

Academic Freedom, Democracy, and the First Amendment*

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Introduction

Nearly fifty years ago the United States Supreme Court declared that “[o]ur 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.”¹ In the ensuing decades, the Court would often repeat the claim that academic freedom is of “special concern” to the First Amendment.² Despite the Court’s ringing rhetoric, the relationship between the First Amendment and academic freedom is in fact tenuous and uncertain. Indeed, contrary to the Court’s assertion, there is not a single Supreme Court decision that definitively establishes academic freedom as a “special concern” of the First Amendment as opposed to a practice protected by generally applicable First Amendment principles.

In this paper I will argue that any “special” First Amendment protection for academic freedom is difficult to justify in terms of the Court’s overall free speech jurisprudence and the values underlying First Amendment doctrine. Rather, academic freedom as a distinct constitutional norm is entitled to only moderate First Amendment protection. But before discussing the extent that academic freedom is, and should be, protected as a constitutional norm, it will be useful to consider academic freedom as a professional

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¹ *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

² *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978); *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985); *Univ. of Penn. v. EEOC*, 493 U.S. 182, 195 (1990); *Grutter v. Bollinger*, 539 U.S. 306, 324 (2003).

norm.³ Accordingly, Part I of this paper will discuss the meaning of the term “academic freedom” as it has been explicated in various statements of the American Association of University Professors (“AAUP”). In addition, to help understand the purpose of academic freedom as a professional norm in this country, it will briefly recount the founding of the AAUP in the early part of the twentieth century in response to dismissals of faculty for expressing controversial ideas. We will then be in a position to consider what aspects of academic freedom as a professional norm should also be protected as a legal norm, particularly a constitutional one. To that end, Part II will describe the Supreme Court cases in which academic freedom is advanced as a ground of decision. Part III will then demonstrate that the invocation of academic freedom in these cases is mostly talk with little doctrinal significance. Relatedly, it will show that in these cases the Supreme Court fails to offer a guiding principle for establishing an academic freedom jurisprudence. The remainder of Part III will be devoted to searching for such a principle by inquiring which, if any, of the values underlying the First Amendment are promoted by constitutional protection of academic freedom. Part IV of this paper concludes that because academic freedom is not a true individual right—which is properly the only “special concern” of the First Amendment—but rather is instrumental to the democratic interests in assuring information needed for informed public opinion, academic freedom is entitled to only modest First Amendment protection.

I. THE MEANING, SCOPE AND PURPOSE OF ACADEMIC FREEDOM AS A PROFESSIONAL NORM

The term “academic freedom” is frequently bandied about by faculty at American universities as “a warm and vaguely fuzzy privilege” or as “a hortatory ideal without conceptual clarity or precision.”⁴ But exactly what does this term mean and precisely what activities does it cover? A good starting point for understanding the meaning of academic freedom as a professional norm are various statements by the AAUP on the subject.

³ For a discussion of the distinction between academic freedom as a professional and a constitutional norm, see Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265 (1988).

⁴ MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD 6 (2009).

A. The 1940, 1966, and 1994 AAUP Statements

The influential 1940 *Statement of Principles on Academic Freedom and Tenure* begins, fittingly, with an explanation of the mission of the university.⁵ “Institutions of higher education,” the *Statement* remarks, “are conducted for the common good,” not to further the interest of the individual teacher or even that of “the institution as a whole.” And the common good, the *Statement* declares, “depends upon the free search for truth and its free exposition.” “Academic freedom,” the *Statement* insists, “is essential to these purposes” and encompasses the right of faculty to: 1) “full freedom in research and in the publication of the results”; 2) “freedom in the classroom in discussing their subject”; and 3) “a right to speak as citizens free from institutional censorship or discipline.” The 1940 *Statement* “has become the standard of academic freedom in the United States. It has been adopted by more than two hundred educational organizations and disciplinary societies [and] has been adopted by name or in text in innumerable college and university rules and regulations.”⁶

Subsequent AAUP Statements have extended academic freedom beyond research, teaching and extramural expression to include a significant amount of “intramural expression” as well. First, the AAUP’s 1966 *Statement on Government of Colleges and Universities* declared that “faculty has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process.”⁷ This was followed by the 1994 *Statement on the Relationship of Faculty Governance to Academic Freedom* that condemned administrative retribution against faculty for speaking on these matters as a violation of academic freedom.⁸

To get a fuller understanding of the meaning, scope and purpose of academic freedom as a professional norm, however, it would be useful to recount some of the condi-

⁵ <http://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure>.

⁶ FINKIN & POST, *supra* note 4 at 48.

⁷ <http://www.aaup.org/report/1966-statement-government-colleges-and-universities>.

⁸ <http://www.aaup.org/report/relationship-faculty-governance-academic-freedom>.

tions and a few of the more notorious incidents that led to the founding of the AAUP and its defense of academic freedom at American universities.

B. Corporate Endowment of the Modern University and the Framework for Conflict

Prior to the Civil War, American institutions of higher learning were typically small, local denominational colleges, where the curriculum was classical, the educational mission aimed at building character, and the faculty often young men awaiting clerical appointment.⁹ Indeed, until the late nineteenth century, “there had hardly been an academic profession at all.”¹⁰ Individual gifts to these institutions were relatively modest, with a \$50,000 donation to Harvard the largest on record before the Civil War. Amherst College was founded for that same sum, comprised of numerous small gifts.¹¹ After the Civil War, however, both the size of the gift and nature of the philanthropy changed, with significant consequences for the autonomy of the university and the intellectual freedom of the professoriate.

Johns Hopkins University was founded in 1867 with a gift of \$3,500,00 by Baltimore entrepreneur; Leland Stanford Junior University in 1891 with a bequest of \$24,000,000 from the estate of a railroad magnate; and the University of Chicago, also in 1891, with a gift of \$34,000,000 from oil tycoon, John D. Rockefeller.¹² “Inevitably, the increase in the size of the gifts changed the relations of donor to recipient. [O]ne may say the givers became entrepreneurs in the field of higher education.” Whereas previously college presidents approached potential donors to ask for funds for purposes that they had determined, after the Civil War benefactors “took the initiative in providing funds and in deciding their general purposes.”¹³ Relatedly, the occupation of the trustees of American colleges and universities became much more business oriented, so that by the end of the nineteenth century the roster of trustees at these institutions “read like a corporate direc-

⁹ FINKIN & POST, *supra* note 4 at 23.

¹⁰ CHRISTOPHER JENCKS & DAVID RIESMAN, *THE ACADEMIC REVOLUTION* 160 (1967).

¹¹ RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 413 (1955).

¹² *Id.*

¹³ *Id.* at 414.

tory.”¹⁴ This new dynamic set up conditions for conflict between business interests and the professoriate.

An early example is the firing in 1887 of economist Henry Carter Adams of Cornell University for making a speech in favor of the labor movement that outraged a member of the board of trustees. Later notable incidents include the dismissal of economist Edward W. Bemis in 1895 from the University of Chicago for expressing antimonopoly views; the termination in 1897 of political scientist James Allen Smith from his post at Marietta College also for antimonopoly teaching; and the 1899 firing of Frank Parsons from Kansas State Agricultural College for his progressive economic views.¹⁵ In addition, in 1897 E. Benjamin Andrews was forced to resign as President of Brown University after being attacked by the regents for his support of free silver.¹⁶ A particularly notorious example of the dismissal of a professor for expressing views contrary to those held by a university founder and trustee, and the proximate cause of the founding of the AAUP, was the firing of economist Edward A. Ross from Stanford University in 1900.

A protégé of progressive economist Richard T. Ely of the University of Wisconsin,¹⁷ Ross publicly defended Socialist Party leader Eugene V. Debs against conservative criticism and also wrote in favor of free silver. But much more controversially for someone who taught at a university founded by money earned by a railroad baron, he also advocated municipal ownership of utilities, and for a ban on Chinese immigration, a source of cheap railroad labor. This was all far too much for Jane Lathrop Stanford, co-founder of the uni-

¹⁴ *Id.* at 415 (quoting Charles Beard & Mary Beard, 2 THE RISE OF AMERICAN CIVILIZATION 470 (1927)).

¹⁵ *Id.* at 419-28. Not all dismissals of professors during this period were for questioning dominant business practices. On university boards where they were a majority, Populists sometimes insisted that the professoriate tow their party line. *See id.* at 423-24. And harkening back to the pre-Civil war period in which dismissals were for challenging religious orthodoxy, geologist Alexander Winchell was dismissed from Vanderbilt University in 1871 for teaching evolution. *Id.* at 330-32.

¹⁶ *Id.* at 421. Some attempts to remove professors for heterodox economic views were unsuccessful. For instance, in 1894, at the behest of the superintendent of public instruction and ex-officio member of the board of regents of the University of Wisconsin, Richard T. Ely was tried before a committee of the regents. He was charged with teaching the propriety of strikes and boycotts and for publishing books that contained “essentially the same principles” and which provided a “moral justification of attack upon life and property” and were “utopian, impractical and pernicious.” *Id.* at 426-27. Although there were conservative businessmen and lawyers on the board of regents and the trial committee, Ely was exonerated and retained his post.

¹⁷ *See supra* note 16.

versity with her late husband, and who at this time operated as its sole trustee. After complaining to Stanford's President David Starr Jordan for several years, Mrs. Stanford finally demanded Ross's dismissal. "[H]owever, brilliant and talented [Professor Ross] may be," wrote Mrs. Stanford to President Jordan, "a man cannot entertain such rabid ideas without inculcating them in the minds of students under his charge." "There is a very deep and bitter feeling of indignation throughout the community," she continued "that Stanford is lending itself to partisanism and even to dangerous socialism." She concluded: "Professor Ross cannot be trusted, and he should go."¹⁸

And go he did. But along with him, seven other Stanford professors went as well, resigning in protest to Ross's dismissal. One of those who left Stanford over this incident was philosopher Arthur O. Lovejoy,¹⁹ who largely motivated by Ross's firing, would later found the AAUP along with Columbia philosopher John Dewey.²⁰

As Matthew Finkin and Robert Post explain in their illuminating study of academic freedom as a professional norm in this country, the general understanding at this time was that a university professor's employment status was no different than that of a business employee who could be dismissed at the unbridled discretion of the company's proprietor or board of directors.²¹ This view is exemplified by the response of George Wharton Pepper, a University of Pennsylvania trustee, when asked to explain the dismissal in 1915 of Scott Nearing, a young professor at the Wharton School of Business, fired in part for his progressive economic views. "If I were dissatisfied with my secretary for anything he had done," Pepper replied, "some people might be in favor of my calling him in here and to sit down and talk it over. Others might think it wiser to dismiss him without assigning any cause. But in any case," Pepper concluded, "I would be within my rights in terminating his

¹⁸ HOFSTADTER & METZGER, *supra* note 11 at 436–39.

¹⁹ *Id.* at 442.

²⁰ FINKIN & POST *supra* note 4 at 45. More immediately, Ross's dismissal led to an unprecedented decision by the American Economic Association in 1900 to launch an investigation of the case. "With this decision, the first professional inquiry into an academic freedom case was conceived and brought into being—the predecessor, if not directly the parent, of the proceedings of Committee A of the AAUP." HOFSTADTER & METZGER, *supra* note 11 at 442-43.

²¹ FINKIN & POST at 3-32.

employment.”²² This view was endorsed in a *New York Times* editorial commenting on the incident in which it was asserted that “trustees are not obliged to give reasons for dismissal.”²³ Similarly, a widespread view held it perfectly proper for the trustees to dismiss a professor for expressing views contrary to those of its founder of the university or of one of its programs. As explained in the *Times* editorial:

men who through toil and ability have got together money enough to endow universities or professors’ chairs, do not generally have in mind that their money should be spent for the dissemination of the dogmas of Socialism. . . . Yet when Trustees conscientiously endeavor to carry out the purposes of the founder by taking proper measure to prevent the misuse of the endowment, we always hear a loud howl about academic freedom.²⁴

C. The AAUP’s 1915 Declaration

The same year as Nearing’s dismissal, 1915, the AAUP was founded. While the *Times* was editorializing about the incident, Edwin R. A. Seligman, an economics professor at Columbia University, was drafting the organization’s foundational *1915 Declaration of Principles on Academic Freedom and Academic Tenure*.²⁵ It was the particular burden of this document to refute the prevalent yet in Seligman’s view highly pernicious conception expressed in the *Times* editorial about relationship between a professor and a university’s trustees or its founders.

The *Declaration* begins by explaining that academic freedom comprises three elements:²⁶ freedom of inquiry and research; freedom of teaching within the university or

²² Quoted in *id.* at 32, citing Evans Clark, *Business Men in Control of American Colleges*, N.Y. Times Mag., June 10, 1917, at 64.

²³ *Id.* at 31, quoting Editorial, *Academic Freedom*, N.Y. Times, June 20, 1915.

²⁴ *Id.* at 32, quoting Editorial, *Academic Freedom*, N.Y. Times, June 20, 1915.

²⁵ <http://www.aaup.org/report/1915-declaration-principles-academic-freedom-and-academic-tenure>. For further discussion about the drafting of the 1915 Statement and the founding of the AAUP, see ROBERT O’NEIL, *ACADEMIC FREEDOM IN THE WIRED WORLD: POLITICAL EXTREMISM, CORPORATE POWER, AND THE UNIVERSITY* 18-20 (2008). This book also provides an excellent discussion of academic freedom both as a professional and legal norm.

²⁶ Revealing the influence that the German concept of academic freedom on the American norm, the *Declaration* refers to *Lehrfreiheit* (teaching freedom) and *Lernfreiheit* (learning freedom). For a discussion of the German influence on the concept of academic freedom in the United States including on the 1915 *Declaration*, see HOFSTADTER & METZGER, *supra* note 11 at 367–412. Seligman and Lovejoy had studied in Germany, as had many of the professors involved in famous academic freedom cases, including Ross and Ely. *Id.* at 396. Despite the reference to *Lernfreiheit*, the *Declaration* makes clear that the freedom which is the subject

college; and freedom of extramural utterance and action.²⁷ It then loses no time in moving to the issue “of the scope and basis of the power exercised by those bodies having ultimate legal authority in academic affairs.”²⁸ The *Declaration* pointedly observes that in some American colleges and universities “the relation of trustees to professors is apparently still conceived to be analogous to that of a private employer to his employees.” Under this conception, the *Declaration* notes, trustees may impose “their personal opinions upon the teaching of the institution” or even dismiss faculty “to gratify their private antipathies or resentments.” Such conduct, the *Declaration* cautions, undermines the essential purposes of the modern university, which is “to promote inquiry and advance the sum of human knowledge;²⁹ to provide general instruction to the students; and to develop experts for various branches of the public service.” To accomplish these purposes, the *Declaration* explains that it is necessary that “what purport to be the conclusions of men trained for, and dedicated to, the quest for truth, shall in fact be the conclusions of such men, and not echoes of the opinions of the lay public, or of the individuals who endow or manage universities.” Accordingly, the *Declaration* berates the “conception of a university as an ordinary business venture, and of academic teaching as a purely private employment” as “a

of this report is that of the teacher. Consistent with this view, academic freedom in this country, both as a professional and legal norm, has usually been conceived as extending exclusively to faculty.

²⁷ The *Declaration* notes that freedom of inquiry and research are “almost everywhere so safeguarded that the dangers of its infringement are slight. It may therefore be disregarded in this report.” It then observes that freedom of teaching within the university or college and freedom of extramural utterance and action “are closely related, and are often not distinguished.” It adds, however, that the latter “has an importance of its own, since of late it has perhaps more frequently been the occasion of difficulties and controversies than has the question of freedom of intra-academic teaching.” In this regard, the *Declaration* notes that in all five of the cases which AAUP had investigated to that point, “the right of university teachers to express their opinions freely outside the university or to engage in political activities in their capacity as citizens” had been a factor.

²⁸ The *Declaration* acknowledges the existence of “proprietary school or college designed for the propagation of specific doctrines prescribed by those who have furnished its endowment.” It explains that such institutions “do not, at least as regards one particular subject, accept the principles of freedom of inquiry, of opinion, and of teaching” and that their “purpose is not to advance knowledge by the unrestricted research and unfettered discussion of impartial investigators.” The *Declaration* declines to comment on “the desirability of the existence of such institutions” but does insist that if they should not be permitted “to sail under false colors.” Accordingly, “any university which lays restrictions upon the intellectual freedom of its professors proclaims itself a proprietary institution, and should be so described whenever it makes a general appeal for funds; and the public should be advised that the institution has no claim whatever to general support or regard.”

²⁹ With respect to this purpose the *Declaration* eloquently explains that within all “domains of knowledge, the first condition of progress is complete and unlimited freedom to pursue inquiry and publish its results. Such freedom is the breath in the nostrils of all scientific activity.”

radical failure to apprehend the nature of the social function discharged by the professional scholar.” The scholar’s function, the *Declaration* emphasizes, “is to deal at first hand, after prolonged and specialized technical training, with the sources of knowledge; and to impart the results of their own and of their fellow-specialists’ investigations and reflection, both to students and to the general public, without fear or favor.”

The *Declaration* then explains that to the extent that non-experts, including university founders or trustees, interfere with professors in the “formulation or promulgation of their opinions,” then to that degree “the university teaching profession is corrupted; its proper influence upon public opinion is diminished and vitiated; and society at large fails to get from its scholars, in an unadulterated form, the peculiar and necessary service which it is the office of the professional scholar to furnish.” For this reason, the *Declaration* asserts, faculty “are the appointees, but not in any proper sense the employees” of a university’s trustees. “Once appointed,” the *Declaration* continues, “the scholar has professional functions to perform in which the appointing authorities have neither competency nor moral right to intervene.” Any judgments about a scholar’s work therefore must be left to “the judgment of his own profession.”³⁰

Having explicated in terms of the purposes of the university the necessity of professors remaining free from coercive influences by laymen in the formulation and exposition of expert opinion, the *Declaration* then looks to these same purposes in formulating correlative obligations of faculty in expressing these views. “The liberty of the scholar within the university to set forth his conclusions, be they what they may,” the *Declaration* explains, “is conditioned by their being conclusions gained by a scholar’s method and held in a scholar’s spirit; that is to say, they must be the fruits of competent and patient and sincere inquiry, and they should be set forth with dignity, courtesy, and temperateness of language.” Moreover, while a professor is entitled to candidly express his own views, he

³⁰ The *Declaration* analogized the relationship between professors and trustees to relationship between federal judges and the executive who appoints them, “with the consequence that university professors should be understood to be, with respect to the conclusions reached and expressed by them, no more subject to the control of the trustees, than are judges subject to the control of the president, with respect to their decisions.”

should also present “without suppression or innuendo, the divergent opinions of other investigators” and should “above all, remember that his business is not to provide his students with ready-made conclusions, but to train them to think for themselves” Crucially, however, the *Declaration* rejects as “inadmissible” the proposition that “bodies not composed of members of the academic profession” should be empowered to determine when a professor has departed from the requirements the proper scholarly “spirit and method” it just described. Not only do such bodies not have the competence to make such judgments but also “their intervention can never be exempt from the suspicion that it is dictated by other motives than zeal” for the maintenance of scholarly standards. For these reasons, the *Declaration* concluded that “university teachers must be prepared to assume this responsibility for themselves.”

Finally, the *Declaration* turns to the question of professorial extra-mural speech. It declares it “obvious” that academics “are under a peculiar obligation to avoid hasty or unverified or exaggerated statements, and to refrain from intemperate or sensational modes of expression.” These constraints, however, should normally be “self-imposed, or enforced by the public opinion of the profession.” In exceptional cases, the *Declaration* recognized, there may be the need for formal disciplinary action to check “aberrational” extra-mural professorial speech. But as with discipline for research or classroom speech that violate scholarly norms, “such action cannot with safety be taken by bodies not composed of members of the academic profession.” Subject to these largely self-imposed constraints, however, the *Declaration* concluded that professors should even on controversial questions be free to offer their expert judgment, and outside the university should like other citizens be able to exercise freedom of speech on any issue, including those beyond their field of expertise.

II. SUPREME COURT ACADEMIC FREEDOM CASES: A DESCRIPTION

Having explored the meaning, purpose and history of academic freedom as a professional norm, we are now in a position to consider the extent that this arrangement is also recognized as a legal norm, in particular as a constitutional one protected by the First

Amendment.³¹ As late as 1937, a Note in the Yale Law Journal could conclude that “academic freedom is not . . . a constitutional privilege, or even a legal term defined by a history of judicial usage.”³² And according to Walter Metzger, until the middle of the twentieth century “no American court had ruled that any provision of the federal constitution protected academic freedom. Indeed, no petitioner in any federal court appears to have framed a legal action that required the issue to be settled judicially one way or the other.”³³ It was not until McCarthy-era attempts by state legislature to root out allegedly “subversive” teachers from American universities and secondary schools that academic freedom was referred to in Supreme Court decisions as grounds for the protection of academic expression, and then only in dissenting, concurring or plurality opinions.

The decisions of the United States Supreme Court invoking academic freedom as a basis of decision divide rather neatly into two groups defined both by chronology and subject matter. The first set of cases extends from 1952 to 1967 and deals with attempts by states to remove alleged “subversives” from public employment, including at state universities. By virtue of this subject matter and the individuals targeted by these laws, the aspect of academic freedom emphasized in these cases focuses on the right of individual teachers to express provocative ideas and to hold unpopular beliefs. The second group of cases, which covers the period 1978 to 2003, involves claims by students or prospective students against universities and their faculty and thus brings to the fore academic freedom as a constitutional norm protecting the institutional autonomy of universities.

³¹ Although the focus here will be entirely on the First Amendment, it is worth noting that other legal provisions, including state constitutional provision providing institutional autonomy for universities, collective bargaining agreements and individual contractual provisions relating to tenure can also provide protection to academic freedom, though not necessarily directly or expressly by that name. In addition, as we shall see, other federal constitutional norms such as due process can provide such protection.

³² Note, *Academic Freedom and the Law*, 46 YALE L.J 670, 671 (1937).

³³ Metzger, *supra* note 3 at 1285.

A. The “Cold War” Individual Rights Cases

Academic freedom made its debut in the pages of the Supreme Court Reports in 1952 in Justice William O. Douglas’s dissent in *Adler v. Board of Education*.³⁴ The Court, in an opinion by Justice Sherman Minton, upheld New York’s so-called Feinberg Law. This law required the board of regents to make a list of organizations that it found advocated the violent overthrow of government, and made any public school teacher, including at institutions of higher learning, who was a member of any listed organizations, prima facie ineligible for hiring or retention. Invoking the hoary right-privilege distinction, the Court explained that while it is clear that public school teachers have the right to freedom of speech and thought, it is “equally clear that they have no right to work for the State in the school system on their own terms. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere.”³⁵

Justice Douglas, in a dissent joined by Justice Hugo Black, began by noting his disagreement with the doctrine “that a citizen who enters the public service can be forced to sacrifice his civil rights.”³⁶ In addition, he warned that the procedure set up by the Feinberg Law was “certain to raise havoc with academic freedom” because teachers will “shrink from any association that stirs controversy” and consequently “freedom of expression will be stifled.”³⁷ The Feinberg Law in his view “turns the school system into a spying project, a place where [e]ars are cocked for tell-tale signs of disloyalty,” thereby casting a “pall . . . over the classroom.”³⁸

³⁴ 342 U.S. 485 (1952).

³⁵ *Id.* at 492. Here the Court echoes Oliver Wendell Holmes famous aphorism, penned as Chief Justice of the Supreme Judicial Court of Massachusetts, that “[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517-18 (1892). Justice Minton added that 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.” For this reason, the he explained, “school authorities have the right and the duty to screen [teachers] as to their fitness to maintain the integrity of the schools as a part of ordered society,” including by judgments as to their “fitness and loyalty” as revealed by “the company they keep.” *Adler*, 342 U.S. at 493.

³⁶ *Id.* at 508 (Douglas, J., dissenting).

³⁷ *Id.* at 509.

³⁸ *Id.* at 510. Justice Black filed a separate dissent arguing “that the Court’s judgment sustaining this law which effectively penalizes school teachers for their thoughts and their associates” in violation of the First Amendment. *Id.* at 497 (Black, J., dissenting). Justice Felix Frankfurter, who would soon have much to say

Later in 1952, the Court in *Wieman v. Updegraff*³⁹ struck down an Oklahoma law requiring all state employees, including professors at state universities, to sign a loyalty oath swearing that they were not members of organizations found by the Attorney General of the United States to be “subversive” or “Communist-front” organization. In an opinion by Justice Tom Clark, the Court held that the oath requirement violated the Due Process Clause of the Fourteenth Amendment because it applied to “innocent” members unaware of a listed organization’s illicit activities and purposes.⁴⁰ Justice Frankfurter filed a concurring opinion, in which Justice Douglas joined,⁴¹ eloquently praising the importance of academic freedom, which in his view the law imperiled:

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 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.⁴²

Frankfurter then concluded his concurrence with a quotation from the testimony of Robert Hutchins, Associate Director of the Ford Foundation and former President of the University of Chicago, before a House Select Committee charged (readers of this paper may be interested in knowing) with investigating tax exempt organizations:⁴³

on the subject of academic freedom, dissented on the grounds that the case was not ripe for adjudication and therefore should have been dismissed for lack of jurisdiction. *Id.* at 497-508 (Frankfurter, J., dissenting).

³⁹ 344 U.S. 183 (1952).

⁴⁰ *Id.* at 191.

⁴¹ Perhaps it is not just coincidence that both Douglas, the first Justice to invoke academic freedom in a Supreme opinion, and Frankfurter, the author of the paeans to academic freedom in *Wieman* and in *Sweezy v. New Hampshire*, *infra* note 45, had been academics before joining the Court.

⁴² *Id.* at 196–97 (Frankfurter, J., concurring). Interestingly, neither here nor in *Sweezy* does Frankfurter use the term “academic freedom.”

⁴³ H. Res. 561, 82d Cong., 2d Sess. (1952) created a select committee to investigate which tax exempt educational and philanthropic foundations are using their resources for purposes other than the purposes for which they were established “and especially to determine which such foundations and organizations are using their resources for un-American and subversive activities or for purposes not in the Interest or tradition of the United States.”

Now, a university is a place that is established and will function for the benefit of society, provided it is a center of independent thought. . . . A university, then, is a kind of continuing Socratic conversation on the highest level . . . about the most important questions, and the thing that you must do to the uttermost possible limits is to guarantee those men the freedom to think and to express themselves. Now, the limits on this freedom . . . cannot be merely prejudice, because although our prejudices might be perfectly satisfactory, the prejudices of our successors or of those who are in a position to bring pressure to bear on the institution, might be subversive in the real sense, subverting the American doctrine of free thought and free speech.⁴⁴

Five years later, in *Sweezy v. New Hampshire*,⁴⁵ a majority of the Court would take up the theme of academic freedom, though in two separate opinions. As part a comprehensive scheme to root out “subversive” activities within the state, the New Hampshire legislature passed a resolution that empowered the state attorney general “to make full and complete investigation” of the violation of any of its laws regulating subversive activities and “to determine whether subversive persons . . . are presently located within this state.”⁴⁶ Pursuant to this resolution, the attorney general summoned Paul Sweezy, an economist and well-known lecturer who characterized himself a “classical Marxist” and a “socialist,” to testify before him on a wide range of subjects relating to his political activities, associations and beliefs. Sweezy answered all of the questions propounded to him, except those relating to his knowledge of the Progressive Party and its members and those about the content of a guest lecture he had given at the University of New Hampshire.⁴⁷ When he persisted in refusing to answer these questions, he was held in contempt and ordered confined in jail until he answered the questions.

The Court reversed the contempt judgment. Writing for a plurality of the Court, Chief Justice Warren, in an opinion joined by Justices Black, Douglas and Brennan, held

⁴⁴ *Wieman*, 344 U.S. at 197–98, quoting testimony of Robert M. Hutchins, Associate Director of the Ford Foundation, November 25, 1952, in hearings before the House Select Committee to Investigate Tax-Exempt Foundations and Comparable Organizations, pursuant to H. Res. 561, *supra* note 43.

⁴⁵ 354 U.S. 234 (1957).

⁴⁶ *Id.* at 237.

⁴⁷ *Id.* at 248. The questions about the lecture which Sweezy refused to answer were the following: “What was the subject of your lecture?” “Didn’t you tell the class . . . that Socialism was inevitable in this country?” “Did you advocate Marxism at that time?” “Did you express the opinion, or did you make the statement at that time that Socialism was inevitable in America?” “Did you . . . espouse the theory of dialectical materialism?” *Id.* at 243–44.

that the contempt citation violated the Due Process Clause of the Fourteenth Amendment. Warren explained that both Sweezy's lecture and his political associations were protected by the First Amendment, respectively "areas of academic freedom and political expression . . . in which government should be extremely reticent to tread."⁴⁸ Expounding on the inquiry of the lecture, the Chief Justice wrote:

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.⁴⁹

With regard to the questions about the Progressive Party, Warren explained that the First Amendment protected the right of every citizen "to engage in political expression and association" and that in America exercise of these basic freedoms "has traditionally been through the media of political associations."⁵⁰ While expressing doubt whether of any state interest could ever justify infringement of the academic freedom and political association at issue in this case, Warren found it unnecessary to decide in this case such "fundamental questions of state power." For even if, as the New Hampshire Supreme Court had held, "the self-preservation of government outweighed the deprivation of constitutional rights that occurred" by compelling Sweezy to testify on these subjects, there was in Warren's view "nothing to connect the questioning of [Sweezy] with this fundamental interest of the State."⁵¹ Accordingly, the plurality held that the contempt citation violated due process.

⁴⁸ *Id.* at 250.

⁴⁹ *Id.* at 250.

⁵⁰ *Id.* at 251.

⁵¹ *Id.* at 251. The Chief Justice thought it significant in this regard that Sweezy had been "interrogated by a one-man legislative committee, not by the legislature itself," acting under "a sweeping and uncertain mandate." *Id.* at 252, 253.

Justice Frankfurter, joined by Justice John Harlan, filed a concurring opinion agreeing that the contempt citation was unconstitutional. Frankfurter, too, thought that Sweezy's interrogation unjustifiably trenched upon academic freedom and the right of political association. As to the interest in academic freedom, Frankfurter explained that "[f]or society's good," inquiries into its problems, "speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible." Accordingly, government "must abstain from intrusion into this activity of freedom," except for the most exigent and compelling of reasons.⁵² He then quoted from a statement that would decades later be invoked in majority opinions regarding the need to respect the autonomy of the university:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.⁵³

It was not until 1967, in *Keyishian v. Board of Regents*,⁵⁴ that a majority opinion invoked academic freedom as grounds for invalidating a statute on First Amendment grounds. At issue was the validity of the latest version of New York's Feinberg law upheld in *Adler*, enacted to prevent the appointment or retention of "subversive persons" in state employment, including at state universities.⁵⁵ The law imposed a comprehensive, complicated scheme, including imposition of loyalty oaths, termination for "treasonable or seditious" utterances or acts, and disqualification from employment of those who advocated or taught violent overthrow of government.⁵⁶ In identifying the First Amendment interest trenched upon by the application of this law to university faculty, Justice Brennan's majority opinion explained that "[o]ur 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." Brennan then famously

⁵² *Id.* at 262 (Frankfurter, J., concurring).

⁵³ *Id.* at 263 (quoting *The Open Universities in South Africa* 10-12).

⁵⁴ 385 U.S. 589 (1967).

⁵⁵ *Id.* at 592.

⁵⁶ *Id.* at 593, 597.

added: “The classroom is peculiarly the marketplace of ideas.”⁵⁷ Finding that New York’s scheme lacked the “precision of regulation” required of regulations “so closely touching our most precious freedoms,” the Court invalidated “the complicated and intricate scheme” as unconstitutionally vague.⁵⁸

Keyishian was not only the first case in which a majority of the Court invoked academic freedom to invalidate a law on First Amendment grounds, it is also the last one to date to do so. *Keyishian* was also the last Supreme Court decision in which academic freedom is discussed as relating to the constitutional rights of individual faculty members. All subsequent Supreme Court decisions discuss academic freedom as protecting the autonomy of the educational institution. In this regard, there are two significant features to notice about the older, “individual rights” cases just reviewed. First, although there is no shortage of language in the various opinions extoling the importance of not unduly constraining a teacher’s freedom of thought and inquiry, there is also discussion of the institutional autonomy of universities, particularly in Frankfurter’s concurring opinions in *Wieman* and *Sweezy*. Relatedly, and explaining why academic freedom as a constitutional right vested in individual faculty and academic freedom as protecting the institutional autonomy of universities could be discussed in these decisions with no hint of incompatibility, the interests of faculty and the institutions at which they taught were generally aligned in these cases against intrusion by state legislatures.

B. The Institutional Autonomy Cases

Justice Frankfurter’s discussion of academic freedom as protecting the institutional decision making of universities in *Sweezy* lay dormant for more than two decades until invoked by Justice Lewis Powell in his lone but controlling opinion in *Regents of University of California v. Bakke*.⁵⁹ At issue in that case was the constitutionality of a special admissions program established by the medical school at the University of California at Davis setting aside a certain number of spaces for members of minority groups. The Supreme

⁵⁷ *Id.* at 603.

⁵⁸ *Id.* at 603–04.

⁵⁹ 438 U.S. 265 (1978).

Court of California had found the special admissions program unlawful and enjoined the medical school from considering the race of any applicant. Four Justices of the United States Supreme Court, finding that the admission program violated Title VI of the Civil Rights Act of 1964, agreed with the judgment of the lower court prohibiting the use of race as a criterion for admission. Four other justices found the special admissions program lawful under both Title VI and the Equal Protection Clause of the Fourteenth Amendment. Justice Powell's controlling opinion found the special admissions unlawful under both Title VI and the Fourteenth Amendment because it set aside a fixed number of places on the basis of race but held that race could be used as "a factor" in admitting applicants in order to serve the "compelling interest" in a diverse student body.⁶⁰

In explaining why the interest in obtaining a diverse student body was compelling, Powell wrote:

Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. Mr. Justice Frankfurter summarized the "four essential freedoms" that constitute academic freedom: . . . "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."⁶¹

Powell then quoted from Justice Brennan's opinion for the Court in *Keyishian* which declared academic freedom "a transcendent value to all of us and not merely to the teachers concerned" and observed that our "Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues"⁶² The medical school's goal of selecting students who will contribute the most to the "robust exchange of ideas," was in Powell's view "a countervailing constitutional interest" protected by the First Amendment and therefore one of "paramount importance" in the fulfillment of its mission.⁶³

⁶⁰ *Id.* at 314–20 (opinion of Powell, J.).

⁶¹ *Id.* at 312 (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J. concurring)).

⁶² *Id.* at 312 (citing *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)) (internal citations and quotation marks omitted).

⁶³ *Id.* at 313. Justice Harry Blackmun noted his agreement with Justice Powell that "academic freedom is a special concern of the First Amendment." *Id.* at 405 (separate opinion of Blackmun, J.).

In the decades subsequent to *Bakke*, the Court’s equal protection jurisprudence established that all governmental racial classifications, even those used to help racial minorities, are subject to “strict scrutiny,” requiring the government to show that the use of race was the least restrictive means of accomplishing a “compelling state interest.”⁶⁴ The Court also established that diversity in the workplace was not a compelling interest.⁶⁵ So when twenty-five years after its highly fractured *Bakke* decision the Supreme Court in 2003 finally returned to the question of the constitutionality of race-based preference for minorities in university admission, it was an open question whether Justice Powell’s view—that diversity in this context was a compelling interest—would also prevail. In *Grutter v. Bollinger*,⁶⁶ a majority of the Court adopted Powell’s view in *Bakke* that student body diversity was a compelling interest and in doing so relied on his discussion about academic freedom.

Grutter was an equal protection challenge to the University of Michigan Law School’s use of race in its admission process. Unlike the admission program at issue in *Bakke*, however, the law school did not set aside a specific number of places but rather used the race of a minority applicant as a positive factor for admission. Writing for a five person majority of the Court, Justice Sandra Day O’Connor observed that the Court has “long recognized that given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”⁶⁷ She then noted that in determining in *Bakke* that student body diversity was a compelling state interest, Justice Powell “invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy,” including “the freedom of a university to make its own judgments about the selection of its student body.”⁶⁸ Because “attaining a diverse student

⁶⁴ See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995).

⁶⁵ *Id.* at 257-58.

⁶⁶ 539 U.S. 306 (2003).

⁶⁷ *Id.* at 329, citing, among other cases, Frankfurter’s concurrence in *Wieman* as well as *Sweezy* and *Keyishian*.

⁶⁸ *Id.* (quoting *Bakke*, 438 U.S. at 312 (opinion of Powell, J.)).

body is at the heart of the Law School's proper institutional mission,"⁶⁹ she concluded that universities have a compelling interest in a diverse student body. She also held that that "good faith" on the part of a university in making such decisions is "presumed," absent "a showing to the contrary."⁷⁰

In an earlier case, *University of Michigan v. Ewing*,⁷¹ the Court similarly invoked academic freedom to reject a constitutional claim against a university, in this case a substantive due process claim brought by a student who claimed his dismissal from a medical program for academic deficiency was arbitrary. Justice John Paul Steven, in an opinion joined by seven other justices, relied primarily on the lack of constitutional text or history supporting substantive due process for declining to expand this jurisprudence to encompass the student's claim.⁷² The Court added that another reason for rejecting the claim was "a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, 'a special concern of the First Amendment.'"⁷³ In the Court's view, the judiciary should override an academic decision

⁶⁹ *Id.* at 329.

⁷⁰ *Id.* (quoting *Bakke*, 438 U.S. 318-319 (opinion of Powell, J.)).

⁷¹ 474 U.S. 214 (1985).

⁷² Justice Powell filed a concurring opinion disagreeing with the Court assumption for the sake of argument that the student had a constitutionally protectable property right in continued enrollment in the program and explained why, in his view, no such substantive due process right existed. *Id.* at 228-30 (Powell, J., concurring). He agreed though with the Court that the student's claim implicated the university's academic freedom, an interest Powell described as "long . . . viewed as a special concern of the First Amendment," *id.* at 230, n. * (quoting *Bakke*, 438 U.S. at 312 (opinion of POWELL, J.)) (citing *Keyishian*, 385 U.S. at 603).

⁷³ *Ewing*, 474 U.S. at 226 (citing *Keyishian*, 385 U.S. at 603). The Court reasoned that if "the federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies, far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions – decisions that require 'an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking. . . .'" *id.* at 226 (quoting *Bd. of Curators v. Horowitz*, 435 U.S. 78, 89-90 (1978)). On the one hand, this statement suggests that as compared to the decisions of other public institutions, decisions of academic institutions are a "special concern" of the First Amendment. On the other hand, and perhaps more significantly, it reveals that the reason for the deference federal courts pay to academic decisions is at least in part not based on any First Amendment value but rather on the limited competence of the federal judiciary to review such decisions. *Horowitz*, *supra*, rejected a claim by a former student at the University of Missouri-Kansas City Medical that her dismissal for academic deficiency violated her Fourteenth Amendment right to procedural due process. The Court concluded that due process did not require that a student dismissed for academic deficiency as opposed to for a disciplinary reason be afforded a formal hearing prior to dismissal. As it had in *Ewing*, the Court in *Horowitz* cautioned that "[c]ourts are particularly ill-equipped to evaluate academic performance" (435 U.S. at 92), and consequentially, as in *Ewing* took a very deferential stance towards the university's decision to dismiss the student. *See, e.g.*, *id.* at 90 ("Under such

on substantive due process grounds only if the decision is “such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.”⁷⁴ Interestingly, the Court observed in a footnote that “[a]cademic 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.”⁷⁵ This is the first time the Court recognized the tension between these two aspects of academic freedom.

Despite the talk in *Ewing* about its “responsibility to safeguard” the academic freedom of universities and about this interest being “a special concern of the First Amendment,” the Court in *EEOC v. University of Pennsylvania*⁷⁶ significantly confined the operation of academic freedom as a constitutional norm. At issue in that case was a subpoena issued by the Equal Employment Opportunity Commission (“EEOC”) to the University of Pennsylvania in connection with an investigation of a complaint by an associate professor at the Wharton School of Business who alleged that she was denied tenure due to her race, sex and national origin. The subpoena sought confidential peer review information, including confidential letters written by outside evaluators and the tenure files of other members of the Wharton faculty. The university responded by requesting that the EEOC “adopt a balancing approach reflecting the constitutional and societal interest inherent in the peer review process” and to resort to “all feasible methods to minimize the intrusive

circumstances, we decline to ignore the historic judgment of educators and thereby formalize the academic dismissal process by requiring a hearing.”). Unlike *Ewing*, however, the Court did not ground this deference in a First Amendment right of academic freedom protecting the institutional autonomy of universities. Indeed, the Court’s opinion in *Horowitz* does not mention the term “academic freedom” or even, except arguably by its insistence on judicial deference to academic judgments, allude to the concept.

⁷⁴ *Ewing*, 474 U.S. at 225.

⁷⁵ *Id.* at 226 n. 12. For the aspect of academic freedom protecting the exchange of ideas among teachers and students, the Court cited *Keyishian*, 385 U.S. at 603 and *Sweezy*, 354 U.S. at 250 (opinion of Warren, C. J.). For the aspect protecting institutional autonomy, the Court cited *Bakke*, 438 U.S. at 312 (opinion of Powell, J.) and *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring). The Court added that “[d]iscretion to determine, on academic grounds, who may be admitted to study, has been described as one of ‘the four essential freedoms’ of a university,” *id.* (quoting *Bakke*, 438 U.S. at 312 (opinion of Powell, J.) (quoting *Sweezy* at 263 (Frankfurter, J., concurring))).

⁷⁶ 493 U.S. 182 (1990).

effects of its investigations.”⁷⁷ The EEOC refused to adopt such an approach and sought enforcement of the subpoena as originally issued.

The United States Supreme Court upheld the enforcement of the subpoena, rejecting the university’s argument that compelling wholesale production of the confidential documents unmodified the proposed “balancing approach” violated the university’s academic freedom. Writing for a unanimous Court, Justice Blackmun explained that a university’s academic freedom is implicated only when government attempts “to control or direct the content of the speech engaged in by the university or those affiliated with it.”⁷⁸ The Court noted that such content control was at issue, for instance, in *Sweezy* where a lecturer was jailed for not revealing the content of the lecture he gave at a university and in *Keyishian*, where faculty had to certify that they were not members of the Communist party. In contrast, the Court pointed out, the university in this case does not allege that “the Commission’s subpoenas are intended to or will in fact direct the content of university discourse toward or away from particular subjects or points of view.”⁷⁹

In addition, the Court distinguished its prior upholding of academic freedom as involving “*direct* infringements” on academic institutions’ right to determine who has a right to teach, such as was involved in *Keyishian*, where government tried to “substitute its teaching employment criteria for those already in place at the academic institutions.”⁸⁰ In contrast, the Court emphasized, the Commission in issuing the subpoena in this case was not directly mandating criteria for the selection of teachers. Finding the academic freedom that its previous opinions had held protected by the First Amendment was not even implicated by the subpoena, the Court held that the EEOC need not show any “special justification”⁸¹ in order to enforce a subpoena demanding confidential peer review materials.⁸²

⁷⁷ *Id.* at 186.

⁷⁸ *Id.* at 197.

⁷⁹ *Id.* at 198.

⁸⁰ *Id.*

⁸¹ *Id.* at 202.

⁸² For a more detailed discussion of the cases establishing academic freedom as a legal norm, see O’NEIL, *supra* note 25 at 43-79.

III. SUPREME COURT ACADEMIC FREEDOM CASES: AN ANALYSIS

A. In Search of Academic Freedom Doctrine

In an influential study of the Supreme Court's academic freedom decisions, Peter Byrne aptly observes:

The cases shorn of panegyrics, are inconclusive There has been no adequate analysis of what academic freedom the Constitution protects or of why it protects it. Lacking definition or guiding principle, the doctrine floats in the law, picking up decisions as a hull does barnacles.⁸³

George Wright echoes this concern. "Beyond the strands of supportive rhetoric," Wright notes, "lies much current controversy and uncertainty." The constitutionally protected realm of academic freedom in Wright's assessment "is largely unanalyzed, undefined, and unguided by principled application, leading to its inconsistent and skeptical or questioned invocation" by lower courts.⁸⁴ Or as Robert Post succinctly summarizes the situation in a recent book: "At present . . . the doctrine of academic freedom stands in a state of shocking disarray and incoherence."⁸⁵

On the surface, the problem lies with the Supreme Court's having made little effort to mold the cases described in Section II, above, into anything resembling academic freedom doctrine. *Keyishian*, the only case in which a majority of the Court has invoked academic freedom to invalidate a law on First Amendment grounds, announced no substantive First Amendment rule or standard regarding protection of academic freedom, but rather invalidated the regulatory scheme at issue on vagueness grounds. True, the vagueness that the Court found fatal to the law is properly part of First Amendment doctrine in that this jurisprudence requires laws regulating protected speech to be drawn with greater pre-

⁸³ J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 252–53 (1989).

⁸⁴ R. George Wright, *The Emergence of First Amendment Academic Freedom*, 85 NEB. L. REV. 793, 794 (2007). See *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000) (en banc) ("courts are remarkably consistent in their unwillingness to give analytical shape to the rhetoric of academic freedom") (citation omitted).

⁸⁵ ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM* 62 (2012).

cision than laws regulating other activities.⁸⁶ Nonetheless, like prior restraint and overbreadth, vagueness is a procedural aspect of First Amendment jurisprudence often invoked by the Court to avoid demarcating the boundaries of the protected expression and sometimes even to evade deciding if the regulated speech is protected. Thus *Keyishian* left open the possibility that at least some of the “subversive” speech that the state wanted to root out could have been suppressed by more precise legislation.

Relatedly, the discussion of academic freedom in *Keyishian* may well be surplusage, since it is not at all clear why general free speech principles applicable to all public employees would not have been a sufficient basis for decision.⁸⁷ As Alan Chen aptly observes, “[i]f there is a constitutional academic freedom doctrine, it must provide different (greater, less, or otherwise qualitatively distinctive) protection for academic speech than that available to non-academics”⁸⁸ Accordingly, the Court’s claim in *Keyishian* that academic freedom is “a special concern of the First Amendment” seems both unnecessary and unwarranted. Similarly, it is not at all certain that the invocation of academic freedom in either *Grutter* or *Ewing* was necessary to the result in that case. Indeed, in *Ewing* it is fairly certain that the reason that the Court first gives—reluctance to extend its substantive due process jurisprudence—was sufficient grounds for the decision.

The only time the Court has discussed the contours of the academic freedom protected by the First Amendment and thus has made any attempt to construct an academic freedom doctrine was in *EEOC v. University of Pennsylvania*, where it *rejected* the academic freedom claim. Here, as noted, the Court distinguished the cases in which it had invoked academic freedom as a basis for invalidating a law as involving content-based restrictions on speech. The subpoenas at issue in the *University of Pennsylvania* case were, in contrast, the Court explained, not intended to “direct the content of university discourse toward or away from particular subjects or points of view.”⁸⁹ Ironically, however, in draw-

⁸⁶ See, e.g., *Smith v. Goguen*, 415 U.S. 566 (1974).

⁸⁷ See *Wright*, *supra* note 84 at 794.

⁸⁸ Alan K. Chen, *Bureaucracy and Distrust: Germaneness and the Paradoxes of the Academic Freedom Doctrine*, 77 U. COLO. L. REV. 955, 983 n.97 (2006).

⁸⁹ 493 U.S. at 198.

ing this distinction, the Court may have demonstrated that academic freedom indeed has no independent significance distinct from generally applicable free speech principles.

The Court correctly notes that “[o]bvious First Amendment problems would arise where government attempts to direct the content of speech at private universities,” such as the University of Pennsylvania, because “content-based regulation of private speech traditionally has carried with it a heavy burden of justification.”⁹⁰ In support of this proposition the Court cites *Police Department of Chicago v. Mosley*,⁹¹ the foundational case for the general rule against content discrimination. But this key feature of American free speech doctrine would not only protect universities from governmental attempts to direct “discourse toward or away from particular subjects or points of view,” it would also protect many other private institutions, for instance, social clubs, from such content-discriminatory laws. Perhaps private universities do and should have certain First Amendment immunities from content regulation the Elks Club or the Loyal Order of Moose do not share. Still, the Court’s reducing the entire line of academic freedom cases to “reaction to content-based regulation”⁹² and its invocation of *Mosley* suggests that this they may not be the case.

As to state imposed content restrictions on public universities, the Court observed that “complicated First Amendment issues are presented because government is simultaneously both speaker and regulator.”⁹³ Relatedly, as the Court would subsequently note, the entire notion of public entities having First Amendment rights is problematic.⁹⁴ So the upshot of the Court’s only effort to date to rationalize and explain its academic freedom cases, minimal though it was, is the implication that private universities have no greater protection against content discriminatory laws than do other private institutions, and that state universities may have no First Amendment rights at all, grounded in academic free-

⁹⁰ *Id.* at 198 n. 6.

⁹¹ *Id.* (citing *Mosley*, 408 U.S. 92, 95, 98–99 (1972)).

⁹² *Id.* at 197.

⁹³ *Id.* at 198 n.6.

⁹⁴ *United States v. Am. Library Ass'n*, 539 U.S. 194, 210–11 (2003).

dom or otherwise. This suggests that despite the Court’s enthusiastic rhetoric, academic freedom is far from a “special concern” of the First Amendment principles.

While the lack of any “special” First Amendment protection for universities is inferentially suggested by the *University of Pennsylvania* case, the Court in *Garcetti v. Ceballos*⁹⁵ unmistakably raises the possibility that no such distinctive protection exists for speech of individual professors. In that case, an assistant deputy district attorney for the County of Los Angeles claimed that he had been retaliated against for writing a memorandum to his supervisor expressing his belief that an affidavit used to obtain a search warrant contained serious misrepresentations. In rejecting the claim that the alleged retaliation violated the First Amendment the Court, in a 5-4 decision, held in an opinion by Justice Anthony Kennedy that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”⁹⁶ In dissent, Justice David Souter noted that the domain of expression the majority held unprotected by the First Amendment would seem to include the speech of public university professors who “necessarily speak and write ‘pursuant to [their] official duties.’”⁹⁷ Souter accordingly feared that the Court’s holding might “imperil First Amendment protection of academic freedom in public colleges and universities.”⁹⁸

In response to Souter’s concern, the Court noted that there is “some argument” that “expression related to academic scholarship or classroom instruction” may implicate “additional constitutional interests” that are not fully accounted for by the Court’s “customary employee-speech jurisprudence.”⁹⁹ The Court therefore expressly reserved the question whether the rule it announced was applicable to scholarship or teaching. It seems though that the Court will have a difficult time distinguishing academic speech from the speech it held unprotected in *Garcetti*, for the speech at issue in that case was itself not

⁹⁵ 547 U.S. 410 (2006).

⁹⁶ *Id.* at 421.

⁹⁷ *Id.* at 438 (Souter, J. dissenting).

⁹⁸ *Id.*

⁹⁹ 547 U.S. at 425.

“customary employee-speech” but rather expression brimming with constitutional value. As Justice Stephen Breyer pointed out in his dissent, because a prosecutor has a constitutional obligation to communicate with the defense regarding exculpatory evidence, “the Constitution itself here imposes speech obligations upon the government’s professional employee.”¹⁰⁰

B. In Search of a Connection between Academic Freedom and First Amendment Values

The unsatisfactory state of academic freedom doctrine may stem from something much more profound than the Court’s failure to extract rules and standards from its academic freedom decisions. Rather, I suggest that the reason that the Court has not been able to construct coherent doctrine endowing academic freedom with “special” First Amendment protection is that there is no evidently robust connection between academic freedom and the values that inform and animate the First Amendment. To explore this idea, I will first briefly set forth the various values thought to underlie the First Amendment and then compare the interests promoted by academic freedom to these values.

1. *First Amendment Values*

Courts and commentators generally agree that the constitutional protection of free speech serves one or more of the following values: “advancing knowledge and ‘truth’ in the ‘marketplace of ideas,’ facilitating representative democracy and self-government, and promoting individual autonomy, self-expression and self-fulfillment.”¹⁰¹ With respect to the democracy rationale, it is crucial to distinguish between two types of interests. The first is the interest of the electorate in receiving information necessary to perform their

¹⁰⁰ *Id.* at 447 (Breyer, J., dissenting). There is a split among the Circuit courts regarding *Garcetti*’s application to academia: *Compare* *Savage v. Gee*, 665 F.3d 732 (6th Cir. 2012) (applying *Garcetti* to academic speech); *Renken v. Gregory*, 541 F.3d 769, 775 (7th Cir. 2008) (same); *with* *Demers v. Austin*, 2013 U.S. App. LEXIS 18355 (9th Cir. 2013) (holding that *Garcetti* is not applicable to academic speech); *Adams v. Trustees of UNC Wilmington*, 640 F.3d 550, 562 (4th Cir. 2011) (same). If *Garcetti* is applicable to academics in public institutions, this will harmonize their position with academics at private universities where, because of the state action doctrine, employees have no First Amendment rights against their supervisors or institutions.

¹⁰¹ KATHLEEN M. SULLIVAN & NOAH FELDMAN, *CONSTITUTIONAL LAW* 888–89 (18th ed. 2013).

function as the ultimate sovereigns in a democratic society. This instrumental, audience-centered interest was championed in the influential work of philosopher Alexander Meiklejohn¹⁰² and as we shall see, will play an important role in our search for a connection between academic freedom and free speech values. The second democratic interest underlying the First Amendment protection of free speech is the right of each individual to participate freely and equally in the speech by which we govern ourselves, expression that the Court and commentators have referred to as “public discourse.”¹⁰³ This speaker-based interest is, to use Ronald Dworkin’s terminology,¹⁰⁴ constitutive of rather than instrumental to democracy, and as such is essential to the legitimacy of the legal system.¹⁰⁵

To summarize, the following are the First Amendment values that might be promoted by the protection of academic freedom:

1. discovery of knowledge and truth in the “marketplace of ideas”;
2. respect for individual autonomy (which, as I shall use the term, encompasses self-expression and self-fulfillment);
3. assuring information necessary for democratic self-governance;
4. securing the opportunity for individual participation in democratic self-governance.

As we shall now discover, the Court’s claim that academic freedom is “a special concern of the First Amendment” is difficult to justify in terms of any of these values.

¹⁰² See, e.g., ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

¹⁰³ See, e.g., *Cohen v. California*, 403 U.S. 15, 22 (1971); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601 (1990).

¹⁰⁴ See RONALD DWORIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 200–01 (1996).

¹⁰⁵ See James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 498 (2011).

2. *The Connection between Academic Freedom and First Amendment Values*

a. *Individual autonomy and participation in democratic self-governance*

We can summarily dismiss the second and fourth values listed above—respect for individual autonomy and securing the right of each individual to participate in democratic self-governance—as values that would justify “special” First Amendment protection for academic freedom. The extent to which the government may infringe the constitutionally protected autonomy interests of its employees, including autonomy-based free speech interests, in order to promote a safe, efficient and fair workplace is a difficult question. But I can perceive no reason why a public employee who happens to be an academic has any greater constitutionally-protected autonomy interests, be it in the realm of reproductive choice, sexual intimacy, free speech or regarding any other matter relating to a “person’s authority (or right) to make decisions about herself,”¹⁰⁶ than does an employee at the Department of Motor Vehicles or at any other government agency.¹⁰⁷ Similarly, there is no justification for endowing university professors with special privileges to engage in democratic self-governance in the workplace or anywhere else for that matter. Indeed, doing so would violate the basic precept of formal equality underlying the individual right to democratic participation.¹⁰⁸ In addition, the workplace, public or private, is not a setting established primarily for public discourse or other forms of democratic self-governance.

In accordance with this view, academic freedom as a professional norm has never been justified as promoting individual autonomy or the individual right of democratic participation. To the contrary, as the AAUP’s 1940 *Statement* explains, institutions of higher education are conducted “not to further the interest of . . . the individual teacher” but for “the common good,” which “depends upon the free search for truth and its free exposition.” Academic freedom, the *Statement* continues, is “essential to these purposes,” stress-

¹⁰⁶ C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 254 (2009).

¹⁰⁷ Conversely, there are situations in which the “special need” of a government employer justifies infringement of employees’ autonomy interests. See, e.g., *Skinner v. Railway Labor Executives’ Assn.*, 489 U.S. 602 (1989) (in upholding constitutionality of drug testing of certain railroad employees without individualized suspicion, the Court finds public safety to be a “special need” that outweighs employees’ privacy interest).

¹⁰⁸ See James Weinstein, *Free Speech and Political Legitimacy*, 27 CONST. COMMENT. 361, 369–70 (2009).

ing that “[f]reedom in research is fundamental to the advancement of truth.”¹⁰⁹ The 1940 *Statement’s* explanation that the purpose of the university is not to further the interest of the individual teacher and its emphasis on the connection between academic freedom and the “advancement of truth” thus confirms that the First Amendment value that would justify any “special” constitutional protection for academic freedom is neither the individual interests in autonomy nor in democratic self-governance. Rather, if the values underlying the professional and constitutional norms are to be consonant, the 1940 *Statement’s* emphasis on “advancement of truth” suggests that it would be useful to closely examine the first item on the list—discovery of knowledge and truth in the “marketplace of ideas”—as a candidate for the primary value underlying constitutional protection of academic freedom.

b. Discovery of knowledge and truth in the “marketplace of ideas”

First invoked by John Milton in the seventeenth century,¹¹⁰ the truth-discovery rationale for free speech was more fully developed two centuries later by John Stuart Mill.¹¹¹ It was incorporated into American free speech doctrine in the early twentieth century by Justice Oliver Wendell Holmes, who famously wrote that “the ultimate good desired is better reached by free trade in ideas” rather than by persecution of seemingly false ideas, and that “the best test of truth is the power of the thought to get itself in the competition of the market.”¹¹² This rationale has frequently been invoked by the modern Court as justification for its rule against content discrimination,¹¹³ the cornerstone of contemporary free speech doctrine noted above.¹¹⁴ And in *Keyishian v. Board of Regents*, which declared academic freedom to be of “special concern” of the First Amendment, the Court justified this

¹⁰⁹ 1940 *Statement of Principles on Academic Freedom and Tenure*, discussed above at text accompanying notes 5 to 6.

¹¹⁰ John Milton, *Aereopagica—A Speech for the Liberty of Unlicensed Printing* (1644) (“Let [Truth] and Falsehood grapple; who ever knew Truth put to the worst, in a free and open encounter?”).

¹¹¹ John Stuart Mill, *ON LIBERTY* (1859).

¹¹² *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

¹¹³ See, e.g., *Simon & Schuster, Inc. v. Members of N.Y. St. Crime Board*, 502 U.S. 105 (1991) (“the Government’s ability to impose content-based burdens on speech raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace”).

¹¹⁴ See *supra* note 91 and accompanying text.

extraordinary solicitude on the grounds that the classroom “is peculiarly the marketplace of ideas.”¹¹⁵

Robert Post assails the commonly-held view that First Amendment protection for academic freedom can be justified under a marketplace of ideas rationale. He notes that although the AAUP’s foundational 1915 *Declaration* defends “the university teacher’s independence of thought and utterance,” the *Declaration* “also takes pains to distinguish this independence of thought from a marketplace of ideas in which all ideas must be tolerated.”¹¹⁶ As Post cogently explains:

The *Declaration* explicitly repudiates the position that academic freedom implies that individual teachers should be exempt from all restraints as to the matter or manner of their utterances either within or without the university. [According to the *Declaration*] “the liberty of the scholar within the university to set forth his conclusions, be they what they may is conditioned by their being conclusions gained by a scholar’s method and held in a scholar’s spirit; that is to say, they must be the fruits of competent and patient and sincere inquiry.” The *Declaration* [thus] conceives academic freedom as the freedom to pursue the “scholar’s profession” according to the standards of that profession. It is only in this way that scholars can fulfill the university’s mission of creating new knowledge.¹¹⁷

Post’s point is well taken. Unlike in the “marketplace of ideas,” where content regulation is forbidden and where government must “remain neutral” about the various ideas on offer,¹¹⁸ academic life routinely requires judgments regarding the content of expression, often even about the validity of ideas, in such matters as hiring, promotion and tenure. And such content-based judgments are not only commonplace, they are essential to the mission of the university. So Post is correct that the “marketplace of ideas” rationale cannot justify First Amendment protection of academic freedom. Still, he may be a bit too hasty in dispensing with that rationale in its entirety. For while the “marketplace of ideas” rationale and the disciplined process of research and inquiry at the university may utilize very different means, their end is the same: discovery of knowledge and truth. But if it is

¹¹⁵ 385 U.S. 589, 603 (1967).

¹¹⁶ POST, *supra* note 85 at 66.

¹¹⁷ *Id.* (quoting the AAUP’s 1915 *Declaration of Principles on Academic Freedom and Academic Tenure*, discussed Part I C, above).

¹¹⁸ *FCC v. Pacifica Foundation*, 438 U.S. 726, 745–46 (1978) (“government must remain neutral in the marketplace of ideas”).

this goal, rather than any particular means of accomplishing it, that is crucial, then discovery of knowledge and truth would seem to provide an excellent justification for special protection of academic freedom, particularly since this goal is particularly likely to be promoted through disciplined research and exposition of ideas.

In my view, however, the interest in discovery of knowledge and truth, whether produced by “the scholar’s method” or thorough unconstrained “free trade in ideas,” or even by the combination of these two approaches,¹¹⁹ cannot justify First Amendment protection of free speech generally or academic freedom in particular. This is because the collective interest in discovery of knowledge and truth is not an individual right, nor even an interest instrumental to an individual right, but rather a classic general welfare concern, albeit one of vital importance. Significantly, when government seeks to limit speech, it usually asserts some general welfare concern, sometimes of crucial importance. But when various general social welfare interests clash in this way, it is highly inappropriate for the judiciary to decide under the guise of some supposed federal constitutional compulsion which of these interests shall prevail. Rather, except where the text or structure of the Constitution unmistakably commands otherwise,¹²⁰ balancing society welfare concerns—otherwise known as a public policy decisions—are in a democratic society appropriately left to legislative and administrative processes.¹²¹ This is true even if welfare concerns are crucial to the advancement of society such as the discovery of knowledge and truth “for the common good.” Nothing in the text of the First Amendment declares discovery of knowledge and truth to be a goal of free speech, nor is such a purpose inferable from the legislative history of that provision. As I discussed elsewhere regarding the marketplace of ideas rationale for free speech generally, under the best understanding of the First Amendment, the societal interest in discovery of truth and knowledge, is, at most, a pe-

¹¹⁹ Precisely because knowledge production and its exposition in the academy is constrained by disciplinary paradigms, the unconstrained clash of ideas in public discourse outside of the academy might provide a useful supplement to expert knowledge produced in and disseminated from the university.

¹²⁰ *E.g.*, by specific provisions such that the President by at least 35 years of age or structural commands relating to such matters as separation of powers or federalism.

¹²¹ In contrast, the judiciary in our system has a duty to safeguard fundamental individual rights against infringement justified by general welfare concerns, particularly when the right is enumerated in the Constitution, and more controversially, and, more controversially, when a fundamental right is not enumerated, pursuant to the Court’s substantive due process jurisprudence. *See supra* text accompanying note 72.

ripheral free speech value.¹²² Consistent with this view, every case I am aware of in which the Court has invoked the marketplace of ideas rationale can be explained as vindicating a First Amendment value either constitutive of or at least instrumental to an individual right, most often the right of political participation.¹²³ Also belying the marketplace of ideas rationale as a significant free speech value, there are number of cases in which the Court has upheld laws that impair the marketplace of ideas.¹²⁴ Accordingly, the collective¹²⁵ interest in creation of knowledge and discovery of truth is not in my view an appropriate justification for First Amendment protection of academic freedom.¹²⁶

c. Information needed for democratic self-governance

We come then to the last First Amendment value left standing as a possible justification for the special constitutional protection of academic freedom—assurance of information necessary for democratic self-governance. In an illuminating recent book, *DEMOCRACY, EXPERTISE AND ACADEMIC FREEDOM*,¹²⁷ Robert Post locates the constitutional value of academic freedom in this value, a norm he dubs “democratic competence.” By “demo-

¹²² See James Weinstein, *Institutional Review Boards and the Constitution*, 101 NW. U. L. REV. 493, 517–18 (2007).

¹²³ See e.g., *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 340 (1995) (invoking the marketplace of ideas rationale in invalidating a ban on anonymous campaign literature). And of course, the *Abrams* case itself involved core political speech—protest against American involvement in World War I. Indeed, it has been argued that Holmes’s marketplace of ideas rationale is essentially a *democratic* theory. See Vincent Blasi, *Propter Honoris Respectum: Reading Holmes Through the Lens of Schauer: The Abrams Dissent*, 72 NOTRE DAME L. REV. 1343, 1349, 1351 (1997) (claiming that Holmes’s *Abrams* dissent “rests on a vision of the political function of free speech” and “builds on a sophisticated conception of the role of ‘the people’ in the system of government enacted by the Constitution”).

¹²⁴ See, e.g., *Columbia Broad. Sys. Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94 (1973) (Court rejects First Amendment challenge to FCC ruling upholding a policy under which broadcasters refused to sell time to those who wanted to present their views on controversial issues); *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998) (upholding against First Amendment challenge to public television station’s decision to exclude third party candidate from televised debate between Democrat and Republican candidates for Congressional seat); *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (despite strong arguments that extension of the copyright term to already existing work would impede cultural development without out any significant offsetting benefit to society, the Court refuses to subject the extension to any meaningful First Amendment scrutiny).

¹²⁵ In contrast to the *societal* interest in the discovery of knowledge and truth, the *individual* interest in pursuing this information is a constitutional value, though in my view one only of moderate weight. See James Weinstein, *Democracy, Individual Rights and the Regulation of Science*, 15 SCIENCE AND ENGINEERING ETHICS 407 (2009).

¹²⁶ Of course, if contrary to my conclusion, knowledge and truth discovery is a core First Amendment value, then it provides an excellent justification for constitutional protection of academic freedom.

¹²⁷ POST, *supra* note 85.

cratic competence” Post means “the cognitive empowerment of persons within public discourse, which in part depends upon their access to disciplinary knowledge [of the type produced by universities]. Cognitive empowerment is necessary both for intelligent self-governance and for the value of democratic legitimation.”¹²⁸ For Post, as for me, the central free speech value is assuring every individual the opportunity to participate in public discourse, the speech by which citizens in democracy govern themselves. Accordingly, it is crucial both that those wishing to participate in public discourse have access to expert knowledge and that the public be informed by this knowledge.

Within public discourse, Post explains, the “fundamental First Amendment of content neutrality” prevents government from denying people “access to processes of public opinion formation” on the basis of what they want to say. This doctrine promotes democratic legitimation by keeping the formation of public opinion open to “the subjective engagement of all, even of the idiosyncratic and eccentric.”¹²⁹ Expert knowledge, in contrast, “is not to be determined by the indiscriminate engagement of all” but rather by “disciplinary standards” such as verifiability, reproducibility, and falsifiability. Crucially, however, because of the overriding concern with “egalitarian principles of democratic legitimation,” the state cannot constitutionally impose these disciplinary standards upon public discourse.¹³⁰ Still, despite this radically equalitarian conception of public discourse envisioned by contemporary First Amendment doctrine, Post explains that it is also essential that public opinion be “educated and informed” if public opinion is to serve its democratic purpose of “intelligently and effectively supervis[ing] the government.”¹³¹

Because universities are unique in their “disinterested pursuit of disciplinary knowledge”¹³² and are the only places where disciplines are “articulated, replenished, and

¹²⁸ *Id.* at 33–34.

¹²⁹ *Id.* at 28.

¹³⁰ *Id.* at 29.

¹³¹ *Id.* at 35.

¹³² *Id.* at 75–76.

sustained,” these institutions are in Post’s view essential to democratic competence.¹³³ It therefore follows, Post insists, that constitutional protection of academic freedom is necessary to insure democratic competence. A state that manipulates “the production of disciplinary knowledge” can, he warns, “set the terms of its own legitimacy” by undermining “the capacity of its citizens to form autonomous and critical opinions.”¹³⁴ First Amendment protection of academic freedom therefore is essential to democratic competence in that it prevents the state “from obliterating independent sources of expert knowledge.”¹³⁵ Post acknowledges, however, that it is one thing to “identify a social need” but quite another “to identify constitutional principles” that address that need. He then attempts to “discern distinct First Amendment doctrines”¹³⁶ designed to protect the disciplinary knowledge.

Unlike the marketplace of ideas rationale, which, as I have explained, is a general welfare concern, the societal interest in an informed public opinion is, as Post so eloquently elucidates, essential to the success of democratic self-governance and thus is a collective welfare concern with constitutional salience. In addition, to the extent that this information provides individuals not just with the benefit of informed discussion on public issues but also allows them to more effectively participate in public discourse, this interest is instrumental to the exercise of a core First Amendment right. It is not surprising, therefore, that in contrast to the absence of any decisions actually grounded in the search for knowledge and truth in the marketplace of ideas, some Supreme Court decisions are explainable only in terms of promoting the interest in democratic competence. Post notes, for instance, a case striking down on First Amendment grounds a federal law requiring the post office to detain foreign mailings of “communist political propaganda” and deliver it only upon the affirmative request of the addressee.¹³⁷ And he places special emphasis on a few cases invoking the First Amendment as grounds for requiring that criminal trials be

¹³³ In a perceptive review essay of Post’s book, Joseph Blocher objects that there is a lacuna in this argument in that Post does not adequately explain how expert knowledge is disseminated into public discourse. See Joseph Blocher, *Public Discourse, Expert Knowledge and the Press*, 87 WASH. L. REV. 409 (2012).

¹³⁴ POST, *supra* note 85 at 39.

¹³⁵ *Id.* at 59.

¹³⁶ *Id.* at 33

¹³⁷ *Id.* at 37 n. 37 (citing *Lamont v. Postmaster General of the U.S.*, 381 U.S. 301 (1965)).

open to the public.¹³⁸ Post concedes, however, that besides these few cases “the Court has been exceedingly reluctant to interpret the First Amendment to require government disclosure of information to enhance democratic competence,” and therefore Post acknowledges that it is necessary to look elsewhere “to find robust evidence of judicial enforcement of the value of democratic competence”¹³⁹

In search of such evidence, Post first looks, dubiously in my view, to the Court’s commercial speech doctrine. He argues that the Court extended protection to commercial advertising primarily “because it conveys factual knowledge that cognitively empowers public opinion” and thus its protections “serves the value of democratic competence.”¹⁴⁰ With all due respect to my friend Robert Post, it requires a rather large stretch of the imagination, it seems to me, to perceive ordinary commercial advertising as significantly contributing to the information needed for democratic self-governance.¹⁴¹ Post next invokes a recent Supreme Court decision which narrowly construes a federal law, which seemed to prohibit lawyers from advising clients about debts they could legally incur in contemplation of bankruptcy, to apply only to advice counseling otherwise illegal activity.¹⁴² Post is surely correct that some underlying constitutional concern raised by this legislative attempt to “disrupt the communication of accurate expert knowledge” led the Court to narrowly construe this law.¹⁴³ But it is by no means certain that this concern was a fear that the law would make public opinion less informed. In any event, neither this case nor commercial speech doctrine provides “robust evidence of judicial enforcement of the value of demo-

¹³⁸ *Id.* n.38 (citing, *inter alia*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576–77 (1984)).

¹³⁹ *Id.* at 37–38.

¹⁴⁰ *Id.* at 40–41.

¹⁴¹ Rather, a much more forthright explanation of the constitutional protection provided commercial speech is that it promotes the individual autonomy interests of the audience. See James Weinstein, *Fools, Knaves, and the Protection of Commercial Speech: A Response to Professor Redish*, 41 LOY. L.A. L. REV. 133, 150 n.71 (2007).

¹⁴² POST, *supra*, note 85, at 48–53 (discussing *Milavetz, Gallop & Milavetz v. United States*, 559 U.S. 229 (2010)).

¹⁴³ *Id.* at 48. A more obvious interest implicated by this law than democratic competence is that it unduly burdens some constitutionally protected aspect of the attorney-client relationship. Similarly, it is not at all certain, as Post suggests, that democratic competence is the constitutional interest impaired by laws requiring physicians to give women seeking abortions untruthful and misleading information about that procedure. *Id.* (citing *Planned Parenthood v. Heineman*, 724 F. Supp. 2d 1025 (D. Neb. 2000)). Much more obviously, the law places an undue burden on the constitutionally-protected rights of women to terminate pregnancy prior to the viability of the fetus. See *id.* at 1042–46.

cratic competence.” Rather, the panoply of Supreme Court cases dealing with democratic competence reveal that judicial enforcement of this interest is quite sporadic and when recognized is, as appropriate to an interest instrumental to but not constitutive of a right,¹⁴⁴ given only modest weight.¹⁴⁵

Aside from little “robust evidence of judicial enforcement of the value of democratic competence,”¹⁴⁶ another difficulty with grounding academic freedom in this value is that it does not fully capture the purpose of academic freedom. Academic freedom promotes the creation of knowledge and discovery of truth about a myriad of matters, many of which, such as cosmology and pure mathematics, have little to do with the formation of a public opinion that can “intelligently and effectively supervise the government.”¹⁴⁷ This is not to disparage the importance of the disinterested production of expert knowledge over a vast range of subjects that *are* essential to an informed public opinion and *do* influence collective decision making in our democracy. Nor can it be denied that it is not possible to accurately predict the types of knowledge that will become relevant to such decision making. Still, while an important consequence of disinterested knowledge production and

¹⁴⁴ See Weinstein, *supra* note 105 at 500–01.

¹⁴⁵ For instance, *Kleindienst v. Mandel*, 408 U.S. 753 (1972), as Post correctly observes, recognized a First Amendment *interest* in receiving information relevant to democratic self-governance. POST *supra* note 85 at 37, n.37. However, Post fails to note that the Court in that case *rejected* the First Amendment claim and upheld the exclusion from the United States of a foreign Marxist journalist invited to give a series of academic lectures. *Accord*, *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (though acknowledging that ban on Americans’ travel to Cuba impeded the “free flow of information concerning that country,” the Court upheld the ban). See also *Gannett v. DePasquale*, 443 U.S. 368 (1979) (rejecting First Amendment right of public access to pre-trial hearing in criminal case); *Pell v. Procunier*, 417 U.S. 817 (rejecting First Amendment challenge to state’s Department of Correction’s policy barring interviews with prison inmates); *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984) (rejecting First Amendment challenge to a protective order in a civil suit preventing the disclosure of a matter of public concern obtained in discovery).

¹⁴⁶ Post, *supra* note 85 at 37–38. Another example of the interest in democratic competence being afforded only moderate weight is the Court’s traditionally deferential stance towards legislative restrictions on campaign speech by corporations. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 205 (2003); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990). Such deference was appropriate because ordinary business corporations are not constitutionally relevant speakers for purposes of the legitimation conferred by participation in the democratic self-governance concerned, and so the speech of such entities is valued for the information it might provide the electorate. In *Citizens United v. FEC*, 558 U.S. 310 (2010), however, the Court reversed course and adamantly refused to defer to the Congress’s judgment that any impediment of information needed by the electorate imposed by key provisions of the Bipartisan Campaign Reform Act of 2002 was outweighed by other democratic interests advanced by that legislation. The Court’s ardent vindication of democratic competence in *Citizens United* should, in my view, give pause to commentators such as Robert Post who seem to advocate “robust . . . judicial enforcement of the value of democratic competence.”

¹⁴⁷ POST, *supra* note 85 at 35.

search for the truth is promotion of democratic competence, this is not its essential purpose. For one, there is the literally inestimable value of discovery of knowledge and pursuit of truth for its own sake.¹⁴⁸ But even if we consider only the instrumental purpose of knowledge creation in the disciplined setting of the university, it is far more encompassing than promoting democratic competence. Post seems to acknowledge this when he accurately observes that the production of expert knowledge at American universities “has propelled us to the forefront of the world stage” and that in “today’s information age, intellectual stagnation implies economic and military failure.”¹⁴⁹

In this regard, despite all its failings as an explanation for the constitutional underpinnings of academic freedom, the marketplace rationale better captures the purpose of academic freedom than does democratic competence. The marketplace of ideas rationale and academic freedom share the same goal—discovery of knowledge and truth without limitation—while democratic competency values this information only to the extent that it can inform public opinion relevant to democratic self-governance. So academic freedom falls between two stools: one, democratic competence, that does not fully capture the essence of academic freedom, and the second, the marketplace of ideas rationale, whose means for discovering knowledge and truth does not capture, and indeed is at odds with, the disciplinary method of knowledge creation that academic freedom protects. This phenomenon may largely explain the Court’s confusion in trying to ground academic freedom in a constitutional norm, bouncing between these two stools, sometimes invoking the marketplace of ideas and at other times democratic interests. Post’s analysis helps to clear up this confusion by demonstrating the jarring mismatch between the marketplace of ideas rationale and academic freedom so far as the method of knowledge production is con-

¹⁴⁸ As Marvin Greenberg relates:

According to legend, a beginning student of geometry asked Euclid, “What shall I get by learning these things?” Euclid called his slave, saying, “Give him a coin, since he must make gain out of what he learns.” To this day, this attitude toward application persists among many pure mathematicians—they study mathematics for its own sake, for its intrinsic beauty and elegance. [Although] pure mathematics often turns out to have applications never dreamt of by its creators . . . those parts of mathematics that have not been applied are also valuable . . . as aesthetic works . . . or as contributions to the expansion of human consciousness and understanding. Marvin Jay Greenberg, *EUCLIDEAN AND NON-EUCLIDEAN GEOMETRIES* 7–8 (2d ed. 1973).

¹⁴⁹ POST, *supra* note 85 at 92.

cerned. His analysis falls short, however, in claiming a better fit between academic freedom and democratic competence than is warranted. Still, unlike the collective interest in discovery of knowledge and truth, the interest in democratic competence is at least a significant First Amendment value. Accordingly, Post deserves enormous credit for correctly identifying democratic competence as the only viable First Amendment value underlying constitutional protection of academic freedom.

IV. THE DOCTRINAL IMPLICATIONS OF GROUNDING ACADEMIC FREEDOM IN DEMOCRATIC COMPETENCE

Modest in both strength and in scope though it may be, democratic competence provides uniquely among all the various First Amendment values a plausible basis for academic freedom as a constitutional norm. Manifestly, however, this value does not, despite the Court's rhetoric, justify any "special" First Amendment concern for academic freedom, at least not in the sense of providing universities or professors any special immunity from application of laws or procedures of general applicability. In *EEOC v. University of Pennsylvania*, it will be recalled, the university claimed that academic freedom required that the EEOC in subpoenaing confidential peer review to "adopt a balancing approach reflecting the constitutional and societal interest inherent in the peer review process" and to resort to "all feasible methods to minimize the intrusive effects of its investigations."¹⁵⁰ Several decisions regarding freedom of the press suggest that the Court was correct in holding in this case that the EEOC need not show any "special justification"¹⁵¹ for demanding such material. It cannot be gainsaid that however important academic freedom might be to democratic competence, freedom of the press is at least, if not more, crucial to assuring that the electorate is well informed about the performance of government and other issues of public concern. The Court, however, has consistently denied claims by the press that the First Amendment entitles it to special consideration in the application to it of laws or legal proceedings of general applicability. For instance, the Court has rejected the claim that the First Amendment requires the police to obtain a subpoena in order to search a

¹⁵⁰ 493 U.S. at 186.

¹⁵¹ *Id.* at 202.

newsroom rather than a search warrant as is required to search other premises.¹⁵² Similarly, the Court rebuffed the claim that journalists have a constitutional privilege to refuse to reveal confidential sources in grand jury proceeding, declining to interpret the First Amendment “to grant newsmen a testimonial privilege that other citizens do not enjoy.”¹⁵³ If freedom of the press, which is inarguably essential to democratic competence, and moreover, is expressly mentioned in the text of the First Amendment, does not entitle the press or journalists to immunity from laws or legal procedures of general applicability, then surely academic freedom does not endow universities or professors with such a privilege.

But if academic freedom does not create such special immunities for universities or faculty, precisely what protection does it supply distinct from protection provided by the First Amendment to citizens generally? As noted above, the Court’s explanation in the *University of Pennsylvania* case that all of the decisions in which it upheld a claim of academic freedom involved content-based restrictions suggests that the answer may be “none.” This is because according to a belief widely shared by commentators¹⁵⁴ and supported by Court dicta,¹⁵⁵ all content-based restrictions are presumptively invalid and subject to strict scrutiny unless they fall within some short list of exceptions. As I have written, however, the rule against content discrimination is in fact much more circumscribed than most commentators and the Court say it is, applying primarily to “public discourse,” that is, to speech on matters of public concern in settings dedicated to or essential to democratic self-governance, such as books, magazines, films the Internet, and public forums

¹⁵² *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

¹⁵³ *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972). *See also* *Pell v. Procunier*, 417 U.S. 817 (1974) (in upholding a state Department of Correction’s policy prohibiting the press from interviewing prisoners, the Court stated that the Constitution “does not require government to accord the press special access to information not shared by members of the public generally”).

¹⁵⁴ *See, e.g.*, JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 1131–32 (7th ed. 2004) (stating that other than (1) incitement to imminent violence; (2) “fighting words”; (3) obscenity; (4) child pornography; (5) certain types of defamatory speech; and (6) certain types of commercial speech, the government may not ban speech because of its content unless the regulation passes “strict scrutiny”).

¹⁵⁵ *See, e.g.*, *United States v. Stevens*, 559 U.S. 460, 468 (2010) (stating that despite its absolute command, “the First Amendment has permitted restrictions upon the content of speech in a few limited areas . . . including obscenity, defamation, incitement, and speech integral to criminal conduct”).

such as the speakers' corner of a park.¹⁵⁶ In contrast, in settings dedicated to purposes other than democratic self-governance through public discourse, such as the courtroom, the classroom in public primary and secondary schools, and in the workplace, the government has more leeway to regulate the content of speech.¹⁵⁷

If my view of the limited scope of the rule against content discrimination is correct, then academic freedom based in democratic competency might explain why the First Amendment limits the government's power to regulate speech in the university classroom but permits identical speech regulation in other settings also not dedicated to public discourse. Although the primary purpose of a university classroom is not democratic self-governance, and it is therefore not a forum for unconstrained discussion of public issues, it is a setting that promotes democratic competence through structured, disciplined dialogue and open inquiry.¹⁵⁸ For this reason, the First Amendment would, for example, prohibit the state Superintendent of Public Instruction from forbidding a professor at a state university from expressing the view in psychology class that homosexuality is a mental disorder. In contrast, since secondary schools are not institutions essential to the production of expert knowledge, a high school teacher could likely be prohibited consistent with the First Amendment from expressing this discredited view in a high school psychology class. Similarly, academic freedom grounded in democratic competence would likely render unconstitutional an attempt by the state's Superintendent of Public Instruction to prevent a biology professor at a state university from endorsing J. Philippe Ruston's views that blacks are on average genetically less intelligent and less law abiding than Asians and whites.¹⁵⁹ But since the primary purpose of the workplace is work, not democratic self-governance through public discourse, and, unlike a university classroom, is not a setting

¹⁵⁶ See Weinstein, *supra* note 105 at 493.

¹⁵⁷ See *id.* at 493–94.

¹⁵⁸ For this reason, restrictions on classroom speech implicate the freedom of research and publication in addition to the freedom of teaching independent of these interests. "Freedom of research is implicated in the classroom not merely because classrooms are a medium for the transmission of scholarly expertise to the public, but also because classrooms are the only medium through which the next generation of disciplinary experts can be produced." POST, *supra* note 85 at 88. I do not in this paper consider freedom of teaching apart from its relation to freedom of research and publication.

¹⁵⁹ See http://en.wikipedia.org/wiki/J._Philippe_Rushton.

instrumental to democratic competence, it is likely permissible under the First Amendment for a state's Equal Employment Commissioner to prohibit an employer from regaling his employees in a mandatory meeting at the beginning of the workday with these same racist theories.

The uncertainty about the scope of rule against content discrimination discussed above would likely make it difficult to detect any distinct role played by academic freedom in cases involving state imposed content-based restrictions on speech in the university classroom. In contrast, the independent existence of academic freedom as a First Amendment value would likely become visible if the state or federal government were to target universities with regulations that do not restrict the content of speech but which nonetheless threaten to impede the knowledge-creating function of the university. Suppose, for instance, that a legislature in a certain southwestern state is convinced that because the vast majority of the university faculty in that state have studied at graduate schools at elite east coast institutions, professors at these universities do not have enough knowledge about or interest in local and regional problems. It therefore passes a law requiring that all universities within the state give preference in faculty hiring to candidates who hold their highest degrees from universities located in the southwest region of the United States, with a goal that within 7 years all universities within the state, and each department within each university, will comprise at least 20% faculty with their highest degrees from regional universities.

In *Grutter*, the Court explained that the autonomy of the university “grounded in the First Amendment” protected the freedom of the university “to make decisions about the selection of its student body.”¹⁶⁰ As the Court has also recognized, “discretion to determine . . . who may be admitted to study” is one of “the four essential freedoms” of a university, citing Justice Frankfurter’s concurrence in *Sweezy*.¹⁶¹ This influential concurrence, as we have seen, lists the freedom to determine “who may teach” as the first of

¹⁶⁰ See *supra* text accompanying note 68.

¹⁶¹ *Univ. of Mich. v. Ewing*, 474 U.S. at 226 n.12 (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring)).

these four essential freedoms.¹⁶² And there can be no doubt that in terms of producing the knowledge, including that necessary to informing public opinion, the freedom of a university to select its faculty is even more important than the freedom of the university to select its student body. I have little doubt, therefore, that such a law would be held unconstitutional as applied to *private* institutions of higher learning within the state and that academic freedom protected by the First Amendment would most likely be the basis for the decision. Even the modest weight appropriate to a norm instrumental to democracy would be adequate to the task of invalidating a law directly meddling with the authority of these institutions to select their own faculty,¹⁶³ given the weak interests in controlling the hiring at private universities. With respect to *public* universities, however, it is not at all certain that this law would be held unconstitutional. Precisely because these are publicly funded institutions, the state has a somewhat greater interest in having a voice in who is hired by these institutions. Yet, if academic freedom is as suggested by Court's rhetoric and Robert Post's analysis robustly protected by the First Amendment, then despite this modest additional interest, state interference with the authority of a public university to make decisions on something as core to its mission as the qualifications of its faculty should be patently unconstitutional. It is difficult to imagine, however, that the Court would strike this law down on First Amendment grounds as applied to public universities. If I am right that it would not, this shows that academic freedom is, in reality, a First Amendment norm of modest scope and weight, which can be outweighed by relatively modest countervailing state interests.¹⁶⁴

¹⁶² *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring).

¹⁶³ In this regard, recall that the Court in *EEOC v. Pennsylvania* thought it significant that the subpoena requiring the university to turn over confidential material regarding a tenure decision did not directly mandate criteria for the selection of teachers. See *supra* text accompanying note 80.

¹⁶⁴ Also supporting this conclusion about the modest scope and weight of academic freedom as a constitutional norm is that due to the "state action" requirement, faculty at private universities can make no First Amendment claims against their academic supervisors or their institutions for violation of academic freedom, no matter how severe or unjustified the infringement. But if academic freedom were as essential to the proper functioning of democracy as Post claims it is, then the state action requirement should not stand in the way of its vindication. See, e.g., *Marsh v. Alabama*, 326 U.S. 501 (1946) (upholding the First Amendment right to distribute religious literature in privately-owned "company" town); *Terry v. Adams*, 345 U.S. 461 (1953) (finding that the 15th Amendment bars exclusion of blacks from privately sponsored "pre-primary" elections that effectively chose Democratic Party candidates).

We return, finally, to the important question left open in *Garcetti v. Ceballos*, which held that discipline imposed upon public employees by their supervisors for statements made “pursuant to [the employees’] official duties” does not violate the First Amendment. The Court noted, however, that there is “some argument” that “additional constitutional interests” might make this holding inapplicable to “expression related to academic scholarship or classroom instruction.”¹⁶⁵ I considered above restrictions on classroom instruction imposed from a public official outside of the university. But what if a professor who expounded Rushton’s racist views was not punished for doing so by an elected Superintendent of Public Instruction but rather by a dean or department chairman? The difference is that now the sanction is imposed not by a layperson subject to political pressure or to the influence of uninformed public opinion. Rather, the discipline is now imposed by a fellow academic with the expertise to evaluate, on academic grounds, whether this widely discredited position is nonetheless supported by evidence sufficient to render it one that a competent academic could honestly hold. In addition, an academic administrator is better able than is a layman to balance, if such balancing be proper,¹⁶⁶ the interest in the discovery of knowledge and truth that might be promoted by a professor expressing this highly inflammatory view in the classroom¹⁶⁷ against the university’s interest in minimizing the alienation of minority students that such expression is certain to engender.

That discipline on a professor for views expressed in the classroom is imposed by an academic supervisor rather than by a layperson is a crucial consideration in determining whether academic freedom has been breached as a professional norm. But whether this distinction makes a crucial difference in determining whether academic freedom has been violated as a matter of constitutional law is a much more difficult question. In light of the important constitutional values promoted by the prosecutor’s speech questioning the valid-

¹⁶⁵ See *supra* text accompanying note 99.

¹⁶⁶ Whether academic freedom as a professional norm properly permits the search for knowledge and truth to ever be compromised to important ancillary interest such as preventing minority students from feeling alienated is a very difficult question on which I have not yet formed an opinion.

¹⁶⁷ See *supra* note 158.

ity of a search warrant¹⁶⁸ but which the Court in *Garcetti* held could be disciplined consistent with the First Amendment, a principled basis for exempting academic research or classroom speech from supervisory discipline is not readily apparent.¹⁶⁹ Of course, if *Garcetti* was wrongly decided, either generally in depriving public employees of First Amendment protection from discipline for their work related speech, or in particular by failing to protect a lawyer's complaint to his superior about a defective search warrant, then a strong argument could be made that the reach of this erroneous opinion should be limited in any way possible. Militating strongly against such an argument are the weighty interests in doctrinal coherence and the principled adjudication. These jurisprudential considerations aside (or, which amount to the same thing, if *Garcetti* were overruled), the interest in democratic competence are in my view provide sufficient justification for some modest First Amendment protection of research, scholarly publications and teaching from unwarranted discipline by academic supervisors. Such judicial vindication of this norm, however, should give appropriate deference to the academic judgment of the supervisors.

A frequent subject of recent lower court academic freedom cases involve claims by faculty that they have been retaliated against by academic supervisors for expressing their

¹⁶⁸ See *supra* text accompanying note 100.

¹⁶⁹ Robert O'Neil argues that so far as "official duties" are concerned "the clarity with which a court can determine the responsibilities of an assistant district attorney ... simply does not apply to college professors." He adds that the "whistleblower" and related protection that the Court in *Garcetti* invoked as alternatives to First Amendment protection for public workers who expose government wrongdoing are not generally available to faculty at public universities. See Robert M. O'Neil, *Academic Speech in the Post-Garcetti Environment*, 7 FIRST AMEND. L. REV. 1, 18-19 (2008). I am not persuaded, however, that these practical differences are significant enough to distinguish in terms of constitutional value faculty speech from the speech of an assistant district attorney informing his supervisor of a defective search warrant. More telling, and related to O'Neil's first point, is that the management structure endemic to university life is totally unlike that of that of typical public workplace, including district attorneys' offices. I agree with O'Neil about the uniqueness of the management structure of the academic workplace and his implication (echoed more explicitly by Post, *supra* note 85 at 91-92) that applying *Garcetti* to the academic setting would be inconsistent with the view that faculty are "are the appointees, but not in any proper sense the employees" of a university's trustees." See *supra* text accompanying note 30. I am not familiar enough with the management structure of district attorneys' offices to be confident that denying First Amendment protection from the discipline in that case was not equally inconsistent with the professional norms of prosecutors' offices, though I suspect that it was not. But even if applying *Garcetti* to an academic setting would be more inconsistent with academic professional norms than the holding in that case was with prosecutorial professional norms, I am still not persuaded denying faculty speech First Amendment protection from supervisory discipline poses a greater threat to constitutional values than did the denial of protection to the speech in *Garcetti*. This is a difficult question that requires further thought, for which O'Neil's cogent arguments provide plenty of food.

views about internal institutional matters such hiring or the curriculum.¹⁷⁰ These cases present the issue of whether the possible exception mentioned in *Garcetti* applies to intramural speech, that is, “speech that does not involve disciplinary expertise but is instead about the action, policy or personnel of a faculty member’s home institution.”¹⁷¹ As discussed above, retaliation by academic administrators against faculty for expressing their views on such subjects violates academic freedom as a professional norm.¹⁷² It is doubtful, however, that such expression is protected as a matter of constitutional law or should be so protected.

The wording used by the Court in *Garcetti* to describe the possible exception for academic speech suggests the possibility that intramural speech might not come within this exception. In discussing this exception, the Court referred to “expression related to academic scholarship or classroom instruction” and to “speech related to scholarship or teaching.”¹⁷³ This language is ambiguous, for it is unclear whether the Court meant expression or speech “related to” to refer only to “scholarship”¹⁷⁴ but not to “classroom instruction” or “teaching.” If the Court meant that only “classroom instruction” and “teaching” per se and not speech “related to” these activities is eligible for the possible exception,¹⁷⁵ then very little intramural speech would be eligible for First Amendment protection from supervisory discipline.

Linguistic considerations aside, there is reason to think that intramural speech is not, as a descriptive matter, protected from discipline. As I have already mentioned, the constitutional interests promoted by the prosecutor’s complaint about the search warrant in *Garcetti* are so substantial as to suggest that a principled application of that decision would likely conclude that there is no exception even for academic research or classroom

¹⁷⁰ See, e.g., *Demers v. Austin*, 2013 U.S. App. LEXIS 18355 (9th Cir. 2013); *Savage v. Gee*, 665 F.3d 732 (6th Cir. 2012); *Miller v. Univ. of S. Ala.*, 2010 U.S. Dist. LEXIS 4863 (S.D. Ala. 2010); *Hong v. Grant*, 516 F. Supp. 1158 (C.D. Ca. 2007); *Scallet v. Rosenblum*, 911 F. Supp 999 (W.D. Va. 1996).

¹⁷¹ FINKIN & POST, *supra* note 4 at 113. See *supra*, text accompanying notes 7.

¹⁷² See *supra*, text accompanying note 8.

¹⁷³ *Garcetti*, 547 U.S. at 425. See *supra*, text accompanying note 99.

¹⁷⁴ Speech and expression “related to scholarship” was likely used to denote scholarly publications and perhaps also to distinguish publication from research activity such as fieldwork or laboratory experiments.

¹⁷⁵ This interpretation is supported by the preposition “to” not being repeated before “classroom instruction” or “teaching.”

instruction. As categories of activity, research and teaching promote democratic competence far more than does intramural speech. Therefore, if teaching and research are not eligible for First Amendment protection from supervisory discipline, it follows *a fortiori* that intramural speech is not eligible.

As I also have mentioned, *Garcetti* complications aside, research and teaching should in my view be eligible to some modest degree of First Amendment protection from supervisory discipline in light of the contribution to democratic competence that these activities make. In contrast, my tentative view is that even if *Garcetti* were overruled, intramural speech should not be afforded First Amendment protection from supervisory discipline. I am open to persuasion that my view on this matter is ill informed, but my tentative conclusion is that unlike research and teaching, faculty speech on curricular, hiring and related matters makes only a minimal contribution to democratic competence.¹⁷⁶ There may be other reasons not peculiar to academic speech but more generally applicable to public employees that administrative retaliation against such speech should under the best understanding of the First Amendment be protected from supervisory discipline. Democratic competence, however, would not seem to be among them.

Conclusion

The signal contribution that the modern American university has made to the progress of society cannot be seriously doubted. Among other measures, this enormous contribution is confirmed by the impressive number of Nobel Prizes that have been awarded

¹⁷⁶ Or at least does not directly make a substantial contribution to democratic competence. It could be argued that faculty views on issues such as hiring and curriculum, and particularly the type of research that is valued, is crucial for assuring the university properly and efficiently carry out its mission of creating knowledge, and that therefore administrative retaliation against faculty for expressing their views on these would impede this mission, which would in turn impair the ability of the university to contribute to democratic competence. In my view, such an indirect and attenuated effect on democratic competence is insufficient to violate academic freedom as a constitutional norm, which in light of its instrumental nature has been properly afforded only moderate scope and weight. This view is in accord with *EEOC v. University of Pennsylvania*, which held that because the production of confidential peer review material pursuant to a subpoena did not directly mandate criteria for selecting teachers, enforcement of the subpoena did not violate the constitutionally protected academic freedom of the university. See *supra*, text accompanying note 80.

to faculty at American Universities.¹⁷⁷ Nor can there be any reasonable doubt that academic freedom has been integral to the creation and dissemination of the knowledge upon which the progress of society depends. But what is open to question is whether it is either appropriate or necessary for the judiciary to vigorously protect academic freedom as constitutional norm. The burden of this paper has been to suggest that the judiciary should have only a modest role in that enterprise. This is because academic freedom has never been conceived as a true individual right but rather as a means of promoting “the common good.” Under our Constitution, it is emphatically the province the political branches government, not the judiciary, to effectuate the common good by balancing competing and often incommensurate general welfare concerns.

The only reason that academic freedom is properly given even modest weight as a constitutional norm is because a case can be made, as persuasively demonstrated by Robert Post, that the expert knowledge created by universities prominently contributes to the informed public opinion essential to democratic self-governance. As such, any doctrinal rules or standards developed to protect academic freedom under the First Amendment should be tightly structured to promote democratic competence. To this end, the primary concern of this doctrine should be to prevent government from “obliterating” universities as “independent sources of expert knowledge.”¹⁷⁸ This suggests that significant First Amendment barricades are appropriately raised when government seeks to meddle with the institutional decision making authority of the university in ways truly threaten the creation or transmission knowledge. By the same token, however, there should significantly less First Amendment oversight of internal decisions by *academic* administrators said to infringe the academic freedom of individual faculty, and arguably no judicial role whatsoever for over claims of retaliation against faculty for intramural speech.

Having emphasized in this paper that it is inappropriate for court to have any more than a modest role in vindicating academic freedom, I will close by suggesting that any greater judicial involvement is also unnecessary. Robert Post worries that if the Court were

¹⁷⁷ See http://en.wikipedia.org/wiki/List_of_Nobel_laureates_by_university_affiliation

¹⁷⁸ POST, *supra* note 85 at 59.

to decide that there is no academic exception to *Garcetti*, this might “strip the nation of an invaluable resource, one that has propelled us to the forefront of the world stage.”¹⁷⁹ Surely, this concern is overstated. Before *Garcetti*, First Amendment protection of speech by public employees in the workplace, including speech by faculty at public universities, was far from robust, to put it mildly.¹⁸⁰ And speech by faculty at private universities has never enjoyed First Amendment protection from supervisory discipline. Yet, this dearth of judicial protection did not keep the American university from “propel[ing] us on to the world stage.” It is worth noting that even in the face of the truly profound threat to academic freedom posed by the McCarthy-era attempts to root out “subversives” from American universities, the AAUP was reluctant to urge the courts to recognize academic freedom as a legal norm, in light of the concern about “the long-term consequences of having judges rather than professors elaborate and apply the protective rules of academic life.”¹⁸¹ For this reason, the AAUP chose not to file an amicus brief in *Sweezy*.¹⁸²

Today, it is true, the AAUP is firmly committed to the judicial protection of academic freedom as a constitutional norm, and supports an academic exception to *Garcetti*. Nonetheless, a recent AAUP *Report on Garcetti* and its progeny, issued by a subcommittee of the organization’s committee on academic freedom and chaired by Robert O’Neil, one of the nation’s foremost authorities on academic freedom, fittingly reminds us “that the case for academic freedom is not now written, nor was it ever written, merely on legal litmus paper but in the history of the profession that recognizes universities that deserve to bear the name.” For this reason, the *Report* urges the adoption of “institutional policy language” in documents, such as Board of Regent’s statements, handbooks and collective bar-

¹⁷⁹ POST, supra note 85 at 92.

¹⁸⁰ See *Protecting an Independent Faculty Voice: Academic Freedom after Garcetti v. Ceballos* (Report of subcommittee of AAUP’s Committee A on Academic Freedom and Tenure, 2009) (“*Garcetti Report*”).

<http://www.aaup.org/report/protecting-independent-faculty-voice-academic-freedom-after-garcetti-v-ceballos>

¹⁸¹ Byrne, supra note 83 at 291. “[O]ne reason for the Association’s reluctance to see academic freedom defined as a legal concept has been its fear that what the courts give, they may take away, and that having thus given and taken away, academic freedom may be left in a weaker position than it was before it became a concern of the law.” *Id.*, n.150 (quoting Robert Carr, *Academic Freedom, the American Association of University Professors, and the United States Supreme Court*, 45 A.A.U.P. BULL. 5, 20 (1959)).

¹⁸² *Id.*

gaining agreements, “aimed at protecting academic freedom where courts cannot or should not be relied upon.”¹⁸³

¹⁸³ See *Garcetti Report*, supra note 180.

Supplemental Material for

Faculty and Student Speech Session

National Center on Philanthropy and the Law

2013 Annual Conference

October 24, 2013

Prepared by Hallie Tessororf

J.D. Candidate 2014

Sandra Day O'Connor College of Law

Note:

The paper I have prepared for this session, *Academic Freedom, Democracy, and the First Amendment*, focuses exclusively on faculty speech. To provide a fuller picture of free speech issues on university campuses, I have included an outline and summary of cases involving student speech together with a short bibliography of the literature on the subject, both prepared for this conference by my research assistant.

James Weinstein

Student Speech on University Campuses

CASES

I. SPEECH CODES

A. *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232 (3d Cir. 2010)

Student who was charged with violating university's student code of conduct for allegedly harassing an individual who had accused his friend of rape brought § 1983 action against university, its president, and its housing director, alleging that various code provisions violated the First Amendment. The Court held that the code was facially overbroad in violation of the First Amendment.

B. *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008)

Graduate student brought action against university, its former president, and two former graduate school professors, seeking injunctive relief against university's policy on sexual harassment, alleging that it violated First Amendment freedom of speech and expression. The Court found the university's policy facially overbroad.

C. *Bair v. Shippensburg Univ.*, 280 F.Supp.2d 357 (M.D. Pa. 2003)

Student and recent graduate sued state university, alleging that university's speech code violated First Amendment's free speech guarantee. The Court enjoined the enforcement of Shippensburg University's speech code, which mandated that student expression must not "provoke, harass, intimidate, or harm another," effectively outlawing a staggering amount of communication among students.

D. *Booher v. Northern Kent. Univ.*, No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky July 21, 1998)

Professor challenged university's sexual harassment policy as facially unconstitutional. Federal district court struck down the policy under overbreadth and vagueness doctrines.

E. *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995)

University men's basketball coach brought challenge to discriminatory harassment policy that prohibited, in relevant part, "demeaning or slurring individuals" and "using symbols, [epithets] or slogans that infer negative connotations about the

Student Speech on University Campuses

individual's racial or ethnic affiliation." The Sixth Circuit found the policy to be unconstitutionally vague and overbroad.

- F. *Corry v. Leland Stanford Junior Univ.*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (Slip op.)

Student challenged university's policy on "harassment by personal vilification," which prohibited speech "intended to insult or stigmatize" an individual on the basis of listed personal characteristics. The state court invalidated the policy under California's "Leonard Law."

- G. *UWM Post v. Bd. of Regents*, 774 F.Supp. 1163 (E.D. Wis. 1991)

Challenge was brought to university system's rule prohibiting students from directing discriminatory epithets at particular individuals with intent to demean them and create a hostile educational environment. The Court held that the rule on its face violates the overbreadth doctrine and is unduly vague in violation of the First Amendment.

- H. *Doe v. Univ. of Mich.*, 721 F.Supp. 852 (E.D. Mich. 1989)

Graduate student brought suit challenging the constitutionality of a university's policy on discrimination and discriminatory harassment of students. The Court held there is no evidence in the record that any officials at the University ever seriously attempted to reconcile their efforts to combat discrimination with the requirements of the First Amendment and therefore declared the law unconstitutional.

II. POLITICAL SPEECH

- A. *Barnes v. Zaccari*, 669 F.3d 1295 (11th Cir. 2012)

Student challenged university's decision to "administratively withdraw" him for engaging in activism regarding university's plan to spend mandatory student fees to construct parking garages on campus. Student also challenged lack of due process afforded him by the university, which did not provide him with notice of any

Student Speech on University Campuses

charges or an opportunity to defend himself. The Court found that the student's property interest in his enrollment required notice and hearing before expulsion.

B. *Smith v. Tarrant Cnty. Coll. Dist.*, 694 F.Supp.2d 610 (N.D. Tex. 2010)

Student advocates for concealed firearms on college campuses filed lawsuit under § 1983 against community college defendants, alleging that school's rules and regulations impermissibly deprived them of their right to engage in speech by denying them the ability to wear empty holsters on campus and by restricting their other efforts, handing out leaflets and engaging students in conversation, to a designated free-speech zone. The Court held the disruptive-activities provision, as applied to student SCCC members to prevent them from wearing empty holsters on campus or in the classroom, violated the students' First Amendment right to free speech.

C. *Flint v. Dennison*, 488 F.3d 816 (9th Cir. 2007)

Student brought § 1983 action against state university president, student association, and individual association members, alleging that association bylaws imposing per-candidate limit on campaign spending for student government offices violated his free speech rights. The Court held that imposing an expenditure limitation on student candidates is viewpoint neutral and serves to effectuate the purpose of the university's elections.

D. *Husain v. Springer*, 494 F.3d 108 (2d Cir. 2007)

Editors or staff of student newspaper, candidates in student government election, and student who voted in election brought action against college and administrators, alleging a violation of their First Amendment rights with school's decision to nullify the election and schedule new one as result of newspaper's support of particular slate of candidates. The Court held that the college does not have a duty to ensure a balanced viewpoint from the newspaper and that the nullification of the election was a violation of the student's First Amendment rights.

E. *Ala. Student Party v. Student Gov't Ass'n*, 867 F.2d 1344 (11th Cir. 1989)

Association of students of University of Alabama brought First Amendment

Student Speech on University Campuses

challenge to regulations adopted by student government association which restricted distribution of campus literature to three days prior to election and only at residence or outside of campus buildings, prohibited distribution of campaign literature on election day, and limited open forums or debates to week of election. The Court held that the university regulations were reasonably related to its legitimate interest in minimizing disruptive effect of campus electioneering and were therefore constitutional.

III. SAFETY THREATS

A. *Rock for Life-UMBC v. Hrabowski*, 411 F.App'x 541 (4th Cir. 2010)

Student anti-abortion organization filed § 1983 action alleging that former university policy on use of facilities violated First Amendment rights of free speech and assembly and Fourteenth Amendment right to equal protection. The Court upheld the District Court's finding that the organization lacked standing.

B. *Murakowski v. Univ. of Del.*, 575 F.Supp.2d 571 (D. Del. 2008)

University student instituted § 1983 action against state university, challenging its right to discipline him for posting allegedly threatening comments on website maintained by university's server. The Court held that the student's speech did not constitute true threats and therefore was protected speech. Additionally, the Court held the University had not shown that the speech created disruption or significantly and adversely impacted the college community; however, the Court found that the student received the proper process under the Fourteenth Amendment.

IV. DISRUPTIONS TO THE ACADEMIC ENVIRONMENT

A. *Corlett v. Oakland Univ.*, 2013 U.S. Dist. LEXIS 103653 (E.D. Mich. July 23, 2013)

Student challenged university's decision to discipline him for creative writing he submitted for his English course, in which he described his attraction to his professor. Student also challenged university's policy on "Unlawful Individual

Student Speech on University Campuses

Activities” as unconstitutional on its face and as applied against his expression. The Court held that the student’s writing was not protected speech and that the university’s policy was neither vague nor overbroad.

B. *Tatro v. Univ. of Minn.*, 816 N.W.2d 509 (Minn. 2012)

Student in state university's mortuary science program appealed from disciplinary sanctions imposed by university for her posts on social networking website. The Court held that the sanctions did not violate the free speech rights of the student when the posts violated the academic program rules that were narrowly tailored and directly related to established professional conduct standards.

C. *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002)

Student challenged decision of university thesis committee to deny approval of a “disacknowledgments” section on his graduate thesis. Although the student was granted his degree, the thesis was not placed in the university library, which the student alleged to be a violation of his First Amendment rights. The Court held that the thesis committee's refusal to approve graduate student's master's thesis did not violate student's First Amendment rights.

D. *Qvyit v. Lin*, 953 F.Supp. 244 (N.D. Ill. 1997)

The Court held that state university officials cannot retaliate or punish a graduate student for the content of his speech, regardless of whether that speech touches matters of public or private concern.

E. *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F.Supp.2d 1005 (N.D. Cal. 2007)

Student organization at state university brought § 1983 action against administrators with university and state university system, challenging regulations as vague and overbroad. Student organization moved for preliminary injunction. The University policies that mandated students to “be good citizens,” to “engage in responsible behaviors that reflect well upon their university,” and to “be civil to one another,” risked that the University's discipline of organizations whose members offend any of these policies would chill the exercise of expressive rights of free speech.

Student Speech on University Campuses

V. OBSCENE & INDECENT SPEECH

A. *Papish v. Bd. of Curators*, 410 U.S. 667 (1973)

Action by expelled graduate student against board of curators of state university and others for declaratory and injunctive relief under Civil Rights Act. The Supreme Court held that a political cartoon and headline story were not constitutionally obscene or otherwise unprotected.

VI. HATE SPEECH

A. *IOTA XI Chapter v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993)

Fraternity sued university under § 1983 alleging that university's sanction of fraternity for conducting “ugly woman contest” with racist and sexist overtones violated First Amendment. The Court found the speech protected by First Amendment and the sanction unconstitutional.

VII. STUDENT FEES & FORCED SPEECH

A. *Bd. of Regents v. Southworth*, 529 U.S. 217 (2000)

Students sued University of Wisconsin board of regents alleging that mandatory student activity fee violated their First Amendment rights of free speech, free association, and free exercise and that the university must grant them the choice not to fund organizations that engage in political and ideological expression offensive to their personal beliefs. The Court upheld the fee as consistent with the First Amendment.

B. *Smith v. Regents of Univ. of Cal.*, (56 Cal.App.4th 979 (1997)

Students and student organizations brought suits challenging use of mandatory student activities fee collected by University of California at Berkeley for political activities of student body organization. The court rejected the claim.

C. *Rosenburger v. Rector of Univ. of Va.*, 515 U.S. 819 (1995)

University student organization which published newspaper with Christian editorial viewpoint brought action against university challenging denial of funds from fund

Student Speech on University Campuses

created by university to make payments to outside contractors for printing costs of publications of student groups. The Court found the policy be an unconstitutional viewpoint-based restriction.

VIII. STUDENT GROUPS

A. *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790 (9th Cir. 2011)

Christian sorority and Christian fraternity that were denied official university recognition brought action challenging state university's requirement that student groups in the university's student organization program adhere to the university's nondiscrimination policy, which prohibited membership requirements based on religion. The Court found that the policy was viewpoint neutral and reasonable in light of its purpose and held it did not violate the organizations' free speech.

B. *Christian Legal Soc'y v. Martinez*, 130 S.Ct. 2971 (2010)

Student religious organization brought § 1983 action alleging that law school's policy of requiring officially recognized student groups to comply with school's nondiscrimination policy violated the organization's First and Fourteenth Amendment rights to free speech, expressive association, and free exercise of religion. The Court found that the university's policy was reasonable and viewpoint neutral thus it rejected the organization's free speech claim.

C. *Chi Iota Colony v. City Univ.*, 502 F.3d 136 (2d Cir. 2007)

Fraternity sued state university, claiming that university's policy of withholding official recognition from organizations that engaged in gender discrimination violated First Amendment intimate-association rights of its members. The Court held that the District Court wrongly applied strict scrutiny to the Fraternity's claim.

D. *Justice For All v. Faulkner*, 410 F.3d 760 (5th Cir. 2005)

Student anti-abortion group brought action against university officials to challenge university's literature distribution policy as a violation of the First Amendment. The Court found that anonymous leafleting was a form of protected speech. It then applied strict scrutiny review to the university's policy and found the policy was not

Student Speech on University Campuses

narrowly tailored to a significant government interest and thus invalid under the First Amendment.

E. *Gay Student Servs. v. Texas A&M Univ.*, 737 F.2d 1317 (5th Cir. 1984)

Homosexual student group appealed the upholding of university's refusal to officially recognize the group. The Court held that the asserted justifications for the refusal of recognition were insufficient to justify infringement of group's First Amendment rights.

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

Student group challenged the decision of the university to deny it official recognition on the basis of fear of potential disruption and violence, as seen on other campuses across the country. The Supreme Court held that this restricted the student group's exercise of freedom of association under the First Amendment. It was not enough, as the college argued, that the group could still associate, express its views, and distribute materials off campus.

IX. FREE SPEECH ZONES

A. *Roberts v. Hanagan*, 346 F.Supp.2d 853 (N.D. Tex. 2004)

Designated forum area section of state university's interim policy, which provided that student expression in the designated public forums was not subject to any content restrictions or prior restraints. It therefore did not impose a prior restraint on free expression by requiring a student to acquire a permit at least two business days before engaging in protected speech on the campus outside of the designated free-speech zones. Nor was the policy unconstitutional as applied to campus areas that were public forums, since prior permission requirement left no discretion to anyone to deny permission based on the content or viewpoint of any expressive activity.

Student Speech on University Campuses

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