities, by teaching young citizens, promote the same values they thought essential to a democracy.

Another way that colleges and universities provide First Amendment value under the democratic theory is that the institution—through its professors—can provide information on which voters have some reason to believe they can rely. Because of the increased complexity and specialization of almost everything, the average voter is unlikely to have the expertise in an area to make a truly informed opinion about an issue. The college or university—where a certain level of accomplishment is

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37. BENJAMIN FRANKLIN, PROPOSAL RELATING TO THE EDUCATION OF YOUTH IN PENNSYLVANIA (1749), *reprinted in* AREEN, *supra* note 6, at 29.

38. BENJAMIN RUSH, ADDRESS TO THE PEOPLE OF THE UNITED STATES (1787), *reprinted in* AREEN, *supra* note 6, at 32.

39. George Washington, Message to Congress (1790), *reprinted in* AREEN, *supra* note 6, at 33.

required to become a professor and research is vetted through the peer-review process—there is a place to turn for reliable information. The college or university can also provide a powerful check on government. The sort of protection afforded tenured professors allows the professoriate to counter false claims without fear of reprisal and the prestige that accompanies professorship lends weight to the opinions of an educated dissenter.

Finally, student movements also have a rich history as democratic actors. From Kent State to Tienanmin Square to Tehran, university students have been at the forefront of many important political movements. Colleges and universities, by their very nature, create communities of young, energetic, and idealistic people. They provide a nexus for these students to meet and organize, develop ideas and advocate positions. The examples mentioned above clearly implicate the second form of democratic theory; the value of the college or university as a government check. It also serves the first democratic value; the value of disseminating ideas to help inform the electorate.

So it is that colleges and universities specially serve the values supporting the First Amendment. The values promoted are familiar, but the ways in which the college or university serves those values are unique and uniquely valuable. We now turn to the courts to see if these special functions have been recognized and if so, whether they give rise to a constitutional right of academic freedom.

## II. THE SUPREME COURT AND ACADEMIC FREEDOM

In 1957, a majority on the Supreme Court first took up the cause of academic freedom in *Sweezy v. State of New Hampshire*.<sup>40</sup> During a period when the cold war atmosphere gave rise to many constitutionally questionable laws, just such a law was passed by the New Hampshire legislature.<sup>41</sup> The statute was construed to allow the Attorney General of New Hampshire to call before him possible subversives for questioning, a power he exercised over Paul Sweezy, a visiting professor at the University of New Hampshire. Sweezy refused to answer questions about his lectures and was held in contempt.<sup>42</sup>

In a plurality decision, the Supreme Court overturned his conviction on the grounds that the procedure that was followed in his case violated the procedural component of the Due Process Clause of the Fourteenth Amendment. But Chief Justice Warren, writing for the plurality, devoted a substantial portion of his opinion to the importance of the substantive rights that were implicated. He wrote: “[w]e believe that there unquestionably was an invasion of petitioner’s liberties in the areas of academic freedom

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

41. *Id.* at 236–37.

42. *Id.* at 235–45.

and political expression—areas in which government should be extremely reticent to tread[,] . . . rights which are safeguarded by the Bill of Rights and the Fourteenth Amendment.”<sup>43</sup> He went on to write “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.”<sup>44</sup> Having decided the case on other grounds, Chief Justice Warren declined to define these rights beyond broad recognition.<sup>45</sup>

Justice Frankfurter wrote a separate opinion, concurring with Chief Justice Warren as to the result but basing his opinion not on procedural due process, but the substantive rights at issue.<sup>46</sup> He explained that academic freedom was indispensable in a free society and, addressing the State’s argument that routing out subversive teaching justified the constitutional encroachment, Justice Frankfurter wrote: “When weighed against the grave harm resulting from governmental intrusion into the intellectual life of a university, such justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate.”<sup>47</sup> He went further and stated, “Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people’s well-being, except for reasons that are exigent and obviously compelling.”<sup>48</sup> Finally, Justice Frankfurter spoke of the “‘four essential freedoms’ of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”<sup>49</sup>

Chief Justice Warren had four votes and Justice Frankfurter had two. While they decided the case on different grounds, they both recognized something called academic freedom. Additionally, both Justices used language strongly suggesting that academic freedom might be a fundamental right. Chief Justice Warren invoked the Bill of Rights and the Fourteenth Amendment. Justice Frankfurter stated that governmental intrusion in this area could only be for reasons that are “exigent and obviously compelling.”<sup>50</sup> However, by splitting the majority on the grounds of the holding—with the plurality opinion resting on procedural

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43. *Id.* at 250.

44. *Id.*

45. *Id.* at 251. (“We do not now conceive of any circumstance wherein a state interest would justify infringement of rights in these fields. But we do not need to reach such fundamental question of state power to decide this case.”).

46. *Id.* at 266–77 (1957) (Frankfurter, J., concurring).

47. *Id.*

48. *Id.* at 262.

49. *Id.* at 263.

50. *Id.* at 262.

due process grounds—the two justices reduced their strong language in favor of a constitutional right of academic freedom to dicta. Additionally, their opinions regarding academic freedom seem to diverge in a major respect. Chief Justice Warren conceived of the right of academic freedom as adhering in the professoriate, while Justice Frankfurter, by laying out the “four essential freedoms of a university,” presented an academic freedom that seemed to adhere in the institution itself. This distinction is the source of much scholarly debate and will be taken up directly in Part III. For purposes of this part the distinction is of interest only to the extent that it casts light on whether academic freedom has the full force of a constitutional right.

Different inferences can be drawn from the Justices’ separate treatments of academic freedom. Justice Frankfurter, by addressing the institution instead of the individual, created a separation between academic freedom and other First Amendment rights. By placing the right with the institution, Justice Frankfurter seems to be claiming a unique right on colleges’ or universities’ behalf. Additionally, the “four freedoms” Justice Frankfurter listed in his concurrence—“to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study”—are hard to square with other First Amendment rights, such as speech or association.<sup>51</sup> Finally, that Justice Frankfurter claimed the right of academic freedom on behalf of a state institution was—and is—exceptional.<sup>52</sup> Overall, the posture taken by Justice Frankfurter seems to indicate that academic freedom is not merely an extension or particular application of other First Amendment rights, but a unique right standing alone.

On the other hand, by referring directly to “the petitioner’s liberties,” Chief Justice Warren’s interpretation of academic freedom fits more easily within freedom of speech doctrine. Because Chief Justice Warren—unlike Justice Frankfurter—declined to elaborate on the scope of academic freedom, his opinion may stand only for the proposition that a professor has the right to lecture without undue fear of state sanction. This certainly could be argued to be within the ambit of the Free Speech Clause of the First Amendment. Under this interpretation, the Court is recognizing that some previously acknowledged First Amendment rights, e.g. speech or expression, are of particular value in the college and university context; and thus receive greater protection from legislative encroachment when exercised there than in other contexts. It would follow that academic

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51. *Id.* at 263. Granted, the list is easier to square with current expressive association doctrine, *see* *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), but the first case in that line was not decided for another year. *NAACP v. Alabama*, 357 U.S. 449 (1958) (“freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.”).

52. See *infra* note 79 and accompanying text.

freedom is just a way of describing a particular form of protected speech that is at the core of the values the First Amendment protects. Understood this way, academic freedom is not a constitutionally supported right in and of itself, but a reason to take special notice of previously established First Amendment rights when they are exercised in educational institutions.

It is notable, however, that by recognizing that the Constitution protects state-employed professors' speech, Chief Justice Warren set the professor apart from other state employees. In 1957, public employees were granted very little, if any, First Amendment protection. Until *Pickering v. Board of Education*,<sup>53</sup> decided in 1968, public-employee speech was subject to a right/privilege distinction. Justice Holmes, while sitting on the Supreme Judicial Court of Massachusetts, described the doctrine this way in *McAuliffe v. Mayor of New Bedford*: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman . . . The city may impose any reasonable condition upon holding offices within its control."<sup>54</sup>

Viewed with this background in mind, Chief Justice Warren's assertion "that there unquestionably was an invasion of petitioner's liberties" seems to recognize that the professor's right to academic freedom is different in kind from the citizen's right to speak. It could be deduced from this that academic freedom is supported by more compelling—or at least different—constitutional values than speech exercised in other contexts. Subsequent public-employee speech cases have acknowledged this likelihood. Most recently in *Garcetti v. Ceballos*<sup>55</sup> the Supreme Court carefully avoided academic freedom while retooling the public-employee speech doctrine. In response to Justice Souter's concern that the new rule may "imperil First Amendment protection of academic freedom in public colleges and universities,"<sup>56</sup> Justice Kennedy, writing for the court, admitted that "[t]here 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." The Court, therefore, declined to "decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."<sup>57</sup> Thus, Chief Justice Warren's dicta illustrates how, even when overlapping with other

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53. 391 U.S. 563 (1968).

54. 291 N.E. 517 (Mass. 1892). This case, although a state decision, represents the Supreme Court's position at the time. See Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945 (2009).

55. 547 U.S. 410 (2006).

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

57. *Id.* at 425; cf. Neal H. Hutchens, *A Confused Concern of the First Amendment: The Uncertain Status of Constitutional Protection for Individual Academic Freedom*, 36 J.C. & U.L. 145 (2009).

constitutionally protected rights, academic freedom can be seen as distinct from them.

Finally, even though neither justice invoked the First Amendment directly, both justices noted that institutions of higher learning serve a special truth-seeking role. Chief Justice Warren said, “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.”<sup>58</sup> Justice Frankfurter echoed the sentiment: “For society’s good . . . inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible.”<sup>59</sup> Since public-employee speech did not yet receive the First Amendment protection that it does now, the justices seem to be recognizing that academic freedom is something distinct, compelling and rooted in traditional First Amendment values.

Several years after *Sweezy*, a majority of the Supreme Court signed onto a single opinion declaring “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[.]”<sup>60</sup> The case, *Keyishian v. Board of Regents of the University of the State of New York*, arose from another challenge to a state law intended to prevent “subversive” employees from obtaining state employment.<sup>61</sup> In a succinct pair of paragraphs the Court invoked the First Amendment, supported it with both the truth seeking theory<sup>62</sup> and the democratic theory,<sup>63</sup> and quoted a lengthy portion of Chief Justice Warren’s decision in *Sweezy*, thereby elevating it from dicta in a plurality opinion to the grounds for decision in a majority opinion.<sup>64</sup>

It might be argued that the Court, by stating that academic freedom is a “special concern of the First Amendment” as opposed to something like “a right grounded in the First Amendment,” hedged or sidestepped the issue whether academic freedom is a constitutional right. But the rest of the sentence belies this position. The full sentence—“That freedom [academic freedom] is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom[.]”<sup>65</sup>—is more easily understood as giving more, not less, First

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58. Hutchens, *supra* note 57, at 250.

59. *Id.* at 262.

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

61. *Id.* at 591–93.

62. *Id.* at 603. (“The classroom is peculiarly ‘the marketplace of ideas.’”).

63. *Id.* (“The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas”).

64. *Id.*

65. *Id.* Justice Powell, in his opinion in *Bakke*, quoted this passage but omitted the second clause in favor of material more relevant to that case.

Amendment protection to academic freedom.<sup>66</sup> If the First Amendment does not tolerate pall-casting laws in the classroom, then some form of academic freedom is certainly protected by the First Amendment. Justice Brennan's comment that academic freedom is a special concern of the First Amendment—far from hedging of the constitutional dimension of the right—positions the right closer to the core of First Amendment rights, like political speech. This position is in accord with the central First Amendment role that the Court claims for academic freedom under the truth-seeking and democratic theories.<sup>67</sup>

Ten years after *Keyishian*, Justice Frankfurter's more expansive description of academic freedom was taken up by Justice Powell in *Regents of the University of California v. Bakke*.<sup>68</sup> The Medical School of the University of California at Davis had an admissions policy of reserving 16 of its 100 positions in the class for "disadvantaged" minority students. Alan Bakke, a white male applicant, was rejected. He then challenged the admissions policy under Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. The Court splintered with Justice Powell casting the deciding vote. Four justices signed an opinion arguing that the admissions policy violated Title VI of the Civil Rights Act of 1964 and did not reach the constitutional question. Four more signed an opinion arguing that Title VI tracked the Equal Protection Clause and that the admissions program was permissible under both. Finally, Justice Powell wrote a separate opinion arguing that Title VI tracked the Equal Protection Clause, but that the program was in violation of both, thus tipping the scale against the admissions policy.

Justice Powell was careful to explain, however, that racial classifications were not *per se* unconstitutional when used in college or university admissions policies. He based his assertion on his understanding of academic freedom. He began by stating that "[a]cademic freedom, though not a specifically enumerated right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body."<sup>69</sup> After quoting Justice Frankfurter's "four essential freedoms" he said that the college or university is within its protected area of academic freedom when selecting a diverse student body. It is important to note, at this juncture, that the four freedoms of Justice Frankfurter were limited to decisions made "*on academic grounds*." It was therefore necessary for Justice Powell to establish legitimate academic grounds for making race-conscious

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66. In fact, the Court's strong language—"does not tolerate laws"—seems to suggest that laws infringing academic freedom would not be subject to strict scrutiny like other fundamental rights, but *per se* unconstitutional. This article does not take that position.

67. *See supra* Part I.

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

69. *Id.* at 312.

decisions. He did this by quoting the president of Princeton University<sup>70</sup> and by adding his own observation that “it is not too much to say that the “nation’s future depends upon leaders trained through wide exposure” to the ideas and mores of students as diverse as this Nation of many peoples.”<sup>71</sup>

Having found race-conscious admissions to be within the scope of academic freedom, Justice Powell was faced with conflicting constitutional rights: Bakke’s right to equal protection and the University of California’s “countervailing constitutional interest, that of the First Amendment.”<sup>72</sup> He split the baby by holding the University’s admissions program unconstitutional but providing the example of Harvard’s constitutionally sound race-conscious admissions program.<sup>73</sup>

Justice Powell’s treatment of academic freedom certainly seems to give it the weight of a constitutional right, but he was the only member of the Court to discuss it, and in the end, he found it to be outweighed by the Equal Protection Clause in that case. In *Grutter v. Bollinger*, however, his construction was elevated to a holding in a majority opinion.<sup>74</sup> *Grutter* involved an equal protection challenge to the race-conscious admissions process at the University of Michigan Law School. The case is most often cited for the proposition that diversity in education is a compelling interest and an individualized applicant review is narrowly tailored toward that end, thus satisfying the strict scrutiny mandated by the Equal Protection Clause.<sup>75</sup> But a closer reading reveals an incorporation of Justice Powell’s recognition of a constitutional right of academic freedom.

Justice O’Connor, writing for the Court, notes Justice Powell’s reliance on the “constitutional dimension, grounded in the First Amendment, of educational autonomy” which includes “[t]he freedom of a university to make its own judgments as to . . . the selection of its student body.”<sup>76</sup> She thereby comes to the same conflict of constitutional rights that Justice Powell identified. *Grutter*’s right to equal protection is in conflict with the Law School’s right to advance its educational mission through student body selection. Justice O’Connor continued quoting Justice Powell: “the right to select those students who will contribute the most to the “robust exchange of ideas,”” a university ‘seek[s] to achieve a goal that is of

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70. *Id.* at 313, n. 48.

71. *Id.* at 313.

72. *Id.*

73. *Id.* at 316.

74. 539 U.S. 306 (2003).

75. *See, e.g.,* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 551 U.S. 701, 722–25 (2007) (stating that *Grutter* stands for the proposition that diversity in higher education can be a compelling state interest when applying strict scrutiny to racial classifications but distinguishing the higher education from primary and secondary education).

76. *Grutter*, 539 U.S. at 329.



paramount importance in the fulfillment of its mission.”<sup>77</sup> Justice Powell’s point—and through adoption, Justice O’Connor’s—can be understood to be that setting admissions policies that achieve diversity is within a college’s or university’s academic freedom right to choose “on academic grounds” who may be admitted. The question for Justice O’Connor, as it was for Justice Powell, was whether, *in light of the countervailing First Amendment interests involved*, the particular policy was narrowly tailored to achieve its legitimate goal.

Justice Powell’s opinion in *Bakke* and Justice O’Connor’s majority opinion in *Grutter* can thus be read as balancing a college’s or university’s constitutional right of academic freedom against an applicant’s constitutional right of equal protection, not just a straight forward application of equal protection jurisprudence. It follows that absent the countervailing constitutional concern—i.e. equal protection—the college’s or university’s right to shape its admission policy is protected by the Federal Constitution. Therefore, state legislation—even a validly enacted state constitutional provision—that infringes on an educational institution’s First Amendment right of academic freedom, is vulnerable to a Federal Constitutional challenge.<sup>78</sup> It is important to note that this interpretation of *Bakke* and *Grutter* does not require colleges and universities to employ race-conscious admissions policies. Quite the contrary, it recognizes that they have wide latitude in shaping their admissions policies toward the “fulfillment of [their] mission”—the pursuit of truth and the perfecting of democracy. It does, however, lead to the conclusion that federal and state legislatures cannot interfere with properly shaped admissions policies.

### III. ACADEMIC FREEDOM PROTECTS THE ACADEMIC ENDEAVOR

So far, this note has treated academic freedom somewhat abstractly—exploring whether the values underpinning the First Amendment and the Supreme Court’s academic freedom jurisprudence support a constitutional right of academic freedom without defining what academic freedom protects. The interpretation of *Bakke* and *Grutter* argued for in Part II certainly envisions admissions policies as being protected by constitutional academic freedom. So, for the purpose of using academic freedom as a sword against anti-affirmative action statutes, the argument could stop there. But other Supreme Court cases that have addressed academic freedom, such as *Sweezy* and *Keyishian*, as well as much of the academic community recognize academic freedom as right relating to the speech and research of professors, a very different concept of academic freedom. In order to posit a comprehensive, and hopefully persuasive, theory of constitutional academic freedom it becomes necessary to posit a theory of academic freedom that ties the many strands of academic freedom together.

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77. *Id.*

78. *Id.* at 333.

The question whether academic freedom protects individuals or institutions has been the source of much scholarly debate<sup>79</sup> and has weighty implications on the scope and enforceability of a constitutional academic freedom. For instance, if academic freedom is a constitutional right enjoyed only by faculty (or perhaps by faculty and students), it may not include areas that are more easily understood as under institutional prerogative, such as admissions. If the right of academic freedom adheres in the institution, it could easily include all four of Justice Frankfurter's freedoms, which would include admissions. But it might reduce the freedom enjoyed by the professors. An institution that has a broad constitutional right to decide "on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted" seemingly has the power to control the pedagogical work of, or put pressure on, professors in a way that would undermine the particular First Amendment colleges and universities serve. Moreover, an institutionally enjoyed right of academic freedom raises difficult questions of enforcement in the public college or university context. As Walter Metzger has put it:

The claim that public entities such as schools and colleges are protected by the noble bans of the first amendment contains the corollary that the agent state has constitutional rights enforceable against its creator and paymaster, the prime state—an idea that may appeal to legal sentimentalists but that is not an easy one for constitutional logicians to follow or swallow.<sup>80</sup>

The individual versus institutional academic freedom debate has been fueled by the separate histories of academic freedom as a professional standard and as legal concept. Academic freedom as a professional standard in American academia predates its recognition by the courts and differs significantly from academic freedom as understood by the courts.<sup>81</sup> Its animating force has been conflict between faculty and administration. The courts, by contrast, have had their jurisprudence regarding academic freedom shaped, as one would expect, by the nature of the controversies brought before them. The plaintiffs in cases implicating academic freedom have shifted over time from professors to students. Those cases initiated by professors usually have challenged state statutes infringing on academic freedom as it applies to them. The courts' discussions of academic freedom in these cases tend to address conflicts between legislatures and professors, in a sense by-passing the college or university. Applied in such

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79. See, e.g., William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS. 79 (1990); Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1318 (1988); Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497 (2007).

80. Metzger, *supra* note 79, at 1318.

81. AREEN, *supra* note 6, at 67.

situations, academic freedom seems to be a right held by the individual professor and resembles the professional standard. But the cases initiated by students tend to challenge policies initiated by the college or university and the ensuing discussions of academic freedom tend to proceed from the prospective of the institution.

The impulse to combine these different lines of authority, an impulse indulged in this note, has led to a tangled and hazy doctrine. But individual and institutional academic freedom are not incapable of reconciliation. The debate presents a false choice; an understanding of constitutional academic freedom need not decide between professors and institutions; it can protect both in their proper spheres. The different strands of academic freedom theory and jurisprudence can be reconciled not by placing a right with any particular academic player, but by understanding academic freedom as a value of constitutional force alternatively favoring different players in the complicated higher education structure. It is best understood as adhering in the academic endeavor itself. This understanding can be teased out from both lines of constitutional academic freedom cases and from the version of it promoted by the AAUP.

#### A. Academic Freedom in the Courts: Faculty Suits

As noted above, there have been two lines of litigation where courts have addressed the issue of academic freedom. The first line is characterized by suits brought by professors challenging state laws or regulations.<sup>82</sup> The second line involves suits against the college or university itself, brought by students.<sup>83</sup> The phrase “academic freedom” received its Supreme Court debut in 1952 in Justice Douglas’ dissent in *Adler v. Board of Education of City of New York*<sup>84</sup>—a case in the first line.<sup>85</sup> In that case, public school teachers in New York challenged the

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82. *Wieman v. Updegraff*, 344 U.S. 183 (1952) (challenging loyalty oath required for public employment); *Adler v. Bd. of Educ. of City of New York*, 342 U.S. 485 (1952) (challenging New York Feinberg Law); *Sweezy v. New Hampshire*, 354 U.S. 234, 234 (1957) (challenging subversive activities investigation); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 589 (1967) (challenging New York Feinberg Law).

83 *Healy v. James*, 408 U.S. 169 (1972) (student group challenges non-official status); *Regents of the Univ. of Cal. V. Bakke*, 438 U.S. 265 (1978) (applicant challenges race-conscious admissions policy); *Widmar v. Vincent*, 454 U.S. 263 (1981) (religious student group challenges non-official status); *Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985) (student challenges dismissal); *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (religious campus newsletter challenges non-reimbursement policy); *Board of Regents of the Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217 (2000) (students challenge mandatory student activity fee); *Grutter*, 539 U.S. at 306 (applicant challenges race-conscious law school admissions policy); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (applicant challenges race-conscious undergraduate admissions policy).

84. *Adler*, 342 U.S. at 509.

85. The two lines of academic freedom cases are separated chronologically with the professor/state cases coming first. *See supra* notes 82–83.

constitutionality of the Feinberg Law, which made ineligible for employment any person advocating, or belonging to, organizations advocating the overthrow of government by force, violence or unlawful means—the same law found unconstitutional several years later in *Keyishian*.<sup>86</sup> This case involved primary and secondary school teachers—not college or university professors—and the Court upheld the law, but Justice Douglas’ dissent illustrates some of the early themes surrounding academic freedom in the courts.<sup>87</sup> First, the threat to the teachers’ academic freedom ultimately comes from the state legislature, not the teacher’s direct administrative superiors—an important factor when distinguishing academic freedom in the courts from the professional standard.<sup>88</sup> Second, Justice Douglas recognized the unique role education plays in our form of government: “The Constitution guarantees freedom of thought and expression to everyone in our society. All are entitled to it; and none needs it more than the teacher. . . . The public school is in most respects the cradle of our democracy.”<sup>89</sup> It can be inferred from this quote that while a teacher has a right to free expression as a citizen, what Justice Douglas wished to protect was the pupils’ education. He went on to say, “A school system producing students trained as robots threatens to rob a generation of the versatility that has been perhaps our greatest distinction.”<sup>90</sup>

Later that year Justice Frankfurter took up the cause of academic freedom with his concurring opinion in *Wieman v. Updegraff*, a case appealed<sup>91</sup> by faculty from the Oklahoma Agricultural and Mechanical College challenging a law that required public employees to swear that they had not been affiliated with a subversive group.<sup>92</sup> The Court struck down the law on due process grounds because the oath made no distinction between innocent and knowing affiliation. Justice Frankfurter wrote separately to stress the particular danger the law posed when applied to teachers, as opposed to other public employees. After noting that “in considering the constitutionality of legislation like the statute before us it is necessary to keep steadfastly in mind what it is that is to be secured[,]” Justice Frankfurter proceeded to lay out the rationale for the unique

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86. See *infra* notes 101–02 and accompanying text.

87. The courts have not been particularly careful to distinguish between the law in primary and secondary schools and that of colleges and universities. See generally Kelly Sarabyn, *The Twenty-Six Amendment: Resolving the Federal Circuit Split Over College Students’ First Amendment Rights*, 14 TEX. J. C.L. & C.R. 27 (2008).

88. See *infra* notes 125–37 and accompanying text.

89. *Adler*, 342 U.S. at 508.

90. *Id.* at 511.

91. This case had an interesting posture. The action was originally brought by a citizen and tax payer against state officials to enjoin them from paying the salary of state employees who had not taken the oath. The faculty members intervened, lost, and appealed to the Supreme Court. *Wieman v. Updegraff*, 344 U.S. 183, 185 (1952).

92. *Id.* at 185–87.

importance of education in a democratic system:

That our democracy ultimately rests on public opinion is a platitude of speech but not a commonplace in action. Public opinion is the ultimate reliance of our society only if it be disciplined and responsible. It can be disciplined and responsible only if habits of open-mindedness and of critical inquiry are acquired in the formative years of our citizens. The process of education has naturally enough been the basis of hope for the perdurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards.<sup>93</sup>

Like the teachers in *Adler*, the professors in *Wieman* were challenging the statute on the basis of the effect it had on their own alleged constitutional rights. Framed this way, the academic freedom written about by Justice Douglas and alluded to by Justice Frankfurter can look like a right belonging to the teachers. However, both justices took care to point out that they found the statutes to be unconstitutional not just because of the effect they had on the teachers' rights standing alone, but because of the statutes' interference with the educational process and by extension, the democratic system.

In *Sweezy*, the case that marked for the first time an endorsement of academic freedom by a majority of the Supreme Court, the separate opinions of Chief Justice Warren and Justice Frankfurter seemingly cast the right of academic freedom in different ways.<sup>94</sup> Chief Justice Warren wrote of the "invasion of [Sweezy's] liberties"<sup>95</sup> while Justice Frankfurter wrote of the "governmental intrusion into the intellectual life of a university."<sup>96</sup> But a closer look at the value each is protecting brings the reasoning of the two opinions together. Both Justices based their arguments on the value of a college or university to society. Justice Frankfurter supported academic freedom because of the "dependence of a free society on free universities."<sup>97</sup> Chief Justice Warren was concerned that an abrogation of academic freedom would "imperil the future of our Nation."<sup>98</sup> Both also saw this value as stemming from the college or university as a truth seeker. In the Chief Justice's words, "No field of education is so thoroughly comprehended by man that new discoveries cannot be made. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust."<sup>99</sup> Now Justice Frankfurter: "For society's good . . . inquires into these problems [certain areas of scholarship], speculations about them,

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93. *Id.* at 195–96 (Frankfurter, J., concurring).

94. For a discussion of the facts of this case see *supra* notes 39–41 and accompanying text.

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

96. *Id.* at 261.

97. *Id.* at 262.

98. *Id.* at 250.

99. *Id.*

stimulation in others of reflection upon them, must be left as unfettered as possible.”<sup>100</sup> So while Chief Justice Warren tailored his opinion more to the case at bar and Justice Frankfurter took a broader position, they both envisioned academic freedom as protecting the same thing—the academic endeavor that is at the value of the college or university, but not the institution or individual as an entity.

In *Keyishian v. Board of Regents of the University of the State of New York*,<sup>101</sup> the Supreme Court again spoke of academic freedom, this time placing it squarely in the First Amendment. The suit was a challenge to New York’s Feinberg Law brought by faculty members of the University of New York. The law made a public employee’s treasonable or seditious words or acts grounds for removal from the public school system or state employment. The court held that the administrative procedures implementing the statute were unconstitutionally vague and in violation of the First Amendment. Justice Brennan, writing for the Court, invoked academic freedom:

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.<sup>102</sup>

This opinion states clearly that academic freedom “is of transcendent value to all of us and not merely to the teachers concerned.” The implication seems to be that even though the teacher is the direct recipient of the protection of academic freedom in this case, the right only adheres in him or her incidentally. Constitutional academic freedom primarily protects not individuals, but the academic marketplace of ideas and the training of our Nation’s future leaders.

#### B. Academic Freedom in the Courts: Student Suits

Many of the cases used to support an institutional right of academic freedom come from the line of student suits.<sup>103</sup> The history of student suits

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100. *Id.* at 262.

101. 385 U.S. 589 (1967).

102. *Id.* at 603 (quotations and citations omitted).

103. See e.g., *Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

presents two interesting problems that do not arise in the faculty suits discussed in the previous section. First, courts often use cases addressing the rights of primary and secondary school students as precedent in similar higher education cases without addressing the possible distinctions between different levels of education.<sup>104</sup> Second, while faculty suits tend to present an academic freedom argument as part of, or in conjunction with, a First Amendment or due process claim,<sup>105</sup> in student suits the college or university is usually asserting academic freedom in response to the due process or equal protection claim of the student, thereby setting the two arguments in opposition to each other. This presents a situation where the court is forced to weigh the competing asserted rights; it is also why these suits tend to frame academic freedom institutionally.

The idea that students' rights—as against state operated schools—might be constitutionally protected can be traced to the 1960s.<sup>106</sup> While the demonstrations against the war in Vietnam on college and university campuses are well documented, it was an anti-war demonstration in a high school that produced the first Supreme Court decision recognizing First Amendment rights for students.<sup>107</sup> In *Tinker v. Des Moines*<sup>108</sup> the Supreme Court upheld the right of elementary and secondary public school students to wear armbands in protest of the war. Speaking for the Court, Justice Fortas wrote: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>109</sup> This began a line of cases that balanced public school students' First Amendment rights against the schools' responsibility to educate and maintain order.<sup>110</sup> By taking this approach, the courts have carved out a wide margin of deference for public schools when their policies infringe the rights of students. The cases in this line deal with primary and secondary schools, but the justifications for allowing primary

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104. See *infra* notes 112–19 and accompanying text.

105. For instance, in *Sweezy*, Justice Warren invoked academic freedom with regard to Paul Sweezy's First Amendment rights, which were infringed, but the state action in question also violated the due process requirements of the Fourteenth Amendment. *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 254–55 (1957).

106. AREEN, *supra* note 6, at 108 (stating that the beginning of the "Free speech movement" can be traced back to Mario Savio at Berkeley in 1964). Actually the Flag Salute Cases in the 1940s were the first cases addressing the First Amendment rights of students, but these were compelled speech cases and not usually cited for what rights students have.

107. *Tinker v. Des Moines*, 393 U.S. 503 (1969).

108. *Id.*

109. *Id.* at 506.

110. *Morse v. Frederick* 551 U.S. 393 (2007) (suspension of student for waiving banner reading "Bong Hits 4 Jesus" does not violate First Amendment); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (sexually suggestive speech by student at school assembly not protected by First Amendment); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (censoring of articles about teenage pregnancy in high school newspaper does not violate First Amendment).

and secondary schools to curtail the constitutional rights of children—the need for discipline, the maturity level, the school’s responsibility to educate—may not be as compelling when applied to young adults in the higher education context.<sup>111</sup>

The Supreme Court has, when directly faced with the question whether the same standards apply to both lower and higher education, declined to address the issue.<sup>112</sup> On other occasions, the Court has simply cited cases involving primary or secondary education without explanation when deciding issues involving higher education. *Healy v. James*<sup>113</sup>—a case about a student group at Central Connecticut State College—provides an illustrative example.

*Healy* involved a group of students who wanted to start a college-recognized Students for a Democratic Society (SDS) chapter. The administration was concerned that the student group would be affiliated with the national SDS, which was known for violence, and refused to recognize their chapter.<sup>114</sup> The student group challenged the college’s refusal to recognize them on First Amendment associational grounds. The Court ruled in the students’ favor.

Justice Powell, speaking for the Court, begins his analysis by stating that “colleges and universities are not enclaves immune from the sweep of the First Amendment.”<sup>115</sup> He then quotes *Tinker*—a case about high school students—for the proposition that constitutional rights do not stop “at the school house gate.” Continuing to quote *Tinker* he admits that the court must recognize the need for the schools to “prescribe and control conduct,” but—in his own words now—“the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.”<sup>116</sup> By stating this Justice Powell seems to be acknowledging the difference between the high school and the college, and establishing that First Amendment protections might be greater in the latter. However, the quote he uses to drive this point home—“[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools”—is from *Shelton v. Tucker*.<sup>117</sup> That case was about the constitutionality of a state statute requiring public school

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111. See Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split Over College Student’s First Amendment Rights*, 14 TEX. J. C.L. & C.R. 27 (2008).

112. *Hazelwood Sch. Dist.*, 484 U.S. at 260, n. 7 (“We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.”).

113. *Healy v. James*, 408 U.S. 169 (1972).

114. *Id.*

115. *Id.* at 180.

116. *Id.*

117. 364 U.S. 479 (1960).



teachers to disclose their membership in groups as a prerequisite to employment. He concludes with: “The college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas’” and we break no new constitutional ground in reaffirming this Nation’s dedication to safeguarding academic freedom.”<sup>118</sup> To support this statement he cites *Keyishian*<sup>119</sup>—a case about state statutes punishing university professors for subversion—and *Sweezy*.

In addition to illustrating how lower and higher education cases have become interlaced, the opinion can be seen as consistent with a concept of academic freedom that protects the academic endeavor. By ruling in favor of the students, the Court was “safeguarding academic freedom” which includes the exercise of their First Amendment rights in the “college classroom [and its] surrounding environs [which are] peculiarly the “marketplace of ideas.” But the Court also noted that “[a]ssociational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education.” By setting these limits on the scope of students’ First Amendment rights, the Court seems to be recognizing that such rights must give way when they impede the academic endeavor.

*Regents of the University of Michigan v. Ewing* provides an example of how academic freedom can, in appropriate circumstances, protect administrative decisions by an institution of higher education.<sup>120</sup> Scott Ewing challenged his dismissal from a combined undergraduate/medical degree program at the University of Michigan as a deprivation of his property right in his education in violation of due process. The case was not a hard one for the Court.<sup>121</sup> Justice Stevens, writing for the Court, assumed *arguendo* that the claimed property right existed and held that the dismissal was made “conscientiously and with careful deliberation” and therefore violated no due process rights.<sup>122</sup> But he went further to note “a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom[.]”<sup>123</sup> This statement seems to indicate that the Court will generally defer to the institution on administrative decisions in the name of academic freedom. A footnote followed stating, “[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on

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118. *Healy*, 408 U.S. at 180–81.

119. 385 U.S. 598 (1967).

120. 474 U.S. 214 (1985).

121. *Id.* at 230 (Powell, J., concurring) (“In view of Ewing’s academic record that the Court charitably characterizes as ‘unfortunate,’ this is a case that never should have been litigated.”).

122. *Id.* at 225.

123. *Id.* at 226.

autonomous decision making by the academy itself[.]”<sup>124</sup> Far from being somewhat inconsistent, Justice Stevens’ observation is wholly consistent with a First Amendment academic freedom that does not primarily protect the actors in higher education but instead protects the academic endeavor itself.

### C. Academic Freedom as a Professional Standard

The initial concern of professional academic freedom—as distinct from constitutional academic freedom—was the protection of professors’ employment.<sup>125</sup> The initial threat to professors was the administration of the college or university at which they worked.<sup>126</sup> American institutions of higher learning began to turn towards the German model of the research university in the last half of the 19th century.<sup>127</sup> This transformation of the university was accompanied (or perhaps driven) by a transformation of the professoriate from knuckle-rapping disciplinarians to respected experts in their respective fields, with responsibilities now bifurcated into teaching and research.<sup>128</sup> As professors’ research led them to take controversial positions on hot-button topics, conflicts arose between the professors and the administrators of their institutions. The American Association of University Professors (AAUP) was formed in response to the dismissal of several tenured professors who advocated controversial ideas.<sup>129</sup> The AAUP first crystallized the concept of academic freedom in the United States with its *1915 Declaration of Principles on Academic Freedom and Academic Tenure*.<sup>130</sup> This document provides the first clear statement of academic freedom and continues to influence the academic community.<sup>131</sup>

The AAUP formulation of academic freedom certainly seems, at first, to involve a right held by professors, which is accord with how academic freedom as a professional norm has generally been understood.<sup>132</sup> And because the immediate threat to academic freedom addressed by the AAUP was not from government but from college and university administrators, academic freedom adhering in the institution itself would seem to exacerbate the problem. But a closer reading of the *1915 Declaration*

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124. *Id.* at 226 n. 12.

125. J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment”*, 99 *YALE L.J.* 251, 267–70 (1989).

126. *Id.* at 273.

127. AREEN, *supra* note 6, at 53.

128. Metzger, *supra* note 79, at 1267.

129. Lawrence White, *Fifty Years of Academic Freedom Jurisprudence*, 36 *J.C. & U.L.* 791, 799–801 (2010).

130. Metzger, *supra* note 79, at 1268.

131. See generally William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 *LAW & CONTEMP. PROBS.* 79 (1990).

132. See generally Metzger, *supra* note 79.

reveals a line of reasoning that foreshadows that of the courts and admits of a subtler understanding of academic freedom, one that is reconcilable with the judicial concepts of academic freedom.

The *1915 Declaration* begins by noting that the board of a college or university owes its duty to the public; “The trustees [of the college or university] are trustees for the public. In the case of our state universities this is self-evident. In the case of most of our privately endowed institutions, the situation is really not different.”<sup>133</sup> It goes on to state that the university’s duty to the public was: “a. To promote inquiry and advance the sum of human knowledge. b. To provide general instruction to the students. [and] c. To develop experts for various branches of the public service.”<sup>134</sup> In order to discharge these duties it would be required that “our universities shall be so free that no fair-minded person shall find any excuse for even a suspicion that the utterances of university teachers are shaped or restricted by the judgment, not of professional scholars, but of inexpert and possibly not wholly disinterested persons outside their ranks.”<sup>135</sup>

The AAUP recognized the duty of the college or university to society and believed that this duty was best served by according professional autonomy to professors. In order to achieve this freedom, a system of tenure and review was proposed; it has subsequently been adopted in some form by virtually all colleges and universities.<sup>136</sup> But the goal was not to protect the professoriate. The goal was to “promote inquiry”, advance knowledge, “provide general instruction” and “develop experts”. These are roughly the same values that colleges and universities serve under the First Amendment theories of truth seeking and democracy.<sup>137</sup> The protections promulgated and championed by the AAUP were intended to advance these goals, just as First Amendment academic freedom protects different higher education actors in public education to promote similar goals. The AAUP, of course, has as its main concern the professoriate, but its policies are consistent with a constitutional academic freedom that adheres primarily in the academic endeavor.

#### IV. CONCLUSION

Academic freedom serves special, central First Amendment values; it therefore should be granted special constitutional protection. Over the years, the Supreme Court has recognized that colleges and universities serve these special First Amendment values and has developed a doctrine

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133. 1915 DECLARATION, *supra* note 28, at 293; *See generally*, Metzger, *supra* note 79.

134. 1915 DECLARATION, *supra* note 28, at 295.

135. *Id.* at 294.

136. Metzger, *supra* note 79, at 1266.

137. *See supra* Part I.

that is consistent with a right of academic freedom supported by the full force of the Constitution. Academic freedom—understood as protecting the academic endeavor—should protect college and university admissions policies insofar as they further the academic endeavor. And, as the Supreme Court recognized in *Grutter*, institutions of higher education further the academic endeavor by admitting a diverse student body.

The emergence of state anti-affirmative action constitutional provisions provides an opportunity to test the force of the constitutional academic freedom described above. The interpretation of academic freedom developed in this article would—if found compelling by a court—provide colleges and universities with a Constitutional shield against these laws if such a shield was desired. Whether the shield is taken up, and whether this theory of academic freedom is tested, remains to be seen.