

ARTICLES

Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance

JUDITH AREEN*

“[O]nly scholars can pass judgment on scholars as such”

–Immanuel Kant¹

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More than fifty years have passed since Chief Justice Earl Warren pronounced the value of academic freedom “self-evident,” and warned that “[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.”² Within a decade, a majority of the Supreme Court had declared academic freedom “a special concern of the First Amendment.”³ Despite this auspicious beginning, the Court has not developed a coherent theory to guide constitutional protection of academic freedom, and recently, in *Garcetti v. Ceballos*,⁴ it placed the protection, itself, in doubt.

In *Garcetti*, a closely divided Court rejected the free-expression claim of a state prosecutor on the ground that statements made pursuant to the “professional duties” of public employees are not shielded from employer discipline.⁵ Justice Souter, in a dissent joined by Justices Stevens and Ginsburg, warned that the decision could “imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write ‘pursuant to official duties.’”⁶ In response, the majority agreed to leave unde-

2. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion).

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

4. 547 U.S. 410 (2006).

5. *Id.* at 426.

6. *Id.* at 438 (Souter, J., dissenting) (internal citation omitted).

cided for now whether *Garcetti* signals the end of constitutional protection for academic freedom.⁷

This Article responds to the invitation in *Garcetti* to identify constitutional interests that support academic freedom and that are not fully accounted for by public-employee speech jurisprudence. It first argues that, contrary to common understanding, academic freedom is about much more than faculty speech—more than simply the university professor’s analog to the citizen’s right of free speech. Rather, academic freedom is central to the functioning and governance of colleges and universities. Louis Menand recognized this broader role when he called academic freedom a “key legitimating concept” of academic life, one that explains a wide array of issues, from why departments have the authority to hire and fire their own members to why the football coach is not allowed to influence the quarterback’s grade in a course.⁸ Academic freedom, properly understood, has what I will call a “governance dimension.” It is not only about faculty research and teaching; it is also about the freedom of faculties to govern their institutions in a way that accords with academic values whether they are approving the curriculum, hiring faculty, or establishing graduation requirements for students.

The governance dimension of academic freedom has been overlooked by most legal scholars who have written on the First Amendment’s application to academic freedom,⁹ or reduced to a right that belongs only to the governing

7. *Id.* at 425 (“We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”).

8. Louis Menand, *The Limits of Academic Freedom*, in *THE FUTURE OF ACADEMIC FREEDOM* 3, 4 (Louis Menand ed., 1996).

9. *See, e.g.*, Alan K. Chen, *Bureaucracy and Distrust: Germaneness and the Paradoxes of the Academic Freedom Doctrine*, 77 U. COLO. L. REV. 955 (2006); Rebecca Gose Lynch, *Pawns of the State or Priests of Democracy? Analyzing Professors’ Academic Freedom Rights Within the State’s Managerial Realm*, 91 CAL. L. REV. 1061 (2003); Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33 (2008); Larry D. Spurgeon, *A Transcendent Value: The Quest To Safeguard Academic Freedom*, 34 J.C. & U.L. 111 (2007); William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, LAW & CONTEMP. PROBS., Summer 1990, at 79. Walter Metzger criticized the American Association of University Professors (AAUP) for failing to insist that faculty be put in charge of their colleges and universities, but overlooked the Declaration’s embrace of shared governance. Walter Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1276–77 (1988).

Professor David Rabban is one of the few scholars to mention the governance dimension of academic freedom, but he did not otherwise analyze its role. *See* David M. Rabban, *A Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment*, LAW & CONTEMP. PROBS., Summer 1990, at 227, 295 (“Claims of administrative abuse of the peer review process and disagreements over curricular and other educational policy issues seem sufficiently linked to critical inquiry to come within the specific theory of academic freedom.”); *see also* WILLIAM A. KAPLIN & BARBARA A. LEE, 1 *THE LAW OF HIGHER EDUCATION* 663, 666 (4th ed. 2006) (“[A faculty claim] may properly be characterized as an academic freedom claim . . . if the opinions and ideas that the faculty member expresses implicate the *academic* operations of a program, department, or school.”); Neal Kumar Katyal, *The Promise and Precondition of Educational Autonomy*, 31 HASTINGS CONST. L.Q. 557, 566 (2003) (“If educational autonomy becomes a license for university administrators to admit who they want when they want without faculty oversight, it’s not part of academic freedom at all.”).

board or administration of a college or university.¹⁰ Debate over whether academic freedom is an individual or an institutional right has claimed a disproportionate share of the scholarly literature, yet for the most part that literature has failed to consider whether faculty involvement in an academic governance decision should affect the level of constitutional protection provided for that decision.¹¹ This Article reclaims the broader understanding of academic freedom from analytic neglect and uses it to recast the relationship between academic freedom and the First Amendment.

Part I argues that academic freedom encompasses more than research and teaching; it has a governance dimension. It traces the emergence of this robust conception of academic freedom as a professional standard for free thought in the classroom and laboratory, as well as for academic governance by faculties, to 1915 when the American Association of University Professors (AAUP) credited the German ideal of academic freedom as the inspiration for its Declaration of Principles on Academic Freedom and Academic Tenure.¹² Part II examines the development of constitutional protection for academic freedom at public colleges and universities. It documents how the constitutional understanding of academic freedom has been compromised by its failure to encompass governance as at the heart of the ideal. Part III uses the broad understanding of academic freedom to reconceptualize academic freedom within the First Amendment. It concludes that if we are to protect successfully a robust conception of academic freedom, it is necessary to identify academic freedom as inherent in one of the government's many functions or roles: that of government-as-educator. Because constitutional academic freedom was never justified as a benefit for faculty, but for its value to the First Amendment and to the nation, there is no good basis for carving out an exception to *Garcetti* for faculty. There are compelling reasons, however, to develop a jurisprudence for the role of government-as-educator, and to distinguish that role from the role of either government-as-sovereign or government-as-employer. Because of the distinc-

10. See, e.g., J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 311 (1989) ("In the last decade, the Supreme Court's decisions concerning academic freedom have protected principally and expressly a First Amendment right of the university itself—understood in its corporate capacity—largely to be free from government interference in the performance of core educational functions.").

11. Compare *id.*, with Rabban, *supra* note 9, at 230 ("I disagree [with Byrne]. Courts may have been presented with more institutional claims than individual claims of academic freedom, but they have also recognized that the [F]irst [A]mendment protects individual academic freedom."). Courts also have disagreed about whether academic freedom is an institutional right only. Compare *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000) (en banc) ("[Academic freedom] inheres in the University, not in individual professors . . ."), with *Piarowsky v. Ill. Cmty. Coll. Dist.* 515, 759 F.2d 625, 629 (7th Cir. 1985) ("[Academic freedom] is used to denote both the freedom of the academy to pursue its ends without interference from the government . . . and the freedom of the individual teacher . . . to pursue his ends without interference from the academy . . .").

12. See Am. Ass'n of Univ. Professors, *The A.A.U.P.'s "General Declaration of Principles," 1915*, in 2 AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY 860, 860 (Richard Hofstadter & Wilson Smith eds., 1961) [hereinafter *1915 Declaration*].

tive nature of the academic workplace, constitutional academic freedom should protect not only a professor's speech, but also her power, as a member of a governing faculty, to be the architect of a place of study and learning that can facilitate the core university tasks of producing and disseminating new knowledge.

I. THE PROFESSIONAL STANDARD OF ACADEMIC FREEDOM

A. THE CHALLENGE POSED TO ACADEMIC FREEDOM BY LAY GOVERNING BOARDS

1. Modern Academic Freedom and the Kantian University

Academic freedom has roots that have been traced back to the thirteenth century when universities sought freedom from both Church and State by playing one off against the other in pursuit of more institutional autonomy.¹³ The institutional autonomy achieved in medieval times, however, provided little freedom of inquiry for individual scholars.¹⁴ That modern understanding of academic freedom did not emerge until the late-eighteenth century inspired in large part by the ideas of Kant and other scholars of the period.¹⁵ Kant addressed the relationship between universities and the State in *The Conflict of the Faculties*,¹⁶ a work that was largely overlooked in the United States until the late twentieth century.¹⁷ That he wrote in a deliberately oblique way should not

13. See, e.g., 1 HASTINGS RASHDALL, *THE UNIVERSITIES OF EUROPE IN THE MIDDLE AGES* 334–38 (F.M. Powicke & A.B. Emden eds., 1936) (1895). Rashdall describes events at the University of Paris, from 1228 to 1229, that began with a tavern brawl involving students. The local government, in response, sent in a company of soldiers. When several students were killed, the faculty suspended lectures in protest and threatened to disperse unless appropriate redress was taken. A number of the faculty did go to Oxford and Cambridge. The threat worked; the papal legate who had advised the fatal attack was recalled, and Pope Gregory IX issued an order to the King and Queen-Mother directing them to punish the offenders. A series of papal bulls followed that increased the authority of the university. It was authorized, for example, to make its own rules and to punish violators by expulsion. Limits were placed on the authority of the local bishop and on the chancellors of the university to punish students. *Id.* See generally RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 3–77 (1955).

14. HOFSTADTER & METZGER, *supra* note 13, at 17 (“The medieval model of inquiry was limited by the presence of a hard core of accepted doctrine, authoritatively established, which was defined and enforced, made obligatory on all thinkers at the risk not only of their worldly position but of their spiritual privileges and possibly even their eternal souls.”).

15. Kant, Schelling, Fichte, Schleiermacher, and Humboldt developed the ideal of academic freedom in reaction to Prussian censorship. FRITZ K. RINGER, *THE DECLINE OF THE GERMAN MANDARINS: THE GERMAN ACADEMIC COMMUNITY, 1890–1933*, at 23–24 (1969).

16. KANT, *supra* note 1.

17. Hofstadter and Metzger, for example, did not discuss Kant's work in their classic history of academic freedom. See HOFSTADTER & METZGER, *supra* note 13. Jacques Derrida described the “invisibility” of the text in the United States. Jacques Derrida, *Canons and Metonymies: An Interview with Jacques Derrida*, in *LOGOMACHIA: THE CONFLICT OF THE FACULTIES* 195, 199 (Richard Rand ed., 1992). In France, the text was known for its remarks on the French Revolution and “its links to [Kant's] *Religion within the Limits of Mere Reason*,” but “it was not previously read as a discourse on the university, on the history and structure of this institution or its relationships to the state.” *Id.* Interest in Kant's text

surprise given his personal experience with royal censorship:¹⁸

Whoever it was that first hit on the notion of a university and proposed that a public institution of this kind be established, it was not a bad idea to handle the entire content of learning . . . by a division of labor, so that for every branch of the sciences there would be a public teacher or *professor* appointed as its trustee, and all of these together would form a kind of learned community called a *university* The university would have a certain autonomy (since only scholars can pass judgment on scholars as such), and accordingly it would be authorized to perform certain functions through its *faculties* . . . : to admit . . . students . . . and, having conducted examinations, by its own authority to grant degrees¹⁹

The views of Kant and other academics also guided the founding of the University of Berlin in 1810—the first university dedicated to research as well as to teaching—by liberal reformer Wilhelm von Humboldt.²⁰ Soon, universities throughout Germany were offering lectures in which faculty reported the results of their studies, and even students were encouraged to undertake their own research.²¹

was ignited when Jacques Derrida delivered a lecture about it at the 1980 centennial of Columbia University's Graduate School. *Id.* at vii.

18. In the preface, Kant quotes from the letter he received in 1794 from Frederick William, the King of Prussia: “Our most high person has long observed with great displeasure how you misuse your philosophy to distort and disparage many of the cardinal and basic teaching of the Holy Scriptures” KANT, *supra* note 1, at 11. Kant replied that he had never disparaged Christianity and that in the future he would not speak in public on religion. *Id.* at 19.

19. KANT, *supra* note 1, at 23. Kant argued that the benefits of academic freedom extend beyond the university:

It is absolutely essential that the learned community at the university . . . contain a faculty that is independent of the government's command with regard to its teaching; one that, having no commands to give, is free to evaluate everything, and concerns itself with the interests of the sciences, that is with truth; one in which reason is authorized to speak out publicly. For without a faculty of this kind, the truth would not come to light (and this would be to the government's own detriment).

Id. at 27–29. Kant also discussed the relationship among the traditional four faculties of a university. He praised the “lower” faculty of philosophy (today's “arts & sciences”) for its commitment to reason over the three so-called “higher” faculties of theology, law, and medicine, which he saw as too controlled by the State. *Id.*

20. See WILLIAM CLARK, *ACADEMIC CHARISMA AND THE ORIGINS OF THE RESEARCH UNIVERSITY* 442–46 (2006); DANIEL FALLON, *THE GERMAN UNIVERSITY: A HEROIC IDEAL IN CONFLICT WITH THE MODERN WORLD* 10–31 (1980); 2 PAUL R. SWEET, *WILHELM VON HUMBOLDT: A BIOGRAPHY* 15, 53–71 (1980); 3 *A HISTORY OF THE UNIVERSITY IN EUROPE* 4–5 (Walter Rüegg ed., 2004); see also GERARD DELANTY, *CHALLENGING KNOWLEDGE: THE UNIVERSITY IN THE KNOWLEDGE SOCIETY* 33 (2001) (“von Humboldt was the most influential advocate of the Kantian idea of the university and the idea of academic freedom”).

21. 3 *A HISTORY OF THE UNIVERSITY IN EUROPE*, *supra* note 20, at 5–6, 21, 33. The Humboldtian approach was heavily influenced by philosopher Friedrich Schleiermacher's vision: “The teacher must produce everything he says before his listeners: he must not narrate what he knows, but rather reproduce his own way to knowledge, the action itself. The listeners should not only collect knowledge.

2. The Origin of Lay Governing Boards

Nine institutions of higher education in the United States were founded before the nation. Harvard, the oldest of the nine colonial colleges,²² was closely modeled on Oxford and Cambridge with one significant difference: the governance system. Because there were not enough scholars in Massachusetts Bay Colony to reproduce the English system of faculty governance, the colonists established a lay (in the sense of nonfaculty) governing board.²³ This new form of academic governance was adopted, in turn, by the other colonial colleges,²⁴ and it remains the most common form of university and college governance in the United States.²⁵

They should directly observe the activity of intelligence producing knowledge and, by observing it, learn how to do it themselves." *Id.* at 21.

22. The nine colonial colleges were: Harvard (1636), William & Mary (1693), Collegiate School at New Haven (Yale) (1701), College of Philadelphia (University of Pennsylvania) (1740), College of New Jersey (Princeton) (1746), King's College (Columbia) (1754), College of Rhode Island (Brown) (1764), Queen's College (Rutgers) (1766), and Dartmouth (1769). *THE HISTORY OF HIGHER EDUCATION*, at xxvii (Lester F. Goodchild & Harold S. Wechsler eds., 2d ed. Pearson Custom Publ'g 1997) (1989).

23. See 1 *AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY* 3 (Richard Hofstadter & Wilson Smith eds., 1961) ("The European universities had been founded by groups of mature scholars; the American colleges were founded by their communities; and since they did not soon develop the mature scholars possessed from the beginning by their European predecessors but were staffed instead for generations mainly by young and transient tutors, the community leaders were reluctant to drop their reins of control.").

The new governance structure was not accepted without struggle and was complicated by the fact that Harvard had two governing boards. In 1721, after there had been for some time only one faculty member on the five-person Corporation (the primary governing board at Harvard), two faculty members petitioned the Overseers (the other governing board) for seats on the Corporation. The controversy dragged on for several years until the Governor of Massachusetts sided with the Corporation against the faculty. When a similar protest arose in the early nineteenth century, the Overseers voted that faculty members did not have a right to be members of the Corporation, and the question has not been revisited since. A. LAWRENCE LOWELL, *The Relation Between Faculties and Governing Boards*, in *AT WAR WITH ACADEMIC TRADITIONS IN AMERICA* 281, 283–85 (1934).

24. See HOFSTADTER & METZGER, *supra* note 13, at 134–51. At William & Mary, as at Harvard, there were struggles over governance by a lay board. In 1779, when Thomas Jefferson was governor of Virginia and, therefore, ex officio head of the Board of Visitors of William & Mary (the college's lay governing board), the Board voted to modernize the curriculum. As part of their reform, the Latin professor was dismissed. When he sued, the college hired the young John Marshall as its lawyer. Marshall won the case by arguing that, because the college was private, the Board was free to operate as it thought best as long as it complied with the college's charter—an argument that prefigured the position Marshall later adopted as Chief Justice in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). See *Bracken v. Visitors of William & Mary Coll.*, 7 Va. (3 Call) 573 (1790).

25. See Ass'n of Governing Bds. of Univs. & Colls. (AGB), *AGB Statement on Institutional Governance*, in *AGB STATEMENT ON INSTITUTIONAL GOVERNANCE AND GOVERNING IN THE PUBLIC TRUST: EXTERNAL INFLUENCES ON COLLEGES AND UNIVERSITIES* 1, 2 (2003) [hereinafter *AGB Statement*] ("[T]he presence of lay governing boards is what distinguishes American higher education from most of the rest of the world . . ."). In contrast, Oxford has kept a faculty-governance structure that has changed little in more than seven centuries. A twenty-six-member Council sets policy for the University on many matters, but final responsibility rests with Congregation, a body that includes some 4,000 members of the academic, senior research, library, museum, and administrative staffs. News: Next Steps for Oxford Governance, <http://www.admin.ox.ac.uk/po/051212.shtml> (last visited Jan. 4, 2008). A White Paper, published in May 2006, proposed significant changes that would have resulted in a governing structure similar to that of an American university. The proposals were strongly supported by the Vice-

Lay governing boards worked well enough when most colleges were small and sectarian. Faculty were hired simply to teach, and their teaching was limited to a narrow curriculum that used scripture and the classics to further religious ends.²⁶ Henry Adams summed up the experience of many when he complained that, during his years as a student at Harvard in the 1850s, the college “taught little, and that little ill.”²⁷

In the early years of the nation, most faculty members were limited to diffusing already accepted knowledge.²⁸ By the late-nineteenth century, however, with science taking the place of religious instruction in a growing number of colleges and universities, and faculty performing original research and developing scholarly expertise in a variety of disciplines,²⁹ faculty members

Chancellor, the chief executive officer of the university. According to the White Paper, the Council was to be reduced in size from twenty-six to fifteen members. The new board would have had seven internal and seven lay members and a lay chair. *Id.*

On November 28, 2006, a meeting of Congregation voted down the proposed change in governance, 730 to 456. The Vice-Chancellor elected to take the matter to all of Congregation in December by postal ballot. *Report of Proceedings in Congregation, 28 November 2006*, OXFORD U. GAZETTE, Dec. 7, 2006, available at www.ox.ac.uk/gazette/2006-7/supps/1_4791.htm. This time, more than 2,500 members of Congregation voted, and again the proposal was rejected when more than sixty percent of those who voted opposed the change. *Rejection on a Division of Amended Legislative Proposal Confirmed by Postal Vote*, OXFORD U. GAZETTE, Jan. 11, 2007, available at www.ox.ac.uk/gazette/2006-7/weekly/110107/acts.htm.

26. CAROLINE WINTERER, *THE CULTURE OF CLASSICISM: ANCIENT GREECE AND ROME IN AMERICAN INTELLECTUAL LIFE 1780–1910*, at 11–29 (2002). The disputes that arose typically involved the failure of a president or faculty member to adhere to the religious doctrine of the sponsoring denomination. Henry Dunster was doing a good job as president of Harvard, for example, when he was forced out in 1654 for opposing infant baptism. 1 SAMUEL ELIOT MORISON, *HARVARD COLLEGE IN THE SEVENTEENTH CENTURY 305–14* (1936).

27. HENRY ADAMS, *THE EDUCATION OF HENRY ADAMS* 51 (Ira B. Nadel ed., 1999) (1918). The problem was caused as much by bad pedagogy as by the curriculum as shown by the recollections of Andrew Dickson White, later the first president of Cornell, of his time as a student at Yale in the 1850s:

The worst feature of the junior year was the fact that through two terms, during five hours each week, “recitations” were heard by a tutor in “Olmsted’s Natural Philosophy.” The text-book was simply repeated by rote. Not one student in fifty took the least interest in it; and the man who could give the words of the text most glibly secured the best marks. One exceedingly unfortunate result of this kind of instruction was that it so disgusted the class with the whole subject, that the really excellent lectures of Professor Olmsted, illustrated by probably the best apparatus then possessed by any American university, were voted a bore. Almost as bad was the historical instruction given by Professor James Hadley. It consisted simply in hearing the student repeat from memory the dates from “Pütz’s Ancient History.” How a man so gifted as Hadley could have allowed any part of his work to be so worthless, it is hard to understand.

1 AUTOBIOGRAPHY OF ANDREW DICKSON WHITE 27–28 (1905).

28. *1915 Declaration*, *supra* note 12, at 866–67.

29. The German approach to higher education, particularly its commitment to research as well as teaching, significantly influenced the development of research universities in the United States, beginning with the founding of Johns Hopkins in 1876. Daniel Coit Gilman, discouraged by the criticism he received as the first president of the University of California, agreed to become the first president of Johns Hopkins when its governing board accepted his plan to establish an American university modeled on those in Germany. HUGH HAWKINS, *PIONEER: A HISTORY OF JOHNS HOPKINS UNIVERSITY, 1874–1889*, at 15, 21–22 (Johns Hopkins Paperbacks 2002) (1960). Gilman was one of the

began to clash with governing boards.³⁰ One of the most publicized conflicts arose at Stanford,³¹ but there were also major disputes at Wisconsin,³² Vanderbilt,³³ and the University of Pennsylvania,³⁴ among others.

B. THE PROFESSION EXPANDS AMERICAN ACADEMIC FREEDOM TO INCLUDE SHARED GOVERNANCE

1. The 1915 AAUP Declaration Defends Shared Governance

In 1915, largely in response to the many faculty-board conflicts, the American Association of University Professors (AAUP) was founded and that same

more than nine thousand Americans who studied at German universities in the nineteenth century as were nearly all of the fifty-three members of the Hopkins faculty in 1884. CARL DIEHL, *AMERICANS AND GERMAN SCHOLARSHIP 1770–1870*, at 1 (1978); CHARLES THWING, *THE AMERICAN AND GERMAN UNIVERSITY: ONE HUNDRED YEARS OF HISTORY* 43 (1928).

30. See CHRISTOPHER JENCKS & DAVID RIESMAN, *THE ACADEMIC REVOLUTION 15–20* (1968); LAWRENCE R. VEYSEY, *THE EMERGENCE OF THE AMERICAN UNIVERSITY* 384–418 (1965).

31. Edward Ross was already a prominent economist when he was recruited to the Stanford faculty in 1892. His public advocacy of free silver and opposition to the exploitation of foreign labor offended Mrs. Leland Stanford, the sole surviving trustee of the university that she and her late husband had founded in memory of their son, Leland, Jr. In 1897, she demanded that David Starr Jordan, then president of Stanford, fire Professor Ross. Jordan delayed for as long as he could, but ultimately he capitulated and, in 1900, forced Ross out. ORRIN LESLIE ELLIOTT, *STANFORD UNIVERSITY: THE FIRST TWENTY-FIVE YEARS* 326–78 (1937); MARY O. FURNER, *ADVOCACY AND OBJECTIVITY: A CRISIS IN THE PROFESSIONALIZATION OF AMERICAN SOCIAL SCIENCE, 1865–1905*, at 241–42 (1975). Donald Kennedy, a former president of Stanford, has challenged the accuracy of this history. He reports that what triggered Jane Stanford's ire was a speech by Ross opposing Asian immigration in which he said, "And should the worst come to the worst, it would be better for us if we were to turn our guns upon every vessel bringing Japanese to our shores than to permit them to land." The speech was made at a time when Stanford was making special efforts to include Japanese and Chinese students in its classes. DONALD KENNEDY, *ACADEMIC DUTY* 125 (1997).

32. Professor Richard Ely in 1894 was tried but ultimately acquitted by a committee of the Regents of the University of Wisconsin for advocating strikes and boycotts. The Regents affirmed their commitment to academic freedom in their final report and added: "Whatever may be the limitations which trammel inquiry elsewhere, we believe that the great state University of Wisconsin should ever encourage that continual sifting and winnowing by which alone truth can be found." Theodore Herfurth, *Sifting and Winnowing: A Chapter in the History of Academic Freedom at the University of Wisconsin*, in *ACADEMIC FREEDOM ON TRIAL: 100 YEARS OF SIFTING AND WINNOWING AT THE UNIVERSITY OF WISCONSIN-MADISON* 58, 59–67 (W. Lee Hansen ed., 1998).

33. The conflict at Vanderbilt was also one of the first American disputes over the teaching of evolution. In 1873, Central University of Nashville, Tennessee, was renamed in recognition of a large gift from Commodore Vanderbilt. The gift was conditioned on the university retaining an ecclesiastical system of control by the Methodist church, under which the local bishop served as ex officio president of the governing board. As part of his effort to increase the academic position of the school, Bishop McTyeire hired Alexander Winchell, a respected geologist and known evolutionist. After a number of religious journals accused Professor Winchell of attempting to destroy the truths of the Gospel, McTyeire dismissed Winchell in 1878. HOFSTADTER & METZGER, *supra* note 13, at 330–32.

34. Scott Nearing's contract as an assistant professor at the Wharton School of the University of Pennsylvania was not renewed in 1915. Although the trustees denied that they acted because of Nearing's support of legislation to limit child labor, faculty members were not persuaded. LIGHTNER WITMER, *THE NEARING CASE: THE LIMITATION ON ACADEMIC FREEDOM AT THE UNIVERSITY OF PENNSYLVANIA BY ACT OF THE BOARD OF TRUSTEES, JUNE 14, 1915*, at 1–14 (1915); see also *Report of the Committee of Inquiry on the Case of Professor Scott Nearing of the University of Pennsylvania*, 11 AAUP BULL. 3, 7–15 (1916).

year issued its Declaration of Principles on Academic Freedom and Academic Tenure (the Declaration).³⁵ Although the Declaration was not well-received outside the profession when it first appeared,³⁶ modern scholars consider it the seminal statement of American academic freedom.³⁷

Philosopher John Dewey, the first president of the Association, appointed leading scholars to a new Committee on Academic Freedom and Academic Tenure to draft the Declaration. The Committee, known as the Seligman Committee after its chair, Edwin Seligman, a Columbia professor of economics, included philosopher Arthur Lovejoy of Johns Hopkins and Roscoe Pound, then dean of the Harvard Law School.³⁸

The Seligman Committee had a clear vision of the purpose of higher education when it crafted the Declaration. It acknowledged that there is political freedom in a democracy, but warned of the risk that “an overwhelming and concentrated public opinion” could lead to “a tyranny of public opinion.”³⁹ A university must be a refuge from such tyranny, the Committee asserted, “an intellectual experiment station, where new ideas may germinate and where their fruit, though still distasteful to the community as a whole, may be allowed to ripen until finally . . . it may become a part of the accepted intellectual food of the nation or of the world.”⁴⁰ A university also should be “the conservator of all genuine elements of value in the past thought and life of mankind which are not in the fashion of the moment.”⁴¹ To resist public pressure to conform to views that are merely fashionable, a university needs academic freedom.

35. *1915 Declaration*, *supra* note 12. Faculty members were inspired to act in part by the spirit of Progressivism. The formation of the AAUP began with a call for a conference on establishing a national organization that was issued by eighteen full professors at Johns Hopkins and was sent to faculties of nine leading universities. Seven of them—Clark, Columbia, Cornell, Harvard, Princeton, Wisconsin, and Yale—sent delegates. HOFSTADTER & METZGER, *supra* note 13, at 474–77.

36. *See, e.g.*, Editorial, *The Professors' Union*, N.Y. TIMES, Jan. 21, 1916, at 8 (“‘Academic freedom,’ that is, the inalienable right of every college instructor to make a fool of himself and his college by . . . intemperate, sensational prattle about every subject under heaven, to his classes and to the public, and still keep on the payroll or be reft therefrom only by elaborate process, is cried to all the winds by the organized dons . . . It may be worth while to . . . remark that the ‘sciences’ about which the uplift professors are apt to be most cocksure are pseudo-sciences, mere opinions. A sociologist, for instance, cannot rightly speak with the certainty of a mathematician or a chemist . . .”). *See generally* Walter P. Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, LAW & CONTEMP. PROBS., Summer 1990, at 3, 16 (citing additional negative reviews).

37. *See, e.g.*, Byrne, *supra* note 10, at 276 (calling the Declaration “the single most important document relating to American academic freedom”); Robert Post, *The Structure of Academic Freedom*, in ACADEMIC FREEDOM AFTER SEPTEMBER 11, at 61, 64 (Beshara Doumani ed., 2006) (deeming the Declaration “[t]he first systematic and arguably the greatest articulation of the logic and structure of academic freedom in America”); Rabban, *supra* note 9, at 229 (referring to the Declaration as “the seminal professional definition”).

38. *1915 Declaration*, *supra* note 12, at 878. Lovejoy was one of seven faculty members who resigned from Stanford when his colleague, Edward Ross, was forced out. HOFSTADTER & METZGER, *supra* note 13, at 442; *see supra* note 31. Seligman wrote the first draft of the Declaration which was then extensively revised by Lovejoy. THOMAS L. HASKELL, OBJECTIVITY IS NOT NEUTRALITY 184 (1998).

39. *1915 Declaration*, *supra* note 12, at 870.

40. *Id.*

41. *Id.*

To build support for the ideal of academic freedom, particularly among governing board members, the Declaration explicitly connected the freedom to the universities of Germany, then widely considered to be the best in the world.⁴² The Declaration begins by explaining that academic freedom has traditionally had two applications—to the freedom of the teacher (*Lehrfreiheit*) and to that of the student (*Lernfreiheit*).⁴³ *Lehrfreiheit*, or “freedom in teaching,” was understood to protect faculty research as well as teaching.⁴⁴ All nineteenth-century German universities were governmental institutions, which meant all faculty members were government employees. By statute, however, academics were granted more freedom of expression than other public employees.⁴⁵

The German states, through their ministries of education, exercised a fair amount of control over their universities: they set the budgets, created new chairs, appointed professors, and established the general scope of instruction.⁴⁶ On the other hand, the faculties at the universities elected the rectors⁴⁷ and deans, appointed lecturers, and nominated scholars to be appointed to the faculty.⁴⁸ In some respects, the arrangement anticipated the shared governance by lay boards and the faculty that characterizes American colleges and universities today.

As much as Americans wanted to emulate the academic freedom of German universities, they were faced with a fundamental difference in governing structures: in Germany no lay boards were interposed between the government and

42. See VEYSEY, *supra* note 30, at 129–30.

43. *Lernfreiheit*, or student freedom, primarily protected the right of students to select which university to attend and which courses to take. FRIEDRICH PAULSEN, THE GERMAN UNIVERSITIES: THEIR CHARACTER AND HISTORICAL DEVELOPMENT 201 (photo. reprint 2007) (Edward Delavon Perry trans., 1895). The Declaration made clear that it would only discuss *Lehrfreiheit*. 1915 Declaration, *supra* note 12, at 861.

44. PAULSEN, *supra* note 43, at 170–71 (noting that *Lehrfreiheit* necessarily protects inquiry as well as teaching because university students want to hear “thoughts put forward as personal convictions by a man who has given thorough and earnest consideration to the great questions of the world and of life,” not “officially prescribed or permitted views”).

45. See Metzger, *supra* note 9, at 1269 (“In its native habitat, [*Lehrfreiheit*] referred to the statutory right of full and associate professors, who were salaried civil servants, to discharge their professional duties outside the chain of command that encompassed other government officials. It allowed them to decide on the content of their lectures and to publish the findings of their research without seeking prior ministerial or ecclesiastical approval or fearing state or church reproof; it protected the restiveness of academic intellect from the obedience norms of hierarchy.”).

46. ABRAHAM FLEXNER, UNIVERSITIES: AMERICAN, ENGLISH, GERMAN 316–18 (Transaction Publishers 1994) (1930); HOFSTADTER & METZGER, *supra* note 13, at 385–86. Humboldt asked the king to make the universities financially independent by giving them large grants of property. The official in charge of education within the Ministry of the Interior at the time persuaded the king to reject this proposal by pointing out that “however exalted the heads may be, the stomachs will always maintain their rights against them. . . . He who rules the latter will always be able to deal with the former.” RINGER, *supra* note 15, at 112.

47. The Rector, who was the head of the university, was chosen annually by, and from, the full professors. PAULSEN, *supra* note 43, at 94–95.

48. HOFSTADTER & METZGER, *supra* note 13, at 386; PAULSEN, *supra* note 43, at 93–100.

the powers of the faculty.⁴⁹ For this reason, the academic freedom that developed in Germany protected faculty only from government interference, and only for faculty actions inside the university.⁵⁰ Outside the university, German professors, like other civil servants, were expected to be circumspect and loyal to the government. Participation in politics was frowned upon as likely to spoil the habits of scholarship.⁵¹

The members of the Seligman Committee addressed the difference in governance by expanding the scope of academic freedom in the United States to protect faculty from interference by governing boards as well as from interference by government.⁵² They emphasized that this expanded conception of academic freedom did not prevent holding individual faculty members accountable for what they said and did.⁵³ The Declaration favors restraints that are “self-imposed” or enforced by the “opinion” of the profession, but acknowledges that there will be times when the “aberrations” of individual faculty members require disciplinary action.⁵⁴ “It is . . . not the absolute freedom of utterance of the individual scholar, but the absolute freedom of thought, of inquiry, of discussion and of teaching, of the academic profession, that is asserted by this declaration of principles.”⁵⁵

This crucial sentence makes clear that American academic freedom protects *both* individual members of the faculty and faculty in their institutional and disciplinary communities. Professor Walter Metzger has identified these overlapping functions as the “double lives” of faculty. All faculty members belong simultaneously to a “profession-across-the-disciplines” when they function as part of a deliberative faculty body in a particular institution with primary authority over such academic matters as curriculum and admissions, and to a

49. PAULSEN, *supra* note 43, at 93–97.

50. Faculty were protected from government intervention both individually and as a body. *Id.*

51. HOFSTADTER & METZGER, *supra* note 13, at 389.

52. *1915 Declaration*, *supra* note 12, at 863 (“Trustees . . . have no moral right to bind the reason or conscience of any professor. All claim to such right is waived by the appeal to the general public for contributions and for moral support in the maintenance, not of a propaganda, but of a non-partisan institution of learning. . . . [T]he public should be advised that [any institution that restricts the intellectual freedom of its professors] has no claim whatever to general support or regard.”).

One of the most quoted sections of the Declaration is its assertion that academic freedom has three parts: freedom of inquiry and research, freedom of teaching, and freedom of extramural utterance and action. *Id.* at 861. What has been overlooked, however, is that the Declaration qualifies this definition by saying that it is there defining *only* the freedom of the teacher, not all of academic freedom. *Id.*

53. Scholars’ conclusions must be “gained by a scholar’s method and held in a scholar’s spirit.” *Id.* at 871. A scholar’s conclusions also must be “the fruits of competent and patient and sincere inquiry,” and set forth with “dignity, courtesy, and temperateness of language.” *Id.*

The Declaration places even greater limits on the teaching freedom of faculty. Students are not to be indoctrinated; they are to be educated to think for themselves. *Id.* at 871. With immature students, the Declaration establishes even more stringent limits. Faculty must guard against “taking unfair advantage of the student’s immaturity by indoctrinating him with the teacher’s own opinions before the student has had an opportunity fairly to examine other opinions upon the matters in question.” *Id.* at 873.

54. *Id.* at 875.

55. *Id.*

“profession-in-a-discipline” that links them to scholars in the same discipline at their own and other institutions.⁵⁶

The Declaration’s recognition that the academic freedom of the profession trumps that of individual scholars provides a way to resolve many internal disputes in colleges and universities. Because it is the faculty *as a body* that is given primary responsibility over academic matters, when there is a conflict between an individual faculty member and her faculty over an institutional academic matter, the claim of the individual member of the faculty normally should yield.⁵⁷ Individual faculty members remain free to decide what problems they will research, and how they will report their findings, although the need to demonstrate their fitness for tenure to their faculty colleagues places some constraints on the scholarly freedom of untenured faculty. Once tenure is achieved, individual faculty members have extremely broad freedom as to their research, subject only to the risk of being dismissed if their peers agree after a full hearing that they have met one of the grounds for dismissal at their institution. Individual faculty members have somewhat less freedom with respect to their teaching, as the authority to decide such institutional academic matters as what courses will be taught and what grading standards are to be followed is vested in the faculty as a body.⁵⁸

Protecting faculty members from trustees is a more complex task than protecting them from government interference because boards and the administrators they appoint are *inside* the university. Mere adoption by a governing board of a policy of academic freedom might accomplish little, therefore, if the board were given sole power to decide what courses will be offered or who will teach them. The Seligman Committee’s solution was to give *faculties* primary responsibility for academic matters:

56. Metzger, *supra* note 9, at 1267; *see also* HASKELL, *supra* note 38, at 175 (noting that the scholarly disciplines are “communities of the competent” around which the modern university was formed, and further commenting that “[d]efending their authority is . . . what academic freedom is principally about”).

57. The Supreme Court has held that an academic decision made by the faculty as a body may be challenged, but only if the decision is “such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment.” *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 227 (1985).

Many courts, unfortunately, have not acknowledged the importance of the role of the faculty as a body when internal disputes are litigated. Some have held, for example, that it is the *administration* rather than the faculty as a body that has the authority to decide which courses are to be taught. *See, e.g.*, *Scallet v. Rosenblum*, 911 F. Supp. 999, 1017 n.18 (W.D. Va. 1996) (“[I]f school administrators believe, as they apparently do, that a required first-year class on business ethics is the most appropriate forum in which to teach issues of diversity, they are entitled to make that judgment . . .”), *aff’d*, 106 F.3d 391 (4th Cir. 1997). Other courts have held that the *institution* rather than the faculty as a body has the authority to set the grading curve. *See, e.g.*, *Lovelace v. Se. Mass. Univ.*, 793 F.2d 419, 426 (1st Cir. 1986) (“[M]atters such as course content, homework load, and grading policy are core university concerns . . .”).

58. *See supra* text accompanying notes 53–57.

A university is a great and indispensable organ of the higher life of a civilized community, in the work of which the trustees hold an essential and highly honorable place, but in which the faculties hold an independent place, with quite equal responsibilities—and in relation to purely scientific and educational questions, the primary responsibility.⁵⁹

The Declaration justifies this shared governance role for faculties and boards on the pragmatic ground that it is the best way for a university to promote “[g]enuine boldness and thoroughness of inquiry.”⁶⁰ If trustees have authority to decide what is taught and written, by contrast, whether it be the advantages of a protective tariff or the doctrines of socialism, the institution will be more an “instrument of propaganda” than a true university.⁶¹

Allocating primary responsibility for the governance of academic functions of a university to the faculty also reduces the risk that the research or teaching of individual faculty members will be shaped or restricted by “inexpert and possibly not wholly disinterested persons outside their ranks,” whether it be the lay board or the administration.⁶² It makes no more sense for the lay members of a governing board to supersede the authority of faculties over academic matters than for the lay board members of an opera company to take responsibility for casting the major roles, or for those of a hospital to hire the surgeons.

To bolster the argument for limiting the power of lay boards over academic matters, the Declaration quotes Charles Eliot, who had completed forty years as president of Harvard and was one of the most admired academic leaders of his generation:

“In the institutions of higher education the board of trustees is the body on whose discretion, good feeling, and experience the securing of academic

59. 1915 Declaration, *supra* note 12, at 866.

60. *Id.* at 862. The Seligman Committee did not invent shared government. There had been faculty participation in governance of academic matters at some colleges and universities in the United States for nearly a century before the committee was formed. Jerimiah Day, for example, who served as president of Yale from 1817 to 1846, adopted the practice of discussing and deciding all questions connected with college policy in meetings of the faculty. HOFSTADTER AND METZGER, *supra* note 13, at 235. In 1837, Reverend Jasper Adams, a professor at West Point, argued for a functional allocation of powers that would give the faculty the right to determine the course of study, the choice of textbooks, and the internal matters of instruction and administration. *Id.* at 237. The European tradition of faculty governance was another source of support for faculty governance of academic matters. As late as 1960, European professors who visited the United States evidenced surprise that “lay outsiders should presume to exercise power over educational affairs.” JOHN J. CORSON, GOVERNANCE OF COLLEGES AND UNIVERSITIES 46 (1960).

61. 1915 Declaration, *supra* note 12, at 862. Richard Chait conducted a survey on faculty governance that confirmed there is a link between tenure and shared governance: “Tenure was a reliable, but not infallible, indicator of greater faculty voice and slightly greater faculty interest in campus governance. . . . The absence of tenure suggested a comparatively vulnerable college where faculty have relatively limited authority or interest in shared governance.” Richard P. Chait, *Does Faculty Governance Differ at Colleges with Tenure and Colleges Without Tenure*, in THE QUESTIONS OF TENURE 69, 96 (Richard P. Chait ed., 2002).

62. 1915 Declaration, *supra* note 12, at 865.

freedom now depends. There are boards which leave nothing to be desired in these respects; but there are also numerous bodies that have everything to learn with regard to academic freedom. These barbarous boards exercise an arbitrary power of dismissal. They exclude from the teachings of the university unpopular or dangerous subjects. In some states they even treat professors' positions as common political spoils"⁶³

Even if a university ostensibly grants the faculties primary responsibility over academic matters, however, the faculties may find it difficult to stand up for academic values if individual faculty members remain mere at-will employees who can be summarily dismissed. The Declaration, therefore, recommends two procedural protections to support academic freedom and governance: (1) tenure and (2) the right to a pretermination hearing before academic peers.

Tenure is endorsed not as an end in itself, but for its instrumental value in attracting able people to become faculty members by providing some assurance of freedom in research and teaching, and compensating for the relatively low salaries offered.⁶⁴ Tenure also should strengthen the ability of faculties and individual faculty members to resist improper trustee pressure, just as the Constitution supports judicial independence by providing protection for federal judges during good behavior.⁶⁵

Thus, tenure is designed to support faculty members in their search for truth even when their research leads them to positions that are unpopular or unwelcome to the public or to their own governing boards.⁶⁶ Contrary to popular

63. *Id.* at 864 (quoting Charles William Eliot, President, Harvard Univ., Academic Freedom, An Address Delivered Before the New York Chapter of the Phi Beta Kappa Society at Cornell University (May 29, 1907)). Eliot's successor at Harvard, A. Lawrence Lowell, who worked as a corporate lawyer for seventeen years before joining the academy, wrote in even more detail about the appropriate relationship between the faculty and governing boards. See *LOWELL, supra* note 23, at 281. Lowell reasoned that corporate boards are not good role models for university boards because there are no private owners of a university for members of the governing board to represent. Universities are more like trusts, he concluded, than they are like for-profit corporations. *Id.* at 285. Lowell favored the same division of labor between board and faculty endorsed by Eliot and the Declaration, but opposed developing written rules to govern their relationship because he thought it ought to be based on trust. He compared the relationship to marriage and added, "If a husband and wife should attempt to define by regulations their respective rights and duties in the household, that marriage could safely be pronounced a failure." *Id.* at 290–91.

64. *1915 Declaration, supra* note 12, at 864–65.

65. See *id.* at 866 ("University teachers should be understood to be, with respect to the conclusions reached and expressed by them, no more subject to the control of the trustees, than are judges subject to control of the president, with respect to their decisions."); see also CLARK BYSE & LOUIS JOUGHIN, *TENURE IN AMERICAN HIGHER EDUCATION: PLANS, PRACTICES, AND THE LAW* 5 (1959) ("The government pays judges but it does not tell them how to decide. An independent . . . university is as essential to the community as an independent judiciary." (quoting ZECHARIAH CHAFEE, JR., *THE BLESSINGS OF LIBERTY* 241 (1956))).

66. The Declaration catalogues the various external pressures that have threatened academic freedom in America from the early period, when the "chief menace . . . was ecclesiastical, and the disciplines chiefly affected were philosophy and the natural sciences" to "more recent times [when] the danger zone has been shifted to the political and social sciences." *1915 Declaration, supra* note 12, at 868. In private colleges and universities, according to the Declaration, the primary risk is to opinions

understanding, tenure never was intended to provide lifetime job security; the Declaration explicitly provides that tenure may be terminated in appropriate circumstances, although termination must be for legitimate reasons that are formulated in advance with “reasonable definiteness” by each institution.⁶⁷

Even tenure may not provide sufficient protection for academic freedom, however, if the governing board has sole authority to decide whether particular expressions by individual faculty members are protected by academic freedom. The Declaration, therefore, follows the Kantian precept that “only scholars can pass judgment on scholars as such,” and endorses a second procedural protection: faculty members, whether tenured or not, may not be disciplined or dismissed for their ideas without a hearing before the faculty—or a duly constituted committee of the faculty.⁶⁸

In disputes that do not call for academic judgments, such as cases involving “habitual neglect of assigned duties,” the Declaration acknowledges that lay boards are qualified to decide whether there is cause for discipline or dismissal.⁶⁹ When, however, dismissal or other disciplinary action is sought for ideas that may be merely unpopular rather than evidence of scholarly incapacity, only other scholars have the expert knowledge and experience to decide whether dismissal is justified. As Professor Joan Scott has explained, “Academic freedom protects those whose thinking challenges orthodoxy; at the same time the legitimacy of the challenge—the proof that the critic is not a madman or a crank—is secured by membership in a disciplinary community based upon shared commitments to certain methods, standards, and beliefs.”⁷⁰

The Declaration thus adopts peer review backed up by disciplinary norms in lieu of authorizing lay governing boards to evaluate the scholarship of faculty.⁷¹ Of course, peer review does not always work well. It can be undermined by

that question economic conditions or commercial practices because the governing body includes trustees who are personally interested in “great private enterprises.” *Id.* at 869. In public institutions, which are dependent on legislatures for funding, the primary risk is to opinions that are deemed “ultra-conservative” rather than “ultra-radical.” *Id.* at 870.

67. *Id.* at 877.

68. “[Disciplinary] action can not with safety be taken by bodies not composed of members of the academic profession. . . . [I]n matters of opinion, and of the utterance of opinion, [lay governing] boards cannot intervene without destroying . . . the essential nature of a university—without converting it from a place dedicated to openness of mind . . . into a place barred against the access of new light, and precommitted to the opinions or prejudices of men who have not been set apart or expressly trained for the scholar’s duties.” *Id.* at 875.

69. *Id.*

70. Joan W. Scott, *Academic Freedom as an Ethical Practice*, in *THE FUTURE OF ACADEMIC FREEDOM* 163, 166 (Louis Menand ed., 1996).

71. Professor Robert Post has identified a paradox that results from the Declaration’s reliance on professional standards: “academic freedom [is] simultaneously limited by and independent of professional norms.” Post, *supra* note 37, at 75–78. Professors do not have academic freedom to violate professional norms at will, yet professional norms ought to be subject to criticism and disagreement. Post argues that the problem is somewhat mitigated by the fact that controversy is built into “the everyday practice of scholarship,” although he cautions that the ideal of academic freedom will be sustained only if peer reviewers use professional norms wisely. *Id.* at 76.

inadequate disciplinary standards or such standards may be applied improperly by faculty peers.⁷² The effectiveness of the Declaration's reliance on peer review, in other words, depends on the willingness of faculty to assume responsibility for judging the scholarly work of other faculty, and doing so fairly. The Declaration somewhat ominously warns that unless the academic profession is willing "to purge its ranks of the incompetent and the unworthy," then others will assume that task.⁷³

In evaluating the work of other scholars, faculty are expected to judge on the basis of the quality of the research methodology employed and the arguments presented rather than whether they agree with the conclusions reached. That is, both a scholar's work and peer evaluations of it are supposed to be objective or "disinterested," to use the terminology of the Declaration.⁷⁴

72. The Declaration warns faculty that they must avoid letting academic freedom be used "as a shelter for inefficiency, for superficiality, or for uncritical and intemperate partisanship." *1915 Declaration*, *supra* note 12, at 872.

73. *Id.* In Professor Haskell's memorable phrase: "Unchecked, the republic of letters becomes a republic of pals." HASKELL, *supra* note 38, at 215.

74. *1915 Declaration*, *supra* note 12, at 865 (stating that a university teacher should not hold or express "any conclusion which is not the genuine and uncolored product of his own study or that of fellow-specialists," and that scholars' utterances, in particular, should not be shaped by the judgment of "inexpert and possibly not wholly disinterested persons outside of their ranks").

Northrop Frye provided one of the best descriptions of how a scholar should produce disinterested scholarship:

One starts out with a tentative goal in mind, but on the way to it one must consider evidence impartially and draw only the strictly rational conclusions from that evidence. Cooking or manipulating the evidence to make it fit a preconceived idea works against detachment. . . .

. . . [E]very discipline must be as scientific as its subject matter will allow it to be, or abandon all claim to be taken seriously

Northrop Frye, *The Knowledge of Good and Evil*, in *THE MORALITY OF SCHOLARSHIP* 3, 3–4 (Max Black ed., 1967).

Professor J. Peter Byrne has expanded on Frye's statement by noting that a disinterested scholar "may be driven to conclusions by her respect for methodology and evidence that contradict her own preconceptions and cherished assumptions." Byrne, *supra* note 10, at 259; *see also* STEVEN M. CAHN, *SAINTS AND SCAMPS: ETHICS AND ACADEMIA* 52 (1994) ("Reliable evaluators do not indulge in captious criticism or inordinate praise. They refuse to glorify mediocrity but recognize that what is imperfect may nevertheless be meritorious. They focus on the work to be judged and not on irrelevant factors such as the author's . . . political persuasion. In addition, they acknowledge their own intellectual predilections, admitting that not all their judgments would be shared by other reputable authorities. . . . Even a conceptual or methodological schism within a discipline should not prevent a reliable evaluator from reaching a negative judgment about the work of an ally or a positive judgment about the work of an opponent."); HASKELL, *supra* note 38, at 149 ("Although [detachment] is an ideal and holds out a standard higher than any of us routinely achieve, acceptable performance under its regulative influence does not require superhuman effort. It is that frail and limited but perfectly real power that . . . permits conscientious scholars to referee one another's work fairly, to acknowledge merit even in the writings of one's critics, and successfully to bend over backwards when grading students so as not to penalize those holding antagonistic political convictions.").

2. The 1940 Statement Codifies the 1915 Declaration

In 1940, a briefer version of the 1915 Declaration was adopted.⁷⁵ It had been negotiated between the AAUP and the Association of American Colleges (AAC), an organization of presidents of undergraduate institutions.⁷⁶ The 1940 Statement contains the same core principles as the Declaration: academic freedom is endorsed along with its handmaiden—tenure—and faculty are to be given a due process hearing before peers whenever a university seeks to dismiss or otherwise discipline them over protected speech.⁷⁷ The Statement adds a pragmatic qualification to the hearing protection, however, by adding the phrase “if possible.”⁷⁸

The 1940 Statement, unlike the 1915 Declaration, was soon adopted widely, aided no doubt by the fact that it had been written with, and endorsed by, academic administrators as well as faculty members.⁷⁹ By 2006, more than 200 learned societies and higher education associations had formally endorsed the 1940 Statement and its 1970 Interpretive Comments.⁸⁰ The Statement also has been adopted by most colleges and universities in the United States, and it is widely incorporated or referenced in faculty contracts.⁸¹

The most important difference between the Declaration and the Statement for these purposes is that the Statement does not discuss the governance role of faculty. The Statement does describe faculty as “educational officers”⁸² rather than as “employees,” however, thus at least implicitly acknowledging that faculty have a role in governance of academic matters.

3. The 1966 Statement on Government

The task of elucidating shared governance was taken up in the 1966 Statement on Government of Colleges and Universities (Statement on Government), which was jointly formulated by the AAUP, the American Council of Educa-

75. AM. ASS'N OF UNIV. PROFESSORS, *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, in AAUP POLICY DOCUMENTS & REPORTS 3–11 (10th ed. 2006) [hereinafter *1940 Statement*].

76. Today the AAC is known as the Association of American Colleges and Universities (AACU).

77. *1940 Statement*, *supra* note 75, at 3–4.

78. *Id.* at 4.

79. See Metzger, *supra* note 36, at 12–77.

80. *1940 Statement*, *supra* note 75, at 7–11.

81. See, e.g., *Vega v. Miller*, 273 F.3d 460, 476 (2d Cir. 2001) (Cabranes, J., dissenting) (“The AAUP’s 1940 Statement of Principles on Academic Freedom and Tenure has been relied upon as persuasive authority by courts to shed light on, and to resolve, a wide range of cases related to academic freedom and tenure.”); *Jimenez v. Almodovar*, 650 F.2d 363, 368 (1st Cir. 1981) (“American court decisions [on tenure] are consistent with the 1940 Statement of Principles on Academic Freedom and Tenure widely adopted by institutions of higher education and professional organizations of faculty members.”); *Browzin v. Catholic Univ. of Am.*, 527 F.2d 843, 848 & n.8 (D.C. Cir. 1975) (“[The 1940 Statement] represent[s] widely shared norms within the academic community, having achieved acceptance by organizations which represent teachers as well as organizations which represent administrators and governing boards.”).

82. *1940 Statement*, *supra* note 75, at 3.

tion, and the Association of Governing Boards of Universities and Colleges (AGB).⁸³ The Statement on Government begins by emphasizing the need for “appropriately shared responsibility and cooperative action” by boards, faculties, and administrators if they are to cope with “the variety and complexity of the tasks performed” by modern colleges and universities.⁸⁴ The need for a unified institutional position is more important than ever, the Statement explains, because legislative and governmental authorities at all levels are playing an increasing part in shaping academic policy. It also advises governing boards to “undertake appropriate self-limitation” by “entrust[ing] the conduct of administration to the administrative officers [and] teaching and research to the faculty.”⁸⁵

The Statement on Government, like the 1915 Declaration, justifies giving faculties primary responsibility for academic matters on the basis of their expertise.⁸⁶ It also includes an illustrative list of matters that are “academic” and, therefore, should be overseen primarily by the faculty: “curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life that relate to the educational process.”⁸⁷

The Statement explains that giving the faculty primary responsibility means that the president and the board should overrule faculty decisions about academic matters “only in exceptional circumstances, and for reasons communicated to the faculty.”⁸⁸ Budgets and personnel limitations are identified as the types of factors that may justify a board in rejecting faculty advice. Faculty participation in the governance of academic matters should be arranged at all relevant levels including departments and schools as well as through a faculty-elected Senate. Participation may take a variety of forms, moreover, including standing committees, joint ad hoc committees, and membership of faculty members on administrative bodies.⁸⁹

To improve the academic quality of faculty, the Statement in effect adopts a one-way ratchet: an affirmative vote on tenure by the faculty of a department or

83. Am. Ass’n of Univ. Professors, *1966 Statement on Government of Colleges and Universities*, in AAUP POLICY DOCUMENTS & REPORTS 135–40 (10th ed. 2006) [hereinafter *Statement on Government*]. The Association of Governing Boards of Universities and Colleges issued a separate statement on institutional governance in 1988 that is more critical of shared governance. See *AGB Statement*, *supra* note 25, at 3.

84. *Statement on Government*, *supra* note 83, at 135–36.

85. *Id.* at 138.

86. *Id.* The Statement on Government lists examples of the kinds of matters that are a mix of academic and business judgments, and thus should involve the participation of the board, administration, and faculty. Such matters include “major changes in the size or composition of the student body and the relative emphasis to be given to the various elements of the education and research program.” *Id.* at 136.

87. *Id.* at 139. Faculty also should establish “the requirements for the degrees offered in the course, determine[] when the requirements have been met, and authorize[] the president and board to grant the degrees thus achieved.” *Id.*

88. *Id.*

89. *Id.*

a campus-wide faculty committee is necessary, but it is not sufficient.⁹⁰ The administration (or governing board) may turn down a candidate approved by the relevant faculty for compelling reasons, but only in rare instances, and their reasons should be stated in detail.⁹¹ The administration (or governing board) should not deny tenure merely because they disagree with a candidate's ideas, nor grant tenure to a candidate who has not been duly approved by the faculty.

4. The Challenge of Shared Governance

Not all colleges and universities in the United States have adopted shared governance.⁹² It has been criticized in some quarters as cumbersome because “timely decisions are difficult to make, and small factions often are able to impede the decision-making process.”⁹³ A 1996 report opposed to shared governance warned that “[i]nstitutions ignore a changing environment at their peril,” and added that “[l]ike dinosaurs, [universities] risk becoming exhibits in a kind of cultural Jurassic Park: places of great interest and curiosity, increasingly irrelevant in a world that has passed them by.”⁹⁴ Most of these criticisms fail to distinguish between governance of academic and of nonacademic matters. They also assume that speed is a virtue. When it comes to academic matters, however, it may not be. As Harvard University President Drew Gilpin Faust has explained, “A university is not about results in the next quarter It is about learning that molds a lifetime, learning that transmits the heritage of millennia; learning that shapes the future.”⁹⁵ Moreover, shared governance does not mean that everyone or even every component of a college or university must agree. Even within a faculty, after appropriate deliberation, votes can be taken to decide a matter opposed by only a small faction. Shared governance also supports making use of the skills of different parts of a college or university for the greater good. Faculty who trust the administration are likely to delegate a great many tasks to them. Conversely, successful department chairs, deans, and presidents typically are able to work with the faculty to build consensus by using committees to incubate new approaches and by consulting widely before submitting matters for formal faculty votes.

90. *See id.* (“Determinations in these matters should *first* be made by faculty action through established procedures” (emphasis added)).

91. *Id.*

92. *See infra* notes 215–233 and accompanying text (discussing the *Yeshiva* standard and institutions that do not meet that standard).

93. *AGB Statement*, *supra* note 25, at 3.

94. Robert Birnbaum, *The End of Shared Governance: Looking Ahead or Looking Back*, in *RESTRUCTURING SHARED GOVERNANCE IN HIGHER EDUCATION* 5, 6–7 (William G. Tierney & Vicente M. Lechuga eds., 2004) (quoting *KELLOGG COMMISSION ON THE FUTURE OF STATE AND LAND-GRANT COLLEGES* 1 (1996)).

95. Drew Gilpin Faust, *Installation Address: Unleashing Our Most Ambitious Imaginings*, *HARV. MAG.*, Nov.–Dec. 2007, at 62, available at http://www.president.harvard.edu/speeches/faust/071012_installation.html; *see also* Birnbaum, *supra* note 94, at 7 (“The greatest danger to higher education may not be that decisions are made too slowly because of the drag of consultation, but that they are made too swiftly and without regard for institutional core values.”).

Other critics of shared governance have argued that university governance should be more corporate in style.⁹⁶ A more hierarchical approach to academic matters, however, could undermine the ability of the institutions to perform their core functions of teaching and research.⁹⁷ As Derek Bok has noted, “No one ever raised the level of scholarship by ordering professors to write better books, nor has the quality of teaching ever improved by telling instructors to give more interesting classes. In these domains, good work depends on the talent and enthusiasm of professors.”⁹⁸ Giving faculties primary responsibility for core academic matters is a proven way to strengthen their commitment to

96. See, e.g., James J. Duderstadt, *Fire, Ready, Aim! University Decision-Making During an Era of Rapid Change*, in *GOVERNANCE IN HIGHER EDUCATION: THE UNIVERSITY IN A STATE OF FLUX* 26, 27 (Werner Z. Hirsch & Luc E. Weber eds., 2001) (“The faculty traditions of debate and consensus building, along with the highly compartmentalized organization of academic departments and disciplines, seem incompatible with the breadth and rapid pace required in today’s high momentum university-wide decision environment.”).

97. Professor D.G. Fraser of Worcester College made a similar point during the 2006 faculty debate at Oxford:

How ironic that today’s leading businesses are moving in the opposite direction from the failed 1970s policies [embodied in the proposed change in governance]. Dynamic knowledge-based businesses are moving away from large, centrally administered monoliths, towards small, self-organising entrepreneurial cells, flexibly connected and practically self determining . . . just like Oxford colleges. . . . Look at . . . the Howard Hughes Medical Institute. They have just set up a . . . campus to look at Neuroscience . . . and the management structure? Small groups, collegiality, minimal management, trust in the past excellence of the people they employ.

The debate ended with the faculty voting to reject an American-style lay governance board. *Report of Proceedings in Congregation, 14 November 2006*, OXFORD U. GAZETTE, Nov. 22, 2006, available at http://www.ox.ac.uk/gazette/2006-7/supps/1_4788.htm; see also Burton R. Clark, *Faculty Organization and Authority*, in *ACADEMIC GOVERNANCE: RESEARCH ON INSTITUTIONAL POLITICS AND DECISION MAKING* 236, 240 (J. Victor Baldrige ed., 1971) (“As work becomes professionalized . . . the organization of work must create room for expert judgment, and autonomy of decision-making and practice become a hallmark of the advanced profession.”). Clark contends that faculty need more autonomy than other professional groups:

Professionals who largely give advice or follow the guidelines of a received body of knowledge require extensive but not great autonomy for the individual and the group. They need sufficient leeway to give an honest expert opinion or to apply the canons of judgment of their field. Those requiring great autonomy are those who wish to crawl along the frontiers of knowledge . . . searching for the new—the new scientific finding, the new reinterpretation of history, the new criticism in literature or art. Academic man is a special kind of professional man, a type characterized by a particularly high need for autonomy. To be innovative, to be critical of established ways, these are the commitments of the academy and the impulses of scientific and scholarly roles that press for unusual autonomy.

Id. at 240–41. See generally WILLIAM G. TIERNEY, *THE IMPACT OF CULTURE ON ORGANIZATIONAL DECISION MAKING: THEORY AND PRACTICE IN HIGHER EDUCATION* 133–75 (2008).

98. Derek Bok, 2006–2007 Annual Report to the Harvard Corporation, available at <http://harvardmagazine.com/breaking-news/president-boks-annual-report> (last visited Jan. 17, 2009); cf. Joan Scott, *The Critical State of Shared Governance*, 88 *ACADEME* 41, 43 (2002) (“[E]ducational institutions have ways of dealing with conflict that are . . . different from those of businesses. There’s more give and take, more discussion, more commitment to the exchange of ideas, and more respect for differences. Deliberation rather than speed characterizes this process.”). Bok, who served as president of Harvard from 1979 to 1991, returned to serve as interim president from 2006 to 2007.

the production and dissemination of knowledge.

On nonacademic matters, by contrast, from fundraising to management of the endowment or the physical plant, corporate-style organization is both appropriate and consistent with shared governance. A more hierarchical approach also can expedite decisionmaking on time-sensitive, nonacademic matters. It is common for governing boards, for example, to establish executive committees or expedited procedures designed to handle matters that need immediate resolution between board meetings. Colleges and universities in recent years also have developed procedures to ensure business continuity and safety on campus when there is an emergency.

By the second-half of the twentieth century, the value of academic freedom, including shared governance, had been recognized by most major colleges and universities, public and private.⁹⁹ The unresolved legal issue was whether

George Keller argues that faculty participation in governance works best at particular levels of governance:

At the department level, professorial governance can and should be highly democratic, with little administrative interference unless the faculty in the department drift from the institution's policies or fall into disarray or decline. . . . Shared governance often works best, especially at large universities, at the level of a specialized school or college: . . . medicine, communications, business, and the like. The unit is small enough, the academic purposes are more focused, and the deans are not responsible for such a wide spectrum of chores as presidents. At the all-college or whole university level, shared governance increasingly is a failure, although it can work quite effectively at smaller institutions if there is a mutual understanding, mutual respect, and generosity of spirit. Yet large faculty senates are frequently quarrel pits . . . and platforms for harangues . . . And the pace is often snail-like.

George Keller, *A Growing Quaintness: Traditional Governance in the Markedly New Realm of U.S. Higher Education*, in *COMPETING CONCEPTIONS OF ACADEMIC GOVERNANCE: NEGOTIATING THE PERFECT STORM* 158, 172 (William G. Tierney ed., 2004).

To avoid the problems seen in some faculty senates, Keller recommends having faculty participate through special task forces that focus on a particular problem or issue and then dissolve. He notes that many professors:

[A]re superb analysts, first-rate thinkers, and exceptionally knowledgeable persons, so when their attention is captured for a special purpose and for a limited period, and they are given adequate and detailed information about the topic and reasons for a decision on the topic, their counsel and suggestions can be invaluable.

Id. at 173.

99. The 2001 Survey of Higher Education Governance is one of the few research studies to look in-depth at the subject. It surveyed 1321 four-year institutions. Gabriel E. Kaplan, *How Academic Ships Actually Navigate*, in *GOVERNING ACADEMIA* 165, 172 (Ronald G. Ehrenberg ed., 2004). Those surveyed reported that 89.9% of the faculties had determinative or joint authority with the administration on content of the curriculum; on faculty appointments, it was 69.9% of the faculties; on tenure, it was 66.1%. *Id.* at 184. The survey also found that faculty participation in governance of academic matters increased over time. In 1970, faculties determined the content of curriculum at 45.6% of the institutions, and they shared authority with the administration at another 36.4%. By 2001, faculties determined curriculum content at 62.8% of the institutions, and they shared authority at 30.4%. In 1970, faculties determined the appointments of full-time faculty in 4.5% of the institutions, and they shared authority at 26.4%. By 2001, faculties determined appointments of full-time faculty in 14.5% and shared authority in 58.2% of the institutions. *Id.* at 202.

Faculty participation in governance varies significantly by type of institution. "In for-profits the faculty are quite clearly employees, few faculty are involved in creating curriculum, and decision

academic freedom at public colleges and universities would remain a professional right only, protected primarily by contract law—as at private institutions—or would be granted constitutional protection.

II. THE CONSTITUTIONAL STANDARD OF ACADEMIC FREEDOM

The academic freedom decisions of the Supreme Court naturally fall into two distinct periods. In the early period, which began in 1952, the Court protected the academic freedom of faculty from intrusions by state legislatures. The early opinions also acknowledged the important contributions made by higher education both in educating citizens and in serving as incubators for new knowledge. In 1968, however, in *Pickering v. Board of Education*,¹⁰⁰ the Court began to provide constitutional protection for the speech of government employees generally.¹⁰¹ Applying the new standard to faculty at public colleges and universities, however, soon diluted constitutional protection of their academic freedom.

After 1968, most Court cases involved internal rather than external challenges to academic freedom. The Court expanded the scope of constitutional academic freedom, moreover, to apply to such governance matters as the freedom to decide who shall teach and who shall be admitted. Increasingly, however, it described these freedoms as belonging to the institution rather than to the faculty as a body. Making academic freedom an institutional right does not alter outcomes if the faculty and institution are aligned in opposition to an external challenge. When there is a dispute between an individual faculty member and the administration or lay governing board of an institution, however, the Court's rhetorical assignment of the right to the institution could undermine the academic freedom of all faculty. The problem of deciding how much judicial deference should be given to academic decisions made by institutions is compounded by the Court's failure to discuss the governance role of faculties.

A. EARLY COURT DECISIONS ADDRESS EXTERNAL THREATS

Academic freedom was not mentioned in any American judicial decision until 1940, a quarter century after the AAUP Declaration was issued.¹⁰² The delay was consistent with the widespread skepticism that initially greeted the

making of all sorts is firmly in the hands of managers." Brian Pusser & Sarah E. Turner, *Nonprofit and For-Profit Governance in Higher Education*, in *GOVERNING ACADEMIA* 235, 251 (Ronald G. Ehrenberg ed., 2004).

100. 391 U.S. 563 (1968).

101. *Id.* at 574.

102. *See Kay v. Bd. of Higher Educ. of N.Y.*, 18 N.Y.S.2d 821 (Sup. Ct.), *aff'd*, 20 N.Y.S.2d 1016 (App. Div.), *app. denied*, 29 N.E.2d 657 (N.Y. 1940). This first judicial mention of "academic freedom" occurred in a case with unfortunate parallels to the trial of Socrates for corrupting the youth of Athens. The trial court in *Kay* overturned the decision of City College to hire philosopher Bertrand Russell. The court based its decision on books published by Russell that supported the idea of "temporary childless

Declaration.¹⁰³ More than another decade passed, moreover, before the Supreme Court addressed the concept. The first academic freedom cases heard by the Court did not involve the intrusions by “barbarous boards” feared by Charles Eliot and the drafters of the 1915 Declaration; instead, the early cases involved external threats posed by state government actions. Of the four most important cases from this period, three involved state legislation intended to bar the public employment of subversives; a fourth grew out of a state investigation into alleged subversive activities, including a class taught at a state university. Justice Frankfurter, a tenured professor of law at Harvard before his appointment to the Court, had the most to say about academic freedom in these early cases,¹⁰⁴ although it was Justice Douglas, formerly a tenured professor of law at Yale, who first used the term “academic freedom” in his dissenting opinion in

marriages” by university students, and it held that his appointment would undermine “the morals of students.” *Id.* at 827, 831.

103. *See supra* note 36 and accompanying text.

104. Frankfurter was involved in several challenges to academic freedom at Harvard. In May 1921, Austen Fox, a member of the Board of Overseers, submitted a statement complaining about an article that Professor Zachariah Chafee, Jr. had published in the *Harvard Law Review* that was critical of the conviction of Jacob Abrams and several codefendants. That conviction was for distributing leaflets, which urged munitions workers to stop producing war material that could be used against revolutionary forces in Russia, and for endorsing a petition for pardon submitted to the President of the United States. ARTHUR E. SUTHERLAND, *THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN 1817–1967*, at 252–55 (1967). Fox’s complaint, together with a petition for pardoning Chafee signed by Dean Pound, Frankfurter, and other faculty was referred to the Visiting Committee of the Law School, which held what became known as “the Trial at the Harvard Club.” *Id.* at 255. In the end the committee found no impropriety in Chafee’s signing the petition for the pardon of Abrams and that any erroneous statements in the article were minor and could be corrected in a future issue of the law review. No further action was recommended or taken. *Id.*

In 1927, Professor Frankfurter published an article in the *Atlantic Monthly* criticizing as unjust the trial of Nicola Sacco and Bartolomeo Vanzetti, who were convicted for murdering a shoefactory paymaster and his guard. Dean Wigmore of Northwestern Law School published an article disagreeing with Frankfurter. The governor appointed a committee of three that included President Lowell of Harvard, the president of MIT, and a retired judge to advise him on clemency in the case. The committee reported that Sacco and Vanzetti had been properly convicted. The governor denied clemency, and they were executed. Despite his disagreement with Frankfurter about the fairness of the trial, Lowell resisted calls from alumni to dismiss Frankfurter, explaining that in his judgment only moral turpitude would justify dismissing a professor. *Id.* at 261–62.

In 1934, two popular economics instructors active in left-wing politics were given terminal appointments rather than appointments with the possibility of tenure. Eight senior professors, including Frankfurter, were asked by Harvard President James Conant to look into the matter. The Committee of Eight concluded that no political bias had been involved in the appointment decisions, but that the two instructors had been denied a fair review. They recommended that the university give them appointments with the possibility of tenure. Conant refused to follow the recommendations of the Committee. He did ask the Committee, however, to review promotion procedures generally. He was concerned that without a limit on the length of nontenured appointments, mediocre faculty would be kept on. The Committee recommended the process that still prevails at Harvard: nontenured faculty stay a maximum of eight years. Then it is up or out, based first on a formal review and vote by their department. Affirmative departmental recommendations are reviewed by an ad hoc committee of outside scholars, and the final decision is made by the president and governing board. MORTON KELLER & PHYLLIS KELLER, *MAKING HARVARD MODERN: THE RISE OF AMERICA’S UNIVERSITY* 66–68 (2001).

Adler v. Board of Education.¹⁰⁵

In *Adler*, the Court rejected a challenge brought by teachers to the Feinberg law, a New York statute that authorized the state to refuse to hire any applicant, or to fire any public employee, who supported using violence to alter the form of government in the United States. The law also made membership in any listed subversive group prima facie evidence that the person was in violation of the law. Justice Douglas, in a dissent joined by Justice Black, concluded that the law should have been held unconstitutional.¹⁰⁶ School is a “cradle of our democracy,” he argued, one that should foster “bold and adventuresome” thinking.¹⁰⁷ Justice Douglas emphasized the importance of education in the production of new discoveries and warned that, without academic freedom, “[s]upineness and dogmatism take the place of inquiry.”¹⁰⁸ He was particularly concerned about the threat that the law posed to teachers:

What happens under this law is typical of what happens in a police state. Teachers are under constant surveillance; their pasts are combed for signs of disloyalty; their utterances are watched for clues to dangerous thoughts. A pall is cast over the classrooms. There can be no real academic freedom in that environment.¹⁰⁹

The same Term, in *Wieman v. Updegraff*,¹¹⁰ the Court held unconstitutional an Oklahoma statute that required all state employees, including faculty members at public colleges and universities, to take a loyalty oath.¹¹¹ Justice Frankfurter concurred in the Court’s decision and, joined by Justice Douglas, emphasized the close ties between education and democracy.¹¹² Justice Frankfurter, like Justice Douglas in *Adler*, highlighted the importance of academic freedom to the successful functioning of a university.¹¹³

105. 342 U.S. 485, 509, 510, 511 (1952) (Douglas, J., dissenting).

106. *Id.* at 508. Justice Frankfurter dissented as well, but on jurisdictional grounds. *Id.* at 497–98 (Frankfurter, J., dissenting).

107. *Id.* at 508, 511 (Douglas, J., dissenting).

108. *Id.* at 510.

109. *Id.*

110. 344 U.S. 183 (1952).

111. *Id.* at 191.

112. *Id.* at 196 (Frankfurter, J., concurring) (observing that public opinion can be “disciplined and responsible” only if “habits of open-mindedness and of critical inquiry” are acquired in a citizen’s formative years). Justice Frankfurter added that it was not hyperbole to regard teachers from primary grades to the university as the “priests of our democracy.” *Id.*

In contrast, Chief Justice Roberts, writing for the Court in *Parents Involved in Community Schools v. Seattle School District No. 1*, drew a firm line between higher education and elementary and secondary schools: “In upholding the admissions plan in *Grutter* . . . this Court relied upon considerations unique to institutions of higher education, noting that in light of ‘the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.’” 127 S. Ct. 2738, 2754 (2007) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003)). He declined to extend the *Grutter* holding to elementary and secondary schools. *Id.*

113. *Wieman*, 344 U.S. at 196 (noting that faculty need “conditions for the practice of a responsible and critical mind” if they are to “fulfill their function by precept and practice”).

To further illuminate the mission of universities, Justice Frankfurter quoted congressional testimony given by Robert Hutchins, the former president of the University of Chicago, that a university should be “a center of independent thought and criticism.”¹¹⁴ Hutchins saw higher education as “a kind of continuing dialogue,” and added that “a dialogue assumes, in the nature of the case, different points of view.”¹¹⁵

Hutchins’s words recall the 1915 Declaration’s description of a university as “an intellectual experiment station, where new ideas may germinate.”¹¹⁶ By quoting Hutchins, Justice Frankfurter emphasized both how the academic workplace differs from other public workplaces, and the value of that difference to the nation. We might not want the state bureau of motor vehicles to be a hotbed of independent thought, but colleges and universities need to be if they are to produce new knowledge for the benefit of students and the nation.

In 1957, a mere three years after the decision in *Brown v. Board of Education*,¹¹⁷ a majority of the Justices, in *Sweezy v. New Hampshire*,¹¹⁸ for the first time affirmed the importance of academic freedom.¹¹⁹ They could not agree, however, on a constitutional basis for deciding the case. Sweezy, who was co-editor of a progressive economics journal, had been a guest lecturer in a humanities course at the University of New Hampshire. When he was investigated for possible subversive activities by the New Hampshire Attorney General, Sweezy denied ever belonging to the Communist Party but, invoking his constitutional rights, refused to answer questions about what he had said to students in class.¹²⁰ When Sweezy was held in contempt of court for his refusal to answer, he appealed.¹²¹

The Court overturned his contempt conviction.¹²² Chief Justice Warren,

114. *Id.* at 197 (quoting *Hearing Before the House Select Comm. To Investigate Tax-Exempt Foundations and Comparable Organizations*, 82d Cong. (1952) (statement of Robert M. Hutchins, Assoc. Dir. of the Ford Found.)).

Harold Shapiro, former president of Princeton, expanded on this understanding when he described a university as “a place where the achievements, hopes, and interests of our recovered past meet and interact with those of the present as we shape our cultural traditions for the future. The contemporary research university [can] be thought of as holding a continuing conversation with both past and future generations regarding those matters that are truly significant.” HAROLD T. SHAPIRO, *A LARGER SENSE OF PURPOSE: HIGHER EDUCATION AND SOCIETY* 10 (2005).

115. *Wieman*, 344 U.S. at 197 (quoting *Hearing Before the House Select Comm. To Investigate Tax-Exempt Foundations and Comparable Organizations*, 82d Cong. (1952) (statement of Robert M. Hutchins, Assoc. Dir. of the Ford Found.)).

116. *See supra* text accompanying note 40.

117. 347 U.S. 483 (1954).

118. 354 U.S. 234 (1957) (plurality opinion).

119. *Id.* at 250.

120. *Id.* at 254–55. Sweezy also refused to answer questions about the Progressive Party. The Court upheld Sweezy’s refusal to answer those questions as well, and noted that in the 1948 election the Progressive Party had offered a slate of candidates headed by Henry Wallace, a former vice president of the United States. *Id.* at 242–44, 255.

121. *Id.* at 255.

122. *Id.* at 254–55.

joined by Justices Black, Douglas, and Brennan, held that the lower court's use of the contempt power denied *Sweezy* due process. Chief Justice Warren also extolled both the importance of higher education to the nation and the importance of academic freedom in the academic workplace: "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."¹²³

In a concurring opinion that rested on the First Amendment rather than the Due Process Clause, Justice Frankfurter, joined by Justice Harlan, agreed that academic freedom is needed for universities to function effectively.¹²⁴ Justice Frankfurter included a quotation from a recent conference of senior scholars from the University of Cape Town and the University of Witwatersrand in South Africa, which has since become a touchstone for understanding constitutional academic freedom:

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.¹²⁵

Justice Frankfurter thereby broke important, new conceptual ground.¹²⁶ Although *Sweezy* was about teaching, the South African conference quotation that

123. *Id.* at 250.

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

125. *Id.* at 263. The two universities were known as "Open Universities" because they admitted black as well as white students. CONFERENCE OF REPRESENTATIVES OF THE UNIV. OF CAPE TOWN AND THE UNIV. OF THE WITWATERSRAND, THE OPEN UNIVERSITIES IN SOUTH AFRICA iii (1957) [hereinafter CONFERENCE REPORT]. The conference was convened because the government of South Africa had announced that it intended to prohibit students of different races from attending universities together. *Id.* The report invoked academic freedom to argue that universities should be able to decide for themselves whom to admit. *Id.* at 7–9. It cited *Brown v. Board of Education* for its holding that separate educational facilities are inherently unequal. *Id.* at 43. In 1959, the South African government passed a law that barred universities from admitting "non-white persons." Extension of the University Education Act 45 of 1959.

126. Justice Frankfurter's adoption of "the four essential freedoms" was used as precedent by Justice Powell in 1978 in his opinion announcing the judgment of the Court in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). See *infra* notes 167–77 and accompanying text. In 1981, in *Widmar v. Vincent*, 454 U.S. 263 (1981), Justice Powell, this time writing for a majority of the Court, again favorably cited Frankfurter's *Sweezy* opinion. *Id.* at 276 ("[We do not] question the right of the 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.'"). In 2003, a majority of the Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003), held that Michigan Law School had a compelling interest in attaining a diverse student body, and cited Powell's opinion in *Bakke* as precedent. 539 U.S. at 329, 332–33.

In *Grutter*, Justice Thomas, joined by Justice Scalia, criticized the "constitutionalization" of academic freedom that began with the concurring opinion of Justice Frankfurter in *Sweezy*: "I doubt that when Justice Frankfurter spoke of government intrusions into the independence of universities, he was thinking of the Constitution's ban on racial discrimination." *Id.* at 356 (Thomas, J., dissenting). Justice Frankfurter clearly was thinking about the need to have a diverse student body—that was the impetus

he used expanded constitutional academic freedom to include academic governance matters as well as research and teaching. This was the same robust understanding of academic freedom that had been adopted in the 1915 Declaration.¹²⁷

In contrast to the Declaration, however, the quotation states that the four freedoms belong to the “university.” Some courts have relied on this language to hold that academic freedom does not protect individual faculty members,¹²⁸ but such an interpretation overlooks the plurality opinion in *Sweezy*, Justice Frankfurter’s statements in other parts of his *Sweezy* concurrence as well as in other cases, and the circumstances of the South African conference.

Chief Justice Warren’s plurality opinion in *Sweezy* made clear that academic freedom protects individual faculty and noted approvingly that even the New Hampshire Supreme Court had conceded below that *Sweezy* had a constitutionally protected right to lecture.¹²⁹ Warren added that “there unquestionably was an invasion of petitioner’s liberties in the area[] of academic freedom.”¹³⁰

Justice Frankfurter in his concurrence made clear that lecturing is a part of the intellectual life of a university that is constitutionally protected.¹³¹ He also noted, as did the plurality, that the New Hampshire Supreme Court correctly recognized that *Sweezy* had a constitutionally guaranteed right to lecture.¹³² And, to underscore his belief that academic freedom protects individual faculty, he added, “[W]hen weighed against the grave harm resulting from governmental intrusion into the intellectual life of a university, such justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate.”¹³³

In several earlier opinions, Justice Frankfurter also had made clear that he considered constitutional academic freedom to be an individual as well as an institutional right. In his dissent in *Adler*, for example, Justice Frankfurter held that the claims of the plaintiffs touched on the deepest interests of a democratic society including “ample scope for the individual’s freedom, especially the teacher’s freedom of thought, inquiry and expression.”¹³⁴ And, in his concurrence in *Wieman*, Justice Frankfurter spoke at length about the importance of the right of teachers to freedom of thought and noted that it is a right protected by the Bill of Rights and the Fourteenth Amendment.¹³⁵

for the report from the Conference of the Open Universities that had taken place earlier the same year that *Sweezy* was decided.

127. See *supra* notes 59–62 and accompanying text.

128. See, e.g., *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000) (en banc) (“[Academic freedom] inheres in the University, not in individual professors . . .”).

129. *Sweezy*, 354 U.S. at 249–50 (plurality opinion).

130. *Id.* at 250.

131. *Id.* at 261 (Frankfurter, J., concurring).

132. *Id.* at 260–61.

133. *Id.* at 260.

134. *Adler v. Bd. of Educ.*, 342 U.S. 485, 504 (1952).

135. In particular, Justice Frankfurter stated:

The participants in the conference that produced the report quoted by Justice Frankfurter were trustees and faculty members of the Open Universities in South Africa. The two groups were in agreement, moreover, that their universities should be able to continue their nondiscriminatory admissions policies in the face of government opposition. Thus, the conference participants were using the word “university” in the thick sense of faculty and board united, not in the thin sense of lay governing board only.¹³⁶

One decade after *Sweezy*, in *Keyishian v. Board of Regents*,¹³⁷ the Court for the second time heard a challenge to New York’s Feinberg law.¹³⁸ In the years since *Adler* was decided, Cold War fears about subversives had receded somewhat. In addition, public opinion had turned against Senator Joseph McCarthy’s tactics, and he had been censured by the Senate.¹³⁹ This time, the Court held the law unconstitutional. Justice Brennan, writing for the majority, included the strongest statement yet made by the Court about the constitutional position of the freedom: “[A]cademic freedom . . . 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

[I]n view of the nature of the teacher’s relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of these amendments vividly into operation. . . .

. . . .

. . . It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom

Wiemann v. Updegraff, 344 U.S. 183, 195–97 (1952) (Frankfurter, J., concurring).

136. The universities in South Africa were state-aided, but not state-controlled. Each was controlled by a lay council, of which not more than one-third of the members were public officials. The faculty senates were given specified powers over academic matters. CONFERENCE REPORT, *supra* note 125, at 1. This was the governance context in which the report spoke of the freedoms of the university.

137. 385 U.S. 589 (1967).

138. *Id.* at 592–93. During the intervening decade, Justice Douglas, writing for the Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965), confirmed the constitutional position of academic freedom. In the course of announcing that there is a constitutional right of privacy, Justice Douglas used academic freedom as an example of a constitutional right—like privacy—that is not mentioned in the Constitution: “The right of freedom of speech and press includes not only the right to utter or to print, but . . . freedom of inquiry, freedom of thought, and freedom to teach . . . indeed the freedom of the entire university community.” 381 U.S. at 482 (internal citations omitted). It is noteworthy that Justice Douglas did not describe academic freedom as an institutional right, but as one that belongs to the entire community, a phrase that presumably includes the faculty.

139. GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 387–90 (2004).

orthodoxy over the classroom.”¹⁴⁰

One year later, however, the Court adopted a new constitutional standard for public-employee speech—a change that over time would weaken the constitutional position of academic freedom.

B. PUBLIC-EMPLOYEE SPEECH CASES LIMIT FACULTY ACADEMIC FREEDOM

The Court embraced a new constitutional standard for judging public-employee speech in *Pickering v. Board of Education*.¹⁴¹ Before *Pickering*, public-employee speech was subject to the right-privilege distinction relied on by Justice Oliver Wendell Holmes in *McAuliffe v. Mayor of New Bedford*¹⁴² when he was still a justice on the Massachusetts Supreme Judicial Court. In upholding the right of a city to fire a policeman for violating regulations that prohibited political activity, Holmes in *McAuliffe* announced that “[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. . . . [T]he city may impose any reasonable condition upon holding offices within its control.”¹⁴³

Pickering rejected this right-privilege distinction.¹⁴⁴ Marvin Pickering was a high school teacher who wrote a letter that was published in the local newspaper. In it, he criticized the Board of Education and the district superintendent of schools for spending too much of the school budget on athletics and not enough on academic functions. Pickering was fired, and his firing was upheld by the courts of Illinois. The Supreme Court overturned Pickering’s dismissal, however, and in the process extended some First Amendment protection to the speech of public employees. Justice Marshall, writing for the majority, used a balancing test that weighed the interests of the employee as a citizen to comment against the interests of the government-as-employer in “promoting the efficiency of the public services it performs through its employees.”¹⁴⁵ *Pickering* thus did not give government workers’ speech as much protection as the First Amendment provides for the speech of citizens, although by rejecting the *McAuliffe* right-privilege distinction, it gave some.¹⁴⁶

In *Connick v. Myers*,¹⁴⁷ a closely divided Court further limited the protection provided by *Pickering* by holding that the First Amendment protects public-employee speech only when the subject matter is of public concern, not when the speech involves matters of personal interest only.¹⁴⁸ Even if employee speech passes the public-concern test, moreover, it must still pass the *Pickering*

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

141. 391 U.S. 563 (1968).

142. 291 N.E. 517 (Mass. 1892).

143. *Id.* at 517–18.

144. The right-privilege distinction was already eroding by the time *Pickering* was decided. *See, e.g., Olson v. Regents of the Univ. of Minn.*, 301 F. Supp. 1356, 1359 (D. Minn. 1969).

145. *Pickering*, 391 U.S. at 568.

146. *Id.* at 574.

147. 461 U.S. 138 (1983).

148. *Id.* at 147.

balancing test.¹⁴⁹

In applying the *Pickering* balancing test in *Connick*, the Court quoted with approval Justice Powell's description of the public workplace from an earlier case:

“To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the workplace, foster disharmony, and ultimately impair the efficiency of an office or agency.”¹⁵⁰

The typical academic workplace is quite different, however, from the public workplace described by Justice Powell. In a university, debate is not only acceptable, it is a vital part of the continuing dialogue celebrated by Robert Hutchins—a dialogue that depends on the expression of different points of view.¹⁵¹ As the Court itself has recognized, the professional expertise of the faculty is “indispensable to the formulation and implementation of academic policy.”¹⁵² Thus, neither the *Pickering* balancing test nor the *Connick* public-concern test seems particularly suited to the nature of the academic workplace. A number of lower court decisions illustrate this mismatch. In *Brown v. Armenti*,¹⁵³ the Third Circuit held that a professor could be fired for writing a critical review of the president of his university for presentation to the Board of Trustees. The court found that his expression did not pass the *Connick* public-concern test.¹⁵⁴ In *Clinger v. New Mexico Highlands University*,¹⁵⁵ the Tenth Circuit denied a retaliation claim in a tenure-denial case in which a faculty member had criticized a proposed academic reorganization for being in conflict with the Faculty Handbook and advocated a “no confidence vote” for some members of the governing board. The court held that her expressions did not pass the *Connick* test.¹⁵⁶ The courts may have been correct to hold that the challenged statements were not of interest to the general public, but that standard undercuts the ability of universities to function as refuges from the

149. *Id.* at 150.

150. *Id.* at 151 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring)).

151. See *supra* notes 114–15 and accompanying text.

152. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 689 (1980). For a discussion of *Yeshiva*, see *infra* text accompanying notes 215–228.

153. 247 F.3d 69 (3d Cir. 2001).

154. *Id.* at 79.

155. 215 F.3d 1162 (10th Cir. 2000).

156. See *id.* at 1166–67; see also *Hong v. Grant*, 516 F. Supp. 2d 1158 (C.D. Cal. 2007) (finding that faculty criticism of the hiring process and use of too many adjuncts to teach departmental courses does not pass the public-concern test). For a discussion of *Hong*, see *infra* notes 292–98 and accompanying text.

merely fashionable.¹⁵⁷

It was against this background that *Garcetti* was decided. Richard Ceballos was a deputy district attorney in the Los Angeles County District Attorney's Office.¹⁵⁸ After receiving complaints from a defense attorney, Ceballos examined the affidavit used to obtain a key search warrant in a pending case and concluded that the affidavit contained serious misrepresentations.¹⁵⁹ Although he expressed his concerns to his supervisors, they decided to proceed with the prosecution.¹⁶⁰ Ceballos was called as a witness by the defense, but the trial court upheld the warrant.¹⁶¹ Believing he was subjected to retaliatory employment actions (including reassignment to another position, transfer to another courthouse, and denial of a promotion) because of his complaints about the affidavit, Ceballos filed suit against his supervisors.¹⁶² The Supreme Court held that his statements passed both the *Connick* public-concern test and the *Pickering* balancing test, but they ruled against him nonetheless on the ground that the First Amendment does not shield from discipline expressions that are made pursuant to the "official duties" of a public employee.¹⁶³

The Court in *Garcetti* explained that it wanted to avoid having too many disputes about the work of public employees litigated in federal court as First Amendment cases.¹⁶⁴ Unfortunately, as Justice Souter warned in his dissent, the standard the Court embraced calls into question whether any constitutional protection remains for the research, teaching, and academic governance responsibilities of faculty at public colleges and universities.¹⁶⁵

C. POST-PICKERING DECISIONS EMBRACE ACADEMIC GOVERNANCE AS PART OF ACADEMIC FREEDOM

In contrast to the early academic freedom opinions of the Court, almost all of the post-*Pickering* decisions involved internal university disputes rather than threats from outside the university. Moreover, the internal dispute cases heard, for the most part, were brought by students—or would-be students—rather than by faculty members. The change in plaintiffs no doubt reflects the fact that after *Pickering*, most lower courts treated faculty-initiated internal disputes as ordinary public-employee speech cases.

The first two academic freedom decisions of importance were announced in the spring of 1978: *Board of Curators of the University of Missouri v. Horo-*

157. See *infra* text accompanying notes 280–83.

158. *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006).

159. *Id.* at 414.

160. *Id.*

161. *Id.* at 414–15.

162. *Id.* at 415.

163. *Id.* at 426.

164. *Id.* at 423 (“Ceballos’ [claim if adopted] would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business.”).

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

witz¹⁶⁶ and *Regents of the University of California v. Bakke*.¹⁶⁷ When medical student Charlotte Horowitz was dismissed from medical school for failing to meet academic standards, she sued, arguing that she was entitled to a hearing before being dismissed.¹⁶⁸ In denying her request, Justice Rehnquist, writing for the Court, emphasized that an academic judgment about a student's ability to perform adequately as a doctor is more subjective and evaluative than the factual questions presented in most public-employee disciplinary decisions.¹⁶⁹ A public hearing might be useless or even harmful in assessing such academic judgments because they require "expert evaluation of cumulative information."¹⁷⁰ Justice Rehnquist thus both confirmed the important role of faculty in establishing graduation standards for students and deferred to it when he declined "to ignore the historic judgment of educators" by imposing procedural due process standards on the academic dismissal process.¹⁷¹

That same year in *Bakke*, a closely divided Court struck down the special admissions policy of the Medical School of the University of California at Davis under which sixteen of the one hundred places in the entering class had been set aside for minority students.¹⁷² In announcing the judgment of the Court, Justice Powell held that race may be one factor used in deciding whether to admit a candidate as part of an admissions policy crafted to achieve a diverse student body, as long as race is not the sole factor.¹⁷³ In defending this position, Justice Powell argued that having a diverse student body is a constitutionally protected goal for an institution of higher education because academic freedom, "though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."¹⁷⁴ He continued, "The freedom of a university to make its own judgments as to education includes the selection of its student body," and he cited Justice Frankfurter's four essential freedoms.¹⁷⁵ Justice Powell concluded that because the right to select the students is protected by the First Amendment, it can counterbalance equal protection concerns raised by appropriately structured special-admission programs.¹⁷⁶ The Davis program did not pass muster, even though the faculty had devised the admissions policy, because it used race as the sole factor in setting aside sixteen places.¹⁷⁷ In short, according to Justice Powell, a broad understanding of academic freedom that includes such academic matters as the policy on admis-

166. 435 U.S. 78 (1978).

167. 438 U.S. 265 (1978).

168. *Horowitz*, 435 U.S. at 79–80.

169. *See id.* at 89–90.

170. *Id.* at 90.

171. *Id.*

172. *Bakke*, 438 U.S. at 271, 275.

173. *Id.* at 272.

174. *Id.* at 311–12.

175. *Id.* at 312.

176. *Id.* at 313.

177. *Id.* at 320.

sions is protected by the Constitution, but academic freedom does not always trump other constitutional values. In particular, academic freedom may not be used to insulate from the demands of the equal protection clause an admissions set-aside that rests entirely on race.

In *Bakke*, Justice Powell did not discuss in any detail the role of faculty in carrying out the four essential freedoms. Their role was addressed explicitly, however, in *Regents of the University of Michigan v. Ewing*.¹⁷⁸ Scott Ewing was dismissed from medical school, but, unlike Charlotte Horowitz, he brought a substantive rather than a procedural due process challenge.¹⁷⁹ Ewing had enrolled in a special program in which students could earn both a college and medical degree in six years.¹⁸⁰ Before beginning the final two years of the program, students were required to complete four years of basic medical science courses and to pass the NBME, a two-day, written test administered by the National Board of Medical Examiners.¹⁸¹ Ewing had both academic and personal difficulties during his first four years and failed the NBME.¹⁸² In fact, he received the lowest score on the NBME ever received by a student in the program. The medical school's Promotion and Review Board reviewed his record and recommended that he be dismissed.¹⁸³ One week later they reconvened, and gave him an opportunity to explain why the test did not fairly reflect his academic progress or potential. The nine voting members present then reaffirmed the earlier decision to drop Ewing from the program.¹⁸⁴

Justice Stevens, for a unanimous Court, upheld the decision to dismiss Ewing, emphasizing that the judgment that Ewing did not meet academic standards was made by *faculty*, and that "the faculty's decision was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing's academic career."¹⁸⁵ Faculty decisions are not immune from challenge according to the Court, but any challenger must meet a very high standard: judges should not override a faculty's professional judgment unless it is "such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment."¹⁸⁶ The decision of the Michigan faculty in *Ewing* passed the test.¹⁸⁷

Justice Stevens identified a number of reasons why the judiciary should defer to academic decisions, including the Court's "reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to

178. 474 U.S. 214 (1985).

179. *Id.* at 217.

180. *Id.* at 215.

181. *Id.* at 215-16.

182. *Id.* at 216.

183. *Id.*

184. *Id.*

185. *Id.* at 225.

186. *Id.*

187. *Id.* at 227.

safeguard their academic freedom.”¹⁸⁸ He added that if federal courts are not “the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies,¹⁸⁹ they are even less suited to evaluate “the multitude of academic decisions that are made daily by faculty members of public educational institutions.”¹⁹⁰

The Court clarified an issue that had been much debated by scholars and lower courts¹⁹¹ when it stated, 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 decisionmaking by the academy itself.”¹⁹² In other words, constitutional academic freedom protects both individual faculty members and institutions.

Justice Stevens used the word “academy,” however, rather than “institution.” (The word “academy” was also employed by Judge Posner in an academic freedom decision handed down eight months earlier.¹⁹³) The word “academy,” which commonly refers to a society or association of scholars,¹⁹⁴ suggests that the Court agreed with the 1915 Declaration that academic freedom belongs to the faculty as a body rather than to the *institution* in a corporate sense.

Because the faculty, administration, and board in *Ewing* were all in agreement that Ewing should be dismissed, there was no reason for the Court to discuss their respective roles. It is significant, therefore, that the Court emphasized that judicial deference was granted because *faculty* made the academic decision: “When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the *faculty’s* professional judgment.”¹⁹⁵ The Court, however, did not address the question whether courts should be equally deferential to academic decisions made by a governing board in the absence of faculty involvement.

The next academic freedom decision of interest, *University of Pennsylvania v. EEOC*,¹⁹⁶ unlike the decisions in *Adler*, *Wieman*, and *Keyishian*, involved a federal, rather than a state, statute. The case also is one of the few to be heard by

188. *Id.* at 226.

189. *Id.* (quoting *Bishop v. Wood*, 426 U.S. 341, 349 (1967)). In *Bishop*, the Court held that a city employee had no right to a pretermination hearing. *Id.* at 350.

190. *Id.*

191. *See supra* note 11 (acknowledging the scholarly debate over whether academic freedom is an individual or an institutional right).

192. *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (internal citations omitted).

193. *Piarowsky v. Ill. Cmty. Coll. Dist.* 515, 759 F.2d 625, 629 (7th Cir. 1985) (“[Academic freedom] is used to denote both the freedom of the academy to pursue its ends without interference from the government . . . and the freedom of the individual teacher . . . to pursue his ends without interference from the academy . . .”).

194. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 9 (Philip Babcock Gove ed., 1968) (“1: the school of philosophy founded by Plato; 2: a school above the elementary level . . . ; 3: a society of learned individuals united for the advancement of the arts and sciences . . .”).

195. *Ewing*, 474 U.S. at 225 (emphasis added).

196. 493 U.S. 182 (1990).

the Court involving a private, rather than a public, university.¹⁹⁷ The controversy began when the University of Pennsylvania refused to comply with an EEOC subpoena. The university argued that academic freedom protected the confidentiality of the peer-review materials that the EEOC was seeking in connection with a Title VII claim filed by a faculty member.¹⁹⁸

Justice Blackmun, writing for a unanimous Court, called the university's reliance on the academic freedom cases "misplaced" because in those cases the government had been attempting to control or direct the *content* of academic speech.¹⁹⁹ The earlier cases involved "direct" infringements of academic freedom, moreover, which he acknowledged includes the right to determine who may teach.²⁰⁰ In *Keyishian*, noted Justice Blackmun, the government "was attempting to *substitute* its teaching employment criteria for those already in place at the academic institutions, directly and completely usurping the discretion of each institution."²⁰¹ In *University of Pennsylvania v. EEOC*, by contrast, any burden on the ability of the university to determine who may teach was indirect at best because the EEOC, unlike New York State, was not providing criteria that the university was required to follow in selecting faculty.²⁰²

The distinction Justice Blackmun drew between direct and indirect infringements of academic freedom explains why a university may not claim a First Amendment violation when it is taxed or subjected to other government regulation.²⁰³ Even regulations that might deprive a university of revenue that "it needs to bid for professors who are contemplating working for other academic

197. Most internal disputes over academic freedom at private colleges and universities are not subject to constitutional norms because there are no public actors and, therefore, there is no state action. In *University of Pennsylvania v. EEOC*, the EEOC went to court to enforce its subpoena for university records, which provided the necessary state action. *Id.* at 185–88. The Court in its opinion makes clear that it is prepared to act in an appropriate case to protect the academic freedom of faculty at a private university from state intrusion: "Obvious First Amendment problems would arise where government attempts to direct the content of speech at private universities. Such content-based regulation of private speech traditionally has carried with it a heavy burden of justification." *Id.* at 198 n.6.

The Court adds that government attempts to direct the content of speech at public educational institutions raise particularly complicated First Amendment issues because "government is simultaneously both speaker and regulator." *Id.* Judge Posner has acknowledged the difficulty of resolving these First Amendment issues and noted, "It is, to be sure, a considerable mystery why government is in the business of owning and operating colleges and universities in the first place. The mystery is not public support of education, but public operation." RICHARD POSNER, *FRONTIERS OF LEGAL THEORY* 88 (2003). Posner would prefer having government get out of the business of operating universities, thereby removing such issues as affirmative action from the constitutional agenda. *Id.*

198. *Univ. of Pa.*, 493 U.S. at 185–86.

199. *Id.* at 197.

200. *Id.* at 198.

201. *Id.*

202. *Id.*

203. Professor J. Peter Byrne considers *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), which upheld antitrust limitations on NCAA football television contracts, to be a good example of the Court rejecting arguments for deference because it saw no direct connection with academic concerns. J. Peter Byrne, *Constitutional Academic Freedom After Grutter: Getting Real About the "Four Freedoms" of a University*, 77 U. COLO. L. REV. 929, 941 (2006).

institutions or in industry” are only indirect burdens, the Court added, and thus are constitutional.²⁰⁴

Finally, in *Grutter v. Bollinger*,²⁰⁵ Justice O’Connor, writing for a slim majority of the Court, found that the University of Michigan Law School had a compelling state interest in student body diversity and, therefore, upheld its admissions policy.²⁰⁶ To justify its decision, the Court relied on the position taken by Justice Powell in *Bakke* that the First Amendment protects four essential academic freedoms (including deciding who may be admitted to study).²⁰⁷ Justice O’Connor argued that another reason to be bound by the earlier opinion was that public and private universities across the nation had relied on Justice Powell’s opinion in *Bakke* to craft their own admissions programs.²⁰⁸ The Court’s scrutiny was “no less strict,” she added, because it had “tak[en] into account complex educational judgments in an area that lies primarily within the expertise of the university.”²⁰⁹

Justice O’Connor, like Justice Stevens in *Ewing*, devoted some attention to the role of the faculty as a body. She specifically mentioned that the challenged admissions policy had been crafted by a faculty committee and that it only became the school’s “official” admissions policy after it was approved by the faculty.²¹⁰ In deferring to the faculty’s “educational judgment” that a diverse student body was essential to the university’s educational mission, Justice O’Connor cited “our tradition of giving a degree of deference to a university’s academic decisions.”²¹¹ She concluded by writing that “universities occupy a special niche in our constitutional tradition,”²¹² however, rather than by reaffirming that academic freedom is a “special concern of the First Amendment.”²¹³ Whether that “special niche” depends on faculty participation in making academic decisions was not discussed.

The later academic freedom decisions thus repeatedly extended academic freedom beyond research and teaching to cover the kinds of academic matters embodied in the four essential freedoms. Most of the Court’s decisions, however, described academic freedom as belonging to the institution, rather than to the faculty. Only in *Ewing* did the Court emphasize that its deference turned on the fact that *faculty* made the challenged decision. The Court’s failure to address

204. *Univ. of Pa.*, 493 U.S. at 200–01; *cf.* *Califano v. Jobst*, 434 U.S. 47 (1977) (holding constitutional, because they were not direct infringements of the right to marry, those sections of the Social Security Act that specify a dependent child’s benefits terminate upon marriage to an individual not entitled to benefits under the Act).

205. 539 U.S. 306 (2003).

206. *Id.* at 343.

207. *Id.* at 329.

208. *Id.* at 323.

209. *Id.* at 328.

210. *Id.* at 314–15.

211. *Id.* at 328.

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

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

the governance role of faculty that is at the heart of academic freedom, combined with its failure to justify protecting institutional academic freedom in the absence of faculty participation, has confused both litigants and lower courts.²¹⁴

D. THE COURT AND SHARED GOVERNANCE

The Supreme Court acknowledged the value of giving faculty primary responsibility for academic matters in *NLRB v. Yeshiva University*,²¹⁵ a case not usually considered an academic freedom decision.²¹⁶ Nonetheless, four years later the Court held that faculty do not have a constitutional right to participate in academic governance.²¹⁷

In *Yeshiva*, the Court held that faculty members at Yeshiva University could not organize under the National Labor Relations Act because they are “managerial employees.”²¹⁸ In justifying its decision, the Court explained:

The “business” of a university is education, and its vitality ultimately must depend on academic policies that largely are formulated and generally are implemented by faculty governance decisions. . . .

. . . The university requires faculty participation in governance because professional expertise is indispensable to the formulation and implementation of academic policy.²¹⁹

The Court devoted considerable attention in its opinion to the governance structure of Yeshiva, which is typical of the shared governance of many colleges and universities in the United States. “Ultimate authority” is vested in the Board of Trustees.²²⁰ The President sits with the Board, and serves as chief executive officer.²²¹ The budget of each school is drafted by a dean and is subject to approval by the president after consultation with a committee of administrators.²²² Faculty participate in university-wide governance through an elected student-faculty council.²²³

214. See, e.g., *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000) (en banc) (stating that academic freedom “inheres in the University, not in individual professors”).

215. 444 U.S. 672 (1980).

216. See, e.g., Van Alstyne, *supra* note 9 (providing a comprehensive survey of academic freedom decisions of the Court that does not include *Yeshiva*).

217. *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271 (1984). For a discussion of *Knight*, see *infra* notes 230–33 and accompanying text.

218. *Yeshiva*, 444 U.S. at 686.

219. *Id.* at 688. The dissenters agreed that faculty should have primary responsibility for academic matters, but were concerned that lay boards nonetheless might ignore the faculty. See *id.* at 697–98 (Brennan, J., joined by White, Marshall, & Blackmun, JJ., dissenting).

220. *Yeshiva*, 444 U.S. at 675.

221. *Id.*

222. *Id.*

223. *Id.* at 675–76. Most universities, by contrast, have faculty senates that are made up of faculty only. See Kaplan, *supra* note 99, at 191 (referring to a 2001 survey of higher-education governance,

Individual schools are substantially autonomous. Faculty at each school meet formally and informally to decide a range of academic matters, both in committees and as a whole. The Court specifically found that faculty at each school at Yeshiva “effectively determine its curriculum, grading system, admission and matriculation standards, academic calendars, and course schedules.”²²⁴ Because deans regard faculty actions as binding, no academic decision made by the faculty had been vetoed in more than a dozen years.²²⁵

The faculties of the various schools make recommendations to their dean as to faculty hiring, tenure, sabbaticals, termination, and promotion. Although the final decision is made by the central administration on the advice of the dean, the overwhelming majority of faculty recommendations are implemented.²²⁶

The Court compared this governance structure of higher education with that of private industry. It found that the National Labor Relations Act was intended to accommodate the type of management-employee relations that prevail in the “pyramidal hierarchies of private industry,” not the “shared authority” that is typical of higher education under which authority is divided between a central administration and one or more faculties.²²⁷ The Court also agreed with the National Labor Relations Board (NLRB) that, because of the difference in governance, principles developed for use in the industrial setting should not be “imposed blindly on the academic world.”²²⁸

In the years since *Yeshiva*, lower courts and the NLRB have struggled with the question of whether faculties in particular colleges and universities have as much governance authority as the faculty in *Yeshiva*. Their decisions reveal that, in American higher education, there exists a continuum of governance practices that ranges from institutions, like Yeshiva, that give faculty primary responsibility for most academic matters to institutions that treat faculty as ordinary at-will employees with little or no role in formulating academic policy.²²⁹ A well-

which found that 72.3% of the institutions have regular meetings of the full faculty, 58.6% have faculty senates made up of faculty only, and only 16.2% have senates composed of faculty, students, and staff).

224. *Yeshiva*, 444 U.S. at 676.

225. *Id.* at 676 n.4.

226. *Id.* at 677.

227. *Id.* at 680.

228. *Id.* at 680–81.

229. *Compare, e.g., Fla. Mem’l Coll.*, 263 N.L.R.B. 1248, 1252–53 (1982) (holding that the faculty in question are not managerial employees because “unlike Yeshiva, the curriculum is not within the faculty’s absolute control, since all decisions involving course offerings must be approved by the Academic Council, almost one-half of whose voting members are administrators, and other curricular proposals must be approved by the dean of academic affairs or the board of trustees. . . . While the faculty members generally determine the content of their own courses, even this basic academic function is carried out in collaboration with the dean of academic affairs insofar as the selection of textbooks is concerned. . . . The faculty has no effective control over admissions policy or matters relating to the retention, suspension, probation, or expulsion of students or to graduation requirements. . . . The faculty is also without any substantial authority with respect to such matters as hiring, tenure, promotions, grievances, or sabbaticals. . . . There is no tenure at the College . . . [and t]he president has unilaterally determined that the contracts of at least five faculty members would not be renewed, and he did so in apparent disregard of the procedures set forth in the faculty handbook regarding such

crafted jurisprudence of academic freedom should take account of this continuum.

Although the Court in *Yeshiva* acknowledged the value of faculty participation in governance, in *Minnesota State Board for Community Colleges v. Knight* it held that faculty members do not have a constitutional right to participate in academic governance at public colleges and universities.²³⁰ *Knight* involved a Minnesota statute that required public employees to bargain over the terms and conditions of employment. The statute also required public employers to exchange views on subjects relating to employment but outside the scope of mandatory bargaining *solely* with the exclusive representative selected by employees.²³¹ The statute was challenged by twenty faculty members at community colleges who wanted to talk directly with their employers about academic matters. Justice O'Connor, writing for the Court, acknowledged that there are numerous policy arguments to support faculty participation in school governance, but concluded, nonetheless, that faculty do not have a constitutional right to participate in policymaking in academic institutions.²³²

It would be an unprecedented expansion of First Amendment jurisprudence to require all colleges and universities to adopt shared governance. Imposing a single governance structure also would put at risk the institutional diversity that has characterized and strengthened American higher education for nearly two centuries.²³³ There is nothing in the *Knight* holding, however, to prevent

decisions.”), *with Lewis & Clark Coll.*, 300 N.L.R.B. 155, 157, 161–62 (1990) (holding that the faculty in question are managerial employees and noting that the recommendations of committees composed predominantly of faculty members were usually followed in areas such as admissions requirements and curriculum, and that faculty views were followed in sixty-five of sixty-seven promotion cases and fifty-two of fifty-seven tenure decisions).

230. 465 U.S. 271, 273 (1984).

231. *Id.* at 274–75 (noting that under the Public Employees Labor Relations Act (PELRA), employees may neither “meet and negotiate” nor “meet and confer” with any members of their bargaining unit except through their exclusive representatives).

232. *Id.* at 287. Justice Brennan in dissent argued:

If the First Amendment is truly to protect the “free play of the spirit” within our institutions of higher learning, then the faculty at those institutions must be able to participate effectively in the discussion of such matters as, for example, curriculum reform, degree requirements, student affairs, new facilities, and budgetary planning. The freedom to teach without inhibition may be jeopardized just as gravely by a restriction on the faculty’s ability to speak out on such matters as by the more direct restrictions struck down in *Keyishian*.

Id. at 297 (Brennan, J., dissenting).

233. See CLAUDIA GOLDIN & LAWRENCE F. KATZ, *THE RACE BETWEEN EDUCATION AND TECHNOLOGY* 283 (2008) (American higher education grew strong because of its diversity, competition, and decentralization); Philip G. Altbach, *The American Academic Model in Comparative Perspective*, in *IN DEFENSE OF AMERICAN HIGHER EDUCATION* 1, 17 (Philip G. Altbach et al. eds., 2001) (noting that diversity is a central organizing principle of American higher education); see also Keller, *supra* note 98, at 171 (“Daytona Beach Community College with 10,000 students needs a different governance scheme than does Eckerd College with 1,500 students, and Iowa State University should exhibit a different form of governance from Grinnell College.”).

Private colleges and universities dominated higher education in its early years. JERGEN HERBST, *FROM CRISIS TO CRISIS: AMERICAN COLLEGE GOVERNMENT, 1636–1819, at 189–90* (1982). By 2005, however,

expanding constitutional academic freedom to protect speech that is concerned with academic governance—speech that I will term “academic governance speech.”

III. TOWARD A NEW UNDERSTANDING OF FIRST AMENDMENT PROTECTION OF ACADEMIC FREEDOM

A. PARTIAL CONVERGENCE OF THE PROFESSIONAL AND CONSTITUTIONAL STANDARDS OF ACADEMIC FREEDOM

The academic freedom decisions of the Supreme Court reveal that there has been some convergence of the professional and constitutional standards over time, at least with respect to expanding academic freedom to protect academic governance matters, as well as research and teaching. The Court in its later decisions embraced Frankfurter’s position in his *Sweezy* concurrence and extended constitutional protection to a number of academic governance matters including admissions policy (*Bakke* and *Grutter*), student academic standards (*Ewing*), and the tenure process (*University of Pennsylvania v. EEOC*).

This partial convergence of the professional and constitutional standards of academic freedom reflects an ongoing conversation that has taken place between the profession and the Court—a conversation that has been assisted by the experience of judges who were academics before being appointed to the bench.²³⁴ The conversation got off to a fairly slow start when the AAUP decided not to file an amicus brief in *Sweezy* because it was not persuaded of the wisdom of seeking legal protection for academic freedom.²³⁵ Since *Sweezy*, however, the AAUP has submitted briefs in most of the major academic freedom decisions of the Court.

Although the two standards have converged as to the scope of academic freedom, they continue to differ significantly in the way they address governance matters. The professional standard, which applies to private, as well as to public, colleges and universities, allocates primary responsibility for academic matters to the faculty. This assignment of primary responsibility over academic matters does not give faculty *exclusive* control, however. Universities are

65% of the nation’s 1.29 million faculty members were at public institutions. 54 CHRON. HIGHER EDUC., Aug. 31, 2007, at 25. Of the 696,660 associate degrees awarded during the 2004–2005 academic year, 79% were from public institutions, 7% from private nonprofits, and 15% from private for-profits; of the 1,439,214 bachelor degrees, 65% were from public institutions, 32% from private nonprofits, and 3% from private for-profits. *Id.* at 20.

234. On the current Court, Justices Breyer, Ginsburg, and Scalia all have been tenured faculty members, and Justice Kennedy taught law regularly when he was on the Ninth Circuit. Important lower-court academic freedom opinions decided by former academics include: *Urofsky v. Gilmore*, 216 F.3d 401, 426 (4th Cir. 2000) (Wilkinson, C.J., concurring); *Feldman v. Bahn*, 12 F.3d 730, 732–33 (7th Cir. 1993) (Easterbrook, J.); and *Piarowsky v. Ill. Cmty. Coll. Dist. 515*, 759 F.2d 625 (7th Cir. 1985) (Posner, J.).

235. Robert K. Carr, *Academic Freedom, the American Association of University Professors, and the United States Supreme Court*, 45 AAUP BULL. 5, 19 (1959). The AAUP also did not think that the case would be decided on academic freedom principles. *Id.*

deliberately structured to make it difficult to earn tenure, for example, or to have it taken away.²³⁶ Tenure normally requires a series of approvals: first at the departmental or school level, then by a university-wide committee of faculty from different schools and departments, then by the provost, the president and, at some institutions, the governing board. At each stage of the process, the decisionmakers have access to reviews of the candidate's scholarship by scholars in the same discipline both at the home and at other institutions, and reviews of the candidate's teaching by faculty and students. The goal of this lengthy process of checks and balances is to ensure that candidates granted tenure meet the highest academic standards.²³⁷ At the same time, professional academic freedom standards limit the power that universities (and their faculties) may exert over the academic freedom of individual faculty members once they are tenured. Tenure is not to be revoked except for cause, and only after a hearing before faculty peers. Faculty expression can be the basis for dismissal only if it "clearly demonstrates the faculty member's unfitness for his or her position."²³⁸

Although the AAUP 1915 Declaration endorsed shared governance, it did not address "academic governance speech."²³⁹ The omission probably reflects that the Declaration was written to make the general case for academic freedom, and not as a guide for the judiciary. Some scholars have dealt with the omission by

236. A number of courts have recognized that they should give considerable deference to the academic judgments of institutions to deny tenure, but less deference to decisions to dismiss tenured faculty. *See, e.g.,* *Vanasco v. National-Louis Univ.*, 137 F.3d 962, 968 (7th Cir. 1998) ("[T]enure decisions are often based on 'the distinction between competent and superior achievement.' Such decisions necessarily rely on subjective judgments about academic potential. . . . Universities should not be allowed to use the subjective nature of the tenure process to camouflage discrimination. . . . However, we must not second-guess the expert decisions of faculty in the absence of evidence that those decisions mask actual but unarticulated reasons for the University's action." (quoting *Kuhn v. Ball State Univ.*, 78 F.3d 330, 331 (7th Cir. 1996))); *Beitzel v. Jeffrey*, 643 F.2d 870, 875 (1st Cir. 1981) ("Given the university's overall mission, the creation and transmission of knowledge, the very need for strong procedural protections to prevent the wrongful dismissal of a tenured teacher concomitantly suggests a need for wide discretion in making the initial tenure award.").

237. *See, e.g.,* *Weinstock v. Columbia Univ.*, 224 F.3d 33, 43 (2d Cir. 2000) (upholding tenure denial in Title VII case where the provost overturned a favorable vote by a closely divided ad hoc committee on tenure on the ground that the candidate's scholarship did not meet university standards after discussing the work with other scholars in the candidate's discipline); *see also supra* notes 90–91 and accompanying text (describing the lengthy one-way ratchet process recommended in the Statement on Government).

238. 1940 *Statement, supra* note 75, at 6. The 1970 Interpretive Comments add: "Extramural utterances rarely bear upon the faculty member's fitness for his or her position. Moreover, a final decision should take into account the faculty member's entire record as a teacher and scholar." *Id.*

239. In 2003, the AAUP Council approved a statement, *On the Relationship of Faculty Governance to Academic Freedom*, which provides:

The academic freedom of faculty members includes the freedom to express their views (1) on academic matters in the classroom and in the conduct of research, (2) on matters having to do with their institution and its policies, and (3) on issues of public interest generally, and to do so even if their views are in conflict with one or another received wisdom.

AAUP POLICY DOCUMENTS & REPORTS 141, 142 (10th ed. 2006) (emphasis added).

discussing what they term “intramural” speech.²⁴⁰ Professor Matthew Finkin, for example, reports that by 1957 the AAUP extended academic freedom to intramural speech.²⁴¹ He uses the term “intramural speech” primarily to mean faculty criticism of the administration, however.²⁴² Such criticism may have little to do with faculty governance responsibilities, so it is not clear why it should be protected by academic freedom. When faculty criticize the president of their college for refusing to add a course approved by the faculty to the curriculum, for example, they are speaking about an aspect of academic governance. When they criticize the president for his style of speaking, however, they are not. Academic governance speech also encompasses more types of speech than criticism of the administration including, for example, speech about the curriculum and speech about tenure matters.

Professor David Rabban, by contrast, has advocated protecting intramural speech if it “promotes critical inquiry.” He argues that intramural speech about parking has such an indirect connection to research and teaching that it does not deserve to be protected by constitutional academic freedom, although other intramural speech does, including speech about the curriculum or administrative abuse of the peer review process.²⁴³ His standard of “promotes critical inquiry,” unfortunately, does not provide as clear a path for identifying which speech should be protected as does this Article’s recommended protection for academic governance speech.

The constitutional standard, unlike the professional standard, applies to public colleges and universities only. Faculty at public institutions may not have a constitutional right to participate in academic governance,²⁴⁴ but their speech on academic matters such as student academic standards has been granted constitutional protection by the Supreme Court.²⁴⁵ Lower federal courts have extended

240. See, e.g., Matthew W. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323, 1349 (1988) (“Surely a teacher in a state college is entitled to some academic freedom in criticizing school programs with which he is in disagreement.” (quoting with approval *State ex rel. Ball v. McPhee*, 94 N.W.2d 711, 719 (Wis. 1959))); Rabban, *supra* note 9, at 294–97; Ailsa W. Chang, Note, *Resuscitating the Constitutional “Theory” of Academic Freedom: A Search for a Standard Beyond Pickering and Connick*, 53 STAN. L. REV. 915, 945–48 (2001) (defining “intramural speech” as “complaints about university admissions standards, grading policies, tenure policies, peer review standards, personal treatment by colleagues and other administrative actions”).

241. Finkin, *supra* note 240, at 1337 n.74 (citing *Academic Freedom and Tenure: Eastern Washington College of Education*, 43 AAUP BULL. 225, 235 (1957) (dismissal of a faculty member for criticizing the administration violates academic freedom)). Finkin identifies the *Report on the University of Missouri*, 8 AAUP BULL. 46, 52 (1922), as an example of AAUP recognition that academic freedom protects intramural speech, but that report turns more on the failure to give the faculty member involved a hearing prior to his dismissal than on expanding academic freedom to cover intramural speech.

242. See Finkin, *supra* note 240, at 1336 (discussing 1915 investigation of University of Utah for firing two faculty for “speaking in a very uncomplimentary way about the administration” and for “speaking very disrespectfully of the Chairman of the Board of Regents”).

243. Rabban, *supra* note 9, at 295.

244. See *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 283 (1984).

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

constitutional protection to an even broader range of academic governance speech, including criticism of a department's unsound teaching and administrative practices,²⁴⁶ discussion of admissions policy and size of the student body,²⁴⁷ and criticism of the administration at a meeting of the faculty senate.²⁴⁸

The protection granted to faculty governance speech has been limited, however, by the increasing application by courts of the public-employee speech doctrine to faculty claims. Both the *Pickering* balancing test and the *Connick* public-concern test have been used to deny constitutional protection to faculty governance speech.²⁴⁹ The *Garcetti* official-duty test now threatens to terminate all constitutional protection for it, and for academic freedom generally.

A final difference between the ways the two standards address governance matters is that the Court's more recent decisions increasingly have declared academic freedom to be an institutional right. When the Declaration expanded the scope of academic freedom to apply to governance matters, it justified the expansion as necessary to protect the academic freedom of the faculty from intrusions by administrators and lay governing boards. The Court, on the other hand, has failed to justify granting constitutional protection to institutional decisions about academic matters, especially those made without faculty participation, nor has it discussed, apart from *Ewing* and *Yeshiva*, the relevance (if any) of faculty participation in making institutional academic decisions or in establishing institutional academic policies.

B. GOVERNMENT AS EDUCATOR

It is apparent that the Court needs a new approach to deciding academic freedom cases, particularly those that involve internal disputes between faculty members and their institutions. Carving out an exception for faculty to the *Garcetti* official-duty test is one possible response, but one that would be hard to defend. First, as Frederick Schauer has noted, the Court generally has resisted drawing these sorts of distinctions between institutions when it applies the First Amendment.²⁵⁰ Second, as has been shown above, academic freedom was never

246. See *Mumford v. Godfried*, 52 F.3d 756, 761–62 (8th Cir. 1995).

247. See *Honore v. Douglas*, 833 F.2d 565, 567, 569 (5th Cir. 1987).

248. See *Mabey v. Regan*, 537 F.2d 1036, 1050 (9th Cir. 1976); see also *Powell v. Gallentine*, 992 F.2d 1088, 1090–91 (10th Cir. 1993) (publications of allegations of grade fraud by an adjunct professor); *Johnson v. Lincoln Univ. of the Commonwealth Sys. of Higher Educ.*, 776 F.2d 443, 452 (3d Cir. 1985) (sending a letter to the university's accreditor criticizing low academic standards); *Scallet v. Rosenblum*, 911 F. Supp. 999, 1018 (W.D. Va. 1996), (advocacy of diversity in a faculty meeting), *aff'd*, 106 F.3d 391 (4th Cir. 1997). *But cf.* *Clinger v. N.M. Highlands Univ.*, 215 F.3d 1162, 1167 (10th Cir. 2000) (advocacy in the faculty senate of a “no confidence” vote with respect to four members of the Board of Regents, and criticism of a proposed academic reorganization for conflicting with faculty handbook do not pass the *Connick* public-concern test).

249. See *supra* notes 153–56 and accompanying text.

250. Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 106–13 (1998) (identifying three reasons for avoiding institution-specific solutions: (1) a general preference for large categories; (2) a preference for juridical categories, rather than nonlegal ones like libraries, the arts, and schools; and (3) a preference for principle over policy).

justified as a benefit for faculty, but for its value to the First Amendment and to the nation. Third, carving out an exception to *Garcetti* for faculty would not resolve the deeper problems that have been uncovered with applying employee-speech jurisprudence to faculty. Neither the *Pickering* balancing test nor the *Connick* public-concern test, for example, takes adequate account of the distinctive nature of the academic workplace. In particular, the tests ignore both the governance responsibilities of faculty and the need for colleges and universities to be refuges from views that are currently fashionable. The Court also needs to clarify whether the judiciary should defer to academic decisions made by administrators or lay boards in the absence of the kind of faculty participation relied on in *Ewing*.²⁵¹

The Court, on the other hand, has identified several different roles or functions performed by the government and developed different constitutional standards for them.²⁵² The Court's willingness to make such functional distinctions suggests that the best way to resolve the problems posed by *Garcetti* and other employee-speech cases to academic freedom is to focus on the role of government-as-educator and to develop a jurisprudence for the role that is tailored to the distinctive goals, needs, and characteristics of higher education.

We are accustomed to thinking of the government-as-sovereign, but it sometimes functions in quasi-private roles as well. The work of Professor Robert Post in distinguishing the "governance" and the "managerial" authority of the government is helpful in understanding this distinction.²⁵³ According to Post, when the government is in one of its managerial roles, such as operating a prison or a motor vehicle bureau, it may regulate the speech of its employees to achieve the objectives of the institution; in governance of the public realm, by contrast, the government's ability to regulate speech is constrained by traditional First Amendment standards that, for example, prohibit most content-based regulation.²⁵⁴ The government in its role as government-as-employer for this reason may regulate employee speech far more than government-as-sovereign may regulate the speech of citizens.

Recognition of the role of government-as-educator similarly would authorize public colleges and universities to make academic decisions about faculty and

251. See, e.g., Katyal, *supra* note 9, at 566 ("Many institutions that may be tempted to plead educational autonomy in admissions challenge cases do not use faculty at all in their processes—the admissions decisions are being made by administrators who may lack understanding about the educational dynamics of the university. And, in some of those universities, the administrators' decisions are not reviewed by the faculty after they are made, at any time, to ensure that the choices are consistent with the best education the university can offer." (citations omitted)).

252. See, e.g., *Burson v. Freeman*, 504 U.S. 191, 211 (1991) (upholding limits on campaign materials near polling places where government serves as administrator of elections); *Rust v. Sullivan*, 500 U.S. 173, 192–200 (1991) (government-as-speaker); *Pell v. Procunier*, 417 U.S. 817, 822–23 (1974) (government-as-military); *Pickering v. Bd. of Educ.*, 391 U.S. 564, 568 (1968) (government-as-employer).

253. See ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 199–267 (1995).

254. *Id.* at 200.

students that turn on the content of their work, decisions that government-as-sovereign could not make. But in contrast to the *Connick* line of cases, government-as-educator jurisprudence would provide protection for faculty speech about academic matters whether or not the speech is on a subject of concern to the general public.

1. Distinguishing Government as Educator from Government as Employer

In singling out different government roles, Post cautions that courts should pay careful attention to the “patterns of rules that establish recognizable forms of ‘social ordering.’”²⁵⁵ When the government is functioning in its role as educator, this means courts need to take into account the ways in which the academic workplace differs from other public workplaces.²⁵⁶

In typical public workplaces, the government is understandably concerned with efficiency and employee morale.²⁵⁷ Universities need to be efficient as well, of course, but their primary goals are research and teaching, not the delivery of services to the general public. Debate that might be viewed as disruptive in other public agencies is an accepted, and even necessary, part of the production of new knowledge and its dissemination in classrooms.²⁵⁸ So, too, employee criticism that might seem insubordinate in other public agencies may be a necessary part of fulfilling the governance responsibilities of a faculty member in a college or university.²⁵⁹

255. *Id.* at 1.

256. *See* Byrne, *supra* note 10, at 254 (“All too often, courts fail to recognize that universities are fundamentally different from business corporations, government agencies, or churches. . . . Our universities require legal provisions tailored to their own goals and problems.”).

257. *See* Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring).

258. *See* Trotman v. Bd. of Trs. of Lincoln Univ., 635 F.2d 216, 218–19 (3d Cir. 1980) (“Our society assumes, in almost all cases with good reason, that different views within the academic community will be tested in an atmosphere of free debate. It is the dialectic process which underlies learning and progress.”); *see also* Ronald Dworkin, *We Need a New Interpretation of Academic Freedom*, in *THE FUTURE OF ACADEMIC FREEDOM* 181, 189 (Louis Menand ed., 1996) (“Professors and others who teach and study in a university have an . . . uncompromising responsibility. They have a paradigmatic duty to discover and teach what they find important and true, and this duty is not . . . subject to any qualification about the best interests of those to whom they speak. It is an undiluted responsibility to the truth . . .”).

259. *Cf. supra* note 227 and accompanying text (distinguishing between the pyramidal hierarchies of industry and the shared authority of universities in the context of *NLRB v. Yeshiva University*, 444 U.S. 672, 680 (1980)). The Court has distinguished the function of universities from other public agencies in other cases as well. *See, e.g.,* *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion) (“No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. . . . 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.”); *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring) (“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 . . . cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma.”).

The line between government-as-educator and government-as-employer should not be a rigid one. Universities regularly fill both roles simultaneously by acting as educator in their dealings with faculty and students, and as employer with staff. On nonacademic matters, such as parking or benefits policy, even a university's relationship with faculty is that of employer and employee because academic matters are not involved.

Another reason to distinguish the role of government-as-educator from government-as-employer is that faculty at public institutions of higher education must be protected from state censorship if they are to fulfill their mission of critical inquiry into the functioning of other parts of the government. Most government agencies, by contrast, are expected to be responsive to the directives of both the executive and legislative branches rather than shielded from those directives.

Protection of the decentralized nature of higher education is yet another reason to recognize the role of government-as-educator. In *The Dartmouth College Case*,²⁶⁰ the Court, itself, played a crucial role in preserving the institutional diversity and decentralization that characterize American higher education when it protected private colleges and universities from being taken over by the states.²⁶¹ Affirming constitutional protection for academic freedom by recognizing the role of government-as-educator would support the decentralized nature and consequent competition that have strengthened American higher education.²⁶²

2. Distinguishing Government as Educator from Government as Speaker

The role of government-as-educator should be distinguished also from the role of government-as-speaker, a role that was first recognized by the Court in *Rust v. Sullivan*.²⁶³ In the course of upholding the right of the government to prohibit physicians in family-planning programs funded by the government from counseling patients about abortion, the Court in *Rust* held that the free-speech rights of the physicians were not unconstitutionally abridged because they remained free to pursue abortion-related speech when they were not acting under the auspices of the federally funded project.²⁶⁴ The government was not engaging in unconstitutional viewpoint discrimination, according to the Court, it was simply choosing to fund one program rather than another.²⁶⁵

Again, the academic workplace is different. The job of faculty is to produce

260. Trs. of Dartmouth Coll. v. Woodward (*The Dartmouth College Case*), 17 U.S. (4 Wheat.) 518 (1819).

261. See *id.* at 654 (holding that New Hampshire legislative acts that took over control of Dartmouth College violated the no-impairment-of-contracts provision of the Constitution).

262. See GOLDIN & KATZ, *supra* note 233, at 283 (“[T]he true hallmarks of the American higher education system relative to its counterparts in other nations have been its decentralized control, the enormous competition between and within the public and private sectors, and its laissez faire orientation.”).

263. 500 U.S. 173 (1991).

264. *Id.* at 198–99.

265. *Id.* at 194.

and disseminate new knowledge and to encourage critical thinking, not to indoctrinate students with ideas selected by the government.²⁶⁶ In *Rust*, for this reason, the Court itself specifically limited the applicability of the doctrine of government-as-speaker to universities.²⁶⁷

Creating an exception to *Rust* for universities is further supported by the decision in *Legal Services Corp. v. Velazquez*,²⁶⁸ where the Court struck down a federal statute that prohibited legal services attorneys from representing clients in any effort to amend or otherwise challenge existing welfare law. The Court justified its decision to create an exception to *Rust* for legal services attorneys in part by noting that the challenged restriction of the role of attorneys would alter the traditional role of attorneys and thereby distort the legal system.²⁶⁹ So, too, restricting faculty to promote governmental messages would alter their traditional role and distort public higher education.

3. Distinguishing Government as Educator from Government as Sovereign

The role of government-as-educator also should be distinguished from government-as-sovereign.²⁷⁰ Government-as-sovereign generally may not use content-based restrictions when regulating the speech of citizens.²⁷¹ Colleges and universities, by contrast, regularly act on the basis of the content of the speech of faculty—and of students. Student papers are judged on the quality of their content, for example, and students are dismissed if their work does not meet the academic standards of their college or university. Faculty expressions are evaluated as well; faculty are hired, promoted, and tenured (or not) based on the quality of content of their teaching and writing. As Justice Stevens noted in

266. See, e.g., Chen, *supra* note 9, at 964 (“Universities serve a different function than any other governmental institution or any other governmental employer. . . . They are created as institutions of both teaching and research, which advance social interest in producing educated citizens and increasing understanding across multiple academic disciplines. . . . [U]niversities encourage and develop critical thinking processes in their students and the ability to challenge accepted wisdom, which leads not only to a better educated citizenry but also meaningfully facilitates self-governance in a democratic society.” (citations omitted)).

Even Lawrence Rosenthal has acknowledged that “*Garcetti* involved speech made by public employees acting as agents of the government. It is far from clear that scholarly work can be described in a similar fashion.” Rosenthal, *supra* note 9, at 97 (arguing that managerial control over public-employee speech is essential).

267. See *Rust*, 500 U.S. at 199–200 (“This is not to suggest that funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression. . . . [W]e have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government’s ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment” (internal citations omitted)).

268. 531 U.S. 533 (2001).

269. *Id.* at 544.

270. Cf., e.g., *Rankin v. McPherson*, 483 U.S. 378, 395 (1987) (“[T]he government’s power as an employer to make hiring and firing decisions on the basis of what its employees and prospective employees say has a much greater scope than its power to regulate expression by the general public.”).

271. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995).

Widmar v. Vincent.²⁷²

In performing their learning and teaching missions, the managers of a university routinely make countless decisions based on the content of communicative materials. They select books for inclusion in the library, they hire professors on the basis of their academic philosophies, they select courses for inclusion in the curriculum, and they reward scholars for what they have written.²⁷³

Moreover, in making decisions on the basis of the content of the expression of faculty and students, universities—unlike government in its role of government-as-sovereign—regularly decide some expressions are superior to others. University decisions cannot be “viewpoint neutral” if they are to fulfill their missions of teaching and research. Justice Souter, joined by Justices Stevens and Breyer, recognized this special function of institutions of higher education in his concurrence in *Regents of the University of Wisconsin v. Southworth*.²⁷⁴

[In a university] students are inevitably required to support the expression of personally offensive viewpoints in ways that cannot be thought constitutionally objectionable unless one is prepared to deny the University its choice over what to teach. No one disputes that some fraction of students’ tuition payments may be used for course offerings that are ideologically offensive to some students, and for paying professors who say things in the university forum that are radically at odds with the politics of particular students. Least of all does anyone claim that the University is somehow required to offer a spectrum of courses to satisfy a viewpoint neutrality requirement. The University need not provide junior years abroad in North Korea as well as France, instruct in the theory of plutocracy as well as democracy, or teach Nietzsche as well as St. Thomas.²⁷⁵

272. 454 U.S. 263 (1981).

273. *Id.* at 278–79 (Stevens, J., concurring). Judge Frank Easterbrook made a similar observation in *Feldman v. Bahn*, 12 F.3d 730, 732–33 (7th Cir. 1993):

Teachers . . . speak and write for a living and are eager to protect both public and private interests in freedom to stake out controversial positions. Yet they also *evaluate* speech for a living and are eager to protect both public and private interests in the ability to judge the speech of others and react adversely to some. They grade their students’ papers and performance in class. They edit journals, which reject scholarly papers of poor quality. They evaluate their colleagues’ academic writing, and they deny continuing employment to professors whose speech does not meet their institution’s standards of quality. “The government” as an abstraction could not penalize any citizen for misunderstanding the views of Karl Marx or misrepresenting the political philosophy of James Madison, but a Department of Political Science can and should show such a person the door. . . . Every university evaluates *and acts* on the basis of speech by members of the faculty. . . .

274. 529 U.S. 217 (2000).

275. *Id.* at 242–43.

C. THE JURISPRUDENCE OF GOVERNMENT AS EDUCATOR

When the government is in its role as educator, and it faces an external threat to academic freedom, normally there will be no need to examine the governance structure of a university. Cases like *Wieman*, *Sweezy*, and *Keyishian* thus would be decided in the same way. When the threat to academic freedom is internal, however, the doctrine of government-as-educator, in contrast to the public-employee speech doctrine of government-as-employer, would provide First Amendment protection for the speech of individual faculty members as long as the speech concerned research, teaching, or faculty governance matters. Speech that met this “academic matters” test would not need to satisfy either the *Connick* public-concern test or the *Pickering* balancing test. Academic speech could be limited, however, by the same sort of reasonable time, place, and manner limitations that may be used to limit citizen speech under the First Amendment.²⁷⁶

Justice Rehnquist, in *Mt. Healthy City School District Board of Education v. Doyle*,²⁷⁷ established a causation test for First Amendment challenges brought by public employees that also can serve as a guide in challenges brought by faculty against a college or university pursuant to the doctrine of government-as-educator. Under *Mt. Healthy*, a plaintiff challenging an employer’s disciplinary action, taken in response to statements by the plaintiff, has the initial burden of establishing that the contested expression was constitutionally protected and that it was the reason for the challenged employer action.²⁷⁸ In a government-as-educator case, a faculty member first would have to show that his or her expression met the academic-matter test—that is, that the speech was concerned with research, teaching, or academic governance matters. If the faculty-plaintiff fails to meet this burden, then the jurisprudence of government-as-employer should be followed. In a case like *Smith v. Kent State University*,²⁷⁹ for

276. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.’” (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984))); *Piarowsky v. Ill. Cmty. Coll. Dist.* 515, 759 F.2d 625, 630 (7th Cir. 1985) (holding that internal disputes over academic freedom may be resolved on the ground that the institution’s limitations were reasonable).

277. 429 U.S. 274 (1977).

278. *Id.* at 287.

279. 696 F.2d 476 (6th Cir. 1983). Smith refused to teach a course assigned to him after he received an unfavorable rating for his teaching of a basic course in his field. A committee of peer faculty approved assigning him to teach the course, but recommended against dismissal as too severe a sanction. The following year when Smith was again assigned the course, he advised at the last minute that he would not teach it, and that he would appeal the assignment. Smith’s lawyer agreed that Smith would teach the class during the appeal, but Smith again failed to appear. After notice and a hearing, Smith was terminated by a vote of a faculty committee. *Id.* at 477–78; see also *Stastny v. Bd. of Trs. of Cent. Wash. Univ.*, 647 P.2d 496 (Wash. Ct. App. 1982) (upholding the termination of a tenured associate professor who repeatedly failed to teach classes).

example, where a faculty member refused to teach his assigned course, his actions would not be constitutionally protected. Once a faculty member established that his or her expression was protected because it concerned an academic matter, however, and that the protected expression was the basis for the challenged disciplinary action by the university then, as in *Mt. Healthy*, the burden of justifying the discipline or dismissal action would shift to the university.

Under the government-as-educator doctrine, if a university shows that its disciplinary decision was supported by the faculty (or by an authorized committee of the faculty), a court should presume that the decision was made on academic grounds and defer to it. This presumption would not only be logical, it would have the additional benefit of limiting judicial intrusion into the internal processes of most colleges and universities. Judges are public officials, of course, so they should avoid infringing the academic freedom of academic institutions unless their intervention is necessary to protect the academic freedom of faculty.

An individual faculty-plaintiff could challenge a decision made by the faculty, but the bar would be set extremely high. Following *Ewing*, courts should defer to an academic decision made by the faculty as a body (or a standing committee of the faculty) unless the plaintiff is able to show that the decision was “such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise its professional judgment.”²⁸⁰

If the administration or governing board did not consult with the faculty through established channels,²⁸¹ however, or if it overturned a decision made by the faculty, courts may need to intervene. The Supreme Court, unfortunately, has never specified what test should be used to evaluate the actions of an institution of higher education in the absence of faculty participation.

Fortunately, a viable standard is set forth in the same opinion that first endorsed the expanded conception of academic freedom—Justice Frankfurter’s concurrence in *Sweezy*. The conference quotation he selected provides that, in exercising the four essential freedoms, a university should make determinations “for itself *on academic grounds*.”²⁸² Frankfurter’s opinion does not define “academic grounds” but, by custom, the phrase means evaluating students and faculty on the basis of the quality of their work, not by their social position or institutional importance. Core academic policies, such as what courses will be offered in the curriculum and the requirements for earning a degree, also are to be formulated on the basis of their academic merit, not the position of their proponent.²⁸³ When a faculty makes an academic decision, it is reasonable for a

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

281. A board should not be able to select the most compliant faculty.

282. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (emphasis added).

283. See *supra* notes 70–74 and accompanying text. A recent violation of the custom occurred at West Virginia University (WVU). In April 2008, the provost and the dean of the business school resigned their administrative positions after the report of an independent panel found that they had

court to assume that the decision was made on academic grounds. When the administration or governing board makes a decision without consulting faculty, or rejects a faculty recommendation, however, they must bear the burden of proving that the decision was made on academic grounds.

A lay governing board is likely to find it difficult to make academic decisions “on academic grounds” without consulting experienced faculty members because most trustees are not scholars—and, indeed, should not be. They are selected to bring to the board important but different talents, expertise, and experience from those of professional scholars. They have not had the prolonged and specialized technical training of academics,²⁸⁴ nor are they experienced teachers or scholars. A prudent governing board, therefore, normally will involve scholars at appropriate points in its decisional processes, just as the Committee of Eight provided for the involvement of peer review at key points in Harvard’s tenure process.²⁸⁵

There will be instances, nonetheless, when a responsible governing board (or its appointed administration) should overrule a decision of the faculty. The Statement on Government, for example, acknowledges that departments sometimes need to be reformed.²⁸⁶ Professor David Rabban gives the example of a university administrator who, out of concern that the philosophy department has no expert on Plato and Aristotle, denies tenure to a philosopher with another specialty despite the fact that the philosopher’s department recommended tenure.²⁸⁷ This kind of administrative concern with departmental balance is one that even the AAUP accepts as appropriate.²⁸⁸ The constitutional value of using “academic grounds” as the standard for evaluating university decisions has been acknowledged by the government, moreover, in its brief in *University of Pennsylvania v. EEOC*.²⁸⁹

Courts should defer to a decision made by an institution of higher education if the institution can show that it was made on academic grounds.²⁹⁰ A decision

improperly granted a degree to the daughter of the governor, who had not completed the necessary coursework. On May 5, 2008, the faculty senate passed a resolution of no-confidence in the president and asked that he resign as well. Robin Shulman, *WVU President Clings to Job After Faculty Vote*, WASH. POST, May 8, 2008, at A2. On June 6, 2008, Mike Garrison, the president of WVU, announced that he would step down in September. Paul Fain, *Questions Follow a Political President’s Fall*, CHRON. HIGHER EDUC., June 20, 2008, at A11.

284. See *1915 Declaration*, *supra* note 12, at 865.

285. See *supra* note 104.

286. See *Statement on Government*, *supra* note 83, at 138 (“The president must at times, with or without support, infuse new life into a department . . .”).

287. Rabban, *supra* note 9, at 286.

288. *Id.*

289. Brief for the Respondent at 29, *Univ. of Pa. v. EEOC*, 493 U.S. 182 (1990) (No. 88-493) (“Where a university is alleged to have infringed an individual’s rights, it can invoke legitimate academic considerations to justify its actions, but it has no ‘constitutional shield.’”).

290. Cf. Rabban, *supra* note 9, at 283–87 (disagreeing with Byrne’s opposition to judicial review of internal university disputes and noting that a good model for judicial review exists in cases in which faculty claim that universities have violated Title VII prohibitions on employment discrimination or the First Amendment).

made by the administration or board should not be granted judicial deference, however, if it was based on mere disagreement with the expression of a faculty member.²⁹¹

The jurisprudence of government-as-educator also should take into account the most effective institutional use of the faculties as to academic matters. Generally, faculties are best used to establish policy on academic matters such as curriculum and admissions, not to make every decision applying the policy. Administrators are appropriately delegated authority, for example, to decide at what times and in what classrooms courses approved by the faculty will be taught, and to evaluate admissions applications according to a policy established by the faculty. Those administration decisions should be entitled to judicial deference as long as they are consistent with faculty-approved policies.

The proposed jurisprudence for government-as-educator would not make faculty participation in governance a constitutional requirement, but it would protect speech arising from the governance roles of faculty as well as from their research or teaching. Colleges and universities would remain free to decide whether and how much to involve faculty in making academic decisions. If faculty were not consulted about a particular academic decision that was later challenged in court, the institution would have the burden of showing that the challenged decision was made on academic grounds.

A good illustration of how the doctrine of government-as-educator would function can be seen by applying it to the facts of *Hong v. Grant*.²⁹² Juan Hong is a professor in the Department of Chemical Engineering and Materials Science at the University of California, Irvine.²⁹³ He sued the administrators of his university for denying him a merit salary increase, and alleged that the denial was in retaliation for his criticism of the hiring and promotion of other faculty, and of the Department's use of too many lecturers.²⁹⁴ The court acknowledged that in the University of California system, a faculty member's duties include a variety of governance matters:

In the University of California system, a faculty member's official duties are not limited to classroom instruction and professional research. . . . [T]hey also include a wide range of academic, administrative and personnel functions in accordance with UCI's self-governance principle. As an active participant in his institution's self-governance, Mr. Hong has a professional responsibility to

291. See, e.g., *Smith v. Losee*, 485 F.2d 334 (10th Cir. 1973) (overturning decision by the university president to refuse to support tenure because of candidate's "anti-administration" attitude, despite affirmative vote by faculty); cf. *Chen*, *supra* note 9, at 972 ("[I]t is not clear why courts ought to trust academic administrators, many of whom are subject to the same political pressures (public and private) as other public officials, particularly where something as vital as speech is concerned.").

292. 516 F. Supp. 2d 1158 (C.D. Cal. 2007).

293. *Id.* at 1161.

294. *Id.* at 1164.

offer feedback, advice and criticism about his department's administration and operation from his perspective as a tenured, experienced professor.²⁹⁵

After finding that Hong's speech was made pursuant to his "official duties" as a faculty member,²⁹⁶ the court, citing *Garcetti*, held that his speech therefore was not constitutionally protected, and granted summary judgment to the university.²⁹⁷ The court also held that Hong's speech was not of public significance, and thus it failed the *Connick* public-concern test as well.²⁹⁸

If *Hong* were decided under the government-as-educator standard, Hong would have the initial burden of showing that his speech met the academic-matter test and, therefore, was protected, and that his speech was the reason he was denied the merit increase. Assuming Hong met this initial burden, the burden going forward would shift to the university to show either that the denial of the merit increase was based on a policy approved by the faculty or, in the alternative, that it had been made on academic grounds and not in retaliation for Hong's protected speech. His speech would not be subjected to the *Pickering* balancing test, the *Connick* public-concern test, or the *Garcetti* official-duty test.

Conditioning judicial deference on whether a challenged university decision was made on academic grounds is a much better way to resolve internal disputes than a presumption that the institution should prevail.²⁹⁹ Moreover, the academic-matter test that would be central to the jurisprudence of government-as-educator better fits the nature of the academic workplace than either the *Pickering* balancing test, which turns on the extent to which the speech was disruptive, or the *Connick* test of whether the speech was on a matter of public concern.

Adopting a jurisprudence tailored to the distinctive role of government-as-educator also will enable the Court to maintain its longstanding recognition of the importance of higher education to the nation. As Justice Frankfurter observed in *Wieman*, education is "the basis of hope for the perdurance of our democracy" because it fosters "those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened . . . public opinion."³⁰⁰ Higher education contributes much more

295. *Id.* at 1166–67 (internal citations omitted).

296. *Id.* at 1168.

297. *Id.* at 1168, 1170. The Seventh Circuit also has relied on *Garcetti* to deny constitutional protection to speech by a faculty member about a university's use of his grant funds. *See Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008).

298. *Hong*, 516 F. Supp. 2d at 1169.

299. Byrne, for example, advocates "a very limited role in protecting faculty against their schools." Byrne, *supra* note 10, at 255. However, he did qualify his position somewhat by later adding that "constitutional academic freedom ought not to protect institutions resembling universities but which . . . recognize no role for faculty in governance." *Id.* at 338.

300. *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring); *see also* George Washington, Farewell Address (Sept. 19, 1796), reprinted in 1 AMERICAN STATES PAPERS: SPEECHES AND MESSAGES OF THE PRESIDENTS OF THE UNITED STATES TO BOTH HOUSES OF CONGRESS 34, 36 (1833) ("Promote, then, as an object of primary importance, institutions for the general diffusion of knowl-

to the nation, moreover, than educated citizens. It is also a prime source of new ideas, which, from the earliest days of the republic, have stimulated the economy, strengthened national security, enhanced culture, and enriched civic life.

CONCLUSION

Most legal scholars have overlooked the governance dimension of academic freedom. When the modern concept of academic freedom as protection for the freedom of individual faculty members to inquire and to teach was transplanted to the United States, the drafters of the seminal 1915 AAUP Declaration of Academic Freedom faced the problem that American colleges and universities, unlike their European counterparts, were run by lay governing boards, not faculties. Their solution, which has been carried forward in later professional statements, was to expand academic freedom to protect faculty from intrusions by governing boards (or the administrators they appoint). To this end, the Declaration allocates faculties primary—although not exclusive—responsibility for such academic matters as the curriculum, student academic standards, and granting (or denying) tenure. Faculty at both private and public colleges and universities thus have a professional obligation to oversee core academic matters in their institutions, in addition to their research and teaching. The Declaration also provides that, in the event of a conflict over a core academic matter, the judgment of the faculty as a body trumps that of individual faculty members.

The Supreme Court extended First Amendment protection to the academic freedom of faculty members at public colleges and universities in the 1950s. In 1968, however, the Court began to use public-employee speech jurisprudence to decide faculty-speech cases. That change reduced the amount of constitutional protection provided for academic freedom. The *Garcetti* holding that speech made pursuant to a public employee's "official duties" is not protected, now threatens to end all constitutional protection for the academic freedom of faculty at public colleges and universities.

Academic freedom was never defended as a benefit for faculty, but for its value to the First Amendment and to the nation. There is little justification, therefore, for carving out an exception for faculty to the *Garcetti* "official duty" test. Such an exception also would fail to resolve the deeper constitutional problem that neither the *Pickering* balancing test, nor the *Connick* public-concern test, adequately accounts for the distinctive nature of the academic workplace, including the governance responsibilities of the faculty. As the Court itself has acknowledged in *Yeshiva*, the academic workplace is different from most public workplaces.

A better judicial approach is to recognize that the function or role of

edge. In proportion as the structure of government gives force to public opinion, it is essential that public opinion should be enlightened.").

government-as-educator is different from the role of government-as-employer or government-as-speaker, and to develop an appropriate jurisprudence for it. Under the doctrine of government-as-educator, the First Amendment would not limit the ability of public colleges and universities to make judgments about faculty and students on the basis of the content of their speech. When faculty members challenge a university decision to discipline or dismiss them, following *Mt. Healthy*, they would have the burden of showing that their speech was constitutionally protected and that it was the reason for the discipline or dismissal. If the university demonstrates that the faculty (or a duly constituted committee of the faculty) agreed with the institutional decision, courts should presume that the matter was decided on academic grounds and defer to it. If the faculty were not consulted, however, or if the board or administration overruled the faculty, then the institution would bear the burden of showing that its decision was made on academic grounds.

The Supreme Court will face a choice. It can extend the holding of *Garcetti* to faculty at public colleges and universities, and thereby effectively eliminate constitutional protection for their scholarship, teaching, and governance activities. That result would ignore more than fifty years of constitutional protection of academic freedom. It also risks seriously undermining the intellectual vigor and, therefore, the academic quality, of our public colleges and universities and, indirectly, of all of higher education. It probably would lead to reduced competition between public and private institutions of higher education, a competition that has helped to produce our extraordinarily successful higher-education sector. Alternatively, the Court can recognize the role of government-as-educator, and develop a jurisprudence that takes appropriate account of the special characteristics of the academic workplace and the importance of higher education to the nation.