

RESOLVING ENMITY BETWEEN ACADEMIC FREEDOM AND INSTITUTIONAL AUTONOMY

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Abstract

This article contends that if academic freedom has independent constitutional significance it must be, as originally conceived, to promote the marketplace of ideas as a collective good in pursuit of truth and to avoid the pall of orthodoxy that stymies innovation. In this event, it is best to view academic freedom narrowly as a one-way ratchet in favor of expanding the marketplace of ideas in public institutions and to distinguish academic freedom from institutional academic autonomy. Much of what passes as academic freedom has never been within its scope and should be permanently carved out, for example, intemperateness, neglect of duty, moral delinquency, and even the avoidance of controversial matter without relation to course subject matter. Institutional academic autonomy is not the same as academic freedom, but this is not to say it is unimportant. When enumerated constitutional liberties are not jeopardized, deference to institutional educational judgment is reasonable because of the special importance of education in our society and the limits of judicial review. Church autonomy doctrine offers a partial analogy. Institutional academic autonomy does not merit deference when it infringes enumerated constitutional liberties or becomes a pretext for viewpoint discrimination or retaliation.

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INTRODUCTION

Academic freedom is a constitutional doctrine in shambles. Although nowhere to be found in the Bill of Rights and bereft of evidence the founders intended it for constitutional status,¹ the U.S. Supreme Court has considered its “essentiality” nearly “self-evident,”¹ and has deemed the “uninhibited exchange of ideas” that academic freedom is designed to promote a vital prerequisite of democracy.² The liberty is associated with the First and Fourteenth Amendments,³ but whether it has independent constitutional significance is a source of considerable disagreement due in part to the sorry state of its doctrinal development.⁴

A majority of courts now insist that, if an independent liberty, academic freedom is institutional,⁵ notwithstanding that it was conceptualized originally as protecting faculty from interference by university trustees. Tension is the result, according to the U.S. Supreme Court, between the wielding of academic freedom by faculty and academic institutions.⁶ This is a charitable summation. Another way to put it is that the freedom has become self-annulling. When the two kinds of academic freedom cross swords, institutional freedom generally prevails.

1 J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251, 312, 331 (1989).

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

2 *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985); *accord Sweezy*, 354 U.S. at 250.

3 *See Wieman v. Updegraff*, 344 U.S. 183, 221 (1952) (Frankfurter and Douglas, JJ., concurring) (associating academic freedom with due process); *Gutter v. Bollinger*, 539 U.S. 306 (2003) (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (“Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.”)).

4 *See Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992); *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1266 (10th Cir. 2005) (“[W]e agree with the magistrate judge that an independent right to academic freedom does not arise under the First Amendment without reference to the attendant right of free expression. Thus, the right to academic freedom is not cognizable without a protected free speech or associational right.”); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1293 n.14 (10th Cir. 2004) (“Although we recognize and apply this principle [of judicial restraint in reviewing academic decisions] in our analysis, we do not view it as constituting a separate right apart from the operation of the First Amendment within the university setting.”); *Emergency Coalition to Defend Educ. Travel v. U.S. Dep’t of the Treasury*, 545 F.3d 4, 19 (D.C. Cir. 2008) (Silberman, J. concurring) (“I therefore share the doubts of our Fourth Circuit colleagues as to the notion that ‘academic freedom’ is a constitutional right at all and that, should it exist, it inheres in individual professors.”) (citing *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 1998), *cert. denied*, 531 U.S. 1070 (2001)).

5 *See Urofsky*, 216 F.3d at 414–15; *Johnson-Kurek v. Abu-Absi*, 423 F.3d 590, 593 (6th Cir. 2005), *cert. denied*, 546 U.S. 1175 (2006); *Wozniak v. Conry*, 236 F.3d 888, 891 (7th Cir. 2001), *cert. denied*, 533 U.S. 903 (2001); *Stronach v. Va. State Univ.*, No. 3:07CV646-HEH, 2008 WL 161304 (E.D. Va. Jan. 15, 2008); *Martinez v. Univ. of P.R.*, No. CIV 061713 JAF (D.P.R. Dec. 22, 2006).

6 *See Ewing*, 474 U.S. at 226 n.12 (“Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision making by the academy itself.”) (citations omitted); *Parate v. Isibor*, 868 F.2d 821, 826 (6th Cir. 1989) (the term “academic freedom” “is used to denote both the freedom of the academy to pursue its end without interference from the government ... and the freedom of the individual teacher ... to pursue his ends without interference from the academy; and these two freedoms are in conflict.”) (citation omitted).

Another consequence of a dimly lit constitutional liberty is that academic freedom is over-utilized as if any time academicians are involved, so is academic freedom. Faculty dress petty individual employment grievances with constitutional garb. Institutions treat their decisions as matters of academic freedom even when the outcome shrinks the marketplace of ideas. Each treat academic freedom as a private right, although it was conceptualized as a public good to ensure a free exchange of ideas in search of truth and its liberal exposition.

Lacking any independent test for the exercise of academic freedom, courts draw from a variety of ill-fitting legal paradigms. These include (1) the *Wieman-Sweezy* paradigm, (2) the curricular speech doctrine associated with *Hazelwood School District v. Kuhlmeier*,⁷ (3) the *Connick-Pickering* balancing test,⁸ and (4) the *Garcetti* test.⁹ Most of these paradigms favor institutions over faculty, especially when the subject matter is religious speech.¹⁰ Public forum analysis and viewpoint discrimination law rarely have a seat at the table. Because these paradigms depend upon the First Amendment, faculty of private universities lack constitutional protection.¹¹

It is time either to jettison academic freedom as an ill-conceived constitutional liberty that almost was, or to revisit the doctrine and provide it with a foundation consistent with its conceptualization as a public good in a manner consistent with collective action theory. If the doctrine has any independent constitutional significance, it must be, as originally described, to promote the marketplace of non-obscene ideas to avoid the pall of orthodoxy that stymies innovation. In this event, it is best to view academic freedom narrowly as a one-way ratchet in favor of expanding that marketplace of ideas in public institutions (and by contract in private institutions).

The easiest cases in which to find common ground about academic freedom arise a “pall of orthodoxy” imposed externally, for example, as happened during McCarthyism. In this event, faculty, students and many institutions shared congruent interests. Academic freedom was birthed as a constitutional liberty in this milieu, leaving it incompletely articulated. Harder cases followed, arising from intramural disputes between academic institutions and faculty or students. In these cases, academic freedom may be pitted against express constitutional rights. The doctrine has floundered here.

Several schools of thought have emerged about what to do in these circumstances. On the one hand, some like Professor Judith Areen recommend that courts enforce

7 484 U.S. 20, 270–71 (1988); *see also* *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

8 Referring to a four-part test premised upon *Connick v. Myers*, 461 U.S. 138 (1983) and *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

9 Referring to *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).

10 *See* *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, *Bishop v. Delchamps*, 505 U.S. 1218 (1992); *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667 (7th Cir. 2006).

11 Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1286 (June 1988) (“[S]tate action doctrine ... leave[s] academics in private colleges and universities wholly unprotected.”).

academic freedom as an independent implied constitutional liberty, superseding the express constitutional liberties of faculty.¹² Professor Scott Bauries views academic freedom as a contractual tenure right.¹³ In between, but favoring the institution, Professor Matthew W. Finkin believes academic freedom requires supplementing the *Connick* test with contract rights reflecting professional norms.¹⁴ There is general consensus among these scholars that viewpoint and content-based discrimination against faculty and students coheres with academic freedom.¹⁵

This thinking is inconsistent with the origins of academic freedom, not to mention the First Amendment. The position of this article is that if academic freedom is a constitutional right, it cannot be detrimental to free expression; it must be supplemental. In particular, academic freedom should not be a tool to be brandished by institutions against faculty and student viewpoint or vice-versa, as if a mere implied constitutional right could tip the scale against either side's express liberties. We most respect the concept of academic freedom and resolve enmity with institutional autonomy by not referencing it when it is unlikely to liberate thought and expression, regardless whether it is in furtherance of an academic or professional norm. There is a major caveat. Much of what passes as the subject matter of academic freedom has never been within its scope and should be permanently carved-out; for example, intemperateness, neglect of duty, moral delinquency, and even the avoidance of controversial matter without relation to course subject matter.

Academic freedom is not the same as institutional academic autonomy, but this is not to say it is unimportant. Courts lack the wherewithal to second-guess pedagogical and credentialing decisions, to name just a couple areas requiring educational judgment. Deference to educational judgment is appropriate when constitutional liberties are not imperiled and especially when academic freedom is furthered. It would be better to disentangle institutional academic autonomy from academic freedom to explore the proper contours of both and allow them to flourish rather than to suppress academic freedom as originally articulated in a thicket of doctrinal confusion.¹⁶ There is one other exception and implied right known as the

12 Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 949, 957 (2009) (“[W]hen there is a conflict between an individual faculty member and her faculty over an institutional academic matter, the claim of the individual member of the faculty normally should yield.”); see also Byrne, *supra* note 1, at 312, 339 (“[R]outine protection of the rights of individual professors against academic officers is excessively problematic.”; “[F]aculty should not be able legally to challenge good faith, internal personnel decisions as violations of academic freedom.”).

13 Scott R. Bauries, *Individual Academic Freedom: An Ordinary Concern of the First Amendment*, 83 MISS. L.J. 677, 743 (2014).

14 Matthew W. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323, 1348 (1988).

15 Robert C. Post, *Academic Freedom and Legal Scholarship*, 64 J. LEGAL EDUC. 530, 533 (2015); Areen, *supra* note 13, at 992; Byrne, *supra* note 1, at 283 (“[A]cademic freedom does not insulate speakers from being penalized for the content of their speech. Academic freedom only requires that speakers be evaluated by their peers for relative professional competence and within the procedural restraints of the tenure system.”); MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 43 (2009).

16 Alisa W. Chang, Note, *Resuscitating the Constitutional ‘Theory’ of Academic Freedom: A Search*

church autonomy doctrine, specially designed to protect religious organizations' employment and governance decisions. In both cases, courts recognize that they lack the institutional competence to decide the implicated disputes.

There are admonitions and recommendations in this article regarding academic freedom as a potential constitutional liberty. Do not confuse academic freedom with institutional academic autonomy. Do not invoke academic freedom when it has no relevance to a dispute. Use academic freedom only in connection with expanding the public marketplace of non-obscene ideas or do not use it at all, and distinguish it from any presumption in favor of institutional academic autonomy. Do not supersede an express constitutional liberty with an implied one. It is better to interpret academic freedom narrowly than to distort or impoverish it or, worse, describe it at enmity with itself in the form of institutional academic autonomy.

Part I of this article reviews the roots of academic freedom. Part II explores the modern constitutional paradigms used to articulate the freedom to teach. Part III explores modern constitutional law regarding the freedom to learn. Part IV proposes a restatement of academic freedom as a constitutional norm distinct from institutional academic autonomy. Part V is the conclusion.

I. The Roots of Academic Freedom

The source of decisional disagreement over academic freedom as a constitutional liberty has much to do with the circumstances of the freedom's recent origins in Germany, the memorialization of academic freedom in *The 1915 Declaration of Principles* and the articulation of academic freedom as a constitutional norm during McCarthyism. We explore these roots of academic freedom in this section.

A. *Academic Freedom in Germany*

Faculty first asserted academic freedom in the early-1900s, purportedly to achieve a degree of professional autonomy from the trustees controlling their institutions. Until then, "institutions of higher education in this country were not considered centers of research and scholarship, but rather were viewed as a means of passing received wisdom on to the next generation."¹⁷ They "were characterized by 'legal control by non-academic trustees; effective governance by administrators set apart from the faculty by political allegiance and professional orientation; [and a] dependent and insecure faculty.'"¹⁸ German universities were then considered the best in the world and, although governmental institutions, had carved-out

for a Standard Beyond Pickering and Connick, 53 STAN. L. REV. 915, 933 (2001) ("Indecision regarding whether academic freedom should be viewed primarily as an institutional or an individual right prevents any coherent, precise understanding of what the Supreme Court professes to protect.").

17 Urofsky v. Gilmore, 216 F.3d 401, 410 (4th Cir. 2000), cert. denied, 531 U.S. 1070 (2001) (citing RICHARD HOFSTADTER & WALTER P. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 278-79 (1955); W Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 NEB. L. REV. 301, 302 (1998)).

18 Urofsky, 216 F.3d at 410 (citing HOFSTADTER, *supra* note 18, at 268-69).

greater freedom of expression for professors than other public employees.¹⁹ No lay board was interposed between government and faculty as is true in America today.²⁰

A movement developed to adopt two German notions of academic freedom at odds with the current conception:

- *Lehrfreiheit*, or “teaching freedom,” embodying the idea that “professors should be free to conduct research and publish findings without fear of reproof from the church or state”; and denoting “the authority to determine the content of courses and lectures”; and
- *Lehrfreiheit*, or “learning freedom,” which was “a corollary right of students to determine the course of their studies for themselves.”²¹

B. *The 1915 Declaration of Principles*

The Committee on Academic Freedom and Academic Tenure of the American Association of University Professors (“AAUP”) formulated a statement of principles on academic freedom and academic tenure known as *The 1915 Declaration of Principles* (the “Declaration”), stating that the term “academic freedom” has two applications defined by these two concepts.²² But the Declaration adapted just the concept of *Lehrfreiheit* to the American university, with the goal of gaining a measure of professional autonomy from lay administrators and trustees.²³ This statement was amended in 1925, and later codified in a 1940 *Statement of Principles on Academic Freedom and Tenure* (the “1940 Statement”), which has been endorsed since by most American universities.²⁴

19 Areen, *supra* note 13, at 955.

20 *Id.* at 955–56.

21 *Urofsky*, 216 F.3d at 410; *see also* Metzger, *supra* note 12, at 1269 (“In its native habitat,” *Lehrfreiheit* “referred to the statutory right of full and associate professors, who were salaried civil servants, to discharge their professional duties outside the chain of command that encompassed other government officials. It allowed them to decide on the content of their lectures and to publish the findings of their research without seeking prior ministerial or ecclesiastical approval or fearing state or church reproof; it protected the restiveness of academic intellect from the obedience norms of hierarchy.”; *Lernfreiheit* “amounted to a disclaimer by the university of any control over the students’ course of study save that which they needed to prepare them for state professional examinations or to qualify them for an academic teaching license. It also absolved the university of any responsibility for students’ private conduct, provided they kept the peace and paid their bills.”).

22 American Association of University Professors, *The 1915 Declaration of Principles*, in ACADEMIC FREEDOM AND TENURE 155 (Louis Joughin ed., 1969) [hereinafter Declaration].

23 *Urofsky*, 216 F.3d at 410 (citing also Byrne, *supra* note 1, at 253); *see also* Metzger, *supra* note 12, at 1271 (“One alteration was tantamount to an amputation: on the opening page of its report, the members of the Seligman committee announced that they would dispense with the principle of *Lernfreiheit*.”).

24 *Urofsky*, 216 F.3d at 411 (citing Richard H. Hiers, *Academic Freedom in Public Colleges and Universities: O Say, Does that Star-Spangled First Amendment Banner Yet Wave?*, 40 WAYNE L. REV. 1, 4–5 (1993)).

The AAUP defined academic freedom as the “freedom of inquiry and research, freedom of teaching within the university or college; and freedom of extra-mural utterance and action.”²⁵ The last of these was a material expansion on *Lehrfreiheit*, as extramural utterances that do not relate to teaching or research and do not fall in the area of the speaker’s acknowledged expertise.²⁶ Concerning whose right it was to assert these freedoms, the AAUP said academic freedom is “a right claimed by the accredited educator, as teacher and investigator, to interpret his findings and to communicate his conclusions without being subjected to any interference, molestation or penalization....”²⁷

Academic freedom, as conceptualized in the Declaration, made the rights of individual faculty preeminent.²⁸ It recognized just two notable limitations: First, the so-called “limitations clause” of the Declaration exempted “proprietary school[s] or college[s] designed for the propagation of specific doctrines,” serving a proprietary trust instead of public trust, and fit within this category certain private and religious institutions, provided they make full disclosure of the restrictions on academic freedom to prospective faculty and donors.²⁹ By 1970, when the AAUP added interpretive comments to the 1940 Statement, the AAUP concluded that most church-related institutions no longer needed or desired the departure and decided no longer to endorse it, although it is plain that many private colleges have more narrowly interpreted academic freedom than public academic institutions, as was their right from the beginning.

Second, the Declaration indicated that academic freedom was not a defense to “charges of habitual neglect of assigned duties, on the part of individual teachers, and concerning charges of grave moral delinquency,” concerning which the AAUP stated lay governing boards are “competent to judge.”³⁰ According to the 1940 Statement, teachers “should be careful not to introduce into their teaching controversial matter which has no relation to their subject.”³¹ Beginning in 1915, faculty were expected to display “dignity, courtesy and temperateness,” to have a “fair and judicial mind,” and demonstrate “patient and sincere inquiry.”³² The “academic profession” itself could exercise judgment about the content of faculty teaching, discussion and inquiry.³³ The 1970 interpretive comments anticipated

25 *Id.*

26 Metzger, *supra* note 12, at 1274.

27 *Urofsky*, 216 F.3d at 411 (citing *Stuller*, *supra* note 18, at 302 (citing Declaration, *supra* note 23, at 155).

28 Metzger, *supra* note 12, at 1284 (“[A]cademic freedom stood for the freedom of the academic, not for the freedom of the academy.”); Elizabeth Mertz, Comment, *The Burden of Proof and Academic Freedom: Protection for Institution or Individual?* 82 Nw. U. L. REV. 492, 518 (1988).

29 Declaration, *supra* note 23, at 155.

30 *Id.*

31 Am. Ass’n of Univ. Professors, The 1940 Statement of Principles on Academic Freedom and Tenure, <https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure> [hereinafter 1940 Statement].

32 *Id.*

33 *Id.* (“The responsibility of the university teacher is primarily to the public itself, and to the

that any dismissal for cause of a continuous appointment would be considered by both a faculty committee and the governing board of the institution after a hearing if facts are in dispute.³⁴ Exclusively in the event of “moral turpitude,” teachers on continuous appointment would be entitled to at least one year’s salary following dismissal.³⁵ Moral turpitude involved not merely behavior warranting discharge, but that which “would evoke condemnation by the academic community generally.”³⁶

Set aside by the Declaration was not only *Lernfreiheit*, but also the German concept known as *Freiheit der Wissenschaft* or literally “freedom of science,” where science meant the study of everything taught by the university or the study of things for themselves and for their ultimate meanings.³⁷ Professor Metzger refers to the *Freiheit der Wissenschaft* as the tertium quid of academic freedom. It was “the university’s right, under the direction of its senior professors organized into separate faculties and a common senate, to control its internal affairs.”³⁸ Without specific reference to *Freiheit der Wissenschaft*, Professor Areen described something like it as the “governance dimension” of academic freedom.³⁹ Whereas Professor Metzger concluded the Declaration is silent on *Freiheit der Wissenschaft*,⁴⁰ Professor Areen finds this support for it in the Declaration: “It is ... not the absolute freedom of utterance of the individual scholar, but the absolute freedom of thought, of inquiry, of discussion and of teaching, of the academic profession, that is asserted by this declaration of principles.”⁴¹ Either way, the governance dimension is not a prominent theme of the Declaration remotely like *Lehrfreiheit*.

As grounds for academic freedom, the Declaration dipped into what today we might call public goods or collective action theory associated with Paul Samuelson and Mancur Olson.⁴² Academic freedom was justified “as a means of advancing the search for truth,” rather than as a manifestation of a First Amendment right.⁴³

judgment of his own profession.”); *id.* (“It is ... inadmissible that the power of determining when departures from the requirements of the scientific spirit and method have occurred, should be vested in bodies not composed of members of the academic profession.”); *id.* (“It is ... the absolute freedom of thought, of inquiry, of discussion, and of teaching, of the academic profession, that is asserted by this declaration of principles.”).

34 *Id.*

35 *Id.*

36 *Id.*

37 HOFSTADTER & METZGER, *supra* note 18, at 373.

38 Metzger, *supra* note 12, at 1270.

39 Areen, *supra* note 13, at 947.

40 Metzger, *supra* note 12, at 1277 (“Of the link between individual freedom and corporate autonomy—the link formed in the long historic struggle of the studium against the imperium and sacerdotium—the [Declaration] had nothing to say.”).

41 Areen, *supra* note 13, at 956.

42 Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387, 387 (1954); MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

43 *Urofsky*, 216 F.3d at 411.

It was in furtherance of a “public trust.”⁴⁴ In fact, the *Declaration* stated, “The responsibility of the university teacher is primarily to the public itself, and to the judgment of his own profession.”⁴⁵ The 1940 Statement reaffirmed that academic freedom is essential to enable academic institutions to be “conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole.”⁴⁶

Originally, academic freedom was a professional norm, rather than constitutional liberty. It could be vindicated by professors as a matter of contract law through tenure or otherwise. At the time, although there was tension between faculty and trustees, federal or state governments allegedly “largely refrained from any involvement in internal university affairs.”⁴⁷ But this was to change radically in the 1950s, as the long shadow of communism fell across Eastern Europe and fear gripped Americans concerning the communists who could be among us.

C. *Academic Freedom Meets McCarthyism*

Once McCarthyism took root in America, the focus of academic freedom was bound to shift as states enacted laws designed to root out communist sympathizers and required academic boards to enforce them. The cases *Adler v. Board of Education of City of N.Y.*,⁴⁸ *Wieman v. Updegraff*,⁴⁹ *Sweezy v. New Hampshire*,⁵⁰ *Barenblatt v. United States*,⁵¹ and *Shelton v. Tucker*⁵² were the first to invoke academic freedom, but they addressed quite different contests than the struggle between faculty and institution that was the soil from which the idea germinated. The issue in these cases was not the independence of faculty in teaching, research, or writing from the university board of trustees, but rather whether the state could test the democratic loyalty of faculty. The state was the university or its board of governors or regents. In this sense, the interests of the academic institution and of the faculty were formally at odds; however, many universities were reluctant participants in the enterprise. Academic freedom emerged in these cases in dissenting or concurring opinions as benefiting faculty. The idea of academic freedom benefiting universities and students also emerged but in a coordinate fashion supportive of faculty.

Irving Adler was a New York City high school teacher terminated for refusing to answer this question required by the 1949 New York State “Feinberg Law”: “Are you now or have you ever been a member of the Community Party?” In *Adler v.*

44 Declaration, *supra* note 23, at 155.

45 *Id.*

46 1940 Statement, *supra* note 32.

47 *Urofsky*, 216 F.3d at 411 n.10 (citing *Byrne*, *supra* note 1).

48 342 U.S. 485 (1952).

49 344 U.S. 183 (1952).

50 354 U.S. 234 (1957).

51 360 U.S. 109 (1959).

52 364 U.S. 479 (1960).

Board of Education, appellants sought a declaratory judgment against the Board of Education of the City of New York that the Feinberg Law, and rules of the State Board of Regents promulgated thereunder, violated free speech and assembly and the due process clause of the Fourteenth Amendment.⁵³ The Court disagreed and upheld the Feinberg Law, including its limitation on membership in certain organizations. "Certainly such limitation is not one the state may not make in the exercise of its police power to protect the schools from pollution and thereby to defend its own existence."⁵⁴ The faculty lost.

In dissent, Justices Douglas, formerly a tenured professor of law at Yale University, and Justice Black invoked academic freedom for the first time and opined, "There can be no real academic freedom" in a police state marked by "constant surveillance" and scrutiny of utterances.⁵⁵ They continued, "The very threat of such a procedure is certain to raise havoc with academic freedom":

The teacher is no longer a stimulant to adventurous thinking; she becomes instead a pipe line for safe and sound information. A deadening dogma takes the place of free inquiry. Instruction tends to become sterile; pursuit of knowledge is discouraged; discussion often leaves off where it should being. This, I think is what happens when a censor looks over a teacher's shoulder. This system of spying and surveillance with its accompanying reports and trials cannot go hand in hand with academic freedom. It produces standardized thought, not the pursuit of truth. Yet it was the pursuit of truth which the First Amendment was designed to protect.⁵⁶

Justices Douglas and Black associated academic freedom with faculty, freedom of inquiry, and the pursuit of truth. In particular, Justices Douglas and Black wrote that a teacher's "private life, her political philosophy, her social creed should not be the cause of reprisals against her."⁵⁷ Justice Black added separately:

[A] policy of freedom is in my judgment embodied in the First Amendment and made applicable to the states by the Fourteenth. Because of this policy public officials cannot be constitutionally vested with powers to select the ideas people can think about, censor the public views they can express, or choose the persons or groups people can associate with.⁵⁸

Justice Frankfurter, formerly a tenured professor of law at Harvard University, also dissented in *Adler* but on jurisdictional grounds such as standing and ripeness. For him there was too much uncertainty about the operation of the law and rules and too much at stake to decide the case. He wrote:

The broad, generalized claims urged at the bar touch the deepest interests of a democratic society: its right to self-preservation and ample scope for the

53 342 U.S. 485, 487 (1952).

54 *Id.* at 493.

55 *Id.* at 510 (Douglas and Black, JJ. dissenting).

56 *Id.* at 510–11 (Douglas and Black, JJ. dissenting).

57 *Id.* at 511.

58 *Id.* at 497 (Black, J. dissenting).

individual's freedom, especially the teacher's freedom of thought, inquiry and expression. No problem of a free society is probably more difficult than the reconciliation or accommodation of these too often conflicting interests.⁵⁹

Whereas McCarthyism prevailed in *Adler*, it did not in *Wieman v. Updegraff*.⁶⁰ The appellants were faculty members and staff of Oklahoma Agricultural and Mechanical College who declined to subscribe to a loyalty oath that they were not then or for five years before affiliated with or members of organizations listed by the U.S. Attorney General or other authorized federal agencies as communist front or subversive organizations.⁶¹ Appellee Updegraff and a few other citizen taxpayers took it upon themselves to bring suit to enjoin state officials from paying further compensation to the appellants, who intervened to challenge the validity of the Oklahoma law on the grounds that, inter alia, it violated due process.⁶² The Court struck the law as a violation of due process without reference to academic freedom. The faculty prevailed against the citizen taxpayer without any direct adversity to the college.

In concurrence, Justices Frankfurter and Douglass invoked academic freedom as follows:

By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition ... has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers.⁶³

The two justices associated academic freedom with faculty as an enhanced First Amendment right critical to freedom of thought and, relatedly, democracy, because "public opinion is the ultimate reliance of our society" and the opinion can "be disciplined and responsible only if habits of open-mindedness and of critical inquiry are acquired in the formative years of our citizens."⁶⁴ In contrast, they said, "no totalitarian government is prepared to face the consequences of creating free universities."⁶⁵ They continued by recognizing academic freedom as a liberty of teachers at all levels from the lowest grades to the highest:

59 *Id.* at 504 (Frankfurter, J. dissenting).

60 344 U.S. 183 (1952).

61 *Id.* at 216.

62 *Id.*

63 *Id.* at 221 (Frankfurter and Douglas, JJ., concurring).

64 *Id.*

65 *Id.* at 222 (Frankfurter and Douglas, JJ., concurring).

To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They 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 infraction by national or State government.⁶⁶

In *Wieman*, academic freedom was to Justices Frankfurter and Douglas a supplemental First Amendment liberty available to faculty against an extramural threat by the state to freedom of thought and inquiry.

Following closely on the heels of this decision was *Sweezy v. New Hampshire*,⁶⁷ which addressed academic freedom in the plurality opinion in a similar way. Marxist economist Paul Sweezy was a lecturer at the University of New Hampshire. The New Hampshire Attorney General began investigating Professor Sweezy, pursuant to New Hampshire's law against "subversive activities" and "subversive organizations" enacted in 1951.⁶⁸ When he refused to answer questions about any socialistic content in his lecture or to disclose his knowledge of the Progressive Party and its adherents, the Attorney General tried to compel answers. When Professor Sweezy refused he was eventually jailed for contempt.⁶⁹ A plurality (Warren, Black, Douglas, Brennan, JJ.) ruled that the state "unquestionably" infringed the professor's "liberties in the areas of academic freedom and political expression"⁷⁰ but vacated his contempt conviction not on First Amendment grounds, but rather because it violated due process.⁷¹ The plurality observed,

66 *Id.* at 221 (Frankfurter and Douglas, JJ., concurring).

67 354 U.S. 234 (1957).

68 *Id.* at 236.

69 *See id.* at 240–45.

70 *Id.* at 250.

71 *Id.* at 255 (explained in *Urofsky v. Gilmore*, 216 F.3d 401, 412 (4th Cir. 2000) as follows: "[T] he plurality did not vacate Sweezy's contempt conviction on First Amendment grounds, but rather concluded that because the Attorney General lacked authority to investigate Sweezy, the conviction violated due process.").

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 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.⁷²

Here, the Court first seriously associated universities and students with academic freedom, although in a manner assumed congruent with faculty interests, all in furtherance of freedom of inquiry as a collective good critical to the nation.

Concurring in the result, Justices Frankfurter and Harlan relied explicitly on academic freedom in concluding that lecturer Sweezy's contempt citation offended the Constitution. They were no less insistent about identifying academic freedom with the public good and urged limiting intrusion into the freedom only "for reasons that are exigent and obviously compelling" for fear of otherwise chilling the "ardor and fearlessness" of academic inquiry⁷³ Justice Frankfurter wrote, and Justice Harlan agreed:

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....

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught and who may be admitted to study.⁷⁴

In *Sweezy*, academic freedom was to the concurrence a liberty benefiting academic institutions, faculty, and students, if not primarily the first of these,

72 *Id.* at 250.

73 *Id.* at 262 (Frankfurter and Harlan, JJ., concurring in result).

74 *Id.* at 262–63 (*quoting* from Conference of Representatives of the Univ. of Cape Town and the Univ. of the Witwatersrand, the Open Universities in South Africa iii (1957)).

counterpoised to external interference by the state.⁷⁵ The facts of the case did not require Justices Frankfurter or Harlan to consider how to sort out any divergent interests of institutions, faculty, and students. Nevertheless, courts have since construed the “four essential freedoms of a university” that they incanted to accord priority to the university.

Academic freedom came into focus again a couple years later in *Barenblatt v. United States*.⁷⁶ The Subcommittee of the House Committee on Un-American Activities summoned to testify Lloyd Barenblatt, a professor of psychology at Vassar College, after another witness claimed that Barenblatt was a communist. On the basis of freedom of speech, thought, press and association, Barenblatt refused to answer a series of questions such as “Have you ever been a member of the Communist Party?”⁷⁷ He did not invoke the Fifth Amendment. The Subcommittee certified the matter for contempt proceedings that led to a general sentence of six months’ imprisonment and fine. Notwithstanding *Sweezy*, which the Court said was not to the contrary,⁷⁸ the Court affirmed the conviction, explaining:

[B]roadly viewed, inquires cannot be made into the teaching that is pursued in any of our educational institutions. When *academic teaching-freedom* and its corollary *learning-freedom*, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain. But this does not mean that the Congress is precluded from interrogating a witness merely because he is a teacher. An educational institution is not a constitutional sanctuary from inquiry into matters that may otherwise be within the constitutional legislative domain merely for the reason that inquiry is made of someone within its walls.⁷⁹

The Court was not persuaded by Barenblatt, trying to analogize to Sweezy’s lecturing, that what was at stake in his case was the “theoretical classroom discussion of communism.”⁸⁰ Instead, the Court said this case concerned inquiry into the extent to which the Communist Party had infiltrated universities.⁸¹ As such, the Court implied that academic freedom was something belonging to Sweezy as a faculty member, in comparison to the university: “An educational institution is not a constitutional sanctuary from inquiry” by Congress into such matters.⁸² The use by the Court of the hyphenated phrase, “academic teaching-freedom,” is also telling about the meaning the Court gave to academic freedom. Academic freedom was about teaching, not the institution per se. Teaching was not at issue, so neither

75 *Grutter v. Bollinger*, 539 U.S. 306, 362 (2003) (Thomas and Scalia, JJ. concurring in part and dissenting in part) (“Much of the rhetoric in Justice Frankfurter’s opinion was devoted to the personal right of Sweezy to free speech.”).

76 360 U.S. 109 (1959).

77 *Id.* at 114.

78 *Id.* at 129.

79 *Id.* at 112 (emphasis added).

80 *Id.* at 130.

81 *Id.* at 129.

82 *Id.* at 112.

was academic teaching freedom. “[I]ts corollary learning freedom, so essential to the well-being of the Nation” is the first reference by the Court to *Lernfreiheit*.

Justices Black and Douglas bitterly dissented without reference to academic freedom, saying that the Court’s balancing test was “closely akin to the notion that neither the First Amendment nor any other provision of the Bill of Rights should be enforced unless the Court believes it is reasonable to do so.”⁸³

One year later, the Court took up academic freedom again in *Shelton v. Tucker*.⁸⁴ Teachers and an associate professor declined to file an affidavit required by an Arkansas statute of all faculty in state-supported schools or colleges, asking them to list every organization to which they belonged or regularly contributed within the preceding five years. The scholars separately sued the school district and University of Arkansas on the basis of “their rights to personal, associational, and academic liberty, protected by the Due Process Clause of the Fourteenth Amendment.”⁸⁵ The Court (including Justice Douglas) struck the statute 5–4 due to its “unlimited and indiscriminate sweep” and “comprehensive interference with associational freedom,” going “far beyond what might be justified in the exercise of the State’s legitimate inquiry into the fitness and competency of its teachers.”⁸⁶ The Court quoted from Justice Frankfurter’s concurring opinion in *Wieman* and from *Sweezy* in connection with their warning against the “unwarranted inhibition upon the free spirit of teachers” and its chilling effect on scholarship.⁸⁷ Without specifically referencing academic freedom, the Court did so indirectly by invoking the constitutional freedoms available to teachers to protect “freedom of thought” and “freedom to inquire” under the Bill of Rights and Fourteenth Amendment.⁸⁸

As the first evidence of doctrinal confusion, Justice Frankfurter did not approve of the majority’s use of his concurrence. He and Justice Harlan, among others (i.e., Justices Clark and Whittaker), dissented. Justice Frankfurter said his dissent was not due to “put[ting] a low value on academic freedom,” but “because that very freedom in its most creative reaches, is dependent in no small part upon the careful and discriminating selection of teachers.”⁸⁹ Likewise, Justice Harlan argued, “It is surely indisputable that a State has the right to choose its teachers on the basis of fitness.”⁹⁰ Here was affirmation that in their view academic freedom is primarily an institutional liberty, in contrast to the majority’s reading of the same and earlier language treating academic freedom as an individual liberty benefiting faculty. Justice Frankfurter explained there was a limitation to institutional academic freedom: “if the information gathered by the required affidavits is used to further a

83 *Id.* at 143 (Douglas and Black, JJ dissenting); *accord id.* at 1114 (Brennan, J., dissenting).

84 364 U.S. 479, 480 (1960).

85 *Id.* at 484–85.

86 *Id.* at 490.

87 *Id.* at 487 (quoting *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (concurring op.) and *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).

88 *Id.*

89 *Id.* at 495–96 (Frankfurter, J. dissenting).

90 *Id.* at 497 (Harlan, J. dissenting).

scheme of terminating the employment of teachers solely because of their membership in unpopular organizations, that use will run afoul of the Fourteenth Amendment."⁹¹ Put otherwise, some forms of viewpoint discrimination exercised by an academic institution would, in Justice Frankfurter's view, violate academic freedom.

Two more cases decided in 1967, but with roots in the McCarthyite period, may be viewed in some respects as a transition to modern litigation involving academic freedom. In both *Keyishian v. Board of Regents of University of State of N.Y.*⁹² and *Whitehill v. Elkins*,⁹³ the board of regents of the state university systems enforced laws against sedition stemming from the 1950s or earlier by adopting administrative rules.⁹⁴ Although not their direct employer, the board of regents also was not as independent from academics as the attorney generals who were central protagonists in the preceding cases besides *Adler*. A contest between professor and institutional governance reemerged but incident to the state's continuing interest in the loyalties of its employees. The majority in both cases aligned academic freedom predominately with faculty, but strong dissents in both cases denied that the liberty was even at issue as opposed to institutional autonomy in hiring.

In *Whitehill v. Elkins*,⁹⁵ an oath was required by a 1957 Maryland law and pursuant thereto the board of regents.⁹⁶ When appellant White refused to sign the oath, indicating that he would not engage in an attempt to overthrow federal, state or local government, he was denied employment in the state university as a temporary lecturer.⁹⁷ Quoting extensively from the majority decision in *Sweezy*, the Court observed, "The continuing surveillance which this type of law places on teachers is hostile to academic freedom."⁹⁸ Once again, the 6–3 majority, with Justice Douglas writing for the Court, conveyed its view that academic freedom benefits primarily faculty, but the Court struck the oath on the basis of overbreadth, which it said "may deter the flowering of academic freedom as much as successive suits for perjury."⁹⁹ Three justices in dissent, including Justice Harlan (Harlan, Stewart and White, JJ.), were not persuaded the oath had any bearing on freedom of speech or association.¹⁰⁰ They complained, "References to ... controversial discussions,

91 *Id.* at 496 (Frankfurter, J. dissenting).

92 385 U.S. 589 (1967).

93 389 U.S. 54 (1967).

94 *Whitehill*, 389 U.S. at 56 (oath "prepared by the Attorney General and approved by the Board of Regents that has exclusive management of the university"); *Keyishian*, 385 U.S. at 594–95 (oath was in the form of a certificate required by the Board of Regents).

95 389 U.S. 54.

96 *Id.* at 56.

97 *See id.* at 55–56; *accord id.* at 62 (Harlan, Stewart and White, JJ., dissenting); *cf.* *Barenblatt v. United States*, 360 U.S. 109, 112, 129, 130 (1959) (the Court recognized academic freedom element, but upheld contempt conviction of teaching fellow who refused to answer questions about Communist Party membership, since investigation was not directed at controlling what was taught at university but at overthrow of government).

98 *Whitehill*, 389 U.S. 59–60.

99 *Id.* at 62.

100 *Id.* at 63 (Harlan, Stewart and White, JJ., dissenting).

support of minority candidates, academic freedom and the like cannot disguise the fact that Whitehill was asked simply to disclaim actual, present activity amounting in effect to treasonable conduct.”¹⁰¹

In *Keyishian v. Board of Regents of University of State of N.Y.*,¹⁰² the Court once again considered the Feinberg Law and this time ruled it unconstitutional. At issue was an oath in the form of a certificate required by the board of regents pursuant to the Feinberg Law, asking appellants who were faculty and nonfaculty members of state universities whether they were communists, and if they were, whether they had communicated that fact to the president of the state university.¹⁰³ The New York statutory scheme was complex, listing as grounds for removal from the public school system or state employment treasonable or seditious words or acts, barring from employment in public universities any person willfully advocating or teaching a doctrine of forcible overthrow of government, and disqualifying public school employees involved with the distribution, advocacy of, or teaching of a doctrine of forcible overthrow of government.¹⁰⁴

The Court receded from *Adler* and decided 5–4 that the Feinberg Law was unconstitutionally vague under the First Amendment.¹⁰⁵ Quoting liberally from *Sweezy*, the Court expressed concern about the stifling and chilling impact of the New York law on faculty: “It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery.”¹⁰⁶ Interpreting its prior decisions, the Court ruled that *Keyishian* and *Sweezy* were reactions to “content-based regulation” or government efforts “to control or direct the content of the speech engaged in by the university or those affiliated with it.”¹⁰⁷ Justice Brennan, writing for the majority in *Keyishian*, famously observed,

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.” *Shelton v. Tucker*, 364 U.S. at 487.... The classroom is peculiarly the “marketplace of ideas.” The Nation’s

101 *Id.* at 62–63 (Harlan, Stewart and White, JJ., dissenting).

102 385 U.S. 589 (1967).

103 *Id.* at 594–95; *accord id.* at 621 (Clark, Harlan, Stewart, and White, JJ., dissenting).

104 *Id.* at 592–95.

105 *Id.* at 594 (“[T]o the extent that *Adler* sustained the provision of the Feinberg Law constituting membership in an organization advocating forcible overthrow of government a ground for disqualification, pertinent constitutional doctrines have since rejected the premises upon which that conclusion rested.”).

106 *Id.* at 604 (“The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.”); *id.* at 607–08 n.12 (referencing various studies on the “stifling effect on the academic mind from curtailing freedom of association”).

107 *Univ. of Pa. v. EEOC*, 493 U.S. 182, 198 (1990).

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.”¹⁰⁸

The dissent, including Justices Harlan, Clark, Stewart, and White, disagreed that the case had anything to do with “freedom of speech, freedom of thought, freedom of press, freedom of assembly or of association,” as opposed to the “narrow question” whether the state may disqualify from teaching in its university “one who, after a hearing with full judicial review, is found to have willfully and deliberately advocated, advised, or taught that our Government should be overthrown by force.”¹⁰⁹ Quoting from *Adler*, the dissent articulated the institutional academic autonomy doctrine that guides many courts today when they cautioned,

“A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society cannot be doubted.”¹¹⁰

These words from *Adler*, rejected by the majority in *Keyishian*, may today be more influential than Justice Brennan’s memorable words about the transcendent collective good of academic freedom. Some like Professor Byrne now believe that academic freedom as a constitutional matter pertains solely in the event of extramural political inference.¹¹¹ At least during the McCarthyite era, the Court in every case post-*Adler* conceptualized academic freedom as protecting faculty at all grade levels. Beginning with *Sweezy*, the Court also conceived of academic freedom as benefiting institutions and students but in a fashion congruent with the interests of faculty. Even in *Shelton*, the dissent limited the right of the institution autonomously to select teachers by a teacher’s association rights.

No serious commentary during this period addressed how to resolve divergent interests of universities, faculty and students, because McCarthyism was largely an external threat. Universities and boards of regent were state actors required to enforce the law, but not all jumped at the chance. Citizen taxpayers had to step into the gap in *Wieman* and the attorney general in *Sweezy*. In every case except *Adler*, which was overturned in *Keyishian*, faculty prevailed. None of these cases was decided expressly on grounds of academic freedom, but all were decided on the basis of coordinate express liberties such as due process and freedom of association. The opinions emphasized the purpose of academic freedom was to safeguard freedom of inquiry, a “marketplace of ideas,” and “habits of open-mindedness.”

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

109 *Id.* at 628–29 (Clark, Harlan, Stewart, and White, JJ., dissenting).

110 *Id.* (quoting *Adler v. Bd. of Educ. of City of N.Y.*, 342 U.S. 485, 493 (1952)).

111 Byrne, *supra* note 1, at 255.

II. Modern Constitutional Paradigms of the Freedom to Teach

The epic struggle between McCarthyism and academia took a back seat in the 1970s. The more fundamental contest over *Lehrfreiheit*, leading in the first place to the articulation of academic freedom, reappeared. Relying on the same case law, decisionmakers reached different conclusions about the lessons of the paeans of Justices Douglas, Frankfurter, and Brennan as relates to academic freedom. Summarizing the juxtaposed conclusions, the U.S. Supreme Court would later too charitably explain: “Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students,” citing *Keyishian* and *Sweezy*, “but also, and somewhat inconsistently, on autonomous decision making by the academy itself,” citing *Bakke* and Justice Frankfurter’s concurrence in *Sweezy*.¹¹²

No decision from the McCarthy period elaborated any test for lower courts to judge intramural academic disputes. They looked elsewhere to fill in the gap. Sometimes courts turned to First Amendment retaliation law, including the *Pickering* test, then *Connick-Pickering* test, and, most recently, occasionally to the *Garcetti* test. Relatedly, the curricular or school-sponsored speech doctrine began to influence courts in their consideration of academic freedom. Because the cases disproportionately have concerned religious expression, courts also turned to establishment clause precedent. University admissions cases also began to influence academic freedom, until the current period dominated by cases concerning antidiscrimination and antiharassment policies. We examine these modern constitutional paradigms next and their impact on academic freedom.

A. *The Pickering Test*

The U.S. Supreme Court decided *Pickering* in 1968, when Justices Douglas, Black, Harlan, and Brennan were still on the bench.¹¹³ The board of education dismissed a teacher for writing and publishing in a local newspaper a letter to the editor criticizing the board’s alleged overallocation of school funds to athletics and the board and superintendent for failing to share the real reasons they sought additional tax revenues. Relying upon *Wieman*, *Shelton*, and *Keyishian*, the Court

112 *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (citing *Keyishian*, 385 U.S. at 603; *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring in result); and *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265 (1978) (opinion of Powell, J.)); *see also* *Cooper v. Ross*, 472 F. Supp. 802, 813 (D. Ark. 1979) (“The present case is particularly difficult because it involves a fundamental tension between the academic freedom of the individual teacher to be free of restraints from the university administration, and the academic freedom of the university to be free of government, including judicial, interference.”); *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 671 (7th Cir. 2006) (citing *Webb v. Bd. of Trs. of Ball State Univ.*, 167 F.3d 1146, 1149 (7th Cir. 1999)) (“As we have recognized in the past, academic freedom has two aspects.... ‘[T]he First Amendment protects the right of faculty members to engage in academic debates, pursuits, and inquiries’ and to discuss ideas.’... On the other hand, we have also recognized that a university’s ‘ability to set a curriculum is as much an element of academic freedom as any scholar’s right to express a point of view.’”); *Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992); (citing *Ala. Student Party v. Student Gov’t Ass’n*, 867 F.2d 1344, 1347 (11th Cir. 1989) (citing *Ewing*, 474 U.S. at 226 n.12).

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

roundly criticized the Illinois Supreme Court to the extent its opinion could be read to suggest that teachers may be compelled to relinquish their First Amendment rights to comment on matters of public concern.¹¹⁴

The Court ruled 8–1 that a balancing must occur between the interests of the teacher as a citizen to make these kinds of comments and the interests of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.¹¹⁵ In this instance, the Court determined that the teacher made erroneous public statements upon issues then currently the subject of public attention, critical of his employer, but that did not impede the teacher's proper performance of his daily duties in the classroom or interfere with the regular operation of the schools generally.¹¹⁶ In this circumstance, absent proof of false statements made knowingly or recklessly, the Court ruled that the teacher could not be dismissed for the letter.¹¹⁷

Through the early 1980s, the Court elaborated on *Pickering* in several more decisions such as *Perry v. Sindermann*,¹¹⁸ *Mt. Healthy City Board of Education v. Doyle*,¹¹⁹ *Givhan v. Western Line Consolidated School District*,¹²⁰ and *Connick v. Myers*.¹²¹ In *Perry*, the Court determined that the nontenured status of a junior college professor who publicly criticized the policies of the regents did not defeat his free speech claim and that he was entitled to procedural due process, including a hearing.¹²² In *Mt. Healthy*, the Court determined that a school district could still prevail if it would have dismissed a teacher even if his constitutionally protected conduct had not occurred.¹²³ *Givhan*, a junior high school teacher, was dismissed after meeting several times with the principal to complain about employment practices at the school, which she thought were racially discriminatory in purpose or effect.¹²⁴ The Court ruled that the private character of the communication did not negate her constitutional freedom of speech.¹²⁵

Following *Pickering*, courts of appeal have sought to balance the First Amendment rights of professors against the interests of academic institutions as employers in circumstances involving academic freedom, as if First Amendment retaliation law and academic freedom were synonymous concepts. Because the

114 *Id.* at 568.

115 *Id.*

116 *Id.* at 572–73.

117 *Id.* at 573.

118 408 U.S. 593 (1972).

119 429 U.S. 274 (1977).

120 439 U.S. 410 (1979).

121 461 U.S. 138 (1983).

122 408 U.S. at 598, 603.

123 429 U.S. at 576.

124 *Givhan*, 439 U.S. at 413.

125 *Id.* at 415.

costs and benefits to be weighed are so different, the balancing is subjective.¹²⁶ There is no common metric permitting objective comparison. When faculty have prevailed, the courts have emphasized the importance of academic freedom and lack of disruption caused by expression.¹²⁷ When universities have prevailed, the opposite has been true, and the courts have tended to focus on the “four essential freedoms of the university” outlined in *Sweezy*. Few red lines have emerged from the balancing except increasingly (as we shall see) relates to university control of curriculum and methodology, as well as limitations on profane, sexual and religious speech.

The earliest court of appeals decision to apply *Pickering* and *Keyishian* may be *Pred v. Board of Instruction of Dade County, Florida*, where the court ruled that teachers stated a First Amendment claim when they were denied fourth year contracts tantamount to tenure because of their participation in a teachers’ association and by one teacher for advancing demands for campus freedom in the classroom.¹²⁸ Expressly invoking academic freedom and properly conceiving it as about expanding the “marketplace of ideas,” the court emphasized that “[t]he protections of the First Amendment have been given special meaning when teachers have been involved.”¹²⁹

Another early decision reads like a page from Justice Harlan’s dissent in *Keyishian*. In 1969, the court in *Jones v. Hopper* relied on Colorado statutory law granting the board of trustees the control and management of Southern Colorado State College.¹³⁰ The court concluded that *Pickering* posed no obstacle to refuse to reappoint a professor after his term of employment expired, although he claimed it was due to his (1) anti-Vietnam War speech and activities, (2) objection to the disqualification of an applicant for his department because she was Oriental, and

126 The court in *Smith v. Losee*, 485 F.2d 334 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974), ruled that a nontenured associate professor of a junior college stated a claim for dismissal by reason of supporting a particular candidate for election and having opposed the college administration. Specifically, he was denied tenure because (1) the Young Democrats whom Smith served as sponsor circulated a flyer in a state senate election that upset some townspeople, and the president thought the professor authored it; (2) Smith presented a question about another instructor’s competence to the academic dean, which the dean of the college considered interference; and (3) Smith raised questions about the college administration’s misuse of funds. *Id.* at 336–37. The court determined that the college marshaled no evidence that Smith’s speech interfered with the operation of the college. *Id.* at 340.

127 *Id.*; *Pred v. Bd. of Pub. Inst. of Dade Cnty.*, 415 F.2d 851, 857-58 (5th Cir. 1969) (“[N]o question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here.”; “There is no indication that the work of the school or any class was disrupted.”); *James v. Bd. of Educ.*, 461 F.2d 566, 572 (2d Cir. 1972), *cert. denied*, 409 U.S. 1042 (1972) (“It is to be noted that in this case, the Board of Education has made no showing whatsoever at any stage of the proceedings that [English teacher] Charles James, by wearing a black armband, threatened to disrupt classroom activities or created any disruption in the school. Nor does the record demonstrate any facts ‘which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities....’”).

128 415 F.2d 851 (5th Cir. 1969).

129 *Id.* at 855–56.

130 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1970).

(3) attack on an English department textbook in a student newspaper.¹³¹ The court offered a spirited defense of institutional academic autonomy as follows:

It would be intolerable for the courts to interject themselves and to require an educational institution to hire or to maintain on its staff a professor or instructor whom it deemed undesirable and did not wish to employ. For the courts to impose such a requirement would be an interference with the operation of institutions of higher learning contrary to established principles of law and to the best traditions of education.¹³²

Likewise, in *Hetrick v. Martin*, the court determined that a university, consistent with the First Amendment, was entitled not to renew a nontenured professor's contract because of displeasure with her pedagogical attitude and teaching methods.¹³³ The court began with what it said the case was not about: academic freedom as discussed in *Keyishian*, *Shelton*, or *Sweezy*; comments on matters of public concern as in *Pickering*; or "a state's effort to restrict in-class utterances or assignments in order to maintain curriculum control."¹³⁴ The court ruled:

Whatever may be the ultimate scope of the amorphous "academic freedom" guaranteed to our Nation's teachers and students, *Healy v. James*, 408 U.S. 169, 180-81 ... (1972) ... it does not encompass the right of a nontenured teacher to have her teaching style insulated from review by her superiors when they determine whether she has merited tenured status just because her methods and philosophy are considered acceptable somewhere within the teaching profession.¹³⁵

Institutional academic autonomy as relates to employment and pedagogy has become a theme of *Pickering* jurisprudence, as has protecting criticism against institutional administration as long as it is not too disruptive. Pedagogy was an early subject of *Lehrfreiheit* but not hiring decisions, neglect of duty, and certainly not moral delinquency. Neglect of duty and moral delinquency do not concern academic freedom, yet they repeatedly appear in case law as somehow connected.

On one end of the spectrum is *Mabey v. Reagan*. The court remanded the case due to a questions of fact as to whether the plaintiff's comments at an academic senate meeting, critical of the administration, were protected and whether his department was overstaffed as claimed by the state college.¹³⁶ According to the court, the college had become "one of the battlegrounds of the political and academic conflicts of the middle and late 1960s," when "[c]ivility, even among faculty and administrators, was a major casualty."¹³⁷ The administration was aligned with the "conservative faction," and was quoted in an article referring

131 *Id.* at 1326.

132 *Id.* at 1329.

133 480 F.2d 705 (6th Cir. 1973), *cert. denied*, 414 U.S. 1075 (1973).

134 *Id.* at 708-09.

135 *Id.* at 709.

136 537 F.2d 1036 (9th Cir. 1976).

137 *Id.* at 1040.

to younger faculty as “punks” and “damned liars.”¹³⁸ The plaintiff returned the favor during the senate meeting.¹³⁹ Although it was clear that Mabey momentarily disrupted the senate meeting, the court questioned the severity of it, observed that Mabey did not use or incite violence, and determined that the “academic senate is one place where expression of opinions should be most unfettered.”¹⁴⁰ The court called for “a closer look at the facts than the summary disposition has allowed.”¹⁴¹

At the other end of the spectrum is *Adamian v. Lombardi*, where the court upheld dismissal of a professor who played a prominent role in unauthorized student protest during school hours on school property, led raucous catcalls after the university president had asked the audience to be quiet, attempted to stop the governor’s motorcade, and otherwise caused substantial disruption of a duly constituted university function and created a danger of violence.¹⁴²

Other cases in the middle of the disturbance spectrum are more complicated. For example, in *Duke v. North Texas State University*, the court determined that a university teaching assistant, who was dismissed for making speeches using profane language and criticizing university administration and policies, did not state a claim under *Pickering*.¹⁴³ The court decided that the university’s decision was pursuant to a legitimate interest in maintaining “competent faculty” and perpetuating “public confidence” in the university, which the professor’s conduct undermined.¹⁴⁴ The court explained that under *Pickering*, the court must give great weight to the factual findings of academic agencies when reached by correct procedure and supported by substantial evidence to avoid interfering in the “day-to-day operations of schools” and to avoid selecting faculty and staff for colleges and universities.¹⁴⁵ Furthermore, the court ruled that the professor “owed the university a minimal duty of loyalty and civility to refrain from extremely disrespectful and grossly offensive remarks aimed at the administrators of the university.”¹⁴⁶ Lack of civility is not protected by academic freedom.

Similarly, in *Megill v. Board of Regents*, the court ruled that the failure to grant tenure to a professor who made false and misleading public statements about the university and its president, used profanity and disrupted a meeting, combined one of his courses with another, and gave inadequate supervision to the course did not violate the First Amendment rights of the professor.¹⁴⁷ Neglect of duty is not protected by academic freedom. Nevertheless, balancing the plaintiff’s First

138 *Id.*

139 *Id.*

140 *Id.* at 1048–50.

141 *Id.* at 1051.

142 608 F.2d 1224, 1227–28 (9th Cir. 1979), *cert. denied*, 446 U.S. 938 (1980).

143 469 F.2d 829 (5th Cir. 1973), *cert. denied*, 412 U.S. 932 (1973).

144 *Id.* at 839.

145 *Id.* at 838.

146 *Id.* at 840.

147 541 F.2d 1073 (5th Cir. 1976).

Amendment rights against those of the board of regents, the court determined that it had to favor the board due to the falsity and inaccuracy of the professors' statements and that doing so would not threaten academic freedom as articulated in *Keyishian* in circumstances where, at all levels of the administrative review process, his constitutional rights were recognized.¹⁴⁸ "When his statements and actions fell short of those that the board could rightfully expect of its tenured professors, the state's strong interest in a quality university system and effective teacher contribution to the educational process prevailed."¹⁴⁹

Professors also lost under *Pickering* when the university proved it would have dismissed a professor regardless of his speech; for example, in *Hillis v. Stephen F. Austin State University*, where the university proved dismissal was due to the professor's continual lack of cooperation, abrasive personality, and unacceptable conduct, including refusal to assign a grade to a student as instructed by the department head, which the court declined to treat as a fundamental violation of academic freedom.¹⁵⁰ In *Trotman v. Board of Trustees of Lincoln University*, the court determined that fourteen faculty members' criticism of the university president and his policies and their picketing was protected speech even if strident, but the court remanded for fact finding about whether the defendants would have taken retaliatory action against the faculty anyway due to the disruptive character of their speech.¹⁵¹ Incivility, profanity, and moral delinquency are not protected by academic freedom, yet the courts continue to link them.

B. The Connick-Pickering Test

Because not every appellate court treated, as a threshold question under *Pickering*, whether an employee's speech addresses a matter of public concern, the U.S. Supreme Court revisited *Pickering* in *Connick* in 1983.¹⁵² The result is the modern *Connick-Pickering* test, which examines (1) whether the employee's speech is fairly characterized as constituting speech as a citizen on a matter of public concern, (2) whether the employee's interest in speaking outweighs the government's legitimate interest in efficient public service, (3) whether the speech played a substantial part in the government's challenged employment decision, and (4) whether the government has shown by a preponderance of the evidence that it would have made the same employment decision even in the absence of the protected conduct.¹⁵³ We discuss the first two *Connick-Pickering* tests next.

148 *Id.* at 1085.

149 *Id.* at 1086.

150 665 F.2d 547 (5th Cir. 1982).

151 635 F.2d 216 (3d Cir. 1980).

152 *Connick v. Myers*, 461 U.S. 138, 147–48 (1983).

153 *Battle v. Bd. of Regents*, 468 F.3d 755, 759–60 (11th Cir. 2006) (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) and *Connick*, 461 U.S. 138)).

1. *Matters of Public Concern*

In evaluating the threshold prong of the test, whether the employee's speech is a matter of public concern, courts ask whether the speech can fairly be considered to relate to "any matter of political, social or other concern to the community" and whether the "main thrust" of the speech is "essentially public in nature or private, whether the speech was communicated to the public at large or privately to an individual, and what the speaker's motivation in speaking was."¹⁵⁴ Criticizing the relevance of this prong to academics, one observer argued that two schools of thoughts are equally reasonable: (1) what a professor chooses to teach her students in a public university is inherently and always of public concern, as is any intramural speech about university governance; or (2) because a professor's selection of course material constitutes expression that relates only to the workplace, it is never a matter of general public interest.¹⁵⁵ There is a better way to reconcile these views by focusing on whether the speech expands the marketplace of ideas.

Hence, in *Adams v. Trustees of the University of N.C.-Wilmington*, the court determined that a professor's conservative speech regarding academic freedom, civil rights, campus culture, sex, feminism, abortion, homosexuality, religion, and morality in regular columns, books, and on radio and television broadcasts as a commentator were matters of public concern.¹⁵⁶ The speech expanded the marketplace of ideas pertaining to political and social matters. The court of appeals reversed the district court's finding that this speech became private once listed in the professor's promotion application.¹⁵⁷ The university denied him promotion, in the professor's view, because of retaliation and viewpoint discrimination.¹⁵⁸

In contrast, institutional academic autonomy properly took preeminence where a public employee's speech did not expand the marketplace of ideas and concerned matters only of personal interest.¹⁵⁹ For example, in *Clinger v. New Mexico Highlands University, Board of Regents*, the court reiterated that speech concerning individual personnel disputes or internal policies does not typically involve a matter of public concern.¹⁶⁰ The court ruled that a professor failed the first prong of the *Connick-Pickering* test when she (1) claimed retaliation for advocacy before the Faculty Senate of a "no confidence" vote with respect to members of the board of regents, due to their purported failure to comply with an internal policy on the appointment of a new president; (2) criticized a regent as untrustworthy based on the presidential appointment process; (3) criticized another for accepting the position of University President; and (4) criticized a proposed academic reorganization.¹⁶¹

154 *Connick*, 461 U.S. at 146; *Mitchell v. Hillsborough Cnty.*, 468 F.3d 1276, 1283 (11th Cir. 2006).

155 Chang, *supra* note 17, at 941–46.

156 640 F.3d 550, 565 (4th Cir. 2011).

157 *Id.* at 562.

158 *Id.* at 556.

159 *Connick*, 461 U.S. at 146–47.

160 215 F.3d 1162, 1166 (10th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001).

161 *Id.*

In two exceptional cases, the courts determined that faculty speech critical of their own departments were matters of public concern, but in a manner consistent with the legacy of *Pickering*. The court in *Demers v. Austin* ruled that a professor had addressed a matter of public concern when he wrote and distributed a pamphlet critical of the lack of professional orientation in the communications program of the school.¹⁶² The professor did not focus on personnel issues or internal disputes nor voice personal complaints as much as he made broad proposals to change the direction and focus of the school away from purely scholarly to professional journalism.¹⁶³ In this way, he expanded the marketplace of ideas. In addition, the professor widely distributed the pamphlet to broadcast media, which the court said “reinforce[d] its conclusion that it addressed matters of public concern.”¹⁶⁴

In *Johnson v. Lincoln University*, the court of appeals reversed the district court for determining as a matter of law that a faculty member did not address a matter of public concern in connection with controversies in which he was involved within the chemistry department that often degenerated into name-calling and shouting matches, and letters that he sent to the accreditor regarding the master of human services program and low academic standards generally.¹⁶⁵ Petty disputes with the administration are not protected speech. Academic freedom belongs only to faculty who display “dignity, courtesy and temperateness” and have a “fair and judicial mind.”¹⁶⁶ But the court also found evidence of controversy over educational standards and academic policies that it decided could relate to a matter of public concern and remanded for a trial on the matter.¹⁶⁷ For example, the professor was critical of a master’s degree program that admitted students without a bachelor’s degree and required only a tenth-grade literacy level, which he said would reinforce the view that the academic standards at Black institutions and the qualifications of their students are less than at others.¹⁶⁸

There was nothing so redeeming in *Brown v. Armenti*, where the court ruled a professor’s speech criticizing the university’s president on issues of morale and employee confidence did not involve a matter of public concern.¹⁶⁹ Likewise, in *Gorum v. Sessoms*, the same court added that a professor’s speech assisting and supporting a student with violating the university’s policy against weapons possession, then withdrawing the president’s invitation to speak at a fraternity’s prayer breakfast did not involve a matter of public concern.¹⁷⁰ Professor Finkin has alleged that, although this speech did not advance the search for truth, it should have been protected anyway up to some ill-defined communal standard of uncouth

162 746 F.3d 402, 414–15 (9th Cir. 2014).

163 *Id.* at 416.

164 *Id.*

165 776 F.2d 443, 451 (3d Cir. 1985).

166 *See* 1940 Statement, *supra* note 32.

167 *Id.* at 452.

168 *Id.*

169 247 F.3d 69 (3d Cir. 2001).

170 561 F.3d 179 (3d Cir. 2009).

civil intramural discourse because professors are not mere employees, servants, or agents.¹⁷¹ Professor Finkin draws the boundary at willful obstruction, defamation, and inciting to riot,¹⁷² but the bar set by the Declaration was not so high: “In their extramural utterances, it is obvious that academic teachers are under a peculiar obligation to avoid hasty or unverified or exaggerated statements and to refrain from intemperate or sensational modes of expression.”¹⁷³

Sexual speech is not protected under the Declaration or first prong of *Connick-Pickering* either. The Declaration did not defend grave moral delinquency because it had no bona fide linkage to the public good that academic freedom was designed to protect. Therefore, in *Urofsky v. Gilmore*, the court declined to enjoin a statute restricting college professors from accessing sexually explicit material on computers that were owned or leased by the state. The court determined that the law regulated only the speech of state employees in their capacity as employees, and not as private citizens, and declined to identify any constitutional academic liberty at stake.¹⁷⁴

Similarly, in *Trejo v. Shoben*, the court ruled that a male assistant professor’s sexually charged comments made in the presence of male and female professors and students at an off-campus professional conference were designed to further the professor’s private interests in soliciting female companionship.¹⁷⁵ Likewise, in *Buchanan v. Alexander*, a court ruled that a former professor’s use of profanity and discussion about the professor’s sex life was not speech protected by the First Amendment, such that the university’s sexual harassment policies did not violate the First Amendment as applied to the professor.¹⁷⁶

There was no sharp departure from *Pickering*, once *Connick* became law in the area of personnel disputes, moral delinquency, or pedagogy. Rather, the *Connick-Pickering* test prolongs judicial deference toward pedagogy. For example, in *Boring v. Buncombe County Board of Education*, the court ruled that selection of a play for four students to perform in her advanced acting class involving a divorced mother and three daughters, one a lesbian and another pregnant with an illegitimate child, did not involve a matter of public concern and that even if it did, school officials had a legitimate pedagogical interest in regulating that speech.¹⁷⁷ According to the court, “the four essential freedoms” of a university outlined by Justice Frankfurter in *Sweezy* “should no less obtain in public schools unless quite impracticable or contrary to law.”¹⁷⁸

171 Finkin, *supra* note 15, at 1340.

172 *Id.* at 1345.

173 Declaration, *supra* note 23, at 155.

174 *Urofsky v. Gilmore*, 216 F.3d 401, 409, 415 (4th Cir. 1998), *cert. denied*, 531 U.S. 1070 (2001).

175 319 F.3d 878 (7th Cir. 2003).

176 919 F.3d 847 (5th Cir. 2019), *cert. denied*, 140 S.Ct. 432 (2019).

177 136 F.3d 364 (4th Cir. 1998), *cert. denied*, 525 U.S. 813 (1998).

178 *Id.* at 370.

2. *Weighing Interests*

The second prong of the *Connick-Pickering* test, evaluating whether the employee's interest in speaking outweighs the government's legitimate interest in efficient public service, has also prolonged several themes that emerged under *Pickering*. Foremost among them is that disruptive speech by faculty is unprotected. Once again, intemperate speech lacking dignity and courtesy and grave moral delinquency never were protected under the Declaration. In *Jeffries v. Harleston*, the court determined that a Black studies professor who claimed he was removed as department chair (though retained as a tenured professor) due to controversial off-campus speech failed to state a claim because university officials were motivated by a reasonable prediction of disruption to university operations.¹⁷⁹

Similarly, in *Schrier v. University of Colorado*, the court determined that the speech of the terminated chair of the university's medical department criticizing the proposed relocation of the medical campus was on a matter of public concern, but he was unlikely to prevail because of the actual disruption that it caused by impairing the harmony among coworkers; detrimentally impacted working relationships within the school of medicine, impairing his performance as department chair; and interfering with the university's ability to implement the move.¹⁸⁰ The plaintiff maintained that as a professor, he possessed a special constitutional right of academic freedom not enjoyed by other public employees that must also be taken into account, but the court disagreed:

[A]n independent right to academic freedom does not arise under the First Amendment without reference to the attendant right of free expression. Thus, the right to academic freedom is not cognizable without a protected free speech or associational right. Dr. Schrier's argument implies that professors possess a special constitutional right of academic freedom not enjoyed by other governmental employees. We decline to construe the First Amendment in a manner that would promote such inequality among similarly situated citizens.¹⁸¹

Academic institutional autonomy also remains a pillar of *Connick-Pickering*. In *Feldman v. Ho*, the court determined that, assuming arguendo a professor's accusation that a colleague engaged in academic misconduct was an issue of public importance, it concerned the manner in which the mathematics department handled its core "business" of choosing and promoting scholars and, thus, was so central to the university's mission that its interests dominated over the professor's interest in speech.¹⁸² The court distinguished a mathematics professor's speech unrelated to his job, speech unrelated to mathematics, and about the rules by which the department evaluates charges of scholarly misconduct.¹⁸³ The court observed that "[a] university's academic independence is protected by the Constitution, just

179 52 F.3d 9 (2d Cir. 1995), *cert. denied*, 516 U.S. 862 (1995).

180 427 F.3d 1253 (10th Cir. 2005).

181 *Id.* at 1266.

182 171 F.3d 494 (7th Cir. 1999), *cert. denied*, 528 U.S. 928 (1999).

183 *Id.* at 497-98.

like a faculty member's own speech,"¹⁸⁴ and "the only way to preserve academic freedom is to keep claims of academic error out of the legal maw."¹⁸⁵

Without another test to apply to lawsuits implicating academic freedom, courts have turned to the *Connick-Pickering* test and wound up merging academic freedom within the protections of First Amendment retaliation law, once again raising the question whether academic freedom has any independent legal significance. It plainly does, if academic freedom is the same as institutional academic autonomy, but, quoting from *Adler*, the dissent in *Keyishian* argued that academic freedom was different. Recognizing the right of institutions to forbid profane and sexual speech in the classroom and to determine the required curriculum for degree programs and minimum course content for professional programs is one thing. Beyond this, *Lehrfreiheit* confers on faculty the authority to determine course content and the content of lectures, excluding controversial subject matter unrelated to the subject. Inasmuch as academic freedom and institutional academic autonomy are not necessarily corollary, it does not benefit academic freedom to confuse them. This becomes even more evident when we consider the curricular speech doctrine.

C. Curricular or School-Sponsored Speech Doctrine

Another paradigm to which courts have turned to evaluate academic freedom as a constitutional liberty is the curricular or school-sponsored speech doctrine. "Curricular speech" has been expansively defined as "all planned school activities including, besides courses of study, organized play, athletics, dramatics, clubs, and homeroom program."¹⁸⁶ It includes "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."¹⁸⁷ As these examples suggest, curriculum speech need not occur in the classroom, but it must be supervised by faculty and "designed to impart particular knowledge or skills to student participants and audiences."¹⁸⁸ It applies in the clinical setting,¹⁸⁹ even to extracurricular programs,¹⁹⁰ and to a school-sponsored social event or class trip, as long as the speech bears the school's imprimatur.¹⁹¹ It may be even broader than this as discussed below.

184 *Id.* at 495.

185 *Id.* at 497.

186 *Lee v. Cnty. Sch. Div.*, 418 F. Supp. 2d 816, 824 (E.D. Va. 2006), *aff'd*, 484 F.3d 687 (4th Cir. 2007), *cert. denied*, 552 U.S. 950 (2007) (citing *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 367–68 (4th Cir. 1998), *cert. denied*, 525 U.S. 813 (1998)).

187 *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

188 *Hazelwood*, 484 U.S. at 271.

189 *See, e.g., Ward v. Members of Bd. of Control of E. Mich. Univ.*, 700 F. Supp. 2d 803, 814 (E.D. Mich. 2010) ("courts have traditionally given public colleges and graduate schools wide latitude 'to create curricular that fit schools' understandings of their educational missions.'... 'This judicial deference to educators in their curriculum decisions is no less applicable in a clinical setting....'").

190 *See, e.g., Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 687 (2010).

191 *See, e.g., Morse v. Frederick*, 551 U.S. 393, 405–06 (2007).

The curricular speech doctrine arose out of the primary and secondary grades and, therefore, has an uneasy fit in the postsecondary academy. In *Edwards v. Aguillard*, the issue was whether a law requiring the teaching of creation science when evolution was taught violated the Establishment Clause.¹⁹² Justice Brennan, writing for the Court, concluded that, especially when a state or local school board must monitor compliance with the Establishment Clause, it should have “considerable discretion” when operating elementary and secondary schools.¹⁹³ The majority considered creation science religious speech, rather than a scientific theory as alleged by the State. The Court expressed concern that students this age “are impressionable and their attendance is involuntary,” in contrast to “college students who voluntarily enroll in courses” and are less susceptible to “undue influence.”¹⁹⁴ Lacking a valid secular purpose, the court struck the “Louisiana Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act” as in violation of the Establishment Clause.

The State argued that, rather than infringe academic freedom, the Act protected it by requiring a balanced presentation of the theories benefiting students.¹⁹⁵ The dissent led by Justices Scalia and Rehnquist agreed: “Witness after witness urged the legislators to support the Act, so that students would not be ‘indoctrinated’ but would instead be free to decide for themselves, based upon a fair presentation of the scientific evidence, about the origin of life.”¹⁹⁶ Record evidence pointed to “censorship and misrepresentation of scientific information” pertaining to evolution.¹⁹⁷ If true, *Edwards* is one of the few cases where the state sought to liberalize the marketplace of ideas, but the academy opposed and thwarted it.

The definition of academic freedom that the appellate court supplied was decidedly individual in orientation, similar to Justice Frankfurter’s articulation of it in *Wieman*: “Academic freedom embodies the principle that individual instructors are at liberty to teach that which they deem to be appropriate in the exercise of their professional judgment.”¹⁹⁸ In contrast, the U.S. Supreme Court ruled that academic freedom was not relevant in the circumstances, because teachers are not free to

192 482 U.S. 578, 583 (1987).

193 *Id.* at 583–84; *accord* *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 724 (8th Cir.1998) (finding that school board had legitimate academic interest in promoting generally acceptable social standards and, thus, could punish teacher for allowing profanity and graphic displays of oral sex in student works); *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004 (7th Cir. 1990) (finding that state had compelling interest in selection of and requiring adherence to suitable curriculum and that individual teachers did not have right to make such curriculum choices (teacher classroom speech case)).

194 *Edwards*, 482 U.S. at 584 & n.5; *accord id.* at 607 n.7 (Powell and O’Connor, JJ., concurring) (“[T]he difference in maturity between college-age and secondary students may affect the constitutional analysis of a particular public school policy.”) This contrast is why, according to the majority, “the Court has not questioned the authority of state colleges and universities to offer courses on religion or theology.” *Id.* at 584 n.5.

195 *Id.* at 586.

196 *Id.* at 631 (Scalia and Rehnquist, JJ. dissenting).

197 *Id.* at 633; *accord id.* at 624–26.

198 *Id.* at 586 n.6.

teach courses other than as prescribed by the State Board of Education. In any event, the Court decided that the Act diminished academic freedom “by removing the flexibility to teach evolution without also teaching creation science.”¹⁹⁹ The first ruling negated any potential intra-First Amendment conflict between academic freedom and the Establishment Clause by eliminating a class of teachers who Justice Frankfurter had said could exercise academic freedom. *Edwards* establishes that K–12 teachers lack academic freedom.²⁰⁰

Justice Brennan switched sides in *Hazelwood School District v. Kuhlmeier*,²⁰¹ which concerned students in the *Journalism II* class at Hazelwood East High School who wanted to publish a story in the high school newspaper about their peers’ experiences with teen pregnancy and the impact of divorce. The school district prevented it. Justice Brennan was not convinced a high school newspaper amounted to curricular speech,²⁰² but the majority ruled otherwise and held that a school board had considerable leeway when regulating school-sponsored speech, defined generally as “speech that a school ‘affirmatively ... promotes,’ as opposed to speech that it ‘tolerates.’”²⁰³ The Court indicated that it wanted to empower school authorities to control pedagogy and to protect primary and secondary students from material they might not be mature enough to handle:

Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school....

[A] school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting.²⁰⁴

The court reiterated the importance of showing “substantial deference” to secondary school officials’ decisions about curricular content,²⁰⁵ but specifically declined

199 *Id.*

200 As a result, it is hard to see why the Act’s imposition on the State Board of Education of a curricular requirement should have been actionable by teachers who were among those who brought the suit.

201 484 U.S. 260, 271 (1988).

202 *Id.* at 283.

203 *Id.* at 273 (noting that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns”).

204 *Id.* at 271.

205 *Id.* at 273 (“the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.”); *id.* at 273 n.7 (“[E]ducators’ decision with regard to the content of school sponsored newspapers, dramatic productions, and other expressive activities are entitled to substantial deference.”).

to decide “whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.”²⁰⁶

The curricular speech doctrine should have no bearing on cases at the heart of academic freedom. Both *Kuhlmeier* and *Edwards* arise from a more pedagogically regulated environment than postsecondary institutions, which themselves may fit along a continuum with community colleges and proprietary private schools the most like school districts and public research universities the least like them.²⁰⁷ Both cases also hinge on younger and more impressionable students compelled to attend K–12 school, as compared to postsecondary students who volunteer to enroll. More recently, the Court has tended to deemphasize a concern for the impressionability of youth even in K–12, and has drawn a clear distinction between the maturity of primary and even high school students.²⁰⁸ To the extent impressionability should be a concern at the postsecondary level, the differences between pedagogical regulation and student maturity at the secondary and postsecondary level should impact the applicability of curricular speech doctrine.

But there is little evidence lower courts have taken these differences into account. It has not mattered that neither *Kuhlmeier* nor *Edwards* pitted faculty against institution. Instead, lower courts have readily applied *Kuhlmeier* and *Edwards* to struggles between postsecondary institutions and faculty or students, with the result that when a university’s interests are juxtaposed, the university usually wins. As one district court put it bluntly, “‘To 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.’”²⁰⁹ The key case upon which this court and many others now rely is the Fourth Circuit’s decision in *Urofsky v. Gilmore*, which reviews the same case law this article examines and concludes as follows:

206 *Id.* at 273 n.7. The Court did not reference its earlier decision in *Ewing* requiring judges reviewing “the substance of a genuinely academic decision” to “show great respect for the faculty’s professional judgment.” *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 & n.11 (1985) (adding that “[u]niversity faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation”); *id.* at 226 (“Added to our concern for lack of standards is a reluctant to trench on the prerogatives of state and local educational institutions and our responsibilities to safeguard their academic freedom, ‘a special concern of the First Amendment.’”).

207 *See Axson-Flynn v. Johnson*, 356 F.3d 1277, 1289 (10th Cir. 2004) (“[W]e are not unmindful of the differences in maturity between university and high school students. Age, maturity, and sophistication level of the students will be factored in determining whether the restriction is reasonably related to legitimate pedagogical concerns.”).

208 *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 65 (2006) (observing that “[w]e have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy”) (citing, *inter alia*, *Bd. of Educ. of Westside Comm. Schs. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)).

209 *Martinez v. Univ. of Puerto Rico*, No. CIV 061713 JAF, 2006 WL 3791360 (D.P.R. Dec. 22, 2006) (citing *Urofsky v. Gilmore*, 216 F.3d 401, 490 (4th Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001); *accord Radolf v. Univ. of Conn.*, 364 F. Supp. 2d 204, 216 (D. Conn. 2005) (“No court has ever held that a university professor has a First Amendment right of academic freedom to participate in ... performing research under any particular grant.”).

[C]ases that have referred to a First Amendment right of academic freedom have done so generally in terms of the institution, not the individual.... [T]he [Supreme] Court has focused its discussions of academic freedom solely on issues of institutional autonomy.... 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.²¹⁰

This outcome vindicating *Adler* is now the majority rule in contests between faculty and institutions that more often than not concern religion.²¹¹

Kuhlmeier influences application of the first prong of the *Connick-Pickering* test in classroom-related cases by undermining a professor's claim that speech in the classroom concerns the public. For example, in *Kenney v. Genesee Valley Board of Cooperative Education Services*, the district court considered a criminal justice instructor's presentation to other teachers on the topic of law enforcement and ballistics inclusive of an individual committing suicide curricular in nature and, therefore, not a matter of public concern.²¹² The instructor alleged that two of his supervisors approved use of the video and that the video was directly related to the curriculum that the plaintiff was employed to teach, but the superintendent terminated him anyway.²¹³ The court dismissed his free speech retaliation claim related to academic freedom.²¹⁴ Were the video shown merely to stoke controversy unrelated to the subject matter of the course, it would not have been protected by academic freedom, but in this case the video had no such purpose; it was shown to demonstrate the science and math of ballistics and the effects of bullets on human bodies.

Kuhlmeier also influences the second prong of the *Connick-Pickering* test when applied to instructor speech. For example, in *Evans-Marshall v. Board of Education*, a high school literature teacher alleged that she was retaliated against for the curricular and pedagogical choices she made while teaching, as well as for exercising her First Amendment rights.²¹⁵ The court agreed with her that teaching literature addressing homosexuality, drug abuse, rape, religious killing, and

210 *Urofsky*, 216 F.3d at 414–15.

211 *See, e.g.,* *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, *Bishop v. Delchamps*, 505 U.S. 1218 (1992); *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667 (7th Cir. 2006); *cf. Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007), *cert. denied*, 552 U.S. 823 (2007) (elementary school teacher properly dismissed when a student complaint about her response to a student's question, asking whether she had participated in a political demonstration, and responded that she showed solidarity with antiwar demonstrators by honking her horn).

212 No. 07-CV-6442 CJS, 2008 WL 343110, at *4 (W.D.N.Y. Feb. 6, 2008) (citing *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 697 (4th Cir. 2007), *cert. denied*, 552 U.S. 950 (2007) (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988))).

213 *Id.*

214 *Id.* at *5.

215 *Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Vill. Sch. Dist.*, No. 3:03cv091, 2008 WL 2987174 (S.D. Ohio July 30, 2008) (“[I]t is not clear that *Garcetti* necessarily applies to the facts of this case. Thus, absent Sixth Circuit or further Supreme Court guidance to the contrary, this Court will continue to apply the traditional *Pickering-Connick* approach to cases involving in-class speech by primary and secondary public school teachers.”).

destruction of religious objects was a matter of public concern,²¹⁶ but the court found that the school district's "interest in regulating the Plaintiff's selection of instructional materials and methods of instruction far outweighed the Plaintiff's right to use whatever supplemental materials and methods she chose."²¹⁷ Citing *Kuhlmeier* with echoes from *Piggee*, the court explained:

While the Board's regular practice might have been to allow its teachers the latitude to select supplemental materials and incorporate instructional methods of their choosing, this does not give a teacher the 'right' to do so, if the administrators or the Board do not approve of such selections. For example, a Spanish teacher should not have the 'right' to supplement his Spanish textbook with instructional materials on how to speak Japanese, if the administrators do not approve. Or, a trigonometry teacher who decides that mathematical basics are 'passé' should not have the 'right' to implement a supplemental new-wave method of teaching mathematics, if the Board does not concur.²¹⁸

Of course, these hypotheticals are easier than the one the court confronted involving an instructor teaching the discipline she was hired to teach. Had the instructor been teaching college literature and touched on these subjects not merely to provoke controversy, but in furtherance of her assigned subject matter, this again would have been a core academic freedom concern. Teaching trigonometry in literature amounts to neglect of duty and was not protected by academic freedom as articulated in the Declaration. Institutional academic autonomy takes precedence in this event.

The district courts in *Evans-Marshall* and *Kenney* relied in part on *Lee v. York County School Division*, where the Fourth Circuit held (based on *Kuhlmeier*) religious speech posted by a high school teacher on her classroom bulletin board curricular in character and, thus, not of public interest.²¹⁹ In concluding this was "nothing more than an ordinary employment dispute," the court added, "A school need not tolerate student [or teacher] speech that is inconsistent with its basic educational mission even though the government could not censor similar speech outside the school."²²⁰ The idea that all religious speech is inconsistent with basic education is hardly self-evident and, in any event, once again veers toward a type of control over curriculum inconsistent with *Lehrfreiheit*, as long as the speech relates to course subject matter.

216 *Id.* at *10.

217 *Id.* at *13.

218 *Id.* (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) ("Although neither the Supreme Court nor the Sixth Circuit has addressed the balance between a public primary or secondary school district's interest in dictating the curricular speech of its teachers with a teacher's interest in independently choosing such curriculum, without the factual component of preapproval of the speech in question, this holding is in concert with both Supreme Court and Sixth Circuit decisions on similar issues....")).

219 *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 700 (4th Cir. 2007), *cert. denied*, 552 U.S. 950 (2007).

220 *Id.* at 696.

Kuhlmeier is materially influencing two key *Connick-Pickering* tests that determine whether a professor's classroom-related speech is protected under the First Amendment, generally in a manner vindicating institutional academic autonomy at the expense of *Lehrfreiheit*. If all curricular speech is unprotected by academic freedom, then the doctrine has no relation any longer to its underpinnings. *Lehrfreiheit* always had curriculum within its sites, including course and lecture content, excluding profane and sexual speech and gratuitously controversial speech. Unless academic freedom now means something totally different than it did at the start, the *Kuhlmeier* paradigm should be abandoned when evaluating academic freedom.

D. Religious Speech in the Classroom

Courts remain especially wary of religious speech in universities in accord with the curricular speech doctrine stemming from *Edwards*, but then academic freedom and the liberalism in which it is grounded have long been at odds with strong religious belief.²²¹ For example, the Eleventh Circuit held in *Bishop v. Aronov*²²² that a public university did not infringe an exercise physiology professor's academic freedom or free speech rights when it directed him to discontinue "(1) the interjection of religious beliefs and/or preferences during instructional time periods and (2) optional classes where a 'Christian Perspective' of an academic topic is delivered."²²³ In class, Professor Bishop commented upon what, to his understanding, was evidence "of the creative force behind human physiology."²²⁴ He explained that Christianity colored his outlook and conduct, but added, "If that is not your bias, that is fine. You need, however, to filter everything I say with that (Christian bias) filter."²²⁵ He also organized an optional after-class meeting wherein he lectured on and discussed "Evidences of God in Human Physiology."²²⁶

Notably, Professor Bishop was teaching the course and curriculum assigned to him. These were not at issue, as compared to his lecture content at the core of academic freedom. Plaintiff's supervisor delivered a memorandum to him, ordering him to discontinue "interjection of religious beliefs and/or preferences, during instructional time periods and optional classes where a 'Christian Perspective' of an academic topic is delivered." The plaintiff filed suit against the board of trustees when the university refused to withdraw the memorandum order.

The Eleventh Circuit held that, although the university could not limit the professor's expression on his own time, in public forums on campus, or in

221 See Stanley Fish, *Academic Freedom: How Odd Is That?* 88 TEX. L. REV. 171, 173–74 (2009) ("Strong religious beliefs have always posed a problem for the doctrine of academic freedom because they pose a problem for liberalism in general.").

222 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992).

223 *Id.* at 1076.

224 *Id.* at 1068.

225 *Id.*

226 *Id.* at 1068–69.

publications,²²⁷ the university could direct him “to refrain from expression of religious viewpoints in the classroom” and, according to the court, “must have the final say” in a dispute about a “matter of content in the courses” taught.²²⁸ The Declaration emphasized that academic freedom must prevent exclusion “from the teachings of the university unpopular or dangerous subjects.”²²⁹ It specifically protected “freedom of teaching within the university or college and freedom of extramural utterance and action,” but the court ruled that “Dr. Bishop’s interest in academic freedom and free speech do not displace the University’s interest inside the classroom.”²³⁰

The court drew the principle of *Lehrfreiheit* into question when it opined, “[W]e hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student [or professor] speech in school-sponsored expressive activities, so long as their actions are reasonably related to legitimate pedagogical concerns.”²³¹ Courts have expressed the same sentiment about educator speech in K–12 classrooms to the point of stating that the school system “hires” their speech.²³²

The Seventh Circuit in *Piggee v. Carl Sandburg College* held similar to the Eleventh Circuit with respect to the religious expression of a cosmetology instructor at a community college during a clinic.²³³ The court vindicated the institution’s institutional autonomy over the instructor’s First Amendment liberties when a student complained about her placing religious pamphlets on the sinfulness of homosexuality in his smock during clinical instruction time as he was preparing to leave for the day and invited him to read and discuss them with her later.²³⁴ The college determined that the instructor had perpetrated sexual harassment and chose not to renew her contract.²³⁵ She sued and argued that the clinical beauty salon where the conduct occurred was located at a noncurricular site in a store, but the court held it “one of the places where cosmetology instruction was taking place” and, thus, compared her speech squarely to curricular speech within the control of the institution: “[T]he college had an interest in ensuring that its instructors stay

227 *Id.*

228 *Id.*

229 Declaration, *supra* note 23, at 155.

230 *Id.* at 1076.

231 *Bishop*, 926 F.2d at 1074 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)).

232 *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Village Sch. Dist.*, 624 F.3d 332, 340 (6th Cir. 2010), *cert. denied*, 564 U.S. 1038 (2011). In *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1992), the court ruled that a fifth-grade teacher could not even read a Bible silently during the daily fifteen-minute mandatory “silent reading period.” The teacher objected that this violated his First Amendment rights of free speech and academic freedom, but the court ruled that his actions substantially infringed on the rights of his students who the court characterized as “impressionable ten-, eleven- and twelve-year old[s].” *Id.* at 1057–58. Reviewing this decision, another court concluded that its foundation was *Kuhlmeier. Bishop*, 926 F.2d at 1073.

233 464 F.3d 667 (7th Cir. 2006).

234 *Id.* at 668.

235 *Id.* at 669.

on message while they were supervising the beauty clinic, just as it had an interest in ensuring that the instructors do the same while in the classroom."²³⁶ The court elaborated as follows:

"Universities are entitled to insist that members of the faculty (and their administrative aides) devote their energies to promoting goals such as research and teaching."... No college or university is required to allow a chemistry professor to devote extensive classroom time to the teaching of James Joyce's demanding novel *Ulysses*, nor must it permit a professor of mathematics to fill her class hours with instruction on the law of torts. Classroom or instructional speech, in short, is inevitably speech that is part of the instructor's official duties, even though at the same time the instructor's freedom to express her views on the assigned course is protected.²³⁷

The implication of *Piggee* is that academic freedom is unrelated to course content or, as the court would later say, her teaching duties. It sets up a distinction between this type of speech and speech related to course content embraced within the concept of *Lehrfreiheit* that, nevertheless, the court in *Bishop* would not protect in deference to institutional academic autonomy. To the extent this was because of the particular Christian message concerned, this case betrays viewpoint discrimination. To the extent the ruling can be generalized, it is facially inconsistent with the easier of the two curricular components of *Lehrfreiheit*. The harder element is freedom to determine the content of courses. The court in *Piggee* reasonably objects that academic freedom should not liberate the chemistry teacher from teaching chemistry. The chemistry teacher who instead taught literature would neglect her duty, which is not protected by the Declaration. But the same Declaration would have rejected the idea that a professor of political science may not design a course in political theory and lecture based on whatever political theorist the professor chose to feature germane to the topic.

Regardless, the conclusion that not only school districts, but also universities may determine what and how classes are taught has gained momentum at the expense of the original conception of academic freedom.²³⁸ Religious speech has

236 *Id.* at 672; *see also* Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 480 (7th Cir. 2007), *cert. denied*, 552 U.S. 823 (2007) (explaining the same court's earlier decision in *Piggee*).

237 *Piggee*, 464 F.3d at 671.

238 *See also* Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 491 (3d Cir.1998), *cert. denied*, 525 U.S. 1143 (1999) (the First Amendment does not allow a university professor to decide what is taught in the classroom, but rather protects the university's right to select the curriculum); Parate v. Isibor, 868 F.2d 821, 827 (6th Cir. 1989) ("The university may constitutionally choose not to renew the contract of a nontenured professor whose pedagogical attitude and teaching methods do not conform to institutional standards. The First Amendment concept does not require that a nontenured professor be made a sovereign unto himself."); Johnson-Kurek v. Abu-Absi, 423 F.3d 590, 595 (6th Cir. 2005), *cert. denied*, 546 U.S. 1175 (2006) ("While the First Amendment may protect Johnson-Kurek's right to express her ideas about pedagogy, it does not require that the university permit her to teach her classes in accordance with those ideas. The freedom of a university to decide what may be taught and how it shall be taught would be meaningless if a professor were entitled to refuse to comply with university requirements whenever they conflict with his or her teaching philosophy."); Webb v. Bd. of Trs. of Ball State Univ., 167 F.3d 1146, 1149 (7th Cir. 1999) (The university's "ability to set a curriculum is as much an element

uniquely propelled this doctrinal development, but it is by no means the exclusive reason. The contrast is stark with the U.S. Supreme Court's earlier explanation of the core of academic freedom as follows: "'Teachers and students must always remain free to inquiry, to study, and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die.'"²³⁹ The Declaration even treated religion as one of the three fields of human inquiry worthy of study, including "the interpretation of the general meaning and ends of human existence and its relation to the universe."²⁴⁰ The Declaration insisted that "[i]n all three domains of knowledge, the first condition of progress is complete and unlimited freedom to pursue inquiry and publish its results."²⁴¹ By carving out a whole viewpoint from the marketplace of ideas, institutions have thwarted another key goal of academic freedom: to attract individuals of "high gifts and character" to academics.²⁴² The numbers of devoutly religious in academia are few. Here is an example of academic institutional autonomy precipitating a pall of orthodoxy, rather than undermining it.

E. *The Garcetti Test*

Subsequent to the advent of curricular speech doctrine, including its preoccupation with religious speech, the U.S. Supreme Court expressed concern that the *Connick-Pickering* test was not properly balancing the interests of public employees, as citizens, and the government, as employer, in circumstances when the employee's speech relates to the employee's job duties.²⁴³ Consequently, the Court interpolated a new threshold inquiry: "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 further discipline."²⁴⁴ On the particular facts of *Garcetti v. Ceballos*, Richard Ceballos, a deputy district attorney, was fired after recommending dismissal of a case that was prosecuted and ultimately won. The court rejected his retaliation claim on the grounds that the First Amendment does not "constitutionalize the employee grievance."²⁴⁵ The dissent was generally critical of superseding the balancing test but especially so in relation to the academy.²⁴⁶

of academic freedom as any scholar's right to express a point of view.").

239 *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967). (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)); accord *Dow Chem. Co. v. Allen*, 672 F.2d 1262, 1275 (7th Cir. 1982) (citing T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 594 (1970) ("[t]he heart of the system consists in the right of the individual faculty member to teach, carry on research, and publish without interference from the government, the community, the university administration, or his fellow faculty members.")).

240 Declaration, *supra* note 23, at 155.

241 *Id.*

242 *Id.*

243 *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).

244 *Id.* at 421.

245 *Id.* at 420.

246 *Id.* at 438 (Souter, Stevens, Ginsburg, JJ., dissenting).

Justice Souter's dissent stated that he hoped the majority did not "mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to ... official duties.'"²⁴⁷ He did not distinguish curricular from noncurricular speech. In response, the majority did not "decide whether the analysis ... would apply in the same manner to a case involving speech related to scholarship or teaching."²⁴⁸ The majority recognized 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."²⁴⁹ The Court did not endorse the idea that curricular speech may be protected, but neither did it undermine it.

Granted the discretion to apply the *Connick-Pickering* test without the *Garcetti* overlay, several courts of appeal have done so at the postsecondary level but not in a manner any more protective of an individual professor's speech in light of the curricular speech doctrine.²⁵⁰ The Ninth Circuit ruled in *Demers v. Austin* that *Garcetti* could not, consistent with the First Amendment's protection of academic freedom, apply to teaching and academic writing that are performed "pursuant to the official duties" of a teacher and professor.²⁵¹ But restating the institutional autonomy doctrine, the court added that district courts applying the balancing prong of the *Connick-Pickering* test should "hesitate before concluding that we know better than the institution itself the nature and strength of its legitimate interests."²⁵²

Demers was a professor who distributed a pamphlet including chapters of an in-progress book relating to scholarship and teaching and recommending restructuring in the communications school.²⁵³ In *The Ivory Tower of Babel*, he was critical of the lack of professional orientation in the communications program, which, to his mind, was not adequately preparing students for careers. Demers claimed that the school retaliated against him with negative evaluations, diminished his compensation and reputation, prevented him from serving on committees and teaching preferred classes, triggered internal audits, and spied on his classes.²⁵⁴ Similar to earlier cited cases involving critiques of a professor's own department, the court concluded that Demers had addressed a matter of public interest, because his speech incorporated serious suggestions about the future

247 *Id.* (Souter, Stevens, Ginsburg, JJ. dissenting).

248 *Id.* at 425.

249 *Id.* at 425.

250 *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 562 (4th Cir. 2011); *Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2014) (case remanded to apply the *Connick-Pickering* balancing test after court ruled that professor's accreditation plan for the communications department containing "serious suggestions about the future course of an important department ... at a time when the Murrow School itself was debating some of those very suggestions" was a matter of public concern).

251 746 F.3d at 412.

252 *Id.* at 417.

253 *Id.* at 407.

254 *Id.* at 408.

course of an important department then under debate at the school and because he distributed his views widely, including to local media.²⁵⁵ But the court remanded for the district court to undertake the remainder of the *Connick-Pickering* analysis, including the weighting of interests that has derailed other claims.²⁵⁶

In most other cases at both the postsecondary and K–12 level, where there is a split in the circuits as to whether *Garcetti* or *Connick-Pickering* applies,²⁵⁷ institutions have prevailed, regardless of the test applied. For example, in *Nichols v. University of Southern Mississippi*,²⁵⁸ a district court granted summary judgment to the University of Southern Mississippi against an adjunct music professor under *Garcetti* and *Connick-Pickering*. The professor was non-renewed for statements made in a classroom to a student about homosexuality and the entertainment industry in New York City.²⁵⁹ Nichols spent time working on Broadway and said that “he was warning Lunsford that ‘New York was morally challenging, that AIDS was a severe problem there, and that he should be careful how he handled himself there.’”²⁶⁰ A purpose of academic freedom was to protect against “overwhelming and concentrated public opinion,”²⁶¹ but the court ruled that Nichols’s speech “is best characterized” as “classroom speech” made in Dr. Nichols’s “official capacity.” Consequently, *Garcetti*, together with *Kuhlmeier*, barred his claim. But the court added that even if his speech was that of a citizen on a matter of public concern, he “failed to demonstrate that his interest in making these comments outweighed the University’s interest in promoting efficiency”²⁶² and, more particularly, its nondiscrimination policy. Consequently, the court ruled that his speech also violated the *Connick-Pickering* test.

The outcome in *Nichols* puts an exclamation point on curricular speech doctrine in the context of religious speech after *Garcetti*. Although some might consider the outcome appropriate, a less controversial case reveals the power of *Kuhlmeier* even

255 *Id.* at 417.

256 *Id.*

257 Compare *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 695 n.11 (4th Cir. 2007), *cert. denied*, 552 U.S. 950 (2007) (applying *Connick-Pickering* test to public high school teacher’s speech related to teaching); *Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153, 171 n.13 (3d Cir. 2008), *cert. denied*, 555 U.S. 1212 (2009) (applying *Connick-Pickering* test to high school football coach’s acts of bowing his head and taking a knee with his team while they prayed without deciding whether *Garcetti* applies on the grounds that it did not matter because his speech was not on a matter of public concern) with *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Village Sch. Dist.*, 624 F.3d 332, 343 (6th Cir. 2010), *cert. denied*, 564 U.S. 1038 (2011) (“*Garcetti*’s caveat offers no refuge to Evans-Marshall. She is not a teacher at a ‘public college[]’ or ‘universit[y]’ and thus falls outside of the group the dissent wished to protect.”); *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 480 (7th Cir. 2007), *cert. denied*, 552 U.S. 823 (2007) (applying *Garcetti* to the curricular and pedagogical choices of primary and secondary school teachers); *Brown v. Chicago Bd. of Educ.*, 824 F.3d 713, 716 (7th Cir. 2016) (similar); *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1204 (10th Cir. 2007) (applying *Garcetti* and *Connick-Pickering* to charter school teachers).

258 669 F. Supp. 2d 684 (S.D. Miss. 2009).

259 *Id.* at 689, 696.

260 *Id.* at 689.

261 Declaration, *supra* note 23, at 155.

262 *Nichols*, 669 F. Supp. 2d at 699.

when diversity and religious speech are not at issue In *Mayer v. Monroe County Community School Corp.*,²⁶³ the Seventh Circuit granted summary judgment pursuant to *Garcetti* and *Kuhlmeier* to Monroe County Community School Corporation against an elementary school teacher when, in response to a student's question, she expressed solidarity with antiwar demonstrators, notwithstanding a general instruction not to teach about Iraq policy.²⁶⁴ She relied on *Piggee*, involving the cosmetology instructor who placed a religious pamphlet in a student's smock, to claim that "principles of academic freedom supersede *Garcetti*." Not so, ruled the court. In *Piggee*, the Seventh Circuit ruled that *Garcetti* was "not directly relevant to our problem, but it does signal the Court's concern that courts give appropriate weight to the public employer's interests."²⁶⁵ In *Monroe*, the court explained what it meant by that statement in an opaque manner:

Our remark that *Garcetti* was 'not directly relevant' [in *Piggee*] did not reflect doubt about the rule that employers are entitled to control speech from an instructor to a student on college grounds during working hours; it reflects, rather the fact that *Piggee* had not been hired to button hole cosmetology students in the corridors and hand out tracts proclaiming that homosexuality is a mortal sin. The speech to which the student (and the college) objected was not part of *Piggee's* teaching duties. By contrast, *Mayer's* current-events lesson was part of her assigned tasks in the classroom; *Garcetti* applies directly.²⁶⁶

This passage is hard to square with the ruling in *Piggee* that the instructor's button holing was "curricular speech." In *Piggee*, the instructor objected that hers was extracurricular protected speech and lost. In this passage, the *Monroe* court articulated a new category of curricular speech not part of a faculty member's teaching duties: *Garcetti* "directly" applies to curricular speech that is part of a faculty member's teaching duties but not to curricular speech that is somehow not part of a faculty member's teaching duties. As if this were not incoherent enough, the court left open the possibility that *Garcetti* may apply "indirectly" to any "speech

263 474 F.3d 477 (7th Cir. 2007), cert. denied, 552 U.S. 823 (2007).

264 *Id.* (citing *Webster v. New Lenox Sch. Dist.* No. 122, 917 F.2d 1004, 1008 (7th Cir. 1990) (citing *Kuhlmeier*, 484 U.S. at 273)).

265 *Piggee v. Carl Sandburg College*, 464 F.3d 667, 672 (7th Cir. 2006).

266 *Monroe*, 474 F. 3d at 480. See also *Panse v. Eastwood*, 303 Fed. App'x 933 (2d Cir. 2008) (stating that, although it was an open question whether *Garcetti* applies in the circuit to classroom instruction, a high school art teacher failed to state a first amendment claim because his statements encouraging students to participate in a for-profit course he planned to teach outside of school involving the drawing and sketching of nude models were made pursuant to his official job duties); *Shums v. N.Y. City Dep't of Educ.*, No. 04-CV-4589 (DLI)(LB), 2009 WL 750126 (E.D.N.Y. Mar. 17, 2009) (statements made in plaintiff's letters by former teacher of English as a Second Language about insufficient services or time for services for her students fell within the scope of her duties and, thus, were not afforded constitutional protection and were not the cause of the adverse employment action); *Weintraub v. Bd. of Educ.*, 489 F. Supp. 2d 209, 221 n.12 (E.D.N.Y. 2007), aff'd, 593 F. 3d 196 (2d Cir. 2010), cert. denied, 562 U.S. 995 (2010) (speech related to classroom discipline governed by *Garcetti*; plaintiff's effort to argue otherwise on the basis of academic freedom was "frivolous," because "[i]t is clear from the context of the court's statement its reference to 'teaching' refers to the substance of academic expression, not to the enforcement of disciplinary procedures in a public classroom").

from an instructor to a student on college grounds during working hours,"²⁶⁷ contrary to the carve-out in *Garcetti* for speech and writing of university faculty.

Academic institutional autonomy has now eclipsed other aspects of what courts still refer to as academic freedom. Even when faculty teach their assigned courses and content, but lecture from a minority viewpoint, there is not protection under *Garcetti* or the curricular speech doctrine. Institutional autonomy controls not only in these circumstances, but also when faculty speak in a noncurricular environment, irrespective whether the speech is profane, morally delinquent, or gratuitously controversial. If this is academic freedom, the concept now means the inverse of what it did in 1915.

E. Academic Freedom and Admissions

One more influence on the doctrinal development of academic freedom is race-sensitive admissions. Beginning with *Regents of the University of California v. Bakke*,²⁶⁸ Justice Powell discussed academic freedom as it related to a program of admissions quotas established by a medical school. Powell's opinion emerged as the linchpin of an otherwise splintered Court that produced six separate opinions, none of which commanded a majority of the Court. The only holding to emerge from the case was that a "State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."²⁶⁹ Powell provided the crucial fifth vote for invalidating the set-aside program and reversing the state court's injunction against any use of race whatsoever.²⁷⁰

Justice Powell quoted liberally from Justice Frankfurter's discussion in *Sweezy* of "the four essential freedoms of a university" and from *Keyishian*, which he described as announcing "[o]ur national commitment to the safeguarding of these freedoms within university communities."²⁷¹ Relying on *Keyishian*, he said, "[I]t 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."²⁷² It was Powell who said academic freedom, "though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."²⁷³ He counted as a foremost freedom in this respect the right of a university "to make its own judgments as to education includ[ing] the selection of its student body."²⁷⁴ Powell's notion of academic freedom in *Bakke* was primarily institutional but to enable students corporately to realize their full academic

267 *Monroe*, 474 F. 3d at 480.

268 438 U.S. 265 (1978).

269 *Grutter v. Bollinger*, 539 U.S. 306, 322–23 (2003) (citing *Bakke*, 438 U.S. at 320).

270 *Id.* at 322.

271 *Id.* at 312.

272 *Id.* at 313.

273 *Id.* at 312.

274 *Id.*

potential even to the disadvantage of students (and their express constitutional liberties) who might otherwise be admitted to the university.

Several times since, the U.S. Supreme Court has explicitly endorsed Justice Powell's opinion that "student body diversity is a compelling state interest that can justify the use of race in university admissions" to benefit the student body.²⁷⁵ In *Grutter v. Bollinger*,²⁷⁶ the Court quoted extensively from Justice Powell to reaffirm a law school's race-conscious admissions policy and considered it "grounded ... in [] academic freedom."²⁷⁷ Justice O'Connor emphasized that the admissions policy had been crafted and approved by the faculty.²⁷⁸ The Court ruled, "In seeking the 'right to select those students who will contribute the most to the 'robust exchange of ideas,'" a university seeks 'to achieve a goal that is of paramount importance in the fulfillment of its mission.'"²⁷⁹ It mentioned "a special niche in our constitutional tradition" occupied by universities,²⁸⁰ the "overriding importance of preparing students for work and citizenship,"²⁸¹ and considered its holding "in keeping with our tradition of giving a degree of deference to a university's academic decisions within constitutionally prescribed limits."²⁸² Dissenting, Justice Thomas objected that deference is not due when an express constitutional liberty, equal protection, is violated.²⁸³

The court continued Justice Powell's theme in *Fisher v. University of Texas at Austin*, where it reaffirmed that "[t]he academic mission of a university is 'a special concern of the First Amendment'" and ruled that courts must defer to a university's "educational judgment that [] diversity is essential to its educational mission."²⁸⁴ As approved pedagogical justifications for pursuing a diverse student body, the court once again mentioned corporate benefits for students, including "enhanced classroom dialogue," the "lessening of racial isolation and stereotypes," providing "that atmosphere which is most conducive to speculation, experiment and creation," promoting "learning outcomes" and "better prepar[ing] students for an increasingly diverse workforce and society."²⁸⁵

275 *Id.* at 325; *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2418 (2013) [hereinafter *Fisher I*]; *Fisher v. Univ. of Tex. at Austin*, *_* U.S. *_* 136 S. Ct. 2198, 2210 (2016) [hereinafter *Fisher II*].

276 539 U.S. 306 (2003).

277 *Id.* at 324.

278 *Id.* at 314–15.

279 *Id.* (citing *Bakke*, 438 U.S. at 313).

280 *Id.* at 329.

281 *Id.* at 331.

282 *Id.* at 328.

283 *Id.* at 362 (Thomas and Scalia, JJ. concurring in part and dissenting in part) ("In my view, there is no basis for a right of public universities to do what would otherwise violate the Equal Protection Clause.").

284 *Fisher I*, 133 S. Ct. at 2418–19.

285 *Id.* at 2418; *Fisher II*, 136 S. Ct. at 2210; *see also* *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 188 (D Mass. 2019) (observing that judicial deference is proper with respect to the academic judgment that student body diversity is an educational benefit, but determining in accord with *Fisher II* that no deference is owed when determining whether the use of race is narrowly tailored to achieve the university's permissible goals).

In the final analysis, the Court referred to this as “the business of a university.”²⁸⁶

Reviewing these admissions cases, lower courts have been reticent to decide that a right to academic freedom can be asserted by an individual professor,²⁸⁷ or affirmatively concluded that academic freedom is primarily institutional, rather than an individual.²⁸⁸ Yet, when the focus is on academic admission cases, the perspective is distorted because of the congruence in interests in these cases between the universities and faculty, similar to their common opposition to McCarthyism. There could be no compelling interest in achieving a diverse student body and, thus, no related academic freedom to favor minorities in admissions, unless the student body allegedly benefited; and there could be no race-sensitive admission policy without faculty support. It cannot reasonably be inferred from the congruence of interests in these cases that when they diverge, academic freedom is necessarily irrelevant or always the university’s to assert against individuals.

Although reluctant to find an individual right to academic freedom based on precedent relating to admissions, the D.C. Circuit took another path and said that if it does exist, “the right can be invoked only to prevent a governmental effort to regulate the *content* of a professor’s academic speech.”²⁸⁹ In this event, the regulation must be content neutral and satisfy intermediate scrutiny, meaning that any infringement must further an important or substantial government interest.²⁹⁰ Were this standard applied even in the context of curricular speech, it could reconcile the university’s interest in selecting curriculum with the faculty member’s interest in controlling pedagogy in a more robust way than academic freedom conceptualized as an extension of the *Connick-Pickering* test.

286 *Fisher I*, 570 U.S. at 308.

287 *See* Emergency Coalition to Defend Educ. Travel v. U.S. Dep’t of the Treasury, 545 F.3d 4, 12 (D.C. Cir. 2008) (“Assuming that the right to academic freedom exists and that it can be asserted by an individual professor, its contours in this case are certainly similar to those of the right of free speech.”); *id.* at 19 (Silberman, J concurring) (“I [] share the doubts of our Fourth Circuit colleagues as to the notion that ‘academic freedom’ is a constitutional right at all and that, should it exist, it inheres in individual professors.”). *See also* Heublein v. Wefald, 784 F. Supp. 2d 1186 (D. Kan. 2011) (uncertain whether a professor can state an academic freedom claim as opposed to an institution, but finding no claim stated).

288 *See, e.g.*, *Urofsky v. Gilmore*, 216 F.3d 401, 414 (4th Cir. 1998) (citing *Bakke*, 438 U.S. at 312) (“Other cases that have referred to a First Amendment right of academic freedom have done so generally in terms of the institution, not the individual. . . . Significantly, the Court has never recognized the 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.”); *Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332 (6th Cir. 2010), *cert. denied*, 564 U.S. 1038 (2011) (“[I]t is the educational institution that has a right to academic freedom, not the individual teacher.”); *Stronach v. Va. State Univ.*, No. 3:07CV646-HEH, 2008 WL 161304 (E.D. Va. Jan. 15, 2008) (professor had no constitutional right to academic freedom preventing change of student grade by university officials) (citing *Wozniak v. Conry*, 236 F.3d 888, 891 (7th Cir. 2001), *cert. denied*, 533 U.S. 903 (2001) (“No person has a fundamental right to teach undergraduate engineering classes without following the university’s grading rules.”); *Lovelace v. S.E. Mass. Univ.*, 793 F.2d 419, 425 (1st Cir. 1986) (similar); *Brown v. Amenti*, 247 F.3d 69, 75 (3d Cir. 2001) (similar); *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3d Cir. 1998), *cert. denied*, 525 U.S. 1143 (1999) (First Amendment does not allow university professor to decide what is taught in the classroom but rather protects the university’s right to select the curriculum.).

289 *Emergency Coalition*, 545 F.3d at 12 (emphasis original).

290 *Id.*

If academic freedom is a constitutional right, it cannot be detrimental to academic expression; it must be supplemental. We most respect the concept of academic freedom by not referencing it when it is unlikely to liberate thought and expression, regardless whether it is in furtherance of an academic or professional norm. To maintain connection to *Lehrfreiheit*, academic freedom must not be a tool to be brandished by postsecondary institutions against faculty and students or vice versa, as if a mere implied constitutional right could somehow tip the scale against either side's express constitutional rights. Academic freedom may be properly conceived as a defense to external interference with the academic teaching and research enterprise of the university and professor as originally conceived in *Wieman* and *Sweezy*. But that is quite different from academic freedom as a defense to internal interference with the same academic undertakings. Said infringement would be the opposite of the *Lehrfreiheit* that birthed academic freedom.

G. Public Forum Doctrine

Justice Powell authored another decision important for how it has distinguished academic freedom from public forum doctrine. In *Widmar v. Vincent*, student members of an on-campus religious group named Cornerstone sued the University of Missouri when it excluded them from using facilities "for purposes of religious worship or religious teaching" that were generally available for other activities of registered student groups.²⁹¹ The university said that the Establishment Clause and Missouri Constitution required it to discriminate. The U.S. Supreme Court disagreed and ruled that the Free Exercise Clause and Free Speech Clause constrained the state interest in vindicating separation of church and state. The Court determined that the university had created a forum generally open for use by student groups through its policy of accommodating their meetings.²⁹²

But the Court was quick to add that it did not mean to question "the right of the University to make academic judgments as to how best to allocate scarce resources or 'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'"²⁹³ Concurring, Justice Stevens was even more emphatic. He agreed that separation of church and state was an insufficient reason to exclude the religious group and went so far as to indicate that the school could not exclude usage on the basis of viewpoint. For example, the University "could not allow a group of Republicans or Presbyterians to meet while denying Democrats or Mormons the same privilege."²⁹⁴ But the University could "exercise a measure of control over the agenda for student use of school facilities, preferring some subjects over others, without needing to identify

291 454 U.S. 263, 265 (1981).

292 *Id.* at 267–68.

293 *Id.* at 276–77 (Stevens, J. concurring) (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957); *Bakke*, 438 U.S. at 312–13).

294 *Id.* at 281.

so-called ‘compelling state interests.’”²⁹⁵ In the final analysis, he wrote, “Judgments of this kind should be made by academicians, not by federal judges....”²⁹⁶

Professor Byrne called Justice Stevens’s concurrence “a refreshing acknowledgment that universities must and should distinguish among speakers on the basis of the content of their speech.”²⁹⁷ The Supreme Court has not agreed in several public forum cases since involving students.²⁹⁸ For example, in *Board of Regents of University of Wisconsin System v. Southworth*, the Court determined that “[t]he First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral.”²⁹⁹ If the university decides to impose a mandatory fee to “sustain an open dialogue” and “dynamic discussions of philosophical, religious, scientific, social and political subjects in their extracurricular campus life outside the lecture hall,” the university must protect students’ First Amendment interests.³⁰⁰ Specially concurring, Justice Souter took up Justice Stevens’s mantle skeptical of “cast-iron viewpoint neutrality,” reiterating with the majority that government speech was not at issue and that “universities and schools should have the freedom to make decisions about how and what to teach.”³⁰¹ Yet, even Justice Souter observed, “[W]e have never held that universities lie entirely beyond the reach of students’ First Amendment rights.”³⁰²

Just a handful of courts have vindicated a professor’s First Amendment rights under public forum doctrine because here, too, the curricular speech doctrine casts a long shadow. The Supreme Court ruled in *Kuhlmeier* that “school facilities may be deemed to be public forums only if school authorities have ‘by policy or by practice’ opened those facilities ‘for indiscriminate use by the general public’ ... or by some segment of the public, such as student organizations.... If the facilities have instead been reserved for other intended purposes ... then no public forum has been created, and school officials may impose *reasonable restrictions* on the speech of students, teachers, and other members of the school community.”³⁰³ In a nonpublic forum, school officials “may impose restrictions on speech that are reasonable and viewpoint neutral.”³⁰⁴ Discrimination against speech because of its message is unconstitutional even in a nonpublic forum.³⁰⁵ This principle is

295 *Id.*

296 *Id.* at 278–79.

297 Byrne, *supra* note 1, at 316.

298 See *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

299 529 U.S. 217, 221 (2000).

300 *Id.* at 233.

301 *Id.* at 237 (Souter, Stevens, Breyer, JJ. concurring in judgment).

302 *Id.* at 239.

303 *Kuhlmeier*, 484 U.S. at 267.

304 *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009).

305 *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

in tension with the abundance of cases vindicating institutional autonomy over religious speech.

In light of *Kuhlmeier*, courts have ruled that any speech that occurs in a classroom or clinical practicum is school sponsored and distinguished speech within a public forum.³⁰⁶ Consequently, the Fourth Circuit granted summary judgment, pursuant to the *Connick-Pickering* test, to York County School Division against a high school Spanish teacher who brought suit when the principal removed articles from his bulletin board pertaining to religion.³⁰⁷ Relying in part on *Kuhlmeier*, the court ruled the postings “curricular speech,” although entirely unrelated to Spanish, and, thus, not matters of public concern as a matter of law.³⁰⁸

An exception is *Johnson v. Poway Unified School District*, where a high school math teacher was ordered to remove banners that he hung in his classroom, stating phrases such as “In God We Trust.”³⁰⁹ Distinguishing the many cases at the K–12 level holding that schools may control the speech of instructors, the court in *Johnson* focused on the school district’s policy, practice, and custom of allowing teachers to display messages in their classrooms, and the fact that the plaintiff designed, created, and paid for the banners that he hung. This case is unusual because the court was willing to examine the circumstances in the classroom to decide whether the hangings were part of a public forum, rather than adhere to a per se rule that classrooms are not public forums.³¹⁰ The court declined to dismiss the teacher’s case and in a later decision granted summary judgment for the teacher.³¹¹ On appeal, the court of appeals reversed and held the bulletin board was government speech; the court ruled against the math teacher, applying *Pickering* rather than public forum analysis.³¹²

H. Nondiscrimination and Harassment

Nondiscrimination and harassment policies have also had an influence on academic freedom in recent years. Sexual and profane speech not germane to the subject matter of a course was not protected by the Declaration. It is error to treat

306 See e.g., *Bishop v. Aronov*, 926 F.2d 1066, 1076 (11th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1284 (10th Cir. 2004); *Keeton v. Anderson-Wiley*, 664 F.3d 865, 872 (11th Cir. 2011) (counseling program constitutes a nonpublic forum) (citing *Watts v. Fla. Int’l Univ.*, 495 F.3d 1289 (11th Cir. 2007)); *Ward v. Members of Bd. of Control of E. Mich. Univ.*, 700 F. Supp. 2d 803, 814 (E.D. Mich. 2010.) (treating counseling practicum as non-public forum).

307 *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687 (4th Cir. 2007), *cert. denied*, 552 U.S. 950 (2007).

308 *Id.* at 695 (citing *Kuhlmeier*, 484 U.S. at 267) (“Courts have generally recognized that the public schools possess the right to regulate speech that occurs within a compulsory classroom setting, and that a school board’s ability in this regard exceeds the permissible regulation of speech in other governmental workplaces or forums.”).

309 No. 07cv783 BEN (LSP), 2008 WL 5657801 (S.D. Cal. Sept. 4, 2008).

310 *Bishop*, 926 F.2d at 1071; *Axson-Flynn*, 356 F.3d at 1284.

311 *Johnson v. Poway Unified Sch. Dist.*, No. 07cv783 BEN (NLS), 2010 WL 768856 (S.D. Cal. 2010).

312 *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 969 (9th Cir. 2011), *cert. denied*, 566 U.S. 906 (2012).

this kind of speech as implicating academic freedom at all. One court explained the reason that academic freedom must yield to these policies as follows: “[I]f the concept [of academic freedom] is expanded too far it can cause other important societal goals (such as the elimination of discrimination in employment decisions) to be frustrated.”³¹³ “To rule otherwise would mean that the concept of academic freedom would give any institution of higher learning a *carte blanche* to practice discrimination of all types.”³¹⁴ It would “send a message that the First Amendment may be used as a shield by teachers who choose to use their unique and superior position to sexually harass students secure in the knowledge that whatever they say or do will be protected.”³¹⁵ States have the constitutional authority to enact legislation prohibiting invidious discrimination and a substantial or compelling interest in prohibiting various kinds of discrimination.³¹⁶

Consequently, courts have given wide latitude to postsecondary institutions to enforce nondiscrimination and antiharassment policies especially in the curricular setting.³¹⁷ For example, in *Corlett v. Oakland University Board of Trustees*,³¹⁸ the court granted the university’s motion to dismiss a fifty-six-year-old student’s challenge to a campus regulation providing, inter alia, that “[n]o person shall ... in any way intimidate, harass, threaten or assault any person engaged in lawful activities on campus,” under which he was suspended for three semesters for writing in a required *Writer’s Daybook* entries describing his lust for women’s breasts, generally, and for his teacher specifically. The *Writer’s Daybook* was to be “an ongoing volume that essentially functions as a place for a writer to try out ideas and record impressions and observations.”³¹⁹ In one journal entry, titled “Hot for Teacher,” the student described his instructor as “tall, blond [sic], stacked, skirt, heels, fingernails, smart, articulate, smile,” and in another entry described the student’s sexual preference for Ginger over Maryann—two character from the 1960s television sitcom *Gilligan’s Island*—and the student’s perception of the instructor as his “Ginger.”³²⁰

313 *In re Dinnan*, 661 F.2d 426, 430 (5th Cir. 1981).

314 *Id.* at 431.

315 *Bonnell v. Lorenzo*, 241 F.3d 800, 824 (6th Cir. 2001), *cert. denied*, 534 U.S. 951 (2001).

316 *See, e.g., Roberts v. U.S. Jaycees*, 468 U.S. 609, 623–24 (1984) (state had a compelling interest “of the highest order” in eradicating sex discrimination through public accommodations law, therefore, compelling the U.S. Jaycees to accept women, as regular members did not abridge either the male members’ freedom of intimate association or their freedom of expressive association).

317 The U.S. Supreme Court recognized a unique limitation on a university’s nondiscrimination policy in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006), where the U.S. Supreme Court held that the federal government could condition funding on schools permitting military recruiters access at least equal to that provided other recruiters complying with the schools’ antidiscrimination policies, because the authorizing amendment regulated conduct, not speech. The court rejected the argument by an association of law schools that the Solomon Amendment was unconstitutional, because it infringed their associational expression rights to prohibit discrimination on the basis of sexual orientation. The Court emphasized that the schools remained at liberty to express whatever views they may have about the military’s employment policy, all the while retaining federal funding.

318 958 F. Supp. 2d 795 (E.D. Mich. 2013).

319 *Id.* at 799.

320 *Id.* at 799–800.

The district court looked to *Kuhlmeier* for direction, which the court said “granted schools particular leeway to restrict speech ‘which is an integral part of the classroom-teaching function of an educational institution.’”³²¹ Admitting that universities “may not bear the same responsibility as elementary and secondary schools to act in *loco parentis*,” the court nevertheless concluded that they “retain some responsibility to teach students proper professional behavior, in other words, to prepare students to behave and communicate properly in the workforce.”³²² The court explained that the particular speech in this case was not entitled to First Amendment protection as was student speech in *Tinker v. Des Moines Independent School District*³²³ and that, in any event, it could not “intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.”³²⁴

Sexual speech in the classroom not germane to the course subject matter serves the private interest, rather than public good. Academic freedom is not at issue, but institutional academic autonomy deserves deference in these cases. Whereas student discipline in this case was appropriate, it was not because the school regulation was constitutional or the speech at issue was curricular, but because the speech was “offensively lewd and indecent,” as in *Bethel School District No. 403 v. Fraser*, where the U.S. Supreme Court upheld discipline of a student who, at a school assembly, gave a lewd speech replete with “elaborate, graphic and explicit sexual metaphor.”³²⁵ The court in *Bonnell* put this in terms of the *Connick-Pickering* test as follows: “The analysis of what constitutes a matter of public concern and what raises academic freedom concerns is essentially the same character.”³²⁶ Speech that is vulgar or profane is not entitled to absolute constitutional protection and if not relevant to the subject matter of the course, does not implicate academic freedom.³²⁷ But institutional autonomy is pertinent.

Comparing *Tinker* with *Piggee*, the line drawn between curricular and noncurricular speech is sharper in the student context than in the faculty context, even when the speech at issue is discriminatory. For example, in *UWM Post, Inc. v.*

321 *Id.* at 806.

322 *Id.* at 805.

323 393 U.S. 503 (1969). In *Tinker*, students were suspended for wearing black arm bands in protest of the Vietnam War. Famously, the Court announced, “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students,” and added that neither “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Id.* at 506. The Court announced that school officials may not limit speech based on “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *Id.* at 509. It emphasized that school officials “do not possess absolute authority over their students,” they may not conduct school so as to “foster a homogenous people,” and students retain the right to express their opinions “even on controversial subjects,” as long as they do not “materially and substantially interfer[e] with the requirements of appropriate discipline in the operation of the school’ and without colliding with the rights of others.” *Id.* at 511–13.

324 *Corlett*, 958 F. Supp. 2d at 809.

325 478 U.S. 675, 677 (1986).

326 *Bonnell v. Lorenzo*, 241 F.3d 800, 820 (6th Cir. 2001), *cert. denied*, 534 U.S. 951 (2001).

327 *Id.* at 821.

Board of Regents of University of Wisconsin System,³²⁸ the court struck a speech code that prohibited racist or discriminatory comments, epithets, or other expressive behavior when the conduct intentionally demeaned the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry, or age of another and created an intimidating, hostile or demeaning environment for university-related activities. The court found that it was not clear whether the regulated speech had to actually demean the listener and create an intimidating, hostile, or demeaning environment for education; or whether the speaker merely had to intend to demean the listener and create such an environment. The court concluded that the code had been inappropriately applied nine times to inappropriate comments by students.³²⁹

Sexual speech by students is typically more protected than religious speech by faculty. Recall *Bishop v. Aronov*, where the university instructed a professor, among other things, not to hold optional classes where a “Christian Perspective” of an academic topic is delivered.³³⁰ The court distinguished the applicability of *Tinker*. Although recognizing that *Tinker* involved “in-class conduct,”³³¹ the *Bishop* court stated that “[w]hile a student’s expression can be more readily identified as a thing independent of the school, a teacher’s speech can be taken as directly and deliberately representative of the school.”³³² The professor defended his religious speech, in part, based on the fact that the university had no policy for limiting the speech of its professors only to their subject areas.³³³ About this, the *Bishop* court stated:

One would not expect to find such a policy, and, to the contrary, as one would expect, there are various indications ... that the University generally endorses academic freedom for its faculty.... But plainly some topics understandably produce more apprehension than comfort in students. Just as women students would find no comfort in an openly sexist instructor, an Islamic or Jewish student will not likely savor the Christian bias that Dr. Bishop professes, much less seek camaraderie.... The opposite effect was apparently achieved. There is no suggestion that any other professor has produced student complaints or struck constitutional chords. Because the University may heretofore not have restricted the classroom speech of any other professor does not make out a case of overbreadth, vagueness, or infringement as to Dr. Bishop.³³⁴

Put simply, the court in *Bishop* concluded that academic freedom could not excuse the plaintiff instructor from observing nondiscriminatory norms, whether

328 774 F. Supp. 1163 (E.D. Wis. 1991).

329 *Id.* at 1168. For example, a male student yelled at a female student, “You’ve got nice tits,” a female student referred to a Black female student as a “fat-ass nigg--,” and a student sent an email message from a university computer stating “Death to all Arabs!! Die Islamic scumbags!”

330 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, *Bishop v. Delchamps*, 505 U.S. 1218 (1992).

331 *Id.* at 1073.

332 *Id.*

333 *Id.* at 1071.

334 *Id.* at 1071–72.

or not the university failed to take adverse action against other faculty for the same discriminatory classroom speech.

Even collectively students lack academic freedom rights adequate to supersede nondiscrimination policies. The comparison between the U.S. Supreme Court's decisions in *Healy v. James* and *Christian Legal Society v. Martinez* shows this.³³⁵ In *Healy*, a state college denied school affiliation to a student group that wished to form a local chapter of Students for a Democratic Society. The president of the college explicitly denied the student group official recognition because of the group's viewpoint. The Court opined, "[A] public educational institution exceeds constitutional bounds ... when it 'restrict[s] speech or association simply because it finds the views expressed by [a] group to be abhorrent.'"³³⁶ In contrast, in *Martinez*, when Hastings College of the Law rejected Christian Legal Society's application to become a registered student organization on the grounds that the group's bylaws did not comply with Hasting's nondiscrimination policy, the court affirmed summary judgment for the law school.³³⁷ The court ruled in a fashion, suggesting that it is willing to match the lower courts' expansive definition of curricular speech when students are plaintiffs:

Cognizant that judges lack the on-the-ground expertise and experience of school administrators, ... we have cautioned courts in various contexts to resist "substitut[ing] their own notions of sound educational policy for those of the school authorities which they review." ... *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 273.... A college's commission—and its concomitant license to choose among pedagogical approaches—is not confined to the classroom, for extracurricular programs are, today, essential parts of the educational process.... Schools, we have emphasized, enjoy "a significant measure of authority over the type of officially recognized activities in which their students participate." ... We therefore "approach our task with special caution," ... mindful that Hastings' decisions about the character of its student-group program are due decent respect.³³⁸

Here is more evidence that the concept of "curricular speech" is broadening even for students from the classroom to extracurricular programs.³³⁹ In dissent, Justice Alito objected sharply that the majority's decision stood for the principle

335 Compare *Christian Legal Soc'y v. Martinez*, 561 U.S. 661 (2010) with *Healy v. James*, 408 U.S. 169 (1972).

336 *Healy*, 408 U.S. at 187–88.

337 *Martinez*, 561 U.S. at 696.

338 *Id.* at 686–87.

339 The only exception to the rule that a school may enforce an "all comers policy" or a requirement that student groups "accept all comers as voting members even if those individuals disagree with the mission of the group," which federal courts have thus far recognized is when an academic institution selectively exempts organizations from its nondiscrimination policy. See *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 650 (9th Cir. 2008) ("to the extent [the plaintiff] argue[d] it was denied an exemption from the non-discrimination policy based on the content of its speech," the group "raised a triable issue of fact," where plaintiff showed evidence that other student groups had been granted official recognition, despite violating a nondiscrimination policy); *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 866–67 (7th Cir. 2006) (awarding injunction to group where, although the school's nondiscrimination policy was "viewpoint neutral on its face," there was "strong evidence that the policy had not been applied in a viewpoint neutral way.").

that there should be “no freedom for expression that offends prevailing standards of political correctness in our country’s institutions of higher learning.”³⁴⁰

III. Modern Constitutional Paradigms of the Freedom to Learn

As a general matter, *Lernfreiheit* has not received as much mention in American constitutional law as *Lehrfreiheit*. “As a matter of fact,” wrote Professor Metzger, “it has never been declared on judicial authority at any level that students ‘have’ academic freedom.”³⁴¹ This is just as well, according to Professor Byrne, because “no recognized student right[] of free speech . . . has anything to do with scholarship or systematic learning.”³⁴² Two responses: First, and contrariwise, beginning with *Barenblatt*, the Court made reference to “learning-freedom,”³⁴³ and as recently as *Southworth*, again made reference to students’ First Amendment rights in the context of academic freedom.³⁴⁴ Second, if Professor Byrne is right, then it is hypocritical to invoke student interests at all in furtherance of institutional academic autonomy in admissions cases or as part of curricular speech doctrine.³⁴⁵

It is true that *Lernfreiheit* is even less well developed than *Lehrfreiheit*, in part due to the Supreme Court’s ruling in *Board of Curators of the University of Missouri v. Horowitz*³⁴⁶ and *Regents of the University of Michigan v. Ewing*.³⁴⁷ Neither case actually involved academic freedom, but both are treated as if they did. In both, students challenged their dismissal from medical degree programs not under the First Amendment, but the Due Process Clause. In *Horowitz*, the student was dismissed because her performance was below that of her peers in all clinical patient-oriented settings, she was erratic in her attendance at clinical sessions, and she lacked a critical concern for personal hygiene.³⁴⁸ In *Ewing*, the student was dismissed when he failed the NBME Part I examination with the lowest score recorded in the history of the program.

Ewing sued, alleging breach of contract and a property interest in his continued enrollment. Stating its “responsibility to safeguard” the “academic freedom” of “state and local educational institutions,” the U.S. Supreme Court rejected the claim.³⁴⁹ Judge Edwards observed in a concurrence that *Ewing* “gives some life to this idea” that academic freedom may include what Professor Areen refers to as

340 *Martinez*, 561 U.S. at 706 (Alito, J., dissenting).

341 Metzger, *supra* note 12, at 1304.

342 Byrne, *supra* note 1, at 262.

343 *Barenblatt v. United States*, 360 U.S. 109, 112 (1959).

344 *Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 239 (2000). (Souter, Bryer, Stevens, JJ. concurring in judgment).

345 *Fisher I*, 570 U.S. at 308; *Fisher II*, 136 S. Ct. at 2210.

346 435 U.S. 78 (1978).

347 474 U.S. 214 (1985).

348 *Horowitz*, 435 U.S. at 81.

349 474 U.S. at 226.

“shared governance.”³⁵⁰ The court explained, “When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty’s professional judgment.”³⁵¹ The court added, “University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation.”³⁵² Concurring, Justice Powell stated that “[j]udicial review of academic decisions, including those with respect to the admission or dismissal of students, is rarely appropriate, particularly where orderly administrative procedures are followed—as in this case.”³⁵³

The students’ claims in *Horowitz* and *Ewing* were perhaps the easiest kind for the Court to decide. Neither *Lernfreiheit* nor student speech was at issue. The right of a student to determine the course of his studies does not include the right to receive a degree despite failing test scores, below par clinical reviews, or personal hygiene deficiencies. The faculty and institution were in agreement. There was no student conscientious or religious objection at issue. As Justice Powell observed, “In view of *Ewing*’s academic record... this is a case that never should have been litigated.”³⁵⁴ Neither case should have precedential value in most modern lawsuits involving student speech in the classroom, yet it is often relied upon for the proposition that courts must not override a faculty member’s professional judgment, “unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.”³⁵⁵

Courts confronting modern claims by students that could be styled academic freedom claims have not addressed them as such.³⁵⁶ Instead, most have applied *Ewing* and/or the curricular speech doctrine and vindicated the professor and/or institution against the student.³⁵⁷ Once again, the cases typically involve religious speech. For example, in *Settle v. Dickson County School Board*,³⁵⁸ the Sixth Circuit ruled against a ninth grade student who wanted to write a required research paper on Jesus Christ, whereas the teacher would allow a paper no narrower than on

350 *Emergency Coalition*, 545 F.3d at 234 (J. Edwards, concurring).

351 *Id.* at 225.

352 *Id.* at 225 n.11.

353 *Ewing*, 474 U.S. at 230.

354 *Id.*

355 *Axson-Flynn*, 356 F.3d at 1292–93 (citing *Ewing*, 474 U.S. at 225).

356 *See Axson-Flynn*, 356 F.3d at n.14 (“In their pleadings, Defendants rely on the ill-defined right of ‘academic freedom’ when they reference this principle of judicial restraint in reviewing academic decisions. Although we recognize and apply this principle in our analysis, we do not view it as constituting a separate right apart from the operation of the First Amendment within the university setting.”).

357 *See, e.g., Ward v. Members of Bd. of Control of E. Mich. Univ.*, 700 F. Supp. 2d 803, 814 (E.D. Mich. 2010) (“courts have traditionally given public colleges and graduate schools wide latitude ‘to create curricular that fit schools’ understandings of their educational missions.’... ‘This judicial deference to educators in their curriculum decisions is no less applicable in a clinical setting....’”).

358 53 F.3d 152 (6th Cir. 1995), *cert. denied*, 516 U.S. 989 (1995).

religion in general. She gave several reasons such as that she thought it would be difficult to evaluate; the assignment required four sources, not just the Bible; and it is inappropriate to deal with “personal religion” in a public school.³⁵⁹ The administration supported the teacher. The student believed that the teacher was simply hostile to her faith. The court affirmed summary judgment for the defendants and reasoned as follows:

Where learning is the focus, as in the classroom, student speech may be even more circumscribed than in the school newspaper or other open forum. So long as the teacher limits speech or grades speech in the classroom in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion, the federal courts should not interfere.³⁶⁰

According to the court, each of the teacher’s reasons for refusing to allow the student to write her paper were within the “broad leeway of teachers to determine the nature of the curriculum and the grades to be awarded to students.”³⁶¹ The court concluded there was no basis for finding a dispute of fact about the teacher’s motives.³⁶²

Several other courts of appeal have ruled that religiously informed opinions at odds with professional standards voiced by students in the classroom are grounds for dismissal.³⁶³ For example, a student claimed that Arizona State University imposed a remediation plan on her because of her views on homosexuality as a form of viewpoint discrimination, but the Eleventh Circuit ruled it was because she expressed an intent to impose her personal religious views on her clients in alleged violation of the American Counseling Association Code of Ethics.³⁶⁴ In a case not dealing with religion, but a threat that a student posted on Facebook, the Eighth Circuit went even further in affirming removal of a student from a college’s associate degree nursing program for violation of professional standards. It ruled that “college administrators and educators in a professional school have discretion to require compliance with recognized standards of the [nursing] profession, both on and off campus, ‘so long as their actions are reasonably related to legitimate pedagogical concerns.’”³⁶⁵

359 *Id.* at 154.

360 *Id.* at 155.

361 *Id.* at 156.

362 *Id.*

363 *See, e.g., Oyama v. Univ. of Haw.*, 813 F.3d 850, 872 (9th Cir. 2015) (upholding dismissal of a student based “only upon statements Oyama made in the context of the certification program—in the classroom, in written assignments, and directly to the instructors responsible for evaluating his suitability for teaching”); *Keeton v. Anderson-Wiley*, 664 F.3d 865, 868 (11th Cir. 2011) (upholding university’s decision to sanction a student in a graduate-level school counseling program for stating that she “intended to attempt to convert students from being homosexual to heterosexual contrary to the American Counseling Association’s Code of Ethics”); *Hennessy v. City of Melrose*, 194 F.3d 237, 242–43 (1st Cir. 1999) (upholding termination of student teacher for repeatedly interrupting school events with religious “proselytizing,” such as showing a picture of an aborted fetus to another teacher and storming out of a presentation that he considered obscene as consistent with general professional standards and four “common teaching competencies” required for state certification).

364 *Keeton*, 664 F.3d at 872.

365 *Keefe v. Adams*, 840 F.3d 523, 531 (8th Cir. 2016), *cert. denied*, 137 S.Ct. 1448 (2017).

The exception that the courts have allowed is in the event of pretext for punishing a student for her race, gender, economic class, religion, or political persuasion.³⁶⁶ Thus, on the one hand, the Tenth Circuit in *Axson-Flynn v. Johnson* declined to second-guess the school's pedagogical interest in requiring a Mormon student to "modify [her] values" and curse to continue in a university actor training program but, on the other hand, determined that it would be abdicating its judicial duty if it failed to investigate whether the professors' pedagogical concern was pretextual religious discrimination.³⁶⁷ This is the foremost protective lesson several courts have taken from *Ewing*; i.e., that courts "may override an educator's judgment where the proffered goal or methodology was a sham pretext for an impermissible ulterior motive."³⁶⁸

Observing that "student speech doctrine fails to account for the vital importance of academic freedom at public colleges and universities," the Ninth Circuit, in *Oyama v. University of Hawaii*, adopted its own test that is not noticeably different.³⁶⁹ The court relied on "a set of decisions of other courts that have considered free speech claims," which "generally defer to certification decisions based on defined professional standards."³⁷⁰ Many of these cases rely upon *Kuhlmeier*.³⁷¹ Summarizing them, the court announced this rule: "[U]niversities may consider students' speech in making certification decisions, so long as their decisions are based on defined professional standards, and not an officials' personal disagreement with students' views."³⁷² The court went on to examine whether the university's decision denying a student's application to become a student teacher, a prerequisite for teacher certification, was narrowly tailored and, in a restatement of the pretext standard, asked whether the university's decision reflects a reasonable professional judgment. Applying this test, the court ruled that the denial did not violate the First Amendment, because it was based on their view that the student's comments approving consensual sex between adult teachers and minors and regarding educating disabled students violated professional standards. Sexual speech, such as this, is not protected by academic freedom and is generally disfavored under the *Connick-Pickering* test, although the more so when it is by instructors.

To the extent *Lernfreiheit* has any constitutional protection at all, both the Ninth and Tenth Circuits' rulings conceptualize student academic freedom after *Kuhlmeier*

366 See *Settle*, 53 F.3d at 156; *Axson-Flynn*, 356 F.3d at 1293.

367 356 F.3d at 1293.

368 *Id.*; see also *id.* at 1300 ("*Ewing*, 474 U.S. at 225 ... was clear in requiring courts to override faculty judgment when it is a pretext for an impermissibly ulterior motive.")

369 *Oyama*, 813 F.3d at 863 (denial of student's application to become a student teacher, a prerequisite for teacher certification, because of his comments approving sex between adults and minors and regarding educating disabled students did not violate his free speech rights);

370 *Id.* at 866.

371 *Id.* (citing these cases that rely upon *Kuhlmeier*: *Keeton*, 664 F.3d at 868; *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012); *Axson-Flynn*, 356 F.3d at 1292-93; and this case that relies upon *Pickering*: *Hennessy v. City of Melrose*, 194 F.3d 237 (1st Cir. 1999)).

372 *Id.* at 867-68.

and *Ewing* as, at best, a nondiscrimination or nonretaliation right.³⁷³ Students may determine the course of their studies contractually but constitutionally only in the sense that they are entitled to equal treatment. It is not obvious how this is a unique manifestation of student academic freedom as opposed to a particular application of the equal protection clause. So, it is especially intriguing that institutions invoke students as the foundation of their own academic freedoms when, in reality, student academic freedom rights barely register and are even dismissed by scholars such as Professor Bryne.³⁷⁴

IV. Restating Academic Freedom and Distinguishing Institutional Academic Autonomy

Academic freedom needs restatement as a constitutional liberty in light of its original purpose and conceptualization as a public good. The paradigms to which courts have turned to articulate the freedom to teach and freedom to learn do not achieve the purpose. Curricular speech doctrine undermines it. Conduct carved out of academic freedom is treated as subject to it. Courts have come to believe that institutional academic autonomy *is* academic freedom or at least supersedes any other variety of academic freedom. It is critical now to disentangle academic freedom from institutional academic autonomy, so that both can thrive in their respective spheres. This section proposes one way of restating academic freedom as a constitutional liberty and of distinguishing institutional academic autonomy.

A. Academic Freedom as a Public Good

The point of academic freedom as originally conceptualized and elaborated by the U.S. Supreme Court is to preserve a free exchange of ideas in search of truth and its liberal exposition, not merely as an end in itself but in furtherance of democracy and the national welfare. The Declaration treats academic freedom as a “public trust” and the responsibility of the university teacher as primarily to the public.³⁷⁵ The 1940 Statement reaffirmed that academic freedom is “for the common good and

373 Compare *Ward v. Members of Bd. of Control of E. Mich.*, 700 F. Supp. 2d 803 (E.D. Mich. 2010) (genuine issues of material fact existed as to whether university’s reasons for discharging a student from a graduate counseling program for her unwillingness to affirm a client’s homosexual behavior and, thus, request for the director to refer the client to another counselor were a mere pretext to retaliate against her for expressing her religious beliefs) with *Keefe v. Adams*, 840 F.3d 523 (8th Cir. 2016), *cert. denied*, 137 S.Ct. 1448 (2017) (removal of student from nursing program for threatening Facebook postings made outside of class did not violate his free speech rights where removal was pursuant to professional nursing standards that a school has a legitimate pedagogical interest in enforcing on and off campus); *Keeton*, 664 F.3d at 868 (upholding university’s decision to require a student to complete a remediation plan to participate in its clinical counseling program for stating that she “intended to attempt to convert students from being homosexual to heterosexual”); *Jemaneh v. Univ. of Wyo.*, 82 F. Supp. 3d 1281 (D. Colo. 2015) (remediation plan, which student alleged contained compelled speech was reasonably related to pedagogical purposes and professors’ failure to give student credit for correct work on exam was not caused by student’s complaint of discrimination), *aff’d*, 622 Fed. Appx. 765 (10th Cir. 2015), *cert. denied*, 136 S.Ct. 2419 (2016).

374 Bryne, *supra* note 1, at 262.

375 Declaration, *supra* note 23, at 155; *accord Metzger*, *supra* note 12, at 1279.

not to further the interest of either the individual teacher or the institution as a whole."³⁷⁶

The stakes are high, according to the Court: the "Nation's future" depends upon "leaders trained through wide exposure to that robust exchange of ideas which discover truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection."³⁷⁷ The Court explained that it is essential to democracy to form habits of critical inquiry and public opinion.³⁷⁸ When, instead, principles are treated as absolutes and dogma goes unquestioned, civilization stagnates and dies.³⁷⁹ Public officials "cannot be constitutionally vested with powers to select ideas people can think about, censor the public views they can express, or choose the persons or groups people can associate with."³⁸⁰ "Inhibition of freedom of thought"³⁸¹ or "freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas"³⁸² stifles innovation and prevents us from realizing the "ideal of Socrates—to follow the argument where it leads."³⁸³

Not everyone will agree with these premises, but if academic freedom has currency as a constitutional liberty, it should take seriously these purposes and values articulated by the Court and try to vindicate them.

1. *Borrow from Collective Action Theory*

There is no better place to turn for assistance than public goods or collective action theory. The hallmark of a public or collective good is that it is both nonexcludable and nonrivalrous, meaning that (1) consumers cannot be excluded from use or could benefit from the good without paying for it and (2) use by one person does not reduce availability to others.³⁸⁴ One faculty member or institution can benefit from a free marketplace of ideas without derogating from another, and the marketplace of ideas cannot be ensured for just one of us without benefiting all of us. In practice, most goods may share characteristics of both purely private and purely public goods, making for quasi-public or quasi-private goods.³⁸⁵

Nonexcludability leads to what is termed the "free rider problem." The optimal level of the public good is typically under-produced because it is in each individual's

376 1940 Statement, *supra* note 32.

377 *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

378 *Wieman v. Updegraff*, 344 U.S. 183, 221 (1952) (Frankfurter and Douglas, JJ. concurring).

379 *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957).

380 *Adler v. Bd. of Educ. of City of N.Y.*, 342 U.S. 485, 497 (1952) (Black, J. dissenting).

381 *Wieman*, 344 U.S. at 221 (Frankfurter and Douglas, JJ. concurring).

382 *Id.*

383 *Sweezy*, 354 U.S. at 262–63.

384 Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387, 387 (1954); Paul A. Samuelson, *Diagrammatic Explanation of a Theory of Public Expenditure*, 376 Rev. Econ & Stat. 350, 350 (1955); DAVID A. STARRETT, FOUNDATIONS OF PUBLIC ECONOMICS 42-44 (1988).

385 ROGER W. BENJAMIN, THE LIMITS OF POLITICS 10 (1980); RICHARD CORNES AND TODD SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS AND CLUB GOODS 124-28 (1986).

interest to let somebody else pay the price for the public good. Worse, the “tragedy of the commons” is that individual consumers of the shared resource, acting in their own self-interest, behave contrary to the common good by depleting or spoiling the shared resource through their collective action.³⁸⁶ Commonly, the self-interest of faculty, students, and institutions eclipse the public good. Students try to free themselves from academic standards as a condition of graduation. Faculty invoke a public good for their private employment benefit. Institutions exclude or discriminate against faculty and students with views they disapprove.³⁸⁷ All three take advantage of their academic liberty to pick and choose from the marketplace of ideas, while censoring other views. None of this is consistent with academic freedom as a public good.³⁸⁸ The closest the Court has so far come to protect academic freedom as a collective good was when threats external to the academy would diminish or extinguish it for both faculty and academic institutions. During part of the 1950s, individual and institutional academic interests converged in opposition to McCarthyism. Both resisted shrinking the marketplace of ideas. The question the U.S. Supreme Court wrestled with was whether loyalty tests were in fact antithetical to expanding the marketplace of ideas. Originally, the court ruled the oaths constitutional, then changed sides based on due process without ever bridging the judicial fracture over their congruity with academic freedom.

At bottom, *Sweezy* and *Keyishian* were reactions to impermissible “content-based regulation” or government efforts “to control or direct the content of the speech engaged in by the university or those affiliated with it.”³⁸⁹ Not even Justice Frankfurter who would have required professors to file affidavits listing organizations to which they belonged or contributed as a term of employment, would have tolerated terminating faculty solely because of their membership in unpopular organizations.³⁹⁰ If academic freedom has currency as a constitutional liberty, it must be, as the D.C. Circuit concluded in *Emergency Coalition*, to prevent this sort of governmental or quasi-governmental regulation of the content of a professor’s or student’s academic speech.³⁹¹ A free marketplace of ideas, the collective good to be advanced, requires that regulation be content-neutral and satisfy intermediate scrutiny, meaning that any infringement must further an important or substantial government interest.³⁹²

2. *Police the Boundaries of the Collective Good*

The cases have not become easier as threats to the public good have arisen

386 Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1244-45 (Dec. 13, 1968).

387 The Declaration is silent about ideological hiring as compared to ideological dismissal. The AAUP turns a blind eye to it. Metzger, *supra* note 12, at 1282.

388 Accord Areen, *supra* note 13, at 999 (“Academic freedom was never defended as a benefit for faculty, but for its value to the First Amendment and to the nation.”).

389 *Univ. of Pa.*, 493 U.S. at 198.

390 *Shelton*, 364 U.S. at 496 (Frankfurter, J. dissenting).

391 *Emergency Coalition*, 545 F. 3d at 12.

392 *Id.*

endogenously, pitting institutional interests squarely against individual interests. As the first step when approaching this intramural conflict, courts should strictly police the boundaries of the public good, thereby carving out a large swath of faculty and student speech and conduct from academic freedom protection. Most of these cases fail the threshold “matter of public concern” test of *Connick-Pickering* anyway. From the beginning, as articulated in the Declaration, academic freedom has not protected intemperateness, neglect of duty, moral delinquency, and even the avoidance of controversial matter without relation to course subject matter. Whether or not faculty are more than employees, agents, or servants, they are not entitled, as Professor Finkin implies, to demean others pursuant to some university-specific uncivil communal standard.³⁹³ Yet in recent years “conflicts over parochial prides and precedences and charges of hierarchic insubordination and coworker friction, have far outnumbered disputes involving the content of teaching or research.”³⁹⁴

Dressing up in constitutional garb petty employment disputes arising from gratuitous profanity, sexually promiscuous speech or conduct, failure to show up at work, and failure to teach assigned courses does not change the fact that, in reality, they concern private interests, not public ones. Academic freedom is not at stake when professors speak solely with the purpose to degrade or humiliate a student or detract from the subject matter with speech irrelevant to the class material.³⁹⁵ The same is true of students who sexualize assignments and classroom discussion when not germane to the subject matter or when they communicate racial epithets. The Declaration indicated lay governing boards in the academy are competent to judge these matters. Their institutional decisions are properly due deference in court not because academic freedom is at issue, but because it is not. Furthermore, as Professor Byrne has observed, off-campus political activity of faculty should not qualify either, because faculty have no greater or lesser right to participate in political affairs than other government employees.³⁹⁶ Academic freedom concerns exclusively rights unique or necessary to the functions of higher education.³⁹⁷

3. *Determine Whether the Speech at Issue Expands the Marketplace of Ideas*

With that underbrush removed, the hard work of resolving serious intramural conflict between institutional and individual interests begins. The foremost question should be whether the civil speech at issue expands the marketplace of ideas at public institutions.³⁹⁸ Academic freedom as a constitutional liberty must act, if at all, as a one-way ratchet in favor of liberating thought and expression in public colleges and universities. In the employment context, a modified *Connick-Pickering*

393 Finkin, *supra* note 15, at 1340 et seq.

394 Metzger, *supra* note 12, at 1276.

395 Chang, *supra* note 17, at 954.

396 Byrne, *supra* note 1, at 264.

397 *Id.* at 264.

398 In private colleges and universities, academic freedom will be exclusively a matter of tenure and contract law.

test could serve this purpose. The threshold test of the *Connick-Pickering* test examines whether the employee's speech is fairly characterized as constituting speech as a citizen on a matter of public concern. Speech expanding the marketplace of ideas at public institutions generally should qualify. "The analysis of what constitutes a matter of public concern and what raises academic freedom concerns is of essentially the same character."³⁹⁹

Teaching subjects germane to a course with civility should generally qualify for protection. Extramural utterances concerning institutional academic matters may also qualify when they concern more than the private interests of faculty such as academic and admission standards. These may implicate openness and free expression within the academy. Extramural utterances regarding institutional academic matters such as personnel actions, salary, promotion, grading, testing, and degree program requirements rarely should qualify. It matters little whether the speech was "public in nature" or "communicated to the public at large." If the central object of the speech is to expand the marketplace of ideas at public institutions, it furthers the collective good, democracy, and the welfare of the nation even when conveyed privately. Regulation must be content-neutral and satisfy intermediate scrutiny, meaning that any infringement must further an important or substantial government interest.⁴⁰⁰

Deference is not due under this approach when speech of faculty or students that is shielded by academic freedom is jeopardized or institutional educational judgment is a pretext for viewpoint discrimination or retaliation. Because of the tragedy of the commons, the collective good is unlikely to be produced without judicial enforcement. Contrariwise, Professor Areen would turn over intramural disputes to faculty bodies and require deference to their decision, notwithstanding her full expectation that they will exercise viewpoint discrimination.⁴⁰¹ Although conceding that "[d]isciplines that do not encourage internal criticism risk atrophy and death," Professor Post agrees: "[D]isciplines that do not bound internal criticism risk disintegration and incoherence."⁴⁰² Likewise, Professor Byrne argues the academic enterprise requires censorship and "ineradicable elements of ideological partisanship."⁴⁰³ Faculty enforce standards for teaching and scholarship and reign in crackpot ideas or at least fail to hire or approve tenure for faculty who espouse them.⁴⁰⁴ Consequently, "[t]he same faculty candidate can be seen as a careful scholar, a tiresome grunt, an effective teacher, a shameless showman, a thoughtful conservative and a homophobic reactionary."⁴⁰⁵ Most likely, these commentators would say faculty may evaluate and grade students the same way, according to the content of their ideas, not merely the quality.

399 *Bonnell v. Lorenzo*, 241 F.3d 800, 820 (6th Cir. 2001), *cert. denied*, 534 U.S. 951 (2001) (citing *Dembrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1180 (6th Cir. 1995))

400 *Emergency Coalition*, 545 F.3d at 12.

401 Areen, *supra* note 13, at 992, 995.

402 Post, *supra* note 16, at 535.

403 *Id.* at 305.

404 Byrne, *supra* note 1, at 297.

405 *Id.*

The claim that faculty and students must be judged on not only the quality of their work, but also its viewpoint should be rejected or academic freedom itself abandoned as a constitutional freedom.⁴⁰⁶ This is not to deny the importance of socializing students in the key theorems of their disciplines.⁴⁰⁷ Students and faculty may certainly be expected to know and articulate a discipline's laws and theorems. It is instead to reject the idea that faculty and students may never disagree with or propose alternatives to theorems. There is a difference between laws and postulates or theorems. For example, it is one thing for a scholar to deny the law of gravity, the holocaust, or to teach that $2 + 2 = 8$.⁴⁰⁸ The academic guild may properly police these boundaries as a matter of institutional academic autonomy. The guild may insist upon work product capable of evaluation. But it is another thing to discriminate against faculty or students who thoughtfully disagree with mere theories or fashionable ideological convictions or whose sincere religious convictions preclude them from parroting or endorsing speech or conduct they consider immoral. When a public institution retaliates against that type of speech, it generates the pall of orthodoxy that academic freedom was intended to prevent.

When presented with claims by faculty or students that their rights have been violated, courts should, according to Professor Byrne, go no further than to assess whether academic grounds were given. Professor Areen offers little more: "An individual faculty-plaintiff could challenge a decision made by the faculty, but the bar would be set extremely high."⁴⁰⁹ The test she proposes would have two parts: (1) the faculty member would have the initial burden to allege that her speech leading to adverse action concerned an academic matter and (2) the university would then have to show that the adverse action was based on a policy approved by faculty or was made on an academic grounds and not in retaliation for the speech.⁴¹⁰ "Academic grounds" is so broad the faculty member would rarely prevail especially when academic grounds justify viewpoint discrimination. Hence, in recognition of the extent to which academic freedom has been flipped on its head, Professor Bauries refers to faculty speech rights as the least protected government employee speech rights, rather than most protected.⁴¹¹ When academic freedom is conceived of exclusively as a one-way ratchet in favor of liberating thought and expression in public colleges and universities and as supplemental to individual liberties and contract rights, and when the boundaries of academic freedom are strictly policed, the so-called tension between its exercise by individual

406 Areen, *supra* note 13, at 992.

407 Post, *supra* note 16, at 535 ("Continuity is maintained because dissenters must first be sufficiently socialized into existing disciplinary practices that their criticisms can be formulated in a manner that is intelligible to members of a discipline.").

408 See Stanley Fish, *Holocaust Denial and Academic Freedom*, *VAL. U. L. REV.* (2001); Chang, *supra* note 17, at 948.

409 Areen, *supra* note 13, at 995.

410 *Id.* at 998.

411 Bauries, *supra* note 14, at 715 ("[T]he academic speech of public university professors is among the least protected forms of speech. In fact, it stands on the same footing as obscenity, fighting words, incitement speech, and child pornography, which are all categorically unprotected under the First Amendment due to their "low-value.").

faculty members and institutions dissipates. No more than one of the parties to an intramural conflict ordinarily will be looking to expand the marketplace of ideas. When college speech policies go too far, academic freedom and other First Amendment doctrines such as overbreadth and vagueness are pertinent to prevent a pall of orthodoxy. But that is not to say that they will always prevail.

The intramural conflict could still turn on the remaining two *Connick-Pickering* tests: whether the speech played a substantial part in the government's challenged employment decision and whether the government has shown, by a preponderance of the evidence, that it would have made the same employment decision in the absence of the protected conduct. These tests inherently recognize the observation of Professors Finkin and Post, among others, that a scholar's right to assert academic freedom requires that the scholar act within the academic enterprise. If the institution would have taken adverse action against a scholar irrespective of his speech; for example, because repeated teaching evaluations by her students are poor, we can be certain that the action is unrelated to restricting the marketplace of ideas. Then, institutional academic autonomy is the most important concern.⁴¹²

4. *Jettison Unhelpful Precedent*

Some paradigms to which the courts have turned to assess academic freedom should be jettisoned. Curricular speech doctrine has no place in the academic freedom analysis because it privatizes the marketplace of ideas. The recent line of admissions cases confuse the meaning of academic freedom. As the Court has already allowed, *Garcetti* is not helpful either. Neither is the *Connick-Pickering* balancing test ordinarily helpful.

a. **Curricular Speech Doctrine Is Inimical to Academic Freedom.**

Whatever relevance *Kuhlmeier* may have to other disputes, its rationale; i.e., inuring impressionable students against certain speech, is inimical to academic freedom. *Lernfreiheit* demands the opposite. Curricular speech doctrine is also disproportionately adverse to religious speech and illiberal views. Talented, but sincerely religious faculty are endangered species on most public campuses because institutions have excluded them. As curricular speech doctrine has warped the marketplace of ideas, aligning the academy with one side of the culture war, distrust of the academy has deepened.⁴¹³ Whereas the Declaration emphasized the importance of universities being so free that no "fair-minded person" would find any excuse for doubting the professional neutrality of the academy, this is precisely what is now most doubted.⁴¹⁴

412 Private institutions were always exempt in their discretion from the academic freedom doctrine, leaving it up to them whether and how much academic freedom to accord faculty and students as a contractual matter.

413 See Paul Horwitz, Fisher, *Academic Freedom and Distrust*, 59 LOY. L. REV. 489, 494 (2013).

414 Declaration, *supra* note 23, at 155. Another warning sign that academic freedom is limited is the origins of America's most influential innovations. Microsoft, Apple, Google, and Amazon were birthed in garages, rather than universities. Cf. Areen, *supra* note 13, at 999 (Higher education is "a prime source of new ideas, which, from the earliest days of the republic, have stimulated the

The exclusionary effect of curricular speech doctrine extends to accreditors and professional associations, which attempt to compel private institutions to conform with their peers to exclude and discriminate against the same views rejected by public institutions, rather than leave them as counterweights in the marketplace of ideas. This is at odds with the limitations clause inserted in the Declaration,⁴¹⁵ which at least condescendingly recognized that religious and proprietary institutions are at liberty to define the scope of academic freedom they will offer faculty and students as a contractual matter. The choice faculty and students have to attend these institutions, learn and publish should not be truncated if the goal is academic freedom. Curricular speech doctrine should be discarded at the postsecondary level in connection with academic freedom disputes; and even at the secondary level, the rationale for imposing the doctrine would be adequately protected by policing the boundaries of academic freedom.

b. The Admissions Cases Confuse Interests.

Challenges to race-sensitive admissions policies present the most recent example of an external threat to academics uniting the interests of institutions and faculty. The majority of faculty and colleges consider race a proxy for ideas. No other demographic factors are typically as important surrogates and, in fact, some like religion are denigrated. Thus far, a majority on the Court has also agreed that race-sensitive admissions policies further academic freedom not only by promoting “the four essential freedoms of a university,” but also expanding the marketplace of ideas. In this case, *Lehrfreiheit* is not at issue; *Lernfreiheit* is. The conflict here is exogenous to the relationship between institutions and faculty but endogenous to the relationship between institutions and prospective students. Faculty have no adverse stake in the matter and, to the contrary, agree that race-sensitive policies benefit education.

The question indirectly at issue in the admissions cases is whether to expand the freedom to learn it is necessary simultaneously to limit it. Professor Metzger insists students do not have academic freedom interests,⁴¹⁶ yet the cases are grounded in the idea that the study body benefits from “enhanced classroom dialogue,” the “lessening of racial isolation and stereotypes,” providing “that atmosphere which is most conducive to speculation, experiment and creation,” promoting “learning outcomes” and “better prepar[ing] students for an increasingly diverse workforce and society.”⁴¹⁷ Not so students who would have been admitted but for the policy. As far as pure collective goods are concerned, here would be a unicorn: an institution excluding prospective students otherwise qualified from enjoying the collective good (i.e., learning) by denying them admission while somehow expanding the collective good through enhancing classroom dialogue. By cabining equal protection, the Court has not had to decide whether academic freedom overshadows it or whether *Lernfreiheit* is protected at all.

economy, strengthened national security, enhanced culture and enriched civic life.”).

415 See *supra* note 30 and related text.

416 Metzger, *supra* note 12, at 1304.

417 *Fisher I*, 570 U.S. at 308; *Fisher II*, 136 S. Ct. at 2210.

Confusing the matter is that there is a possibility that a quasi-public good is at stake, as well as another collective good: diversity. The implication of the admission cases may be that diversity is more important as a collective good than the freedom to learn. By failing to sort out the collective goods and their importance; the respective interests of institutions, faculty and students; and failing to define academic freedom and who is entitled to assert it, the admissions cases are not necessarily helpful for purposes of elucidating academic freedom as a nascent liberty.

c. Other Paradigms.

Garcetti is also no help to police the limits of academic freedom because, as Justice Souter pointed out, teachers necessarily speak and write pursuant to their official duties. The Court has conceded this point.⁴¹⁸ Neither does the weighing interests prong of the *Connick-Pickering* test (i.e., the original *Pickering* test) typically sort out things because there is ordinarily no objective basis for comparison purpose; the interests are generally categorically different as in *Demers* between the professor's interest in criticizing the lack of professional orientation in the communications program and the university's interest in ensuring that he appear in person for classes and publish scholarship. Set this test aside or presume it met when academic freedom is at stake unless there is an objective basis for comparison purpose.

5. Broaden Public Fora.

A final recommendation to expand the marketplace of ideas is to broaden public fora to provide an additional avenue to share views without biasing by reference to viewpoint the expression of ideas or associations that meet or post in the forum. "[A] public educational institution exceeds constitutional bounds ... when it 'restrict[s] speech or association simply because it finds the views expressed by [a] group to be abhorrent.'"⁴¹⁹ Curricular speech doctrine has expanded the "classroom" so much that there are precious little public fora left. Abandoning *Kuhlmeier* at the postsecondary level should concordantly help to expand public fora. Speakers in public fora will generally not wield the influence that the professor does in the classroom and research laboratory, and so will offer mere supplemental support for academic freedom, but public fora are still important to ensure a vibrant marketplace of ideas at public institutions.

B. Institutional Academic Autonomy Distinguished

Academic freedom is not the same as institutional academic autonomy, but this is not to say that the latter is unimportant. Professor Metzger called *Freiheit der Wissenschaft* a tertium quid to academic freedom, meaning it is related to, but distinct from, academic freedom.⁴²⁰ Justices Frankfurter and Harlan treated the four freedoms as the foundation for enabling colleges and universities—both

418 *Garcetti*, 547 U.S. at 425.

419 *Healy*, 408 U.S. at 187-88.

420 Metzger, *supra* note 12, at 1270.

public and private—to establish the framework for speculation, atmosphere, and creation. The academy has a decided collective aspect as if more than its constituent parts. This was Justices Frankfurter and Harlan’s point in *Sweezy* when they viewed academic autonomy as an expression of the collective scholarship of faculty and students, yet something also to be asserted independently by an academic institution itself. They called this academic freedom, which has led us to our contemporary constitutional morass, where individuals and institutions can assert the same freedom against each other with the result that the institution generally wins as if in its hands the same doctrine is more powerful.

If the same constitutional liberty may encompass both a professor’s freedom to teach and an institution’s freedom to limit teaching, besides the student’s freedom to learn and the institution’s freedom to limit that learning, it is easy to see that the liberty contains within itself its undoing. Trouble for the nascent constitutional liberty began when the side arguing no conflict between loyalty oaths and academic freedom sought to encompass within the liberty an institution’s right to decide who may teach, what may be taught, how it shall be taught, and who may be admitted to study. Academic freedom defined as such fails the nonexcludability prong of public good analysis. Academic freedom becomes a quasi-private or purely private good that does not inherently expand the marketplace of ideas. In fact, academic freedom defined as such may commonly shrink it. There is a better approach that distinguishes academic freedom from institutional academic autonomy and allows both to thrive in their respective spheres.

1. *Deference to Educational Judgment*

When enumerated constitutional liberties and academic freedom are not jeopardized, deference to institutional educational judgment is reasonable because of the special importance of education in our society and the limits of judicial review. Intemperateness, neglect of duty, moral delinquency, and even the avoidance of controversial matter without relation to course subject matter are matters for institutions to address. Determining what may be taught and how it shall be taught concerns pedagogy. All colleges and universities are in this business. Courts repeatedly state that they are reticent to second-guess pedagogical decisions. Determining who may teach and who may be admitted to study primarily concerns free association for private institutions. Even when the selection of the student body infringes equal protection, courts have extended considerable deference to the educational judgment of colleges and universities as relates to whom is admitted.

Both public and private colleges are entitled to impose bona fide occupational qualifications that enable them to insist on certain minimum credentials; e.g., astrophysics professors with related degrees. Courts are reticent to second-guess these mandatory professional qualifications or tenure decisions. Likewise, they believe universities should have wide discretion to judge the academic performance of students and their entitlement to graduation.⁴²¹ In *Ewing*, the court observed that judges are ill-equipped to make decisions concerning “the multitude of academic

421 *Emergency Coalition*, 545 F.3d at 234 (citing *Ewing*, 474 U.S. at 225 n.11).

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 decisionmaking.’⁴²²

The deference due institutions in these circumstances we have referred to throughout as institutional “academic autonomy.” Elsewhere, it has been called “academic abstention.”⁴²³ “Abstention” has been defined as the act or practice of choosing not to do or have something.⁴²⁴ Choice is less the focus of the courts in academic freedom cases than lack of competence or even jurisdiction. “Autonomy” involves the right of self-government.⁴²⁵ Hence, autonomy seems more apt. As Professor Areen suggests, deference is especially appropriate when faculty bodies support the decision but not only in this event.⁴²⁶

2. *Church Autonomy Doctrine*

There is an interesting partial analogy also derivative of the First Amendment known as the church autonomy doctrine specially conceived to protect religious organizations’ employment and governance decisions. In *Watson v. Jones*, the U.S. Supreme Court announced the church autonomy doctrine by distinguishing the English common law.⁴²⁷ Lord Eldon’s Rule, as it was called, enabled the courts to inquire which party to an ecclesiastical dispute bore “the true standard of faith in the church organization.”⁴²⁸ In contrast, the U.S. Supreme Court held, “The law knows no heresy.”⁴²⁹ There is a sense in which the courts also “see the college as a separate realm, pursuing values different from those of society as a whole.”⁴³⁰ This is perhaps due to a common sacerdotal heritage (that many universities would now prefer to forget). The university is where knowledge and understanding should be pursued with detachment and disinterestedness without internal or external compulsion. In several states, public universities or boards of regents are constitutional bodies with, in some cases, separate branch-like powers.⁴³¹

In the same way that academic autonomy is said to be a function of the rights of scholars to teach, research, and inquire, and said to be supplemental to those rights in furtherance of the academic decisions of the collective faculty body, there

422 *Ewing*, 474 U.S. at 226.

423 *Byrne*, *supra* note 1, at 323.

424 MERRIAM-WEBSTER DICTIONARY (2020).

425 *Id.*

426 Areen, *supra* note 13, at 996-97.

427 80 U.S. 679 (1871).

428 *Id.* at 727.

429 *Id.* at 728.

430 *Byrne*, *supra* note 1, at 325.

431 *See, e.g.*, CAL. CONST. art. IX, § 9; FLA. CONST. art. IX, § 7; GA. CONST. art. VIII, § 4; HAW. CONST. art. X, § 6; IDAHO CONST. art. IX, § 10; MICH. CONST. art. VIII, § 5; MINN. CONST. art. XIII, § 3; MONT. CONST. art. X, § 9; NEB. CONST. art. VII, § 10; and OKLA. CONST. Art. XIII, § 8; Regents of the Univ. of Mich. v. State, 166 Mich. App. 314, 419 N.W. 2d 773 (1988).

is a sense in which church autonomy is both derivative of the rights of the faithful to free exercise of religion and separation of church and state, and supplemental to those rights in furtherance of the employment and governance decisions that only the collective body of believers organized as an institution can make. The U.S. Supreme Court recognized one variety of church autonomy known as the ministerial exception doctrine, when the court confirmed that a religious organization is entitled to select its ministers and, as a result, has an affirmative defense to various kinds of discrimination claims.⁴³² This is directly relevant to religious postsecondary institutions that would assert their institutional autonomy against challenges to their employment decisions and perhaps, by extension, student admissions, dismissal, and grading decisions.

There is no direct relevance to public institutions. Free speech and assembly belong to private parties.⁴³³ State actors do not have constitutional rights to exercise.⁴³⁴ Academic institutions deploy academic autonomy at odds with enumerated liberties, including those contained in the First Amendment, whereas religious institutions assert church autonomy incident to their First Amendment liberties. Some will reasonably conclude that this makes the analogy wholly inapt; and it is certainly true that academic autonomy cannot be used in this fashion for any symmetry to survive. But there remains in common several ideas, such as the grounding of academic freedom in the notion that faculty bodies should be free to act “according to their own consciences,”⁴³⁵ besides the idea that judges feel incompetent to decide who should teach, what should be taught, how it should be taught, and who should be admitted to study.⁴³⁶

Watson required civil courts to accept the decision of the highest church judicatory as authoritative because the courts are not “competent in the ecclesiastical law and religious faith....”⁴³⁷ Similarly, scholars like Professor Areen insist faculty bodies are best suited to judge faculty scholarship and conduct,⁴³⁸ and consider courts as out of their element. Church autonomy doctrine is jurisdictional in many state courts and was in federal court until the Court resolved a split in favor of it as an affirmative defense.⁴³⁹ Institutional academic autonomy is ordinarily not an affirmative defense, but functions like one, in the form of deference, when faculty and students file First Amendment retaliation instead of Title VII retaliation claims against universities.

432 *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171 (2012); *Our Lady Guadalupe Sch. v. Morrissey-Berru*, _ U.S. _, 140 S. Ct. 2049 (2020).

433 Metzger, *supra* note 12, at 1291 (“The basic truth about the first amendment is that it protects the liberties of citizens solely against actions by the state.”)

434 Byrne, *supra* note 1, at 300 (“A final anomaly in the application of state action doctrine is that constitutional academic freedom is the only constitutional right exercised by state actors.”)

435 Declaration, *supra* note 23, at 155.

436 Bryne, *supra* note 1, at 325.

437 *Watson v. Jones*, 80 U.S. 679, 729 (1871).

438 Areen, *supra* note 13, at 992, 995.

439 *Hosanna-Tabor*, 565 U.S. at 709 n.4.

If in the exercise of their educational judgment, postsecondary institutions do not transgress enumerated constitutional liberties, courts should be reticent to second guess them. However, when the exercise of educational judgment by public institutions results in viewpoint or content-based discrimination against particular ideas, courts should step in to preserve the marketplace of ideas and academic autonomy must give way. If academic freedom exists as a constitutional matter at all, it must be in furtherance of this liberation of thought; otherwise, it should be abandoned altogether as a would-be constitutional liberty, so as not to justify infringement of enumerated constitutional liberties, and consigned exclusively to tenure and contract law.

V. Conclusion

The jurisprudence of academic freedom is now at enmity with the doctrinal statements out of which it grew in the early 1900s. Then, it was a professional norm, primarily concerned with liberating the professor's thought from the institution and assuring a vigorous exchange of ideas in the classroom benefiting students. In the 1950s-'60s, the norm was elevated to quasi-constitutional status to protect primarily the faculty, and incidentally universities, from the state's McCarthyite inquiries. Beginning in the 1970s, internal struggles within the academy between faculty and leadership reached the courts. A presumption arose in favor of academic institutional autonomy. In the 1980s, the U.S. Supreme Court articulated the curricular speech doctrine in reaction to secondary students who complained of interference with their speech rights. By the 2000s, religious speech and admissions cases led to an emerging consensus that academic freedom is primarily an institutional liberty, counterbalancing even enumerated liberties of individual faculty and students in intramural disputes with the institutions. Understood thus, academic freedom undermines its original purpose to expand the marketplace of ideas.

The easiest type of academic freedom to vindicate arises, as in the *Wieman-Sweezy* line of authority and admissions cases, when the interests of institutions and faculty are largely congruent. But when they diverge, a conception of academic freedom as both protecting faculty and institutions threatens to annul the doctrine. A better approach is to treat academic freedom as a public good and one-way ratchet in favor of liberating thought and expression in public colleges and universities, and as supplemental to individual liberties and contract rights, but to set it aside as inapplicable in situations where it would shrink the marketplace of ideas. The D.C. Circuit hypothesized that one way to do this is to invoke the doctrine "only to prevent a governmental effort to regulate the *content* of a professor's academic speech."⁴⁴⁰ In addition, public fora doctrine could be expanded to liberate speech.

The concept of academic freedom in the courts is both underinclusive to the extent it is conceived primarily as institutional in character and overinclusive to the extent individual plaintiffs seek to constitutionalize employment grievances. Even as originally ensconced in the Declaration, academic freedom was not relevant to many such disputes involving, for example, intemperateness, neglect of duty,

440 *Emergency Coalition*, 545 F.3d at 12 (emphasis original).

moral delinquency, and even the avoidance of controversial matter without relation to course subject matter. The reason is not that these activities constitute curricular speech but that they are outside the scope of academic freedom and within the purview of institutional academic autonomy. Admissions decisions have also historically been treated as fundamentally institutional, rather than matters of academic freedom. They primarily concern students who have generally received the shortest end of the academic freedom stick.

The applicability of the *Kuhlmeier* curricular speech doctrine at the postsecondary level deserves scrutiny because it is at war with the rationale of academic freedom to expand the “marketplace of ideas” in the pursuit of truth. From the beginning, academic freedom has concerned curricular speech. Curricular paternalism, as distinct from protection against obscenity, is least convincing as relates to professional and graduate students. Curricular speech conceptualized as inclusive of out-of-classroom statements seems oxymoronic and is in tension with the exercise of express constitutional rights.

Whether speech is curricular or not has become the real threshold inquiry determining whether a plaintiff states a claim under the *Connick-Pickering* or *Garcetti* test. Under current law, if speech is curricular, it is not of public interest and the government’s interest supersedes the individual’s interest, so the professor fails to state a claim under *Connick-Pickering*. This is all the more likely if the speech is religious. If speech is noncurricular, and in a professor’s official capacity, the professor fails to state a claim under *Garcetti*. Rather than ask the curricular question as the fundamental one, while paying lip service to academic freedom, courts should instead pose the threshold question whether academic freedom interests are at stake. To the extent the speech or conduct at issue is not excepted from the Declaration, and infringing upon it would tend to limit the marketplace of ideas, then the academic freedom interest is triggered but in a fashion accommodated to a public institution’s legitimate expectation of civility and professional duty.

Whereas institutional academic autonomy may be at odds with *Lehrfreiheit*, it makes no sense to continue to distinguish academic freedom from *Lehrfreiheit*. For the sake of doctrinal coherence, it would be best to distinguish institutional academic autonomy from academic freedom and when they come into tension to elaborate a more principled manner of deciding the case. If, in every such instance, academic freedom must lose and the only times it wins is when institutional academic autonomy points the same way, then truly there is no such liberty as academic freedom as originally conceptualized. Then, what passes for academic freedom is really institutional academic autonomy, and academic freedom is no more than an illusory transcendent value that contract law alone may protect. The worst possible jurisprudence would mistake academic freedom for institutional academic autonomy and supersede enumerated constitutional rights. The purpose of academic freedom is a limited one for the common good to ensure a free exchange of ideas in search of truth and its liberal exposition. It is better not to invoke academic freedom at all than be guilty of using it in a manner that would achieve the inverse of this objective.